

The London School of Economics and Political Science

**Positive Action as a Means to Achieve Full and Effective Equality
in Europe**

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Abstract

The concept of positive action features as a traditional theme of controversy in the contemporary legal and political discourse on equality. The paradox of resorting to unequal treatment in order to achieve “full and effective equality” - according to the wording of the Preamble to Protocol 12 of the ECHR - has been dealt with in a parochial and incoherent way. This is true with regard to both the theoretical justifications provided and the concrete legal measures of domestic jurisdictions.

This thesis aims to explore the nature of the relationship between positive action and equality in a European normative and philosophical framework. The principal enquiry is whether it is possible to find a common European denominator regarding the content and legal consequences of the concept of equal treatment, understood as full equality.

The analytical process is carried out in four stages. Part I constitutes an attempt to map the theoretical debate and identify the main problems in the justificatory rationale of the “classical” conception of positive action. Part II provides a thorough examination of the current position of the European legal order on the matter. The latter is understood broadly, with EU law and the ECHR being the two pillars of a common normative framework that determines what counts as equal treatment across Europe. Part III explains why a “one size fits all” approach on positive action fails to adequately account for the idiosyncratic requirements of equal treatment in different areas of the public sphere, such as the employment field, politics and the judiciary. Finally, Part IV introduces the notions of indistinctibility of respect and proportionality of concern as the symbiotic conceptual axes of equality. Against this theoretical construct positive action

should be properly understood not as an exception to equal treatment but as an expression of proportionality of concern.

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“Justice is equality, as all men think, even apart from argument”
[Aristotle, Nicomachean Ethics, Book E, 1131a, 14-15]

Introduction

From academic amphitheatres to political fora, from the workplace to the realm of family life, from public debates to private discussions the nature, content and practice of equality generates heated debates. This is not only due to the undoubted rhetoric appeal and immediate resonance of the concept with every aspect of our social existence, but also to the fact that equality creates an oxymoron. Although most general theories of justice from Aristotle to the present condemn social inequalities as a pathogeny that democratic societies should strive to eradicate, such inequalities have proved to be incredibly resistant in the face of political and legal change. Part of the blame for this failure must be allocated to the lack of consensus regarding the true meaning of equality. The remaining responsibility lies with the long tradition of formal equality that has dominated the political and legal discourse in Europe.

Against this background, the emergence of a new equality paradigm in Europe bears the promise of succeeding where we have failed in the past. *Full and effective equality*, according to the Preamble to Protocol 12 of the European Convention of Human Rights, or *full equality in practice*, according to the equivalent phrasing of Article 141 EC, have the potential of transforming the normative reality of European states and creating a truly democratic European polity that transcends the boundaries of the European Union. Positive action may become an indispensable weapon in the pursuit of these goals, not only because of its ability to achieve short-term results, but also due to

the loud and clear symbolism it connotes as a leap forward and away from formalism. Despite these optimistic projections, however, the classical conception of positive action seems inadequate to fulfil its destined role under the full and effective equality paradigm.

This thesis aims to prove that positive action is, indeed, a legitimate and even necessary mechanism to achieve full and effective equality in Europe, insofar as it is construed in a more nuanced and intellectually flexible manner. An approach to positive action that is sensitive to the different expectations and concerns in different areas of the public sphere will, in fact, be an *expression* of full and effective equality rather than an *exception* to it. Accordingly, the thesis will put forward a theory of equality that explains the new equality paradigm and define the place of positive action therein.

From a methodological point of view the philosophical project undertaken here is marked by two major analytical distinctions, one that is established and one that is deliberately omitted. The former is the division of the social sphere into three distinct areas: “standard” employment, elected public offices and sensitive areas of the public sphere. The claim put forward is that the principle of equal treatment operates differently in each of these areas, which entails that its normative consequences will inevitably vary. Positive action schemes, therefore, should vary accordingly in order to effectively address the inequalities that arise in each particular context.

The other distinction is the obvious one regarding the different *types* of discrimination, corresponding to the protected grounds enshrined in European equality law instruments. Instead of covering all possible dimensions of full equality, the arguments are tailored to fit the needs of a *gender-oriented* analysis. This priority to gender was deemed to be the only sound methodological choice to approach an issue of

such breadth. In principle, however, most of these arguments will remain valid across the spectrum of equality of treatment.

Space limitations have inevitably determined, to an extent, the length and depth of the analysis in particular areas of the enquiry. For instance, the idea that a European Legal Order of Rights (ELOR) has emerged in the European normative space (chapter 3) is admittedly not fully developed. Relationships between states within this legal order, particularly with regard to EU Member States, are under-theorised. More work is also needed in order to work out the technicalities of the constitutionalised co-existence between Luxembourg and Strasbourg. A detailed proposal in earlier drafts regarding the a possible *mutual reference system* between the two courts, modelled along the lines of Article 234 EC, could unfortunately not be included in the final version of this thesis. Similarly, the theory of equal treatment as *indistinctibility of respect* and *proportionality of concern* (chapter 10) is no more than a summary of a more detailed and, hopefully, more comprehensive future theoretical project.

In both these areas the choice of what to include in and what to leave out of this final version was made on the basis of a functional criterion. The objective of this thesis is to explore and explain how positive action can be a conceptual building block in arriving at full and effective equality, which, in turn, encapsulates the meaning of equal treatment in a common European normative framework. Arguments, therefore, that are instrumental in the development and coherence of the analysis are presented in full, whereas peripheral considerations, notwithstanding the generic interest they may generate, are dealt with somewhat more laconically.

The thesis is divided into four parts, reflecting the gradual progress of the analysis along the lines of a coherent narrative.

Part I sets out the theoretical premises of the classical conception of positive action and highlights the problematic aspects of the latter. The analytical project begins early on in *chapter 2*. After brief terminological clarifications and a defence of methodological choices, the chapter sets out a preliminary conceptual framework to explore the relationship between equality and positive action in its classical formulation. The relationship is inevitably shaped by the understanding of positive action as a tool of anti-discrimination law, designed to counter the effects of past or present discrimination that result in certain social groups being disadvantaged or under-represented in areas of the public sphere.

The following two sections examine respectively two fundamental and interconnected problems of the classical conception of positive action that have attracted severe criticism in the literature. The first is the inconsistency between target groups and individual beneficiaries. The second problem relates to the way anti-discrimination law conceptualises social groups. It is argued that social groups are treated as singular entities which can somehow claim the allegiance of their members automatically. This is particularly important when it comes to tackling under-representation of a group in an area of the public sphere, and especially in candidature for elected office.

After identifying the problems inherent in the classical conception of positive action, the analysis in *Part II* turns to consider the principle of equal treatment within a European normative framework. The underlying assumption and primary objective of the thesis is that it is possible to identify a distinctly *European* conception of equality on the

basis of the combined rules and principles enshrined in EU law, on the one hand, and the European Convention of Human Rights, on the other.

Chapter 3 attempts to give this assumption normative bite, by suggesting that the harmonious co-existence of these two bodies of law during the past sixty years has gradually led to the emergence of a *European Legal Order of Rights* (ELOR). Within this novel and ever-developing construct, *equality* has a prime position, both as a right per se and as an overarching principle guiding the distribution and enjoyment of other rights. Positive action is an indispensable element of the discourse, as it constitutes the key to identify full and effective equality and distinguish it from other, non-meaningful conceptions of equality.

It is obvious, then, that the distinctly European meaning ascribed to the notion of full and effective equality and the relationship of the latter to positive action can only be found in the Luxembourg and Strasbourg jurisprudence, discussed in chapters 4 and 5 respectively.

Chapter 4 begins by challenging the preliminary conceptual framework of equality, set out in chapter 2, as too simplistic to account for the nuances that may appear within the EU system. Instead, a more refined taxonomy of EU equality law is put forward, featuring five analytical categories that aim to cover a wide spectrum of possible interpretations of the equal treatment principle. The second section of the chapter is devoted to the examination of the ECJ positive action case-law. The analytical purpose of the section is to consider the way the ECJ conceptualises positive action as a tool in the achievement of *full equality in practice*, according to the wording of Article 141 EC. At this stage of the enquiry, the term full equality in practice - equivalent to the term full and

effective equality that appears in the ECHR – is taken to indicate a general commitment to substantive equality. In this context, the main question is whether the ECJ has shifted from a formal equality to a substantive equality paradigm, as a significant portion of the literature seems to argue when considering the *Badeck* formula, which encapsulates the interpretative status quo of EU law on positive action. According to the latter, positive action can legitimately operate as a *tie-break* between *equally qualified* candidates, insofar as the preference allocated to the beneficiary is neither automatic nor unconditional.

Chapter 5 moves on to consider the second limb of the normative framework identified earlier as the European Legal Order of Rights. The focus here is on the interpretation of equal treatment under the Convention system and on the place of positive action therein. The chapter begins with a detailed assessment of the ECtHR's Opinion regarding the use of gender quotas by Signatory Parties when drawing up the list of candidatures for the "national" judge to serve on the Court itself. This is the only instance in which the ECtHR had an opportunity to consider the legality of quotas under the Convention and, as a result, the importance of the findings cannot be overstated. The ECtHR's conclusions appear to be in tandem with those of the ECJ with one important difference that renders the ECtHR approach more appealing for present purposes. Strasbourg does not *limit* legitimate quotas to those acting as a tie-breaker between *equally* qualified candidates. In the absence of a *Badeck*-type formula the ECtHR reasoning seems to accept that preference to *fully* qualified candidates from the under-represented group is permissible.

Building on these findings, the following section questions whether the Opinion is reflective of a more general shift in the conceptualisation of the equal treatment principle under the Convention. The ECtHR has often been criticised for adhering to a formal equality paradigm in its case-law. *Thlimmenos v. Greece*, however, may be indicative of a radical change in the Court's interpretative attitude, albeit carried out in a non-celebratory fashion. Interpreting the prohibition of discrimination under Article 14 ECHR, the Court found it to encompass a *state obligation* to afford different treatment to persons in considerably different situations. The abandonment of a rigid formal equality reasoning is coupled with the introduction of the new Protocol 12 of the Convention, discussed in the final section of the chapter. Taking its cue from the Preamble to the latter, which reaffirms the legitimacy of measures designed to promote *full and effective equality*, the section examines the extent to which the Protocol can deliver on its promises. In view of the reluctance with which Protocol 12 has been met and considering the relatively small number of ratifications, there is little room for optimism on this front.

Cautious reactions to the notion of full and effective equality, however, are not simply a matter of pragmatic concerns on the part of national governments regarding the additional regulatory burdens they would have to undertake. The problem, above all else, lies in the failings of the classical conception of positive action itself. The reason is none other than the "one size fits all" approach that seems to dominate both the interpretation of normative instruments and the general academic discourse.

Part III attempts to deal with the problem head on, by dissecting the concept of positive action into three dimensions, corresponding to the three principal areas of the public sphere in which it may operate.

Chapter 6 deals with positive action in the field of employment, termed “standard” employment so that it is distinguished from the third category discussed later on. The analysis begins with a presentation of the types of permissible measures and the grounds upon which these are premised. It then turns to evaluate the status quo regarding the legality of quotas in employment from a point of view of European law. Building on the analysis of ECJ case-law earlier on, the focus this time is on the *impact* of this case-law on national jurisdictions.

The last section of the chapter considers arguably the biggest obstacle to the use of positive action in employment. This is none other than the *merit* principle, which is at the heart of liberal theory and exemplifies the commitment of the latter to the primacy of the individual. The operation of merit as the ultimate criterion of selection in employment is also the main reason behind treating politics and the judiciary as separate categories for present analytical purposes, given that what counts as merit differs significantly in the context of each category.

Chapter 7 discusses positive action in politics, by comparing two national quota systems designed to address under-representation of women in elected public bodies. The analysis is premised on the idea that full equality in this context involves not only the treatment of under-represented groups but also that of the electorate as a whole. What is of particular importance is that the use of positive action in political candidatures is thought to fall outside the regulatory scope of EU law, which is designed in the first instance to cover the field of employment. Although it is accepted that candidature for elected office does not constitute employment, the view endorsed is that the requirement for full equality in practice encapsulates a general principle of Community law and

should, therefore, apply across the spectrum of social activity. The final section of the chapter considers alternative legal bases upon which the relationship between positive action and full equality in this particular area can be normatively assessed.

Chapter 8 deals with the third category in which positive action may operate, that is the *sensitive* areas of the public sphere, such as the judiciary. Diversity on the bench is a standard feminist claim and seems *prima facie* compatible with full and effective equality. In view of the institutional role of the judiciary, however, positive action in this case should be geared towards maximising democracy, by ensuring that the composition of the judiciary is to an extent reflective of the society it is expected to serve.

Chapter 9 serves a double purpose. First, it provides a comprehensive image of the normative status quo under European law, by reviewing the types of positive measures that can legitimately be used in each category of the public sphere and the conditions of permissibility. Second, it critically evaluates the conceptual interplay between the notions of *under-representation* and *disadvantage* that constitute normative prerequisites of positive action. The fact that these two terms are used, by and large, interchangeably in the literature obscures the justificatory rationale of positive action and reveals a significant lacuna in the foundations of anti-discrimination discourse.

Part IV reconstructs the concept of positive action within the framework of a theory of full and effective equality. It is argued, in *chapter 10*, that full and effective equality translates into an overarching legal principle of equal treatment, consisting in the right to indistinctibility of respect and the right to proportionality of concern. Positive action, in this regard, is an *expression* of equal treatment seen through the lens of proportionality of concern. This theoretical claim is tested in *chapter 11*, which explains

why positive action should not be considered as a form of special treatment. The positive action case-law of the ECJ is once again put under scrutiny, with a view to identifying how the notion of proportionality of concern can resonate with existing interpretations and expose inconsistencies in the Court's approach to full and effective equality. Finally, the penultimate section of the thesis uses proportionality of concern as a unifying theory that at once justifies the use of particular positive measures in employment, politics and the judiciary and defines the conditions under which these can be used.

PART I: THE CLASSICAL CONCEPTION OF POSITIVE ACTION

Chapter 2: THE CONCEPT OF POSITIVE ACTION: AN ATTEMPT TO UNRAVEL THE CONTROVERSY

2.1 Methodological Choices and Working Definition of the Classical Conception: The Context of Non-Discrimination Law

Positive action, affirmative action, preferential treatment, positive discrimination, reverse discrimination, parity, positive measures, quotas. These are the most commonly used terms, coined to account for a whole array of policies or legal provisions designed to serve as the spearhead of an active anti-discrimination project. Many of these terms are used almost interchangeably throughout the vast literature on the subject, in spite of their overt and inconspicuous differences. Linguistic choices in this area may demonstrate political or philosophical allegiances, as some of the terms are ideologically laden. Reverse or positive discrimination, for instance, automatically set the tone of the discourse by inviting the reader to think in terms of *exceptions to equal treatment* that may or may not be justified. Positive action or affirmative action, on the other hand, seem to take a more “sympathetic” or, at the very least, neutral stance towards the concept they describe, leaving open the possibility of understanding the relevant policies and rules as *fair in principle*.

Against this linguistic background the term positive action, employed consistently throughout this thesis, reflects a conscious choice. It is inspired by the conviction that equal treatment is not merely a formalistic principle of due process, but that it involves a

higher level of normative sophistication that cannot be reached through the reductionist conception of formal equality. It is also a generic term, wide enough to encompass all possible variants that relevant actors can come up with in the context of anti-discrimination law. Last but not least, it is the preferred term of the European Institutions, featuring both in Article 141(4) of the Treaty and in secondary instruments. Having said that, the bulk of the analysis will be devoted to the consideration a particular instance of positive action, namely *quotas*. The reason is obvious: if the arguments presented can justify positive action in its “strictest” form, then they are *a fortiori* applicable to less controversial types of measures favouring social minorities. With this in mind let us now turn to the substance of the concept.

According to a moderate, comprehensive and relatively non-controversial definition, positive action denotes the deliberate use of race- or gender-conscious criteria for the specific purpose of benefiting a group that has previously been disadvantaged or excluded from important areas of the public sphere on the grounds of race or gender respectively.¹ Two important points regarding the notion of group employed here become immediately obvious. First, any category of persons that have been or are being discriminated against on grounds of a shared characteristic should, in principle, be entitled to claim the status of a *social group* for the purposes of positive action.² In other words, there appears to be nothing in the definition of positive action to suggest that its

¹ Fredman, S. (2002). *Discrimination Law* Oxford University Press, p. 126.

² On a very significant discussion on the normative construction of the concept of social group see Young, I. M. (1990). *Justice and the Politics of Difference*, Princeton University Press., p. 42-48; Young, I. M. (1989). "Polity and Group Difference: A Critique of the Ideal of Universal Citizenship." *Ethics* 99(2): 250-274., p. 250-274.

use should be limited to particular social groups.³ Second, the benefiting groups may be either *disadvantaged* or *under-represented* as a result of the invidious use of the shared characteristic. The relationship, however, between disadvantage and under-representation is seriously under-theorised, which

The aim of the present chapter is to assess the traditional arguments articulated against the group-approach, especially with respect to its doctrinal position within the European legal order,⁴ and to critically consider what ought to constitute a “target-group” for positive action. In this regard three major issues will be identified and discussed: the potential contrast between the legal subject entitled to the benefits and the actual beneficiaries, the construction of group identity and, finally, the conceptual confusion between disadvantaged (or under-privileged) and under-represented (or excluded) groups.

³ This is, indeed, the rationale behind the ongoing expansion of the scope of anti-discrimination law towards a more inclusive approach. Besides race and gender, other human characteristics, such as age, ethnicity, disability and sexual orientation have been gradually added to the list of protected grounds of discrimination. Note, for instance, the phrasing of Article 14 ECHR and of Art. 1 of Protocol 12 to the Convention.

⁴ The term is used here in a broad sense, encompassing the general legal principles on equality and non-discrimination set out in primary and secondary EU legislation, as well as in the ECHR. In chapter 3 this normative space will be introduced as a distinct supranational legal order, the European Legal Order of Rights.

2.2 General Conceptual Framework: Three Approaches to Equality and Positive Action

Positive action is arguably one of the most controversial current legal issues. The theoretical debate, established in the 1960s, has been enriched with arguments coming not only from legal theorists, but also from all other actors and stake-holders: lawyers, judges, trade-unionists, economists, politicians and members of the disadvantaged and benefiting communities. However broad the field may be, the real question ultimately boils down to the underlying conception of equality one ascribes to and to the true meaning and consequences of equal treatment as a legal principle.

For introductory purposes, it would be useful to identify a preliminary analytical framework⁵ that seems to emerge from the literature. In this regard it is possible to distinguish three main approaches to positive action:⁶ the “symmetrical” approach, the “equal-opportunities” approach and the “substantive equality” approach. The first rejects positive action in principle; the second allows positive action within strict limits but seems generally uncomfortable with the idea of quotas and preferential treatment, while the third largely supports positive action, albeit not unconditionally.

⁵ For a more refined analytical categorisation in the framework of EU law see *infra*, chapter 4.1.

⁶ Fredman, S. (1997). "Reversing Discrimination." *Law Quarterly Review* 113(Oct): 575 - 600. Fredman's distinction is adopted here with certain reservations. First, it is not necessary for every contribution to the relevant discourse to fit comfortably within the specified conceptual boundaries of the three categories. It is possible to endorse the “substantive equality” approach that largely supports positive action and, still, reject positive action for reasons of inefficiency, as Dworkin correctly points out (see Dworkin, R. (2005). *Taking Rights Seriously*, Harvard University Press., p. 227 et seq.).

2.2.1 Symmetrical approach

The symmetrical approach relies conceptually on two limbs: first, the Aristotelian notion of formal equality, which requires to “treat likes alike”,⁷ and, second, a strong individualistic background that endorses the principle of state neutrality. It invokes an absolute moral prohibition against discrimination on the grounds of race or sex. If discrimination on those grounds is unfair, then it is unfair as such and it is insignificant whether those benefiting from the discriminatory practices are members of a *disadvantaged* group.⁸ Discrimination would amount in any case to the distortion of the principle of equality and, consequently, to a violation of justice.⁹ In this respect, discrimination cannot be justified by appeal to the idea of equality, since the latter is dependent upon the notion of justice, which suffers a breach by discrimination. Moreover, in this view justice is an a priori concept,¹⁰ formulated independently of its historical or political contexts and applies, therefore, in the same way under all circumstances, without reference to any prior distribution of goods or benefits, which may have already established an unequal status for individual or groups.

The symmetrical model asserts the primacy of the individual in two dimensions: *merit* and *responsibility*.¹¹ The merit principle requires that every individual be treated

⁷ It is essential to underline that the maxim “treating likes alike” comes, indeed, from Aristotle’s *Nicomachean Ethics* (book E), but the relevant passage has often been misunderstood and misinterpreted. This point will be discussed in more detail later on in this thesis, especially in chapters 4.1 and 10.2.1.

⁸ As Justice Powell of the U.S. Supreme Court declared in the famous Bakke case: “The guarantee of equal protection [under the U.S. Constitution] cannot mean one thing when applied to one individual and something else when applied to an individual of a different colour”.

⁹ “All discrimination is wrong *prima facie* because it violates justice; and that goes for reverse discrimination too” (ibid). Also see Newton, L. H. (1995). *Reverse Discrimination as Unjustified. The Affirmative Action Debate*. S. M. Cahn, Routledge.

¹⁰ Ginsberg, M. (1963). “The Concept of Justice.” *Philosophy* 38(143): 99-116. p. 100.

¹¹ Fredman, supra n. 1. For an interesting study of the historical roots of these liberal notions see Adkins, A. W. H. (1960). *Merit and Responsibility: A Study in Greek Values*, Oxford: Clarendon Press.

according to his or her own personal characteristics that are relevant to the situation under consideration. Thus, merit emerges as an objective criterion of distribution and is – at least *prima facie* – incompatible with any reference to race or gender whatsoever.

Responsibility is conceived solely on the basis of individual fault.¹² There must be a direct causal link between the mistake and the agent so that the latter is held responsible for it. In this way, an individual cannot bear any obligation to compensate for social ills that are not directly attributed to him or her. According to this argument, collective responsibility should be regarded as nothing more than an arithmetical addition of the responsibility of every individual that took part in the collective decision.¹³ So, positive action would only be fair if the individuals excluded from a benefit in favour of black people, women or members of a minority played some part in the history of discrimination against these groups. But even in that, rather improbable, case positive action would not satisfy the condition of judging people according to merit and would again be regarded as unfair.

Finally, the symmetrical approach deals with positive action under the light of the state-neutrality principle, which requires that a state has the same “attitude” towards its citizens, without favouring or disfavouring some among them, and that it intervenes the least possible in the *free market* economy.¹⁴ Positive action clearly contravenes this principle – the term in itself makes it obvious for that matter – since the state takes an

¹² Lavin, C. (2008). The Politics of Responsibility, University of Illinois Press., esp. pp. Viii et seq. (Preface).

¹³ This is not, of course, an uncontroversial view. See contra Cooper, D. (1968). "Collective Responsibility." Philosophy 43(165): 258-268.

¹⁴ See generally S. Wall and G. Klosko (eds.), Perfectionism and Neutrality: Essays in Liberal Theory, Rowman & Littlefield, 2003, and especially Introduction p. 1-30, and G. F. Gaus, Liberal Neutrality: A Compelling and Radical Principle, p. 137-166.

active stance in favour of specific groups and in many cases seeks to expand this favourable status into the private sector by exerting its normative powers horizontally.

2.2.2 Equal opportunities approach

The equal opportunities approach can be described as the “*third way*” to equality.¹⁵ This model dissociates from the narrow individualism of the symmetrical approach, recognising that the individual’s opportunities in life are determined to some extent by his or her initial social position and can be distorted by structural discrimination based on group membership. The equal opportunities approach, therefore, is committed to *levelling the playing field*¹⁶ by putting all individuals at the same starting point and partially accepts positive action as a means towards this end.¹⁷

At the point, however, that equality of opportunities has been achieved, the principle of state neutrality and the individualistic ideal of equal treatment based on merit regain their dominance. Under this notion, therefore, softer forms of positive action, such as single-sex training,¹⁸ are accepted as lawful means of ensuring equal *access* to opportunities, but the legitimacy of *result quotas* affecting the outcome of a selection process is generally contested. Preference to members of a disadvantaged or under-represented group at the final stages of a selection process can only be accepted under

¹⁵ Along the lines of Giddens’s third way to social democracy. See Giddens, A. (1998). The Third Way: The Renewal of Social Democracy, Polity Press.

¹⁶ Roemer, J. (1998). Equality of Opportunity, Cambridge University Press.

¹⁷ See for instance Williams, B. (1962). The Idea of Equality. Philosophy, Politics and Society P. Laslett and W. G. Runciman, Blackwell. 2nd Series., p. 125-126.

¹⁸ Burrows, N. and M. Robinson (2006). "Positive Action for Women in Employment: Time to Align with Europe?" Journal of Law and Society 33(1): 24-41.

strict conditions¹⁹ and only within certain strands of the equality of opportunity theory, most notably in the Rawlsian version of *equality of fair opportunities*.²⁰

What must be made perfectly clear is that the equal opportunities approach is, in fact, an umbrella term used to describe a wide range of “middle of the road” views on equality. It is, consequently, difficult to reach definitive conclusions regarding the exact way in which positive action should operate within this theoretical framework. For present purposes what can be plausibly argued is that theories committed to equality of opportunities are generally *not hostile* to the use of positive action in principle.

2.2.3 Substantive equality approach

Substantive equality is another umbrella-term used as an analytical proxy for a wide range of theoretical approaches to equality. In an attempt to shed some light in this area of the literature, Fredman²¹ proposes an analytical division into four distinct, yet overlapping,²² tenets: equality of results or equality of outcome;²³ substantive equality of

¹⁹ For the concretisation of these conditions within an EU law context see *infra*, chapter 4.2.

²⁰ Rawls, J. (1999). *A Theory of Justice*, Harvard University Press., section 12.

²¹ Fredman, S. (1999). A Critical Review of the Concept of Equality in UK Anti-Discrimination Law. *Independent Review of the Enforcement of UK Anti-Discrimination Legislation*, Cambridge Centre for Public Law and Judge Institute of Management Studies. **Working Paper no. 3**, paragraphs 3.7 - 3.19.

²² Barnard, C. and B. Hepple (2000). "Substantive Equality." *Cambridge Law Journal* 59(3): 562-585., at 564.

²³ Phillips, A. (2004). "Defending Equality of Outcome." *Journal of Political Philosophy* 12(1): 1-19.

opportunities;²⁴ equality in the enjoyment of substantive rights;²⁵ and a broad value-driven approach.²⁶

The common thread holding these approaches together, albeit loosely, is that they have all been born out of the need to identify and challenge the inherent limitations of formal or procedural notions of equality.²⁷ Unsurprisingly, most substantive theories choose to begin, either explicitly or implicitly, from an *a contrario* position and attack the foundational propositions of the symmetrical approach: formal justice, individualism and state neutrality.²⁸

The basic argument against a non-interventionist, symmetrical approach is simple. Doing nothing will inevitably lead to the perpetuation of the status quo and will, therefore, legitimise existing inequalities without questioning their fairness. Substantive approaches, then, underline the paradoxical nature of the principle of neutral state. Neutrality does not entail merely abstinence from action, but also a policy of non-participation in social conflicts, whereby all parties are treated the same in order not to affect the result of the conflict either way. A policy of non-intervention in a society built upon centuries of discrimination will, inevitably, favour the dominant groups by not challenging the status quo. Consequently, it will facilitate the continuity of the existing balance - or, rather, imbalance - in the distribution of power and opportunities in every aspect of social life.

²⁴ Fredman, supra n. 21, paragraph 3.12. It is obvious that this tenet of substantive equality seems to fit better under the equal opportunities approach. This apparent inconsistency that throws into disarray the distinction between equality of opportunities and substantive equality is one of the principal reasons behind the attempt for a more refined analytical distinction in chapter 4.1.

²⁵ Fredman, S. (1998). Equality Issues. The Impact of the Human Rights Bill on English Law. B. S. Markesinis, Oxford University Press., at 115-118. See also *infra*, chapter 5.1.

²⁶ Barnard and Hepple, supra n. 22, p. 567.

²⁷ *Ibid*, p. 526.

²⁸ Fredman, S. (1997). Women and the Law, Oxford University Press., p. 380.

Positive action, then, is a legitimate weapon in the hands of the state when attempting to redress inequalities. Under substantive notions of equality the state has a clearly redistributive role and a positive obligation to correct the results of discrimination, past or present, direct or indirect. It must be said, however, that not all proponents of substantive equality would go so far as to argue that there is a *positive obligation* to take *positive measures*. From an analytic point of view, this may be identified as the principal difference between equality of outcome and other, less “aggressive” notions of substantive equality.

2.3 The Paradox of Positive Action: Group-Approach and Individual Beneficiaries.

One of the most problematic facets of positive action is its insensitivity to the actual distribution of benefits within the under-privileged or under-represented groups. Irrespective of the nature of benefits – usually preferential treatment, but also allocation of social resources²⁹ - there are several arguments asserting the theoretical incoherence of group-oriented positive action.

