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Fight Against Discrimination:
The Race and Framework Employment Directives

"The New Concept of Equality"

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In this paper, I address the "new concept" of equality in European Community law. I do that by distinguishing four different meanings of equality that operate in Community law. I argue that the gender, race and framework directives essentially strengthen a "status-based" idea of equality (previously reflected in EC gender discrimination law) that differs substantially from other existing approaches. I argue further that within the "status-based" idea of equality adopted in Community law, importantly diverging underlying rationales can be identified supporting this approach. I conclude that handing these diverging and (at least, potentially) conflicting ideas of equality require important adjustments by institutions interpreting and applying Community law in the future, and I suggest some adaptations that may be useful.

1. Growth of European Community Law on equality and discrimination

There are several different, but overlapping, sources of Community law that establish equality and non-discrimination norms binding on Community institutions and the Member States, "where they implement, or act within the scope of, Community law." In addition, Community law prohibits other natural and legal persons as well as Community institutions and the Member States from discriminating in more limited circumstances, for example where their actions breach prohibitions of discrimination on grounds of nationality and sex discrimination.

(a) Equality as a general principle of Community law

The ECJ has developed a jurisprudence that subjects the exercise of Community competence to the requirement that it complies with "general principles" of Community law.[1] This has implications for equality and discrimination in several principal ways.

Despite the existence of numerous provisions of the Treaty "that provide for the principle of equal treatment with regard to specific matters,"[2] the Court of Justice has held that principle of equality is one of the general principles of Community law. Within the sphere of Community law, this principle of equality precludes comparable situations from being treated differently, and different situations from being treated in the same way,[3] unless the treatment is objectively justified.[4] The Court of Justice has recognized, for example, that the principle that everyone is equal before the law is a basic principle of

[1] See, in general Takis Tridimas, The General Principles of EC Law (OUP, 1999), chapter 2. See also "Equality" in A.G. Toth, The Oxford Encyclopedia of European Community Law, volume 1 (Clarendon Press, 1990), 188-201.

[2] Tridimas, page 40

[3] Sermide SpA v Cassa Conguaglio Zucchero and others, Case 106/83. 1984 ECR 4209, para 28, See also, Opinion of Mr Advocate General Van Gerven delivered on 15 September 1993, Koinopraxia Enoseon Georgikon Synetairismon Diacheir iseos Enchorion Proionton Syn. PE (KYDEP) v Council of the European Union and Commission of the European Communities, Case C-146/91, 1994 ECR I-4199

[4] See, for example, Case C-189/01 Jippes and Others 2001 ECR I-5689, paragraph 129, and Case C-149/96 Portugal v Council 1999 ECR I-8395, paragraph 91.

Community law.[5] Why did the Court find it necessary to hold that equality is a general principle of Community law? Tridimas observes: "It may be that those [specific] provisions do not guarantee equal treatment in all cases so that the development of a general principle is necessary to cover the lacunae left in written law. The main reason for the development of a general principle, however, seems to be one of principle rather than one of practical necessity."[6]

Second, the protection of fundamental rights is one of the general principles of Community law. The requirements flowing from the protection of fundamental rights in the Community legal order are binding on the Community institutions. They are also binding on Member States when they implement Community rules.[7] The "fundamental rights" identified by the ECJ are drawn from the constitutional traditions of the Member States and, in particular, the European Convention on Human Rights. Among the fundamental rights protected by the Court of Justice, the Court has identified particular aspects of equality. These include religious equality[8] and the prohibition of sex discrimination.[9] More broadly, the Court has held that fundamental rights "include the general principle of equality and non-discrimination."[10]

In this context, equality as an element of fundamental rights does have a limited autonomous, if uncertain, role in EC law.[11] Although in the third Defrenne case[12] the Court recognized that the elimination of sex discrimination formed part of fundamental rights, the Court declined to widen the scope of Article 119 (now 141), which provides for equal pay between men and women, to require equality in respect of other working conditions. In Razzouk, however, after reiterating that sex discrimination is a fundamental right, the Court held that it must, therefore, be upheld in the context of relations between the institutions and their employees. The Court held, therefore, that, in interpreting the Staff Regulations, the requirements of the principle of equal treatment "are in no way limited to those resulting from Article 119 (now 141) of the EEC Treaty

[5] Judgment of 13 November 1984, Case 283/83 Racke [1884] ECR 3791; judgment of 17 April 1997, Case 15/95 EARL [1997] ECR I-1961; judgment of 13 April 2000, Case 292/97, Karlson.
[6] Tridimas, p. 41
[7] Angel Rodriguez Caballero v Fondo de Garant ia Salarial (Fogasa), Case C-442/00, European Court Reports 2002 Page 00000, para. 30.
[8] Case 130/75 Prais v Council [1976] ECR 1589
[9] Defrenne v Sabena, C-149/77, [1978] ECR I-1365 at paras 26, 27. See C. Docksey, The Principle of Equality between Women and Men as Fundamental Right under Community Law (1991) 20 Industrial Law Journal 258.
[10] Angel Rodriguez Caballero v Fondo de Garant ia Salarial (Fogasa), Case C-442/00, European Court Reports 2002 Page 00000, para. 32.
[11] Tridimas, page 69
[12] [Case 149/77 Defrenne v Sabena [1978] ECR 1365],

or from the Community directives adopted in this field."[13] So too, equality as an aspect of fundamental rights played an important role in *P v S and Cornwall*,[14] regarding whether discrimination on the grounds of gender reassignment was prohibited under Community law. For Tridimas, the case "provides a prime example of the way the Court views the principle of equality as a general principle of Community law transcending the provisions of Community legislation." In other cases, however, such as *Grant* (regarding discrimination on grounds of sexual orientation, the Court has been cautious in drawing the apparent logic of this position to reach conclusions that are, in the Court's view, beyond the existing European political consensus.[15]

(b) Equality obligations in the Community treaties and secondary legislation

We may turn now to consider the specific circumstances in which the principles of equality and non-discrimination arise as legally enforceable. There are specific provisions of the Community and Union treaties that establish equality and non-discrimination obligations and, in some cases, rights.

