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Three Case Studies on 'Anti-Discrimination'

Jakob Cornides*

Abstract

In recent years, the EU has adopted a series of new directives to promote 'equality' and to fight 'discrimination'. Further measures are planned. But given that they are based on highly abstract concepts leaving wide margins of interpretation, the true meaning and impact of these new laws is difficult to understand in advance. In this article, I analyse three recent cases that give a foretaste of where European legislators, in their quest for more 'equality', may be heading.

1 Introduction: 'Anti-Discrimination Law' – A Cure or a Disease?

Rather than at the moment of their adoption, the true impact and meaning of new laws is often better understood when law courts start applying them. This is particularly true of the EU directives that have been adopted to promote 'equality' and 'non-discrimination', and the legislative measures taken by Member States to transpose and implement them. Indeed, 'the fight against discrimination' has become a major agenda point for EU legislation in recent years, which in turn suggests that 'discrimination' may be the most pressing problem of contemporary society.

But is this really the case? A Eurobarometer survey on discrimination carried out in 2009 seems to provide supporting evidence: 16 per cent of respondents considered themselves to have been victims of discrimination within the 12 months preceding the survey, and 26 per cent reported they had witnessed someone else being discriminated against.[1] This is an extraordinarily high number of victims in countries where the equality of all before the law has been a fundamental principle of constitutional law for at least a century and where, as far as one can tell, this foundational principle is drawn into question by nobody. But there are some other findings in the survey

* Administrator, European Commission, Directorate-General for Trade. The views and opinions expressed in this article are those of the author, and cannot be attributed to the institution in which he is employed. Email: jakob.cornides@yahoo.com.

[1] Special Eurobarometer 317, *Discrimination in the EU in 2009*, at 22 and 25.

that are unexpected: for example, the EU Member State with the highest incidence of 'discrimination' appears to be Sweden (where 42 per cent of respondents reported to have witnessed 'discrimination'), followed by Austria (38 per cent), and Denmark (36 per cent).[2] Being an Austrian myself, I do not want to comment on my own country – but as far as the two Nordic countries are concerned, I always used to believe that they were models of open, tolerant, and socially inclusive societies. How is it then possible that *these* two countries now turn out to be among those where 'discrimination' is most rampant, whereas on the lower end of the scale we find countries like Turkey (where only 18 per cent of respondents claim to have witnessed 'discrimination'), Romania (15 per cent), Lithuania (14 per cent), and Croatia (19 per cent).[3] This seems to defy common wisdom: is not Turkey the country where the Kurdish minority is oppressed, where Christians (including, in 2010, a Catholic bishop) are occasionally brutally murdered for no reason other than their faith,[4] where a famous Syrian Orthodox Monastery, which looks back on 1,500 years of uninterrupted existence, faces the risk of being stripped of all its property,[5] and where the Ecumenical Patriarchate has, for more than 30 years, been prevented from re-opening its Seminary[6] where it could train new priests? Is not Romania the country with a huge Roma population living under very precarious social conditions? Is not Croatia the country where ethnic conflicts between Croats and Serbs continue to boil beneath the surface? Is not Lithuania the country that has repeatedly been singled out and pilloried by EU politicians[7] for its (allegedly?) hostile and discriminating policies against homosexuals? And yet the greatest number of self-perceived victims of discrimination is found not in any of these countries, but in Sweden.

It appears thus that – according to Eurobarometer – being a victim of discrimination is not a matter of tangible facts, but of *self-perception*.[8] This raises some questions

[2] *Ibid.*., at 27.

[3] Cf. *ibid.*

[4] The most notorious recent cases include the murder (in Iskenderun/Alexandrette on 3 June 2010) of Catholic bishop Luigi Padovese, and the assassination (in Istanbul on 19 Jan. 2007) of Armenian journalist Hrant Dink, as well as the murder of three evangelical Christians in Malatya on 18 Apr. 2007.

[5] Concerning the dispute on land ownership that sets the Mor Gabriel Monastery against the Turkish State Treasury cf. Krüger, 'Rettet das zweite Jerusalem', *Frankfurter Allgemeine Zeitung*, 27 Apr. 2009.

[6] The Seminary on the island of Chalki (Turkish: Heybeliada), which was closed by order of the Turkish government in 1971. It was the main school of theology of the Eastern Orthodox Church's Ecumenical Patriarchate of Constantinople.

[7] Cf. the Res. adopted on 17 Sept. 2009 by the European Parliament to condemn Lithuania for having adopted a new 'Law on the Protection on Minors', which prohibited the promotion of homosexuality at schools. However, on 10 Nov. 2009, the Lithuanian parliament (Seimas) retaliated by adopting a res. requesting the Government to seek the invalidation of the EP Res., which it condemned as an unlawful act. That view was subsequently confirmed by the EU Fundamental Rights agency, which declined the Parliament's request to issue a legal opinion on the controversial law on the ground that it had no legal mandate for doing so.

[8] Searching for opinions rather than facts is the approach that also underlies a new survey on 'LGBT discrimination', which is currently (in April 2012) carried out by Gallup on behalf of the EU Fundamental Rights Agency (FRA). The survey is freely accessible on the internet (www.lgbtsurvey.eu) and anyone wishing to do so can participate, but only the responses of persons who describe themselves as gay, lesbian and transgender are taken into account. The questionnaire does not even remotely comply with the generally known standards for social research. Rather than approaching the issue from a neutral and disinterested point of view, it resembles an invitation to all those LGBT persons who feel discriminated to

both regarding the way in which the issue is nowadays understood by sociologists and regarding the remedies devised by politicians. Could it be that discrimination is most rampant in countries where opinion polls suggest it is not, and that, inversely, in countries where many people believe to have witnessed, or to have been a victim of, discrimination, such widespread sentiment is just the product of government-sponsored 'awareness-raising' policies, through which people are educated to look at themselves as 'victims' whenever there is an occasion to do so? In other words, could it be that anti-discrimination policies, rather than providing a cure, bring a new illness to society: generalized hypochondria? One feels vaguely reminded of Karl Kraus' famous jibe on psychoanalysis: it is '*jene Geisteskrankheit, für deren Therapie sie sich hält*',[9] i.e., it is itself the mental disease of which it believes to be the cure. Could not a similar argument be made against anti-discrimination policies?

It seems rather unlikely that Sweden should be the country in the EU with the highest incidence of *real* discrimination – but it surely appears to be a country where people have very highly developed 'discrimination awareness'. And we are left to wonder whether further education efforts (e.g., media campaigns, anti-discrimination curricula in schools and universities, etc.) could indeed raise that awareness to 80 or even to 100 per cent – i.e., that *all* people would finally discover that they are, in some way or other, victims of 'discrimination'. But in that case, what would such a high level of problem awareness really signify?

As an old saying goes, the truth is in the eyes of the beholder. The inequality and injustice in this world should by no means be trivialized, but on the other hand the problem of 'discrimination' to a large extent exists only because it is perceived as such. Many of the discriminations that seem to preoccupy the minds of specialized researchers, advocacy groups and politicians have never been perceived as a problem by the rest of society. And while it could be argued that just as certain diseases can be

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'tell their story' in order to confirm the FRA's pre-established view that LGBT discrimination is the most pressing of all human rights issues. But the information gathered under this methodology is too unspecific to allow any serious conclusions, given that the survey is *anonymous*, respondents are *not required to provide any verifiable and factual information* regarding the discrimination they allegedly have suffered, and there is even *no firewall to prevent one and the same person from sending multiple responses*. Finally, many of the questions are drafted in a way that is unlikely to lead to any useful new insight: for example, asking transgender people whether they would be in favour of (unspecified) 'workplace anti-discrimination policies referring to gender identity' or 'measures implemented at school to respect gender identity' is rather like asking people whether they want a free meal. Seriously, who would expect them to say no to such a question? It would be more useful to ask the non-LGBT rest of society what they think of such measures and policies, because it is to them that those policies might bring some restrictions and disadvantages.

Which conclusions can validly be drawn from this survey? Not many. There is a certain number of individuals identifying as LGBT who perceive themselves as being victims of discrimination and who respond to the invitation to (anonymously) tell their story – but it is not certain whether this discrimination exists in *reality* (rather than just in the *perception* of the respondents), nor is it clear to what extent those respondents are representative of the totality of LGBT persons.

This new survey is thus hardly apt to provide any credibility to whatever policy proposals it may wish to make on this basis. But it throws a spotlight on how opinion polls are nowadays used to influence policy debates.

9 Kraus, 'Nachts (Zeit)', in G. Fieguth, *Deutsche Aphorismen* (1978), at 227.

diagnosed only by specialist doctors, and that diagnosis of the social evil that is called by the name of 'discrimination' can be perceived only by those who have been trained to perceive it, the question still remains whether some of the proposed remedies are not worse than the evil they are meant to eradicate.