The first line of argument posits a restitutionary assumption as the governing principle of positive action and identifies causal discrepancies between the status of victim and the enjoyment of benefits. Group rights to compensation can only be justified, in this view, insofar as the harm of past discrimination cannot be analysed into separate harms to each individual apart from her being a member of the group.³⁰ With rare but notable exceptions,³¹ group membership might have been the “vehicle” used to justify discrimination in the first place³² by upholding its “legitimate causes”,³³ but the

²⁹ While positive action programmes are usually designed in order to give preference to a member of the target group in a selection process, the benefits may also consist in financial allowances granted on the basis of gender or ethnicity. See the *Griesmar* case (Case C-366/99, *Griesmar v. Ministre de l'Economie* [2001], ECR I-9383), where the French Civil and Military Retirement Pensions Code allocated a “service credit to female civil servants” for each child they had brought up during their working career.

³⁰ Goldman, A. H. (1979). *Justice and Reverse Discrimination*, Princeton University Press, p. 83.

³¹ I assume that the Holocaust qualifies as the paradigm exceptional case of a group suffering collectively to such an extent that individualisation of harm, even if it were possible, would fail to encompass the magnitude of the event and provide an appropriate ground for just compensation. *Mutatis mutandis*, this might also be the case of the indigenous populations in North America (Red Indians), Australia (Aboriginals) and colonial states in Africa. The relevant issues will be discussed further in connection with the problems concerning group identity.

³² Philosophers of the calibre of Schopenhauer have, unfortunately, been instrumental in attempts of “epistemological” justification of women’s inferiority, presenting them as the “sexus sequior, the inferior second sex in every respect” (Schopenhauer, A. (1970). *On Women*. Arthur Schopenhauer: Essay and Aphorisms. R. J. Hollingdale, Penguin.).

³³ A carefully structured educational system in Nazi Germany, alongside an intense and multilevel propaganda, accomplished to empower the scientifically ridiculous Gobineau doctrine with relative

detrimental effects were bestowed upon specific individual members. It follows that the beneficiaries of positive action ought to be selected on the basis of their individual victim-status and not merely take advantage of the group's unfortunate history in which they did not partake.

Closely related to the above is the objection to the idea of group compensation as such, which is deemed appropriate only as long as the group structurally resembles a corporation or a group of enterprises.³⁴ The conditions, then, that a group must meet in order to be entitled to compensation are the following: Similarity of purpose and interaction among its members, specific damages that cannot be individually assigned and an official representative body authorised to receive and further distribute compensation.³⁵ And even if some social or ethnic groups can claim that they fulfil the first requirement, the second is met in exceptional circumstances, whereas the third is typically absent from the relevant discourse. The latter is far from surprising: The existence of analogies between social groups and enterprises, apart from being a counter-intuitive assumption, is little avail here, since compensation for past discrimination is simply one among the declared aims of positive action.

From a slightly different perspective, random benefit distribution within the group is thought to reveal the self-defeating character of positive action, since it reinforces the existing hierarchical structures of the group itself and perpetuates inequalities among its members. In practice, it is said, positive action programmes are tailored – intentionally or

credibility. As a result, a generation of Germans (or, at least, a significant number of the populace) was brought up to believe in the natural superiority of the Arian race and its historic destiny to dominate over the supposedly inferior nations of the world.

³⁴ Fullinwider, R. K. (1980). The Reverse Discrimination Controversy: A Moral and Legal Analysis Rowman and Littlefield., p. 57-65.

³⁵ Goldman, *supra* n. 30, p. 84-88.

not – in a way favourable to the top stratum of the target group. This is particularly obvious when it comes to the tie-break rule, which applies to equally qualified applicants: A member of a disadvantaged group able to live up to the merit standards of all other applicants is unlikely to suffer personally from disadvantage and, in this respect, does not properly “represent” the group, being better-off than the vast majority of his or her fellow members.³⁶ Therefore, positive action as compensation will be in reverse proportion to individual harm caused by discrimination³⁷ in that the actual beneficiaries are, in fact, those who deserve it the least.³⁸

More interesting are the arguments that recognise the multidimensional purpose of positive action, as a mechanism aiming not only to redress past disadvantage but also to enable the representation of the interests of socially excluded groups and to foster diversity.³⁹ The major objection here appears to be one of efficiency. How successful can positive action be in its quest for pluralism and diversity, insofar as it remains committed to a strictly individualistic understanding of equal opportunities? In other words, if group representation and diversity constitute legitimate state aims with a view to contributing to group welfare as well as to social utility,⁴⁰ the merit principle should be overridden. In this case, however, positive action would effectively lower the standards of selection in

³⁶ Posner, R. (1974). The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities. Affirmative Action and the Constitution. G. Chin. 1.,p. 249-280. As it is obvious from the title of the cited article, Posner uses his argument solely on a race-discrimination context, but it can also apply on sex-discrimination, at least in its abstract form.

³⁷ Goldman, supra n. 30, p. 90.

³⁸ Goldman, A. H. (1975). "Reparations to Individuals or Groups?" Analysis 35(5): 168-170.

³⁹ Fredman, supra n. 1, p. 150.

⁴⁰ Instead of many see Dworkin, R. (2002). Affirmative Action: Does It Work? Sovereign Virtue R. Dworkin, Harvard University Press., especially p. 398-400.

order to favour less qualified candidates from the target groups.⁴¹ Consequently, it would become a liability to the free market economy⁴² and contradict fundamental theoretical precepts of liberalism, such as state neutrality and formal equality of treatment.

From the opposite angle now, if positive action is designed as a tie-break rule, it is compatible with the liberal interpretation of equal opportunities but it essentially undervalues the aims it purports to serve. Pluralism and diversity bear only a relative significance, always subject to the primacy of the individual, even at the expense of the target-groups' interests.⁴³ In this regard, however, positive action becomes counter-productive: Giving preference to an already well-qualified applicant on the grounds of gender or race may produce considerable adverse effects for the group as a whole, by stigmatising it and generating social resentment against it⁴⁴ or by reducing incentives within the group for optimum individual performance.⁴⁵

A plethora of counter-arguments have been articulated in response to the objections presented so far, many of which are, indeed, noteworthy. However, it should be made clear that many authors find it appropriate to address positive action in its entirety, without dealing with each problem in relation to the specific aspect of the concept that triggers it. In contrast, this thesis deliberately begins with the assumption that positive action takes up a legal task that has to be performed in the optimum way and within the limits set by general legal principles. The correct question to ask, then, is

⁴¹ Loury, G. (1992). "Incentive effects of Affirmative Action." Affirmative Action revisited: Annals of the American Academy of Political and Social Science 523: 19-29.

⁴² Abram, M. (1986). "Affirmative Action: Fair Shakers and Social Engineers." Harvard Law Review 99(6): 1312-1326, p. 1322.

⁴³ This is, by and large, the approach adopted by the European Court of Justice (ECJ) ever since *Marschall* (Case C-409/95, *Marschall v. Land Nordrhein Westfalen* [1997], ECR I-6363). See *infra*, chapter 4.2.

⁴⁴ Sowell, T. (1999). "The Other Side of Affirmative Action." Jewish World Review 8.

⁴⁵ Loury, G. (1997). "How to mend Affirmative Action." The Public Interest (107): 33-43.

whether the currently dominant conception of positive action embodies the best possible understanding of the project. To this end, it is crucial to analytically identify the problematic aspects and examine them separately before engaging in an overall assessment of the project and propose necessary modifications.

The focal point of the present chapter is to evaluate whether and under which circumstances the group-approach adopted by the classical conception threatens the legitimacy of positive action. The fundamental problem in this connection seems to be the disparity between intended and actual beneficiaries, although not necessarily from a compensatory standpoint.⁴⁶ If the legal mandate of positive action is to promote equality for under-privileged and under-represented groups, the lack of control as to the distribution of benefits within the group may prove an insurmountable problem, insofar as the valuable effects for the group are peripheral and do not match the original expectations.

Typically in the relevant discourse, a substantial part of the debate focuses on whether the overall outcome of positive measures enhances the social position of the target-group in practice. As illustrated earlier, these concerns are both reasonable and useful, since they emphasise the importance of pragmatic criteria as to the success of the whole enterprise. The fundamental shortcoming, however, of arguments invoking the inefficiency of positive action due to its unintentional adverse effects⁴⁷ is their hypothetical status. They rely on sketchy empirical evidence⁴⁸ and they rarely take into

⁴⁶ The serious difficulties arising from the conception of positive action as a means to redress past disadvantage will be discussed in the relevant chapter.

⁴⁷ In addition to the sources already cited see also Thernstrom, S. and A. Thernstrom (1997). America in Black and White Simon and Schuster. and Steele, S. (1994). A Negative Vote on Affirmative Action. Debating Affirmative Action: Race, Gender Ethnicity and the Politics of Inclusion N. Mills, Delta.

⁴⁸ R. Dworkin, *supra* n. 40, p.389.

account the different nuances of discrimination corresponding to the social context in which it occurs.⁴⁹ Moreover, they ignore that social response to positive action, far from being uniform, differs immensely in Europe compared to the United States and equally different are the current legal positions on the matter as reflected in the recent jurisprudence of the ECJ and the US Supreme Court respectively. And, in any case, it is exactly in inherently xenophobic, racist or sexist societies, where public opinion resents or puts “an extra burden” upon “affirmative action babies”,⁵⁰ that positive measures are absolutely vital in order to counter the existing pattern of explicit or tacit discrimination. What is more important, however, is that arguments tend to overshadow the key legal problems of proportionality between legitimate ends and the means employed to achieve them and of consistency between ends and actual results, which ought to be the subjects of prior scrutiny.

Inevitably, the lack of alternatives to the non-financial nature of positive measures plays an important role in explaining the disparity between intended and actual beneficiaries.⁵¹ Preferential treatment in employment and higher education can ultimately be enjoyed by individual members of the disadvantaged group and not by the group as a whole, but this fact alone puts in no serious jeopardy the legitimacy of the project, as long as we acknowledge the multidimensional – and not just compensatory - character of positive action. Difficulties arise, however, when the specific individual beneficiary has

⁴⁹ See for instance Wasserstrom, R. A. (2001). *Racism and Sexism. Race and Racism*. B. Boxill, Oxford University Press., Thomas, L. (2001). *Group Autonomy and Narrative Identity: Blacks and Jews. Race and Racism*. B. Boxill, Oxford University Press.

⁵⁰ See Sigelman, L. and J. Todd (1992). "Clarence Thomas, Black Pluralism and Civil Rights Policy." *Political Science Quarterly* 107(2): 231-248., p. 31-248. Justice Clarence Thomas is regarded in the U.S. as a “classic example of an affirmative action baby”.

⁵¹ This line of argument invokes a form of the *double effect doctrine*: the elimination of positive measures altogether would lead to no better result for the target-groups. Therefore, until a preferable alternative is proposed, positive action remains a plausible option.

clearly not suffered from the detrimental effects of discrimination against the group and is not in a disadvantageous position on a personal level.

Let us consider the following example: A well-off female (F) applies for a directorial position in the civil service and, after the consideration process, she is found to be equally qualified⁵² with two of her male co-applicants (M1 and M2 respectively). According to the ECJ's crystallised jurisprudence⁵³ a legal provision giving preference to the female applicant on the grounds of her gender is compatible with the right of all citizens to equal opportunities, subject to the inclusion of a saving clause.⁵⁴ The latter ensures that priority to equally qualified female candidates⁵⁵ is neither automatic nor unconditional and that there exists a prior objective assessment of the specific personal situations of all applicants involved⁵⁶ To the extent that this formulaic approach represents the currently dominant strand in EU law, it is essential to test the validity of any working hypothesis against it.⁵⁷

⁵² Equal qualification here is taken to mean that the applicants are closely matched in every relevant respect and not just that they fulfil certain minimum requirements. The difference between these two possible formulations of a selection process will be further pursued in relation to the merit principle (see *infra*, chapter 6.2.4).

⁵³ After *Marschall* the Court reiterated this position in *Badeck* (Case C-158/97, *Badeck v. Landesanwalt beim Staatsgerichtshof des Landes Hessen* [1999], ECR I-1875, 289). For a detailed discussion see *infra*, chapter 4.2.

⁵⁴ Fredman, *supra* no. 1, p.139.

⁵⁵ Obviously the same rule should apply in principle for members of other disadvantaged or under-represented groups, such as ethnic or racial minorities.

⁵⁶ *Badeck*, para 23.

⁵⁷ The model of positive action examined in this example is that of the tie-break rule, where preferential treatment is granted to an equally qualified applicant from a target-group. The reason for choosing the mildest –hence, less controversial – form of positive action is that a failure to justify it unequivocally would by definition render any other form of positive action virtually unjustifiable.

The governing principle in this analytical structure remains that of individual merit,⁵⁸ which can be overridden in order to favour under-privileged or under-represented groups, as long as a proviso allows for an objective inter-personal comparison of candidates on the basis of their personal situations. Consider, therefore, that one of the male applicants in the example comes from an upper socio-economic background, whereas the other originated from the poorest rural areas of the country and had to overcome a number of obstacles to achieve his academic and professional qualifications. Assuming that financial status and socio-economic background are constitutive elements of “the specific personal situations” taken into account under the savings clause, it is hard to imagine how preference is to be allocated here. If the tie-break rule applies, the term “group disadvantage” becomes conceptually distinct from and normatively prior to “disadvantage” per se, since the interests of the group are given precedence even when represented by a non-disadvantaged member vis-à-vis a genuinely disadvantaged – though not categorised as such – individual.⁵⁹ On the other hand, if the rule is overridden in the light of the proviso, positive action is left with a dangerously narrow scope of application that undermines its declared purpose.

⁵⁸ The ECJ after *Marschall* reaffirmed the legitimacy of the tie-break rule subject to a savings clause, but in parallel made it clear that positive measures aspiring to a substantive notion of equality are subordinate to the primacy of the individual (see Case C-407/98, *Abrahamsson v Akrich* v Home Office, Judgment of 23 September 2003.).

⁵⁹ The problem also arises in the context of competing claims of different under-privileged groups, especially when they are “conveniently classified as ethnic minorities” (Fredman, *supra* n. 1, p. 159), although in this case it is primarily a matter of fair allocation of benefits among equally justifiable claims. For a comprehensive discussion on the difficulties in dealing with disadvantage in the multicultural British society see Modood, T., R. Berthoud, et al. (1997). *Ethnic Minorities in Britain: diversity and Disadvantage. The Fourth National Survey of Ethnic Minorities in Britain* Policy Studies Institute., chapter 10.

This case presents a challenging conundrum: The success of promoting “full and effective equality”⁶⁰ depends on accommodating two competing sets of interest, namely those of the disadvantaged group and those of the disadvantaged individual applicant. The oxymoron of favouring a “privileged” individual participating in an under-privileged group has been a cardinal issue in the discourse. Many advocates of positive action suggest that even in this paradoxical situation there exist significant benefits for the group that enhance its social position. The symbolic power of affirming our general and unassailable commitment to non-discrimination and equality by upholding positive measures in favour of historically victimised social or ethnic groups can prove an indispensable weapon in the fight for a fair, pluralist and democratic society. The conceptual weakness of the argument is obvious: surely, if the daughter of the United States” Secretary of State takes advantage of a positive measure on the grounds of her being an African-American female, the negative symbolic connotations will prevail across the social spectrum. Moreover, the typical resort to the “role-model” argument⁶¹ causes further confusion as it relies upon an assimilationist notion of equality,⁶² which seems to be in direct contradiction with the aim of diversity.⁶³ Especially under a conformist ideal of assimilation,⁶⁴ where disadvantaged groups are expected to conform to predetermined norms, diversity turns out to be a tragic irony.

⁶⁰ This is the phrasing adopted in the preamble of Protocol 12 to the European Convention of Human Rights. Article 141 para 4 of the Treaty of Amsterdam (former art. 119) contains the equivalent term “full equality”.

⁶¹ Among many see Parekh, B. (2001). *Integrating Minorities*, Institute of Contemporary Arts.

⁶² Young, I. M. (2001). *Social Movements and the Politics of Difference*. *Race and Racism* B. Boxill, Oxford University Press.

⁶³ Quite interestingly, however, the role-model argument is usually employed in conjunction with diversity (see Fredman, *supra* no. 1, p. 156-158). The tension between these ideas will be thoroughly examined in relation to the problem of group-identity.

⁶⁴ Young, *supra* no. 62, p. 393.

Most importantly, however, the arguments emphasising the indirect benefits of positive action for the target-groups lose focus of the explicit legal mandate, which is the promotion of equality. In this regard, the major legal dilemma is how to tackle disadvantage and under-representation as such and not necessarily within the stringent conceptual or normative framework of the classical group-approach. To this end it is imperative to rethink the notion of group in positive action, define clearly what disadvantage stands for and what is its relation with under-representation and, finally, determine how they ought to be dealt with.

2.4 Positive action and the legal perception of group identity.

One of the most challenging tasks for contemporary legislators, judges and policy-makers is to adapt domestic legal orders to the emerging multicultural circumstances of the democratic polity. The reconfiguration of a legal system with a view to moving away from the archetypal conceptions of pluralism confined within the relatively homogeneous nation-state⁶⁵ is by no means an easy task. The general aim, according to the legal mandate for full and effective equality, is to reshape political institutions so as to take into account diversity within the citizenry and existing inequalities among social groups.⁶⁶ While many theorists have focused recently on this possibility,⁶⁷ a number of political thinkers⁶⁸ emphasise the lack of homogeneity within the identified groups themselves and argue for the need to realise their multifaceted, fluid and creative character.⁶⁹

The problem, however, is not one that has to do only with social groups themselves. It is the *law* itself that seems to fail to internalise groups as a constitutive

⁶⁵ The idea of homogeneous nation states is open to debate, as far as the European historical context is concerned (see Loughlin, M. (2003). The Idea of Public Law, Oxford University Press., p 16). In various cases, former Yugoslavia being an eloquent exemplification, the existence of a sovereign state does not entail a uniform national identity that not only supersedes religious or other peripheral allegiances but also transforms individual subjectivities into a concrete collective consciousness. This account, however, fails to encapsulate the historical and socio-political reality in the vast majority of European states constituting the so-called "old Europe", where a strong national identity is embedded in the psyche of the populace as both a constitutive element of its collective political existence and a bond ensuring social cohesion and historical continuity.

⁶⁶ Bickford, S. (1999). "Reconfiguring Pluralism: Identity and Institutions in the Inegalitarian Polity." American Journal of Political Science 43(1): 86-108.

⁶⁷ See for instance I. M. Young, *supra* no. 2; Phillips, A. (1993). Democracy and Difference, Pennsylvania State University Press.; Kymlicka, W. (1989). Liberalism, Community and Culture, Oxford University Press.

⁶⁸ Anzaldúa, G. (1990). Making Face, Making Soul: Haciendo Caras, Aunt Lute Foundation.; Spellman, E. (1988). Inessential Woman, Beacon Press.

⁶⁹ See Bickford, *supra* no. 66., p. 87.

element of the normative construct. Within the equality discourse the place and functional importance of groups appears to be severely under-theorised.⁷⁰ As Collins shrewdly observes, the principle of equal treatment entails that “different groups should be treated equally (in otherwise similar circumstances)” but it is effectively silent on “how these groups should be *composed*” [emphasis added].⁷¹

In any case the legal perception of group identity, at least as far as positive action is concerned, can be described *prima facie* without reference either to theories of pluralism or to “identity politics”. According to its classical conception positive action belongs systematically to the normative platform of discrimination law. In this respect, what differentiates “groups” from legally non-significant (for the purposes of positive action) clusters of people is the common denominator used as grounds to discriminate against them. The female gender qualifies as such a denominator, since it has been *per se* a basis of discrimination; hence women constitute a disadvantaged group.⁷² The same reasoning applies in relation to any other social or natural characteristic (race, ethnicity, age, sexual orientation, disability) that has been employed in violation of the equal treatment principle. The notion of group required here is a rather “thin” one, designed to include only those elements necessary in identifying victimised and excluded groups. Such a notion is not particularly sensitive to socio-political or anthropological deliberations on identity.

⁷⁰ With the notable exception of Young that has devoted much of her philosophical work on exactly this area. See particularly I. M. Young, *supra* no. 2, chapter 2.

⁷¹ Collins, H. (2003). “Discrimination, Equality, and Social Inclusion.” *Modern Law Review* 66(1): 16-43., p. 28.

⁷² Within the framework of discrimination law disadvantaged can only be interpreted as directly or indirectly resulting from unjustified discrimination.

This story of what counts as a group for positive action, however, is inherently problematic due to its over-inclusivity. Throughout human history a number of natural characteristics have provided a convenient plateau of unequal treatment to the individuals bearing them.⁷³ The list is virtually endless, especially when we contemplate that certain characteristics, such as body weight, have varied in social status and connotations, corresponding to divergence in social circumstances, beliefs or preferences.⁷⁴ Under this thin notion of group all individuals that have suffered from discriminatory behaviour on the basis of a shared morally irrelevant characteristic – whatever that may be, from hair length to political convictions – can plausibly in principle claim the status of a group. The question whether they are entitled to the special protection afforded by positive action becomes then a matter of factual considerations, concerning the burden of proof (in cases of indirect discrimination), the persistence of discriminatory practices and the severity of their detrimental effects.

A further clarification needs to be made in this connection. Classical positive action applies when *discrimination* has either provoked some form of disadvantage to the target-group or when it constitutes the reason for the group being under-represented in areas of the public sphere. Thus, the semantic differential between women and a non-significant (hence not protected) cluster of individuals may lie in the nature and the scale of the effects produced by discrimination against them. To accept this view, however, would be a serious conceptual mistake, leading to unintelligible results. If we do not rely

⁷³ Unequal treatment here may amount either to discrimination or to allocation of special privileges, in accordance with the high or low social esteem related to the characteristic.

⁷⁴ The standards of beauty for the female body as reflected in the works of art changed dramatically from the classical antiquity to the Renaissance and then again from the Renaissance to the modern age. Furthermore, excessive body weight is still regarded as a sign of social status in certain “primitive” African tribes.

on a thicker notion of group, premised upon preconceived categories, it is impossible to draw a plausible distinction between groups and “non-groups” solely on the basis of discrimination and its results. The nature of disadvantage women had to undergo as the “inferior” gender cannot differ in its essentials from that of American communists during McCarthyism⁷⁵ or HIV patients, although their particular experiences may vary.⁷⁶ All the above were subjected to unequal treatment, their social position was adversely affected and they have an equally justifiable legal claim to the allocated benefits.

Restricting positive measures to a limited number of social groups⁷⁷ appears to be instrumental to the viability of the project, but also to the resonance with its philosophical underpinnings. As explained earlier, the liberal vision of equal opportunities inspires the classical conception of positive action, infused with the recognition that a more substantial understanding of equality is *sine qua non* to the fair diffusion of opportunities throughout the social spectrum. The challenge to remove barriers without building new ones and, at the same time, to uphold the primacy of the individual requires a concrete notion of disadvantaged and under-represented groups.

Inevitably, the law has to deal with problems arising from group-identity head on. This signals the shift of our analysis towards a more traditional notion of group as a central unit of the social order that cannot be defined solely through the reductionist lens

⁷⁵ For a detailed account of persecutions and their various forms against American communists in the McCarthyist era see Fried, A. (1996). McCarthyism, The Great American Red Scare, Oxford University Press.

⁷⁶ It is worth noting that positive action purports to deal with the ongoing effects of past discrimination. Therefore, the argument that anti-communism in the United States no longer exists is invalid (even if true), because all that needs to be proved is that today’s reality has been shaped by an unfair past. This reasoning applies irrespective of which underlying conception prevails as to the aims of the whole project (retribution for past discrimination or removal of present barriers). Consequently objections to the legitimacy of group compensation are irrelevant insofar as positive action is not conceived in terms of compensation.

⁷⁷ This does not mean that there should be *numerus clausus* of eligible groups, but that the set of criteria identifying an entitlement ought to be clear and pre-determined.

of discrimination suffered. The question remains whether the legal perception of groups fits well in social reality and, most importantly, whether positive action provides an adequate explanatory theory for its criteria of selecting among the in principle equally qualified groups.

The concept of positive action is premised upon a pluralist theory of society, acknowledging by definition the existence of multiple groups within the citizenry.⁷⁸ However, the extent to which group-membership defines an individual's personality and, consequently, the body politics itself is open to debate. Interest group pluralism, dominant in political theory and political science until the 1970's,⁷⁹ underlines the cardinal importance of group allegiances and maintains an understanding of the democratic polity as a plateau for bargaining among interest groups.⁸⁰ In this view the law performs a purely regulatory function, establishing rules for fair bargaining and ensuring a minimum overall balance for the sake of social stability. At the opposite end of the spectrum, the currently most prominent strand of political theory develops a normative conception of citizenship embedded with a concern for the public good that overshadows parochial group interests.⁸¹ The role of law here is much more complex and subtle, since it has to uphold social integrity without becoming insensitive to difference and without oppressing individuality.

⁷⁸ Otherwise it would be unintelligible to afford special treatment or allocate benefits to disadvantaged groups. In this sense it could be argued that the concept of positive action is non-individualistic in principle.

⁷⁹ Bickford, *supra* no. 66, p. 89.

⁸⁰ Dahl, R. A. (1956). A Preface to Democratic Theory, Chicago University Press.; Truman, D. (1951). The Governmental Process, Knopf. Interesting analogies can be drawn between interest group pluralism and contractarian thinking in legal philosophy.

⁸¹ Barber, B. (1984). Strong Democracy, University of California Press. The idea of concern for the common good or the general welfare permeates political thought since Aristotle and can hardly be credited to modernity as an original intellectual achievement.

Regardless of which of the above conceptions of pluralism one accepts, positive action's imperative is to cope with inequality among groups as well as among individuals. In this respect, it is in perfect agreement with several critics of interest group pluralism, who argue that social and political institutions systematically privilege some groups at the expense of others, due to structural deficiencies.⁸² This line of argument is central to feminist critiques of the law's inherent logic that doctrinally legitimises particular social relations and creates or sustains illegitimate hierarchies.⁸³ Quite interestingly, the various strands of feminist jurisprudence⁸⁴ seem to unite through the underlying belief that social order – hence legal order as a social construct – is inherently patriarchal.⁸⁵

The problem with the feminist approach to group inequalities lies in its parochial understanding of group-identity, concerning both women themselves and the other social or ethnic groups. Although most feminist theorists identify, as mentioned above, the “male norm” in law as perpetuating patriarchal hegemony,⁸⁶ their suggested methods to cope with existing inequalities differ dramatically from each other.⁸⁷ These “academic”

⁸² Greider, W. (1992). *Who Will Tell the People?*, Simon & Schuster.

⁸³ Menkel-Meadow, C. (1988). "Feminist Legal Theory, Critical Legal Studies and Legal Education or "The Fem Crits Go to Law School". *Journal of Legal Education* 38(1-2): 61-85.

⁸⁴ Cain, P. (1989-1990). "Feminism and the Limits of Equality." *Georgia Law Review* 24: 803-847.; Tong, R. (2009). *Feminist Thought: A More Comprehensive Introduction*, Westview Press.

⁸⁵ Bender, L. (1988). "Lawyer's Primer on Feminist Theory and Tort Law." *Journal of Legal Education* 38(1-2): 3-46.

⁸⁶ Wishik, H. (1985). "To Question Everything: The Inquiries of Feminist Jurisprudence." *Berkeley Women's Law Journal* 1.

⁸⁷ To mention but a typical example, MacKinnon's influential ideas (see MacKinnon, C. (1987). *Feminism Unmodified: Discourses on Life and Law*, Harvard University Press.) on gender equality as an issue of domination and power distribution establishing male supremacy and female subordination have been heavily criticised by other feminist theorists for perpetuating the stereotype of women as victims (Harris, A. (1990). "Race and Essentialism in Feminist Legal Theory." *Stanford Law Review* 42(3): 581-614.) and for embracing a deterministic vision of male-female relations (Finley, L. (1988). "Nature of Domination and the Nature of Women: Reflections on Feminism Unmodified." *North Western University Law Review* 82:

differences reflect, to a certain extent, the lack of consensus among women themselves as to what binds them together as a social (and not merely biological) group. This difficulty becomes even greater when it comes to *heteronomous* identification, that is when a group's common identity is decided from an external, objective point of view, as in the implementation of adequate legal measures tackling disadvantage and under-representation. In other words, individual eligibility for positive action schemes depends upon group-membership, which in turn can only make sense within a pre-established framework of legally defined social groups.