(i) Equality of treatment in economic contexts

There are several EC Treaty provisions in which the principles of non-discrimination or equality are expressly mentioned. These are regarded as specific enumerations of the general principle of equality.[16]The principal examples are Article 12 (ex 6) EC (discrimination on the grounds of being a national of one of the Member States is prohibited.), Article 18 (ex XX) EC (every citizen of the Union has the right to move and reside freely within the territory of the Member States, subject to certain limitations), Article 34(2) (ex 40(3)) EC (non-discrimination between producers and consumers in the context of the Common Agricultural Policy), Article 39 (ex 48) EC (non-discrimination as between workers who are nationals of the host state and those who are nationals of another Member State), Article 43 (ex 52) EC (equal treatment as between nationals and non-nationals who are established in a self-employed capacity in a Member State), Articles 49 (ex 59) EC (equal treatment for providers of services), and Article 90 (ex 95) EC (non-discrimination in the field of taxation as between domestic and imported goods).[17] "Probably the most obvious and central manifestation of the non-discrimination principle in EC law has been in the context of prohibiting discrimination on grounds of

[13] C. Razzouk et A. Beydoun v Commission of the European Communities, Joined cases 75 and 117/82, 1984 ECR 1509, para 17. See also Michel Weiser v Caisse nationale des barreaux francais, Case C-37/89, 1990 ECR I-2395.
[14] Case C-13/94 [1996] ECR I-2143
[15] Grant v South West Trains Ltd. Case C-249/96, [1998] ECR I-621
[16] Frilli v Belgium, Case 1/72 [1972] ECR 457 at para 19; Isoglucose Cases, [1978] ECR 2037 at para 26.
[17] Article 18 EC Treaty.

nationality or origin."[18] A considerable body of secondary legislation has supplemented these provisions.[19]

(ii) Equality and non-discrimination in the area of gender

Articles 2 and 3(2) of the EC Treaty impose the objective of promoting equality between men and women in the Community. Article 141 of the EC Treaty provides for the right to equality between men and women in the context of pay (check and expand). This also provides, however, that the principle of equal treatment does not prevent the maintenance or adoption of measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.[20]

In addition, there is a set of legislative provisions addressing gender inequality that sets a legal framework for women's equality in employment and working conditions. These initially comprised three Directives: one on equal pay (which incorporated the ILO concept of 'equal pay for work of equal value'),[21] one on equal treatment in other aspects of employment (such as hiring, promotions, and dismissals),[22] and the third on equal treatment in a limited number of social security matters.[23] During the 1980s, only two of several proposed Directives on equality were adopted, both in 1986, and both of relatively minor importance: one on equality in occupational social security, and one on equality between self-employed men and women, (the Occupational Social Security Directive[24] and the Self Employed Directive[25]). It was not until the late 1980s when the Council accepted the development of a new social dimension to complement the Single

[18] G. de Búrca, The Role of Equality in European Community Law, in The Principle of Equal Treatment in EC Law, at p. 20.
[19] For example, Regulation 1612/68, Free Movement of Workers
[20] Article 141(4) EC.
[21] Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women [1975] OJ L45/198.
[22] Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [1976] OJ L39/40.
[23] Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security [1979] OJ L6/24.
[24] Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes [1986] OJ L225/40.
[25] Council Directive 86/613/EEC of 11 December 1986 on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood [1986] OJ L359/56.

Market initiative, and the voting system in Council was modified to permit qualified majority in some areas, that further equality legislation was forthcoming.

Several pieces of legislation adopted since then are of importance. The first was the acceptance by the Council in 1992 of a Directive providing certain rights to pregnant women, and those who are breast-feeding (the Pregnant Workers Directive).[26] The second was the passage of the Working Time Directive in 1993.[27] The third was the agreement under the Social Protocol (and excluding the United Kingdom initially) of the parental leave Directive, providing for periods of time off work for mothers and fathers in certain circumstances).[28] The fourth was the acceptance of a Directive on occupational social security, amending the 1986 occupational social security directive).[29] Fifth, in 1997, the Council adopted the Directive on the burden of proof under the Social Protocol.[30] This included a legislative definition of indirect discrimination for the first time, and provisions aiming to adjust the rules on the burden of proof in sex discrimination cases. Finally, the part-time workers' directive prohibited discrimination between part-time and full-time workers in certain circumstances.[31] Most recently, significant amendments to the 1976 Equal Treatment Directive were introduced in 2002.[32]

In addition, there must also be added the promulgation of "soft law" instruments. These instruments, although not in the form of traditional legislation, and thus not directly enforceable, have set standards and raised expectations, whilst also having considerable

[26] Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers who have recently given birth or are breastfeeding [1992] OJ L348/1.
[27] Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time [1993] OJ L307/18.
[28] Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC [1996] OJ L145/11, eventually agreed to by the United Kingdom in Council Directive 97/75/EC of 15 December 1997 amending and extending, to the United Kingdom of Great Britain and Northern Ireland, Directive 96/34/EEC on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC [1997] OJ L10/24.
[29] Council Directive 96/97/EC of 20 December 1996 amending Directive 86/378/EEC on the implementation of the principle of equal treatment for men and women in occupational social security schemes [1997] OJ L14/13.
[30] Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex [1998] OJ L14/6, eventually accepted by the United Kingdom in Council Directive 98/52/EC of 13 July 1998 on the extension of Directive 97/80/EC on the burden of proof in cases of discrimination based on sex to the United Kingdom of Great Britain and Northern Ireland [1998] OJ L205/66.
[31] Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC – Annex: Framework Agreement on part-time work [1998] OJ L14/9.
[32]

indirect influence on the interpretation of the main 'hard law' instruments, particularly in the context of national legislation; they are not, therefore, devoid of legal effect. The Commission and Council have adopted such instruments in several areas of gender equality, in particular in such difficult areas as equal pay, positive action, sexual harassment, and women's representation.[33]

(iii) Equality and non-discrimination on other grounds

Article 13 EC enacts a general legislative power to tackle a broad range of types of discrimination.[34] On the basis of Article 13 EC, the Community has now developed an important initial package of measures, in areas other than gender discrimination.[35] The Race Discrimination Directive[36] prohibits racial and ethnic origin discrimination in access to employment, vocational training, employment and working conditions, membership of and involvement in unions, and employer organisations, social protection, including social security and health care, 'social advantages', education, as well as goods

[33] For example, the EC has put in place a series of action programmes aimed at promoting equal opportunities between men and women which promote the use of positive action measures e.g. the Fourth Action Programme on Equal Opportunities for Men and Women (1996-2000); See also Commission Communication 'Incorporating equal opportunities for women and men into all commission policies and activities' COM (2000) 334; Commission Communication on the consultation of management and labour on the prevention of sexual harassment at work COM (1996) 378; Council Resolution of March 27, 1995 on the balanced participation of men and women in decision-making [1995] OJ L168; Council Recommendation of December 2 1996 on the balanced participation of men and women in the decision-making process [1996] OJ L319/11; Council Recommendation 84/635 on the promotion of positive action for women [1984] OJ L331/34.