Assuredly, the word has a negative connotation, and there seems to be nearly universal agreement that 'discrimination' should be fought against: hence it is easy to adopt political agendas that identify the fight against 'discrimination' as an important priority, or to organize parliamentary majorities to vote in favour of EU directives or national laws that purport to serve that purpose. Yet the traditional precept of justice was not to provide equal treatment to all and everything, but to *distinguish*: as the Romans said, *iustitia est constans et perpetua voluntas ius suum cuique tribuendi*.[10] To give everyone *his due* is definitely different from giving everyone *the same*. But the concept of 'discrimination', as it is enshrined in various EU directives, departs from the perennial concept of justice precisely because it is based on the assumption that justice means nothing other than 'equality'. According to those directives, 'discrimination' occurs when two people are treated differently although they are in a 'comparable' situation.[11] But what does 'comparable' mean? Even very different things can, with some hope for gain of insight, be compared. Yet it requires not much more than a bit of common sense to see that the mere fact that a comparison may be made between two different situations is not sufficient ground to treat them alike. Moreover, even if an obligation not to discriminate related only to identical (rather than also to merely 'comparable') situations, it seems unavoidable that such an obligation, if applied to private persons rather than only to the state, would massively interfere with those persons' personal freedom: for it is part of that freedom that people are allowed to act arbitrarily, in accordance with their personal preferences or dislikes.

In addition, one cannot help noticing that anti-discrimination legislation tends to be based on highly abstract definitions and principles: it refers to concepts such as 'direct' and 'indirect discrimination', identifies certain criteria of discernment as 'suspicious grounds' (whereas other criteria appear to be less 'suspicious', and people and groups identified by such criteria hence receive less protection), and establishes highly unusual reversals of the burden of proof. Even for expert lawyers the practical impact of anti-discrimination laws is thus hardly predictable. Indeed, the only prediction that can be made with great certainty is that they leave a huge margin of interpretation to the judges and public servants who are to apply them, and expose citizens to considerable uncertainty. For the very same reasons, there are strong grounds for doubting whether many of the politicians raising their hands to vote in favour of such laws actually understand the content – not to mention the possible impact – of the measures they are adopting. While it is certainly a gratifying feeling for a politician to have 'stood up against discrimination', the practical results

[10] Corpus Iuris Civilis, Inst. 1, 1, 1; Dig 1, 1, 10.

[11] E.g., EU Dir. 2000/43/EC, Art. 2(2)(a), OJ (2000) L180/22: 'direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation'.

from such political action might, if examined more closely, turn out to be far less gratifying.

In this article, I will take a look at a number of cases where new 'anti-discrimination laws' have been used by courts at supra-national and national levels with rather surprising results. My purpose is to understand how judges nowadays interpret concepts like 'equality' and 'discrimination', and how these interpretations seem to depart from a more traditional understanding of justice.

2 The Gay Widower: *Tadao Maruko v. Versorgungsanstalt der Deutschen Bühnen*

A *The Facts of the Case*

The first of these cases is the *Maruko* Judgment[12] of the European Court of Justice (ECJ), which was hailed by some as a landmark decision with regard to the equal treatment of homosexuals.

The facts of the case are quickly summarized. The plaintiff, Mr Tadao Maruko, is a homosexual man who, shortly after this possibility was introduced in Germany by a law enacted in 2001, entered into a 'registered partnership' with another man who had been employed as a designer of theatrical costumes for more than 40 years and, during that time, had contributed to the compulsory pension scheme of the *Versorgungsanstalt der deutschen Bühnen* (the German Theatre Pension Institution, the 'VddB'). When his life partner died in 2005, Mr Maruko demanded the payment of a widower's pension, as part of the survivor's benefits provided for under the compulsory occupational pension scheme of which his deceased life partner had been a member. But the VddB scheme provided for the grant of a widower's pension only in the case of *married* couples, not in the case of a registered partnership between persons of the same sex. According to Mr Maruko, the VddB's refusal to grant him survivor's benefits on the same conditions as a surviving spouse was discrimination on grounds of his sexual orientation. He filed an action with the Bayerisches Verwaltungsgericht München (Bavarian Administrative Court, Munich), which referred the case to the ECJ for a preliminary ruling, asking whether Directive 2000/78/EC obliges Member States to ensure that in cases such as the one at hand the surviving same-sex partner receives a survivor's benefit equivalent to that granted to a surviving spouse.

B *The Court's Decision*

The ECJ ruled in Mr Maruko's favour, stating that the payment of a widower's pension under an occupational pension scheme was to be considered a part of the employed person's salary, and hence fell within the scope of the Directive which forbids discrimination (*inter alia*) on grounds of sexual orientation with regard to *employment* and employment-related benefits, but explicitly excludes from its scope *social security and social protection schemes*. Therefore,

[12] Case C–267/06, *Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen* [2008] ECR I–01757.

> the combined provisions of Articles 1 and 2 of Directive 2000/78 preclude legislation such as that at issue in the main proceedings under which, after the death of his life partner, the surviving partner does not receive a survivor's benefit equivalent to that granted to a surviving spouse, even though, under national law, life partnership places persons of the same sex in a situation comparable to that of spouses so far as concerns that survivor's benefit. It is for the referring court to determine whether a surviving life partner is in a situation comparable to that of a spouse who is entitled to the survivor's benefit provided for under the occupational pension scheme managed by the VddB.[13]

This was hailed by many as a major breakthrough[14] in the fight against 'discrimination', in particular regarding people with a diverse sexual orientation, and it was claimed that no difference in treatment would be admissible any longer.

In May 2011, the Court issued a very similar judgment in the case of *Jürgen Römer v. Freie und Hansestadt Hamburg,*[15] with the sole difference that what was claimed in the *Römer* case was not a widower's pension, but a higher pension while the registered same-sex partner was still alive. Given the great similarities, I will not discuss the *Römer* case separately, but limit myself to saying that the comments I make with regard to *Maruko* are equally valid for the *Römer* decision, which, once again, was greeted as a ground-breaking victory for lesbian, gay, bisexual, and transgender (LGBT) rights.[16]

However, such comments appear to widely overstate the significance of both cases. Upon reading both judgments more carefully, one finds that the ECJ makes a much more cautious assertion:[17] the obligation of Member States to provide for 'equality' is made dependent on their own policy choice to 'place persons of the same sex in a situation comparable to that of spouses'.[18] In other words, only *if and where* a Member State decides to adopt laws that put same-sex partnerships on a par with marriage must it provide equal treatment. Inversely, if a Member State makes no such decision, the principle of equal treatment does not apply.

This is far from a sweeping statement that Member States *must* legally recognize same-sex partnerships, or provide a legal framework for them, let alone that they must provide such partnerships with the same social benefits or tax breaks that accrue to

[13] Cf. *ibid.*, at para.73 of the judgment.

[14] E.g., the representative of the advocacy group ILGA-Europe spoke of a 'historic victory' and claimed that 'the highest court in the EU today decided that registered (same-sex) partnerships have to be treated on the same footing as marriage and that employers and pension schemes must not restrict benefits to married partners': Rechtskomitee Lambda, press release on 1 Apr. 2008, available at: www.rklambda.at/News/index.htm. This claim was incorrect and so was the heading of the press release ('EuGH ordnet Gleichbehandlung von Lebenspartnerschaft und Ehe an'). In reality the Court did *not* make a general ruling that registered homosexual partnerships must be treated like marriages.

[15] Case C– 147/08, *Jürgen Römer v. Freie und Hansestadt Hamburg* ECJ (Grand Chamber) 10 May 2011, available at: http://curia.europa.eu/,

[16] Press release on 10 May 2011 by the 'Rechtskomittee Lambda', a gay rights pressure group with its seat in Vienna, available at: www.rklambda.at/e/index.htm.

[17] Cf. G. Toggenburg, '"LGBT" go Luxembourg: on the stance of Lesbian Gay Bisexual and Transgender Rights before the European Court of Justice', 5 *European Law Reporter* (2008) 174, at 181: '[a] closer look reveals however that the Court remains rather restrictive in its approach towards gay rights. For the judgment boils down to a rather demure statement communicating little more than the obvious'.

[18] *Maruko*, *supra* note 6, at para. 69.

married couples. Indeed, the ECJ explicitly acknowledges that 'the civil status and the benefits flowing therefrom are matters which fall within the competence of the Member States and Community law does not detract from that competence',[19] and it is difficult to imagine how it could have come to any other conclusion, given that both Article 81(3) of the Treaty on the Functioning of the EU (TFEU) and Recital 22 of Directive 2000/78 itself clearly reserve that competence to the Member States. It was clear from the outset that the Court's interpretation of Directive 2000/78 could not result in an EU-wide introduction of same-sex marriage.

C *Critique of the Decision*

But even as it stands, the ECJ's decision goes farther than it should, and suffers from some apparent flaws.

The first of these flaws is the circularity of the Court's reasoning: what it says is that if and where a Member State chooses to treat marriages and same-sex partnership equally, it should treat them equally. This statement certainly is as true as it is trite. But the ECJ's competence is limited to interpreting EU law, and if the obligation to provide equal treatment is derived from national laws rather than from EU law, it should be for national law courts to decide whether or not such an obligation applies in the concrete case. The ECJ has thus overstepped its competence. The right thing to say would have been that an obligation to provide equal treatment could *not* be derived from the EU Directive and that it was for the German court to determine whether such obligation was to be derived from domestic law.