An interesting complication of the matter emerges when discrimination against the group becomes an integral part of its identity. It was proved earlier that law cannot plausibly premise its understanding of groups solely upon a "reflexive" definition, focusing on the social reaction towards a category of citizens.⁸⁸ But when discriminatory practices and behaviours have a hegemonic presence in the grand narratives of a social or ethnic minority, they become indispensable elements in the historical process of collective self-determination. The case of African-Americans in the United States exemplifies this analysis⁸⁹ and the works of Critical Race theorists⁹⁰ have been

352-386.). On the other hand, the rhetoric of difference, emphasising the distinct female moral vision, which encompasses values of caring and relational connectedness and calls for equal weight to be given to women's "different voice" (Gilligan, C. (1982). *In a Different Voice: Psychological Theory and Women's Development*, Harvard University Press.; West, R. (1988). "Jurisprudence and Gender." *The University of Chicago Law Review* 55(1): 1-72.), has proved no less controversial, especially with regard to its essentialism (a critique also addressed to MacKinnon).

⁸⁸ Apart from what has already been argued it should also be brought to attention that such an understanding would contradict fundamental and universally accepted legal principles, especially the right to self-determination.

⁸⁹ This position is by no means uncontroversial. See contra Thomas, L. (2001). *Group Autonomy and Narrative Identity: Blacks and Jews. Race and Racism*. B. Boxill, Oxford University Press. Thomas claims that contemporary Jews have group autonomy despite (and not because of) the Holocaust, whereas on account of American slavery contemporary blacks do not.

instrumental in enriching “mainstream” jurisprudence with a pluralist vision, as well as in pointing out the hypocrisy of the “role-models” diversity that allows blacks to become white and women to become men.

The idea of racial distinctiveness,⁹¹ however, provides only useful insights and not definitive answers on how to identify target-groups for positive action. The inherent conceptual limitations and the socio-historical specificity⁹² of the relevant arguments illustrate the peripheral character of such an approach. Moreover, the extent to which the assumptions of CRT embody in fact the “public opinion” of the community they allegedly represent is highly debatable.⁹³ But even if such criticism can be dismissed on the basis of empirical evidence, serious objections ought still to be raised from the perspective of equality between two or more disadvantaged or under-represented

⁹⁰ Critical Race Theory (CRT) emerged in the United States in the late 1980's as an offshoot of Critical Legal Studies, when racial minority scholars established “an African-American movement” in legal studies, in order to approach the problems of race from the unique perspective of African-Americans. See Delgado, R. and J. Stefancic (1993). “Critical Race Theory: An Annotated Bibliography.” *Virginia Law Review* 79(2): 461-516..

⁹¹ Crenshaw, K. (1988). “Race, Reform and Retrenchment: Transformation and Legitimation in Anti-Discrimination Law.” *Harvard Law Review* 101(7): 1331-1387.

⁹² The construction of ethnic identity, as well as the legal perception of it, differs in many significant respects from the construction of racial or social identity of minority groups. Although analogies can be drawn, it should be underlined that racial distinctiveness and the very concept of “African-Americans” transcend national identities and, in this way, it effectively annihilates their meaning. The common denominator is *latu sensu* African origin in conjunction with slavery, without any reference to state or nation of origin. Therefore, the arguments of CRT, even if valid, correspond to a specific socio-historical context, outside which they appear dangerously oversimplifying.

⁹³ In relation to positive action see Kennedy, R. (1990). “A Cultural Pluralist Case for Affirmative Action in Legal Academia.” *Duke Law Review* 660: 705-757. Kennedy's extremely controversial article launches a forceful criticism against several central statements of CRT. In particular he challenges (p. 1749): “(i) the argument that on intellectual grounds, white academics are entitled to less “standing” to participate in race-relations law discourse than their colleagues of colour; (ii) the argument that, on intellectual grounds, the minority status of academics of colour should serve as a positive credential for purposes of evaluating their work; (iii) explanations that assign responsibility for the current position of scholars of colour overwhelmingly to the influence of prejudiced decisions of white academics.”

groups.⁹⁴ As explained earlier, disadvantage is not per se a sufficient index of group cohesion, yet it remains the governing consideration in deciding which group falls within the normative scope of positive action. A scheme, therefore, that ignores certain disadvantaged groups while favouring others violates its legal mandate and does not comply with the equal treatment principle. Now, the deficiency of feminist or CRT arguments is exactly that they protest against inequality from an interest group point of view, failing to address the larger issue: their respective claims, although legitimate, serve a much narrower and self-centred purpose than that of positive action, which entertains the ambition to achieve full and effective equality throughout the social field.

The problems of relying too heavily on a group's own perception of its identity become even more evident when it comes to social groups created or defined "negatively"⁹⁵ in the first place. During the last decades homosexuals have established their position as a distinct social group with cultural specificity⁹⁶ and autonomous presence in many spheres of social life.⁹⁷ Discrimination on the grounds of sexual orientation has unfortunately been an endemic characteristic of many European societies and, although improvements have definitely been made in recent years, more institutional

⁹⁴ Farber, E. and S. Sherry (1997). Beyond All Reason: The Radical Assault on Truth in American Law, Minnesota Law Review. The authors accuse CRT for anti-Semitism and anti-Asiatism and challenge in general postmodern theories of radical multiculturalism as self-contradictory.

⁹⁵ In the sense described above, as "others", different from what constitutes the political or social correctness.

⁹⁶ D'Emilio, J. (2002). The World Turned: essays on gay history, politics and culture, Duke University Press.

⁹⁷ It is not an overstatement to say that in the United States gay men and lesbians as an autonomous movement have made an impact in the legal academia as well. See, among many, Eaton, M. (1994). "At the Intersection of Gender and Sexual Orientation: Toward Lesbian Jurisprudence." Southern California Review of Law and Women's Studies 3: 183.; Halley, J. E. (1988-1989). "The Politics of the Closet: Towards Equal Protection for Gay, Lesbian and Bisexual Identity." UCLA Law Review 36: 915-976. On a novel analysis of discrimination on the grounds of sexual orientation see Koppelman, A. (2001-2002). "Why Discrimination against Lesbians and Gay Men Is Sex Discrimination." UCLA Law Review 49: 519-538.

reforms are still necessary with a view to cancelling all prejudices and achieving full equality. Is positive action the right means to this end, considering that it focuses on disadvantaged and under-represented groups?

The legitimacy of giving preference to a homosexual person on the grounds of his or her group-membership should depend upon an examination of what this membership consists in.⁹⁸ The traditional critique questioning whether women should be treated as a uniform social group takes here a more vigorous form, because sexual orientation, unlike gender or race, is not a visible human characteristic.⁹⁹ This is not an attempt, of course, to underestimate the importance of sexuality as an intrinsic element of one's identity, especially as long as one (or a group) regards it as a defining element of one's personality. However, many people even within the gay and lesbian communities seem to concede that freedom to choose one's sexual orientation is, from a legal perspective, intrinsically connected more with the right to privacy or private life than with freedom of expression.¹⁰⁰ And although public statements about one's homosexuality have been rightly thought of as instrumental in the fight against discrimination and homophobia, it is fair to say that usually social allegiances are not determined by sexual identity, especially when the latter has no significance in terms of civil or political rights of the individuals. Therefore, in the democratic polity a citizen's sexual preference should not

⁹⁸ That, in fact, is a standard test that should apply in all similar situations involving allocation of preference or special benefits.

⁹⁹ Within the context of this argument even ethnicity or religious beliefs may qualify as relatively (and under specific circumstances) visible features. A person's place of origin can be determined roughly by skin colour, the shape of the face or the eyes or even by the language or accent. Certain religious beliefs are expressed through a particular outfit or eating habits.

¹⁰⁰ The opposite is the case with racial or ethnic minorities bound together with liaisons of cultural affinity, which simultaneously differentiate them from the majority of the populace that adheres to the "societal culture" (see Kymlicka, W. (1995). Multicultural Citizenship: A Liberal Theory of Minority Groups, Oxford Clarendon Press.).

be treated as a political issue, a matter of respect to difference, exactly because sexuality is in most occasions not expressed publicly. To the extent, then, that its expression remains within the private sphere of human action, sexuality does not necessarily bear any cultural or political connotations per se: it becomes a political (and legal) issue only via discrimination against those diverging from what constitutes the ordinary behaviour.¹⁰¹

To return to the focal question concerning the legal understanding of “group”, it should be concluded that the classical conception of positive action presents serious internal contradictions. On the one hand it excludes from its scope of application categories of the citizenry that evidently suffer or have suffered from discrimination by not recognising them as social groups and, on the other, it accepts under its auspices artificially created and loosely defined social groups with questionable cohesion. The single most important problem in this regard is the conceptual incompatibility of such an inconsistent and confused definition of group with the idea of under-representation. If an individual is given preference because the group she belongs to is “visibly under-represented” in the relevant sphere of social or political life, it follows that this individual undertakes the role of an unofficial representative for a certain community. Such an assumption would be completely untrue, however, in the absence of a minimum of group cohesion that would entail a maximalist and inevitably essentialist definition of social

¹⁰¹ It should be reminded that sexual orientation is discussed here in relation to group identity. The arguments presented purport to emphasise that, however important sexuality may be in the construction of an individual’s personality, it is yet a legally improper basis to define social categories not because that would amount to “reverse discrimination”, but due to the inherently non-political (in the sense of non-public) nature of sexual preference. To accept such an assumption does not mean that one should overlook the larger philosophical problem of the public-private distinction and its legal implications. MacKinnon’s famous aphorism that oppression against women starts in the bedroom provides insights, which ought to be further explored in relation to the true meaning of equality. The point made here, however, is obviously a much narrower one.

groups. What follows will hopefully provide a coherent alternative to the classical conception of positive action that will avoid these conceptual pitfalls.

PART II: THE POSITION OF THE EUROPEAN LEGAL ORDER: POSITIVE ACTION AND LEGAL PRINCIPLES OF EUROPEAN EQUALITY LAW

CHAPTER 3: THE ECJ AND THE ECTHR AS THE PILLARS OF A EUROPEAN LEGAL ORDER OF RIGHTS

3.1 Introduction

Before engaging with the substantive questions raised in this thesis, it is necessary to lay down the analytical groundwork by clearly establishing the normative framework within which these questions will be explored. The title reference to *Europe*, rather than to the European Union, is indicative of two foundational assumptions of the thesis: first, it is possible to discern a *distinctly European notion of equality* firmly rooted in the constitutional traditions of individual countries, despite the inevitable interpretative nuances within each domestic jurisdiction. Second, this common “European” meaning ascribed to equality entails that the legal principle of equal treatment and its relationship to positive action should be primarily determined by reference to European Union law and the European Convention of Human Rights.

The validity of both these assumptions will be tested in the present section. It is, however, important to note from the outset that this section makes a more “ambitious” claim, the normative implications of which extend beyond the limited scope of the current enquiry. It is submitted that, in the past fifty years, a new *sui generis* supranational *legal order* has gradually emerged in Europe in the area of *human rights*

protection. The *European Legal Order of Rights* (hereinafter ELOR) is the product of norms, rules and principles that have been established by EU law and the ECHR and impose *positive obligations* on European states to protect and promote the rights of persons under their respective jurisdictions. Respect for the *principle of equality* and protection of the *right to equal treatment* constitute indispensable elements of this legal order, and this inevitably has implications for the way positive action is conceptualised and justified.

What equality means in Europe, therefore, will be determined on the normative basis of the ELOR. Within this framework it should be possible to identify the common minimum content of the legal principle of equal treatment and determine the place of positive action in Europe.

3.2 The Relationship between Equality and Human Rights

The principal aim of this thesis is to prove that positive action is a legitimate and, at times, necessary means to achieve full and effective equality. With equality, then, being at the spotlight the present claim regarding the existence of a distinct body of law in the field of rights that bears the hallmarks of a legal order may be mistaken for an *obiter dictum*. Such unwelcome misunderstandings could be avoided, should a normatively significant relationship between *equality* and *rights* were to be firmly established. Admittedly it goes beyond the modest ambitions of the present section to delve into the theoretical depths of the philosophy of rights in order to fully appreciate the intricacies of this relationship. It is, nonetheless, analytically feasible to attempt a fairly brief yet straightforward overview of the matter, which will suffice to adequately justify the importance of rights protection for the accomplishment of true equality in practice.

Linking equality to human rights bears intuitive resonance with current normative reality. It is no coincidence that the newly found UK Commission for Equality and Human Rights - the equality body that came into being after the merging of its gender and race predecessors – gives equal weight to both terms in its title. But what is the actual nature and content of the relationship? Equality is directly connected to human rights in two ways that can be encapsulated in the following propositions: equality *qua* right and equality in the *protection* or *enjoyment* of *other rights*. In both these categories *non-discrimination* seems to occupy a central position, as it is said to have a privileged

relationship with the concept of equality.¹⁰² Some would even go so far as to suggest that “equality and non-discrimination are positive and negative statements of the same principle”.¹⁰³ Appealing as this notion may sound, it is a simplistic façade covering a much more complicated philosophical issue. What follows will hopefully shed some light on the matter by explaining how the concept of equality at once shapes and is being shaped by the human rights discourse in Europe.

3.2.1 *Equality qua right*

Equality qua right normatively translates into the *general legal principle of equal treatment*. The latter is recognised as such by most modern legal systems, including the EU,¹⁰⁴ and it typically enjoys constitutional status in national jurisdictions across Europe. The corresponding *individual right to be treated equally*, therefore, is protected either *directly*, in the form of an explicit constitutional clause, or *indirectly*, through a number of more concrete expressions of the principle, most notably the *prohibition of discrimination*.¹⁰⁵ These concrete normative expressions are in turn mirrored in a set of specific *equality rights*, each of which is tailored to fit a particular material context of

¹⁰² For a very interesting study on the relationship between equality and non-discrimination see McCrudden, C. (2004). Equality and Non-Discrimination. English Public Law. Feldman, Oxford University Press., chapter 11.

¹⁰³ Besson, S. (2008). "Gender Discrimination under EU and ECHR Law: Never Shall the Twain Meet?" Human Rights Law Review 8(4): 647-682., at 652.

¹⁰⁴ See McCrudden, C. and H. Kountouros (2006). "Human Rights and European Equality Law." University of Oxford Faculty of Law Legal Studies Research Paper Series Working Paper 8.

¹⁰⁵ Most *international* legal instruments, with the exception of Article 7 of the Universal Declaration of Human Rights, do not include an equality clause as such. Instead they opt for a prohibition of discrimination, either in a generic form, as in Article 14 of the ECHR, or focused on specific grounds of discrimination, as in the case of the Convention for the Elimination of Discrimination Against Women (CEDAW).

application.¹⁰⁶ *Gender* and *race* equality or protection from *age* discrimination, for instance, are all classic examples of the different facets of the general equality principle.

Equality, then, can at once be a general principle of law *and* a fundamental right. In both dimensions it materialises as a *nexus of more concrete and complementing equality rights*, effectively covering every aspect of social and economic life. The difference between *principles* and *rights*, however, is not one to be taken lightly. In the context of EU Law it has proved quite problematic – so much so, in fact, that the distinction between the two, initially inserted in the failed Constitutional Convention, was later abandoned. Theoretically, the term *principles* is used to denote a *prima facie* lack of direct justiciability, whereas the term *rights* generally entails automatic invocability before the courts. Part of the literature, though, seems to be employing the terms “fundamental principle” and “fundamental right” interchangeably. Doskey, for instance, argues that the Court of Justice, from the early 1970s, has developed the abstract general principle of equality into a fundamental right of equal treatment.¹⁰⁷

Admittedly, the ECJ itself has added to the confusion with the choice of wording in many of its judgments. Ever since its seminal ruling in *Internationale Handelsgesellschaft*¹⁰⁸ it has invariably referred to the protection of fundamental rights as forming part of the general principles of Community law. These general principles, however, seem to include both equality *and* non-discrimination, as well as particular expressions of the latter. Taking this interpretive route the ECJ has recognised gender

¹⁰⁶ For instance, the right to equal pay for work of equal value irrespective of sex, enshrined in Article 141 (4) EC.

¹⁰⁷ Doskey, C. (1991). "The Principle of Equality Between Women and Men as a Fundamental Right Under Community Law." *Industrial Law Journal* 20(4): 258-280., at 258.

¹⁰⁸ Case 11/70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (Solange I) [1970], ECR 1125.

equality¹⁰⁹ and protection from age discrimination¹¹⁰ as general principles of Community law on their own merit. In doing so, however, it explained that “the prohibition of discrimination [...] is merely a specific enunciation of the *general principle of equality* which is one of the fundamental principles of community law” [emphasis added].¹¹¹

An important philosophical question is raised in this regard, concerning the relationship between equality and discrimination. In the context of the present enquiry this question is of cardinal significance, as it relates to the definition of equality in Europe. Besson, for instance, asserts that “[o]ne is treated equally when one is not discriminated against and one is discriminated against when one is not treated equally”.¹¹² The fact that, until *Mangold*, the general principle of equality could not be directly invoked before the ECJ in discrimination cases¹¹³ seems to point to this direction. If Besson’s two propositions are both true, however, then there is nothing to separate the two concepts and equality effectively collapses into non-discrimination. In other words, one is left to wonder if protection from discrimination is, in practice, all there is to the seemingly more far-reaching concept of equality.

The answer to this theoretical conundrum cannot be an affirmative one. Both primary EU law and the ECHR contain separate references to non-discrimination and to “full equality”¹¹⁴ and “full and effective equality”¹¹⁵ respectively. These alone suffice to conclude that the right to equal treatment entails state obligations that extend beyond a

¹⁰⁹ Case C-149/77, *Defrenne v Sabena* [1978], ECR 1365.

¹¹⁰ Case C-144/04, *Mangold v Rudiger Helm* [2005], European Anti-Discrimination Law Review.

¹¹¹ Joined Cases 117/76 and 16/77 *Albert Ruckdeschel & Co. And Hansa-Lagerhaus Ströh & Co. V Hauptzollamt Hamburg-St. Annen: Diamalt AG v Hauptzollamt Itzehoe* [1977] ECR 1753., para 7.

¹¹² Besson, *supra* no. 103, p. 652.

¹¹³ Martin, D. (2006). *Egalite et Non-Discrimination dans la Jurisprudence Communautaire – Etude Critique a la Lumiere d’une Approche Comparatiste*, Bruylant., at 515-529.

¹¹⁴ Article 141 EC.

¹¹⁵ Preamble to Protocol 12 of the ECHR.

negative normative formulation, such as the prohibition of discrimination. After all, one is *not necessarily* treated equally if one is merely not discriminated against. Gender or race neutral rules tend to be insensitive to existing differences in individual circumstances that stem from the fact of being a woman or a member of an ethnic minority. Non-discrimination echoes a formal conception of equality and by default, therefore, is subject to the inherent limitations that the latter carries with it.

Equality qua right under EU law and the ECHR, then, should be conceived of in a *substantive* way. It may give rise to a justiciable claim for fourth generation equality rights,¹¹⁶ such as reasonable accommodation and adjustments for employees with disabilities. Theoretically, it may even substantiate a claim for positive action in the form of *preference* to an individual member of a disadvantaged group that fails to enjoy full equality on grounds of her sex or minority status. Of course, under the dominant interpretation of the existing normative framework by both the Luxembourg and the Strasbourg court states seem to have *discretion* rather than an actual *duty* to introduce positive measures in such situations.¹¹⁷ But this does not alter the fact that the normative content of the notion of full equality cannot possibly be exhausted in the protection from discrimination. Equality qua right is a *multidimensional* principle that encompasses various prohibitive and protective rules, some of which can be relied upon directly by an individual bringing a legitimate claim to the European courts. What follows, in this regard, is that equality qua right will not always provide an *autonomous* legal ground for an individual claim, which will more often than not be substantiated in more concrete non-discrimination rules.

¹¹⁶ S. Fredman, *supra* no. 1, pg. 1.

¹¹⁷ This is, of course, a position with which the present thesis strongly disagrees and which will be consistently argued against throughout the analysis.

3.2.2 Equality in the distribution and enjoyment of other rights

The second dimension of the relationship between equality and rights is, arguably, the most important one for present purposes. It involves an understanding of equality as an *overarching principle* that permeates the whole of the legal system, acting as a regulatory agent in the field of rights. When the allocation or enjoyment of rights is at play, *equality between the individual or group beneficiaries* is taken into account both at the stage of law and policy-making and, most significantly, in the process of judicial review.

Gender *mainstreaming* is an emblematic EU policy that exemplifies this approach.¹¹⁸ It involves the consideration of an *equality dimension* in every policy adopted by the EU institutions. In the case of mainstreaming, of course, equality is intended to operate as an *ex ante* consideration, factored in all aspects of policy-making. The *ex post facto* facet of equality is most clearly typified in the ECHR system and its Article 14. The latter enshrines an individual right not to be discriminated against on any grounds in “the enjoyment of the rights and freedoms set forth in [the] Convention”.¹¹⁹ Article 14, then, allows the Court to treat equality – or, more accurately, non-discrimination – as a *measure of legality* of state actions that affect individual rights.

Although this confirms that equality here operates as an overarching principle that cuts across the field of rights, the individual right not to be discriminated against under the Convention is *accessory* in its scope of application. A condition for its invocability is that another “substantive” Convention right provides the factual backdrop against which

¹¹⁸ On the relationship between gender mainstreaming and positive action see Stratigaki, M. (2005). "Gender Mainstreaming vs Positive Action: An ongoing Conflict in EU Gender Equality Policy." *European Journal of Women's Studies* 12(2): 165-186

¹¹⁹ Article 14 ECHR.

discrimination can be examined and substantiated. This, however, is nothing more than the logical consequence of the second dimension of the equality-rights relationship. Equality here is a principle of *due process in the allocation and protection* of rights. It retains its *autonomous* nature in principle, but this autonomy is *contextualised*. Because of this accessory element in its scope of application, therefore, equality here can be a ground for a legally justiciable claim, but only insofar as it is *factually linked* to another right.¹²⁰

As with the previous dimension of the equality-rights relationship, the normative content of the concept of equality is once again relatively unclear. Non-discrimination is undeniably the analytical flagship here: everyone is entitled to enjoy their legally protected rights fully and any differentiation therein should be objectively justified. This echoes the “treating likes alike” Aristotelian maxim, with its formal equality connotations. It also brings to the fore the usual concerns regarding the undesirable possibility of *levelling down* as a potentially lawful response to inequality. If it is not practically feasible to secure the full enjoyment of a specific right by everyone due to scarcity of resources, then equality may dictate that the exercise of the right in this specific context is suspended.¹²¹

These concerns, however, are doctrinally unjustified. The principle of equality regulates not only the enjoyment of rights, which involves a distributional element that may prove controversial, but also their judicial *protection*. The need for protection, however, varies according to the personal circumstances of each individual. Even from a

¹²⁰ According to the ECtHR case-law it suffices that this other right is factually involved, without the need to find a breach of the right.

¹²¹ Wolff, J. (2001). *Leveling Down. Challenges to Democracy: The PSA Yearbook 2000*. K. Dowding, J. Hughes and H. Margetts, Palgrave., p. 18-32.

formal equality point of view, the opposite side of the “treating likes alike” coin is that different situations should be treated differently. When it comes to judicial protection of rights, then, this entails that the Luxembourg and Strasbourg courts may use the non-discrimination principle not only in a *negative* way, as a standard legitimacy test for the legality of state actions, but also in a *positive* way. It is possible, therefore, for the courts to read *positive state obligations* into the principle of non-discrimination in this context, which stem directly from a more substantive notion of equality.

It is in this context that positive action in general and quotas in particular become all the more significant. Their relationship to equality could - and possibly should - be framed in terms of *rights* and this relationship could, consequently, fit within the general human rights discourse more comfortably than under the current anti-discrimination rationale. Instead of being an exception to equality, therefore, preferential treatment may well be an *equality right* in itself, insofar as the underlying concept of equality allows for personal and material differences to be taken into account when determining who is entitled to what.

3.3 Equality and Rights in Europe: The Role of the ECJ and Of The ECtHR

3.3.1 *Defining “European” norms: The EU at the pole position*

During the last decade of the 20th century the European Union has managed to establish itself as the major political player in the European territory. The true ambit of its regulatory power surpasses its geographical boundaries, since the influence of its laws can be felt across its borders. It is not an exaggeration to say that Community law constitutes a basic standard against which non-EU European states - especially those formerly belonging to the Eastern block - measure their success in addressing the modern challenges of democracy in an era of globalisation. After the fifth enlargement and the subsequent recent succession of Bulgaria and Romania, the EU with its 27 Member States does no longer represent a small minority of the nation states of Europe. On the contrary, the peoples of the EU Member States amount to roughly 70% of the total population of Europe.¹²²

The sheer size of the EU is obviously not enough to support a normative claim concerning the legal understanding of the concept of equality. In other words, the way the notion of equality is conceptualised and applied as a matter of Community law cannot tell the whole story of what actually happens outside Union borders. Nor is it acceptable to suggest that the conception of equality that inspires Community law must by default reflect a common “European” *minimum*. It would be equally erroneous, however, to disregard the descriptive strength of such claims. It is a fact that the standards set by

¹²² The 27 EU Member States have a combined population of about 500 million, while the total population of Europe according to the United Nations is around 730 million (in 2005). This statistic is all the more impressive, if one takes into consideration that Russia alone accounts for the best part of the remaining (non-EU) European population, featuring a total population of over 140 million.

Community law affect directly the majority of domestic legal orders in Europe and that they exert a significant *indirect* influence on the rest.

This influence is not only exerted in an entirely abstract form. Formalised expressions can be found, among others, in the requirement imposed on candidate countries, under the Copenhagen criteria for accession, to align their human rights protection systems with that of the Union. If EU institutions are not satisfied, for instance, that gender equality is adequately protected and promoted by the domestic laws and practices of the Turkish state, it is highly likely that Turkey's prospects of joining the Union in the near future will remain dubious.

When the EU, therefore, determines the normative content of rights and principles, the reverberations of this determination travels farther than its geographical or normative borders. Interpreting these rights and principles constitutes the privileged domain of the ECJ. Placed at the top of a transnational judicial hierarchy the latter has the privilege of being one of the few courts worldwide the case-law of which has genuinely far-reaching consequences, as the significance of the legal developments they bring about can be measured on a global scale.

3.3.2 Protection of fundamental rights as a matter of Community law: An ECJ success story.

Against this factual background the argument that the Community interpretation of general legal principles represents a distinctly European approach¹²³ that is not reflective only of the EU Member States' understanding seems to be gaining

¹²³ The ECJ has often insisted that, when protecting fundamental rights as a matter of Community law, it does so on the basis of a European human rights standard based on "constitutional traditions common to Member States" (*Internationale Handelsgesellschaft*, para 4).

momentum.¹²⁴ It is particularly important to note in this regard that the notion of general legal principles has not been incorporated into the founding Treaties. From the very early stages of the Community's existence - and long before its official transformation from an entity with purely economic objectives to a broader political union - the ECJ has used this notion extensively to pursue its own agenda of negative integration.

The field of triumph for general legal principles has been none other than fundamental rights.¹²⁵ The founding Treaties contained no reference to human rights, which is not only due to practical reasons - namely the economic intentions of the enterprise - but also to normative ones, in view of the inherent constitutional quality that fundamental rights possess: An inclusion, in other words, of a commitment to protect fundamental rights would have given the Community undesirable state-like characteristics.¹²⁶ In the absence of such a system of protection, however, the ECJ claim that the EC Treaty had created a "sovereign legal order"¹²⁷ remained unsubstantiated. The concept of sovereignty is intrinsically linked to the existence of a bedrock of constitutional provisions,¹²⁸ which has the double aim of establishing a system of governance and setting out a number of core societal values that entail basic rights and obligations of citizens. Simply put, without fundamental rights the EC Treaty would be

¹²⁴ See for instance Calliess, C. (2007). The Fundamental Right to Property. European Fundamental Rights and Freedoms. D. Ehlers, De Gruyter., at 452, where the author argues that the ECJ ever since *Hauer* (*Hauer v Land-Rheinland-Pfalz* [1979] ECR 321) has been using a "European standard".

¹²⁵ Kumm, M. (forthcoming 2009). Internationale Handelsgesellschaft, Nold and the New Human Rights Paradigm. The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of Rome L. A. M. Maduro, Hart.

¹²⁶ Chalmers, D., C. Hadjiemmanuil, et al. (2006). European Union Law: Text and Materials, Cambridge University Press., chapter 6.

¹²⁷ Case 26/62, *Van Gend en Loos v. Nederlandse Administratie Belastingen*, ECR 1. [1963] CMLR 105; Case 6/64 *Costa v. Ente Nazionale per L'Energia Elettrica (ENEL)*, [1964] ECR 585, CMLR 425.

¹²⁸ This is true even if the constitution is an "unwritten" one, as is the case in the UK.

nothing more than another international agreement imposing mutual obligations among sovereign states.

