EQUALITY AND THE EUROPEAN UNION

Elizabeth F. Defeis*

TABLE OF CONTENTS

I. INTRODUCTION ........................................... 74

II. HISTORY .................................................. 74

III. HUMAN RIGHTS INITIATIVES ............................... 78
    A. Treaty of Amsterdam .................................... 78
    B. Anti-Discrimination Directives ........................ 81
        1. General Provisions ................................. 81
        2. Prohibited Discrimination .......................... 84
        3. Derogations ....................................... 89
        4. Implementation .................................... 94

IV. CHARTER OF FUNDAMENTAL RIGHTS ....................... 97

V. CONCLUSION .............................................. 98

* Professor Elizabeth F. Defeis is a Professor of Law at Seton Hall University School of Law. The author would like to thank Alissa Ryder, Seton Hall Law School, J.D. 2004, for her research assistance and Lillian Atkinson for her assistance and support.
I. INTRODUCTION

The most important developments in the human rights arena are now occurring under the auspices of the European Union (EU). The expansion of the EU to include several formerly totalitarian regimes, the adoption of the Charter of Fundamental Rights of the European Union, as well as the discussions now taking place concerning a constitution for the EU, have pushed human rights to the forefront of the EU agenda. Within the EU, sweeping anti-discrimination Directives are now in place and funding for human rights projects on an unprecedented scale has been allocated. These developments could not have been anticipated when the EU was established almost a half century ago.

In implementing the gender equality provision of the Treaty of Rome, the EU borrowed heavily from the United States experience. The Treaty of Amsterdam, adopted in 1999, expands the areas of prohibited discrimination to include that based on racial or ethnic origin, religion or beliefs, disability, age, or sexual orientation in addition to gender. This Article will examine the new comprehensive initiatives of the EU with respect to human rights and anti-discrimination and compare them to the United States civil rights law.

II. HISTORY

The EU, as is well known, was formed primarily to further market integration. As originally envisioned, human rights would be protected through the individual member states and under mechanisms and agreements established under the auspices of the Council of Europe (Council). Because of their common heritage of political ideals, freedom and the rule of law, EU member states, along with several other European states, had earlier adopted the European Convention for the Protection of Human Rights and Fundamental Freedoms and had provided for an elaborate enforcement mechanism for the protection of human rights through what is known as the Strasbourg process.

---


The European Community (Community) was intended to be an institution of limited competence, encompassing primarily economic concerns, and human rights protection was left to existing institutions and individual member states. Therefore, when the Treaty of Rome came into force in 1957, human rights could be considered an afterthought. However, now through a series of decisions by the ECJ,\textsuperscript{3} Directives of the Council,\textsuperscript{4} Treaty revision,\textsuperscript{5} the adoption of the Charter of Fundamental Rights of the European Union,\textsuperscript{6} and the ongoing discussion of a new Constitution for the EU, the entrenchment of human rights in the fabric of EU law has become a reality.

The Treaty of Rome,\textsuperscript{7} the founding document of the Community, contains only one substantive provision pertaining to human rights. Ex-Article 119, now Article 141, established the principle of equal pay for equal work based on gender.\textsuperscript{8} However, even that provision was adopted because of economic considerations rather than human rights considerations. It was inserted to ensure that French social standards which required equality in the workplace would not be diluted by membership in the common market and that France

Rights and the European Commission of Human Rights sit in Strasbourg, and individuals, as well as member states, may take complaints of human rights violations directly before the court. Jurisdiction over member states is compulsory. All member states of the EU and most potential members, such as Russia and Macedonia, have ratified the Convention. The European Court of Human Rights is separate and apart from the European Court of Justice (ECJ) and the other mechanisms of the EU, such as the European Commission and the Council. See Leuprecht, \textit{supra} note 1, at 315-18.


\textsuperscript{7} \textit{TREATY OF ROME}, Mar. 25, 1957, 298 U.N.T.S. 3 [hereinafter \textit{EC TREATY}]. Although the EC Treaty contains a social chapter which deals with human rights to some extent and guarantees workers' rights, its primary goal is to improve working conditions and standards of living on a harmonized basis throughout the EU. But from its very inception, the EU has embodied the principle of gender equality, at least concerning equal pay for men and women in employment.

\textsuperscript{8} \textit{Id.} art. 141.
would not be placed at an economic disadvantage. However, Article 119 has been the subject of voluminous EU legislation and litigation and has led to an extensive body of case law. Indeed, the equal pay principle has developed into a general equality right between men and women which exists at the core of EU law.\(^9\)

Under the leadership of the ECJ, the EU has developed a rich jurisprudence of human rights law.\(^10\) Decisions of the ECJ have been bold and far-reaching in the area of human rights and have undoubtedly influenced the subsequent treaties that increasingly refer to human rights protections.

It has been said that the attention to human rights was a defensive measure adopted by the Court to still the controversy over the newly articulated doctrine of the supremacy of Community law articulated in the early 1960s. The Court, in a bold move, held that community law as enunciated by the Court takes precedence over domestic constitutions as well as over domestic positive law.\(^11\)

Some member states, which had strong human rights provisions in their constitutions, notably Germany and Italy, were uncomfortable with this doctrine. They feared that the strong human rights provisions in their own constitutions could be negated by Community law and hence resisted the supremacy doctrine.\(^12\) In the face of the judicial decision in *Costa v. ENEL*,

---


\(^10\) See generally Alston & Weiler, supra note 3; see also Leuprecht, supra note 1.