A second point of criticism follows from the first. The ECJ's assumption that German legislation 'places persons of the same sex in a situation comparable to that of spouses' is evidently mistaken. If it had done so, the dispute at hand would never have arisen. But Mr Maruko's problem precisely was that the applicable German law, by *not* granting him an entitlement to a widower's pension, did *not* place him and his partner in the same situation as spouses. This must be seen as a part of Germany's domestic policy in regulating same-sex partnerships, and it was probably a deliberate decision. How, then, is it possible to argue that *because* Germany 'places persons of the same sex in a situation comparable to that of spouses' there must be no difference in treatment? The direct opposite is true: German legislation did not place persons of the same sex on a par with spouses, nor was there any obligation under the EC Directive to do so.

To put all this into simpler words, I could say that, thirdly, the judgment simply suffers from flawed logic. The problem for Mr Maruko was that the applicable German law put him and his partner not in an identical, but only in a 'comparable' (viz. similar) situation to that of a married couple. The ECJ judgment thus boils down to something in the sense of: because Germany has decided to treat same-sex partnerships and marriages *similarly*, the ECJ now demands that it treats them *alike*. But at the same time the Court has to acknowledge that all Member States are free, if they so choose, to treat these situations very differently, e.g., by granting no legal status at all to same-sex

[19] *Ibid.*, at para. 59.

relationships. By which logic, then, can it be licit for Member States to treat marriages and same-sex relationships either equally or differently, but at the same time illicit to treat them with slight differences? And why does it follow from a country's resolve to treat two different situations *similarly* that those situations must be treated *alike*?

This leads me to my fourth point, which probably is the most important one. Fighting against discrimination means ensuring that like situations are treated alike, and unlike situations differently. This implies that one must first compare the two *factual situations* in question, and then the rules to which they are subject. But the ECJ's *Maruko* judgment simply does not do that. It does not draw any comparison at all between the *factual* situation of married couples and that of same-sex life partners; instead, it only draws a comparison between the respective *legal* situations, which are found to be 'comparable', albeit not identical. In omitting the required comparison between relevant factual situations, the ECJ has committed a logical error that is known as *petitio principii*: the proposition that needed to be proven was assumed implicitly or explicitly in the premise. It is affirmed that A and B have been treated unequally in the past and must be treated equally in the future, but there is no argument at all to demonstrate that there actually is any equality between A and B to warrant such equal treatment.

There never was any doubt that there were some differences in the respective legal situations of married couples and same-sex registered partners. But – even by the standards of Directive 2000/78 – in order to find 'discrimination', one would have to demonstrate that there is a convergence in the factual situations that would warrant their being treated alike. In the case at hand, for example, the ECJ would have had to compare the typical situation of same-sex partners with the typical situation of married spouses. Had it done so, it could have discovered that marriage is typically entered into with the purpose of having children, whereas same-sex partners typically have no children. It could also have noticed that having to deal with the upbringing of children in many cases implies that one of the spouses either has no income of his/her own or only a small income from a part-time job, whereas in the case of same-sex couples there is typically no comparable reason why each partner should not live on his/her own salary. It could have found that, as a consequence, most same-sex couples have two incomes (which is why they are increasingly seen as a social group with particularly high purchasing power), whereas married couples with children often are under considerable financial strain. It could have found that in the case of married couples the granting of a widower's pension therefore has a clear social purpose, which in the case of most same-sex partners is definitely less self-evident. Finally, it would have noted that unmarried people and same-sex couples can have pensions only because *other people* raise children, who (once they have grown up) sustain society through their work: married couples thus make an important contribution to the common good whereas same-sex couples typically make no comparable contribution.

Bearing this in mind, one may well ask whether in the case of childless married couples or couples that have two full incomes the surviving spouse should really be entitled to a survivor's pension – but there can be absolutely no doubt that there is

no reason to grant such an entitlement to a surviving homosexual partner like Mr Maruko. This judgment creates no equality, but undeserved privileges.[20]

It is the ECJ's (now CJEU's) unwillingness to deal with relevant facts that lies at the roots of the apparent circularity of its reasoning. But one may ask whether this disturbing insouciance about facts is something that must be laid at the door of the Court alone, or whether it is not already inherent in the legal provisions it had to apply. There seems to be a certain ambiguity, or even a widespread misunderstanding, with regard to the meaning of the terms 'equality' and 'discrimination'.

There is therefore a fifth and last point I should make here: both the ECJ's judgment and the underlying legislation appear to suffer from inherent self-contradictions. If 'equality' means 'equal pay for equal work', and if – as the Court has argued – the benefits that were under consideration in the *Tadao Maruko* and *Römer* cases (i.e., a survivor's pension and, prior to that, a higher pension while the spouse/partner is still alive) are considered to qualify as 'pay', then these benefits must accrue to *all* employees doing the same work, irrespective of any marital or civil partnership status. As things stand now, the new victims of 'discrimination' would be all those who, not being married and not living in a civil partnership, do not receive the same benefits despite delivering the same work output and making the same contribution to the pension scheme. If pension entitlements are part of a person's 'pay', then those unmarried and un-partnered people should be given the right to designate a person of their choice as recipient of a possible 'survivor's pension', otherwise there is no equal pay for equal work. If, by contrast, it is acknowledged that the benefits in question serve a social purpose (i.e., that of providing social security to a person who, for the purpose of raising children, has limited possibilities of earning a salary of his/her own and thus is dependent on his/her partner's income), then one can hardly understand why Messrs Maruko and Römer should be entitled to them. Instead, and in view of the fact that in both cases the employment appears to have been in the public sector, those entitlements must be seen as 'state social security and social protection schemes' that are outside the scope of the Directive. Given the purpose of

[20] The self-serving character of such privileges becomes apparent when one looks at a case that raised widespread media attention in Austria, shortly after the country had enacted legislation for civil partnerships for homosexual couples in 2010. Immediately after the enactment of the new law, Mrs Johanna Dohnal, a former Minister for Gender Equality, contracted such a partnership with another female politician, Mrs Annemarie Aufreiter. Three weeks after the civil partnership had been concluded, Mrs Dohnal died at the age of 71. Her 'widow', who, as a member of the Vienna City Council, earns her own salary and accumulates her own pension entitlements, applied for a survivor's pension that would amount to 60% of Mrs Dohnal's pension as a former member of the Federal Government (i.e., roughly € 13,000 per month). The request was turned down because the applicable legislation provides that, in order for Mrs Aufreiter to be entitled to a survivor's pension, the couple would have had to live in a marriage or civil partnership for at least three years. Not happy with this decision, Mrs Aufreiter has filed a constitutional appeal, claiming that, civil partnerships between homosexuals not having been possible before 2010, it was not possible for her to contract such a partnership with Mrs Dohnal earlier. She considers herself to be a victim of indirect discrimination and demands that the criterion of the registered partnership having lasted for at least three years should not be applied to her case. The case is pending with the Austrian Constitutional Court (*Streit um Witwenpension für Dohnal-Partnerin*, *Die Presse*, 25 Aug. 2010).

such benefits, they should be targeted: they should accrue to the *socially vulnerable*, or to those who, for example by raising children, provide a specific contribution to the common good. From the two ECJ judgments, one fails to see how either of these conditions would be met by Mr Maruko or Mr Römer.

It is a fundamental flaw not just of the two judgments discussed here, but also of the underlying legislation, that a distinction between 'pay' and 'social security' is made in a way that does not correspond to the reality of the market. The reality is that in some employment contracts (especially where higher management is concerned), so-called social benefits are individually negotiated: the employee accepts a lower salary in exchange for a higher pension, or a survivor's pension for his spouse, or similar. There can be no doubt that under such circumstances those benefits should be qualified as 'pay'. But it is hard to imagine how 'anti-discrimination' laws could be applied to such individually negotiated employment conditions without stifling the functioning of the labour market. If and where, by contrast, the employer uses fixed schemes to determine the salaries and other entitlements of their employees (as all public services and, with regard to the lower ranks of their staff, many privately-owned enterprises do), the qualification of social benefits such as pension rights as 'pay' makes not much sense, given that they are dependent not only on the amount and quality of work delivered by an employee, but also on numerous other factors such as the duration of his/her life, his/her marital status, etc. The failure to recognize the social purpose of such benefits and the application of a strict, but ill-conceived, principle of 'equal pay for equal work' is a serious flaw in Directive 2000/78. It simply leads to the result that employers must generally refrain from granting such benefits to any of their employees: it is in the very nature of social benefits that some draw a greater profit from them than others – therefore, there will always be some 'discrimination'. It would therefore appear wiser to interpret Directive 2000/78 more restrictively, and to limit its scope strictly only to *salaries* that are based on a fixed scheme (i.e., not individually negotiated), but not to any employment-related social benefits.

Be that as it may, it seems very clear that the typical situation of gay partners, characterized by double income and no kids, is not equal to the typical situation of a married couple that, while receiving only one or one and a half salaries, bears the expense of raising children and, in doing so, makes a specific contribution to the common good. If the ECJ's interpretation of Directive 2000/78 is correct, then 'anti-discrimination' means that the *unequal must be treated equally*.

