

The European Court of Justice and the march towards substantive equality in European Union anti-discrimination law

International Journal of

Discrimination and the Law

2020, Vol. 20(1) 62–87

© The Author(s) 2020

Article reuse guidelines:

sagepub.com/journals-permissions

DOI: 10.1177/1358229120927947

journals.sagepub.com/home/ijdi



Marc De Vos 

Abstract

European Union (EU) anti-discrimination law has developed under a mostly formal, procedural Aristotelian approach to equality, driven by seminal European case law and incorporated into a body of EU non-discrimination directives. The academic literature has criticized this approach as formalistic and static (Formal equality, non-discrimination and European Union (EU) law section). Against this backdrop, this article explores how the Court of Justice of the EU (CJEU) embraces substantive equality dimensions of non-discrimination. It documents standout cases supporting substantive equality in direct and indirect discrimination (Direct discrimination is less formal than meets the eye and Indirect discrimination is substantive at heart sections). It explores how the CJEU has promoted substantive equality in cases of non-discriminatory differential treatment (Compulsory differential treatment makes formal equality substantive section) and through positive action or discrimination (Positive action can become substantive positive discrimination section). It unearths a wider scope for substantive positive discrimination when constructed as a limitation of, rather than an exception to, formal equality (Substantive positive discrimination can limit formal equality section). It frames the evolution towards substantive equality in the broader fundamental rights context that has become the EU law context, as applied in seminal CJEU cases (Formal anti-

Macquarie University Law School, Macquarie Park, New South Wales, Australia

Corresponding author:

Marc De Vos, Professor and Dean, Macquarie University Law School, Macquarie Park, New South Wales 2109, Australia.

Email: marc.devos@mq.edu.au

discrimination supports and reflects overall substantive equality section). It shows how formal EU equality law has always supported substantive equality and has gradually been mobilized to further substantive equality aims, redefining piecemeal the overarching purpose of EU equality law in the process while increasing concerns of transparency and legitimacy (Conclusion: pragmatism, discretion and legitimacy section).

Keywords

Non-discrimination law, EU law, substantive and formal equality, Court of Justice, positive action, gender, age, disability, religion

Formal equality, non-discrimination and European Union (EU) law

Equality and non-discrimination are complex notions rooted in philosophical, political and constitutional traditions. In modern times, European countries have pursued equality and non-discrimination beyond rule of law principles of citizenship and ‘equality before the law’. The welfare state can be seen as a societal model to promote effective socio-economic equality of opportunity through entitlements that reduce chance and increase merit. Non-discrimination law is used to extend the vertical principle of equality, rooted in rule of law and constitutional neutrality principles, either beyond the state per se or in horizontal relationships between private parties.

In its horizontal dimension, non-discrimination restricts the scope of freedom for private actors. In its vertical dimension, it limits or directs the course of political or collective action. Against this sensitive backdrop arises the fundamental question what ‘equality’ or ‘non-discrimination’ actually means. With a large degree of simplification, two models of equality and its legal protection can be discerned. The ‘formal’, ‘liberal’ or ‘symmetrical’ approach is based on ‘individual justice’ and ‘the merit principle’. This model focuses on equality for individuals, formal neutrality and procedural justice. The ‘substantive’, ‘asymmetrical’ or ‘group justice’ approach focuses on group characteristics and (dis)advantages, group impact, actual results, material equality and desired outcomes. Somewhere in between those two poles lies the middle ground of ‘equality of opportunities’, which combines elements of both and which itself can be stretched towards either the formal or the substantive end (see De Vos, 2007, and the references there; Roemer, 1998).

Formal equality essentially means that likes should be treated alike, period. It emphasizes neutrality expressed through equal treatment of comparable situations or differential treatment of incomparable situations. It requires comparison with a comparator to establish discrimination, it is essentially passive and static vis-à-vis the context of the comparison, it does not assure any particular outcome and it disregards the collective dimensions of individual inequality such as group membership, structural inequality or societal realities. In short, formal equality does not address the critical question of ‘equal to whom?’ This is where substantive equality comes in.

Substantive equality looks at context to achieve outcomes that are considered desirable. It moves beyond or away from individual merit-based comparison to account for the broader context that affects personal merit; it is dynamic in its ambition to influence that context and improve desired outcomes, internalizing various collective or societal dimensions along the way. Depending on its angle or agenda, substantive equality and non-discrimination aim to redress existing or historical disadvantages; to address stigma, stereotyping, prejudice or violence; to enhance voice and participation or to accommodate differences and achieve structural societal change (Fredman, 2016).

The EU's equality and non-discrimination law cannot be placed entirely into any particular camp. This is due to the varying role of equality in different areas of EU law, to the expansion of equality and non-discrimination principles through the historical evolution of EU treaties and to its gradual development through case law. Indeed, the story of equality and non-discrimination law in the EU is essentially one of step-by-step organic development via an ever expanding array of case law, treaty changes and secondary EU legislation without an overarching conceptual framework, resulting in a layered system of equality law (Ellis and Watson, 2012; compare McCrudden, 2003, pp. 3–6; Tobler, 2013).

This variety notwithstanding, the Court of Justice of the EU (CJEU) for over 50 years has consistently defined discrimination as the 'application of different rules to comparable situations or the application of the same rule to different situations'.¹ This definition manifests a formal, procedural Aristotelian approach to equality (compare Burri, 2015; De Vos, 2007; Tobler, 2014). The first tenet of the definition promotes formally equal treatment in comparable situations, irrespective of outcome. From that perspective, the primary emphasis of EU equality law lies clearly on *formal equality* (Tobler, 2005, pp. 26–28; Wentholt, 1999, pp. 53–55). The second tenet of the definition questions formally equal rules for different situations. While it does integrate a substantive assessment of difference in its assessment of comparability and implies a need for rule differentiation, it does not consider context and does not prescribe any specific substantive differential treatment goals.

The formal approach to non-discrimination under EU law arose under the auspices of the then European Economic Community and it is often tied to that economic DNA. Formal equality and neutrality indeed fit an overarching goal of free trade and free movement through an open internal market. Their social dimension of non-discrimination can be seen as instrumental for the economic purpose of free movement of people, services, goods and capital. In this regard, non-discrimination primarily serves economic integration and is therefore naturally nonprescriptive in substance (compare Haverkort, 2012; Prechal, 2004).

The EU has moved on from its economic origins. Non-discrimination is now recognized as a fundamental right and as a general principle of EU law, not in the least by the CJEU itself. Prohibitions of discrimination under EU law are now seen as a fundamental social rights that build European citizenship rights (Bell, 2002; Muir, 2018). This is testified by EU non-discrimination law expanding well beyond nationality and gender towards a wide range of protected grounds that do not serve an agenda of economic market integration. The language of the evolving EU treaties and of the EU Charter of Fundamental Rights (the Charter) now emphasizes equality per se and embraces

European human rights law as primary EU law, against the backdrop of increasing attention to social justice and equal opportunities (Barnard, 2014). The recent European Pillar of Social Rights strives for equal treatment and opportunities across the board, through an array of positive duties and entitlements (Bell, 2018).

These important evolutions, however, have not affected the formal general definition of non-discrimination under EU law. The case law of the CJEU, as well as the statutory prohibitions of discrimination in various EU directives, continue to define non-discrimination through a formal lens that derives discrimination from a difference in treatment in comparable situations. In what has now become a uniform statutory, EU law definition amidst a gradual proliferation of protected characteristics,

- (a) 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 on grounds of (the protected characteristic);
- (b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of (the protected characteristic) at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.²

The concept of non-discrimination as an EU fundamental right thus remains tied to an understanding of legal equality requiring similar situations to be treated in the same manner and different situations to be treated differently on the basis of their difference. To the chagrin of advocates for substantive group justice, EU anti-discrimination law stays firmly rooted in a formal concept that focuses on individual justice and merit, rather than on justice between groups or systemic inequalities (see McCrudden, 2019). Indeed, this is also true, notwithstanding genuine differences in interpretation and implementation, for non-discrimination as a human right under the European Convention on Human Rights and in the case law of the European Court of Human Rights (see Tobler, 2014).

Both under EU law and under European human rights law, therefore, formal non-discrimination has become a fundamental right, coexisting with clearly substantive fundamental rights and freedoms and supporting their implementation. This suggests the distinction between form and substance may not be as clear or as binary as is often assumed. To test and illustrate this hypothesis, this contribution focuses on CJEU case law that blends substantive dimensions into its existing and overarching formal approach to non-discrimination.