\(^11\) Case 6/64, Costa v. ENEL, 1964 E.C.R. 585, ¶7 (establishing the principle of supremacy of Community law over the domestic law of member states in order to ensure application of Community law throughout the community. However, the supremacy doctrine was met with resistance from many member states, particularly in the area of human rights. Because the EEC treaty contained very limited human rights provisions and the constitutions of the member states contained human rights guarantees modeled on documents such as the Universal Declaration of Human Rights, it was unacceptable to some member states to implement community legislation without scrutinizing it through the lens of their own constitutional guarantees of fundamental rights.).

\(^12\) See Louis Henkin, *The Rights of Man Today* 32-33 (1978); see also
starting in 1969, the Court, in a long line of cases, held that indeed human rights considerations would be used to measure the validity of Community law. The Court emphasized that general principles of law, inspiration from the constitutions of member states, and provisions of international human rights conventions would all be applied by the Court.

Among the rights recognized and enforced by the ECJ under this jurisprudence are freedom of expression, freedom of association, the right to religion, the right to property, the right to privacy, and the right to pursue a business. The interpretation put on these rights by the ECJ did not always accord with the decisions of the European Court of Human Rights (ECHR) in Strasbourg. In areas such as privacy, gender discrimination and abortion, the ECJ has taken a narrower approach than the ECHR or the Court has avoided deciding the issue. With the expanded jurisdiction of the ECJ to encompass some human rights concerns, an interesting open question remains: Which court is the ultimate arbiter of human rights? The Court of Human Rights in Strasbourg or the ECJ in Luxembourg? Clearly this is a question that requires further attention and reflection.


13 See Defrenne II, supra note 3.
14 See Alston & Weiler, supra note 3, at 709.
20 Id.
21 See generally Smith and Grady v. United Kingdom, 29 Eur. Ct. H.R. 493, 535 (holding that investigations by the military into an individual’s sexual orientation constituted a direct interference with the applicant’s right to privacy and that “convincing and weighty reasons have not been offered by the Government to justify the policy against homosexuals in the armed forces”); Case 249/96, Grant v. South-West Trains, 1998 E.C.R. I-621 (holding that prohibition of discrimination based on sex, a fundamental principle of Community law, did not cover discrimination on the grounds of sexual orientation). But see Niemietz v. Germany, 16 Eur. Ct. H.R. 97 (1993) (holding that a “search of professional activities and premises” constitutes a violation of the right to privacy); Case 46/87, Hoechst AG v. Commission, 4 C.M.L.R. 410 (1991) (holding that Article 8(1) of the European Convention on Human Rights is concerned primarily with the development of individual’s personal freedom and may not therefore be extended to business premises).
22 In an attempt to avoid this conflict, the Charter of Fundamental Rights and Freedoms of the European Union provides:
The issue of human rights protections rose to the top of the agenda in the 1990s. There were increasing demands, particularly from the Parliament, that the EU itself adopt a Charter of Fundamental Rights or that the Union accede to the European Convention on Human Rights and Fundamental Freedoms. In 1996 the Council of the European Community requested the ECJ to give an advisory opinion on Community accession to the European Convention on Human Rights. Under the authority of Article 228(6) of the Treaty of Rome, the Council asked the ECJ if the accession of the European Community to the Convention for the Protection of Human Rights and Fundamental Freedoms would be compatible with the Treaty establishing the European Community. The Court's answer was a resounding negative. It noted that no treaty provision conferred any general power to the Community to enact rules regarding human rights or the power to conclude the relevant international conventions affirming Community institutions. The ECJ held that, absent treaty revision, the EU could not accede to the European Convention, noting that ratification of the Convention would bind the Community to the rulings of the ECHR. Thus, the EU would have to share or surrender sovereignty with another institution and this was unacceptable.

III. HUMAN RIGHTS INITIATIVES

A. Treaty of Amsterdam

The Treaty of Amsterdam, adopted in 1999, provided the opportunity for treaty revision which would allow the EU to ratify the European Convention.

In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

See Charter of Fundamental Rights and Freedoms of the European Union, supra note 6, art. 52(3).


Id.

Id.

on Human Rights and Fundamental Freedoms, but no such revision was included. At the same time, there were proposals to incorporate a bill of rights into the treaties but these were not adopted. Instead, the Amsterdam Treaty of 1999 contained significant provisions with respect to human rights that heightened the profile of the EU as one based more visibly on human rights. In addition, the EU now has both an internal and external human rights policy.

First, Article 6(1) of the Treaty on European Union (TEU) now states that the EU as such is founded “on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law.”

Second, with respect to its external human rights policy, only those European states that respect the principles set out under Article 6(1) may apply to become members of the EU.

Third, the criteria to be used in evaluating human rights issues are explicitly articulated. The EU “shall respect fundamental rights, as guaranteed by the European Convention on Human Rights . . . and as they result from the constitutional traditions common to the member states, as general principles of Community law.”

Fourth, a new mechanism is provided to deal with member states that persistently and seriously violate the principles set out in Article 6(1). An elaborate (and exclusively political) process is set out according to which the relevant determinations are to be made. The sanction is the suspension of certain rights, including voting rights of the member states concerned. The political costs involved in invoking sanctions are formidably high and it should be noted that this provision was not invoked against Austria in 2000.