3 Unisex Insurance Fees: *Test Achats v. Conseil des Ministres*

A *No Rule without Exception*

Anti-discrimination legislation prohibits unequal treatment on specific grounds that are identified as 'suspect criteria'. But what if, in a given situation, the application of such a 'suspect' criterion turns out to be fair and objective? Should it then still not be used? Long before 'anti-discrimination' policies came to deal predominantly with the promotion of gay and lesbian issues, their main concern was over the equality

of sexes. The underlying narrative that was to provide legitimacy and moral high ground for the proponents of 'anti-discrimination' was that from the dark origins of times to our day *women* had always and everywhere been the victims of discrimination and enslavement, and that – in the absence of any other possible suspects – *men* were responsible for having oppressed them. To remedy this situation, the equality of citizens irrespective of their sex was enshrined as a foundational principle in the constitutional laws of most democracies, and all laws that provided for differences in treatment were, one after the other, modified or abrogated.

But, somehow, this alone did not suffice to satisfy the fighters against 'discrimination'. What they had obtained was equal rights, but what they still want is 'equality'. 'Equality', in their view, does not mean that men and women should have equal rights, but that they have the same living conditions, earn the same salaries (at least on average), occupy the same number of seats in parliaments or governments, or the same number of senior posts in the management of enterprises. For this kind of 'equality', the factual differences between the sexes (e.g., the fact that only women can become pregnant, or that men and women have different preferences in their career planning, or that men are more apt for physical work) often turns out to be an obstacle that can only be overcome by deliberate differences in treatment, which are then called 'positive discrimination'. Bizarrely, therefore, 'equality' is often the opposite of 'equal rights', and 'anti-discrimination policies' turn out in actual fact to be pro-discrimination.

Council Directive 2004/113, which has the stated purpose of 'implementing the principle of equal treatment between men and women in the access to and supply of goods and services' is a perfect example of this. In the civil law of all EU Member States, men and women have the equal right to own property, for example money, and the equal faculty to conclude contracts, for example concerning the purchase of goods and services. Whoever has confidence in the functioning of a free market economy would think that this equality before the law should suffice to give them access to all goods and services they desire. But the lawmakers thought otherwise: they were concerned over the fact that for certain goods and services women and men might have to pay different prices. For example for clothing and shoes (although, obviously, the different styles of dressing may be a good reason for any such price differences). Or for a haircut (maybe we will soon get an EU directive to implement the principle of uniform dressing and hairstyle?)

One of the areas in which men and women often pay different prices is insurance. This, however, is not the result of deliberate discrimination, but is due to the fact that insurance companies, in order to ensure that the premium to be paid for a given insurance policy corresponds to the size of the insured risk, carry out a careful risk assessment that is based on all available statistical information. The more accurate this calculation, the easier it will be for an insurance company to offer insurance at a competitive price.

Statistical evidence demonstrates, however, that in many cases risks may be significantly different for persons of a different sex. There are diseases that affect predominantly women (like breast cancer), or only men (like prostate cancer), or that affect men and women with highly different degrees of likelihood (e.g., cardiovascular

diseases). Health risks associated with pregnancy and maternity affect only women. On the other hand, women have a longer life expectancy, and that fact – combined with the on average lower retirement age – means that they often have to pay higher contributions for their (private) health and pension insurance schemes. At the same time, male drivers, especially young ones, have a higher statistical risk of being involved in a car accident, and hence are often required to pay higher prices for their car insurance. The principle thus applies in both directions: in some cases it results in higher insurance fees for women, in other cases in higher fees for men.

When the EU set out to enforce the principle of equal treatment in the access to and supply of goods and services, it was clear from the outset that an exception had to be made for insurance. The directive, which was adopted by unanimous vote in the Council, thus provided in its Article 5:

1. Member States shall ensure that in all new contracts concluded after 21 December 2007 at the latest, the use of sex as a factor in the calculation of premiums and benefits for the purposes of insurance and related financial services shall not result in differences in individuals' premiums and benefits.
2. Notwithstanding paragraph 1, Member States may decide before 21 December 2007 to permit proportionate differences in individuals' premiums and benefits where the use of sex is a determining factor in the assessment of risk based on relevant and accurate actuarial and statistical data. The Member States concerned shall inform the Commission and ensure that accurate data relevant to the use of sex as a determining actuarial factor are compiled, published and regularly updated. These Member States shall review their decision five years after 21 December 2007, taking into account the Commission report referred to in Article 16, and shall forward the results of this review to the Commission.

The provision in Article 5(2) thus certainly put a burden of proof on the Member States concerned to demonstrate that their legislation was not discriminatory. But the exemption it provided for was clearly intended to be a permanent one. This was further corroborated by a recital which ran thus:

> (19) Certain categories of risks may vary between the sexes. In some cases, sex is one but not necessarily the only determining factor in the assessment of risks insured. For contracts insuring those types of risks, Member States may decide to permit exemptions from the rule of unisex premiums and benefits, as long as they can ensure that underlying actuarial and statistical data on which the calculations are based, are reliable, regularly up-dated and available to the public. Exemptions are allowed only where national legislation has not already applied the unisex rule. Five years after transposition of this Directive, Member States should re-examine the justification for these exemptions, taking into account the most recent actuarial and statistical data and a report by the Commission three years after the date of transposition of this Directive.

B *A Constitutional Complaint Brought to the CJEU*

Given that, according to common wisdom, the purpose of 'anti-discrimination' policies is to protect women against male oppression, it is certainly surprising that two men, Messrs van Vugt and Basselier, should have considered themselves to be victims

of 'discrimination' with regard to access to insurance. And yet this is what happened: for reasons that remain unclear (as the CJEU's judgment makes no mention of them, nor of any details of the proceedings at national level), and availing themselves of the support of Test Achats, a leading Belgian consumers' association, they filed a complaint with the Belgian Constitutional Court, demanding the invalidation on grounds of unconstitutionality of the legal provision by which Belgium had transposed Article 5(2) of Directive 2004/113 into the domestic legal order. In simpler words, they considered that the exemption of insurance services from the general principle of unisex premiums violated the Belgian Constitution.

The Belgian Constitutional Court, however, rather than examining the compliance of the challenged provision with Belgian constitutional law, referred the case to the ECJ for a preliminary ruling on whether Article 5(2) of Directive 2004/113 (i.e., the provision the challenged Belgian law was meant to transpose) was in conformity with the principle of equality and non-discrimination as guaranteed by Article 6(2) of the EU Treaty. This was not strictly necessary, as a law can, while standing in contradiction to the Belgian Constitution, conform to the EU Treaty, and vice versa. It would thus have been possible for the Constitutional Court to invalidate the Belgian law and at the same time leave intact the ability of other Member States to avail themselves of the flexibility offered by Article 5(2) to exempt insurances from the strict application of the unisex premium rule if and where a significant difference in the actuarial risk in relation to sex was demonstrable. But, as it was, the case was turned from a constitutional complaint in Belgium into one at European level – which is remarkable, because individual citizens do not normally have the chance to question the compatibility of EU directives with primary Community law.

By judgment[21] of 1 March 2011, the CJEU ruled that Article 5(2) of Directive 2004/13, having been found incompatible with Articles 21 and 23 of the EU's Fundamental Rights Charter, was to be considered invalid as from 21 December 2012.

C *Critique of the Court's Ruling*

Despite being preceded by the Opinion of Advocate General Juliane Kokott, who had come to the same conclusions, the Court's judgment has surprised many by its bluntness and poverty of argument. For indeed, Mrs Kokott's conclusions had already received harsh criticism in the mass media[22] as well as from legal experts and

[21] Case C–236/09, *Association belge des Consommateurs Test-Achats ASBL, Yann van Vugt, Charles Basselier v. Conseil des ministres* ECJ (Grand Chamber) 1 March 2011, available at: http://curia.europa.eu/.

[22] E.g., the *Financial Times* commented on 4 Feb. 2011 in anticipation of the CJEU's judgment, 'No matter that women's greater longevity is a biological fact. No matter that annuities ultimately pay the same to women as to men over their lifetimes. It seems that an unelected, unaccountable cabal of judges in Luxembourg has given itself the power to overturn basic principles of risk and insurance – and overrule the laws of nature. . . . Juliane Kokott, the advocate general, and her learned friends are actually ruling on the legality of the derogation in the Equal Treatment Directive (2004/113/EC, OJ (2004) L373/37) that permits the use of gender-based statistics in setting all insurance premiums and benefits. So, if they deem this discriminatory, women will have their car insurance premiums raised to subsidise boy-racers from Middlesbrough to Milan. Like so many illogical ideologues, Kokott & co are in danger of reading discrimination into every differential.'

stakeholders (not just the representatives of insurance companies,[23] but also some consumer organizations[24]) which, one might have expected, should have been reason for the Court to handle this case with even greater caution than normal and give the matter a second thought. But there is hardly anything in the judgment to suggest that the Court made any attempt to use caution or restraint.