This contribution does not seek to contribute to the growing body of doctrinal or theoretical typology and taxonomy of the increasingly complex and layered reality of equality and non-discrimination provisions that apply within the jurisdictions of EU member states. Its purpose is to address the traditional distinction between formal and substantive equality through case law of the CJEU. It seeks to explore how this case law has evolved in parallel with the legislative and ‘constitutional’ evolution of non-discrimination and equality under EU law. It assesses the extent to which the Court pursues substantive equality concerns while interpreting and applying its straightforwardly formal definition of non-discrimination. It classifies as ‘substantive’ case law that

moves beyond the plain arithmetic of static comparison-based equality by giving consideration to substantive dimensions such as results, impact, purpose, policy, dynamics, groups or society (compare Fredman, 2016). Like the overall body of EU discrimination law itself, my analysis is organic and punctual. Throughout, the focus lies entirely on case law that deals with definitional and conceptual dimensions of EU anti-discrimination law. I aim to identify and highlight how the CJEU practices a degree of substantive equality while preaching formal non-discrimination, thereby mixing substantive goals with formal equality. The second section explores how *direct discrimination*, that most rigidly formal core of non-discrimination under EU law, has on occasion been bent towards substantive aims. The third section revisits the invention, development and interpretation of *indirect discrimination* by the CJEU as a substantive antidote to formal direct discrimination. The fourth section shows how prescriptions of *differential treatment* under formal equality are applied with clear substantive aims in the case law of the Court. The fifth and sixth sections describe the degree to which the CJEU tolerates or enables *substantive positive discrimination*, whether as an exception to or as a limitation of the principle of formal non-discrimination.

My approach is thematic and not chronological. It demonstrates distinct substantive equality flavours from the earliest epoch of EU non-discrimination law, when the field was dominated by praetorian case law from the Court of Justice. The seventh section documents how the CJEU has continued to heed substantive equality aims when applying formal non-discrimination within the wider and more contemporary context of *substantive human rights under EU law*. Overall, the evidence of the case law demonstrates what can be called a blended '*substantive formal equality*' approach. The eighth section concludes by acknowledging ample judicial discretion in its application, leading to concerns of legitimacy and transparency.

Direct discrimination is less formal than meets the eye

Direct discrimination epitomizes formal equality under EU law. As we have seen, it depends on one person being treated on grounds of a protected characteristic such as nationality, gender, sexual orientation, age, religion and racial or ethnic origin in a less favourable way than another person who is in comparable situation. Without the personal comparator and without the differential treatment being directly caused by the protected ground, there is no discrimination. By contrast, in a substantive equality discourse, the focus would lie on actual outcomes across society or for a given group member in view of whatever dominant policy concern. The causal nexus between characteristic and treatment would be less relevant, as would be the reductionist focus on a specifically protected characteristic and/or the formal comparison with other groups and their members. However, this contrast between form and substance has been significantly reduced by the Court of Justice. Without abandoning formal direct discrimination in principle, the Court has repeatedly applied it in a way that brings it closer to substantive equality in practice.

In *Feryn*, a company director had made public statements to the effect that his undertaking was looking to recruit fitters for installing sectional doors, but that it could not employ 'immigrants' because its customers were reluctant to give them access to their

residences. The CJEU had to decide whether the label of direct discrimination on grounds of ethnic origin applied. Any straightforward formal approach would suggest it does not. Mere statements from a company director are just that, there is no identifiable treatment, no victim, let alone an identifiable comparator. Nevertheless, the Court opted for direct discrimination on the premise that the Race and Ethnic Origin Directive aims ‘to foster conditions for a socially inclusive labour market’. This objective would be hard to achieve if its scope were to be limited to those cases in which an unsuccessful candidate for a post, considering himself to be the victim of direct discrimination, brought legal proceedings against the employer. Hence, public declarations which are likely to strongly dissuade certain candidates from submitting their candidature and, accordingly, to hinder their access to the labour market constitute direct discrimination.³ The Court of Justice thus accepts statements as direct discrimination on the assumption that the prohibition of formal direct discrimination serves substantive societal aims, in the process reinterpreting formal non-discrimination very substantively indeed.

Feryn is but an extreme example of a wider trend that sees the Court water down the victim–comparator–causation triangle underpinning formal equality. The required causal link between treatment and protected characteristic has been extended from discriminatory motive to include every direct objective correlation. Hence, in *Coleman*, the CJEU could apply direct discrimination on grounds of disability to an employee who was treated less favourably by reason of the disability of her child, for whom she was the primary care provider. Even though the employee concerned was not herself disabled, there is a direct correlation between her treatment and disability in the abstract. This suffices to establish direct disability discrimination because the General Framework Directive, in the Court’s opinion, seeks to foster a broad-level playing field as regards equality in employment and occupation.⁴ In the same vein, in *CHEZ*, the Court ruled that the prohibition of direct racial discrimination also benefits persons who, although not themselves a member of the race or ethnic group concerned, nevertheless suffer less favourable treatment on one of those grounds.⁵ Whether through declaration, association or perception: when a treatment can be objectively linked to a protected characteristic, the Court will predictably deduce direct discrimination because of the admitted substantive aim of formal non-discrimination, watering down formal requirements in the process (compare McCrudden, 2016). While sticking with formal equality as a principle, the Court adopts a broad interpretation that serves substantive considerations.

A similar reasoning has allowed the CJEU to extend the reach of a formally protected characteristic to another characteristic if the latter is intrinsically tied to the former. In *Dekker*, the Court had to assess a refusal of employment on account of the financial consequences of absence from work due to pregnancy. It tersely stated ‘that only women can be refused employment on grounds of pregnancy and such a refusal therefore constitutes direct discrimination on grounds of sex’.⁶ The Court equates a refusal of employment because of the financial consequences of pregnancy with pregnancy itself and further equates pregnancy with ‘sex’ since only women can get pregnant. In subsequent cases on maternity leave, the Court has gone one round further, first tying maternity leave to pregnancy, then pregnancy to sex again, condemning as direct sex discrimination any unfavourable treatment because of absence on maternity leave.⁷

By identifying as direct ‘sex discrimination’ treatments that are tied to characteristics directly linked with sex, the Court pushes the formal prohibition of discrimination ‘on grounds of sex’ towards a much more substantive prohibition of gender-related discrimination. The Court has gone on to explore this approach in cases challenging unfavourable treatment in relation to intended or actual gender reassignment. As in *Dekker*, the intimate nexus with ‘sex’ per se can convince the Court of direct sex discrimination even if the treatment concerned is not based on the fact that a person is of one or the other sex. The substantive aims of formal non-discrimination to guarantee equal treatment of men and women, or to protect freedom and dignity, are invoked to extend its scope well beyond its formal bearings.⁸ The Court has not yet fully equated all matters of gender identity with ‘sex’, but it has clearly moved beyond formal sex discrimination as such (see Bell, 2012).

Similarly, the CJEU has repeatedly treated requirements of marital status as direct discrimination on grounds of sexual orientation whenever marriage is only legally possible between persons of different sexes.⁹ When marriage is inseparable from sexual orientation, it becomes equated with sexual orientation for the purpose of non-discrimination, thereby mobilizing formal equality in the very substantive debate on marriage equality. In essence, the prohibition of direct discrimination under EU law has expanded to include treatment that, while not formally differentiating on grounds of a protected characteristic, is substantively identical because it affects only the protected group or a subgroup. This enables the CJEU to incorporate evolving standards of social progress within an otherwise formal approach to non-discrimination (Benoît-Rohmer, 2017).

Dekker, like *Feryn*, is considered an outlier by accepting a case of direct discrimination in the absence of any actual comparator. There was no male candidate to compare Dekker’s treatment with, but the Court nonetheless ruled direct discrimination to be established simply because the reason for the refusal of employment was clearly established. ‘If that reason is to be found in the fact that the person concerned is pregnant, then the decision is directly linked to the sex of the candidate. In those circumstances the absence of male candidates cannot affect the answer (. . .).’¹⁰ It is indeed rare to see the Court explicitly reject the requirement of a comparator it systematically requires in its definitions of discrimination. But *Dekker* can also be read in another way. The comparator is required to establish the reality of differential treatment under formal equality. If and when the reason for a specific treatment is established as being ‘sex’ or ‘directly linked to sex’, it is also established that the victim would have been treated differently had it been of a different sex. When the dominant causation is proven to be the protected characteristic, one does not need to identify an actual comparator because causation intrinsically guarantees potential differential treatment.