When the ECJ proceeded to assert the supremacy of EC law over national constitutional provisions,¹²⁹ the reaction of the German¹³⁰ and the Italian¹³¹ Constitutional courts was unsurprisingly rebellious. Since fundamental rights that were enshrined in national constitutions did not have a textual presence in primary EC law, the rightful guardians of national constitutional orders were not willing to pledge their allegiance to the Community. This triggered a surge of judicial activism on the part of the ECJ in an attempt to secure acceptance of the doctrine of supremacy. Fundamental rights became top priority in the agenda of the Court during the 70s and the 80s through the creation and development of doctrines such as direct effect, indirect effect and state liability. The notion of general principles of Community law, which were derived from the “spirit” of the Treaties, the common constitutional traditions of the Member States and from international instruments protecting human rights, allowed the Court to bypass the lack of positive law.

As a result of this on-going process a relatively consistent interpretation of basic legal concepts that permeate or underlie the protection of fundamental rights has gradually emerged. Equality and non-discrimination constitute, arguably, the core of this nexus of concepts that have proved instrumental in the protection of rights on the Community level. Far from being a coincidence, this can be attributed to at least two easily identifiable reasons:

¹²⁹ *Internationale Handelsgesellschaft*, op. cit.; Case 106/77, *Italian Finance Administration v. Simmenthal* [1978], ECR 629.

¹³⁰ BVerfGE 6, 32 (Elfes).

¹³¹ Decision 183/1973 of 27 December 1973 [1974] 2 CMLR 372, 336.

Firstly, the variety of legal systems within the EU entails differing levels of protection from Member State to Member State. If fundamental rights are to be protected effectively as a matter of *Community law*, the main problem that needs to be addressed is that of unequal treatment or discrimination between citizens of different Member States or between citizens and immigrants.¹³²

Secondly, the legitimacy of the ECJ's interference with issues covered by national constitutional provisions is seriously contested. In view of the doctrine of separation of powers, that inspires all the domestic political systems across the EU, it is not part of the courts' prerogatives to substitute the legislature in making important policy choices.¹³³ In other words, a court should not, in principle, "create" rights that have not been allocated by the democratically elected representatives of the people. Such claims are even more powerful when it comes to a European court dwelling in the realm of national constitutions.¹³⁴ When equality is involved, however,¹³⁵ this line of argument does not apply. By examining whether the general principle of equal treatment or the right not to be discriminated against have been violated the ECJ does not create *new* rights; it merely determines the correct scope *rationae personae* for the application of already existing rights. It is, of course, true that, by doing so, the ECJ may extend the corresponding positive state obligations and generate substantial changes in the legal landscape for states and individuals alike. This, nevertheless, does not alter the fact that the accusations against the ECJ's legitimacy in this area are weak.

¹³² The latter point is connected to the universality of fundamental rights, at least in terms of their *rationae personae* scope, as accepted by the ECHR.

¹³³ This is particularly relevant, for instance, to the level of protection afforded to social rights, most of which are not justiciable in domestic legal orders.

¹³⁴ The perceived threat to national sovereignty is, of course, the underlying concern here.

¹³⁵ Either in the form the equal treatment principle or in the more concrete form of the right not to be discriminated against.

3.3.3 *The impact of the Convention in protecting rights and defining equality in Europe: ECtHR as the ECJ's "significant other"*

What the concept of equality means in Europe, therefore, should primarily be identified with reference to the emblematic general legal principle of equal treatment and the right not to be discriminated against, as these have been interpreted by the ECJ in its various judgments. It is by looking at this case-law that one can hope to find a distinctly European theory of equality and ascertain the place of positive action therein. But this is not the end of the story. EC law can only reveal half of the picture. As mentioned earlier, the sources of EC fundamental rights, in the absence of explicit textual reference in the founding Treaties, were the common constitutional traditions of the Member States and relevant international instruments.¹³⁶ Among those the ECHR was deemed by the ECJ to carry special weight. So much so that the *actual content* of rights as a matter of Community law should be determined in view of the relevant Convention provisions and the ECtHR's interpretation of them.

This deference of the ECJ to the ECtHR is most eloquently seen in one of its relatively recent rulings concerning the right to family life. In *Akrich v UK*¹³⁷ the ECJ was quite explicit in stating that "regard must be had to respect for family life under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms". It then goes on to assert that this right "is among the fundamental rights which, according to the Court's settled case-law, restated by the preamble to the Single European Act and by Article 6(2) EU, are protected in the

¹³⁶ Coupled with the "spirit" of the Treaties, which is nothing more than a proxy to refer to an undeniable moral commitment of democratic institutions to the respecting and protecting human rights.

¹³⁷ Case C109/01 *Secretary of State for the Home Department v. Helene Akrich* [2003] ECR I-9607.

Community legal order". Instead of producing its own interpretation of the limitations to the right to family life under Community law¹³⁸ the ECJ resorts once again openly to the ECtHR, suggesting that "[t]he limits of what is necessary in a democratic society [...] have been highlighted by the European Court of Human Rights in *Boultif v Switzerland*.¹³⁹

The implications of this judgment¹⁴⁰ can be fully conceived of only when one takes into account that the approach adopted antedates the birth of the EU Charter of Fundamental Rights in Nice (2001). The non-binding nature of the Charter is, obviously, a plausible explanation of why the ECJ preferred to continue premising its reasoning on the Convention. Still, the priority given to the Convention by the ECJ seems enough to support the claim that, when it comes to fundamental rights, EC law is not the sole normative source to look at. What appears to be even more important is that the ECJ is not merely using the Convention as "raw material", which can be molded into a "Community standard" of protection. Instead, the ECJ *interpretation* of the rights is not just in tandem with but it is actually "copied and pasted" from ECtHR case-law.

This is confirmed by the second paragraph of Article 6 TEU, which expresses the commitment of the Union to "respect fundamental rights, as guaranteed by the [ECHR] and as they result from the constitutional traditions common to the Member States [...]". The importance of this provision, in view also of the unequivocal statement in the first

¹³⁸ See also Barnard, C. (2007). *The Substantive Law of the EU: The Four Freedoms*, Oxford University Press., p. 260.

¹³⁹ *Boultif v Switzerland*, Application No. 54273/00, 2 August 2001 (nyr).

¹⁴⁰ See also Guild, E. (2000). "The EC Directive on Race Discrimination: Surprises, Possibilities and Limitations." *Industrial Law Journal* 29(4): 416-423., p. 78.

paragraph that the Union is “founded on [...] respect for human rights”,¹⁴¹ cannot be exaggerated: it effectively elevates the ECHR to a primary legal source for the protection of rights in the Union. Far from being a “constraint” on EU law-making, policy decisions and institutional actions, the Convention becomes a basic instrument to determine the actual meaning of rights and, hence, the extent of their protection.

The argument that the ECHR enjoys a “constitutional” status in the Community system for the protection of rights is further reinforced by the fact that the Convention is nowadays part of the *acquis Communautaire*. Although it was initially held by the ECJ that the European Union itself could not become a Signatory Party to the Convention,¹⁴² the Lisbon Treaty puts an end to this irregularity by establishing the legal personality of the Union and providing for its accession to the Convention. In addition to that, all EU Member States are, as a matter of Community law, under the obligation to ratify and enforce the Convention and its protocols. This is true for new Member States of the enlarged Union but also for prospective Member States, since ratification of the ECHR has been added to the Copenhagen criteria for accession.

It is interesting to note at this point that the “institutional deference”, at least between courts, has been mutual. In its recent *Bosphorus* judgment¹⁴³ the ECtHR has recognised that “the protection of fundamental rights by EC law could have been considered to be, and to have been at the relevant time, “equivalent” to that of the Convention system.” It went on to admit that “a presumption arose that Ireland did not

¹⁴¹ Article 6 TEU was amended by the Treaty of Amsterdam. In its original formulation (in the Treaty of Maastricht) it was still short of establishing fundamental rights as a central mission of the Union (see Chalmers et al., *supra* no. 126, chapter.6).

¹⁴² Opinion 1/94, 15 November 1994, [1994] ECR I-5276.

¹⁴³ *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], 30/06/2005, no. 45036/98, Reports of Judgments and Decisions 2005-VI

depart from the requirements of the Convention when it implemented legal obligations flowing from its membership of the EC". This conclusion does not only accept that fundamental rights are protected in parallel by the Convention as well as EC law, but also that the ECJ - in its capacity as a "constitutional court" of the Union - has jurisdiction to decide on such matters when brought before it.¹⁴⁴ As Costello eloquently points out, the ECtHR in *Bosphorus* "attempts to overcome one formal legal demarcation in order to promote convergence and coherence of rights protection in a wider Europe".¹⁴⁵

What becomes clear from the preceding analysis is that the relationship between Strasbourg and Luxembourg constitutes now a salient feature of the European system of rights protection and has attracted considerable attention in the literature.¹⁴⁶ Through this "symbiotic interaction of fragile complexity" as Douglas-Scott has eloquently described it,¹⁴⁷ the two courts seem to have found a satisfactory code of conduct based on mutual understanding and respect of each other's competence. This allows them to perform their respective functions without jeopardising the integrity of the system across the territories of jurisdictional overlap. If it is true, though, that Europe now possesses a "ius commune" of human rights,¹⁴⁸ the claim that this is embedded in a *European Legal Order of Rights* that has gradually emerged seems the logical next step.

¹⁴⁴ On the potential interpretative conflict between the two courts see K. Kuhner, "Bosphorus - Double Standards in European Human Rights Protection?", *Utrecht Law Review*, Volume 2, Issue 2 (December) 2006, pp. 177-189.

¹⁴⁵ Costello, C. (2006). "The Bosphorus Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe." *Human Rights Law Review* 6(1): 87-130., p. 88.

¹⁴⁶ Instead of many see Douglas-Scott, S. (2006). "A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis." *Common Market Law Review* 43(3): 629-665.; Scheeck, L. (2005). "The Relationship between the European Courts and Integration through Human Rights." *ZaoRV* 65: 837-885.

¹⁴⁷ Douglas-Scott, supra no. 146, p. 631.

¹⁴⁸ Ibid, p. 665.

3.4 At The Intersection Between EU Law And The ECHR: Towards A “European Legal Order Of Rights”

3.4.1 Defining the European Legal Order of Rights

The claim that a distinct European Legal Order of Rights (hereinafter ELOR), founded upon EC fundamental rights law and the ECHR, has come into existence seems to be deeply rooted in the current normative reality across the territory of the European Union. No national jurisdiction in Europe can nowadays circumvent human rights obligations without being subjected to the scrutiny of either Strasbourg or Luxembourg.¹⁴⁹ What is more important is that this intertwined system of protection provides a common *modus operandi* for both EU Member States and non-EU European states that are Signatory Parties to the Convention. This is supported by the fact that the ECtHR has been given by the ECJ on a number of occasions the lead in ascertaining the content of rights. On the other hand, the acceptance on the part of the ECtHR that it no longer holds the monopoly of rights’ protection and its consequent deference to the ECJ allows us to conclude that the two courts are on an equal footing as guardians of a distinctly European normative framework with fundamental rights as its core.

The unique characteristic of this *sui generis* legal order is the *duality* of its institutional structure, with two “Supreme Courts”, the ECJ and the ECtHR, sharing the top stratum of an informal judicial hierarchy that serves a common purpose. ELOR, then, should be conceived of effectively as a *bicephalus legal order*, with Luxembourg and Strasbourg as its two heads.

¹⁴⁹ Ibid.

A seemingly radical suggestion as the one put forward here is likely to be met with some mistrust. Most would readily concede that human rights are protected in the European public sphere through a multi-layered system or a nexus of overlapping systems, whereby national legislation is but one strand of the overall regulatory scheme. The most obvious critique that can be levelled against ELOR, then, is that it seems an unnecessary addition to an already convoluted normative space. Even if one were to agree that a greater degree of harmonisation of rules and coordination of systems is needed, one may argue that this can be achieved through more “conventional” means. For instance, there is a growing trend in the literature to regard the European Union as potentially the most important post-national human rights institution worldwide,¹⁵⁰ which could lead the way towards strengthened protection of rights not only inside its borders but also internationally.

Although this “conservative” approach has an undeniable theoretical appeal, especially from an EU point of view, its practical implications are seriously problematic. It has already been conceded that the EU is a dominant player in the European normative arena, with its principles and laws affecting the whole of the Continent. The distance, however, between accepting this reality and asserting that the EU *should* be assigned a *hegemonic* role in human rights protection at the expense of Strasbourg is vast. Despite optimistic views that emphasise the Union’s emerging quality as a “human rights organisation”,¹⁵¹ one must not be oblivious to the lack of enthusiasm with which this identity shift is being carried out. Freedom of movement continues to take precedence

¹⁵⁰ Besson, S. (2006). "The European Union and Human Rights: Towards a Post-National Human Rights Institution?" *Human Rights Law Review* 6(2): 323-360.

¹⁵¹ Krisch, N. (2008). "The Open Architecture of European Human Rights Law." *Modern Law Review* 71(2): 183-216.

over wider societal interests and the ECJ continues to lack general competence to decide human rights cases.¹⁵² The political institutions are reluctant or unable to take the initiative and push forward an aggressive agenda of positive integration in this field, despite the high hopes generated by the Treaty of Amsterdam. This is evident above all in the decision not to incorporate the EU Charter on Fundamental Rights as part of the text of the Lisbon Treaty.

In this political and legal climate giving the EU “carte blanche” to dominate the human rights domain in Europe seems a dubious choice. Apart from creating a *de iure* hegemony, whereby non-EU countries will have to blindly follow in the footsteps of an organisation they have not joined, protection of rights will be almost exclusively entrusted in the hands of an institutional structure that is at best reluctant at this point to undertake such a colossal responsibility. On top of that, unconditional priority to the EU will inevitably undermine the political and normative clout of the ECtHR, which is at present quite successful in performing its role as the principal human rights court at a European level.

There is another obvious factor that has deliberately not been considered up to this point. Despite all the positive signals regarding the level of explicit or implicit¹⁵³ understanding between the two courts and the mutual deference that underpins their

¹⁵² ECJ jurisdiction is established only when the issue at hand falls within the remit of Community law, that is when it engages primary or secondary Community law. This will remain the case even after the entry into force of the Treaty of Lisbon.

¹⁵³ A typical example of what is termed here *implicit* communication can be found in a series of Strasbourg judgements on sexual orientation discrimination in the military (*Lustig-Prean and Beckett v. UK* [Grand Chamber], Application No. 31417/96, 27 September 1999, [2000] 29 EHRR 548; *Smith v. UK* and *Grady v. UK*, Applications Nos. 33985/96 and 33986/96, 27 September 1999, 29 EHRR 493). See also M. D. Goldhaber, *A People's History of the European Court of Human Rights*, Rutgers University Press, 2009, pp. 44-45.

relationship,¹⁵⁴ the possibility of conflicting rulings cannot be totally excluded. No better example exists that their respective views on the compatibility of *different pension age limits for men and women* with the principles of *non-discrimination* and *equal treatment*. In *Stec*¹⁵⁵ the ECtHR referred to the “strong persuasive value” of an ECJ social security ruling,¹⁵⁶ before going on to find that a different retirement age for men and women is compatible with Article 14 of the Convention. Recently, however, the ECJ has ruled to the opposite direction in *Commission v. Greece*,¹⁵⁷ where it has found the different retirement age for men and women provided for in the Greek Civil and Military Pensions Code to violate Article 141 EC. Although one can plausibly assume that Strasbourg will probably refrain from taking issue with this ruling, if the matter is once again put under its scrutiny, the current situation cannot be overlooked. Contradictory rulings are not a figment of commentators’ imagination, but a very real possibility.

With all this in mind, opting for a systematisation of the human rights protection regime in Europe on the basis of a *distinct legal order* that encompasses under its rule the EU, the EU Member States *and* the non-EU countries that are Signatory Parties to the ECHR appears to be a politically and normatively preferable option. It has the benefit of acknowledging the “special” role of the EU, while at the same time recognising that the latter needs to be bound in its policy-making and everyday practices by established principles originating from the ECHR and understood under the light of Strasbourg interpretations. ELOR is, then, a normative scheme that allows the EU to develop and

¹⁵⁴ Evidenced by their apparent efforts to avoid conflicting or contradictory rulings. See Craig, P. and G. D. Burca (2007). *EU Law Text, Cases and Materials*, Oxford University Press., p. 426.

¹⁵⁵ *Stec v. UK* [Grand Chamber], 12 April 2006, Application Nos. 65731/01 and 65900/01, (2006) 43 EHRR 47.

¹⁵⁶ *Ibid*, para 58.

¹⁵⁷ Case C-559/07, *Commission v Greece*, 26 March 2009.

solidify its human rights credentials, but within the confines of a genuinely *European doctrine* that is co-determined by the ECtHR.

In this respect, what still needs to be discussed is the relationship between ELOR and the existing legal orders in Europe. The co-existence of the Community legal order and the domestic legal orders of Member States has already attracted a considerable degree of scholarly attention within the framework of EU constitutional law. Despite numerous attempts to delineate the boundaries between the two, with some being more persuasive than others, a significant amount of uncertainty remains. It is understandable that any argument pertaining to describe the emergence of an additional legal order will initially be seen as adding to the existing complexity and ambiguity. Such reactions, however, are completely unfounded. Closer scrutiny of this European Legal Order of Rights will prove that, apart from descriptive accuracy, it possesses the quality of simplifying the normative structure that guarantees the protection of fundamental rights in Europe. This is all the more true when it comes to non-EU countries that are Signatory Parties to the Convention.

3.4.2 The place of positive action in ELOR

The relationship between equality and human rights, which is at the very foundation of ELOR, has already been firmly established. It is also self-evident that positive action has a “privileged” relationship to the concept of equality, either as an *exception* to it, as under the classical conception, or as an *expression* of it, as with the alternative conception that constitutes the backbone of this thesis. The particular way in which positive action fits into the ELOR system will be examined in detail in the final

chapter,¹⁵⁸ where it will be argued that the ELOR can prompt a *race to the top* with regard to the equal enjoyment of rights. For the time being, however, what needs to be determined is how the ELOR affects the implementation of the equal treatment principle across Europe and what consequences this has on the legality of positive action, either as a possibility or as a state obligation.

Without a doubt the most important contribution of the ELOR to the current normative framework on equality is that it allows for an unqualified expansion of the *rationae personae scope* of the equal treatment principle so that it covers *every individual* and group residing on European soil. In other words, every person within the jurisdiction of the countries that are either Member States of the EU or Signatory Parties to the ECHR - or both - should in principle enjoy the same rights as everyone else, *unless a differentiation can be objectively justified*.

Plainly put, the main issue here boils down to this: in the absence of a systematised pan-European legal order of rights it is highly likely that significant *inter-state inequalities* in the enjoyment of rights by individuals or groups will emerge or continue to exist. Individuals that find themselves under the *same* or *substantially similar* circumstances will be treated *differently* by their respective states.¹⁵⁹ A British woman, for instance, that applies for a position on the disciplinary board of the public body she works for will be treated *less favourably* than a Greek woman in a similar position, given that the latter will be given *preference* in view of a relevant gender quota currently in

¹⁵⁸ See *infra*, chapter 11.2.

¹⁵⁹ From an enforcement point of view, this is particularly evident with regard to the new *optional* Protocol 12 to the ECHR, establishing a free-standing right not to be discriminated against. Individual petitions on this new legal basis will be admissible *only* against Member States that have *ratified* the Protocol. See *infra*, chapter 5.4.

force.¹⁶⁰ Needless to say that, from an equality point of view, this differentiation is *in principle* unacceptable.

What the ELOR does, then, is ensure that such instances of inter-state inequality become the object of direct judicial scrutiny by either the ECJ or the ECtHR. Positive action in this context will no longer be a mere legislative possibility, left entirely to the discretion of each state. It may well become an equality *obligation* under the ELOR, stemming from the commitment to a distinctly European interpretation of the equal treatment principle, understood as *full and effective equality in practice*.¹⁶¹ The legitimacy of quotas and the limitations to their use will at the first instance be determined under the light of the common general principle of equal treatment, with due regard, of course, to the socio-political idiosyncrasies and economic differences between states.

¹⁶⁰ Greek Law 2839/2000 aims to ensure the balanced participation of men and women in decision-making procedures in the public administration, as well as in the entities of the private sector and in the local administration agencies of 1st and 2nd degree (municipalities). Its article 6 stipulates that the departmental boards throughout the public sector will be comprised to a minimum of 1/3 by members of each sex.

¹⁶¹ This wording reflects the combined references to equality in Article 141 EC and the Preamble to Protocol 12 ECHR.

CHAPTER 4. POSITIVE ACTION IN THE EU: FULL EQUALITY IN PRACTICE AND THE JURISPRUDENCE OF THE ECJ

The history of positive action in Europe is inextricably connected with the development of the doctrine within the framework of EU law and in parallel to the general integrationist project. This is hardly a coincidence. Transforming the economic community into a political union has been a long and arduous process,¹⁶² marked by the ever increasing commitment of EU institutions to the protection of the rights of European citizens. Equality in the enjoyment of these rights has inevitably risen to the top of the policy agenda. Commitment to *full and effective* gender equality at the first instance, especially after Maastricht, and to other forms of equality more recently has put positive action under the spotlight, given that the more “conventional” equality strategies have not proved successful in eliminating the gender gap in employment and achieving the goal of social inclusion for minorities.

After a long period of controversy and uncertainty surrounding the positive action provision in article 2 (4) of the Equal Treatment Directive,¹⁶³ the legality of positive action in principle can no longer be put into question. According to the unequivocal wording of article 141 paragraph 4, which was inserted into the Treaty of Amsterdam as a reaction to the Court’s ruling on *Kalanke*,¹⁶⁴ positive action is conceived of as a means to

¹⁶² And, one might add, an unfinished one.

¹⁶³ Directive 2000/78/EC of 27 November 2000, establishing a general framework for equal treatment in employment and occupation.

¹⁶⁴ Case C-450/93, *Kalanke v. Freie Hansestadt Bremen* [1995] ECR I-3051

achieve “full equality” between men and women in working life and not solely as an anti-discrimination mechanism.¹⁶⁵

This signalled, according to many, a move away from the rigid and unsatisfactory notion of formal equality towards a more substantive notion of equality,¹⁶⁶ which would be suitable to account for practical inequalities stemming from institutionalised indirect discrimination. The term “full equality *in practice*” attests to that view by implicitly admitting to a distance between the theoretical equality of opportunities and the *actual* social circumstances that may inhibit women from taking full advantage of these opportunities. Despite the fact that there are competing views as to the meaning of equality and equal treatment in Community law,¹⁶⁷ it is safe to assume that “full equality” encompasses broader socio-political objectives and corresponding state obligations than the mere establishment of a negative right not to be discriminated against. In this respect, positive action is not only a lawful means to achieve gender equality but may also prove instrumental to its attainment, providing a wide range of measures that Member States can employ to this end.

This does not entail, however, that *all* positive measures are lawful under Community law. The current position, as crystallised in the cases of *Badeck*¹⁶⁸ and

¹⁶⁵ Article 141(4) reads as follows: “With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.”

¹⁶⁶ The extent to which this is true will be examined later on in this chapter (see *infra*).

¹⁶⁷ For an analysis of the different versions of equality underlying various instruments of European equality law see Bell, M. and L. Waddington (2003). “Reflecting on Inequalities in European Equality Law.” *European Law Review* 28(3): 349-369, esp. p. 350-357.

¹⁶⁸ Case C-158/97 *Badeck v. Landesanwalt beim Staatsgerichtshof des Landes Hessen* [1999], ECR I-1875

*Abrahamsson*¹⁶⁹ that reaffirm the approach taken in *Marschall*,¹⁷⁰ appears to be relatively straightforward: in order to be compatible with Community law positive measures *must not give an automatic and unconditional preference* to the favoured person or persons and they must ensure that the selection process allows for *objective assessment of the specific personal situations of all applicants*.¹⁷¹

Based on the rationale that equal treatment requires interpersonal comparisons of qualifications and of individual circumstances, this two-part formula can be applied satisfactorily in most areas of employment when the measure in question is of a tie-break type with a saving clause.¹⁷² Policies that allocate preference to a less qualified candidate, however, are still very contentious. In *Abrahamsson* the ECJ reiterated that the governing principle remains the primacy of the individual and that inter-personal comparisons of merit are the only legitimate basis for equality in selection procedures. Consequently, it is stated that positive measures are not allowed when they are “disproportionate to the aim pursued”, but the Court stops short from concluding that “strict” quotas are *always* disproportionate.¹⁷³

It seems, then, that the legal landscape of European equality law is not entirely clear and consistent. One could plausibly argue that the Court has “done well” in situations where the compatibility of the quota with Community law could not be seriously challenged - with the obvious but unique exception of *Kalanke*. Following the

¹⁶⁹ Case C-109/01, *Abrahamsson Akrich v Home Office*, Judgment of 23 September 2003,.

¹⁷⁰ Case C-409/95, *Marschall v. Land Nordrhein Westfalen* [1997], ECR I-6363

¹⁷¹ Badeck, *op. cit.*, para 23.

¹⁷² Fredman characterises this approach as formulaic and discusses at some length the very interesting Opinion of Advocate General Saggio, which renders proportionality as the ultimate criterion for the legality of positive measures. See S. Fredman, *supra* no. 1, p. 142.

¹⁷³ *Ibid*, p. 143. The issue remains unresolved because in *Abrahamsson* the measure in question dictated an automatic preference, thus failing to satisfy the Badeck test anyway.

legislative developments and especially the introduction of Article 141 (4) in Amsterdam the case law gradually incorporated a more “substantive” approach to equality, despite the unassailable commitment to the primacy of the individual. In “hard cases” such as *Abrahamsson*, however, it is very difficult to determine where the Court stands in terms of doctrine. The traditional terms “formal” and “substantive” equality appear to be rather generic and, thus, unsuitable to describe the theoretical underpinnings of the Court’s reasoning in interpreting both article 2 (4) of the Equal Treatment Directive and Article 141 (4) EC. It is, therefore, necessary to try and define more accurately the conceptual framework of equality within the context of European law before any further exploration of the place of positive action therein.

4.1 The Taxonomy of EU Equality Law: Analytical Categories of Equality and Positive Action.

Earlier in this thesis it was submitted that the notion of equality can be analytically classified into three principal categories.¹⁷⁴ It will be asserted later on in this chapter that the difference between ECJ rulings generally perceived to be inspired by a *formal* equality rationale and those that seem to conform to a more *substantive* conception of equality is not as significant as it appears to be. This is, to a large extent, due to the fact that the tripartite distinction between a *formal-symmetrical*, a *substantive-asymmetrical* and an *equal opportunities* model of equality does not exhaust the interpretative possibilities. In other words, although this categorisation has the benefit of relative analytical simplicity, it seems insufficiently nuanced to account for all the interpretations of the equal treatment principle in the European courts' rulings.

For present purposes, therefore, it would be useful to attempt a more refined analytical categorisation of the "European" approaches to equality, with particular emphasis on the place of positive action within each category.¹⁷⁵ The first category, termed *non-comparative formal equality*, is the only one under which quotas are not an acceptable mechanism to achieve equality of treatment and, for this reason, it will be discussed in more length than the rest.

Before moving on to examine the proposed taxonomy one last remark on methodology is necessary. All categories will attempt to identify what types of positive

¹⁷⁴ See *infra* chapter 2.2.

¹⁷⁵ It goes without saying that the limited scope of the present enquiry does not allow for a fully-fledged theoretical analysis of the proposed taxonomy. The ambition of this section is to provide a solid, if not comprehensive, analytical basis for the detailed examination of ECJ case-law that will follow.

action are permissible in *politics* and in *employment*, according to the distinction adopted in Part III of the thesis. In this Part a third category, namely that of *sensitive areas of the public sphere* exemplified by the *judiciary*, is also identified and discussed. Due to space limitations, however, the following sections will not consider how each proposed category of equality responds to the specific issues raised in the context of the third category. Such questions will be explored instead in chapter 8.

4.1.1 Non-comparative formal equality.

Formal equality is one of the most cited and, arguably, ill-treated terms in the equality discourse. Liberal moral and political philosophy has claimed paternity rights on the term, attributing it to Aristotle, arguably one of its remote founding fathers. The maxim “treating likes alike” has consistently been thought to constitute a fundamental principle of liberal justice, underpinning the general legal principle of equal treatment in its various constitutional formulations.¹⁷⁶ It is no surprise that this particular notion of equality has been at the centre of liberal thinking, as it fits easily within a liberal normative framework. With state neutrality¹⁷⁷ and the primacy of the individual¹⁷⁸ at its normative core, liberalism can only afford to accommodate a principle of equality that does not conflict with these premises.

A closer look at Nicomachean Ethics, however, throws these assumptions into disarray. The laconic maxim “treating likes alike” is, indeed, of Aristotelian origin, but it

¹⁷⁶ Most post-Renaissance constitutions include some form of a general equality clause among their provisions. The same is true about most international legal texts on the protection of human rights, in which case the provision may take the form of a general non-discrimination clause.

¹⁷⁷ See for instance Gutman, A. (1980). *Liberal Equality*, Cambridge University Press.; Sandell, M. (1982). *Liberalism and the Limits of Justice*, Cambridge University Press.