The CJEU adopts a rather too simplistic point of view when, in paragraph 16 of its Decision, it says:

> Article 6(2) EU, to which the national court refers in its questions and which is mentioned in recital 1 to Directive 2004/113, provides that the European Union is to respect fundamental rights as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, as general principles of Community law. Those fundamental rights are incorporated in the Charter, which, with effect from 1 December 2009, has the same legal status as the Treaties.

As a summary of the legal framework on fundamental rights, this is not quite correct. The FRC does not *incorporate* the rights contained in the ECHR, but it *paraphrases* those rights with, at times, rather different words. The reason why the Charter, rather than sticking to the text of the Convention, uses different words has never been explained in a satisfactory manner, so that it remains quite unclear whether this is (a) a pure coincidence or inadvertence, or (b) a deliberate attempt by 27 of the 47 Member States of the Council of Europe unilaterally to re-interpret the Convention and change its meaning, or (c) an attempt to provide a higher level of rights protection in the EU than provided for by the Convention. Whichever it is, the two documents differ considerably from each other.[25] This is particularly true for the issue of 'discrimination': while Article 14 ECHR prohibits 'discrimination' only with regard to 'the enjoyment of the rights and freedoms set forth in this Convention', Article 21 of the FRC prohibits 'any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief,

[23] Cf. the press release of CEA, the European Insurance and Reinsurance Federation, of 30 Sept. 2010, available at: www.insuranceeurope.eu/uploads/Modules/Newsroom/100930-ecj-opinion.pdf, which commented on Mrs Kokott's conclusions as follows: '[t]he core principle of risk assessment is that people in comparable situations are treated equally and those in different situations are treated differently. If this risk-based, factual principle is not maintained, premiums will increase, coverage will decrease and some products will be withdrawn from the market entirely. Insurers must be able to calculate their premiums in a fair and sustainable way, using all relevant factors.' ('CEA warns of consumer detriment if insurers can no longer differentiate on basis of sex', press release 30 Sept. 2010, available at: www.insuranceeurope.eu/uploads/Modules/Newsroom/100930-ecj-opinion.pdf.

[24] E.g., OpenEurope, a British think tank, warned that 'UK insurance providers will need to raise an extra £936m in capital to cover themselves against the new uncertainties created in the market' and that 'these costs will be passed on to consumers'. It estimated that 'on average, a 17 year old female driver will have had to pay an extra £4,300 in insurance premiums by the time she is 26 as a consequence of the ruling, while male drivers would (only) save an estimated £3,250 over the same period of time': OpenEurope briefing note, 25 Feb. 2011, available at: /www.openeurope.org.uk/Content/Documents/PDFs/ECJgenderdirective.pdf.

[25] Cf. J. Cornides, 'Verdunklungsgefahr?', in G. Lang and M.F. Strohmer (eds), *Europa der Grundrechte?* (2003). at 116–134.

political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation', and thus creates a completely *new* type of cross-cutting fundamental right. Article 23 of the FRC, which stipulates that 'equality between men and women must be ensured in all areas, including employment, work and pay', has no correlative at all in the ECHR, nor are similar provisions to be found in the constitutional laws of many Member States. On the other hand, however, the second paragraph of Article 23 FRC, which provides that 'the principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex' clearly reveals that this provision does not at all aim at 'equal rights'; quite on the contrary, it contains a mandate for creating 'equality' through *deliberate discrimination,* and must thus rather be seen as a warrant for *unequal rights*. It is hard to describe this approach otherwise than by saying that, standing in direct and radical contradiction to the prohibition of 'any discrimination based on … sex' in Article 21, it evidences the self-contradictions of the European Union's 'anti-discrimination policies': in principle 'discrimination' is bad, but when it suits the interest of certain groups it is good. The assertion that provisions like Articles 21 and 23 'result from the constitutional traditions common to the Member States' seems quite daring, and the CJEU in the judgment at hand does nothing to provide substance and credibility to this claim. What many Member States do have in their constitutional laws[26] is a clause similar to Article 20 of the Charter: *everyone is equal before the law.* But that is something completely different from the novel 'anti-discrimination' language in Article 21 or the pro-discrimination clause in Article 23.

Be that as it may, one thing is certainly true: Articles 21 and 23, albeit contradicting each other, are now a part of the EU's primary law. Therefore, the provisions in a directive must comply with them.

But is it really 'discrimination' in the sense of Article 21 FRC if a directive allows one to charge different premiums for the insurance of risks that, according to all statistical evidence, differ significantly? Would it not rather be 'discrimination' to impose a provision that different risks must be insured at the same price? Does Article 23 not provide legitimacy to certain differences in treatment where this seems appropriate?

One might have expected the Court to discuss these crucial issues exhaustively. This case was not about an individual action with no implications for third parties, but about the broad implications of two articles of the new Fundamental Rights Charter which leave a wide margin of interpretation. Thus, what would have been required here was a careful and yet exhaustive exegesis of those two articles, exploring their scope and their limits.

But those looking for such an analysis in the CJEU's decision will be disappointed. The core passages of the judgment are the following:

[26] E.g. Germany: Art. 3(1) of the Basic Law (Grundgesetz):'[a]*lle Menschen sind vor dem Gesetz gleich*'; France: Déclaration des droits de l'homme et du citoyen, art. premier: '*les hommes naissent et demeurent libres et égaux en droits*'.

> 28 The Court has consistently held that the principle of equal treatment requires that comparable situations must not be treated differently, and different situations must not be treated in the same way, unless such treatment is objectively justified (see Case C-127/07 Arcelor Atlantique et Lorraine and Others [2008] ECR I-9895, paragraph 23).
>
> 29 In that regard, it should be pointed out that the comparability of situations must be assessed in the light of the subject-matter and purpose of the EU measure which makes the distinction in question (see, to that effect, Arcelor Atlantique et Lorraine and Others, paragraph 26). In the present case, that distinction is made by Article 5(2) of Directive 2004/113.
>
> 30 It is not disputed that the purpose of Directive 2004/113 in the insurance services sector is, as is reflected in Article 5(1) of that directive, the application of unisex rules on premiums and benefits. Recital 18 to Directive 2004/113 expressly states that, in order to guarantee equal treatment between men and women, the use of sex as an actuarial factor must not result in differences in premiums and benefits for insured individuals. Recital 19 to that directive describes the option granted to Member States not to apply the rule of unisex premiums and benefits as an option to permit 'exemptions'. Accordingly, Directive 2004/113 is based on the premise that, for the purposes of applying the principle of equal treatment for men and women, enshrined in Articles 21 and 23 of the Charter, the respective situations of men and women with regard to insurance premiums and benefits contracted by them are comparable.
>
> 31 Accordingly, there is a risk that EU law may permit the derogation from the equal treatment of men and women, provided for in Article 5(2) of Directive 2004/113, to persist indefinitely.
>
> 32 Such a provision, which enables the Member States in question to maintain without temporal limitation an exemption from the rule of unisex premiums and benefits, works against the achievement of the objective of equal treatment between men and women, which is the purpose of Directive 2004/113, and is incompatible with Articles 21 and 23 of the Charter.

Five paragraphs, albeit in solemn legal language, are rather a small space in which to discuss an issue of such general importance. Yet the core of the Court's reasoning could be put in even simpler words: the purpose of Directive 2004/113 is to establish the principle of unisex premiums in the insurance sector. The provision made by Article 5(2) is described as an 'exemption'. Therefore, it must be concluded that the legislator of the Directive believed that the respective situations of men and women with regard to insurance premiums and benefits contracted by them are 'comparable' (viz. the same), and that, in the absence of such an 'exemption', the application of different premiums for men and women must (again: according to the legislator of the Directive) be considered 'discrimination'. But such 'discriminations' must not be allowed to persist indefinitely. Therefore, the 'exemption' must be declared invalid 'upon the expiry of an appropriate transitional period'.

This argument – or should I say: this lack of argument? – is astonishing. First and foremost, the CJEU does not even attempt to explain *why* the application of different premiums for statistically different risks should be considered 'discriminatory'. Instead, it defers to mere assumptions allegedly made by the legislator of the Directive, which it considers to be 'based on this premise'. In other words, the Court abdicates its own authority to challenge and examine that premise, which, had it really been made by the legislator, would certainly have deserved some critical scrutiny.

In actual fact, however, it is not at all certain that the legislator really made such a premise, or that he made it with regard to all insurance contracts. From the word 'exemption' alone it cannot be concluded that, in the eyes of the legislator, the insurance contracts covered by Article 5(2) were to be seen as 'discrimination' which, by virtue of that provision, would be allowed to persist only for a limited phasing-out period. On the contrary, the legislator's intention appears to have been that those insurance contracts should be *permanently* exempted from the application of unisex premiums precisely because, under the conditions set out in Article 5(2), the application of different premiums was *not considered discriminatory*. The CJEU has widely overstretched the significance of the word 'exemption', and attributed to the European legislator an opinion it clearly did not have. Quite obviously, there are many types of insurance contracts where the insured person's gender has no influence whatsoever on the risk assessment (wherefore it would indeed seem discriminatory to apply different premiums for men and for women), while in other cases a significant difference of risk depending on to the insured person's sex can easily be demonstrated: the insurance of a house against fire and inundation clearly falls into the first category, while health insurance clearly seems to fall into the second. It seems logical to apply the unisex rule only to some types of insurance contracts, while exempting other types of insurance on a permanent basis. This is what Article 5(2) allowed Member States to do.