Proof of direct causation thus implies proof of a virtual comparator. *Dekker* can be seen to anticipate the contemporary EU law definition of discrimination as one person who is treated less favourably ‘than another is, has been or *would be* treated’ (my italics).¹¹ Proof of dominant causation proves one would have been treated differently, but for the characteristic. By allowing the comparison to go beyond the real-time actual comparator to the potential comparator, EU law has significantly moved away from formal equality towards substantive equality. When treatment ‘because of’ suffices to

establish discrimination, the victim–comparator–causation triangle collapses on itself. Causation means comparison, and the outcome is barely distinguishable from substantive equality that shuns comparison for the sake of group protection per se.

Indirect discrimination is substantive at heart

As we have seen, indirect discrimination today is an integral part of the fabric of EU equality directives, tying discrimination to the discriminatory impact of an otherwise neutral provision, criterion or practice.¹² But under the formal equality approach, discrimination is understood to address treatments based on prohibited characteristics as such. In the beginning, there was only direct discrimination. Then came the CJEU. In *Sotgiu*, workers employed away from their place of residence were entitled to a higher allowance if they had lived in Germany at the time of their initial employment. The Court had to ponder nationality discrimination in relation to a residential requirement, which ostensibly is not a nationality requirement. The Court was moved to look beyond the formal in a passage which is worth quoting in full:

The rules regarding equality of treatment, (...) forbid not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result. This interpretation, which is necessary to ensure the effective working of one of the fundamental principles of the Community, is explicitly recognized by the fifth recital of the preamble to Regulation No 1612/68 which requires that equality of treatment of workers shall be ensured ‘in fact and in law’. It may therefore be that criteria such as place of origin or residence of a worker may, according to circumstances, be tantamount, as regards their practical effect, to discrimination on the grounds of nationality, such as is prohibited by the Treaty and the Regulation.¹³

A clearer expression of the substantive goals behind EU non-discrimination law cannot be found. At the time when non-discrimination was all about formal neutrality for the benefit of economic free movement, the Court single-handedly introduces a concept that puts substance over form.

Indirect discrimination rests upon the cardinal assumption that a formally neutral measure is suspicious when it has substantive disadvantages for a formally protected group. By acknowledging that formal neutrality can disadvantage a protected group, first the Court and later the entire statutory construct of EU equality law acknowledge the importance of structural and group differences in the application of individual formal equality. When a differential treatment between part-time and full-time work is suspicious because it disproportionately affects women, to name a famous example, indirect sex discrimination recognizes the differences in career opportunities that partly explain why women tend to work more part-time than men. When sartorial neutrality at work is suspicious because it disproportionately affects practicing Muslims who wear the headscarf, to name another, indirect religious discrimination expresses the differences in religious traditions and their conflict with secularism in a multicultural society. Indirect discrimination goes a long way in providing the formalism of EU non-discrimination law with a substantive soul.

The deeply substantive nature of indirect discrimination is further illustrated by its judicial interpretation. Everything hinges on the 'disparate impact' of an apparently neutral provision, criterion or practice. How strict is disparate impact to be construed in terms of evidence and threshold? A formal approach would require clear numerical and statistical parameters in need of careful verification. A substantive approach would want to leave room for appreciation. After all, one cannot reduce the relevance or irrelevance of broad societal differences to arbitrary percentages. And indeed, that is the way the case law has gone. The CJEU has shunned fixed criteria, has occasionally downplayed or avoided comparability assessments in establishing indirect discrimination and has allowed national judges ample discretion for motivating their conclusions with bland impact statements (see Tobler, 2009).

In *O'Flynn*, the CJEU had to assess whether a payment scheme for funeral costs violated the prohibition of nationality discrimination by limiting reimbursement to funerals on British soil. The Court stated emphatically that

a provision of national law must be regarded as indirectly discriminatory if it is intrinsically able to affect migrant workers more than national workers and if there is a consequent risk that it will place the former at a particular disadvantage.

It is not necessary in this respect to find that the provision in question does in practice affect a substantially higher proportion of migrant workers. It is sufficient that it is liable to have such an effect.¹⁴ Just as direct discrimination can operate through a mere potential comparator, indirect discrimination exists when an 'apparently neutral provision, criterion or practice *would* put persons of (the protected characteristic) at a particular disadvantage'.¹⁵ Therefore, EU non-discrimination law can hold parties liable for sheer societal realities, irrespective of their role in these realities and irrespective of how the affected group fares within their own organization. Through potential adverse impact, the substantive purpose of indirect discrimination is pushed to the extreme.

Hence, in *Seymour Smith*, the CJEU had no difficulties solving the conundrum whether a 2-year seniority condition to the protection against unfair dismissal constituted indirect sex discrimination. The parties had dazzled the court with exhortations on statistical significance, markedly different impact and disproportionate effect. While stressing the need for 'considerable' impact, the Court sided with a statistical comparison of 'on the one hand, the respective proportions of men in the workforce able to satisfy the requirement of two years' employment under the disputed rule and of those unable to do so, and, on the other, to compare those proportions as regards women in the workforce'.¹⁶ Workforce data are publicly available and allow to gauge impact on a theoretical national level, irrespective of the practical reality on the ground. Indirect discrimination is deduced from potential impact only, disregarding the actual statistical reality at the level of the company where the dismissal took place.

In essence, while indirect discrimination formally hinges on a 'particular disadvantage' for a protected group, its application by the CJEU has rejected any particular degree of seriousness of group impact as a criterion. Instead, the Court only requires impact that is broadly likely to affect particular persons with a protected characteristic, as compared

to other persons. By avoiding a restrictive disadvantage requirement, the Court deliberately seeks to maximize the substantive aim of indirect discrimination as a concept.¹⁷

And it does not end there. Contrary to direct discrimination, the prohibition of indirect discrimination is an open principle that allows for justification. A defendant will escape liability if the contested provision, criterion or practice, notwithstanding its disparate impact, ‘is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary’. Justification is a two-edged sword. On the one hand, it allows genuine and legitimate private aims to stand, since the contested treatment is not overtly discriminatory. On the other hand, it implies that parties run the risk of exposure to indirect discrimination claims if their organization or practices have actual or potential indirect discriminatory impact and are not determined by legitimate aims in an effective and proportionate way.

To the extent that EU law prohibits unjustifiable indirect discrimination, it effectively demands the avoidance of such discrimination through positive anticipation or accommodation of group differences. A limited duty of preventive positive action is therefore implicit in the prohibition of indirect discrimination (De Vos, 2007; Tobler, 2009). Indirect discrimination will arise by failing to take due and positive account of relevant group differences between persons in comparable situations or by failing to ensure that rights and advantages are open and accessible under conditions that only differentiate on legitimate grounds. Predictably, the issue of justification has become a bone of contention, with ample evidence of varying standards and seesawing case law depending on the protected characteristic, the parties involved and the nature and origin of the contested measures (see Tobler, 2009). Substantive justification introduces policy and politics through the backdoor of formal equality. In the recent landmark case of *Achbita*, the CJEU even went beyond mere justification to require *additional accommodation* for a Muslim woman affected by a workplace headscarf ban the Court had found to be justifiable.¹⁸

This is not to say the Court of Justice has entirely detached indirect discrimination from any formal equality consideration. Indirect *age discrimination* is a case in point. In a number of recent cases, the CJEU has been asked to assess remuneration schemes or salary scales that rely on employee classifications, against an assumed backdrop of age-related impact differences across employee groups. In its scrutiny, the Court has been at pains to require objectively comparable employee groups irrespective of their age differences.¹⁹ It has tied indirect age discrimination to treatment based on a criterion which is either inextricably or indirectly linked to the age of employees, rejecting claims based solely on age-related group differences.²⁰ Group inequality alone does not suffice to create a presumption of indirect age discrimination in the absence of a criterion that can itself be directly or indirectly linked to age.

In both instances, the Court adopts a formal stance that steps away from a purely impact-driven approach to indirect discrimination. By insisting on formal *comparison*, the Court refuses to deduce indirect discrimination from substantive group inequality per se. By insisting the contested *criterion or practice* must itself be formally linked to the protected characteristic, the Court refuses to deduce indirect discrimination from substantive impact per se. This line of reasoning is not without conceptual challenges. There is a potential Catch22 when indirect discrimination results from the actual or potential

impact on a protected characteristic, if that impact does not suffice to assume the contested provision, criterion or practice is indeed linked to that characteristic.