[34] '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.' For a discussion of the background to Article 13 EC, see M. Bell and L. Waddington, 'The 1996 Intergovernmental Conference and the Prospects of a Non-discrimination Treaty Article' (1996) 25 *ILJ* 320-36, (stressing the important role played by NGOs and the European Parliament in achieving Article 13 EC). M. Bell, 'The New Article 13 EC Treaty: A Sound Basis for European Anti-Discrimination Law?' (1999) 6 *Maastricht Journal of European Law* 5-23, 6-7: discusses further the background to the drafting of Article 13 EC.

[35] The literature on equality and the Amsterdam Treaty, together with analysis of the new Article 13 EC Directives (in draft and as enacted) is already voluminous, see Mark Bell BOOK.

[36] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22.

and services, including housing. The Framework Directive[37] prohibits discrimination primarily in the employment context (access to employment, self-employment and occupations; vocational guidance and training; employment and working conditions, including dismissals and pay; membership of organisations), but across the rest of the Article 13 EC categories (disability, age, sexual orientation, religion and belief). An action programme to promote action to combat discrimination completes this initial package. These Directives lay down minimum requirements and give Member States the option of introducing or maintaining more favourable provisions. The Directives may not be used to justify any regression in the situation that already prevails in each Member State. Member States must implement the Race Directive by July 2003. The provisions in the Framework Directive in relation to religion or belief and sexual orientation must be implemented by November 2003, and those on age and disability by November 2006.

(c) EU Charter of Fundamental Rights

Another source of the equality principle is the EU Charter of Fundamental Rights promulgated in 2000.[38] In part, this document sets out more systematically the fundamental rights already considered by the ECJ as arising from the general principles of Community law. The Charter goes further, however, in setting out a wider catalogue of rights that are considered to be fundamental in the Community/Union.

The Charter contains a chapter headed "equality". This includes a general provision setting out that everyone is equal before the law.[39] 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.[40] Discrimination on grounds of nationality is prohibited.[41] The Union is to respect cultural, religious and linguistic diversity.[42] Equality between men and women must be ensured in all areas, including employment, work and pay, but the principle of equality "shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.[43] Certain rights of the children are recognized, including the right to such protection and care as necessary for their well-being.[44] The rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life is

[37] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation
[38] 18 December 2000, [2000] OJ C 364/1
[39] Article 20.
[40] Article 21(1).
[41] Article 21(2), "[w]ithin 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."
[42] Article 22.
[43] Article 23.
[44] Article 24.

recognized and respected,[45] as is the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the Community.[46]

The extent to which these provisions will be seen as giving rise to a legally enforceable principle of equality remains to be seen. The legal status of this document is much discussed, and will be subject to further consideration in 2004, but several Advocates General and the Court of First Instance of have already referred to the Charter in their opinions and decisions.

(d) Equality and other human rights instruments

Equality and non-discrimination is, arguably, in the course of being subsumed within a broader human rights discourse. In this context, the domestic reach of the law relating to equality is being expanded to encompass a more inclusive ideal of equality, one that encompasses race, ethnic origin, disability, religion and belief, sexual orientation, and age. It is notable that many of the international human rights treaty commitments that the Member States have entered into since the end of the Second World War contain equality requirements of a broad-based inclusive type. Article 14 of the ECHR and Protocol No. 12 are merely examples of this trend. An important indication of this within the European Community is the development of the EU Charter of Fundamental Rights.[47] It is also expanding well beyond equality in the employment context. This is not, of course, a development that is restricted to the Community. The Fourth World Conference on Women held in Beijing in September 1995 emphatically defined women's rights as human rights. The United Nations Conference on racial equality held in South Africa at the end of the summer of 2001 placed policies against racial discrimination in a human rights context.[48]

(i) European Convention on Human Rights

Article 14 ECHR provides that "the enjoyment of the rights and freedoms set forth in [the] 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

[45] Article 25.
[46] Article 26.
[47] [2000] OJ C 364/01. The Charter was jointly and solemnly proclaimed at Nice in December 2001 by the Council, Commission and Parliament. However, there is no reference to the Charter in the Treaty of Nice, and it does not yet have any legally binding effect. Article 20 provides: 'Everyone is equal before the law', while Article 21(1) reads: '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'.
[48] Declaration and Programme of Action, World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, 8 September 2001.

with a national minority, property, birth or other status." The Council of Europe has adopted a new equality provision (Protocol No. 12) that will go some way to remedying some of the deficiencies of Article 14 of the European Convention on Human Rights.[49] The Protocol, in effect, would add an additional provision to Article 14 that would prohibit discrimination on any grounds such as those set out in Article 14 by a public authority in circumstances where other Convention rights are not engaged, whilst "[r]eaffirming that the principle of non-discrimination does not prevent States Parties from taking measures in order to promote full and effective equality, provided that there is an objective and reasonable justification for those measures."[50] The Protocol has not yet secured sufficient ratifications for it to come into force for those that gave ratified it.[51]

(ii) Other international and regional human rights instruments

In addition to the European Convention on Human Rights, there are several international human rights instruments that contain non-discrimination requirements. These include the major general human rights instruments concluded under the auspices of the United Nations (the International Covenant on Economic, Social and Cultural Rights 1966, the International Covenant on Civil and Political Rights 1966, and the Convention on the Rights of the Child). There are also several treaties with a specific focus on discrimination and equality (Convention on the Political Rights of Women 1953, Convention on the Elimination of All Forms of Racial Discrimination 1966, and the Convention on the Elimination of All Forms of Discrimination Against Women 1979[52]). Several ILO instruments are particularly relevant: (the Equal Remuneration Convention 1951 (No. 100) and the Discrimination (Employment and Occupation) Convention 1958 (No. 111). Several Council of Europe conventions (on economic and social rights (European Social Charter 1961, as amended – update) national minorities (Framework Convention on National Minorities, date?) and minority languages (details)) are important. To some extent these instruments may come to be seen as reinforcing Article 14 of the European Convention on Human Rights.

2. Four Meanings of Equality and Non-discrimination in EC law

Equality and non-discrimination are complex concepts, with considerable debate on their meanings and justification. Four meanings of equality and non-discrimination applicable in EC law are identifiable. Several caveats are necessary regarding these distinctions. First, the categories are constructed to try to make sense of a sometimes-bewildering range of legal material; these distinctions have received no judicial approval. Second, these categories are not watertight, but porous, with developments in one category

[49] Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, adopted Rome, 4th November 2000.
[50] Preamble, fourth indent.
[51] European Convention of Human Rights and Fundamental Freedoms, 1950, Protocol 12 (signed in Rome in November 2000).
[52] Convention on the Eradication of All Forms of Discrimination Against Women 1979 (1980) ILM 33.

influencing approaches in others. Third, in some respects, the principles underlying each category may be in tension with each other, and this may require decisions as to priority between the categories in the case of conflict.