---

28 The Amsterdam Treaty is not a stand alone document but rather amends the EC treaty and the Treaty on European Union. Consequently, the provisions of the EC Treaty have been renumbered.
29 Treaty on European Union [hereinafter TEU], Feb. 7, 1992, O.J. (C 191) 4 (1992). In 1992, the TEU, also known as the Treaty of Maastricht, amended the EC Treaty and created what is now known as the EU. The Amsterdam Treaty, signed in 1997, amends the TEU.
30 See Amsterdam Treaty art. 6.1.
31 Id. art. 49.
32 Id. art. 6.2.
33 Id. art. 7.
34 In October of 2000, Jörg Haider’s Freedom Party received twenty-seven percent of the popular vote during Austria’s Parliamentary elections. Haider’s extreme right-wing tendencies and remarks prompted criticism from many EU leaders, along with the U.S. and Israel, although
Perhaps the greatest expansion in the area of human rights is Article 13 of the Treaty, which expanded the non-discrimination rules of the Treaty to include other categories beyond gender discrimination. Article 13 provides that

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.\(^{35}\)

The original gender equality provision was also expanded. In addition to substantially incorporating the Equal Pay Directive of 1975, which adopted a comparable worth standard,\(^{36}\) the Amsterdam Treaty adds two new provisions. The first provision requires the Council, under qualified majority voting, to adopt measures to ensure equal opportunity and equal treatment of men and women in employment.\(^{37}\) The second provision allows member states to adopt and maintain positive action provisions. It states:

With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting 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.\(^{38}\)

Although the term "under-represented sex" replaces the term "women" as the focus of positive action, a declaration by member states stipulates that such

---


\(^{36}\) Id. art. 13.

\(^{37}\) See Council Directive 75/117, 1975 O.J. (L45) 19 (defining equal pay as "the same work or for work to which equal value is attributed").

\(^{38}\) See EC Treaty, supra note 7, art. 141(3).

\(^{*}\) See AMSTERDAM TREATY, art. 119(4).
action should in the first instance aim at improving the situation of women in working life. This provision, therefore, implicitly rejects the holding of the ECJ in Kalanke v. Freie Hansestadt Breman, which held that a positive action program is only permitted with respect to access to employment, instead permitting affirmative action with respect to other aspects of employment activities.

B. Anti-Discrimination Directives


Relying upon the competence set forth in Article 13, the Commission introduced a set of fair measures in 1999. These included:

1. A Communication on Community measures to combat discrimination;
2. A Directive to implement the "principle of equal treatment between persons irrespective of racial or ethnic origin";
3. A Directive to establish a general framework for equal treatment in employment and occupation; and

---

39 Declaration 28 on Article 119(4) (now article 141(4)), AMSTERDAM TREATY, supra note 26, 1997 O.J. (C 340) 136.
40 Case C-450/93, 1995 E.C.R. I-3051. The ECJ held that a German state law that guaranteed women automatic priority over men in the labor market was contrary to the ETD's prohibition of sex-based discrimination. The decision was consistent with the purpose of the ETD, which promotes the principle of "equal treatment for men and women as regards access to employment." Several member states criticized the ruling as an obstacle to women's progress toward achieving equality in the workplace. Subsequently, in Marschall v. Land Nordrhein-Westfalen, Case C-409/95, 1995 E.C.R. I-3051, the ECJ upheld the German law and recognized that positive action limited to "providing occupational training and guidance for women or... influencing the sharing of occupational and family responsibilities is not sufficient to put an end to... partitioning of labor markets." See also Julie A. Mertus, International Decision: Marschall v. Land Nordrhein-Westfalen, 92 AM. J. INT'L L. 296, 297 (1998); Equal Opportunities: Disagreements About How to Interpret Marschall Judgment, EUR. REP., Jan. 28, 1998.
41 Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on Certain Community measures to Combat Discrimination, 1999 O.J. (C 369) 3.
4. A Decision to establish an action plan to combat discrimination.44

Two landmark Directives have already been adopted on the basis of this new competence. Additional Directives are planned with respect to discrimination based on gender, disability and age. The Directives already adopted are sweeping in scope and would have been unprecedented when the community was formed in 1957. Perhaps because of the political climate existing in Europe, particularly the rise of Jörg Haider’s Freedom party in Austria, the Directives were adopted with unusual speed, particularly in the face of the unanimity requirement set forth in Article 13.

The first Directive, which focuses on racial discrimination, pertains to several spheres beyond the purely economic, such as housing and education, and was adopted by the Council on June 29, 2000.45 The second, adopted by the Council on November 27, 2000,46 is confined to discrimination in the field of employment, and covers all categories mentioned in Article 13 save for gender (already covered under a web of EU Directives) and race, which now has a stand-alone Directive. An “action programme” accompanies and augments the legislative menu.47

Title VII of the United States Civil Rights Act of 196448 and decisions of U.S. courts have been influential in the drafting of the equality legislation in various member states as well as in decisions of the ECJ.49 This influence can be detected as well in the Race and Employment Directives and also in the prior Equal Treatment Directive, which was limited exclusively to gender equality. As enacted in 1964, the Civil Rights Act prohibited discrimination on the basis of race, religion or national origin in various areas including housing and public accommodations. Only Title VII, which prohibits discrimination in all areas of employment, also includes gender as a protected

45 Race Directive, supra note 42.
46 Employment Directive, supra note 43. Gender equality had already been addressed by numerous measures adopted within the European Union and these measures are currently undergoing reevaluation by the Commission. It is expected that a new Directive will issue shortly.
49 See, e.g., Opinion of Advocate General Tesauro in Kalanke, supra note 40.
group. Specifically, Title VII makes it unlawful for an employer to refuse to hire, discharge, or "otherwise discriminate" against any individual, because of race, color, religion, sex, or national origin.

Both Directives require as a minimum that the principle of non-discrimination be applied to "all persons, as regards both the public and private sectors" in relation to employment, self-employment, working conditions, access to vocational training and work experience, membership of workers', employers' or professional organizations, areas traditionally within the competence of EU activity and interest. The Employment Directive also requires member states to introduce protection against discrimination on the grounds of religion or belief, disability, age, sexual orientation, and racial or ethnic origin.