Whatever its merits, the case law on age discrimination shows a Court unwilling to trade a formal construction of substantive indirect discrimination for full blown substantive equality where indirect discrimination would result from group differences alone. There is a limit as to how far the CJEU is willing to stretch the substantive aim of indirect discrimination. However, it cannot be denied that the whole construct of indirect discrimination has detached EU equality law from a rigid set of protected characteristics and has pushed it towards a more comprehensively substantive equality approach, albeit without severing the umbilical cord with formal equality. It has enabled case law to incorporate structural and societal causes of inequality that underlie the disparate impact of neutral measures on protected groups. The assumption that EU law requires individual formal equality only has become largely theoretical when a whole suite of protected characteristics force everyone and anyone to internalize, avoid and address risks of theoretical adverse impact across many societally disadvantaged groups.

Compulsory differential treatment makes formal equality substantive

As we have seen, formal equality under EU law requires both equal treatment and differential treatment, depending on whether the protected characteristic is considered to make a person comparable or incomparable vis-à-vis another. In most cases, formal equality provisions consider people as being equal in regard to the protected characteristic, resulting in a requirement of formal neutrality. However, when a formal equality obligation considers people as being unequal because of a protected characteristic, it results in compulsory differential treatment. Formal equality then becomes barely distinguishable from substantive equality: it requires substantive differential treatment and it does so because of an underlying assumption that equal treatment would undermine a desirable substantive fairness goal. What still sets formal EU equality apart from substantive equality is that the former relies on explicit provisions to prescribe positive differential treatment, whereas the latter holds these to be implicit in the very concept of equality itself. By prescribing positive differential treatment, EU law effectively codifies the reach of substantive duties under an overarching formal equality concept.

Hence, in the case of *disability*, the General Framework Directive prescribes *both* the traditional equal treatment and a specific obligation of differential treatment as follows:

In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to provide training for such a person, unless such measures would impose a disproportionate burden on the employer. When this burden is, to a sufficient extent, remedied by existing measures as an element of disability policy in the Member State, it should not be considered disproportionate. (art. 5)

The duty of ‘reasonable accommodation’, a staple of disability human rights internationally, is imposed as part of an equal treatment concept, making the denial of reasonable accommodation a form of discrimination (Ferri and Lawson, 2016). There can be little doubt that accommodation duties serve a substantive policy aim. For the CJEU, they ‘must be understood as referring to the elimination of the various barriers that hinder the full and effective participation of persons with disabilities in professional life on an equal basis with other workers’.²¹ Seeking alignment with the United Nations (UN) Convention on the Rights of Persons with Disabilities, which the EU itself has ratified, the Court thus adopts a substantive approach that allows EU non-discrimination law to be interpreted towards full practical effect, notwithstanding its formal roots.

In the case of *gender*, EU law has always endorsed specific rights related to pregnancy, maternity and parenthood, now rooted in the Pregnant Workers Directive and the Parental Leave Directive.²² On the surface, these substantive harmonization rights serve health and safety and the reconciliation of work with family life. In the words of the CJEU, they serve to protect a woman’s biological condition during and after pregnancy and the special relationship between a woman and her child after childbirth.²³ But their coexistence with non-discrimination has also brought the CJEU to construct them as expressions of substantive equality.

For the Court, pregnancy and maternity rights, while seeking to protect vulnerable women, also implement the principle of equal treatment regarding access to employment. Equality is then pursued by substantive rights while leaving formal equality principles intact.²⁴ As the Court states in *Hill*, substantive protection of women within family life and in the course of their professional activities is, in the same way as for men, a natural corollary of the formal equality between men and women.²⁵ Because the Court sees pregnancy and maternity rights as fostering substantive equality outcomes, it rejects as discriminatory any unfavourable consequences that would result from them for the female worker. If a worker suffers in promotion and salary opportunities because she is or has been on maternity leave, she is the victim of direct sex discrimination.²⁶

The foundational EU directive on gender equality in employment has always stressed that formal equality does not prejudice ‘provisions concerning the protection of women, particularly as regards pregnancy and maternity’.²⁷ Once more, formal equal treatment and substantive differential treatment are treated as two sides of the same coin, both serving the overarching purpose of non-discrimination. This conceptual symbiosis notwithstanding, there is a thin line between protective measures to maintain employment opportunities in the face of pregnancy or maternity and similarly ‘paternalistic’ measures that effectively reduce employment opportunities.

The CJEU takes pains to distinguish the two. While accepting night work restrictions for women for biological concerns related to pregnancy or maternity, it rejects them when the risks to which women are exposed at night are not inherently different from those to which men are exposed.²⁸ While acknowledging the legitimacy of provisions to protect pregnant women, it rejects provisions that result in unfavourable treatment in access to employment or effectively serve the employer’s interest.²⁹ While supporting leave entitlements that protect the biological condition of women following pregnancy, it rejects similar provisions that are detached from breastfeeding and instead perpetuate a traditional distribution of the roles of men and women as regards parental duties.³⁰ This

case law reveals an implicit tension between differential treatment and equal treatment that both serve equal opportunity. That tension becomes explicit whenever EU law construes differential treatment as an exception to, rather than an element of, formal equality. To this we now turn.

Positive action can become substantive positive discrimination

From its very origin in gender equality, prohibitions of discrimination under EU law have coexisted with authorizations of measures that address underlying causes of inequality for the protected group. In the uniform lingo of today's equal treatment provisions:

With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to (...) (the protected characteristic).³¹

Labelled 'positive action', these provisions offer a stark reminder that formal equality under EU law in no way seeks to block the myriad initiatives that can promote substantive equality outcomes. EU equality law indeed supports a whole spectrum of diversity policies that are unabashedly substantive in purpose, such as mainstreaming, focus measures, outreach and accommodation. Diversity and positive action are eminently compatible with formal equality because they do not result in any formal discrimination and serve the substantive effectiveness of formal equality overall.

The contentious issue is to what extent positive action can be tolerated when it operates through *positive discrimination* that runs afoul of formal equality. Are the recurring positive action clauses substantive outcome principles that balance the principle of formal equality, or instead merely limited exceptions that may or may not tolerate positive discrimination under certain circumstances? As has been documented extensively elsewhere, the CJEU in the field of gender has opted for the second interpretation, reinforcing a formal approach to equality and non-discrimination. For the Court, positive action provisions are 'specifically and exclusively designed to authorise measures which, although discriminatory in appearance, are in fact intended to eliminate or reduce actual instances of inequality which may exist in society'. With some twists and turns, this position can be summarized as follows (see De Vos, 2007; McCrudden, 2019, and the references there).

The CJEU sees positive sex discrimination as an exception to be narrowly tailored to its justification (*Commission v. France, Abrahamsson, Briheche*). Justification operates through a proportionality test that glosses over minor evolutions in the wording of the positive action clauses (*Abrahamsson, Lommers, Briheche*). The concept of 'proportionality' traditionally entails three separate tests: legitimacy, effectiveness and proportionality or necessity. The existing case law is centred on legitimacy while stating but only scratching the surface of the other two criteria.

Legitimacy is accepted where measures resulting in individual positive discrimination are aimed at remedying a proven imbalance between the gender groups. The CJEU seems not particularly concerned with the origin of the imbalance, loosely admitting

positive discrimination in response to the ‘prejudicial effects in employment which arise from social attitudes, behaviour and structures’ (*Kalanke, Marschall*). Positive discrimination therefore should not necessarily seek to compensate for past discrimination as such. The required imbalance should not necessarily have adversely affected the beneficiary of the positive measures.

What level of imbalance is required for positive discrimination to be legitimate has yet to be decided. The CJEU has dealt with a variety of imbalances without having to judge their merits. However, it is clear that positive sex discrimination should aim to eliminate and correct the causes of reduced opportunities of access to employment and careers for women and to improve their ability to compete on the labour market and pursue a career on an equal footing (*Commission v. France, Griesmar, Lommers, Alvarez*). Moreover, such positive discrimination should objectively serve the stated aim and rely on objective and transparent criteria (*Commission v. France, Abrahamsson, Griesmar*). From that perspective, merely seeking to redress imbalances for the sake of more diversity cannot pass.

Furthermore, any positive discrimination should, in accordance with the principle of proportionality, remain within the limits of what is appropriate and necessary to achieve the aim in view, reconciling the principle of equal treatment as far as possible with the requirements of the aim thus pursued (*Abrahamsson, Lommers, Briheche*). The proportionality test can generate crucial substantive discussions about the effectiveness of positive discrimination, its cost/benefit analysis, its necessity, its reach and extent and the availability of alternative measures that are not or less discriminatory.