The reasoning of the Court is thus based on a series of *non sequiturs*. First, from the word 'exemption' in Recital 19 of the Directive it does not follow that the legislator made the assumption 'that … the respective situations of men and women with regard to insurance premiums and benefits contracted by them are comparable'. Secondly, if the legislator had indeed made such an assumption, it still would not follow that that assumption was correct, or that it could not be challenged: a mere assumption is not an established fact. Thirdly, even if the assumption were correct, it would not follow that such 'comparability' would necessarily mean that each and every difference in treatment must be deemed an illicit 'discrimination': as we have seen before, two things that are 'comparable' are not necessarily 'identical'. On the contrary, the very fact that the Directive contained an exemption for insurance contracts means that the legislator considered that in this specific area unequal treatment was *not* discriminatory.

In the light of the preceding remarks, it can be said that what we are witnessing here is the creation *ex nihilo* of a new 'fundamental right': the right to buy services of different value for the same price. Once again, 'anti-discrimination' is transposed into an obligation to give equal treatment to unequal situations.

It is not my intention here to dwell on the economic consequences of the judgment. It suffices to imagine what will happen under normal free market conditions if one particular group of potential clients is asked to pay insurance fees that are higher than what actually would correspond to the risk they seek to insure: that group of clients will simply be discouraged from taking out insurance. The remaining clients (i.e., those representing a higher statistical risk) will thus remain the only ones to take out insurance: but even for them the insurance fee will not decrease because, with the low-risk clients not buying insurance, the insurance fees must still correspond to the

risk of the only remaining group that does take insurance, i.e., the high-risk group. In other words, the sole effect of such a policy would be to evict the low-risk clients from the market. And the only areas where this consequence will not occur are those where insurance is compulsory (as is the case, e.g., for car insurance). The 'equal treatment' provided as per the CJEU judgment is thus in reality a special tax levied on low-risk groups in order to subsidize high-risk groups. It should at least be called by that name.

Now it could certainly be that this analysis is too pessimistic, and that at least a few people will draw some benefit from this landmark decision. But given the harsh criticism this judgment has received, it seems neither unlikely nor illegitimate that a future Community legislator would wish to correct a judgment he might view as careless and ill-reasoned. The problem, however, is that such a correction will hardly be possible.

It should be noted here that Directive 2004/113 was adopted under Article 13 of the EC Treaty (now: Article 19 of the Treaty on the Functioning of the EU (TFEU)). For a directive to be adopted on this legal basis unanimity between Member States is required. This is an aspect of the judgment that, despite the considerable coverage the case has received in the media, does not seem to have caught much attention – but it is nevertheless monumental: by simple majority vote, a Grand Chamber of the CJEU has declared invalid a legal act that had been adopted by the *unanimous decision of the (then) 25 Member States*! A vote of, say, seven versus six judges suffices to invalidate a decision on which, without exception, all governments have agreed. But who knows better which meaning the FRC intended to give to 'equality'? The Member States that adopted the FRC as well as Directive 2004/113 by unanimity, or the CJEU?

If, as seems perfectly legitimate and reasonable, Member States should want to reintroduce a possibility for insurance companies to apply different premiums for men and women in cases where the risk assessment demonstrably depends on the sex of the insured person, they will have to overcome almost insurmountable obstacles. It would not suffice to adopt, once more by unanimous vote, a new provision to that effect. Instead, it would be necessary to change the text of the FRC itself, at least through adding a specific clarification that the EU's endeavour to fight 'discrimination' is not to be understood as meaning that justifiable differences in treatment (such as different insurance premiums for different risks) are not allowed to persist. This would require not only a unanimous vote by Member States, but an intergovernmental conference that would have to be followed by a ratification procedure in each Member State and, in some of them, even a popular referendum.

What we are confronted with is thus not just a silly, and poorly reasoned, Court decision or, indeed, as the *Frankfurter Allgemeine Zeitung*[27] put it, the 'silliest judgment in the history of economy'. Instead, the case aptly illustrates how EU Member States, by adopting a new Fundamental Rights Charter and defining it as part of the EU Treaty, have caught themselves in a trap. A new set of 'fundamental rights' (including not just the 'equality' provisions in Articles 21 and 23 of the Charter, but also other novelties such as the 'right to a good administration' in Article 41 or the 'right to a high level of consumer protection' in Article 38) provide a pretext for the CJEU to

[27] 'Der Unisex-Unsinn', *Frankfurter Allgemeine Zeitung*, 5 May 2011.

adopt extravagant and far-reaching judgments that are apt to cancel out even provisions that have been enacted by unanimous agreement of the entire EU membership. Rather than providing increased protection for citizens, the Charter seems to pave the way towards a dictatorship of the judiciary.

4 Outlawing the Honourable: *Hall & Preddy v. Bull & Bull*

A *The Legal Basis*

The third case[28] I wish to relate here was not decided by the ECJ, nor does it have a basis in current EU legislation. It is a case that has been decided by a court in a Member State based on that Member State's domestic legislation. Also, it should be noted that the ruling was issued by the first instance of the judiciary, and that an appeal is still pending.[29] Nevertheless, the case is significant: given that the legislation it is based on is very similar to a legislative proposal that is currently under discussion at European level, it provides a foretaste of what is due to happen in courts all over Europe, should that legislative proposal be adopted.

The court that issued the judgment is the Bristol County Court, and the legislation on which the judgment was based is the Equality Act (Sexual Orientation) Regulations (SORs), secondary legislation in the UK which was adopted by the Secretary of State in 2007 under powers granted by the Equality Act 2006.

These Regulations prohibit 'discrimination on the grounds of sexual orientation' with regard to the provision of goods and services (among which the 'accommodation in a hotel, boarding house or similar establishment' is explicitly mentioned). They also clarify that, within their scope, married (i.e., different-sex) couples and civil partners[30] (i.e., same-sex couples) must be treated alike.

In substance, the Regulations are similar to the content of the European Commission's proposal[31] for a directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age, or sexual orientation.

B *The Facts of the Case and the Court's Ruling*

The case which was brought to the Bristol County Court concerned the owners of a privately owned Bed & Breakfast in Cornwall who, based on their Christian belief in the sanctity of marriage, had a long-standing policy of not letting double rooms

[28] Bristol County Court, *Hall & Preddy v. Bull & Bull*, 19 Feb. 2011, Case No. 9BS02095, available at: http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/hall-preddy-bull-judgment.pdf.

[29] The appeal was decided (and the judgment upheld) while this article was being reviewed: CA (Civil Division), 10 Feb. 2012 [2012] EWCA Civ 83. References in this article are to the judgment of the Bristol County Court.

[30] The UK introduced 'civil partnerships' as a specific form of union between two people of the same sex in 2004.

[31] COM(2008)0426.

to unmarried couples. This policy was mentioned on the hotel's website, and people wishing to reserve a room by telephone were informed of it. This notwithstanding, a certain Mr Preddy called and reserved a double room for a weekend for himself and his spouse. Only upon their arrival at the hotel did it turn out that Mr Preddy was homosexual and that his 'spouse' was, in fact, a man with whom he lived in a registered civil partnership. The owners of the hotel refused to accommodate them in a double room, but offered two separate rooms instead. But the homosexual couple, rather than accepting this offer, went to court and filed an action for 'discrimination'. Their claim was upheld by Judge Andrew Rutherford, who awarded them £3,600 in damages.

C *A Comment on the Ruling*

Given that a judge's task is to apply laws, there is no reason to reproach him for this judgment: with the SORs providing what is summarized above, he could hardly have decided otherwise. Nonetheless, the judgment caused uproar in the media, and received overwhelmingly negative comments.

Why was this? Apparently the wider public was not familiar with the new legislation, or at least not with its practical implications. The press coverage that had accompanied the legislative process had probably not caught the attention of a wide readership. The few who followed it had read and heard of new measures that were necessary to prevent 'discrimination', not of a law that would massively curtail contractual freedom. Yet while there appears to be wide agreement that 'discrimination', whatever that is, is bad and should not be accepted, the necessity of a law that exposes to heavy financial sanctions an elderly couple who wanted nothing but to run their business in line with their, at worst, somewhat conservative morality was certainly much less self-evident. Was the sanction imposed by the law really proportionate to any damage suffered by the homosexual couple? Why could such matters not simply be regulated by the forces of the free market?

It is thus not the judge's decision that raises many questions, but rather the law on which it was based. Indeed, the judge himself seemed to have some doubts. Besides granting the defendants leave to appeal his ruling, he also stated:

> The standards and principles governing our behaviour which were unquestioningly accepted in one generation may not be so accepted in the next. I am quite satisfied as to the genuineness of the defendants' beliefs and it is, I have no doubt, one which others also hold. It is a very clear example of how social attitudes have changed over the years for it is not so very long ago that these beliefs of the defendants would have been those accepted as normal by society at large. Now it is the other way around. . . .
>
> I have no doubt . . . that the defendants genuinely hold a perfectly orthodox Christian belief in the sanctity of marriage and the sinfulness of homosexuality. . . .
>
> In my view, . . . each side hold perfectly honourable and respectable, albeit wholly contrary, views.