¹⁷⁸ Instead of many see Kymlicka, W. (1990). *Contemporary Political Philosophy*, Oxford Clarendon Press.

only tells half of the story. If similar situations are to be treated according to the same norm, then different situations require different normative treatment. In Aristotle's own words "this is the origin of quarrels and complaints - when either equals have or are awarded unequal shares, or unequals equal shares" because if two persons are not equals "they should not be entitled to enjoy equal shares".¹⁷⁹ It is obvious that, in this view, sameness (or similarity) and difference are equally significant parts of the concept of equality. Not to put too fine a point on it, they are the two sides of the same coin. If this is true, how can then a law that is "blind" - and, thus, insensitive to personal differences and to how these came about - be entrusted with the task to observe and apply the principle of equal treatment?

A preliminary answer to this question, that any advocate of classical formal equality would be ready to venture, is that differences are indeed taken into account in the context of individual merit. If two candidates possess different qualifications, then they should be treated differently on the basis of these and only these. Aristotle himself eloquently suggests that flute players will not perform better if they are better born and, hence, "the superior instrument should be reserved for him who is the superior artist".¹⁸⁰ Although the argument may sound albeit simplistic on its surface, the validity of its transposition into modern liberal thought should be measured against the different social realities of each era. Employing the Aristotelian argument in the modern socio-political context comes at a considerable cost: merit appears to override any other consideration because the aim of the Aristotelian argument was to expose the unfairness of allocating benefits or privileges to the noblesse de robe solely on the basis of their aristocratic birth.

¹⁷⁹ Aristotle (2004). *Nicomachean Ethics* (translated by W.D. Ross), Kessinger Publishing., p. 69.

¹⁸⁰ Aristotle (2004). *Politics*, (translated by D. Jowett), Nuvision., p. 48.

It does not, however, touch upon the exclusionary definition of citizenry, adopted by Aristotle, which leaves slaves and women outside its ambit.¹⁸¹ Obviously, then, the principle of equality envisaged here cannot account for the radical shift in our understanding of the appropriate composition of the polity. Nor is it plausible to suggest that, despite this shift, the normative attitude towards previously excluded groups can remain unaltered as if nothing significant has changed. Both the philosophical and the normative scope of Aristotelian merit, therefore, are too narrow to support a notion of equality compatible with an inclusionary conception of democracy that underpins contemporary political thought and inspires modern legal systems.

From a philosophical point of view this problem could be regarded as one of restitutionary rather than distributive justice. In theory, therefore, one may plausibly argue that the inclusion of previously excluded categories of persons in the definition of citizenry does not necessarily put the pre-existing distributive paradigm into question, as the injustices suffered in the past may be adequately dealt with through compensatory mechanisms. It must be noted at this point, however, that under the notion of classical formal equality positive action cannot be justified even if seen as a form of collective compensation for past discrimination against specific social groups.¹⁸²

In any case, there still remains another important obstacle to the relationship between Aristotelian equality and modern liberalism. The Aristotelian notion of merit should be understood within the framework of his general theory of justice. In this context, merit as a criterion of distributive justice aims at prohibiting a double injustice, occurring against the individual that personally suffers from the inequality, but also

¹⁸¹ In fact Aristotle has ventured a defence of slavery in his *Politics*.

¹⁸² Dworkin, R. (15 May 2003). "The Court and the University." *The New York Review of Books* 50(8).

against the community as a whole. The latter aspect of injustice is of particular importance here, because it is totally missing from the discourse on classical formal equality. The main argument is quite straightforward in an a contrario formulation: if merit is not the only criterion of selection, the community as a whole will be deprived from the positive effects of having a socially valuable activity performed at the highest level of excellence. The state obligation, therefore, to normatively endorse the principle of meritocracy has the double purpose of satisfying the legitimate expectations of the whole community regarding the collective benefit of the activity, as well as protecting the legitimate equality interests of each individual citizen.

Leaving aside for the time being the question of how a socially valuable activity should be defined, it is easy to see why classical formal equality appears to be at odds with this communitarian ethos. Its commitment to individualism entails that upholding the primacy of the individual is a prerequisite of justice and equal treatment. Invoking the collective interest of the community is not sufficient per se to override this principle, at least not in the sense of imposing on the individual a burden that he bears no responsibility for. In other words, under classical formal equality this principle of meritocracy should be fully applicable even in circumstances where the activity in question is of no particular benefit to the community. Although the liberal equality discourse is not indifferent to the existence of such a collective gain, the latter is usually constructed as an argument of efficiency rather than justice: choosing the “best man for the job” is not only fair, but it also ensures that the end result will be as high-quality as possible. Aristotelian meritocracy, on the other hand, is premised upon the assumption

that choosing the “best man for the job” is fair partly because it ensures that the community will reap the benefits of a high-quality end result.

It is clear, then, that classical formal equality poses a conundrum. It must either accept the full consequences of its Aristotelian pedigree or concede that the liberal understanding of formal equality amounts to something quite different from what the Aristotelian conception is really about. The first possibility is not analytically enlightening for obvious reasons. A communitarian version of formal equality would render this notion doctrinally indistinguishable from opposing conceptions with which the former is supposedly at odds. If the principle of the primacy of the individual can be overridden by considerations pertaining to the collective welfare of the community, then the way to a more substantive perception of equal treatment is wide open. Philosophical differences as to the appropriate definition and scope of this collective welfare will still be present in the discourse, but the point is that formal equality will cease to be “formal” in any meaningful sense.

The second possibility, however, offers fruitful grounds for reflection with a view to clarifying the analytical field on equality. Disengaged from its alleged intellectual progeny, a purely liberal conception of equality can make sense in a *non-comparative* context. Resting on the assumption that the allocation of certain rights or obligations is independent from interpersonal differences, such a conception requires a normative mechanism guaranteeing neutrality with respect to these particular rights or obligations. In other words, liberal equality properly understood is a concept closely linked to the notion of non-comparative rights. The latter are by nature not subject to degrees. Their full enjoyment, therefore, should be ensured for every individual irrespective of any other

consideration, including but not confined to the usual grounds of gender, race and so forth. It follows that the implicit distinction between morally relevant and morally irrelevant characteristics is not applicable here, because no human characteristic can have moral (or normative) significance insofar as this particular set of rights is concerned.¹⁸³ Within these limits, therefore, it is possible to label this conception non-comparative formal equality, in the sense that it requires no comparison between persons (or groups) to be satisfied.

A paradigm case seems necessary at this juncture, in order to exemplify what non-comparative formal equality signifies on a normative level. The right to respect for human dignity is the evident candidate for this intellectual enterprise. Its character as a fundamental human right that should be universally protected is generally uncontested. No one has ever plausibly argued that respect for human dignity may be subject to degrees, conditions, restrictions, limitations or derogations and this remains true even in the most strenuous socio-political circumstances, as in the case of war. Full enjoyment of the right is, at least in theory, guaranteed to everyone equally, regardless of gender, race, ethnicity, sexual orientation, physical or mental ability or political beliefs, but also regardless or in spite of personal life-choices that may have even incurred criminal responsibility. This is why the right to human dignity comes as close as possible to the notion of inherent or natural rights, in the sense that it is inalienable. For this reason and

¹⁸³ This proposition has obvious implications for the human rights discourse in general, the most pertinent being the resulting dichotomisation of rights into inherent and non-inherent or fundamental and non-fundamental. Such categorisation implies a hierarchy of rights which, apart from being theoretically controversial, will arguably create a number of practical difficulties. This problematic goes beyond the limits of the present enquiry and can only be adequately addressed in its appropriate context. In any case, the potential effects of this approach on the human rights discourse do not affect its conceptual validity.

because of its universal scope *rationae personae*,¹⁸⁴ it is often asserted that it is the only truly absolute fundamental right.¹⁸⁵

Even if one is inclined to generally reject the idea of absolute rights on philosophical grounds,¹⁸⁶ the meaning of absolute in this context may be easier to defend as being very modest in its ambitions. What it connotes in the light of non-comparative formal equality is merely that the right should be protected in absolute terms, without the need to measure personal characteristics or situations against one another. This by no means entails that there is universal consensus on the appropriate content of the right. Whether female genital mutilation or the obligation to wear the headscarf constitute an affront to human dignity or not is highly debatable. Both camps of advocates, however, declare their unassailable commitment to human dignity. There is no serious dispute over whether human dignity can be lawfully limited or over whether it applies differently to men and women.

Equal treatment with regard to the right to human dignity, therefore, seems to fit perfectly in our proposed liberal construct of non-comparative formal equality. No interpersonal comparison is necessary - or even permissible - to determine whether, how and to what extent this right should be enjoyed. Any differentiation in the state's attitude towards persons or groups in relation to human dignity would constitute unlawful discrimination and, hence, a violation of the principle of equal treatment.

This brings to the fore the cardinal issue of the relationship between this conception of equality and non-discrimination. Although it is suggested that "non-

¹⁸⁴ In the sense that it is guaranteed for everyone equally and without any qualifications.

¹⁸⁵ Arguably the right not to be tortured could fall under the same category, but it would seem ironic to even rehearse the arguments in favour of this view in the era of Guantanamo and Abu Grab.

¹⁸⁶ Suffice it to say here that the hierarchy implicit in the distinction between absolute and non-absolute rights has never been accepted in the jurisprudence of national or international courts.

comparative formal equality” offers a more succinct and accurate account of what liberal equality stands for than the traditional notion of “formal equality”, the proposed alternative is, admittedly, not capable of avoiding the normative “thinness” of which its philosophical predecessor has been accused. It is not difficult to see why. If non-comparative formal equality is satisfied only when every person is treated identically with regard to a particular right or obligation, then the principle of equal treatment appears to collapse into non-discrimination. What is usually perceived, therefore, as the fundamental flaw of formal equality is also present in the alternative conception introduced here. A principle that has primarily negative functions (prohibition of discrimination) seems insufficient to guarantee that persons or groups are genuinely equal to one another in any meaningful respect. From a different perspective, if equal treatment is premised upon the sole fact that persons share a “common humanity”,¹⁸⁷ then equality is in itself an “empty concept”.¹⁸⁸ In this view, if an individual is deprived of the full enjoyment of the right to human dignity, this constitutes a direct violation of the said right rather than a violation of equal treatment.

These remarks, however, even if correct, do not have any bearing on the analytical validity of the notion of non-comparative equality proposed here. The purpose of the latter is descriptive; it is an attempt to provide an intelligible framework of “purely” liberal equality, one that will clearly distinguish it from opposing conceptions,¹⁸⁹ with a view to determining, at the end of the day, what is or should be the appropriate understanding of equality in a European normative context. And if classical formal

¹⁸⁷ Williams, B. (1962). The Idea of Equality. Philosophy, Politics and Society P. Laslett and W. G. Runciman, Blackwell. 2nd Series.

¹⁸⁸ Westen, P. (1982). "The Empty Idea of Equality." Harvard Law Review 95(3): 537-596

¹⁸⁹ Which may still fall within or be closely linked to the generic category of liberal thought.

equality fails to convince of its usefulness in this regard, due to its over-ambitious character, non-comparative formal equality commits no such mistake. Its analytical claims are simple and straightforward and they are compatible with a particular philosophical strand within the human rights discourse, one that ascribes the quality of inalienability to certain rights and labels them as absolute.¹⁹⁰ Whether or not it is philosophically appropriate to discuss these rights in terms of equality in the first place is a different matter.

To put it plainly, the term non-comparative formal equality accurately describes a conception of equality that may be erroneous in one or more respects¹⁹¹ but that operates in a specific context and is context-dependent. It is possible, then, to argue that non-comparative formal equality constitutes the appropriate understanding of equal treatment only within this context - of non-comparative rights, such as the right of respect to human dignity for instance - and that this will not be the case when a comparison of personal situations is necessary to maintain equality of treatment. By having a narrower scope of application than classical formal equality, therefore, the notion of non-comparative formal equality is more concrete and, hence, more coherent.

To sum up, non-comparative formal equality rejects by default positive action as a legitimate means to achieve equality, even in the form of an exception to equal treatment. Gender (or race and so on) should never, in this view, be relevant as a criterion to determine how two persons should be treated. Criminal law is, arguably, the prime field where this conception seems to have resonance with normative reality. In this context

¹⁹⁰ And, of course, one that understands the function of human rights to be the protection of individual autonomy vis-a-vis the state. See Fredman, S. (2005). "Changing the Norm: Positive Duties in Equal Treatment Legislation." *Maastricht Journal of European and Comparative Law* 12(4): 369-398.p. 370.

¹⁹¹ The objections to this particular notion of equality will be thoroughly discussed at a later stage.

equality before the law is generally understood in non-comparative terms. Differences in personal situations are irrelevant when it comes to attributing criminal responsibility, although they may still be decisive when weighing the actual penalty.¹⁹² This is another indication that non-comparativeness does not amount to or entail absoluteness.

The question, of course, is whether such a notion can also underpin our understanding of equal treatment or equality before the law in other normative areas, where positive action is an issue. Within the existing EU legal framework it is evident that a conception of equality rejecting positive action altogether has no place. With the inclusion of article 2 (4) in the Equal Treatment Directive, positive action has been added since the mid-70s to the legal arsenal of the Member States in the battle against inequalities in the workplace. When Article 141 (4) was incorporated into Treaty law at Amsterdam, the possibility of adopting or insisting on a theory of equality that labels positive action as “unfair” or “discriminatory” is no longer available. Although the Court is in a privileged position to interpret the relevant provisions narrowly and diminish their effectiveness, it cannot but accept and uphold the legitimacy of positive action in principle.

A final remark should be made in this connection. When it comes to positive action, classical formal equality obfuscates the discourse: it is seen as representing a “symmetrical” approach,¹⁹³ which is incompatible by default with any form of positive action, while at the same time claiming to be the offspring of Aristotelian thought, which has been proved to be problematic. Non-comparative formal equality, on the other hand, does not assert that positive action is unjustifiable across the normative field, because it

¹⁹² Despite its famous classical depiction, it seems that Justice is not *totally* blind after all.

¹⁹³ Fredman, S. (1999). After Kalanke and Marschall: Affirming Affirmative Action. The Cambridge Yearbook of European Legal Studies - Volume One, 1998. A. Dashwood and A. Ward, Hart., at p. 200.

does not wield a claim for the whole of the normative field. It follows that non-comparative formal equality can be reconciled or coexist with opposing conceptions of equality, insofar as there is no overlap in their respective scopes of application.

4.1.2 Unqualified equality of outcomes.

The notion of equality of results is generally thought to occupy the opposite end of the analytical spectrum. If formal equality is about form and process, equality of outcome is concerned with “where people end up rather than where or how they begin”.¹⁹⁴ The underlying assumption is that vast inequalities in outcomes can almost never be proven to stem from divergence in preferences, tastes or genuine choices. If this is true, that is if individuals do not bear personal responsibility, then these unequal outcomes echo some sort of unfairness. The latter may be the result of inequality of opportunities available at the original position¹⁹⁵ or of inequality of burdens imposed by stereotypical social attitudes towards certain groups of the populace. Inequality of opportunities, therefore, can be classified as purely individualistic, in the sense that it reflects differences in personal circumstances and capacities, whereas inequality of burdens refers to the dissimilar obstacles posed to members of different groups due to stereotypical social attitudes that rest on unjustified presumptions.¹⁹⁶ In any case, the relations produced do not qualify as relations of equality under this conception and they require corrective normative measures aiming at rebalancing the state of affairs.

Much like classical formal equality, however, the notion of equality of outcome is analytically unclear. The main reason is its ambiguous relationship with what is usually

¹⁹⁴ A. Phillips, *supra* no. 23, at p.1.

¹⁹⁵ In which case choices are not really genuine.

¹⁹⁶ The latter, then, is an index of institutionalised indirect discrimination.

termed substantive equality. Although the conceptual affinity between the two is undeniable, suggesting that equality of outcome is merely the “strictest” form of substantive equality does not really account for the significant qualitative differences between the two. These become palpable in “hard” cases, where the adoption of one point of view rather than the other not only determines the dispute at hand, but also defines the appropriate normative scope of equality law. Positive action is the exemplification of such “hard” cases. Whether or not certain types of positive measures are justified under the generic category of substantive equality depends on the specific nuance of substantive equality at work. It is, therefore, useful to attempt a dichotomisation of substantive equality into two clearly distinct analytical categories, termed unqualified equality of outcomes and qualified substantive equality respectively.¹⁹⁷

The first of these categories can, indeed, be defined as the *altera pars* of non-comparative formal equality, in that it unequivocally accepts the legality of positive action in principle as an essential component of equal treatment. In this view positive action does not constitute a state of exception; it is a redistributive mechanism - redistributive of resources and, ultimately, power - designed to ensure that relationships of equality are maintained both at the starting point of the distributive process and after its end. It goes without saying that equality, then, is measured in terms of results rather than in terms of due process - and this is exactly why the difference between unqualified equality of outcomes and qualified substantive equality should be understood as a qualitative (equality of what or at what stage) rather than a quantitative one (what degree of equality or equalisation). Strict quotas, designed to give preference to members of

¹⁹⁷ The category of *qualified substantive equality* will be discussed further below.

under-represented groups without any further qualification or condition, are not only legitimate or justified but also necessary to attain the balance dictated by equality.

Positive action in politics can, indeed, serve as a paradigm case of what unqualified equality of outcomes stands for. The analysis that follows will hopefully allow us to distinguish this notion from its more closely linked counterpart - and ally - on the equality discourse, namely qualified substantive equality. From a methodological point of view the way to determine the semantic differential between or among opposing conceptions of equality with respect to positive action is to identify the strictest form of quota (or of any other, possibly less “invasive”, positive measure) that is justified by each one.

In this regard, it is submitted that unqualified equality of outcomes accepts the legality of quotas in favour of female (or ethnic minority) candidates for elected political office guaranteeing that the elected body will consist of such candidates in a fixed minimum percentage. Positive action of this sort can take the form of either a straightforward quota system as described above¹⁹⁸ or of all-female shortlists, insofar as the latter guarantee that a female (or ethnic minority) candidate will definitely be elected.¹⁹⁹ It must be underlined that the percentage of minimum guaranteed participation in the elected body does not necessarily need to accurately reflect the composition of the electorate. In other words, unqualified equality of outcomes may secure a minimum

¹⁹⁸ Such a system cannot operate in cases of “first past the post” electoral systems that allow for a single candidate per constituency per political party (given that every constituency returns a single seat).

¹⁹⁹ This will be the case only if all political parties are under a *legal obligation* to employ all-female shortlists. It should be noted that the well-known British example of the late 90s involved the *voluntary* establishment of such measures in specific constituencies by the Labour party and did not, therefore, constitute a *compulsory* legal requirement.

female participation of 25% or 35%, despite the fact that women represent, by and large, half of the electorate.²⁰⁰

The case of positive measures in politics, notwithstanding its inherently controversial character, is the most appropriate context in which to contemplate the *modus operandi* of unqualified equality of outcomes. The notion of merit therein is by default relative, as it is not construed according to the same “objective” standards as in employment. Considerations of the merit of individual candidates cannot circumvent, put into question or delegitimise the free and genuine choice of the people in a representative democracy. Of course it is desirable to end up with office-holders that possess the highest level of skills and qualities, but it is even more desirable and, in fact, absolutely crucial to end up with elected representatives that are fully aware of their mandate and their political role within a democratic system of governance.

Unqualified equality of results incorporates this rationale and posits the additional assumption that the imbalance in representation of specific social groups in elected public bodies can be neither logically explained nor legally justified. However counterintuitive this may sound, the Aristotelian connection between equality and justice is pertinent here as well. Under-representation corresponds to an infringement of the principle of equality, which in turn amounts to a violation of the fundamental principle of justice in a democratic context. Positive action, therefore, is legitimate insofar as it is necessary to ensure that the distribution of political power is not the product of unbalanced institutional structures of domination.

²⁰⁰ Obviously this does not exclude the possibility of a quota ensuring the highest possible percentage of participation, which cannot in any case exceed 50%. The French “parity” model appears to come closer to this threshold, although it is not inspired by the notion of unqualified equality of outcomes for reasons that will be explained later on.

The application of such a notion of equality in politics exposes its philosophical weaknesses. From a liberal perspective the obvious critique is that it completely disregards the primacy of the individual by favouring specific candidates over others. This, however, seems to be a moot point, given that an argument coming from an opposing point of view on equality is bound to be circular. The main problem with unqualified equality of outcomes lies with its innate essentialism. Presupposing that female voters can only be properly - or, at least, better - represented by female office-holders amounts to a conception of social representation premised on false assumptions about women's collective interests or convictions.²⁰¹ The very idea of a unitary theory of equality that can account for the "collective" interest of all women does not resonate with modern feminist thought.²⁰² In view of the multiplicity of ethnic minorities in European societies, the same appears to be true from the point of view of race equality as well.²⁰³

Along the same lines, unqualified equality of results is guilty of infantilising parts of the population by assuming that they are not politically mature enough to make informed decisions as to their choice of representatives. This idea of "immature" voters in need of external "guidance" sounds unduly paternalistic, if not extremely dangerous. Stretched to its conceptual limits it appears to negate the very foundations of direct participation through elections in a democratic system of governance.

From a perspective of democracy this problem affects, in fact, the whole of the electorate. Results quotas in political elections entail that the section of the population intending to vote or actually voting for female or minority candidates is treated more

²⁰¹ Mouffe, C. (2005). *The Return of the Political*, Verso., pp. 76-78.

²⁰² Cornell, D. (1990). "The Doubly-Prised World: Myth, Allegory and the Feminine." *Cornell Law Review* 75(3): 644.

²⁰³ Mutatis mutandis this argument applies to all under-represented social groups that may have a legitimate positive action claim.

favourably than the section of the population wishing to vote or actually voting otherwise. The latter either have their set of options curtailed, as in the case of all-female shortlists, or see their choice “count for less”, as in the case of a guaranteed minimum percentage of representatives from specific social groups.²⁰⁴

In view of these complexities the realm of political representation seems inappropriate to accommodate a notion of unqualified equality of outcomes. In pragmatic terms, though, what should be noted is that European law does not take a stance on the legality of positive action in politics, as the normative scope of the relevant provisions is limited to employment and the definition of the latter does not encompass, in the Commission’s view, elected office holders.²⁰⁵ The legitimacy, then, of all-female shortlists or results quotas is - primarily if not exclusively - a matter of national law and, in this regard, there may be substantial divergence across the Union. Thorough analysis of domestic legal systems is necessary in order to provide a definitive answer on this matter. An admittedly superficial overview of positive law, however, is in itself enough to offer a preliminary conclusion: positive measures of this sort may be justified only as a matter of exception to equal treatment, with everything that this entails.²⁰⁶

What remains to be examined is whether and how unqualified equality of outcomes can be applied in the field of employment. This would involve a quota in favour of under-represented groups in certain areas of employment to the effect that positions in these areas would be filled by a minimum number of members of these

²⁰⁴ The argument here refers to the possibility of female or minority candidates being elected with an overall smaller percentage of the vote compared to other candidates (not belonging to under-represented groups).

²⁰⁵ Most Member States’ governments and national authorities, including the UK, seem to support the view that positive action in politics falls outside the scope of Community law.

²⁰⁶ Most importantly that the exception should be narrowly interpreted and that there should be a clearly defined time frame for the operation of such measures, probably in the form of a sunset clause.

groups regardless of qualifications. The semantic differential between unqualified equality of outcomes and the other conceptions of the substantive equality “genre” lies precisely in this last element.²⁰⁷ Professional qualifications are immaterial when it comes to the application of this strict quota. Individual merit, in other words, cannot override the need for equal treatment, as viewed through the lens of unqualified equality of outcomes.

It goes without saying that such a quota could not be justified as a matter of Community law as things stand at present. Even if the principle of the primacy of the individual is not construed in such a way as to effectively preclude strict quotas in general, the legality of the latter, according to the Court, depends on the existence of a proviso allowing for interpersonal comparisons of qualifications between or among candidates. Regardless of how exactly the relevant provisions are or should be interpreted by the Court, it seems rather improbable that positive action can lawfully operate in a normative framework without any reference to merit whatsoever.

Apart from positivist arguments against such a possibility, one must also consider the implications on the collective welfare of the wider community. Leaving merit entirely out of the picture seems irrational, given that the beneficiary of preferential treatment must be at the very least capable of performing the job adequately. Although the threshold of what counts as “adequate” may, of course, vary with regard to the particular occupation and the potential risk the community may have to undertake as a result,²⁰⁸ it is difficult to accept that equal treatment may amount to a complete disregard of individual abilities. Any conception of equality that claims to have practical social value must be

²⁰⁷ The analytical categories of *qualified substantive equality* and *substantive equality of opportunities* will be discussed further below.

²⁰⁸ In this respect, the threshold of a neurosurgeon’s “adequacy” may be higher than that of a research assistant at a University, on the basis of the divergent levels of risk involved in each occupation for both the individuals at the receiving end and the society as a whole.

able to defend itself against “levelling-down” arguments. In the present context this means that the possession of a minimum level of professional ability must feature as a criterion in the selection processes for any employment post in order to avoid what is colloquially referred to as a “race to the bottom”. If this is the case, however, that is if the favoured candidate should be at least sufficiently qualified to perform the tasks at hand, then the underlying conception of equality cannot be what we defined as unqualified equality of outcomes,²⁰⁹ but should rather fall under the category of qualified substantive equality.

4.1.3 Qualified substantive equality.

Having conceded that both unqualified equality of outcomes and qualified substantive equality belong to the large “family” of substantive equality, our first task at this point should be to confirm that this analytical distinction of the two proposed categories is fully justified. To this end it will be useful to follow the same methodology and examine qualified substantive equality by reference to positive action in politics first, so that the differences with the previous notion of equality become patently clear from the outset.

Qualified substantive equality accepts the legality of quotas in favour of under-represented groups in elections for political office requiring that each party electoral list is comprised to a minimum percentage by members of these groups. Contrary to unqualified equality of outcomes, the compulsory quota here does not guarantee that any number of minority candidates will actually be elected. Its aim is to ensure that an

²⁰⁹ The fact that quotas in favour of *sufficiently* qualified candidates have been declared incompatible with Community law by the Court in the case of *Abrahamsson* (see *infra*) does not affect the theoretical validity of the point made here.

adequate number of such candidates will be put to the public vote. The underlying assumption is quite similar to the one guiding the previous notion of equality: if certain social groups are excluded from or severely under-represented in elected decision-making bodies, the only plausible explanation appears to boil down to institutional indirect discrimination.

The main difference, however, with unqualified equality of outcomes is that this quota system has no bearing on the public's exercise of the right to vote. The "one person, one vote" principle is here fully respected, since the quota does not apply at the deciding stage of the process. In this case it is only the individual white male (potential) candidates who did not make it to the party's electoral list that bear the "cost" of the quota and not the electorate as a whole. Qualified substantive equality, therefore, is less problematic with regard to democracy.

A quota system of this sort, focused solely on gender, has been adopted in its most straightforward formulation by Greece with respect to municipal elections.²¹⁰ The latter provides that the parties' electoral lists should be comprised by members of each sex to a minimum of 1/3 of the total party candidates. As already explained, positive measures in politics seem to fall outside the remit of Community law altogether. As a result, the legality of schemes of the Greek variety cannot be put into question for the time being. What is more controversial and, hence, particularly interesting for the present enquiry is the application and consequences of qualified substantive equality in the field of employment and the types of positive action that it justifies therein.

Coming now to the area of employment, it is easier to identify how qualified substantive equality operates with the relation to the competing conceptions and, indeed,

²¹⁰ See *infra*, chapter 7.2.1.

explain the choice of terms. It is *substantive* equality because it accepts the legality in principle of preferential treatment to *equally* or even *fully* qualified²¹¹ members of under-represented groups within a specific employment cadre. Merit, in this regard, is not the sole criterion of selecting the appropriate candidate, as in the case of non-comparative formal equality. At the same time, however, it is *qualified* equality because there are conditions under which the merit principle can be overridden. Quotas are legitimate only insofar as they allow for interpersonal comparisons of individual candidates. Merit, in other words, is still a *necessary* condition for appointments or promotions, but is not a *sufficient* condition in itself to ensure equality of treatment.

The key to understanding the place of positive action in the context of qualified substantive equality is through reference to the notion of *fully qualified* candidates. It is submitted that candidates fulfilling all the *essential* requirements listed in the job description for a particular position are deemed to be *fully qualified* to perform the tasks involved. A quota system, then, that allocates preference to a *fully qualified* candidate from a target group is justified under this conception of equality. The gender or race²¹² of the potential appointee becomes a relevant factor in the selection process *after* it has been established that the candidate is meritorious²¹³ and that there will be no significant losses in terms of *performance quality*.

Such a system has been the object of judicial scrutiny by the ECJ in the case of *Abrahamsson*. Although this case will be extensively discussed later on in this chapter,²¹⁴ it should be noted at this point that the Swedish quota system in question was *rejected* by

²¹¹ The difference between these two will be explored in detail in the final chapter of this thesis.

²¹² Or any of the other personal characteristic used to identify target groups for positive action schemes.