The proof of the pudding is in the eating and the relative dearth of positive discrimination cases has not produced much eating. How positive discrimination could actually be marshalled to further substantive equality remains essentially a mystery. The CJEU has rejected measures that, while ostensibly benefiting women, are in fact liable to perpetuate a traditional distribution of the roles of men and women in the exercise of parental duties (*Alvarez*). It has also rejected preferential treatment that is automatic and unconditional and does not include an objective assessment of all personal circumstances, allowing neutrality to prevail if the circumstances so demand (*Kalanke, Marschall, Badeck, Briheche*). Hard quotas are therefore in principle suspect and the CJEU has so far only conditionally admitted soft quotas in a tie-break situation.

To sum up, the CJEU consistently treats substantive positive discrimination as an exceptional derogation from the principle of formal non-discrimination. This implies, as the Court has now reiterated in a case of religious discrimination, ‘that derogations remain within the limits of what is appropriate and necessary in order to achieve the aim in view and that the principle of equal treatment be reconciled as far as possible with the requirements of the aim thus pursued’.³² Conceptually, the CJEU has created a straightjacket for policy makers, companies or organizations wanting to consider positive discrimination in the EU.

It is perhaps not surprising that the Court’s case law on positive discrimination has been frozen in time for well over a decade. At the same time, a movement towards explicit gender quotas in company boards has gained traction in many European countries without notable litigation or pushback, notwithstanding its potential conflict with the Court’s doctrine (see De Vos and Culliford, 2014). The European Commission has

even proposed an EU directive in favour of compulsory board gender balance.³³ Although this initiative has become politically stuck, the willingness of the Commission as the guardian of EU law to embrace quotas is remarkable. In the meantime, EU non-discrimination law has extended to a plethora of protected traits. Turning away from gender provides indications of a more flexible approach to positive discrimination.

Substantive positive discrimination can limit formal equality

Under formal equality, not all prohibitions of discrimination are created equal. As EU equality law has soared above its origins in nationality and gender, it has introduced protections against discrimination that internalize substantive equality aims as potential limitations of formal neutrality. *Age discrimination* is the case in point. The General Framework Directive not only prohibits age discrimination in employment, it also enumerates what it calls ‘justification of differences of treatment on grounds of age’, including the following:

Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary. (art. 6)

The evolution of the European case law on this provision illustrates the growing pains of a Court of Justice that has been wedded to a formal equality doctrine for decades. In the seminal case of *Mangold*, the CJEU faced a German legislation that allowed the use of fixed-term employment contracts without restrictions for workers as of the age of 52. Could this straightforward age discrimination qualify as legitimate in view of the quoted limitation of the prohibition of age discrimination? The law’s admitted purpose was to promote the vocational integration of unemployed older workers in the German labour market. The Court recognized the legitimacy of such a public interest objective and considered the contested age criterion ‘objective and reasonable’ as a matter of course. However, it was much less forgiving in assessing its proportionality, stating:

In so far as such legislation takes the age of the worker concerned as the only criterion for the application of a fixed-term contract of employment, when it has not been shown that fixing an age threshold, as such, regardless of any other consideration linked to the structure of the labour market in question or the personal situation of the person concerned, is objectively necessary to the attainment of the objective which is the vocational integration of unemployed older workers, it must be considered to go beyond what is appropriate and necessary in order to attain the objective pursued. *Observance of the principle of proportionality requires every derogation from an individual right to reconcile, so far as is possible, the requirements of the principle of equal treatment with those of the aim pursued (...).*³⁴

Explicitly referring to its ruling in *Lommers*, the italicized sentence shows the CJEU applying the standard it has consistently applied in the aforementioned cases of positive

sex discrimination. Formal neutrality is the rule. Positive discrimination for the sake of labour market inclusion is the derogation to be narrowly construed. The General Framework Directive's justifications of differential treatment on grounds of age are applied as exceptional positive discrimination under a general rule of formal non-discrimination.

Under *Mangold*, employment policy can use age thresholds only if the chosen age is a perfect proxy for its policy aim. When the age limit is overbroad and adversely affects people whose employment situation differs from that of the target group notwithstanding their identical age, the age discrimination cannot stand. This is quite a challenge. Labour market policy for age groups, by its very nature, targets groups over individuals. If its age criteria have to withstand the specifics of individual situations, they are no longer generic policy tools. The essence of employment policy is to generalize groups. When group criteria have to be perfect proxies, they can no longer serve as group criteria and group policy has to be abandoned for case-by-case assessment. The Court's emphasis on formal equality effectively rendered the possibility of age-driven employment policy moot.

Mangold applied strict proportionality while emphasizing broad discretion for Member States in their choice of the measures capable of attaining objectives of social and employment policy.³⁵ This internal inconsistency did not last long. In a string of subsequent cases, the Court has allowed as proportionate measures that impose a compulsory retirement age if, in what has now become the standard test for age-driven employment policy:

(...) *it does not appear unreasonable* for the authorities of a Member State to take the view that a measure such as the authorisation of clauses on automatic termination of employment contracts on the ground that an employee has reached the age at which he is eligible for a retirement pension, (...) *may be appropriate and necessary* in order to achieve legitimate aims in the context of national employment policy.³⁶

What started as strict scrutiny in *Mangold* has ended in casual leniency. Proportionality no longer requires that age discrimination be narrowly tailored to its aim. If 'it does not appear unreasonable' and 'may be appropriate and necessary', it will stand. In the process, the CJEU admits a variety of domestic policy aims consistently as legitimate at face value; respects national traditions in assessing proportionality; balances non-discrimination with political, economic, social, demographic and/or budgetary considerations; gives collective bargaining outcomes a presumption of legitimacy, and assumes the labour market effectiveness of age discrimination without verifying its actual impact. Benign ageism, the infamous 'lump of labour fallacy' and age stereotyping now largely remain unassailable in Luxembourg (see and compare Dewhurst, 2013; Doron et al., 2018; Liu and O'Cinneide, 2019; Schiek, 2011).

Regardless of the intrinsic merits of the Court's case law, its approach highlights a remarkable shift from the formal to the substantive in EU age discrimination law. The CJEU does not treat the authorization of age-driven employment policy as a derogation from formal neutrality but as a broad avenue balancing formal non-discrimination with legitimate age policy aims. Positive age discrimination is not a limited exception to the rule of formal neutrality, but a countervailing limitation of formal neutrality. The resulting combination is a much more substantive approach to age and discrimination, a prime

example of how contemporary EU non-discrimination law has evolved to combine formal neutrality with substantive inclusion goals.

The Court's voluntaristic approach to positive age discrimination is echoed in its *Milkova* ruling addressing positive action in relation to *disability*. As with age, the General Framework Directive allows for specific disability-based positive action, declaring:

With regard to disabled persons, the principle of equal treatment shall be without prejudice to the right of Member States to maintain or adopt provisions on the protection of health and safety at work or to measures aimed at creating or maintaining provisions or facilities for safeguarding or promoting their integration into the working environment. (art. 7.2)

For the CJEU, this provision is not to be construed as a narrow exception to the rule of formal neutrality. Rather, its purpose is to broadly support substantive equality over formal equality by authorizing measures aimed at eliminating or reducing actual instances of inequality affecting people with disabilities, which may exist in their social or professional lives. Moreover, the Court does not qualify such disability-based distinctions as contrary but instead as integral to the overall purpose of the General Framework Directive.³⁷ *Milkova* clearly shows how a substantive understanding of non-discrimination can allow for a much more generous interpretation of positive action that is potentially incompatible with formal neutrality. It may well inspire a rethink of the more formalistic gender case law on positive action, if and when the CJEU gets the opportunity to do so.

In *religious discrimination*, EU law has had to go one step further still. Here, the formal prohibition of religious discrimination coexists with the recognition of freedom of religion as a fundamental human right.³⁸ As is well known, freedom of religion extends beyond mere belief itself (*forum internum*) to include religious behaviour and expressions (*forum externum*). Tied to the equally fundamental and substantive right of freedom of association, there is thus an inherent tension between formal religious neutrality and substantive religious freedom. This tension is recognized by the General Framework Directive. While prohibiting direct and indirect discrimination 'on the grounds of religion or belief', it allows:

on the hand, religion to be used as an occupational requirement '(...) in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, (...) where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. (...)',

and on the other hand, 'churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos'. (art. 4.2)

In *Egenberger*, the CJEU stressed that the quoted Directive strikes a balance between the right of autonomy of churches and other organisations whose ethos is based on religion or belief, on the one hand, and, on the other hand, the right of workers (...) not to be discriminated against on grounds of religion or belief, in situations where those rights may clash. Consequently, the Court ruled that EU non-discrimination law must, except in very exceptional cases, refrain from assessing whether the actual ethos of the church or organization concerned is legitimate.³⁹ The coexistence of religious freedom with religious non-discrimination forces the latter towards its most generous standard of justification where religious differentiation becomes the default and religious neutrality the exception.