(a) Equality as "rationality"

The first meaning of equality is where the principle of non-discrimination (interpreted as the limited principle that likes should be treated alike, unless there is an adequate justification for not applying this principle) is a self-standing principle of general application, without specific limitation on the circumstances in which it is applicable (except that it be in the public realm, broadly defined), and without limitation on the grounds on which the difference of treatment is challengeable. In other jurisdictions, this approach to equality is particularly associated with constitutional guarantees. This meaning is essentially rationality-based.

Equality as rationality is essentially concerned with requiring that where the exercise of governmental power results in unequal treatment, it should be properly justified, according to consistently applied, persuasive and acceptable criteria. However, a general idea of equality as rationality cannot operate without criteria of likeness, difference, acceptability and justification.

We can regard this first meaning of equality as having two complementary functions. It is both a general principle underpinning the other categories to be discussed subsequently, as well as a residual category of scrutiny in its own right. As regards the first function of this first meaning, it provides a starting point from which the more detailed meanings of equality that follow ultimately derive. In this sense, the necessary criteria of likeness, difference and justification are supplied in the second, third and fourth meanings of equality. In the second meaning these criteria are supplied by an account of how particularly important interests should be distributed, and in the third and fourth meanings by referring to how particular characteristics of persons should affect the distribution of opportunities more generally. Where, for example, maldistribution of rights is in issue, or the use of race as a criterion of exclusion is present, judgments of unreasonableness or irrationality have more on which to "bite" and they induce more skeptical scrutiny. A greater effort is required to justify such decisions than where other decisions not involving these considerations are in issue. However, as regards the latter function of the first meaning, the courts stand ready to scrutinize decisions more generally, however weakly, on the basis of unequal treatment, even those decisions that do not involve situations in which particularly important interests, or where particular "status-harms", are in issue

(b) Equality as "rights protecting"

In the second meaning, the non-discrimination principle is as an adjunct to the protection of particularly prized "public goods", including human and other rights. The principle is essentially that such "prized public goods" should in principle be distributed to everyone without distinction. In the distribution of the "prized public good", equals should be

treated on a non-discriminatory basis, except where differences can be justified. In this context, the focus is on the distribution of the public good, rather than the characteristics of the recipient. The courts will scrutinize public authorities' actions in a more intense way than under the first meaning, when the actions of the public authority give rise to discrimination (defined essentially as treating someone differently) in these circumstances.

In the second approach, the role of the non-discrimination principle is an adjunct to the protection of particularly prized "public goods". The principle is essentially that in the distribution of the "public good", equals should be treated equally, except where differences can be justified. In this context, the focus is on the distribution of the public good, rather than the characteristics of the recipient, except for the purpose of justifying different treatment. A key issue, in this context, is what "public goods" are to be regarded as of sufficient importance to attract heightened equality-based scrutiny. One example is to be found in the interpretation of Article 14 ECHR, where the "public goods" in issue are fundamental human rights. Indeed, this is also a characteristic approach to the role sometimes accorded equality and non-discrimination in international human rights law more generally.[53] A second example, is in the context of European Community law, where the "public goods" in issue are to be found in those provisions of the Treaty furthering the economic integration of the Community.

As de Búrca argues, "even in those areas of EC law where the principle [of equality] is expressly relevant, it does not play the same role in each context."[54] A rough and ready distinction can be made between two overlapping, but relatively separate, functions of EC equality law. First, there are those aspects of EC equality law, operating primarily in the economic sphere, where equality has particular importance in furthering the market-integration goals of the Community. As de Búrca explains: "the principle can be seen as an *instrument* for the attainment of specific Community aims … promoting equal treatment as a means of eradicating obstacles to the completion of the single market."[55] Tesauro AG has pointed to the fundamental importance of equality in this context: "[T]he principle of equal treatment is fundamental not only because it is a cornerstone of contemporary legal systems but for a more specific reason: Community legislation chiefly concerns economic situations and activities. If, in this field, different rules are laid down for similar situations, the result is not merely inequality before the law, but also, and inevitably, distortions of competition which are absolutely irreconcilable with the fundamental philosophy of the common market."[56] This function is often regarded as the dominant function of equality in Community law. "The principle of equality", writes Tridimas, "acquires particular importance in the field of economic law. (…) Equality … is … a keystone of integration. The notion of distortions of competition is central to

[53] See M. Bossuyt, L'interdiction de la discrimination dans le droit international des droits de l'homme, 68-69 (1976).
[54] Ibid., p. 23.
[55] de Búrca, The Role of Equality in European Community Law, at page 23-24.
[56] Case C-63/89 Assurances du Credit v Council and Commission [1991] ECR I-1799 at 1829.

understanding its function in Community economic law."[57] In this second category, for example, we might place the provisions regarding non-discrimination between producers and consumers.

A second function of the principle of equal treatment in EC law has been identified, however. In this the principle of equal treatment is of particular importance in demonstrating that the goals of the Community go beyond economic goals and extend to the protection of the European social model, defined to include equality considerations. In this context, equality is seen either as important intrinsically or (at least) as important for non-economic integration. As de Búrca explains, equality can be seen "as a value which mediates and possibly constrains or redirects other specific Community measures or goals. Thus, for example, Community measures might be subject to challenge for failure to comply with the equal treatment, or legislation might be tempered by the requirement that there should be no discrimination on grounds such as race or religion in its application. [M]ore controversially, the principle could be viewed as an independent Community goal …."[58] In this second category, for example, we might place the provisions regarding sex discrimination. We shall consider this aspect of Community equality in discussing the next meaning of equality.

Drawing a sharp distinction between these two functions is, however, somewhat problematic. In part, the distinction is sometimes overdrawn because aspects of equality that began within the first function, moved to fulfil the second function. Confining the discussion only to the grounds of gender, we see that the motivations for introducing prohibitions in discrimination may change, and that they may differ significantly from the reasons why similar legislation is introduced in the United Kingdom. The Treaty of Rome of 1957, which included a single article on equality between women and men, namely Article 119 EC regarding equal pay, was included originally to counter what would now be identified as the problem of "social dumping". For over a decade, this provision had no noticeable effect on the Member States, and it was not until the path-breaking decisions by the European Court of Justice in the *Defrenne* cases[59] in the 1970s that the provision began to be seriously considered as giving rise to enforceable legal rights. This judicial activism coincided with the rise of the women's movement in western Europe, and these two factors, combined with the decision of the Community to balance economic policy with a social dimension more generally, led to three main pieces of equality legislation being enacted in the latter half of the 1970s. Increasingly, gender equality became centrally concerned with that social dimension, as aspect of fundamental rights, and thus an element in the second function of equality.