The Race Directive provided several challenges in the drafting process. Despite the preventive measures taken by the EU to prevent discrimination on the grounds of social or ethnic origin within the EU, the Community rejected the notion of separate "human races" and thus no definition of race is included in the Directive. In addition to the areas specified in the Employment Directive, the Race Directive also applies to education, social protection (including social security and health care), social advantages (such as concessionary fares and subsidized meals), and access to goods and services which are available to the public (including housing).

Both Directives apply to any person who is within a member state when the act of discrimination occurs. Thus they apply to non-nationals as well as nationals of member states. However, the Directives clearly state that discrimination based on nationality is outside their scope and cannot be used to challenge conditions that a member state applies to the entry or residence of

---

51 Id.
52 See Race Directive, supra note 42, art. 3(1); Employment Directive, supra note 43, art. 3(1).
54 In 1995 the Commission presented a communication on racism, xenophobia and anti-Semitism; in 1996 the Council adopted a Joint Action Plan, 96/443/JHA, 1996 O.J. (L 185) 7, concerning action to combat racism and xenophobia under which the member states ensured effective judicial cooperation in respect of offenses based on racist or xenophobic behavior; the 2000 Employment Guidelines adopted by the Council in 1999 and 2000 are aimed at combating discrimination against groups such as ethnic minorities.
55 The Council decision establishing the Community Action Programme to combat discrimination stated: "The principle of equal treatment must apply irrespective of whether the racial or ethnic origin is real or presumed." Council Decision 2000/750, supra note 47.
third-country nationals, and any treatment they receive as a result of their legal status.

2. Prohibited Discrimination

The Directives forbid four forms of discrimination. They include direct and indirect discrimination, harassment, and instruction to discriminate. Direct discrimination is stated to occur "where one person is treated less favorably than another is, has been, or would be treated in a comparable situation" on one of the stated grounds.\[^{56}\] Indirect discrimination occurs when an apparently neutral provision criterion or practice "would put [such person] at a particular disadvantage compared with other persons."\[^{57}\] Thus it is not necessary to prove that a person was actually discriminated against; rather it is sufficient to prove that the practice or the provision would put the affected person at a particular disadvantage. This rejects the approach previously taken in the gender equality area where statistical evidence was required to support a claim of indirect discrimination, but rather follows the approach of the ECJ with respect to discrimination in the area of free movement of persons.\[^{58}\] A person claiming discrimination need not prove motive or rely on statistical evidence to support the claim. The burden of proving discrimination, after a prima facie case of discrimination has been presented, shifts to the respondent to prove that discrimination has not occurred. Burden of proof is an important component of such litigation.

The prohibited direct and indirect discrimination corresponds to the two theories of discrimination that have emerged under Title VII of the Civil Rights Act of 1964, namely, disparate treatment and disparate impact.

A prima facie case of disparate treatment is made when an individual proves he or she: (1) was qualified for the position under dispute, or was


\[^{58}\] \textit{See} Case C-237/94, O'Flynn v. Adjudication Officers, 1996 E.C.R. I-2617, stating that conditions imposed by national law must be regarded as indirectly discriminatory where, although applicable irrespective of nationality, they affect essentially migrant workers . . . or the great majority of those affected are migrant workers . . . where they are indistinctly applicable but can more easily be satisfied by national workers than by migrant workers . . . or where there is a risk that they may operate to the particular detriment of migrant workers (citations omitted).
performing his or her job at a level that rules out the possibility of firing for inadequate job performance; (2) was not hired, or suffered some other adverse job action by the employer; and (3) someone with roughly equivalent qualifications was hired instead of him or her, or replaced him or her. 59 If the plaintiff meets the burden of proving that the employer has discriminated against him or her, the employer’s only defense in a disparate treatment case is to prove that a discrimination on the basis of his religion, sex, or national origin requirement or restriction is a bona fide occupational qualification (BFOQ) exception, which is reasonably necessary to the normal operation of its business. While a number of different tests for the BFOQ defense exist, basically the defense requires the employer to show that the “essence of the business operation would be undermined” by hiring employees without the qualification in question.60

The concept of the disparate impact theory was first articulated in the United States in the landmark decision of Griggs v. Duke Power Company, where the United States Supreme Court acknowledged that discriminating conduct need not be direct or overt in order to be considered as a form of disparate treatment.61 In Griggs the employer, Duke Power Company, required both a high school diploma and passing scores on a general aptitude test as a prerequisite of employment. These requirements applied to all departments except for the lowest one. Although the practice appeared neutral on its face, the Supreme Court held that it served as a pretext for discrimination and ultimately resulted in excluding a protected group from a justifiably equal employment opportunity.62 Namely, the high school diploma requirement disproportionately excluded black applicants from employment at Duke Power Company because the graduation rate in North Carolina reflected racial disparity.63

As a result of the Griggs decision, today Title VII proscribes conduct that is “fair in form, but discriminatory in operation.”64 Thus, in disparate impact cases under Title VII, the plaintiff need not establish the employer’s motive or intent in implementing the employment selection process. Instead, the plaintiff

---

60 Id. at 166 (quoting Diaz v. Pan American World Airways, Inc., 442 F.2d 385 (5th Cir. 1971), cert. denied, 404 U.S. 950 (1971)).
62 Id. at 428-29.
63 Id.
64 Id. at 431.
must introduce specific proof to establish the disproportionate impact. Moreover, when such disparate impact occurs, it is the employer’s burden to demonstrate that the requirements in the selection process are related to the job being sought and governed by principles of business necessity. Unlike discriminatory impact cases brought under the U.S. Constitution, the plaintiff need not show discriminatory intent.65