²¹³ And, of course, provided that the group to which this candidate belongs is under-represented.

²¹⁴ See below, chapter 4.2.4.

the Court as incompatible with Article 141 (4) and the Equal Treatment Directive. According to the taxonomy proposed here, then, it is evident that, according to the case-law as it stands at present, only *flexible result quota schemes* pass the legitimacy test of the ECJ. In other words, what is described here as a qualified substantive equality approach has not as yet been adopted by the Court in any of its rulings. This is no coincidence, as the underlying rationale of EU equality law is thought to reflect an *equal opportunities* model, to the examination of which we now turn.

4.1.4 Formal equality of opportunities.

The discourse on equal opportunities is vast and complex. The classical “equal opportunities” notion - if, indeed, one can be identified - is guilty of over-inclusiveness and lack of certainty. It shares the same conceptual grounds with non-comparative formal equality in accepting the primacy of the individual and the liberal principle of state neutrality, but it acknowledges the need to “level the playing field” in view of existing inequalities stemming from discrimination. Deviations from state neutrality, then, are permissible for a limited period of time, until the goal of “equal opportunities” has been achieved. This model, however, fails to give any more specific guidelines as to the appropriate extent of *state intervention* and it does not contain a metric system that would allow an objective assessment of its own success. In other words, any “moderate” theory of equality can qualify as “equality of opportunities”, despite the vast differences that may exist in the determination of what constitutes a truly “level playing field”. For these reasons it has been deemed necessary, in the present context, to break down the generic

category of equal opportunities into two analytical categories, in order to properly account for philosophically and normatively significant nuances therein.

Formal equality of opportunities can be summarised as follows: gender or race may be used as legitimate criteria of selection with a view to “levelling the playing field” for all individual candidates. Justice is not “blind” to personal differences - as it is supposed to be under non-comparative formal equality²¹⁵ - insofar as these differences produce a *restricted* set of valuable options²¹⁶ for members of certain social groups.²¹⁷ Positive action, therefore, may be legitimate in its softer forms, such as targeted professional education or programmes of professional orientation, in order to facilitate access of disadvantaged social groups to the full set of options available to the non-disadvantaged social majority.

Under this conception of equality it is obvious that positive action in politics in the form of *compulsory* quotas cannot be accepted. It may be possible to allow strategies designed to raise public awareness on equality issues with regard to political candidatures²¹⁸ or programmes aimed at enhancing the opportunities of potential candidates from disadvantaged groups to put themselves forward in the party selection proceedings. But a quota system, designed to reserve places for individual members of the target group at *any* stage of the candidate selection process goes beyond what is permissible, because it is thought to achieve results rather than manage access to opportunities.

²¹⁵ Although formal equality of opportunities shares some conceptual affinity with non-comparative formal equality, especially with regard to the primacy of the individual, it is clearly distinguished from the latter as it requires interpersonal *comparisons*.

²¹⁶ Gardner, J. (1998). "On the Grounds of her Sex(uality)." *Oxford Journal of Legal Studies* 18(1): 167-187., at 170.

²¹⁷ Under this liberal view it is the state that determines what counts as a valuable option.

²¹⁸ Such as information campaigns etc.

In the field of employment positive action is, again, acceptable in principle as a mechanism to address inequalities, albeit under strict conditions. Softer forms of positive action will be legitimate, insofar as it can be proved that they are designed to address existing inequalities in the access to or distribution of opportunities. Quota systems, however, are in principle understood as going beyond the legitimate regulation of equal opportunities.

Theoretically, a tie-break rule allocating preference to an *equally* qualified member of an under-represented group might pass the threshold of legality, as it could be argued that the final choice between candidates of equal merit is effectively a matter of ensuring equality of opportunities. Even if this argument were to succeed, quota systems would still be faced with a very high threshold of legality. Justifying the use of quotas would involve an obligation to provide statistical data showing evidence of a *pattern* of favouring male candidates over equally qualified female candidates.²¹⁹ It would not be enough, therefore, to rely on the mere fact that any particular group is under-represented, because the *presumption* that under-representation is due to discrimination does not suffice here. In fact, this presumption is, in a sense, reversed: the legislator has a burden to prove that, in the absence of the quota, there will be no equality of opportunities.

This “reversal of the burden of proof” is explained by reference to the theoretical underpinnings of the notion examined here. Since formal equality of opportunities is conceptually committed to the *primacy of the individual*, what must be demonstrated is that the *individual beneficiary* from the under-represented group in a specific selection procedure would be *deprived* from her right to enjoy equality of opportunities. Arguably,

²¹⁹ Or white candidates over ethnic minority candidates.

the reason the Court struck down the *Kalanke* quota scheme was exactly the insufficient degree of *individualisation* factored into the system.

4.1.5 Substantive equality of opportunities.

The second category within the umbrella concept of equality of opportunities takes a more “substantive” turn. For this reason it is necessary to distinguish it clearly from the two competing notions of qualified substantive equality, on the one hand, and formal equality of opportunities on the other.

Starting with the former, it must be noted that the key assumption underlying substantive equality of opportunities is the same as in qualified substantive equality. Under-representation of specific groups in employment or elected public offices stems from institutionalised indirect discrimination. This assumption operates in favour of the legality of positive action, including flexible quotas. In other words, a system designed to allocate preference to an individual member of the target group is in principle legitimate under both notions of equality, insofar as it provides for the possibility of an ad hoc reversal of the quota on grounds of individual circumstances. This is the common “substantive” element of the two notions.

What tells these two notions apart, however, is, above all else, their commitment to different ideas about the *role* of equality legislation and the degree of *permissible state intervention* within a liberal theoretical framework. For qualified substantive equality “levelling the playing field” will not always be enough. The principle of equal treatment, in this view, should take into account not only present opportunities but also past and present *obstacles* that members of a particular social group have come up against when

trying to build up their set of qualifications that count as *merit*. As a result, preference to a member of an under-represented group may be legitimate even if the individual beneficiary is not the most meritorious candidate in absolute terms.²²⁰

Substantive equality of opportunity, on the other hand, remains unassailably committed to the primacy of the individual. State intervention can only go so far as to ensure fair *access to opportunities* for all individual and social groups. Any interference in the *selection process* itself, however, goes beyond the limits of what is permissible. *Merit* as a criterion for selection, therefore, cannot be overridden. And it must be pointed out that, with quota systems allocating preference to *equally qualified* candidates from the target groups, the merit principle does *apply* throughout the selection process and is *not actually overridden*. The quota is triggered only *after* the application of the merit principle has proved insufficient to determine the outcome of the process, given that the result it produced was a *tie*.

On the same basis - albeit from a different perspective - substantive equality of opportunities is also distinguished from formal equality of opportunities. The latter, as explained earlier, is particularly sceptical towards quota systems, which could only be allowed in exceptional circumstances and under very strict conditions. Substantive equality of opportunities, on the contrary, takes a more relaxed view, because it posits that flexible quotas of the tie-break type do not violate the merit principle and are in principle a legitimate exception to the principle of equal treatment.

By and large, this approach has been adopted by the ECJ in *Marschall* and *Badeck* and seems to reflect the dominant interpretation on the position of positive action under European equality law.

²²⁰ This was the case with the Abrahamsson system, which was, of course, struck down by the ECJ.

4.2 Positive Action in the European Union: The Jurisprudence of the ECJ and the Meaning of “Full Equality”.

It is a commonplace to observe that positive action has been at its most prominent in the field of employment. Apart from reasons of historical significance and political contingency, pertaining to the particular socio-political climate that gave birth to the concept in the United States, the principal explanation is a functional one and should be sought in the human condition of the post-industrial revolution era: men and women of our times tend to devote to their professional occupations the “best” part of their lives, not only in quantitative but also in qualitative terms. Work is no longer merely a means of subsistence for the poor and a “noble” pastime for the rich; it is rather the privileged social locus for the exercise of personality-related rights, the development of the self, the pursuit of ambitions and, ultimately, the affirmation of a plan of life that reflects an individual conception of happiness and personal fulfilment. It should be no surprise, then, that achieving “full equality” in the workplace is a primary objective of every modern democratic society and that positive action litigation before the ECJ in the field of employment has been gaining momentum.

Long before the inclusion of an explicit reference in the Treaties, art. 2 (4) of the Equal Treatment Directive introduced officially the concept of positive action into secondary Community law as a mechanism to ensure that equal treatment would be more than a paper obligation for the Member States. The objective of this provision was to

introduce an exception to the principle of gender equality in employment²²¹ for national measures aiming to promote “equal opportunity for men and women, in particular by removing existing inequalities”.²²² The wording chosen by the drafters is telling: equal treatment is understood as formal equality, along the lines of the well-known “treating likes alike” maxim, and provisions that deviate from this rule can only be justified if they address an actual gender gap in opportunities.

Conceiving of positive measures as exceptional in nature sets the tone for the interpretive margin available to the Court of Justice. Although the Court has, on more than one occasion, proven that its creative activism is enough to overcome obstacles posed by legal formalism and transform the face of Community law, it is beyond doubt that exceptions must be interpreted narrowly. In this regard, it is not surprising that Judges and Advocate Generals have found it difficult - at least initially - to come to terms with the “exciting” new possibilities for anti-discrimination law opened by article 2(4) of the Directive.

4.2.1 The early case law: Reluctance and caution.

The early case law of the Court involved the remit of this provision and the types of national measures that were permitted.²²³ More importantly, however, these cases illustrate the prevalent understanding of the theoretical relationship between positive action and the principle of equal treatment. In *Commission v. France* the Court ruled that

²²¹ Enshrined in article 1 of the Directive.

²²² Art 2(4) Directive 76/207.

²²³ Generally on the early ECJ case-law on positive action and its impact on Member States see also Veldman, A. G. (1999). *Preferential treatment in European Community Law: Current Legal Developments and National Practices. Non-Discrimination Law: Comparative Perspectives*. T. Loenen and P. R. Rodrigues, Kluwer Law International., pp. 279-294.

the exception of article 2(4) was “specifically and exclusively designed to allow measures which, although discriminatory in appearance, were in fact designed to eliminate or reduce actual instances of inequality that might exist in the reality of social life”.²²⁴ The French legislation in question that implemented the Directive permitted collective agreements to include provisions “granting special rights to women”²²⁵ with a view to achieving the goal of effective equality between the sexes as envisaged in the Directive. The Court’s reasoning in striking down the French law is quite revealing: incompatibility with the Directive was the result of the *generality* of the French implementing provisions and the absence of an appropriate *mechanism to review* them periodically.

According to the Court, the French government failed to demonstrate that the “generalised preservation of special rights for women”²²⁶ fell within the ambit of the Directive as a justified deviation from formal equality. As observed in paragraph 14 of the judgment “some of the special rights preserved relate to the protection of women in their capacity as older workers or parents - categories to which both men and women may equally belong”. It seems, then, that the Court is implicitly using an effectiveness test here that the French provisions do not satisfy, insofar as they are not specifically designed to address actual instances of inequality between men and women. Without engaging in a detailed analysis of the issue, the Court employs the traditional “comparator” logic of the non-discrimination discourse but it does so with the objective of assessing the legitimacy of the positive measure. In other words, favourable treatment to female workers is unjustified, if male workers are in similar situations, which is the

²²⁴ Case C-312/86, *Commission v. France Republic* [1988], ECR 6315, para 15.

²²⁵ *Commission v. France*, para 4. These rights included, among others, extension of maternity leave, shorter working hours for female employees above a certain age and additional days of annual leave and “extra points for pension rights” for working mothers.

²²⁶ *Commission v. France*, para 14.

case when using age or parenthood as the criterion of allocation. Despite appearances, then, this reasoning is formally compatible with the basic underlying rationale of positive action that requires some form of disadvantage caused by discrimination in identifying the target groups.²²⁷ What strikes one as particularly odd, however, is that the Court avoids considering whether older female workers *were in practice equally disadvantaged* as the male comparator. By simply asserting that this *may* be the case, the Court appears to be dwelling in its own virtual reality.

When dealing with the *temporal dimension* of the scheme in question the Court's understanding of positive action's *modus operandi* becomes clear. Positive action under the Directive is a temporary derogation from the principle of equal treatment with a view to achieving genuine equality of opportunities. A prerequisite for the legitimacy of such derogation is the existence of a legal mechanism that will allow for a periodic reassessment of the necessity to maintain special treatment for the target group. The goal is the return to formal equality as soon as possible. In the French situation the "special rights" were afforded through collective agreements²²⁸ and it was left to the two sides of industry to determine, through further collective negotiations, whether and when positive action was no longer necessary. The Court dismissed this "delegation" of decision-making as incompatible with the primary state obligation imposed by the Directive, namely to ensure the removal of all instances of gender discrimination in labour relations. The significance of using equal treatment as a counter-argument to positive action cannot be overstated. Positive action is dealt with here as a legal anomaly, a special case of

²²⁷ It follows from this interpretation of the Court's reasoning that the outcome of the case might have been different, if the French government had proved that *older female workers* were at a disadvantage - stemming from discrimination - compared to their male counterparts.

²²⁸ Which were signed before of the entry into force of the Directive.

reverse gender discrimination that can only be functionally justified for a limited period of time and with the constant scrutiny of the state. In the arsenal of anti-discrimination laws positive action is a “nuclear bomb”: it may be necessary to win the war, but it is nonetheless a feared and loathsome weapon.

The Court’s reluctance to endorse a more substantive notion of equality was even more apparent in the famous *Kalanke* judgment.²²⁹ A German regional law with a tie-break clause in favour of equally qualified female candidates in sectors where women were under-represented was found to contravene the Directive. According to the Court, article 2(4) should be understood as a “derogation” from the right to equal treatment and, as such, it should be narrowly interpreted. Again the linguistic choices of the Court are very illuminating. Paragraph 16 of the judgment seems to be very informative as to where the Court’s loyalties lie: “A national rule that, where men and women who are candidates for the same promotion are equally qualified, women are *automatically* to be given priority in sectors where they are under-represented, involves *discrimination on grounds of sex*” [emphasis added]. It is clear that the Court is particularly wary of positive action as reverse discrimination, in tandem with the relevant literature. Paragraphs 22 and 23 cut a long story short and unequivocally explain that the Directive aims at ensuring equality of opportunities rather than equality of results. National rules that overstep this boundary, therefore, will fall outside the permitted exception.

Insofar as this statement reflects a theoretical possibility, it is nothing more than a trivial reaffirmation of the undeniable need to set limits to the use of gender (or any other morally irrelevant characteristic) as a criterion of benefits allocation, even when used for “benign” purposes. Few would disagree with the validity of such an assumption, which is

²²⁹ *Kalanke*

why most proponents of substantive equality are keen on distinguishing “their” notion of equality from what is usually termed equality of results or equality of outcome.²³⁰ This is not, however, what *Kalanke* is really about. The German scheme in question involved the use of a “soft” quota, one designed to favour only *equally qualified* candidates of the *under-represented* sex. The Court attempted to refine the rationale used in its previous case law by bringing into play the concept of meritocracy. Simply put, the main concern is that no individual male candidate should bear the cost of past discrimination against women. As a result, *automatic preference* to the female candidate will amount to unjustifiable reverse discrimination, exactly because there will allegedly be no room in the selection process to take into account the personal circumstances of the competing individual candidates. In this regard, measures that deviate from the principle of individual merit at the decision stage will not be covered, according to *Kalanke*, by the article 2(4) exception.

This judgment can easily be characterised as a particularly weak specimen of legal reasoning and it has rightfully attracted a good deal of harsh criticism.²³¹ The Court applied its theoretical construct of permissible positive action to a *tie-break* quota system that allowed preferential treatment to the female candidate *only after it had been established that she was equally qualified to her male competitor*. How can, then, preference in such a case be regarded as automatic, when the system provides for a full assessment of the candidates’ qualifications prior to triggering the “gender” tie-breaker?

²³⁰ Phillips, *supra* no. 23.

²³¹ Peters, A. (1996). "The Many Meanings of Equality and Positive Action in Favour of Women under European Community Law - A Conceptual Analysis." *European Law Journal* 2(2): 177-196.; Prechal, S. (1996). "Case C-450/93, *Kalanke v. Freie Hansestadt Bremen*, [1995] ECR I-3051." *Common Market Law Review* 33(6): 1245-1259.; Szyszczak, E. (1996). "Positive Action After *Kalanke*." *Modern Law Review* 59(6): 876-873..

In what way is the male candidate treated unfairly when gender is used as a criterion of last resort, instead of tossing a coin to decide who would get the job, as some egalitarian theorists would have it?²³²

The answers to these rhetorical questions become even more obvious given that the German provision applied only to sectors where women were under-represented. In other words, far from being a means to compensate for *past* discrimination, the positive measure in question here was a direct response to “*existing* inequalities” in working life between men and women, in accordance with both the language and the spirit of the Directive. In a further attempt to eschew the real issue the Court finds the measure guilty of seeking “to achieve equal representation of men and women in all grades and levels within a department”, which amounts, in the Court’s view, to substituting “for equality of opportunity as envisaged in Article 2(4) the result which is only to be arrived at by providing such equality of opportunity”.²³³ In view of the facts of the case the assumption that the German law aimed at “equal representation of men and women” seems completely unfounded, at least insofar as “equal representation” is understood in strictly numerical terms. The objective of the law was not to achieve a perfect male-female ratio in all areas of employment, but to rectify situations of substantial under-representation of women that could not be attributed but to discrimination.

Advocate General Tesauro, however, was apparently not convinced that under-representation of women in certain employment sectors was the *existing* direct or indirect result of discrimination. In his Opinion, which appears to have been quite influential in

²³² Incidentally, the Court is clearly not inspired here by an egalitarian rationale. It is, therefore, not necessary to elaborate on why the strictly egalitarian version of a tie-breaker is not more plausible in terms of fairness than the positive action response.

²³³ *Kalanke*, para 23.

determining the outcome of the case, he wonders: “[M]ust each individual’s right not to be discriminated against on grounds of sex [...] yield to the rights of the disadvantaged group, in this case women, in order to compensate for the discrimination suffered by that group in the past?” What this sophistry fails to account for is the ongoing anomaly of certain social groups, in this case women, being *currently* under-represented in particular areas of the employment field. If such under-representation cannot be logically and legally justified, then it constitutes an inequality that requires corrective legislative intervention. What should be the sole point of judicial concern, then, is whether the specific means of redressing this anomaly complies with the requirements of the principle of proportionality.

Advocate General Tesauro, however, does not stop there. In an epitome of contradiction he goes on to state that formal equality is not enough to secure the objective of “full gender equality in working life”, although he firmly believes that the German system is incompatible with the Directive. In his own words “[f]ormal numerical equality is an objective which may salve some consciences, but it will remain illusory and devoid of all substance unless it goes together with measures which are genuinely destined to achieve equality”.²³⁴ If one were to take this observation at face value, one would reach the conclusion that the German law breaches art 2(4) of the Directive because it is not radical enough! Indeed, Advocate General Tesauro adds to the confusion even further when he asserts in paragraph 28 of his Opinion that “[w]hat is necessary above all is a substantial change in the economic, social and cultural model which is at the root of the inequalities.” How then the German law, rather than being a first step to the right

²³⁴ Opinion of AG Tesauro, para 28.

direction, was regarded as incompatible with the purposes of the Directive is truly beyond comprehension.

4.2.2 Marschall and the return to "logic".

The judgment in *Kalanke* produced more reverberations than fierce academic responses. Given that a tie-break rule - probably the "softest" form of preferential treatment - was found to contravene the Directive, the legality of all positive measures was under suspicion. The Commission was, thus, forced to intervene and issued a Communication on *Kalanke*,²³⁵ where it attempted to appease the fears by "clarifying" the Court's rationale. In this respect, the Communication emphasised that the German law was struck down only because it provided for women to be promoted over men in an absolute and unconditional way.²³⁶ Fortunately, it was not long before the Court was also able to partially redeem itself for the legal atrocity that was *Kalanke* and to come up with a more plausible interpretive solution to the conundrum of positive action. Another German case, *Marschall*,²³⁷ offered the Court the perfect opportunity to review *Kalanke* without "losing face".

In *Marschall* the German regional law under scrutiny was, on the face of it, not very different from the one struck down in *Kalanke*. It provided for preferential treatment to equally qualified female candidates in the higher echelons of a career bracket where women were under-represented. The difference that caught the Court's eye, however, was the saving clause: priority would be given to the female candidate "unless reasons

²³⁵ COM (96) 88.

²³⁶ Barnard, C. (1998). "The Principle of Equality in the Community Context: P, Grant, Kalanke and Marschall: Four Uneasy Bedfellows?" *Cambridge Law Journal* 57(2): 352-373., at p. 364-366.

²³⁷ Marschall

specific to an individual [male] candidate tilt the balance in his favour”.²³⁸ This proviso was deemed by the Court enough to ensure that the selection process permitted for an ad hoc consideration of the candidates’ individual circumstances. In this regard, the preference afforded to women under this scheme could not by any standard be classified as “absolute” or “unconditional”.

What is of particular importance in *Marschall* is that the Court proceeded to examine the conditions for the validity of saving clauses themselves. This was no coincidence as a different Advocate General this time was much more “sympathetic” to the positive action cause. Advocate General Jacobs in his Opinion engaged in a thoughtful analysis of how the saving clause might become an instrument to negate the intended effects of positive action. He pointed out that, if not treated with care, saving clauses might have “the result that the post will be offered to the male candidate on the basis of criteria which are accepted as discriminatory”.

The Court, probably eager to make amends for *Kalanke*, was quick to agree. In paragraph 33 of the ruling it states that the criteria against which individual circumstances are measured must not be “such as to discriminate against female candidates”. It is quite obvious that the Court is now fully aware of the possibility to use saving clauses in order to effectively “empty” the positive measure from any real meaning. This would be the case if “individual circumstances” were interpreted widely, so as to bring stereotypical generalisations about male and female abilities through the back door.

²³⁸ C. Barnard, *supra* no. 236.

Marschall was, thus, hailed by many pro-equality lawyers and theorists as a landmark decision, evidencing a shift in the Court's attitude towards equality.²³⁹ Rigid commitment to formal equality was, in this view, abandoned in favour of a more substantive approach that would put the legitimacy of, at least, "soft" quotas beyond any doubt.²⁴⁰ A closer look at the relevant literature²⁴¹ and at *Marschall* itself, however, proves that the initial surge of optimism might not have been entirely justified. What need to be underlined here is that the outcome in *Marschall* could have been exactly the same even under an "equality of opportunities" approach - especially if understood as "substantive equality of opportunities". The German quota in question was carefully designed this time so as to be defensible against the "reverse discrimination" type of argument - more so than the *Kalanke* quota. In this regard, the case cannot constitute an accurate measure of where the Court's allegiance lies on the equality front.

Evidence to that is the fact that the principal focus in the analysis of *Marschall* has been the saving clause and the Court's attempt to insulate it from any indirectly discriminatory effects rather than the confirmation of the legitimacy of "soft" quotas. The former is, indeed, the only irrefutable indication of a possible change in the rationale of positive action cases. It is, nonetheless, not a very strong indication: by suggesting that saving clauses must be non-discriminatory the Court merely re-states the obvious and applies the general gender equality rule enshrined in the Directive. The essence of the *Kalanke* formula, namely that the preference must not be *automatic* or *unconditional*,

²³⁹ Cabral, P. (1998). "A Step Closer to Substantive Equality." *European Law Review* 23(5): 481-488.

²⁴⁰ Veldman, A. (1998). "The Lawfulness of Women's Priority Rules in the EC Labour Market." *Maastricht Journal of European and Comparative Law* 5(4): 403-414

²⁴¹ C. Barnard and B. Hepple, *supra* no. 22, p. 583; Clayton, A. (1998). "Hellmut Marschall v. Nordrhein-Westfalen: Has Equal Opportunity Between the Sexes Finally Found a Champion in European Community Law?" *Boston University International Law Journal* 16(2): 423-450., pp. 441-447.

remains untouched, only this time it is interpreted in a much more reasonable and narrow way. To infer from this, though, that substantive equality “won the battle” is a logical leap that does not correspond to reality, especially since the *Marschall* quota was particularly straightforward and well within the scope of the Kalanke formula.

On the contrary, the Court continues to advance from an “equality of opportunities” starting point, as stated explicitly in paragraph 25 of the judgment, which is clearly juxtaposed to what the UK and French governments term “equality of representation”²⁴² and is most commonly referred to in the literature as “equality of results”. The general feeling stemming from *Marschall* is that the Court treats the provisions of secondary Community law under scrutiny with cautiousness. It shows deference to the Commission’s opinion on the matter as expressed in the Communication after *Kalanke*, but it refuses to go any further than necessary within the then existing legal framework. Positive action was still conceived of as a derogation from equal treatment and, despite wishful thinking to the contrary, this is not what the “substantive” approach stands for.

With *Marschall* it became obvious that, if there was to be a real shift towards substantive equality, the next move had to be made by the political institutions. The impending “constitutional” reform in Amsterdam ensured that the political climate was appropriate to foster more “radical” legislative initiatives with a view to solidifying the social dimension of the European project. Gender equality was now top of the agenda, with gender mainstreaming about to become a guideline for all Community policies. In this context positive action was bound to be seen in a different light and be regarded as an integral part of this more pro-active approach to achieve equality in the workplace,

²⁴² *Marschall*, para 16.

especially since it carries with it symbolic connotations that break with a long tradition of formal equality.

4.2.3 The “revolution” of Amsterdam: Article 141 (4) EC and the “Badeck test”.

What can be singled out as the most important recent development in the field of European equality law is the explicit inclusion of positive action in the Treaty. The new paragraph 4 of Article 141, inserted at Amsterdam, reads as follows: “With a view to ensuring *full equality in practice* between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for *specific advantages* in order to make it easier for the *underrepresented sex* to pursue a vocational activity or to *prevent or compensate for disadvantages* in professional careers” [emphasis added]. The phrasing of the article eloquently reflects the long-awaited “fresh” approach to gender equality: the term *full equality in practice* can be nothing less than a loud and clear message that there exists another “version” of equality, which is *theoretical* and, hence, illusory. *Underrepresentation*, either as a proxy to locate disadvantage or as disadvantage in itself when it is the result of discrimination, is now a key factor in determining the *rationae personae* scope of permissible positive action. Last but not least, positive action is not only a means to prevent inequalities but also a *compensatory mechanism* for disadvantages that are attributable to past or present discrimination.

On the face of it the new provision appeared to be wider in scope than article 2 para 4 of the Equal Treatment Directive. It was not long after the signing and ratification of the Treaty of Amsterdam that Article 141 para 4 provided the legal basis for litigation

before the Court of Justice. In *Badeck*²⁴³ the Court had the chance to clarify the new legal position and explore the relationship of the latest addition to the Treaty with the equivalent existing provision of the Directive. The case, once again coming from Germany, involved public service rules that gave priority to women in promotions, access to training and recruitment. Such priority, however, was neither *automatic* nor *unconditional*: it was only allowed in sectors of the public service where women were under-represented, when the female candidate was equally qualified to her male counterpart and only if no reasons “of greater legal weight” that might tilt the balance in favour of the male candidate were put forward. According to the German government these reasons “of greater legal weight” concerned “various rules of law [...], which make no reference to sex and are often described as social aspects”.²⁴⁴

The first issue that needs to be addressed here, then, is the relationship between the provisions of the Equal Treatment Directive and Article 141 (4) EC. The Court explicitly stated that Article 141 (4) EC will come into play only if the national positive measures were found to be prohibited under article 2 of the Equal Treatment Directive.²⁴⁵ This finding, which was further confirmed in *Abrahamsson*,²⁴⁶ seems to imply that Article 141 (4) is “broader and more permissive”²⁴⁷ than article 2 of the Equal Treatment Directive. Although such a conclusion is well rooted in paragraph 14 of *Badeck*, there are

²⁴³ *Badeck* op. cit.

²⁴⁴ *Badeck*, para 34. In paragraph 35 the Court describes that, according to the official German position, there were “five groups of rules which justify overriding the rule of advancement of women”. In view of these rules there are five categories of cases that take priority over positive action in favour of women: “[F]ormer employees in the public service who have left the service because of family work”, “persons who for reasons of family work worked on a part-time basis and now wish to resume full-time employment”, “former temporary soldiers”, “seriously disabled persons” and long-term unemployed persons.

²⁴⁵ *Badeck*, para 14.

²⁴⁶ *Abrahamsson*.

²⁴⁷ Craig and DeBurca, *supra* no. 154, p. 916.

no other guidelines in the judgment as to the actual scope of the Treaty provision and the extent of the corresponding state obligations. Perhaps the Court was far too eager to examine the substance of the case and consciously avoided to engage with a delicate theoretical exercise in dealing with such a complex point of law.