A second reason for being wary of too sharp a distinction being drawn is that particular instantiations of equality currently appear to fulfil both functions currently. The most prominent example is as regards discrimination on grounds of nationality. The dual

[57] Tridimas, page 45.
[58] de Búrca, The Role of Equality in European Community Law, at page 23-24.
[59] See Case 80/70 *Defrenne v Sabena* [1971] ECR 445; Case 43/75 *Defrenne v Sabena (No. 2)* [1976] *ECR* 455; Case 149/77 *Defrenne v Sabena (No. 3)* [1978] ECR 1365.

faceted nature of Article 12 (ex 6) EC is addressed by Jacobs AG in the Phil Collins case, in which he stresses that the prohibition on discrimination on grounds of (EC member state nationality) both furthers economic integration of the Community, and demonstrates that the Community is not just economic, but a "common enterprise in which all the citizens of Europe are able to participate as individuals …"[60] As Tridimas: "… the Court of Justice has transformed Article 12[6] from a general, programmatic, provision to an autonomous source of rights and obligations *beyond the sphere of the internal market strictly understood* which encompasses a diverse range of situations and whose outer limits remain elusive."[61]

A third reason for being cautious in drawing the distinction too sharply lies in the difficulty of attributing reasons to the Community institutions for the adoption of particular equality provisions. As regards the provisions of the Framework Directive, for example, there is much current academic debate. We can really only speculate on the reasons that led to the enactment of these provisions, and there is some disagreement in the academic commentary as to how much the Community was motivated by economic or social integration motives,[62] and how far the future enlargement of the Community was important.[63] It is quite possible, indeed likely, that different motives underpinned the inclusion of different grounds of discrimination.[64] It is also likely that the Commission

[60] Joined Cases C-92 and C-326/92 [1993] ECR I-5145 at 5163

[61] Tridimas, page 87 (emphasis added).

[62] L. Waddington, 'Testing the Limits of the EC Treaty Article on Non-discrimination' (1999) 28 *Industrial Law Journal* 133-151, 134: '… Article 13 EC's inclusion in the Treaty was not primarily prompted by the desire to combat discrimination for economic reasons or to complement the single market. Instead it is part of a trend which is arguably reflected more in rhetoric than in reality`; to bring Europe "closer to the citizens".' (footnote omitted). In contrast, see S. Fredman, 'Equality: A New Generation?' (2001) 30 *Industrial Law Journal* 145-168, 149 (pointing to an economic rationale for Community responsibility, as set out in the recitals to the new directives); and S. McInerney, 'Equal treatment between persons irrespective of racial or ethnic origin: a comment' (2000) 25 *European Law Review* 317-323, 322-3 (who points to the market-orientated rationale as providing a secondary rationale for the Race Directive).

[63] M. Bell, 'Article 13 EC: The European Commission's Anti-discrimination Proposals' (2000) 29 *ILJ* 79-84, 84 (importance of new directives in the context of enlargement of the Community).

[64] Social integration, particularly in the context of far-Right electoral successes in some European countries, appears to have been influential in speeding the adoption of the Race Directive. The inclusion of age as one of the prohibited grounds, however, should perhaps be viewed, as McGlynn points out, as being part of a larger EC policy about addressing the economic need for 'labour market change to encourage older workers to remain employment active, to persuade employers to reduce the use of "early exit" and to make vocational training and lifelong learning available to all', although it subsequently took on a fundamental rights perspective. C. McGlynn, 'Age Discrimination and European Union Law' (Paper delivered to Workshop organised by the Swedish National

was anxious to exploit the political opportunity it was offered to include as broad a range of grounds as possible in as few Directives as possible, knowing that some grounds would be unlikely to be accepted if they were contained in separate instruments. Nor, given that they have not yet come into force, has any judicial analysis of their functions yet been forthcoming.

Equality in Community law is relevant for the second, third and fourth meanings of equality sketched out above. In this section, we concentrate on its importance for the second meaning. Where entitlements or interests provided for in the Treaty, etc. are being "distributed", then the Community equality principle requires that likes should be treated alike, and differences treated differently, unless there are objectively justified reasons for departing for that principle. This is of particular importance with regard to economic relations. In this sense, the approach of the Court of Justice is to regard the Treaty requirements as of such importance for the functioning of the market that failure to ensure that they are applied equally requires heightened judicial scrutiny. It is as if each particular article in the Treaty has an additional equality clause that provides that that article has to be applied to conform to the equal treatment principle.[65] In this situation, there is no need to identify any specific prohibited ground of discrimination (such as nationality). It is sufficient to establish an unjustified difference in treatment. This is an application of the second meaning of equality.

(c) Equality as preventing "status-harms" arising from discrimination on particular grounds

In the third meaning of non-discrimination, the focus of attention shifts from the importance of the "public good" (particularly the human right in issue) and turns instead to the association between a limited number of particular characteristics (such as race, gender, etc.) and the discrimination suffered by those who have, or are perceived to have, those characteristics. The courts will scrutinize public authorities' (and others') actions in a more intense way than under the first meaning, where the public authorities' actions discriminate against individuals with those particular characteristics. In this context, however, the meaning of discrimination expands beyond the principle that likes should be treated alike to embrace also the principle that unlikes should not be treated alike. This meaning is essentially aimed at preventing status-harms arising from discrimination on particular grounds.

This is the meaning of equality that has recently received such a boost from the new "equality" directives, and it is the meaning of equality that has the best claim to being described as the "new" meaning of equality, although its roots go back as far as the Defrenne cases dealing with sex discrimination. It is this meaning that will be the

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Institute for Working Life on Discrimination and affirmative action on the labour market – legal perspectives, Brussels, 6-7 November 2000), 4.

[65] See, for example, Codorniu v. SA v Council of the European Union, Case C-309/89, European Court Reports 1994 Page I-01853, para. 26.

preoccupation of this Conference, and I will consider some aspects of it in more detail subsequently in this paper.

Before doing so, however, it is necessary to mention the fourth and last conception of equality present in Community law.