To be sure, the CJEU does not favour religious differentiation over formal neutrality. In the contentious case of *Achbita*, it conditionally upheld a company rule prohibiting the visible wearing of any political, philosophical or religious sign in the workplace. The Court recognized that its impact may constitute indirect religious discrimination and explicitly recognized the expression of religious beliefs as a fundamental right. However, it shied away from formulating an adjusted standard of justification that would deliberately balance formal religious neutrality with substantive religious freedom. For the Court, the pursuance of neutrality is a legitimate aim as a matter of principle, an expression of the freedom to conduct a business as recognized by the Charter. Whether a particular policy of neutrality can be justified as indirect religious discrimination depends on it being appropriate for its purpose and genuinely pursued in a consistent and systematic manner without direct religious differentiation.⁴⁰ The protection of religion as a fundamental right does not make neutrality illegitimate or suspect, nor does justification depend on anything but traditional proportionality.

Achbita shows the CJEU's penchant towards formal neutrality in the absence of a specific provision that enables religious differentiation. Nonetheless, the ruling does contain seeds of a substantive religious accommodation. The Court emphasizes that a neutrality policy adversely affecting religious expression must be limited 'to what is strictly necessary', in this case to workers who interact with customers. By stressing 'strict necessity', the Court stretches standard proportionality to the highest level of scrutiny. Moreover, the Court goes beyond the realm of formal equality by suggesting, without any support in the General Framework Directive, additional workplace accommodation for a Muslim woman affected by a justifiable workplace headscarf ban.⁴¹ Clearly, the existence of a fundamental right does shed a substantive light on what remains an otherwise formal approach to non-discrimination.

Formal anti-discrimination supports and reflects overall substantive equality

Discrimination law cases before the CJEU typically deal with the interpretation of secondary EU law provisions, related to specifically protected characteristics. Zooming out, these textual analyses can and should be placed within the broader framework of evolving primary EU law. It is well known and well-documented how the language of the foundational EU treaties has evolved overtime to broaden and strengthen the EU's commitment to fighting discrimination (Benoît-Rohmer, 2017; Bell, 2018).

Under the current treaties, the Union ‘is founded on the values of respect for (...) equality’ (art. 2 TEU), ‘shall combat social exclusion and discrimination’ (art. 3 TEU), ‘shall aim to eliminate inequalities, and to promote equality, between men and women’ (art. 8 TFEU) and support and complement ‘(...) equality between men and women with regard to labour market opportunities and treatment at work’ and ‘combating social exclusion’ (art. 153 TFEU). Moreover, since the Lisbon treaty, the Charter of Fundamental Rights of the EU has full treaty value, whereas fundamental rights, as guaranteed by the ECHR and resulting from constitutional traditions common to the Member States, constitute general principles of EU law (art. 6 TEU).

In short, contemporary primary EU law places secondary anti-discrimination law under an umbrella of equality and other fundamental rights. This paves the way for recontextualizing formal non-discrimination as an instrument in a wider and more substantive equality agenda, consequently blurring the distinctions between the two. This is exactly what has happened. In several cases, the CJEU has stressed that the 2000 equality directives should be interpreted as giving specific expression to a *general and fundamental principle of equality*, as expressed in article 21 of the Charter. As a result, the Court has ruled that these directives cannot be interpreted restrictively and should be interpreted purposefully.⁴²

From the high ground of general EU law principles and fundamental rights, the CJEU is therefore enabled to push formal anti-discrimination towards substantive aims on a case-by-case basis (Liu and O’Cinneide, 2019). Entitled and expected to ensure the purpose and effectiveness of EU law, the Court can reinterpret formal equality as serving overarching substantive equality aspirations. Formal equality and non-discrimination are seen as expressions and illustrations of a general equality goal, allowing their interpretation to be stretched in line with whatever substantive goal the CJEU chooses to define and accept.

This tendency to pull the formal towards the substantive as a matter of principle is clearly evident when EU anti-discrimination law mirrors international or European human rights. Time and again, the CJEU uses parallel human rights instruments to guide EU law towards substantive goals. In *disability* discrimination, the Court has aligned EU anti-discrimination law with the UN Convention on the Rights of Persons with Disabilities. Embracing a human rights model of ‘disability’, it has moved beyond a medical definition of disability towards a social understanding that links impairments with societal barriers, resulting in a broader scope of protection against disability discrimination.⁴³

In the same vein, the Court has chosen to interpret the undefined notions of ‘ethnicity’ and ‘religion’ in EU anti-discrimination directives to reflect their human rights interpretation by the European Court of Human Rights. *Ethnicity* is seen as having ‘its origin in the idea of societal groups marked in particular by common nationality, religious faith, language, cultural and traditional origins and backgrounds’.⁴⁴ *Religion* includes not only religious belief itself but also the right to manifest that belief ‘in worship, teaching, practice and observance’.⁴⁵ Both anti-discrimination concepts have thus received a broad interpretation reflective of their varied societal and personal dimensions as recognized under a substantive human rights approach.

Irrespective of parallel international law sources, the entire body of EU anti-discrimination law can now be marched towards undefined substantive aims by the gravitational pull of a general EU law principle of equality that is both encompassing and open-ended. Furthermore, if and when the CJEU would judge formal equality to undermine general equality, it could simply use the latter's status as primary EU law to overrule the former. It has not come to that yet, but it may well happen at some point in the future.

Conclusion: pragmatism, discretion and legitimacy

Labelling EU anti-discrimination law as formal will never be a misnomer until the CJEU and the respective EU equality directives change their bedrock definition of what constitutes discrimination. However, upon a bedrock of formality, EU law has built many a substantive layer indeed. This contribution has focused on the extent to which the CJEU has tended towards substantive equality aims while applying and otherwise sticking to a formal equality principle. In its approach to direct discrimination, in its invention and development of indirect discrimination, in its embrace of differential treatment in favour of substantive equality: over time and in many cases, the CJEU has introduced, recognized or amplified substantial substantive equality dimensions. In essence, the Court applies a mixed '*substantive formal equality*' approach to what remains essentially formal EU equality law.

Some of the documented cases can be seen as inserting purpose into form, applying a substantive aim to formal non-discrimination (Direct discrimination is less formal than meets the eye section). In indirect discrimination, however, the Court balances formal equality with a countervailing non-discrimination principle it has itself pioneered for actual – that is, substantive – equality (Indirect discrimination is substantive at heart section). Whenever EU equality law imposes a difference in treatment because of group differences, the Court has no qualms in marshalling this strand of formal equality for substantive policy ends (Compulsory differential treatment makes formal equality substantive section).

As long as the default proposition of non-discrimination under EU law remains formal neutrality, the CJEU can hardly be expected to become the natural champion of substantive positive discrimination. EU equality directives contain clauses allowing for positive action to alleviate for specific disadvantages only. However strict its case law may be, the fact remains that the Court does make room in principle for positive discrimination beyond mere positive action, as an *exception* to formal neutrality (Positive action can become substantive positive discrimination section).

Moreover, whenever the EU legislator does require or permit substantive positive discrimination as a *limitation* of formal equality, the Court has been willing to explore this substantive avenue generously (Substantive positive discrimination can limit formal equality section). The recent case law on positive action in relation to age, disability and religion may well spill over into a more generous attitude towards positive discrimination overall, should the Court get the opportunity to revisit its long-standing reluctance vis-à-vis positive sex discrimination.

More fundamental still is the Court's recognition of a general EU law principle of equality or equal treatment capped by the generic non-discrimination provision in article 21 of the Charter. While the Court has remained rather cavalier and bland in declaring its existence, it is clearly ready to use this general principle to steer secondary anti-discrimination law towards more substantive goals (Formal anti-discrimination supports and reflects overall substantive equality section). Whether backed up by particular human rights provisions from the UN or the ECHR, there is now a way to effectively mainstream substantive equality within and through formal equality, a statutory consecration of 'substantive formal equality'.