The third type of prohibited discrimination is harassment. This is the first time in a Community Directive that harassment has been stated as a form of discrimination. However, the type of harassment prohibited in both the Employment and the Race Directives goes far beyond sexual harassment, which has been the subject of study and proposals throughout the EU.66

The concept of sexual harassment as a basis for setting forth a violation of legal rights to non-discrimination was first articulated by Catherine McKinnon in the 1960s and accepted by the courts in the United States as a basis for alleging a violation of Title VII of the Civil Rights Act of 1964. Later, the Equal Employment Opportunity Commission (EEOC), the federal agency charged with implementing Title VII, declared sexual harassment to be a violation of federal law and defined sexual harassment as follows:

unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual’s employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.67

A hostile work environment arises when a co-worker or supervisor, engaging in unwelcome and inappropriate sexually based behavior, renders the

---

65 See id.; see also Personnel Adm’r of Mass. v. Feeney, 442 U.S. 256, 279 (1979).
66 See Race Directive, supra note 42, art. 2(3); Employment Directive, supra note 43, art. 2(3). See also EUROPEAN COMM’N, SEXUAL HARASSMENT AT THE WORKPLACE IN THE EUROPEAN UNION (1998) (summarizing the Commission’s review of research conducted by eleven member countries into sexual harassment in employment in the Community).
workplace atmosphere intimidating, hostile, or offensive. Under the EEOC guidelines, employers are liable when either their supervisors or agents create a hostile environment, if the employer knew or should have known of the sexual harassment and failed to take immediate and appropriate corrective action. According to the EEOC, employers are usually deemed to know of sexual harassment if it is: (1) openly practiced in the workplace; (2) well-known among employees; or (3) brought to the employer's notice by a victim's filing a charge. The adoption of the concept of a hostile work environment has required an extensive review of employment conditions throughout the United States and the implementation of training or education programs on sexual harassment for both employers and employees.

The issue of sexual harassment has attracted much attention throughout the Community. As a result, in September 2002, the EU published a new Directive which amends the Equal Treatment Directive (ETD) on the implementation of the principle of equal treatment for men and women with regard to access to employment, vocational training and promotion and working conditions. The 2002 Directive amends the ETD in accordance with case law, treaty changes and recent EU legislative proposals in the area of discrimination. The 2002 Directive provides that sexual harassment in the workplace constitutes discrimination on the ground of sex and defines sexual harassment as follows: "Where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment."

In addition, the Directive requires that "member states shall encourage, in accordance with national law . . . employers and those responsible for access to vocational training to take measures to prevent all forms of discrimination on grounds of sex, in particular harassment and sexual harassment at the

---

70 Id.
74 Id. art. 2(2).
workplace." Further, member states are urged to "encourage employers to promote equal treatment for men and women in the workplace in a planned and systematic way" and "to provide at appropriate regular intervals employees and/or their representatives with appropriate information on equal treatment for men and women in the undertaking." 76

Clearly, the United States experience in developing the concept of hostile work environment and placing responsibility for education and training on the employer has been influential.

In both the Race Directive and the Employment Directive, the concept of harassment is expanded to encompass "unwanted conduct related to any of the grounds covered by the Directives, or conduct which is intended, or has the effect of, violating an individual's dignity and creating a humiliating, intimidating or hostile environment." 77

Thus, not only is the range of actions expanded, but also the actors who might be affected by the Directives are expanded to include, for example, individual patients or clients. 78 The unwanted conduct need not be of a sexual nature but rather is based on a violation of dignity and the creation of a hostile environment. However, the Directives do not specifically address the question of liability of employers or service providers for allegational conduct that they did not initiate. Rather, the Directives allow member states a wide discretion in determining the full scope of the ban on harassment. 79

Clearly, the type of activity deemed harassment under the Directives is broader in scope than the U.S. model, which focuses exclusively on sexual harassment. However, they borrow from the United States model and adopt the concept of hostile environment as a form of harassment.

Finally, the Directives prohibit instructions to discriminate. This ban is particularly important since it appears that employers in the past have placed pressure on employment agents not to send workers of a particular ethnic origin. 80

75 Id. art. 2(5).
76 Id. art. 8(b)(3) & (4).
77 See Race Directive, supra note 42, art. 2(3); Employment Directive, supra note 43, art. 2(3).
78 See Employment Directive, supra note 43, art. 2(3); Race Directive, supra note 42, art. 2(3).
79 Both Article 2(3) of the Race Directive and Article 2(3) of the Employment Directive provide "the concept of harassment may be defined in accordance with the national laws and practice of the Member States."
80 Mark Bell, Anti-Discrimination Law and the European Union 76 (2002).
Both Directives include protection against retaliation, or, as it is called in the Directives, "victimization," as a consequence of complaining of discrimination or bringing or taking part in discrimination proceedings. Similar provisions exist in the United States civil rights law with respect to employment discrimination. The Civil Rights Act of 1964 protects individuals who have "made a charge, testified, asserted or perpetrated in any manner in an investigation, providing or hearing" under the Act, and protects individuals who have "opposed any practice made unlawful" by the Act.

3. Derogations

Both the Employment Directive and the Race Directive contain several derogations and exceptions. Discrimination is permitted if it is a "genuine and determining occupational requirement." However, a more limited list of occupational requirements is found in the Race Directive than in the Employment Directive. Thus, the Race Directive states:

Member states may provide that a difference of treatment which is based on a characteristic related to racial or ethnic origin shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.