(d) Equality as proactive promotion of equality of opportunity between particular groups

In the fourth meaning, certain public authorities are placed under a duty actively to take steps to promote greater equality of opportunity and good relations (the legal meanings of which are yet to be fully articulated) for particular groups. In that sense, it is a further development of the third ("status-based" meaning. However, the concept of "equality of opportunity" goes beyond any of the concepts of discrimination characteristic of the previous meanings and involves not just a duty on the public authority to eliminate discrimination from its activities, which is seen as merely one example of where equality of opportunity is denied. Under this fourth approach, a public authority to which this duty applies is under a duty to do more than ensure the absence of discrimination from its employment, educational, and other specified functions, but also to act positively to promote equality of opportunity and good relations between different groups throughout all its policy making and in carrying out all its activities. A characteristic of the third approach, discussed in the previous section, is that positive/affirmative action is permitted, but not required. An emerging characteristic of the fourth approach is that, under this approach, positive/affirmative action may be a requirement, where such action would be lawful. It would appear to be the case that for those subject to this duty, there is now an obligation to consider whether adoption by it of lawful affirmative action measures would further equality of opportunity and, if it would, consider adopting such measures.

Is this fourth meaning of equality present in EC law? Barnard rightly observes that the gender, race and framework directives "do not focus on the achievement of equality in the broader, more results-oriented, redistributive sense. However, there is some evidence of the emergence of the fourth meaning of equality in Community law. Thus, for example, we have seen that Articles 2 and 3(2) of the EC Treaty impose the objective of promoting equality between men and women in the Community. Recently, Advocate General Stix-Hackl in *Dory* has interpreted this as imposing an *obligation* on the Community *actively* to promote equality between men and women. It remains to be seen how far this interpretation presages the development of a more fully worked out fourth meaning of equality in Community law (at least with regard to women's equality).

3. Underpinnings of third meaning of discrimination and equality

In the remainder of this paper, I focus attention on the third meaning of equality in EC law, focusing on "status-harms". Why are particular status-harms singled out as particularly unacceptable? A vision for the future of this third meaning requires a deeper understanding of what we mean by equality in this particular context. Drawing on the

European Community experience, there are, in my view, *four* different (although overlapping) concerns currently underpinning the third concept of equality in EC law.

(a) Individual justice model

The first underlying concern I'll call the "*individual* justice" model. This model generally aims to secure the reduction of discrimination by eliminating from decisions considerations based on race, gender or other prohibited considerations that have harmful consequences for individuals. The key word is usually "discrimination".

This approach is not *primarily* concerned with the general effect of decisions on *groups*. It is markedly *individualistic*: concentrating on securing fairness for the individual. It is generally expressed in *universal* terms: blacks and whites are equally protected, for example, as are *men* as well as women, sexual minorities and sexual *majorities*. It reflects respect for efficiency, 'merit', and achievement. It preserves and possibly enhances the operation of the market. It often concentrates on the intention of the perpetrator of the discrimination, and the sense of grievance of the individual arising out of that intention.

This first model of equality as individual justice is reflected in several different aspects of Community law, in particular the prohibition of direct discrimination, the recitals on merit, and the essentially individualised enforcement model adopted.

Despite its obvious attractions, this individual justice model has been criticised as deeply flawed, if it is to be regarded as encapsulating the only meaning of "equality". Various arguments tend to recur. The individual justice model is said to misconceive the deep structure of discrimination in some contexts, such as discrimination against women. Such discrimination is as often institutional as individual, it is argued, and therefore there is little likelihood that a highly individualistic model of equality will adequately capture the depth of the problem or the significance of the changes that need to be made to address it. The problem, it is said, is misconceived as being one of intention rather than effect. The individual justice model is said not to take adequately into account the surrounding and re-enforcing nature of disadvantage and membership of certain groups.

(b) Group justice model

The second underlying concern of policy in the third meaning of equality is *group* justice. This is the view that the aim of equality policy should be to concentrate more on the *outcomes* of the decision-making process, not just the process itself. Supporters of this model often seek to redistribute resources from the advantaged to the disadvantaged. Their basic aim is the improvement of the relative position of particular *groups*, whether to redress past subordination and discrimination, or out of a concern for distributive justice. The key word is usually "redistribution", rather than discrimination.

One of the ways in which this idea of group justice has been conceptualised legally is by requiring that discrimination be defined as including the concept of indirect discrimination, which (loosely defined), involves prohibiting practices that have the

effect of disproportionately disadvantaging a particular group and which cannot be justified objectively. Another common aspect of this notion of group justice is the concept of group-based remedies. This sometimes takes the form of restitutionary remedies. In some countries, positive or affirmative action measures have been developed as one form of such remedies. For the purpose of this discussion, positive or affirmative action includes preference being accorded to an individual because of his or her membership of a group, in order to redress past discrimination, secure greater distributive justice, or ensure the greater representativeness of the institution engaging in the positive or affirmative action. A good illustration of the difference between a group justice conception of equality and an individual justice model of equality is provided by the different legal attitudes to affirmative action. Within the individual justice model, affirmative action is most often characterised as an *exception* to the equality and non-discrimination principles.

Common to both the concept of indirect discrimination and affirmative action is the idea of proportions. Often, therefore, statistics are collected in order to monitor the relative position of the disadvantaged group compared with other groups in the society, and to provide information on which indirect discrimination can more easily be identified and affirmative action programmes devised. We see, finally, an important shift in the use of language from the individual justice to the group justice model. In the former, the emphasis is usually on talk of "discrimination". In the latter, other terms tend to become predominant: material equality, equality of outcome, and disadvantage.

European equality law reflects this model, but (again) only partially. On the one hand, we can point particularly to the incorporation of the concept of indirect discrimination across all the Directives and (by interpretation) the Treaty. The Directives also provides (permissively) for affirmative action, which, although relatively open-ended, clearly incorporates a collective conception of group disadvantage dispensing with a requirement of actual or direct harm and allowing for both retrospective and prophylactic measures. We can also point to the asymmetry of the provisions on disability to support this type of argument.

On the other hand, some argue that whilst, in the past, EC equality law reflected an appropriately asymmetric view of discrimination against women, Community law is now less explicitly asymmetrical. Thus, how far EC equality law reflects a model of group justice is open to considerable debate. It does not, for example, show very much movement towards the more explicitly group-justice based conception of equality reflected in the fourth meaning of equality identified above.

(c) Equality as recognition of identity

However, there is a third underlying concern of equality in this third approach, where equality involves the recognition of diverse *identities*. In this conception of equality, the failure to accord due importance to such differing identities is a form of oppression and inequality in itself. *Diversity* becomes the key word in general debate, and public policy reflects the need for such diversity to some extent.