The *Badeck* positive action system amounted to what is usually described as a “flexible result quota”.²⁴⁸ In paragraph 28 of the judgment the Court itself attributes two main characteristics to this system: it does not “determine quotas uniformly for all the sectors and departments concerned” and it “does not necessarily determine from the outset - automatically - that the outcome of each selection procedure must, in a stalemate situation where the candidates have equal qualifications, necessarily favour the woman candidate”. Technically speaking, however, it should be noted that the term *quota* is not used here in its literal sense. Promoting an equally qualified female candidate constitutes, indeed, a form of *preferential treatment*, but it is not a quota per se,²⁴⁹ given that the position is not, strictly speaking, *set aside* for members of the under-represented group.²⁵⁰

It goes without saying that the “flexible result quota” system in principle passes the *Marschall* test with flying colours. The material scope of the provisions is very precise so that preferential treatment is available only in areas or sections of the employment field where one sex is under-represented. It is not enough that women in general may have been, as a group, victims of past or ongoing discrimination resulting in their under-representation in the public sector as a whole. Female candidates are only

²⁴⁸ Caruso, D. (2003). "Limits of the Classic Method: Positive Action in the European Union After the New Equality Directives." *Harvard International Law Journal* 44(2): 331-386., p. 341.

²⁴⁹ McColgan, A. (2005). *Discrimination Law: Text, Cases and Materials*, Hart Publishing., p.161. For a “genuine” quota system see *infra*, chapter 7.2.1.

²⁵⁰ Ferber, M. (1997). "In Defense of Affirmative Action." *Industrial & Labor Relations Review* 50(3): 516-518.

“eligible” for this “special” benefit insofar as they are situated within a bracket where inequality in representation of the sexes is an undeniable fact - and one that can only be attributed to indirect or institutional discrimination. On top of that, the system possesses an elaborate saving clause that leaves open the possibility for an equally qualified male candidate to counter the tie-breaker.

Although *Badeck* provoked a new surge of enthusiasm from pro-equality lawyers and theorists that regarded it as evidence for a shift from formal to substantive equality,²⁵¹ its alleged radicalism has been significantly overplayed. The Court refined the *Marschall* test in order to adapt it to the requirements of Article 141 (4) but, in reality, the link from *Kalanke* to *Marschall* to *Badeck* remained unbroken.²⁵² *Badeck* confirms that “soft” quotas are permissible in principle and maybe proves that Member States can now feel confident that carefully designed positive action schemes will survive the scrutiny of the Court. Once again, however, the Court was not faced with a hard case: if positive action is a contentious issue that calls for elaborate theoretical exercises in legal reasoning, *Badeck* was a let-off. As with *Marschall*, the quota in question here would pass the threshold of legality even against the theoretical backdrop of *substantive equality of opportunities*.

The explicit reference to substantive equality, then, as a legitimate state objective may be welcome, but its implications are symbolic rather than normative. Accepting the legitimacy of selection criteria that “are manifestly intended to lead to an equality which is substantive rather than formal”²⁵³ is not enough to guarantee anything more than the

²⁵¹ N. Burrows and M. Robison, *supra* no. 18.

²⁵² This link is cleverly characterised by Fredman as an “individualistic straitjacket”. See Fredman, *supra* 190, p. 390.

²⁵³ *Badeck*, para 32.

abandonment of strict or non-comparative formal equality. This, however, begs the question whether *Badeck* has anything to add to our existing understanding of the concepts involved, given that the rejection of “strict formal equality” can be directly inferred from Article 141 (4) without the need to engage in a thorough or deep interpretation.

What appears to be more interesting, however, is the second question of the preliminary reference, concerning the “special system” providing for binding targets for female participation in the academic service. According to the Court this part of the reference “essentially asks whether Article 2(1) and (4) of the Directive precludes a national rule which prescribes that the binding targets of the women's advancement plan for temporary posts in the academic service and for academic assistants must provide for a minimum percentage of women which is at least equal to the percentage of women among graduates, holders of higher degrees and students in each discipline”.²⁵⁴

The language of the national rule was bound to create suspicions as to its compatibility with the underlying rationale of equality of opportunities, since the term *binding targets* appears to be directly linked with equality of results. Indeed, the male applicants in the main proceedings argued that the aim of the rule was to “achieve a defined result” of sex representation in the specified employment areas²⁵⁵ and the German Land Attorney agreed, adding that the quota system in question had “no individual purpose” and was not “linked to a specific disadvantage encountered by women in their working and social lives”.²⁵⁶

²⁵⁴ *Badeck*, para 39.

²⁵⁵ *Badeck*, para 40.

²⁵⁶ *Ibid.*

On the face of it, then, the German rule seems to be too deterministic and insufficiently individualistic to pass the *Marschall* test. Although the saving clause applies throughout the system, the logic of this particular positive measure is such that priority will be given to female candidates *not only when women are under-represented in absolute terms*. Since the *binding target* is not a fixed one but depends upon the actual numbers of female degree-holders in the discipline, the conception of under-representation at work here allows for a gender group to be treated preferentially even when its members constitute the 60% or 70% of the total number of employees in the specific employment area.²⁵⁷ What is more, the rule prescribes that the *minimum* percentage of the binding target should be *at least* equal to the actual number of degree-holders from the gender group. It follows that the desired level of representation aimed at by this scheme may, theoretically, be even higher than the percentage of female degree-holders.²⁵⁸

Despite these considerations, the Court found the rule compatible with the provisions of the Equal Treatment Directive. The reasoning was uncharacteristically brief: “As the Advocate General observes [...] the special system for the academic sector at issue in the main proceedings *does not fix an absolute ceiling* but fixes one by reference to the number of persons who have received appropriate training, *which amounts to using an actual fact as a quantitative criterion for giving preference* to women. It follows that the existence of such a special system for the academic sector

²⁵⁷ Provided, of course, that the number of degree-holders from this gender group is even higher.

²⁵⁸ In reality, however, this is highly unlikely. Despite the ambiguous phrasing, the spirit of the rule in question seems to imply that the target could be higher than the number of female degree-holders only if the latter is significantly lower than that of the male degree-holders. Since such a difference cannot be logically attributed to lack of talent in a particular gender group, it is presumed that it stems from indirect or institutionalised discrimination.

encounters no specific objection from the point of view of Community law” [emphasis added].²⁵⁹

Although this part of the Court’s ruling has not attracted as much attention as its answer to the first - and, arguably, more important²⁶⁰ - question related to the “general” positive action scheme, its significance must not be overlooked. For this may, in fact, be the first time in the history of positive action litigation before the ECJ that the Court breaks with tradition and disregards its own precedent in order to take a radical step forward in the interpretation of Community equality law. It is, therefore, necessary to examine the legal reasoning used here more closely.

The first thing to note is, undoubtedly, the *flexibility* of the rule as perceived by the Court: regardless of the actual percentage opted for in any given time or situation, the legal provision contains no specific reference to an optimum number. Instead, it establishes an *objective* metric system to calculate this optimum *in concreto*. This objectivity is guaranteed by the use of an “actual fact [namely the number of degree-holders from each gender group] as a quantitative criterion”. If it is accepted that “merit” in this context is generally reflected in the possession of a degree, then there is no plausible reason why the number of female employees in the academic sector should not reflect the number of degree-holders in the same discipline. In addition to that, it must be remembered that the flexible quota only applies to *equally qualified* candidates, which entails that the University degree is not necessarily the only determining factor of merit.

²⁵⁹ *Badeck*, paras 42 and 43.

²⁶⁰ Because of the fact that the first question involved the legality of the “general” positive action scheme, whereas the second question referred to a “special” aspect of the scheme, applicable only to particular posts within the academic sector.

Also, the preference afforded to the female candidate cannot be classified as either *automatic* or *unconditional*, since the proviso of the general scheme remains in effect.

In view of these remarks, then, how and why is the Court distancing itself from its previous case-law? The question is, in fact, a theoretical one that takes us back to the discussion on the analytical categories of equality. It is evident that the Court links the absence of a *fixed* ceiling with the notion of equality of opportunities (as opposed to equality of results): the pool of *potential* applicants - that is, all those who are in principle qualified²⁶¹ to stand as candidates - does not necessarily consist of equal numbers from each gender group *in every particular discipline*. Although this may be due to a plethora of reasons,²⁶² what matters in the Court's view is the *objectivity* of the quantitative criterion. In other words, a fixed ceiling of 50% - calculated on the basis of the rough male / female ratio in society - does not satisfy the objectivity requirement, because in any given discipline the number of *potential* female candidates may vary substantially. The compatibility of the German system with Community law, then, lies exactly in the fact that it allows for a calculation that is "sector-sensitive", taking into account the "natural" anomalies in gender representation across the employment field - anomalies, that is, which may be attributed, for instance, to different levels of interest in a specific discipline from the members of each gender group.

If this analysis is correct, the Court's reasoning appears to be in tandem with its previous case law. It aims at establishing a normative platform upon which opportunities can be allocated without discrimination when the pool of potential applicants *has already been determined* on the basis of (equal) merit. Since the personal scope of the national

²⁶¹ In this case, all degree-holders within each discipline.

²⁶² Which may be instrumental in determining the plausibility of the claim discussed here, as it will, in fact, be proven in the course of the next few paragraphs.

rule itself covers only *equally* qualified candidates, the Court stops short from making an evaluative judgement as to how this equal merit is arrived at and whether gender discrimination suffered by a gender group *before* entering the labour market can be legitimately compensated at the stage of selection for a particular post. In other words, from a substantive equality perspective the crucial issue not addressed in *Badeck* is whether national positive action schemes can go so far as to favour *relatively less qualified candidates from the under-represented gender group*, on grounds of discrimination in the process of acquiring qualifications.

4.2.4 The limits of permissible quotas: *Abrahamsson* and the primacy of merit

The first serious test in this regard came in *Abrahamsson*.²⁶³ The case involved a Swedish regulation for appointments to teaching posts in higher education institutions,²⁶⁴ which provided for preference to *sufficiently qualified* candidates of the under-represented sex. It follows that, according to the system in question, preference can be given to *less qualified* female candidates under the *proviso* that the difference in qualifications between the male and the female candidates “is not so great that application of the rule would be contrary to the requirement of objectivity in the making of appointments”.²⁶⁵ Mr Anderson and Ms Abrahamsson, two candidates for a professorial position at the University of Göteborg, challenged the legality of the positive

²⁶³ *Abrahamsson* op. cit.

²⁶⁴ Förordningen (1995:936) om vissa anställningar som professor och forskarassistent vilka inrättas i jämställdhetssyfte [Swedish Regulation concerning certain professors' and research assistants' posts created with a view to promoting equality]. This regulation was premised upon Article 15a of Chapter 4 of the Högskoleförordningen (1993:100) [Swedish Regulation on universities], as in force until 1998, which “establishes a specific form of positive discrimination for cases where a higher educational institution has decided that such discrimination is permissible in the filling of posts or certain categories of posts with a view to promoting equality in the workplace” (*Abrahamsson*, para 9).

²⁶⁵ *Abrahamsson*, para 9.

action scheme that enabled the selection board to offer the vacant academic post to a third female candidate, Ms Fogelqvist. Although the latter was *sufficiently* qualified,²⁶⁶ she was neither the most qualified candidate for the job nor *equally* qualified to the male applicant. In fact, Ms Fogelqvist came in third in the assessment process, behind Mr Anderson who came second and in front of Ms Abrahamsson who ended up fourth.

Unlike all previous cases brought before the Court, the Swedish rule here was not of the tie-break type. What is equally interesting, from either a symbolic or a pragmatic point of view, is that one of the applicants this time was female. Before exploring the significance of this oddity in the context of European equality law any further, it is essential to have a closer look at the reasoning of the Court and examine its consistency with already set interpretive principles and practices.

First of all, one must note that the Court in *Abrahamsson* fully confirms its previous findings, in *Badeck*, as to the functional relationship between Article 141 (4) EC and the provisions of the Equal Treatment Directive. In other words, interpretation of the former will only be necessary - or, in fact, permissible according to the Court's phrasing - if "Article 2 of the Directive precludes national legislation of the kind there at issue".²⁶⁷ Once again, however, it is rather unclear what the actual differences between the two provisions are. The ambiguity is all the more obvious in this case, since the Court found the Swedish provision to be incompatible with the Equal Treatment Directive and went on to discuss it in the light of Article 141 (4). In doing so it remained frustratingly

²⁶⁶ The (female) candidate who came in first in the assessment of the selection board, Ms Destouni, withdrew her application after the selection board had recommended her appointment to the Rector of the University. In placing Ms Destouni top of the list the selection board expressly took into account the Swedish regulation at a second stage of assessment and reversed the initial result, according to which the male applicant, Mr Anderson, was deemed to be marginally the most qualified candidate.

²⁶⁷ *Abrahamsson*, para 40.

cryptic: it considered it to be “enough to point out that, even though Article 141(4) EC allows the Member States to maintain or adopt measures providing for special advantages intended to prevent or compensate for disadvantages in professional careers in order to ensure full equality between men and women in professional life, *it cannot be inferred from this that it allows a selection method of the kind at issue in the main proceedings which appears, on any view, to be disproportionate to the aim pursued*” [emphasis added].²⁶⁸

This conclusion leaves us none the wiser. A national measure that fails the standard proportionality requirement will anyway be prohibited, but this is a similarity rather than a difference between the two provisions. Although it is clear - more so than in *Badeck* - that Article 141 (4) EC is more permissive than the Equal Treatment Directive,²⁶⁹ the Court appears unconvinced that any system similar to the Swedish one would pass the *Badeck* test. If this is the case, it is difficult to see any positive measures stricter than the tie-break type passing the high threshold of legality set in *Abrahamsson*, especially since the Swedish rule at issue was designed in such a way as to guarantee maximum gender equality gains with minimum efficiency losses by limiting its *rationae personae* scope to *sufficiently* qualified candidates.

What needs to be underlined, however, is that the Court is not explicit in rejecting non-tie-break positive measures altogether. When it refers to “a selection method of the kind at issue in the main proceedings”, it emphasises that the Swedish rule gave, in the Court’s view, *automatic* preference to candidates of the under-represented sex subject only to an inadequate and ambiguous proviso, namely that the difference in individual

²⁶⁸ *Abrahamsson*, para 55.

²⁶⁹ Otherwise it would be pointless to examine the national measure in light of Article 141 (4) after having determined its incompatibility with the Equal Treatment Directive.

merit was not significant enough to eschew the objectivity of the selection process.²⁷⁰ It is exactly this *automatic* character of the system that renders it incompatible with Community law, as it directly fails to satisfy the first condition of the *Badeck* test. Stricter quota systems, then, may still be legitimate, as long as they include a saving clause that allows for personal circumstances of individual candidates to be taken into account at the all stages of the selection process.

Although this analysis offers a glimmer of hope for proponents of substantive equality, the crux of the matter remains that the Court takes a very formalistic and narrow view of the *Badeck* test in *Abrahamsson*. It asserts that the assessment of the qualifications of candidates under the Swedish system is not “based on clear and unambiguous criteria”²⁷¹ without explaining why this is the case. It thus seems to implicitly accept that gender cannot be used as a legitimate tie-breaker between or among *sufficiently* qualified candidates, because in such a situation not all individual circumstances - which render candidates *sufficiently but not equally* qualified for the position all things considered - are taken into account. This, however, contradicts the Court’s own conclusion that, in principle, certain factors such as seniority can be legitimately left out of the equation because they tend to be indirectly discriminatory against the under-represented sex.²⁷²

If one reads paragraph 50 together with paragraph 42 of the judgment, then, one is left with the impression that the problem lies with the lack of clarity of the national rule. Such a convenient claim cannot be fully substantiated in view of the description of the Swedish system in the first paragraphs of the judgment. In reality, *Abrahamsson* begs the

²⁷⁰ *Abrahamsson*, para 52.

²⁷¹ *Abrahamsson*, para 50.

²⁷² *Abrahamsson*, para 42, where further references to *Badeck*.

question whether the Court, when presented with the chance, was willing to tamper with the *substantive equality of opportunities* approach at all. Despite using the language of *qualified substantive equality*, most notably when reiterating principles that have emerged in previous case law,²⁷³ there is no corresponding interpretive shift, nor any indication that the fate of stricter quota systems will be any different in the future.

From a substantive equality point of view the main issue should be whether preference to a *sufficiently* qualified candidate from the under-represented sex impairs the basic prerequisites of fairness and equal treatment. Such analysis, which is strikingly missing from the reasoning, should be performed in the context of the spirit of the relevant Community law provisions and with a view to producing the interpretation that would best serve their clear and unequivocal objectives.

4.2.5 Beyond employment quotas: the Badeck approach in Griesmar, Lommers and Briheche.

Although the Badeck formula is primarily designed to apply to quotas in employment, it is also reflective of the Court's general attitude towards the relationship of positive action to the principle of equal treatment. This is evident in three relatively recent judgments that seem to confirm the approach taken in Badeck and extend it to situations where the benefit involved is not appointment or promotion.

In Griesmar²⁷⁴ the Court had an opportunity to apply the Badeck formula to the selective allocation of a social benefit only to female employees, through a system

²⁷³ Paragraph 48 of the judgment reads as follows: "The clear aim of such criteria is to achieve substantive, rather than formal, equality by reducing *de facto* inequalities which may arise in society and, thus, in accordance with Article 141(4) EC, to prevent or compensate for disadvantages in the professional career of persons belonging to the under-represented sex".

²⁷⁴ Case C-366/99, Griesmar v. Ministre de l'Economie [2001], ECR I-9383

designed to offset occupational disadvantages of women. Article L 12(b) of the French Civil and Military Retirement Pensions Code²⁷⁵ provided that female civil servants with children were entitled to a service credit added to their pension for each of their children, biological or adopted. The French government argued that this was a legitimate form of positive action in favour of women, as its aim was to address “disadvantages which [women] incur in the course of their professional career by virtue of the predominant role assigned to them in bringing up children”.²⁷⁶

The Court, however, was not convinced and found that the legislation in question could not be justified under Article 2(4) of the Equal Treatment Directive. Its line of reasoning is refreshingly straightforward. The first stage is to determine whether the situation of female employees that benefit from the pension credit is *comparable* to that of male employees that are not eligible for the credit.²⁷⁷ As the Court shrewdly observes, this depends on whether the system is designed to offset occupational disadvantages that stem from *childbirth*, which is a uniquely female condition, or occupational disadvantages related to the *upbringing* of children, which is not.²⁷⁸ After deciding that the French legislator had clearly opted for the latter rather than the former,²⁷⁹ the second stage of the Court’s reasoning consisted in examining whether male civil servants could

²⁷⁵ Code des pensions civiles et militaires de retraite as amended by Law No 64-1339 of 26 December 1964 (*JORF* of 30 December 1964).

²⁷⁶ Griesmar, paragraph 51.

²⁷⁷ *Ibid*, paragraph 46.

²⁷⁸ The underlying rationale of this dichotomy is that childbirth is a uniquely female condition and, as a result, a scheme designed to address childbirth-related disadvantages is *not positive action*. For a more detailed analysis see *infra*, chapter 11.3.1.

²⁷⁹ The decisive factor for the Court was that the scheme covered *adopted* children, thus being decoupled from occupational disadvantages related to maternity per se. See Griesmar, paragraphs 52 and 53.

legitimately be excluded from the benefit, even if they were in a *comparable* situation to that of female beneficiaries.²⁸⁰

The answer to this rhetorical question is provided by the application of the Badeck formula itself. Automatic exclusion of male civil servants from the scheme on grounds of gender is not compatible with the Equal Treatment Directive, simply because a male employee may be “in a position to prove that he did in fact assume the task of bringing up his children”.²⁸¹

In *Lommers*²⁸² the Court was called upon to scrutinise a Dutch scheme enacted by the Ministry of Agriculture, whereby a limited number of subsidised nursery places were reserved for *female* employees. Male employees could, as a matter of exception, take advantage of the scheme in “emergency” situations to be determined by the administration.²⁸³ The stated aim of the scheme was to tackle severe under-representation of women among the ranks of the Ministry staff, which was thought to be partly due to the lack of adequate and affordable nursery facilities.²⁸⁴

Although the factual setting was similar to that in *Griesmar*, this time the conclusion was different. The Court held that the difference in treatment on grounds of gender established by the scheme was a legitimate form of positive action under the Equal Treatment Directive, insofar as it satisfied the standard criteria of legality. Most important among these was the proviso that male employees could also take advantage of the prescribed benefit in “emergency” situations. This proviso, therefore, should be

²⁸⁰ *Craig and De Búrca*, supra n. 154, p. 896.

²⁸¹ *Griesmar*, paragraph 57.

²⁸² *Case C-476/99 Lommers* [2002] ECR I-2891.

²⁸³ Schutter, O. D. (2007). *Positive Action. Cases, Materials and Text on National, Supranational and International Non-Discrimination Law*. D. Schiek, L. Waddington and M. Bell, Oxford, Hart Publishing., p. 818.

²⁸⁴ *McColgan*, supra n. 249, p. 166.

interpreted by the authorities in such a way as to ensure that male employees who were solely responsible for the upbringing of their children would be eligible for the benefit under the same conditions as working mothers.²⁸⁵

Finally, in *Briheche*²⁸⁶ the object of review was another French piece of legislation. Law No 2001-397²⁸⁷ exempted certain categories of women, including “*widows who have not remarried*”,²⁸⁸ from the maximum age limit of 45 years for obtaining access to public sector employment.²⁸⁹ Mr Briheche, a male widower who had not remarried, challenged this provision after his application to sit a competitive examination organised by the Ministry for the Interior was rejected on the ground that he did not fulfil the age requirement.²⁹⁰

The Court was quick to reiterate the *Badeck* formula²⁹¹ and examine whether its conditions were fulfilled. Agreeing with the observations of the Commission, it went on to conclude that the provision at issue “automatically and unconditionally gives priority to the candidatures of certain categories of women [...] excluding widowers who have not remarried who are in the same situation”.²⁹² It follows that the scheme in question is incompatible with both the Equal Treatment Directive and Article 141 (4).²⁹³

²⁸⁵ Case C-476/99, *Lommers v Minister van Landbouw, Natuurbeheer en Visserij* [2002], ECR I-2891, paragraphs 45-46.

²⁸⁶ Case C-319/03 *Briheche (Serge) v. Ministère de l'intérieur, de la sécurité intérieure et des libertés locales* [2004], ECR I-8807.

²⁸⁷ Law No 79-569 of 7 July 1979 abolishing the age limit for obtaining access to public-sector employment for certain categories of women (JORF of 8 July 1979).

²⁸⁸ *Briheche*, paragraph 9.

²⁸⁹ See Fredman, S. (2005). "Changing the Norm: Positive Duties in Equal Treatment Legislation." *Maastricht Journal of European and Comparative Law* 12(4): 369-398., p.818.

²⁹⁰ *Ibid*, paragraph 12.

²⁹¹ *Ibid*, paragraph 23.

²⁹² *Ibid*, paragraph 27.

²⁹³ *Ibid*, paragraph 31.

The analysis of these three judgments illustrates that a relatively consistent rationale has emerged. What has been referred to here as the Badeck approach consists in *three criteria* for the legality of positive measures. The measure must be:

- Designed to address a *de facto inequality* between men and women in employment.
- *Flexible* with regard to the achievement of desired results, so that the allocation of the benefit is *not automatic*.
- Contain a *saving clause*, so that the allocation of the benefit is *not unconditional*.

The Court explicitly or implicitly refers to each of these criteria in all of the judgments.²⁹⁴ All three criteria must be satisfied, if the measure is to pass the Court's scrutiny successfully. The relationship between them, however, and the way each of them operates in the reasoning has, with the exception of Briheche,²⁹⁵ proved less straightforward than one might have imagined.

In Griesmar, for instance, the Court does not deny the existence of occupational disadvantages stemming from both *childbirth* and *upbringing* of children.²⁹⁶ The distinction between the two categories of disadvantages, though, is crucial for the application of the first criterion. In the case of childbirth the ensuing disadvantages

²⁹⁴ See, for instance, on the first criterion paragraph 46 in Griesmar, paragraph 41 in Lommers and paragraph 22 in Briheche; on the second criterion paragraph 56 in Griesmar, paragraph 43 in Lommers and paragraph 23 in Briheche; and on the third criterion paragraph 57 in Griesmar, paragraph 45 in Lommers and paragraph 23 in Briheche.

²⁹⁵ In Briheche the Court does little more than reiterate the Badeck formula and apply it to the facts of the case in a rather straightforward manner.

²⁹⁶ Griesmar, paragraph 46.

amount by default to de facto *gender* inequality. In the case of upbringing, on the contrary, this is *not necessarily* true, even though “female civil servants are *more affected* by the occupational disadvantages entailed in bringing up children, because this is a task generally carried out by women” [emphasis added].²⁹⁷ It is, therefore, unclear whether the *disparate impact* identified here is enough to satisfy the first criterion.²⁹⁸ In other words, it is not easy to discern from the wording of the judgment whether the fatal flaw of the scheme, according to the Court, was down to the unsatisfactory *causal link* between gender and the targeted inequality.

A closer look at paragraphs 56 and 57 of the judgment, however, gives a different impression as to the main problem with the French scheme. It seems that the scheme fails to satisfy the second and third criteria, so that incompatibility is ultimately due to its non-flexible character and the lack of a saving clause. The benefit is allocated automatically to female civil servants with children, in the sense that they are *guaranteed* to receive the service credit irrespective of their actual individual circumstances.²⁹⁹ In addition to that, the system does not provide for the possibility of an ad hoc *extension* of the benefit to male employees that are in comparable situations with female beneficiaries.³⁰⁰

The question raised here is one of great normative significance. It is a given that the absolute exclusion from the scheme of male employees, who are in a comparable situation to that of female beneficiaries, cannot be justified. This, however, may be interpreted in two ways. It can mean either that a saving clause will suffice to render the scheme legitimate or that gender positive action should be abandoned altogether in this

²⁹⁷ Ibid, paragraph 56.

²⁹⁸ See also Barnard and Hepple, *supra* no. 22, p. 571.

²⁹⁹ Which entails the possibility of individual beneficiaries not having actually suffered occupational disadvantages in their professional careers.

³⁰⁰ This is a form of saving clause by analogy.

case, because the targeted inequality is, in fact, between employees that are parents and employees that are not.³⁰¹

This is closely linked to a second interpretive question. If the French scheme in *Griesmar* fails to satisfy the first criterion, then it would not pass the threshold of legitimacy *even with the inclusion of a saving clause*. Conversely, if the problem lies with the automatic and unconditional allocation of the benefit, then the lack of clarity in the Court's rationale begs the question of levelling-down as a means of complying with the operative part of the judgment. By not excluding this route, the Court undertakes the risk of a national response that would be neither politically nor legally desirable. Indeed, the *Griesmar* ruling has been heavily criticised as being of doubtful sensibility and burdening Member States with "deregulatory constraints".³⁰²

Insofar as determining which of the two approaches the Court has taken, the interpretive difficulty may be overcome if one compares the *Griesmar* line of reasoning with that of the *Lommers* judgment. The inequality that the *Lommers* scheme was designed to tackle is similar to that identified in *Griesmar*. Both schemes aim at offsetting professional disadvantages of working mothers. In *Lommers*, however, the Court chooses much clearer phrasing when describing the Dutch legislation in question. It asserts that the scheme "falls in principle into the category of measures designed to eliminate the causes of women's reduced opportunities for access to employment and careers and are intended to improve their ability to compete on the labour market and to pursue a career

³⁰¹ *Commission v France*, para. 14.

³⁰² Caruso, *supra* no. 248, p. 347.

on an equal footing with men”.³⁰³ This is the case especially since the allocated benefit is not places of employment but “the enjoyment of certain working conditions”.³⁰⁴

There is no doubt, then, that Lommers is in line with settled positive action case-law and explicitly applies the Badeck formula.³⁰⁵ In view of the factual similarities with Lommers, it may be reasonable to assume that the Griesmar rationale was also intended to follow Badeck, despite the problematic phrasing.³⁰⁶ This does not solve the problem posed by the possibility of levelling-down, but it does, at least, contribute to legal certainty by confirming the Badeck formula as the appropriate test of legality for positive action.³⁰⁷

It is, however, interesting to note that the Court in Lommers seems generally more sensitive to the potential side-effects of positive action as a mechanism to combat inequality in employment. Willing to take account of academic opinion on the matter the Court considers whether such measures could inadvertently “also help to perpetuate a traditional division of roles between men and women” in society.³⁰⁸ In doing so it ends up reinforcing the Badeck approach by suggesting that this danger can, in fact, be avoided when a scheme is carefully designed so that it respects the principle of proportionality.³⁰⁹

³⁰³ Lommers, paragraph 38.

³⁰⁴ Ibid.

³⁰⁵ This is particularly evident in paragraphs 43-47, where the Court examines whether the scheme allocates benefits automatically and unconditionally, according to the second and third criteria identified earlier.

³⁰⁶ It must be pointed out that the latter may simply be a reflection of the Court’s view of the Griesmar scheme as identical - or, at least very similar- to that in *Commission v. France* (1988, op. cit.).