This provision is replicated in the Employment Directive. Further, the Employment Directive allows states additional leeway and permits "churches and other public or private organizations the ethos of which is based on religion or belief" to discriminate on the grounds of religion, where, based on the occupational activities at issue or the context in which they are carried out, "a person's religion or belief constitute a genuine, legitimate and justified occupational requirement," provided that it does not justify discrimination on

---

83 Employment Directive, supra note 43, art. 4(1); Race Directive, supra note 42, art. 4.
84 Race Directive, supra note 42, art. 4.
87 Id.
another ground. These organizations can also require "individuals working for them to act in good faith and with loyalty to the organization's ethos." Thus, a religious school may require a teacher to be of that faith. However, the extent to which a person must conform to a code of behavior remains unclear.

Both the United States' experience under Title VII and experience gained in connection with equal treatment based on gender are apparent in this definition. Title VII of the Civil Rights Act of 1964 contains the bona fide occupational qualification (BFOQ) exception, which allows "an employer to hire and employ employees ... on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." The BFOQ has been interpreted narrowly to ensure "that individuals [are] considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group." Thus, the United States, while allowing for a BFOQ exception on the basis of gender, does not permit it on grounds of race.

Specific derogations are also provided in the Employment Directive with respect to disability, age, religion, or belief.

With respect to disability, the Employment Directive requires employers to make reasonable accommodations for disabled persons. Thus, employers shall "take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer." Disability is not defined in the Directive. The area of disability discrimination is comparatively new both in the United States and Europe and continues to evolve. The United States federal law, the Americans with Disabilities Act (ADA) was passed in 1990 and in general provides "reasonable accommodations" for a worker's

---

88 Id.
91 Council Directive 2000/78/EC, ch. III, art. 15, para. 1, 2000 O.J. (L 303) 16, 21 (noting in respect of Northern Ireland, special provision is made concerning teachers and "under representation of one of the major religious communities in the police service of Northern Ireland." The Northern Ireland context allows for additional derogation.).
92 See Employment Directive, supra note 43, art. 5.
93 See id.
disability.\textsuperscript{94} Under the ADA, an employer must provide reasonable accommodations where an individual's disability impedes his or her job performance, unless to do so would impose an undue hardship on the employer. Because of its scope and impact, the ADA is the subject of numerous regulations and lawsuits affecting potentially forty-three million Americans who have mental or physical disabilities.\textsuperscript{95}

It is anticipated that a separate Directive on disability will soon be issued to complement the Employment Directive. A draft disability-specific Directive prepared by the European Disability Forum (EDF)\textsuperscript{96} is already in place.\textsuperscript{97} The goal of this Directive is to "lay down a framework for combating discrimination on the ground of disability, with a view to putting into effect in the Member States the principle of equal treatment."\textsuperscript{98} The draft notes that disability "arises out of a relationship between the environment and physical, intellectual, sensory, psychological, communication or development impairment or chronic illness."\textsuperscript{99} The draft covers four broad categories. These include: (1) social protection including social security and health care; (2) social advantages; (3) education; (4) access to, including conditions regulating access, and supply of goods, services and information which are available to the public, including transportation, the communications environment, the built environment, banking and insurance and housing. When the draft of the proposed Disability Directive is finalized, the EDF will submit it to the European Commission and recommend the Commission to officially propose a Directive.

The Employment Directive also permits derogations with respect to age, provided they are "objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market, and vocational training objectives, and if the means of achieving that aim are appropriate and necessary."\textsuperscript{100} Such differences may include fixing maximum and minimum

\textsuperscript{96} The EDF is a European association mostly funded by the European Union. One of EDF's main objectives, on behalf of European NGOs and European national and local disability organizations, is to achieve a disability-specific Directive based on Article 13 of the EC Treaty.
\textsuperscript{98} Id.
\textsuperscript{99} Id. para. 8.
\textsuperscript{100} See Employment Directive, supra note 43, art. 6.
ages for access to employment and dismissal and access to occupational social
security schemes.

Although the Employment Directive allows age discrimination to be
justified in some instances through derogations, it requires all member states
to introduce legislation prohibiting direct and indirect discrimination at work
on the grounds of age.\textsuperscript{101} The challenge for member states in implementing
such legislation, however, is in identifying those differences of treatment that
are acceptable and those that are not. Extensive research and consulting
among member states and the Commission are now underway to resolve these
issues prior to the promulgation of the age-specific Directive.

In addition to these more specific exceptions, the Employment Directive
contains a general, wide-ranging exception not found in the race or sex
Directives, derived from the Convention for the Protection of Human Rights
and Fundamental Freedoms.\textsuperscript{102} This provides that the

\textbf{Directive shall be without prejudice to measures laid down by
national law which, in a democratic society, are necessary for
public security, for the maintenance of public order and the
prevention of criminal offences, for the protection of public
health and for the protection of the rights and freedoms of
others.}\textsuperscript{103}

It has been noted that “unless the Court of Justice is vigilant, there is a risk that
this derogation could be used by Member States to perpetuate discrimination”
and “historically, stereotypical assumptions about gay men, Jews, Muslims,
and people with mental disabilities have been used to justify their exclusion
from certain jobs in the interest of national security or public health, or to
protect others from these ‘dangerous’ people.”\textsuperscript{104}

Affirmative action, or as it is called, positive action, is specially permitted
as a derogation. After doubts about the compatibility of affirmative action
with the equality principle in the treaties were raised before the ECJ, the
Commission issued a communication to the Council and the Parliament stating

\textsuperscript{101} \textit{Id.} art. 18.