During the 1980s, some political theorists increasing concentrated on the desirability of recognising diverse identities. One of the most important developments affecting anti-discrimination law in the last decade has arisen from this political theory. Theories of justice have developed, based on the importance of the cultural, political and legal recognition of the life-style choices of social groups, viewing the failure to accord due importance to such differing identities as a form of oppression and discrimination.[66] This reflected and, to some extent stimulated, what has been called "identity politics", encompassing attempts to secure the political recognition and accommodation (if not celebration) of ethnic, religious, sexual, and other diversity. Anti-discrimination law is tailor-made for such politics and one of the ways in which this politics manifested itself legally, was by seeking to expand the grounds on which discrimination was prohibited.

This model of equality as recognition is also partially incorporated in the Directives. It can be seen, perhaps particularly, in the prohibition of discrimination on the basis of sexual orientation, and in the Charter of Fundamental Rights redefinition of the right to marry. In this former context, the role of the prohibition of discrimination is in part to gain recognition for the idea that, as Hans Ytterberg, has said, "All human beings can be said to have a sexual orientation, homosexual, bisexual or heterosexual, albeit that heterosexuals tend to forget theirs."[67] He argues for the need for action "to remedy what can be labelled the 'tyranny of silence'."

However, at least two further elements in the political-theory debate over the politics of recognition are becoming influential in the critique of anti-discrimination law theory. One set of debates concerns the justifiability and desirability of focusing on the recognition of social groups.[68] In the anti-discrimination law context, that has been translated into a complex set of concerns around that law's use of such categories as "racial", "ethnic", "religious", even "men" and "women". Does such categorization facilitate or hold back the goal(s) that anti-discrimination law aims to achieve? Does it require such a simplified conception of the characteristics of the social group that it ends up reinforcing an essentialist view of the group, and thus the further stereotyping of the group that anti-discrimination law was meant to protect? Does it reify the existence of such groups, encouraging exclusivity and polarisation between these groups?

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[66] The work of Charles Taylor is of particular significance in this area, see Charles Taylor "The Politics of Recognition" in Amy Gutman (ed.), *Multiculturalism and the 'Politics of Recognition'* (Princeton U.P., 1992). This has also given rise to an ever-expanding literature on multiculturalism. The work of Will Kymlicka has been of especial significance here.

[67] Hans Ytterberg, The right to love whom ever you want – an issue of fundamental human rights! (?), (Paper delivered to conference on "Discrimination and affirmative action on the labour market – legal perspectives, Brussels, 6-7 November 2000), p. 2-3.

[68] Nancy Fraser, "Rethinking Recognition: Overcoming Displacement and Reification in Cultural Politics", 2/3 New Left Review (2000), 107-120.

These questions have particular implications for the development and interpretation of EC equality law, given the emphasis placed in the Directives on indirect discrimination and positive action, which depend to some extent on group classification. These questions pose a particular challenge to aspects of the group-justice rationale more generally, to the extent that, for example, statistics on and the monitoring of group behaviour and status is seen as central to the operational effectiveness of this model. It is instructive to note that the definition of indirect discrimination in the new directives, unlike the definition in the Burden of Proof Directive, does not depend upon using statistical evidence of disproportionate adverse impact, since in several Member States, including Sweden and Denmark, data protection legislation prevents the collection of data about an individual's ethnic origin.[69]

This questioning also has implications for the fact that different Directives relate to different categories of groups. Sandra Fredman, has pointed to the problems associated with a legal regime that necessitates "bright line distinctions between different grounds of discrimination".[70] Referring to the Directives in particular, she argues that "[d]ifferences between groups are highlighted; differences within groups are rendered invisible." She argues that "[T]he structure of the directives make (sic) it inevitable that groups will be defined as if they have fixed, unchanging essences." She sees a need to "revis[e] the meaning of group identity" and advocates "a single harmonised statute which includes all the relevant grounds of discrimination, and does not necessitate harsh distinctions between different grounds."

Another area where the politics of recognition appears in tension with a group justice model justice in the EC context arises from the issue of whether the group justice model's concern with more equal distribution of goods and opportunities to economically disadvantaged groups conflicts with justice as based on the cultural and symbolic recognition of differing identities and their acceptance on the basis of equality.[71] Does a concern with recognition, in other words, displace a concern with economic redistribution in the anti-discrimination theory context? The emerging debate surrounding the idea of diversity and its relationship to equality and anti-discrimination law illustrates the tensions between the group justice and the recognition models of equality. Some black-American groups, for example, are deeply suspicious of diversity rationales for equality because they seem to equate the need for affirmative action for black Americans with the need to include greater representation of other groups which would not otherwise come within the protection of the group-justice rationale, such as Americans of Far-Eastern

[69] Evidence of Adam Tyson of the EC Commission to House of Lords, February 9, 2000, p. 22, EU Proposals to Combat Discrimination, Report of the House of Lords Select Committee on the European Union, HL Paper 68, May 16, 2000. For a fuller discussion of the sources of the new definition, see Mark Bell, Article 13 EC: The European Commission's Anti-discrimination Proposals, 29 *ILJ* 79-84 (2000), p. 82 (Commission drew on the ECJ's nationality discrimination jurisprudence).

[70] Sandra Fredman, Equality: A New Generation?, 30 *Industrial Law Journal* 145-168 (2001), p. 158.

[71] Anne Philips, *The Politics of Presence* (Oxford University Press, 1995).

ethnic origin, leading to a narrowing of what affirmative action can deliver specifically for black Americans.

One response to such concerns, largely adopted by Choudry,[72] is to view anti-discrimination law's emphasis on social groups as both indispensable but also problematic features of such legislation. An alternative approach is to say "a plague on both your houses", reject both the group justice and recognition models, and return to what has previously been identified as the "individual justice" rationale for anti-discrimination law, seeing the end to be achieved by such law as the protection of individuals' choices in a relatively limited area of economic activity, and not the vision of redistribution or identity politics. In particular, this approach rejects an "identity-politics" interpretation of anti-discrimination law as misguided (leading to potential balkanisation of politics, preventing the escape from an identity forced on individuals by others), and unworkable (leading to courts having to engage in debates which they are patently ill-equipped to deal with adequately).

(d) Equality as participation

A fourth underlying concern in the third meaning of equality can also be identified. Claims by the groups protected by EC equality law are viewed as, in part, struggles to be able to articulate their own perspectives and priorities, a claim for political participation in the broadest sense. The aim is that all, including those previously excluded, should have a voice in public affairs, especially in the daily decisions of those who shape their life chances. Participation becomes the key word.