Each side holds honourable and respectable views? This statement would deserve somewhat more nuance. The truth is that one of those views, namely that of the defendants, was universally considered to be the *one and only* honourable and respectable view throughout nearly the entire history of human civilization – at all times, in

all places, and among all people.[32] The other view (i.e., that of the two claimants) has emerged only very recently,[33] and only in a rather limited number of countries. Thus, to describe the defendants' moral stance in any other way than as 'perfectly honourable and respectable' would be tantamount to condemning the moral stances taken by all nations at (nearly) all times. It would mean that *everybody* had been wrong on this issue, except the law-makers of England and Wales as from 2007. Even as I write this, there is hardly any country in the world where laws comparable to the Equality Act (Sexual Orientation) Regulations are in force. With regard to the claimants' views, by contrast, one cannot help noting that they do not have similar credentials. Not many would have described them as 'perfectly honourable and respectable' 20 or 30 years ago. As the judge pointed out, 'social attitudes' have changed, and the laws with them. But have they really? The defendant's stance shows that this recent change of attitude is certainly not shared by all and everyone. And even if it were, i.e., if an overwhelming majority of Britons adhered to the 'new' attitude towards homosexuality, does that mean that it becomes illicit to hold diverging views? Is it wrong for elderly people such as the defendants to stay loyal to the moral values they were brought up with?

Thus, even if we were to assume, for argument's sake, that the judge was right and that, due to 'social attitudes' having changed, both views were now to be considered equally honourable and respectable, that would not answer the question why the defendants, whose views, by the judge's own words, are 'perfectly honourable and respectable', are punished for having acted in accordance with them. Apparently there are some honourable and respectable views, namely those of the claimants, which receive the backing of the law, while the defendants' views, albeit equally honourable and respectable, are now under threat of persecution. While the claimants get their litigation financed by the taxpayer through a government-funded Equality and Human Rights Commission (EHRC),[34] the defendants, albeit equally honourable and respectable, have to bear their own legal expenses. And this, quite absurdly, is the

[32] As regards the case of England, homosexual acts were a capital offence, i.e., threatened by capital punishment, until 1828. They remained a criminal offence until 1967. Until then, *no* hotel owner would ever have thought of letting a double bed room to two people of the same sex if he had reason to suspect that they would use it to engage in homosexual intercourse. The abolition of criminal sanctions meant that the homosexual act was no longer punishable, but this still left everybody free to maintain and express moral objections.

[33] The Civil Partnership Act was adopted only in 2004 – before this, there was no legal recognition of homosexual relationships at all. A legal provision according which everybody (*including* those privately holding moral objections against homosexuality) must provide equal treatment to registered same-sex couples and married couples even in the context of private contractual relations became law through the adoption of the 'Equality Act (Sexual Orientation) Regulations' only in 2007, and there is nothing to indicate that before 2007 such equal treatment had been part of any generally accepted or respected moral code.

[34] Not only did the EHRC fund the claimant's litigation in the first instance, but it even filed, as a reaction to the defendant's appeal, a cross-appeal demanding that the compensation for the claimants should be increased from £3,600 to £5,000. It was only following massive public criticism that the Commission withdrew this cross-appeal, explaining that it had been based on an 'error of judgement' by its legal team: 'Gay couple end hotel payout claim', *The Independent,* 11 Mar. 2011.

result of a law that has the stated purpose of promoting tolerance, equal treatment, and non-discrimination.

Indeed, rather than protecting liberty and equality, the Equality Act (Sexual Orientation) Regulations appear to undermine both. And rather than protecting anyone against bigotry and harassment, they offer a new legal basis for them. In the case at hand, the judge said he did not believe that the defendants were 'set up' by the claimants with the assistance of a group such as Stonewall – but he also said that such a set-up, even if 'very materially affect[ed] the issue of damages', would not by itself defeat the discrimination claim.[35] In other words: this new law does give a mandate to pressure groups such as Stonewall to act as a thought police, bringing claims against people who dare to act according to their different (albeit 'perfectly honourable and respectable') moral views. It is no wonder, then, that in the days following the Bristol County Court's judgment, the defendants were reported to have received abusive and menacing telephone calls from homosexuals attempting to book double rooms at their hotel and warning them that they would be acting illegally if they refused.[36] Also, it was reported that the hotel suddenly received a quantity of malicious bogus reviews on travel websites,[37] the apparent purpose of which it was to put the hotel out of business. While, of course, it is true that the Equality Act (Sexual Orientation) Regulations neither mandate nor give licence to such hate crimes, and the hotel owners have the right to take legal action against the perpetrators, it nevertheless remains that those acts would probably never have taken place had the law not put the hotel owners into such a vulnerable position: nobody would ever have heard of them and their 'conservative' views on the sanctity of marriage, nor would anyone have had the idea of harassing and bullying them because of those views. In the context of their condemnation by the Bristol County Court, the defendants – an elderly couple whose views the Court found 'perfectly honourable and respectable'! - have been exposed to vilification and mockery in certain mass media for their 'narrow-minded, eccentric, batty rejection of *modern* mores'.[38] Moreover, having to bear their own litigation costs in the discrimination case, the hotel owners are hardly able to spend time and money on defending themselves against hate crimes that are committed under the shield of anonymity. It is thus precisely the government's anti-discrimination policy that has the effect of singling them out and exposing them to harassment.

Thus, the UK's cutting-edge legislation on 'equality', instead of providing improved human rights protection, raises serious concerns with regard to its own compatibility with fundamental human rights. With regard to Article 9 ECHR, Judge Rutherford recognized that the running of a hotel along Christian beliefs can be described as 'manifesting one's religion', i.e., that the right to religious freedom is not limited to belief and worship, but also includes the right to act in accordance with one's belief.[39]

[35] Cf. para. 14 of the Judgment, *supra* note 25.

[36] 'Christian hotel owners who turned away gay couple face business ruin after torment by hate callers', *Daily Mail*, 26 Jan. 2011.

[37] Harding, 'Internet lies are destroying us, say Christian hoteliers', *Daily Mail*, 28 Jan. 2011.

[38] Woods, 'Inside a most un-PC B&B', *The Telegraph*, 28 Jan. 2011.

[39] Cf. para. 27 of the Judgment, *supra* note 25.

But even if Article 9 were to be interpreted more restrictively, there could be no doubt that Article 8 of the Convention is applicable. The concluding of contracts is one of the principal ways for us to interact with other persons, and the freedom to determine their content and to decide with whom one wants, or does not want, to enter into contractual relationships is thus one of the most important freedoms everybody should enjoy in a free society. This does not mean that contractual freedom can under no circumstances be restricted. But any such restriction must pass the test that Article 8 ECHR establishes for laws that, in one way or the other, limit a person's right to self-determination: whether it is *necessary in a democratic society*.

Even assuming that homosexuals have been in the past, or continue to be today, victims of discrimination and harassment and that it is therefore necessary to protect them – is it necessary in a democratic society to adopt laws that outlaw views and opinions that, to use yet once more the words of Judge Rutherford, are 'perfectly honourable and respectable'? As it appears, there was never any risk for the two complainants that, being sent away by all hotel owners in the area, they would have had to spend the night under the open sky. Quite on the contrary, it is a known fact that gay tourists are today one of the most sought after clienteles of the tourism industry,[40] and many hotels openly announce their 'gay-friendliness' in order to attract them.[41] Under such circumstances, is it really necessary[42] for the legislator to curtail the contractual freedom of hoteliers? Or is this not a bit disproportionate?

[40] Earlier this year the Belgian newspaper *La Libre Belgique* reported that homosexuals have become the European capital's preferred tourists. The reason is that they have more money to spend than any other group in society. According to the report, gays and lesbians have the 'epicurian' spending habits of businessmen: they do twice as many city trips than average tourists, and a third of them make even 5 or more such trips per year. Two thirds of them spend more than €3,000 per year on their holidays: Meulders, 'Bruxelles cible le tourisme gay', *La Libre Belgique*, 13 May 2011.

[41] E.g., a wide choice of hotels in Cornwall openly advertising their 'gay-friendliness' is found at www.gayaccommodationcornwall.co.uk/. As a result *in casu* there was no particular necessity at all for the claimants to be accommodated in the defendants' hotel, even assuming that they wanted to spend their weekend precisely in the surroundings of Penzance.