Stalwarts of substantive equality should rejoice when surveying the landscape of case law-driven substantive equality law under the aegis of formal equality principles. It is no exaggeration to state that the Court of Justice has retooled formal EU equality law towards substantive equality aims, redefining piecemeal the overarching purpose of EU equality law in the process. Its practical effects in real life may well frustrate the engaged observer or activist, but non-discrimination law can never shape the course of society on its own. What should be acknowledged from a legal perspective, however, is that the pragmatic flexibility of the CJEU in furthering substantive equality goes hand in hand with judicial discretion.

Substantive equality stands for outcomes. When desired outcomes are not prescribed by law but instead enabled by a flexible Court of Justice, the substance of substantive equality essentially becomes judge-made. The substantive reach of direct discrimination depends upon the CJEU's willingness to identify the comparator and tie treatment to a protected characteristic. For instance, whether intersexuality is direct sex discrimination or whether religious practices are equated with religion itself – to name two contested areas – is essentially the Court's choice. Beyond direct discrimination, the scope of indirect discrimination and its substantive outcome entirely depend on the willingness of the Court to detect or reject disparate impact and to accept or refuse its justification. And as soon as the binary world of direct and indirect discrimination is complemented with exceptions and limitations, as with pregnancy, maternity, disability, age and religion, it is again the Court that sets the limits of substantive differential treatment.

Judicial discretion also lies at the heart of the general EU law principle of equality. The CJEU can essentially decide what, if any, substantive focus it attaches to 'equality' beyond formal non-discrimination. In some cases, the Court refuses to distinguish the two, considering them to be equivalent expressions of the prohibition to treat similar situations differently and different situations in the same way unless there are objective reasons for such treatment.⁴⁶ Other cases which we have documented here, while not necessarily acknowledging a paradigm shift, move beyond equivalency and steer anti-discrimination towards substantive aims they choose to attach to the overarching principle of equality.

It is of course always the purview of the courts to interpret the law. But the lack of a clear conceptual and statutory framework for EU discrimination law is, for a large part, the Court's responsibility. The substantive meanderings of EU discrimination law exist because of the CJEU. Their application at Member State level, especially through impact and proportionality tests, also leaves ample space for judicial choice and interpretation. As EU discrimination law embraces protected characteristics without clear-cut

definitions, such as disability, race, ethnicity, religion and belief, its vagueness and organic nature become problematic. As EU discrimination law incorporates substantive policy aims without articulating them up-front, the CJEU becomes a policymaker and potentially an engine for social engineering.

When non-discrimination develops beyond formal equality to substantive goals, its legitimacy depends on a legitimate democratic process to define desired goals. The CJEU has been creative and pragmatic in its gradual development of substantive equality. In the absence of a supporting democratic process, however, this progress comes at the expense of legitimacy, at the same time reflecting and contributing to the deeply political dimension of EU equality lawmaking (see and compare Muir, 2018).

Acknowledgement

I thank Christa Tobler (University of Leiden) for her thoughtful comments on an initial draft.


Declaration of conflicting interests

The author(s) declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

Funding

The author(s) received no financial support for the research, authorship, and/or publication of this article.

ORCID iD

Marc De Vos  <https://orcid.org/0000-0002-5238-5710>

Notes

1. See, for example, C 13/63, *Government of the Italian Republic v. Commission of the European Economic Community*, 17 July 1963; C 283/83, *Racke v. Hauptzollamt Mainz*, 13 November 1984; T-10/93, *A v. Commission*, 14 April 1994; C-279/93, *Finanzamt Köln-Alstadt v. Roland Schumacker*, 14 February 1995; C-137/00, *Milk Marque and National Farmers' Union*, 9 September 2003; C-157/02, *Rieser Internationale Transporte GmbH v. Autobahnen- und Schnellstraßen-Finanzierungs- AG (Asfinag)*, 5 February 2004; C-304/01, *Spain v. Commission*, 9 September 2004; C-486/18, *RE v. Praxair*, 8 May 2019.
2. See Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (hereinafter Race and Ethnic Origin Directive); Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (hereinafter General Framework Directive); Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services; Directive 2006/54/EC of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast); Directive 2010/41/EU of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity.
3. C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV*, 10 July 2008.

4. C-303/06, *S. Coleman v. Attridge Law and Steve Law*, 17 July 2008, para. 47.
5. C-83/14, *CHEZ Razpredelenie Bulgaria AD v. Komisia za zashtita ot diskriminatsia*, 16 July 2015. The Court developed its reasoning both for direct and for indirect discrimination.
6. C-177/88, *Elisabeth Johanna Pacifica Dekker v. Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus*, 8 November 1990, para. 12.
7. C-342/93, *Joan Gillespie and others v. Northern Health and Social Services Boards*, 13 February 1996, para. 22; C-147/02, *Michelle K. Alabaster v. Woolwich plc and Secretary of State for Social Security*, 30 March 2004, para. 47; C-284/02, *Land Brandenburg v. Ursula Sass*, 18 November 2004, para. 36.
8. See C-13/94, *P. v. S. and Cornwall City Council*, 30 April 1996; C-117/01, *K.B. v. National Health Service Pensions Agency, Secretary of State for Health*, 7 January 2004; C-423/04, *Sarah Margaret Richards v. Secretary of State for Work and Pensions*, 27 April 2006.
9. C-267/06, *Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen*, 1 April 2008; C-147/08, *Jürgen Römer v. Freie und Hansestadt Hamburg*, 10 May 2011; C-267/12, *Frédéric Hay v. Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres*, 12 December 2013.
10. C-177/88, para. 17.
11. In *Dekker*, the identification of a virtual comparator of a different sex would of course be impossible if the scope of comparability were limited to pregnancy per se and not to absence from work. Such a narrow approach may explain the Court's motivation in rejecting the need for a comparator.
12. See Formal equality, non-discrimination and European Union (EU) law section and the references in note 2.
13. Case 152/73, *Giovanni Maria Sotgiu v. Deutsche Bundespost*, 12 February 1974, para. 11. The Court had first acknowledged indirect discrimination in Case 15/69, *Württembergische Milchverwertung-Südmilch AG v. Salvatore Ugliola*, 15 October 1969.
14. C-237/94, *John O'Flynn and Adjudication Officer*, 23 May 1996, para. 20–21.
15. See the directives mentioned in note 2, my italics.
16. C-167/97, *Regina v. Secretary of State for Employment, ex parte Nicole Seymour-Smith and Laura Perez*, 9 February 1999, para. 59 and 62.
17. Compare *CHEZ Razpredelenie Bulgaria AD v. Komisia za zashtita ot diskriminatsia*, 16 July 2015, para. 27 and 107.
18. C-157/15, *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV*, 14 March 2017, para. 43.
19. C-49/18, *Carlos Escribano Vindel v. Ministerio de Justicia*, 7 February 2019.
20. C-539/15, *Daniel Bowman v. Pensionsversicherungsanstalt*, 21 December 2016, para. 28; C-154/18, *Tomás Horgan and Claire Keegan v. Minister for Education & Skills, Minister for Finance, Minister for Public Expenditure & Reform, Ireland, Attorney General*, 14 February 2019, para. 27.
21. C-335/11 and C-337/11 (joined), *HK Danmark, on behalf of Jette Ring v. Dansk almennyttigt Boligselskab v. HK Danmark, on behalf of Lone Skouboe Werge v. Dansk Arbejdsgiverforening, on behalf of Pro Display A/S*, 11 April 2013, para. 54.
22. Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding; Directive 2010/18/EU of 8 March 2010