This approach has at least three potential implications for anti-discrimination law, and all have been the subject of debate in the past decade. The first implication relates to the issue of whether it is desirable or not for individual "members" of such social groups to be present in policy-making bodies because their presence adds an important element of diversity to such bodies. Thus, for example, some countries have specified that government committees of various types should have a minimum percentage of women as members, and political parties have specified that women-only shortlists are required in some circumstances in order to increase the chance of better gender participation in the national legislature. The issues for anti-discrimination law, sometimes statutory, more often constitutional, are whether such attempts at increasing the political representation of certain social groups are permissible, or even required. How far should parity democracy be encouraged in the context of gender equality, for example?

The implications go beyond gender equality. Since the late 1980s, the idea of minority rights has also increasingly gained currency and popularity in central and eastern-Europe. The significance of this relationship for anti-discrimination theory lies, again, in the extent to which a focus on minority rights often appears to emphasise groups, rather than individuals. More importantly, however, a minority rights focus often generates

[72] Sujit Choudry, "Distribution vs. Recognition: The Case of Anti-Discrimination Laws", 9 *Geo. Mason Law Review* 145 (2000).

discussion of what form of democracy is justifiable (and practically effective) in order to reduce and accommodate ethnic tensions. In particular, debates from political science on the appropriateness of such concepts as consociational democracy have generated a rich literature. Seen from this perspective, anti-discrimination law has been seen to have an important role to play in ensuring the appropriate distribution of goods and political opportunities between ethnic groups. European equality law has already had to face this issue in the context of negotiating the Framework Directive. There are exceptions relating to Northern Ireland that are firmly based on the need to protect aspects of consociational democracy from a potentially limiting individual justice model.

4. Coping with "equalities"

Which of these four models of equality is "correct"? My argument is that no *one* model can or should claim to represent *the* central or best case of equality in interpreting and explaining EC equality policy. *All* these conceptions of equality are necessary for us to capture its *full* dimensions and the richness of its meanings. We should embrace this diversity of equalities in policy-making, and refuse to narrow equality discourse to only one meaning.

(a) Tensions

There are two different sets of tensions that are likely to arise. First, there will be tensions between the four different meanings of equality sketched out above. There will be tensions, for example, between the second and third meaning of equality when, parts of the third, status-based, notion of equality are seen as contrary to another substantive right, such as freedom of expression, underpinned by the second notion of equality. Second, there will be tensions within the third conception of equality, between different understandings of why particular types of status-based discrimination are seen as unacceptable. In the remainder of this paper, I will concentrate on the tensions within the third meaning.

Requiring that equality policy should reflect all four underlying concerns identified within the third meaning, will clearly lead to *profound* debate about the priorities *between* these underlying concerns when they clash, as they sometimes will. Evidence from the United States shows that there may, for example, be a tension between prohibiting age discrimination (a classic individual justice demand) and redistributive policies on race and gender. The principal beneficiaries of the American age discrimination legislation are, after all, older, white males. The politics of recognition also appears in tension with a group justice model justice in the EC context. The group justice model's concern with more equal distribution of goods and opportunities to economically disadvantaged groups may conflict with justice as based on the cultural and symbolic recognition of differing identities and their acceptance on the basis of equality. Does a concern with recognition, in other words, displace a concern with economic redistribution in the anti-discrimination theory context?

(b) Subsidiarity

How then does EC equality law deal with these complexities? First, very open-textured language are provided that, together with some very extensive exceptions, have given rise to some unease. For example, the extensive exception in Article 4(2) of the Framework Directive on religious discrimination, permitting employers to require good faith and loyalty to the organisation's ethos, may have a chilling effect on an individual's private life and conscience. Very substantial discretion is accorded Member States. So too, we can note the different approaches that can be adopted to the interpretation of racial or ethnic origins in the Race Directive.

A varying margin of discretion is allowed, under the Directives, to the Member States to decide what are the most appropriate means to deliver the equal treatment guaranteed. Probably the least discretion is given to Member States in the gender directives (because there is more consensus, based on greater experience, as to the model of equality that is appropriate in most circumstances), and the greatest discretion is given to Member States in the framework employment equality directive, where much is left open to national level policy debate because there is little consensus on the appropriate model of equality to apply in religion, age, disability and sexual orientation. That approach does not seem to me to be objectionable in principle, provided that there is the type of continuing conversation between the courts, the Member State governments, and the Commission which means that the Community returns to mull over the approaches that particular bodies come up with, as occurs frequently in the gender context. Provided, therefore, we see these Directives as genuinely the start of a dialogue as to what conception of equality is appropriate in particular contexts, the strategy of devolving responsibility back to the Member States to decide initially has much to commend it.

(c) Judicial sensitivity to an equalities approach

It is clear, of course, from the gender discrimination context that these debates at the national level as to how to resolve these tensions between the different conceptions of equality will sometimes end up in the European Court of Justice, whose role will therefore remain of critical significance in the development of European equality law.

How will the Court react to such invitations? There are several possibilities. Faced with this complex array of equalities to choose from, courts may retreat to a default position of equality as mere rationality. This tendency may well be strengthened not only by the broad range of the Article 13 Directives, but also by the judicial tendency to consider such equality legislation as an instantiation of a broad, if thin, human right to equality, rather than an instantiation of an attempt to deal with the separate *sui generis* problems of equal pay, or the exclusion of racial minority groups, etc. The strength of the "equality as human rights" development (namely its generality) is also its potential weakness: there is a tendency to reduce the conception of equality to the lowest common denominator. The problem for the ECJ (and indeed the national courts), therefore, is how to decide among these various conceptions of equality in particular contexts.

My hope is that a considerable degree of judicial modesty will be seen as appropriate, at least until it becomes much clearer which approaches that will evolve at the various national levels on particular issues are theoretically satisfying and practically workable. What I suggest, therefore, is that the courts should follow closely the national developments, regarding them as providing a laboratory for experimentation on *which* equality is most appropriate in *which* circumstances. This may well mean that a single European anti-discrimination law model will be a long time in coming. That should come as no surprise, and be no cause for alarm; the European enterprise is a long-term project. The important role that the courts will play in the initial period is as a forum for rigorous and sustained debate on these issues. It should not seek to close off necessary debates on these issues. What is necessary, then, is a recognition that different equalities are in play in different situations and that what is necessary is the ability of the protected groups to be able to engage with policy makers to help secure the adoption of the conception of equality that best suits their circumstances. We should not prejudge the outcome of that debate. What we need to recognise, therefore, is the importance of "equalities"-talk, rather than "equality"-talk. It will be vital for the debate about equality to take place not only between such groups and government, but also between these groups themselves.