\textsuperscript{102} See Convention, \textit{supra} note 2.

\textsuperscript{103} Employment Directive, \textit{supra} note 43, art. 2(5).

\textsuperscript{104} Catherine Barnard, \textit{The Changing Scope of Fundamental Principle of Equality}, 46
Treatment in Employment: Towards a Comprehensive Community Anti-discrimination Policy?},
30 \textit{Indus. L.J.} 126, 130 (2001)).
that a consensus exists in the EU that "the concept of positive action embraces all measures which aim to counter the effects of past discrimination, to eliminate existing discrimination and to promote equality of opportunity between women and men, particularly in relation to types or levels of jobs where members of one sex are significantly under-represented." The Council has identified a wide range of positive action measures which can be adopted, including goals and timetables. The Amsterdam Treaty specifically addressed positive action in relation to gender. Both the Employment and Race Directives recognize that equal treatment may not be sufficient to overcome the weight of accumulated disadvantage experienced by discriminated groups and permit member states to take positive action measures to "prevent or compensate for" situations of inequality.

The development of positive action in the EU was clearly influenced by the United States experience. Curiously, while the United States has retreated significantly from its endorsement of affirmative action, the EU, through the Amsterdam Treaty and the subsequent Directives, has now firmly established the legitimacy of affirmative action.

Both the Race Directive and the Employment Directive follow the pattern of EU gender equality by facilitating positive action without placing any obligation on member states to adopt such measures. It is anticipated that the new gender equality Directive will address this issue with more specificity. Further, because of the wide scope of the Race Directive, it would seem that positive action could now be permitted in areas beyond employment, such as housing and education.

Article 7(2) of the Employment Directive, however, seems to negate the possibility of positive action for disability. It provides that states can


106 AMSTERDAM TREATY, supra note 26.


108 See Kalanke, supra note 40. In his opinion, Advocate General Tesauro noted that the positive action attempts to eliminate the obstacles affecting a particular disadvantaged category of individuals in the labor market. He recognized the necessity for positive action programs and described positive action programs as "a means of achieving equal opportunities for minority or . . . disadvantaged groups, which generally takes place through the granting of preferential treatment to the groups in question" for a "collective vision of equality." Tesauro reviewed the rationale for positive action and cited numerous United States sources. Id.

109 See Employment Directive, supra note 43, art. 7(2).
derogate from the equality principle in respect of health and safety at work or facilitates for safeguarding or promoting their integration into the working environment.

4. Implementation

Human rights protection requires the acceptance of norms of human rights, acceptance by states of legally binding obligations, and implementation of such rights. In both the international and regional contexts, implementation has proved to be the most problematic. Non-governmental organizations (NGOs), have played a significant, although sometimes non-official, role in implementing protection and standards in the EU, particularly in the area of gender equality. The recent Directives now give NGOs an articulated role in their enforcement. They also empower NGOs to support complainants or to bring proceedings on behalf of complainants. Thus, the Directives provide that:

Member States shall ensure that associations, organisations or other legal entities, which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive.¹¹⁰

The United States’ class action rules, which are often developed and guided by NGOs, have been pivotal in the development of civil rights law in the United States. The role of the National Association for the Advancement of Colored People (NAACP) in developing and strategizing the major civil rights cases is well-known. The NAACP was central in facing the legal and political struggles that culminated in the decision of Brown v. Board of Education,¹¹¹ a class action lawsuit involving state-imposed school segregation. The various efforts of the NAACP, such as conducting research on the damaging psychological effects of segregation, influenced the Supreme Court in Brown

¹¹⁰ Race Directive, supra note 42, art. 7(2); Employment Directive, supra note 43, art. 9(2).
to strike down the concept of "separate but equal" and provided the legal foundation of the Civil Rights Movement of the 1960s.\textsuperscript{112}

Similarly, the role of NGOs in the United States has also been prominent in the area of capital punishment. For example, the American Civil Liberties Union (ACLU) opposes capital punishment without exception, arguing that capital punishment violates the constitutional ban on cruel and unusual punishment, is administered arbitrarily and unfairly, and fails to deter crime or improve public safety. Through the ACLU's Capital Punishment Project, a public education and advocacy program that seeks to bring about the abolition of the death penalty, the United States has limited its use of the death penalty.\textsuperscript{113}

Of particular importance in the Race Directive is a provision with potential far-reaching impact that imposes an obligation on each member state to designate a body to promote racial equality. The Directive provides that such bodies should have powers to assist victims of discrimination to pursue their complaints, conduct independent surveys concerning discrimination, and publish independent reports with recommendations relating to such discrimination.\textsuperscript{114} The Directive, however, does not require the establishment of an equivalent agency at the EU level to coordinate such efforts.

In the United States, the agency charged with administration and enforcement of Title VII of the Civil Rights Act is the EEOC, a five-person board appointed by the president. The EEOC is charged with enforcing the act through suits filed in its name or through intervention in actions filed by private plaintiffs.\textsuperscript{115} Before proceeding to litigate, a plaintiff must file a charge with the EEOC, and if probable cause is established, the EEOC must attempt to resolve the claim through the informal means of conciliation and persuasion. Only if this is unsuccessful may a claimant file suit.\textsuperscript{116} The EEOC is vested with broad subpoena power and can require employers to keep statistics and records. Finally, the EEOC is charged with interpreting the Act and issuing wide ranging interpretive guidelines regulations. These regulations have been issued with respect to sexual harassment and discrimination based on religion, age, and national origin.