[42] In this context, note should be taken of a judgment recently issued by the supreme judicial instance of Germany, the Bundesgerichtshof (BGH), in which it was confirmed that hotel owners are completely free in accepting or refusing someone as their guest. A claim for compensation arises only in cases where a confirmed booking is cancelled (but not if the person requesting the booking provided false information). The case concerned an action brought by Mr Uwe Voigt, leader of an extreme right-wing party, whose booking was refused by a hotel owner who did not want to have a prominent neo-Nazi in his hotel, fearing that other guests might cancel their bookings. The BGH found that this fear was sufficient justification for the hotel owner to refuse the booking, even though the German Basic Law (Grundgesetz) explicitly prohibits discrimination 'on grounds of political opinions'. The fact that Mr Voigt had already in previous years spent holidays in the hotel and that, on these occasions, his behaviour had never given offence to any other guest, was not considered relevant by the Court, which emphasized that the defendant's right to reject a booking of an undesirable guest was grounded in his fundamental rights, namely the rights to private autonomy, property, and free exercise of his profession. Given that the provision in Art. 3 of the Grundgesetz treats discrimination on the grounds of sexual orientation and political opinion in exactly the same way, it can safely be assumed that the judgment would have been the same if the hotelier had turned down a homosexual instead of a neo-Nazi: BGH, 9 Mar. 2012 – V ZR 115/11.

5 Conclusion

This is not about three isolated cases without a broader significance. Of the three cases discussed here, the first two have been decided by the CJEU/ECJ, the supreme judicial body of the EU. They are preliminary rulings under Article 267 (ex Article 234) of the TFEU, through which the CJEU, in a manner which binds all courts throughout the EU, has decided how relevant parts of the EU legislation must be applied. The third one, having been decided by a local court, is still open to review, but there is hardly any doubt that the judge's decision was in keeping with the law he was called on to apply. It is this law, rather than the judge's interpretation of it, that raises serious questions. And it is certainly commendable for lawmakers outside the UK to reflect on those questions before adopting similar laws.

Is 'anti-discrimination' the remedy for a widespread social problem, or is it itself a problem in need of a remedy? From what is exposed above I would draw the following conclusions:

First, there appears to be *a wide divergence between the reality of 'discrimination' and its perception in the media or political environment*. Although it would probably be an exaggeration to affirm that there was an inverse correlation between perceived and factual discrimination, it nevertheless does seem appropriate to caution against basing 'anti-discrimination policies' on subjective perceptions that appear to be caused by obtrusive awareness-raising campaigns rather than on tangible facts.

Secondly, the novel doctrines of 'discrimination' and 'equality' *diverge considerably from the traditional concept of justice* upon which, from antiquity until today, our legal systems were built. While the traditional concept of justice, summarized in the principle '*suum cuique tribuere*', meant to treat equal things equally, unequal things unequally, and everything according to its merit, modern anti-discrimination policies tend to turn this principle upside down. The *Maruko* and *Römer* decisions have resulted in providing additional pension entitlements and family allowances to a group of people typically living in double-income-no-kids situations; very clearly, that is not what these particular social benefits were meant for. The *Test Achats* case has resulted in an obligation for insurance providers to insure unequal risks at the same price – a palpable example of equal treatment for unequal situations. Though this was not examined in detail in this article, I might add that certain other 'anti-discrimination measures', such as the proposal to ensure 'gender balance in business leadership' through putting an obligation on publicly listed companies to reserve a fixed quota of their board chairs to women,[43] commit the opposite error: this kind of affirmative action means treating people of equal qualification and merit unequally, and promoting people on the basis of their being of the right gender rather than on the basis of capabilities and merits. It is hard to see how such policies, which find a legal basis in Article 23 of the

[43] Cf. the European Commission's press release of 1 Mar. 2011 (Ref.: IP/11/242): 'EU Justice Commissioner Viviane Reding meets European business leaders to push for more women in boardrooms'. Another press release of 9 Mar. 2012 (ETW/12/0309) and a *Consultation on Gender imbalance in corporate boards in the EU* launched on 5 Mar. 2012 seem to indicate that the Commission is now seriously considering making such a proposal.

FRC, could be reconciled with the classical concept of justice. They remind one of an attempt to organize a football World Cup in such a way that it would become equally probable for the Faroe Islands to win the trophy as it is for Brazil, e.g., by allotting a certain number of penalty kicks to the Faroe Islands or by reducing the number of Brazilian players in the field to five. But would that still correspond to the purpose of a football competition? And are such measures not conducive to inequality rather than equality? Indeed it appears that, following truly Orwellian logic, 'anti-discrimination' *is* discrimination.

Thirdly, one might also question the *necessity* of those anti-discrimination policies. As Montesquieu famously pointed out, laws that are unnecessary undermine those which are necessary,[44] which is the reason unnecessary laws should not be adopted. With regard to the three court rulings examined in this article, it seems impossible not to question the necessity of the legal provisions upon which they were based. Do gay men who have been able to earn their own salary and to acquire their own pension entitlements for more than 30 years *really* need a survivor's pension? Is it *really* necessary for the wellbeing of society that men and women pay exactly the same price for their car insurance? Is it *really* necessary to adopt and enforce laws that require Christian hotel owners to accommodate gay couples in double bedded rooms when those gay couples have plenty of alternatives? Beyond those women who, through their zeal and personal capability, make their way into leadership positions anyway, is there really a need for companies to have a fixed quota of female board members? These and similar issues are often treated as if the need for the measures in question were a self-evidence. But is it really?

Fourthly, in times of economic crisis and budgetary constraints it is certainly worthwhile spending a thought or two on the *costs* of 'anti-discrimination policy'. These costs include not only the costs of devising and implementing those policies (i.e., the salaries of the public servants drafting and enforcing such laws, the setting-up of specialized agencies at national or EU level,[45] and the heavy subsidizing of certain non-governmental 'advocacy groups'[46]). As the *Maruko* and *Römer* decisions show, anti-discrimination leads to new entitlements that someone has to pay for. If homosexuals obtain access to a new social entitlement, it is the non-homosexual rest of society who will pay for it. The *Test Achats* decision, as has been shown, is likely to

[44] De l'ésprit des loix, XXIX, 16: '*Les lois inutiles affaiblissent les lois nécessaires*' (1755 edn).

[45] For instance, the EU has two specialized agencies promoting 'anti-discrimination' policies: the Fundamental Rights Agency (FRA) in Vienna (according to OpenEurope, the proposed budget for 2011 is €20 million), and the European Institute for Gender Equality (EIGE) in Vilnius (proposed budget for 2011: €7.5 million). At national level, each of the EU's Member States has its own equality agency. In the UK, e.g., this agency is the Equality and Human Rights Commission (EHRC, with, in 2009, an annual budget of £70 million, and 400 employees and rising).

[46] One of the most egregious examples is ILGA Europe, an advocacy group promoting the vested interests of homosexuals. Between 2007 and 2010, ILGA has received a total of €4,107,457.12 from the European Commission in the form of 'bulk grants'. Each year, the organization hands in its 'annual work programme' to the Commission, and receives a grant amounting to roughly 85% of its forecast expenditure. Under these conditions, it seems hardly appropriate to describe ILGA as a 'non-governmental organization', or to speak of it as 'civil-society'.

lead to a generalized increase in insurance costs. Finally, measures like fixed quotas of female (or black, or homosexual, or handicapped. . .) board members for publicly listed companies are very likely to lead to indirect and hidden, but nevertheless considerable, economic costs. If companies are constrained to employ managers other than those with the best qualifications, this may result in positive damage in terms of management mistakes, or in lost business opportunities (in terms of what a more capable manager might have achieved). Moreover, such legislation could even have the result of encouraging companies to move their headquarters to countries where they do not face this kind of constraint. The economic losses, albeit difficult to quantify, could be enormous.

A fifth point to be noted – and maybe the most important one – is the *loss of personal freedom* caused by 'anti-discrimination policies'. This is already discernible in the *Test Achats* case, where the CJEU cancelled out the economic freedom of both insurance companies and their clients to agree on insurance prices that seemed best to correspond to the insured risk. Before that, Directive 2004/113 had already imposed limitations on economic liberty with regard to all other goods and services. But the case in which this liberty-killing effect of 'anti-discrimination' has become most palpable is the B&B case, where people have been punished for having acted in accordance to what the judge himself described as 'perfectly honourable and respectable' views. An 'anti-discrimination law' that allows some people to act in accordance with their honourable and respectable views, while prohibiting others from acting with their equally honourable and respectable views, is, quite obviously, in and of itself discrimination. But this is far from being an isolated case. There are many more instances where anti-discrimination laws have been used to undermine civil liberties, most notably the freedom of speech.

A sixth point is that the loss of self-determination of the average citizen is mirrored by the increase of power for those few who are called to determine what is, and what is not, 'discrimination'. This is mostly due to the fact that 'anti-discrimination laws' such as EU Directives 2000/78 and 2004/113 are by no means more precise than the (outdated?) principle of *suum cuique* – yet being of more recent making, their exact significance still remains rather unclear, which means that courts and public administrations enjoy an extremely wide margin of interpretation. This situation is conducive to costly, unproductive, and often frivolous litigation – especially where, as occurred in the B&B case, potential claimants are allowed to litigate at the expense of a publicly financed quango. The legal uncertainty reaches its extreme when, in the name of a novel but vaguely drafted pan-European super-dogma, a simple majority of CJEU judges overturns a provision that government representatives of 25 Member States had agreed upon by unanimity.

Last but not least, the events that occurred in the aftermath of the B&B case cast serious doubt on the assumption that 'anti-discrimination policies' will lead to more tolerant societies. On the contrary, there is reason to fear that the self-ordained victims of today may become the oppressors of tomorrow.