- implementing the revised Framework Agreement on parental leave concluded by BUSINESS-EUROPE, UEAPME, CEEP and ETUC.
23. Case 184/83, *Ulrich Hofmann v. Barmer Ersatzkasse*, 12 July 1984, para. 25; C-32/93, *Carole Louise Webb v. EMO Air Cargo (UK) Ltd*, 14 July 1994, para. 20; C-394/96, *Mary Brown v. Rentokil Ltd*, 13 June 1998, para. 17; C-203/03, *Commission of the European Communities v. Republic of Austria*, 1 February 2005, para. 43.
 24. C-136/95, *Caisse nationale d'assurance vieillesse des travailleurs salariés v. Thibault*, 30 April 1998, para. 26; C-207/98, *Mahlburg v. Land Mecklenburg-Vorpommern*, 3 February 2000, para. 26.
 25. C-243/95, *Kathleen Hill and Ann Stapleton v. the Revenue Commission and the Department of Finance*, 17 June 1998, para. 42.
 26. C-284/02, *Land Brandenburg v. Ursula Sass*, 8 November 2004, para. 34–37.
 27. Art. 2(3) Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion and working conditions, now art. 28 Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.
 28. C-345/89, Criminal proceedings against Alfred Stoeckel, 25 July 1991.
 29. C-66/96, *Høj Pedersen and others*, 19 November 1998; C-207/98, *Mahlburg v. Land Mecklenburg-Vorpommern*, 3 February 2000.
 30. C-104/09, *Pedro Manuel Roca Álvarez v. Sesa Start España ETT SA*, 30 September 2010.
 31. See the directives mentioned in note 2. In the case of gender, positive action is defined with explicit reference to ‘specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers’ (art. 157 TFEU *juncto* art. 3 Recast Equal Treatment Directive).
 32. C-193/17, *Cresco Investigation GmbH v. Markus Achatzi*, 22 January 2019, para. 65.
 33. European Commission, Proposal for a Directive on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures, COM/2012/0614 final – 2012/0299(COD).
 34. C-144/04, *Werner Mangold v. Rüdiger Helm*, 22 November 2005, para. 65, *my italics*.
 35. *Ibid.*, para. 63.
 36. C 45/09, *Gisela Rosenblatt v. Oellerking Gebäudereinigungsges.*, 12 October 2010, para. 51; C-411/05, *Félix Palacios de la Villa v. Cortefiel Servicios SA*, 16 October 2007, para. 72. See, in the same vein, C-88/08, *David Hütter v. Technische Universität Graz*, 18 June 2009; C-341/08, *Domnica Petersen v. Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe*, 12 January 2010; *Gerhard Fuchs (C-159/10) and Peter Köhler (C-160/10) v. Land Hessen*, 21 July 2011; *Sabine Hennigs (C-297/10) v. Eisenbahn-Bundesamt and Land Berlin (C-298/10) v. Alexander Mai*, 8 September 2011; C-141/11, *Torsten Hörnfeldt v. Posten Meddelande AB*, 5 July 2012; C-286/12, *European Commission v. Hungary*, 6 November 2012.
 37. C 406/15, *Petya Milkova v. Izpalnitelen direktor na Agentsiata za privatizatsia i sledprivatizatsionen control*, para. 46–47, 9 March 2017.
 38. Art. 6 TEU *juncto* art. 21 Charter of Fundamental Rights of the European Union of 7 December 2000 and art. 9 European Convention for the Protection of Human Rights and Fundamental Freedoms.

39. C-414/16, *Vera Egenberger v. Evangelisches Werk für Diakonie und Entwicklung eV*, 17 April 2018, para. 51 and 61.
40. C-157/15, *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v. G4S Secure Solutions NV*, 14 March 2017, para. 37 *et seq.*
41. *Ibid.*, para. 42–43.
42. For example, C-391/09, *Runevič-Vardyn and Wardyn*, 12 May 2011, para. 43; C-83/14, *CHEZ Razpredelenie Bulgaria AD v. Komisia za zashtita ot diskriminatsia*, 16 July 2015, para. 42; compare C-297/10 and C-298/10, *Sabine Hennigs v. Eisenbahn-Bundesamt and Land Berlin v. Alexander Mai*, 8 September 2011, para. 78.
43. C-335/11 and C-337/11 (joined), *HK Danmark, on behalf of Jette Ring v. Dansk almennyttigt Boligselskab v. HK Danmark, on behalf of Lone Skouboe Werge v. Dansk Arbejdsgiverforening*, on behalf of Pro Display A/S, 11 April 2013; C-363/12, *Z. v. A Government department and The Board of management of a community school*, 18 March 2014.
44. C-83/14, *CHEZ Razpredelenie Bulgaria AD v. Komisia za zashtita ot diskriminatsia*, 16 July 2015.
45. C-157/15, *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v. G4S Secure Solutions NV*, 14 March 2017.
46. For example, C-422/02 P, *Europe Chemi-Con (Deutschland) GmbH*, 27 January 2005, para. 33; C-356/12, *Glatzel*, 22 May 2014, para. 43; C-76/15, *Vervloet and Others*, 21 December 2016, para. 74.

References

- Barnard C (2014) EU employment law and the European social model: the past, the present and the future. In: Mitchell P, Suteu S and Paparinskis M (eds), *Current Legal Problems*, Vol. 67(7). Oxford: Oxford Academic, pp. 199–237.
- Bell M (2002) *Anti-Discrimination Law and the EU*. New York: Oxford University Press.
- Bell M (2012) Gender identity and sexual orientation: alternative pathways in EU equality law. *The American Journal of Comparative Law* 60(1): 127–146.
- Bell M (2018) The principle of equal treatment and the European pillar of social rights. *Giornale di Diritto del Lavoro e di Relazioni Industriali* 160: 783–810.
- Benoît-Rohmer F (2017) Lessons from the recent case law of the EU Court of Justice on the principle of non-discrimination. In: Rossi LS and Casolari F (eds), *The Principle of Equality in EU Law*. Cham: Springer International Publishing, pp. 151–166.
- Burri S (2015) Equal treatment: the EU approach. In: Pennings F and Vonk F (eds), *Research Handbook on European Social Security Law*. Cheltenham: Edward Elgar Publishing, pp. 231–257.
- De Vos M (2007) Beyond formal equality. Positive action under directives 2000/43/EC AND 2000/78/EC, European Commission, DG employment, social affairs and equal opportunities. p. 81.
- De Vos M and Culliford PH (eds) (2014) *Gender Quotas for Company Boards*. Antwerp: Intersentia.
- Dewhurst E (2013) Intergenerational balance, mandatory retirement and age discrimination in Europe: how can the ECJ better support national courts in finding a balance between the generations? *Common Market Law Review* 50(5): 1333–1362.
- Ellis E and Watson P (2012) *EU Anti-Discrimination Law*. Oxford: Oxford University Press.

- Doron I, Numhauser-Henning A, Spanier B, et al. (2018) Ageism and anti-ageism in the legal system: a review of key themes. In: Ayalon L and Tesch-Römer C (eds), *Contemporary Perspectives on Ageism*. Cham: Springer, pp. 303–319.
- Ferri D and Lawson A (2016) *Reasonable Accommodation for Disabled People in Employment*. Brussels: European Commission, DG for Justice and Consumers, p. 168.
- Fredman S (2016) Substantive equality revisited. *International Journal of Constitutional Law* 14(3): 712–738.
- Haverkort S (2012) *European Non-Discrimination Law*. Antwerp: Intersentia, p. 378.
- Liu K and O’Cinneide C (2019) The ongoing evolution of the case-law of the court of justice of the European Union on directives 2000/43/EC and 2000/78/EC. Brussels: European Commission, DG for Justice and Consumers, p. 99.
- McCrudden C (2003) *The New Concept of Equality*. Trier: ERA, p. 20.
- McCrudden C (2016) The new architecture of EU equality law after CHEZ: did the Court of Justice reconceptualise direct and indirect discrimination? *European Equality Law Review* 2016: 1–10.
- McCrudden C (2019) *Gender-Based Positive Action in Employment in Europe*. Brussels: European Commission, DG for Justice and Consumers, p. 220.
- Muir E (2018) *EU Equality Law. The First Fundamental Rights Policy of the EU*. Oxford: Oxford University Press, p. 256.
- Prechal S (2004) Non-discrimination and social policy: Achievements in three themes. *Common Market Law Review* 41: 533–551.
- Roemer J (1998) *Equality of Opportunity*. Cambridge: Harvard University Press.
- Schiek D (2011) Age discrimination before the ECJ – conceptual and theoretical issues. *Common Market Law Review* 48: 777–799.
- Tobler C (2005) *Indirect Discrimination: A Case Study into the Development of the Legal Concept of Indirect Discrimination Under EC Law*. Antwerp: Intersentia, p. 516.
- Tobler C (2009) *Limits and potential of the concept of indirect discrimination*, Brussels: European Commission, DG employment, social affairs and equal opportunities, p. 92.
- Tobler C (2013) The prohibition of discrimination in the Union’s Layered System of Equality Law: from early staff cases to the mangold approach, in the Court of Justice and the construction of Europe: analyses and perspectives on sixty years of case-law. Luxembourg: Court of Justice of the European Union, pp. 443–469.
- Tobler C (2014) Equality and non-discrimination under the ECHR and EU law. *Heidelberg Journal of International Law* 74: 521–561.
- Wentholt K (1999) Formal and substantive equal treatment: the limitations and the potential of the legal concept of equality. In: Loenen T and Rodrigues P (eds), *Non-Discrimination Law: Comparative Perspectives*. The Hague: Kluwer, pp. 53–64.