\textsuperscript{112} Id.
\textsuperscript{113} See Atkins v. Virginia, 536 U.S. 304, 321 (2002) (holding that the execution of mentally retarded criminals violates the 8th Amendment of the Constitution).
\textsuperscript{114} Race Directive, supra note 42, para. 24.
\textsuperscript{115} 42 U.S.C. § 2000, § 706(b).
\textsuperscript{116} 42 U.S.C. § 2000, § 706(b).
Clearly, the EEOC has been instrumental in the effectiveness of Title VII. The lawsuits brought by the EEOC based on a pattern or practice of discrimination throughout an industry have had far reaching effects. Suits have been brought against AT&T\textsuperscript{117} and Sears, Roebuck & Company\textsuperscript{118} and, in some cases, have resulted in consent decrees which incorporated goals and timetables to remedy imbalances in the workforce.\textsuperscript{119} The Civil Rights Commission, on the other hand, which has a broader mandate, has no enforcement power.\textsuperscript{120}

In order to strengthen the effectiveness of the Directives, member states are required to publicize widely both their existing laws on equal treatment and non-discrimination in the areas within each of the Directives, as well as any new measures they adopt to bring their laws in line with the Directives. Member states are required to introduce or amend existing laws and procedures to comply with the Directives. Compliance with the Race Directive was required by July 19, 2003, and with the Employment Directive, in relation to religion and sexual orientation, by December 2, 2003. With respect to the more problematic categories of discrimination based on disability and age, compliance is required by December 2006.

\textsuperscript{117} See EEOC v. AT&T, 506 F.2d 735 (C.A. Pa. 1974) (requiring AT&T to implement affirmative action programs in order to promote equal employment opportunities to minorities and women).

\textsuperscript{118} See EEOC v. Sears, Roebuck & Co., 243 F.3d 846 (4th Cir. 2001) (holding that employer’s failure to hire applicant of Hispanic descent violated Title VII).

\textsuperscript{119} Id.

\textsuperscript{120} The U.S. Commission on Civil Rights has the following mandate: 1) Investigate complaints alleging that citizens are being deprived of their right to vote by reason of their race, color, religion, sex, age, disability, or national origin, or by reason of fraudulent practices; 2) Study and collect information relating to discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice; 3) Appraise federal laws and policies with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice; 4) Serve as a national clearinghouse for information in respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice; 5) Submit reports, findings, and recommendations to the President and Congress; and 6) Issue public service announcements to discourage discrimination or denial of equal protection of the laws. See U.S. Comm’n on Civil Rights, at http://www.workplacefairness.org/federalagencies.php.
IV. CHARTER OF FUNDAMENTAL RIGHTS

Despite proposals to include a Charter of Rights in the Treaty of Amsterdam, no elaboration of rights was included. However, the Charter of Fundamental Rights, adopted at the Nice Summit in December 2000, is another milestone in the development of EU law in the area of equality. The Charter contains seven chapters: (1) Dignity, (2) Freedoms, (3) Equality, (4) Solidarity, (5) Citizens' Rights, (6) Justice, and (7) General Provisions. The Equality Chapter prohibits "[a]ny 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." Thus, the grounds for prohibited discrimination are greater than those stated in Article 13 of the Amsterdam Treaty.

The Charter is a declaration with political force but no legal force. It is addressed to the Institutions of the Union and to the member states only when they are implementing EU law. The Charter expressly states that the Charter does not "establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties." But, the ECJ, which in the past has taken a proactive role with respect to human rights issues, might use this instrument as a guide to general principles of Community law which it is directed to apply. Indeed, in many ways, the Charter itself has many similarities to the Universal Declaration of Human Rights (UDHR) that was adopted by the U.N. General Assembly in 1948. At the time that the UDHR was adopted, it was not a legally binding document but was considered a standard towards which all nations would aspire. Nevertheless, it gave impetus to the adoption of legally binding documents including the European Convention on Human Rights and now has a legal force of its own.

The standards set forth in the Charter exceed international standards in several respects, particularly with respect to the social provisions. On other occasions, they seem to fall below such standards. However, in order to assure that the protections set out in the Charter do not in any way dilute international

---

122 Charter of Fundamental Rights of the European Union, supra note 6, para. 51-54.
123 Id. art. 21(1).
124 See id.
protections, which may be stronger than those in the Charter, the Charter states that nothing in the Charter should be interpreted as restricting rights as established under international law. Furthermore, in an effort to harmonize with the European Convention on Human Rights, the Charter states that those rights in the Charter which correspond to rights guaranteed by the Convention shall have the same meaning and scope. It should also be noted that by far the largest section, Solidarity, deals with economic, social, and cultural rights. This is especially significant since these rights do not correspond with any existing competences at the level of the EU.

V. CONCLUSION

The EU has benefited from the concept of "equal pay for equal work," which began as an economic incentive and has evolved into a reaffirmation of human rights in all areas of Union activity that goes well beyond economic concerns. This commitment to human rights protection now has textual support in the Treaty and sweeping Directives have been adopted. But experience with the gender equality provisions in the Treaty of Rome and the Directives adopted pursuant to its provisions indicates that implementation is the key. The new anti-discrimination Directives and the action programme are but a first step. However, the ECJ and the Commission must continue to encourage member states to fully implement the new nondiscrimination provisions of the Amsterdam Treaty and the Directives. Although in the past the equality Directives were viewed from a market integration perspective rather than a social policy perspective, it is clear that human rights is now a complete and comprehensive concern and pillar of the European Union.

126 Charter of Fundamental Rights, supra note 6, art. 52(3).