³⁰⁷ Whether or not, however, this is enough to strike the necessary “delicate balance” between “recognising realities and perpetuating stereotypes” with regard to traditional gender roles in childcare is doubtful. See Barmes, L. and A. W. S. Ashtiany (2003). “Diversity Approach to Achieving Equality: Potential and Pitfalls.” *Industrial Law Journal* 32(4): 274-296.

³⁰⁸ Lommers, paragraph 41.

³⁰⁹ Ibid, paragraph 42 et seq.

When scarcity of resources is taken into account,³¹⁰ a measure such as that in Lommers, does not burden male employees more than their female counterparts that *were not allocated* subsidised nursery positions.³¹¹ The extent to which this approach is justified under the notion of full and effective equality will be examined later on in this thesis with reference to the notion of proportionality of concern.³¹²

³¹⁰ Ibid, paragraph 43.

³¹¹ Ibid, paragraph 44.

³¹² See *infra*, chapter 11.2.

CHAPTER 5: POSITIVE ACTION AND THE ECHR: “A MEANS TO ACHIEVE FULL AND EFFECTIVE EQUALITY”

5.1 Introduction

Ever since its inception on 4th November 1950 the European Convention of Human Rights³¹³ has proved to be hugely influential across the spectrum of its jurisdiction and one of the most successful international human rights instruments worldwide.³¹⁴ Particularly during the last three decades it has gradually developed into “a basis for a European public law”³¹⁵ that brings European countries together under the banner of rights protection. Along these lines, it has been suggested earlier in this thesis³¹⁶ that the interaction between the Convention and EU fundamental rights law has come to produce a common normative platform, termed here the European Legal Order of Rights, which is premised on a distinctly European conception of equality. It is, therefore, time to place the ECHR system under the spotlight and examine more closely where equality and positive action fit in.

A few introductory remarks are necessary in order to justify the analytical choices of this chapter. First, it should be highlighted that the ECHR system deals with equality issues primarily in the context of non-discrimination and through the normative lens of

³¹³ Throughout this chapter the terms ECHR and Convention will be used interchangeably to refer to the European Convention of Human Rights.

³¹⁴ For a very thorough and comprehensive account of the ECHR influence on national European jurisdictions see Blackburn, R. and J. Polakiewicz (2001). Fundamental Rights in Europe: The ECHR and its Member States 1950-2000, Oxford University Press..

³¹⁵ Jacobs, F. (1992). Human Rights in Europe – New Dimensions. Paul Sieghart Memorial Lecture British Institute of Human Rights.

³¹⁶ See *infra*, chapter 3.

Article 14. It is well known that the general principle of equal treatment is textually absent from the Convention. Part of the theory has consequently asserted that Strasbourg case-law is³¹⁷ - or, at least, was for quite some time - reflective of "a clear preference for formal equality".³¹⁸

This approach, however, is erroneous and does not do justice to the vast body of non-discrimination case-law developed by the Court. Even commentators that identify non-discrimination with formal equality usually concede that the Article 14 requirement for an *objective and reasonable justification* of differentiations in treatment on any of the prohibited grounds allows the Court to introduce *substantive* elements in its reasoning.³¹⁹ More importantly, the Court has often made explicit references to the principle of equal treatment, especially in the form of gender equality, as one of the *key principles underlying the Convention*.³²⁰ Especially in recent years there is a growing tendency in the literature to identify a gradual *general* shift of the Court's interpretative position towards a more substantive approach to equality.³²¹

Despite this optimistic outlook, it must be born in mind that the ECHR system suffers from inherent and well documented limitations. Article 14 does not provide a

³¹⁷ Henrard, K. (2000). Devising an Adequate System of Minority Protection: Individual Human Rights, Minority Rights and the Right to Self-Determination, Martinus Nijhoff., p. 59 and p. 76.

³¹⁸ Tarr, G. A., R. F. Williams, et al. (2004). Federalism, Subnational Constitutions and Minority Rights, Praeger., p. 31.

³¹⁹ K. Henrard, *supra* no. 317, at 77.

³²⁰ *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, Series A, no. 94, § 78; *Schuler-Zraggen v. Switzerland*, 24 June 1993, Series A, no. 263, § 67; *Burgharz v. Switzerland*, 22 February 1994, Series A, no. 280-B, § 27; *Van Raalte v. the Netherlands*, 21 February 1997, *Reports 1997-I*, § 39 *in fine*; *Petrovic v. Austria*, 27 March 1998, *Reports 1998-II*, § 37; *Leyla Sahin v. Turkey*, 10 November 2005, *Reports of Judgments and Decisions 2005-XI*, § 115.

³²¹ O'Connell, R. (2009). "Substantive Equality in the European Court of Human Rights?" Michigan Law Review First Impressions 107(129), pp. 129-133; Tarr, Williams and Marko, *supra* no. 318, p. 31.

free-standing non-discrimination right and “has no independent existence”.³²² As a result, the Court on a number of occasions has been known to take the “easy way out” and avoid the equality dimension, simply by declaring that no “separate” issue arises under Article 14 when a complaint under this provision read in conjunction with any of the so-called “substantive” provisions of the Convention has already been examined.³²³

Protocol 12 is intended to cure this deficiency by introducing a free-standing right to non-discrimination. Ratification by Signatory Parties, however, is optional and any legal consequences thereof will translate into justiciable individual claims *only* against those jurisdictions that undertake the relevant obligations. Nonetheless, Protocol 12 does make a rather significant contribution to the equality discourse, especially for the purposes of the present enquiry. In its Preamble there is an explicit affirmation of positive action as a legitimate means to achieve “full and effective equality”. Apart from the obvious impact on the title of this thesis, the reference to a notion of *full and effective* equality necessarily implies that the European conception of equality goes well beyond the narrow confines of non-discrimination.

The present chapter, then, will explore this distinctly European idea of equality further and attempt to determine where positive action fits in. The analysis will be carried out through focusing on three key dimensions along which the relationship between positive action and equal treatment unfolds within the ECHR system. First, the Court’s response to the use of gender quotas by national authorities in the procedures to select candidates to serve on the bench of the Court itself. Second, the relationship between

³²² *Chassagnou and others v. France* (Grand Chamber), 29 September 1999, Reports of Judgments and Decisions 1999-III, § 89.

³²³ Instead of many see *Lustig-Prean and Beckett v. UK* (Grand Chamber), 27 September 1999, 29 ECHR 548, §§ 108-109.

non-discrimination and formal equality in the context of the seminal ruling in *Thlimmenos*, which seems to constitute a benchmark in the interpretation of the equal treatment principle within the Convention system. And, third, the importance and possible impact of Protocol 12 on the understanding of equality in a common European public sphere.

5.2 Positive Action in Judicial Appointments to the European Court of Human Rights

The Court has had the opportunity to address the issue of positive action directly on only one occasion. In 2008 it delivered an Advisory Opinion on the legality of the Parliamentary Assembly's decision not to consider all-male lists of candidates for appointment to the Court submitted by the Contracting Parties. In a nutshell, the Court's conclusion echoes the "standard" European approach on positive action, in line with the position of the ECJ on the matter. Positive action is in principle a legitimate means to achieve gender equality, but this legitimacy is subject to the measures satisfying certain conditions. Most importantly, national authorities have the discretion to introduce such measures, but no positive obligation to that effect exists.

Given the particular context in which the matter has arisen, however, the *reasoning* behind this standard conclusion could prove particularly illuminating. This is not only because the measures introduced here aim at improving the gender balance in the composition of a supranational *judicial* body. It is primarily because the Advisory Opinion, if read properly, gives rise to reasonable expectations that the quota in question may soon be amended so that it passes the threshold of legality set by the Court. A more thorough analysis of the Advisory Opinion, therefore, and of the arguments that have informed the debate is in order.

5.2.1 Exploring the battlefield: Parliamentary Assembly v. Committee of Ministers.

Judicial appointments to Strasbourg are the shared responsibility of the Contracting Parties and the Parliamentary Assembly of the Council of Europe. Each state is expected to submit a shortlist of three candidates that satisfy the criteria of personal competence set out in Article 21 ECHR.³²⁴ The Parliamentary Assembly, then, is empowered under Article 22 (1) ECHR to confirm the appointment of one of the three candidates.³²⁵ Since the criteria of Article 21, however, are fairly generic, the Assembly has seen fit to lay down a more detailed set of eligibility conditions through a number of Resolutions.³²⁶ One of the most significant components of the appointment system as it currently stands is the interview process, which is carried out by an Ad Hoc Subcommittee on the Election of Judges to the European Court of Human Rights.

In 2004 the Parliamentary Assembly decided to take active steps towards achieving a fairer gender balance in the composition of the Court. For this purpose it passed Resolution 1366 (2004),³²⁷ which introduced an array of positive measures aimed at promoting gender equality on the Strasbourg bench.

The first measure imposed a gender quota on the national governments that draw the list of nominees. Paragraph 3 (ii) of the Resolution provides that the Parliamentary

³²⁴ Article 21 (1) ECHR reads as follows: "The judges shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence".

³²⁵ Article 22 (1) ECHR reads as follows: "1. The judges shall be elected by the Parliamentary Assembly with respect to each High Contracting Party by a majority of votes cast from a list of three candidates nominated by the High Contracting Party."

³²⁶ O'Connell, R. (2009). "Substantive Equality in the European Court of Human Rights?" *Michigan Law Review First Impressions* 107(129), at 550.

³²⁷ Council of Europe, Parliamentary Assembly Resolution 1366 (2004), Candidates for the European Court of Human Rights, 30 January 2004.

Assembly will not consider lists of candidates that do not “include at least one member of each sex”.

The second measure consisted in a recommendation to the political groups in the Council that appoint the members of the Sub-committee. When nominating their representatives of choice the political groups should “aim to include at least 40% women”.³²⁸ According to the Resolution, this percentage reflects “the parity threshold deemed necessary by the Council of Europe to exclude possible gender bias in decision-making processes”.³²⁹

The third and last measure introduced a *flexible results quota* at the final stage of the selection process. Paragraph 4 (iv) of the Resolution provides that “*one of the criteria* used by the sub-committee should be that, in the case of *equal merit, preference* should be given to a candidate of the sex *under-represented* in the Court” [emphasis added].

Alongside Resolution 1366 (2004) the Assembly adopted a Recommendation³³⁰ to the Committee of Ministers, suggesting that the latter should amend Article 22 ECHR with a view to “constitutionalising” the gender quota on national authorities imposed by Paragraph 3 (ii) of Resolution 1366. This development was hardly surprising. Ever since 1999 the Assembly had recommended that the Committee of Ministers invited national governments to “select candidates of both sexes in every case”³³¹ when drawing up their lists of nominees for appointment to the Court.

³²⁸ Paragraph 4 (ii), Resolution 1366 (2004).

³²⁹ Ibid.

³³⁰ Council of Europe, Parliamentary Assembly Recommendation 1649 (2004), Candidates for the European Court of Human Rights, 30 January 2004, 8th Sitting.

³³¹ Council of Europe, Parliamentary Assembly Recommendation 1429 (1999), National Procedures for Nominating Candidates for Election to the European Court of Human Rights, 24 September 1999.

A year later the Assembly decided to strengthen its equality agenda even further. The wording of Resolution 1366, according to which single-sex lists would not be considered, did not allow for the possibility of submitting an *all-female* list. This would clearly be contrary to the spirit of the Resolution, as it would defeat the purpose of the quota to enhance female representation on the Court. In order to rectify this omission the Assembly adopted Resolution 1426,³³² which amended Paragraph 3 (ii) of Resolution 1366 so that all-female lists would be accepted and considered as a matter of exception to the “no single-sex lists” rule.

The Committee of Ministers, however, was not convinced and refused to introduce the gender quota in Protocol 14 to the ECHR that was intended to amend Article 22 of the Convention.³³³ In response to the Assembly’s Resolutions 1366 and 1426 and to Recommendation 1649 the Committee approved a Reply,³³⁴ where it asserted that the Assembly’s position, although correct in principle, had been concretised in an unacceptably rigid manner. In paragraph 8 of the Reply the Committee explains that “a Contracting Party may find itself *obliged* to submit a list containing candidates of only one sex” [emphasis added] in order to comply with the other criteria of selection as laid out in Article 21 (1) ECHR. As a result, it would be “undesirable to give such a [positive action] rule binding force under the Convention”.³³⁵ The Committee, then, moves on to invite the Assembly to reconsider its position on the matter and add a *saving clause* to the quota, whereby national authorities could legitimately derogate from the relevant gender

³³² Council of Europe, Parliamentary Assembly Resolution 1426 (2005), Candidates for the European Court of Human Rights, 18 March 2005.

³³³ Protocol 14 was aimed at reforming the Strasbourg enforcement system. See Mowbray, A. (2004). “Protocol 14 to the European Convention on Human Rights.” *Human Rights Law Review* 42(2): 331-354.

³³⁴ Council of Europe, Committee of Ministers Reply adopted on 20 April 2005, CM/AS(2005)Rec1649final, 22 April 2005.

³³⁵ Committee of Ministers Reply, paragraph 8.

equality obligation, insofar as they can present “convincing arguments to the Committee of Ministers and the Assembly”.³³⁶

During this time of institutional impasse, the matter also played out in practical terms. In March 2004 the Maltese government produced an all-male list to replace the outgoing Maltese judge.³³⁷ On the basis of Resolution 1366 the Assembly refused to consider the list, which was subsequently resubmitted unaltered in September 2006. The Assembly refused once again to consider it for failure to satisfy the requirements of Paragraph 3 (ii) of Resolution 1366, as it had by then been amended by Paragraph 5 of Resolution 1426. After extended communications from the Maltese authorities³³⁸ and interventions from the Legal Affairs and Human Rights Committee³³⁹ and from the Committee on Equal Opportunities for Women and Men,³⁴⁰ the Court was finally consulted for an Advisory Opinion in July 2007.³⁴¹ The questions posed to the Court were the following:

“a. can a list of candidates for the post of judge at the European Court of Human Rights, which satisfies the criteria listed in Article 21 of the Convention, be refused solely on the basis of gender-related issues?

³³⁶ Ibid, paragraph 9.

³³⁷ Mowbray, *supra* no. 326, p. 552.

³³⁸ Ibid, at 553.

³³⁹ Committee on Legal Affairs and Human Rights (of the Parliamentary Assembly), Draft Resolution to amend Resolution 1366(2004), Document 11208, 19 March 2007.

³⁴⁰ Committee on Equal Opportunities for Women and Men (of the Parliamentary Assembly), Explanatory Memorandum, Document 11243, 16 April 2007.

³⁴¹ Mowbray, *supra* no. 326, p. 555.

b. are Resolution 1366 (2004) and Resolution 1426 (2005) in breach of the Assembly's responsibilities under Article 22 of the Convention to consider a list, or a name on such list, on the basis of the criteria listed in Article 21 of the Convention?"³⁴²

5.2.2 The Court's Advisory Opinion.

The Grand Chamber of the Court was admittedly faced with an unprecedented issue, both in procedural and in substantive terms. As Mowbray points out,³⁴³ this was the first time that Court exercised its Advisory Opinion jurisdiction according to its mandate under Article 47 of the Convention.³⁴⁴ More importantly, though, this was the first time that the relationship between equality and positive action became the object of an examination under the light of the Convention.

The question of jurisdiction was easily answered to the affirmative by the Court. Without much effort it asserted that "the rights and obligations of the Parliamentary Assembly in the procedure for electing judges [...] is of a legal character".³⁴⁵ On the substance of the matter the Court, mindful of the sovereignty of states, adopted a cautious and formalistic approach. Although it was conceded that the Assembly can legitimately take account of additional criteria of appointment,³⁴⁶ the final power to determine the

³⁴² Advisory Opinion on certain legal questions concerning the lists of candidates submitted with a view to the election of judges to the European Court of Human Rights [GC], 12 February 2008, paragraph 7.

³⁴³ Mowbray, *op. cit.*, p. 549.

³⁴⁴ There was only one previous occasion in 2004 when the Court was asked to exercise this power, but it found the matter to fall outside its jurisdiction. See Decision on the competence of the Court to give an Advisory Opinion [GC], 2 June 2004.

³⁴⁵ Advisory Opinion, paragraph 38.

³⁴⁶ *Ibid*, paragraph 45.

conditions of the selection process was found to lie with the Contracting Parties, as represented by the Committee of Ministers.³⁴⁷

In the Court's view the latter "have, thus, set the boundaries that the Assembly may not overstep in its pursuit of a policy aimed at ensuring that the lists include a candidate of the under-represented sex".³⁴⁸ These boundaries are delineated in the Committee's Reply to Resolution 1366 and Recommendation 1649 and consist in the need to introduce the possibility of exceptions to the gender quota. Insofar as such exceptions are not defined by the Parliamentary Assembly, the positive action provisions of the Resolutions will remain, according to the Court, *incompatible* with the Convention.³⁴⁹

5.2.3 Positive action in the ECHR system: A critical analysis.

A thorough study of the Advisory Opinion and of its consequences for the legality of positive action in the selection of judges for Strasbourg is definitely in order. Before moving on to examine the particular aspects of the issue, however, it is essential to highlight two significant points that set the tone for what will follow. First, the questions posed to the Court by the Committee of Ministers *narrow down the scope of the Court's enquiry*, as they involve only *one out of the three positive measures* that the Parliamentary Assembly has introduced with Resolution 1366. The conclusions of the Advisory Opinion, then, are applicable *exclusively to the provision of Paragraph 3 (ii) of Resolution 1366 as amended by Resolution 1426* and in no way affect the legality of Paragraph 4 (iv) and (vi) of Resolution 1366 and the positive measures introduced

³⁴⁷ Ibid, paragraph 51.

³⁴⁸ Ibid.

³⁴⁹ Ibid, paragraph 54.

therein. Second, it should be made perfectly clear that the Advisory Opinion *unequivocally confirms the legality of positive action in principle*, even if there are certain conditions that the relevant measures need to satisfy in order to pass the threshold of legality.

With this in mind let us now turn to consider the substance of the matter. In the debate between the Parliamentary Assembly and the Committee of Ministers the main point of contention was undoubtedly whether the failure of national authorities to abide by the gender quota could *automatically* lead to the list of candidates being effectively nullified. It is quite clear that the Court was also keen on placing this specific issue at the centre of its analytical construct in delivering its Opinion. In order to do so, it begins by establishing early on that both the Assembly³⁵⁰ and the Contracting Parties³⁵¹ are entitled to take account of *additional criteria* for the purposes of choosing between candidates that fulfil the generic Article 21 (1) conditions. Since “neither Article 22 nor the Convention system sets any explicit limits on the criteria which can be employed by the Parliamentary Assembly”,³⁵² there is no question that gender is among the legitimate criteria that can be used to distinguish between candidates or even to refuse to consider a candidate.

In spite of this latitude that Article 22 allows for,³⁵³ the Court makes it perfectly clear that “the Parliamentary Assembly is bound first and foremost by Article 21 § 1”.³⁵⁴ The same is true for the Contracting Parties, which cannot rely on additional criteria in order to release themselves “from the obligation to present a list of candidates each of

³⁵⁰ Ibid, paragraph 45.

³⁵¹ Ibid, paragraph 42.

³⁵² Ibid, paragraph 45.

³⁵³ Ibid, paragraph 43.

³⁵⁴ Ibid, paragraph 44.

whom fulfils all the conditions laid out in Article 21 § 1”.³⁵⁵ It clearly follows that the Court adopts a two-tiered view, whereby the criteria enshrined in the Convention itself are *first-order* and those imposed by the Assembly or the Contracting Parties are *second-order*. Fulfilling the former is a *conditio sine qua non* for the Assembly to consider a candidate for appointment. But insofar as the latter are concerned the situation may be more complex, depending on the *nature* of each particular criterion, such as gender.

According to the Court the additional criteria employed by the Assembly should be further subdivided into those that *flow implicitly from Article 21 § 1*³⁵⁶ and those that *have no link with Article 21 § 1*.³⁵⁷ This distinction is, indeed, teleologically justified in view of the generality in the wording of Article 21. Requiring, for instance, that all candidates have sufficient knowledge of at least one of the working languages of the Court³⁵⁸ is not only practically necessary,³⁵⁹ but can also be conceived of as part of the “qualifications required for appointment to high judicial office” under Article 21. Gender equality considerations, on the other hand, although legitimate, appear to be entirely unconnected to either high moral character or professional qualifications and competence to serve on the Court as per Article 21.

Simply put, criteria of the first subcategory are sufficiently linked to the notion of *merit*, whereas gender is not. It is the desire to reserve unquestionable priority for merit in selection procedures that inspires the Court’s Opinion. In answering whether the quota can be a legitimate ground to reject all-male lists Strasbourg here adopts a Luxembourg-

³⁵⁵ Ibid, paragraph 42.

³⁵⁶ Ibid, paragraph 47.

³⁵⁷ Ibid, paragraph 48.

³⁵⁸ Resolution 1366, paragraph 3 (iii).

³⁵⁹ The Court uses only English and French as its working languages (Rule 34 § 1 of the Rules of Court).

inspired *Badeck-style* approach,³⁶⁰ whereby quotas are legitimate only insofar as they contain a *proviso* allowing for *objectively justified* derogations.

Objective justification in this context seems to be defined narrowly by the Court. It entails that Contracting Parties will be expected to prove that their choice to submit an all-male list was in fact *inevitable* in view of the need to satisfy the first-order criteria of Article 21. In other words, the only way that national governments can justify all-male lists is by providing convincing evidence that *no female national candidate possessed the necessary qualifications* to be nominated.

With regard to the possibility of respecting the quota by nominating *non-nationals* in this case, the Court was unequivocally dismissive. Although the Committee on Equal Opportunities for Women and Men presented a strong argument premised on the fact that “there is no citizenship requirement to become a judge on the European Court of Human Rights”³⁶¹, the Court was not convinced. It considered this option to be open only in situations where not enough national candidates satisfy *first-order* criteria related to individual *merit*. It would, however, be “unacceptable for a State to be forced to nominate non-national candidates solely in order to satisfy the criterion relating to a candidate’s sex, which is not enshrined in the Convention”, because this would go against the rule “that one of the judges hearing a case must be the ‘national judge’.”³⁶²

It seems, then, that the Court’s main concern is to ensure that the use of the quota will not take priority over considerations of merit, as encapsulated in Article 21. The reasoning mirrors to an extent the one typically used by the European Court of Justice in its own positive action rulings. It has already been suggested that the ECtHR adopts a

³⁶⁰ See the discussion on the *Badeck* ruling of the ECJ in chapter 4.2.

³⁶¹ Explanatory Memorandum, Document 11243, op. cit., paragraph 11.

³⁶² Advisory Opinion, paragraph 52.

Badeck-style approach, in the sense that it considers that the possibility of exceptions to the gender requirement should be written into the rule in order for the latter to be legitimate. Much in the same way the ECJ found in Badeck³⁶³ that preference to the female candidate under a positive action scheme should not be “automatic” and “unconditional”.

Despite the obvious similarities of the ECtHR’s approach in the Advisory Opinion with the ECJ’s Badeck formula, there appears to be a particularly significant *difference* between the respective interpretations of the two European courts. The ECJ has been adamant up to now that, under Community Law, gender³⁶⁴ in selection processes can only operate as a *tie-breaker* between *equally qualified* candidates. The ECtHR’s Advisory Opinion, on the other hand, seems much more “sympathetic” towards positive action, as it does not restrict the quota’s *rationae personae* scope to *equally qualified* female candidates. In order for the quota to be applicable in favour of a female candidate she needs to be *qualified for appointment to high judicial office* according to Article 21, but not necessarily *equally qualified* to the male candidates over whom she is given preference.

One need not scrutinise the wording of the Court too thoroughly before reaching this conclusion. Nowhere in the Advisory Opinion does the Court say or even imply that Contracting Parties should be *allowed to derogate* from the quota in order to put forward the three candidates that they consider to be the *most qualified* for the job. Insofar as candidates are *individually fully qualified*, a *comparison* between candidates does not

³⁶³ And, of course, in Marschall before that.

³⁶⁴ Or race etc.

stem from Article 21 and it definitely cannot be inferred from the Court's interpretation of it.

This is plainly reflected in paragraphs 53 and 54 of the Advisory Opinion. All the Court requires the Assembly to do is: a) make sure that there are exceptions in place “designed to enable each Contracting Party to choose national candidates who satisfy all the requirements of Article 21 § 1”³⁶⁵ and b) if this results in an all-male list, to consider it nonetheless, provided that the “Contracting Party has taken all the necessary and appropriate steps with a view to ensuring that the list contains a candidate of the under-represented sex, but without success”.³⁶⁶ There is no evidence whatsoever that Contracting Parties could legitimately derogate from the quota and submit an all-male list solely on the basis of a claim that the *top three candidates* were male.

Apart from the fact that the Court's commitment to such a progressive view on positive action alone is bound to have a considerable normative impact, it is also important to note that this approach resonates with the reason behind setting up the quota in the first place. In the absence of national positive action measures aiming at securing equal participation of the sexes in the higher cadres of judicial office,³⁶⁷ there is no guarantee that female candidates for the ECtHR will ever be nominated. The assumption, then, that the quota is premised on is that all-male lists *may* be the outcome of institutionalised gender bias at some stage³⁶⁸ of the national selection process. Even with a tie-break type of positive measure in place, if every time a position became available at

³⁶⁵ Advisory Opinion, paragraph 53.

³⁶⁶ Ibid, paragraph 54.

³⁶⁷ According to information provided by the Contracting Parties upon the request of the Court, only Austria, Belgium and Latvia “have specific provisions in their legislation ensuring egalitarian representation in their Supreme and/or Constitutional Courts” (Advisory Opinion, paragraph 35).

³⁶⁸ Most likely at the final stage.

least *three male candidates* were *equally* qualified to the *best* female candidate, nothing would stop the national government from submitting all-male lists ad nauseam. It goes without saying that allowing for such a possibility would defeat the purpose of acting to promote a fairer gender balance in the composition of the Court.

It is possible, then, that the Advisory Opinion constitutes a real breakthrough in the way positive action is conceptualised in a European normative framework. By moving beyond the unjustifiably narrow confines of a “positive action as tie-break” approach, the Court paves the way for its European Union counterpart to follow suit and make gender equality a truly non-negotiable priority. The key is undoubtedly to substitute the doctrinally and pragmatically problematic “equally qualified” requirement of the ECJ with the more reasonable “*fully qualified*” formulation of the ECtHR. When *fully qualified* women are selected or promoted over more qualified men in any area of the employment field, including the judiciary, the *merit* principle is in no way overridden or downgraded. Regardless of their gender, the persons selected are deemed as capable of meeting the expectations of the body that set the conditions of appointment or promotion. The benefit, therefore, of maintaining the desired gender balance³⁶⁹ through positive action is achieved without any significant cost on the *merit* front.

5.2.4 Anticipating the future: Some suggestions to the Parliamentary Assembly of the Council of Europe.

From the analysis of the Advisory Opinion it becomes clear, first and foremost, that the Court does not consider the gender-quota *per se* as incompatible with the Convention. The particular formulation of the quota as it stands at the moment is

³⁶⁹ Or race balance etc.

problematic, insofar as it does not allow for the possibility of *exceptions*, which according to the Court “should be defined [...] as soon as possible”.³⁷⁰ What follows is intended as a reasonable proposal for amending the Assembly’s Resolution at the first instance, which will hopefully be followed by a corresponding amendment of Article 21 of the Convention itself.

Each Contracting Party, if unable or unwilling³⁷¹ to comply with the quota and include at least one woman among the three nominees, should submit to the Assembly the *full list of female candidates* with *detailed explanation* of the reasons why these were rejected. The Assembly will then have the *discretion to review the substance* of the national selection process and, if unconvinced by the explanatory memorandum of the national authorities, it will additionally have the *exceptional power to add* a fourth *female* candidate to the three already put forward.

In addition to that, the amended rule should contain a *proviso* stating that Contracting Parties *cannot* avail of the exception to the quota by submitting an all-male list *twice in a row*. This is a reasonable burden to impose on the Contracting Parties in view of their declared shared commitment to improve the level of female participation in the Court. Since the term of office for which judges are appointed is *six years*, there is a considerable period of time between two nominations from each government. Once an all-male list has been submitted, therefore, national authorities should take appropriate steps to ensure the presence of at least one woman in the subsequent list of nominees. Failure to do so would clearly indicate an unjustifiable gender gap that cannot be

³⁷⁰ Advisory Opinion, paragraph 54.

³⁷¹ In reality it is not possible to determine with absolute certainty the motives of a national government when submitting an all-male list. As with every other positive measure, the quota introduced by the Assembly here is premised on a *reasonable assumption* that in each Contracting Party there must be at least one female candidate that satisfies the conditions laid down by Article 21.

tolerated under the Convention system. In these highly exceptional circumstances the Contracting Party should be under an obligation to put forward a female nominee, *even if she is a non-national*.

5.3 The Case of Thlimmenos v. Greece: A Shift from Formal to Substantive Equality in the ECHR?

The compatibility of positive action *per se* with the Convention has only come under judicial scrutiny in the Advisory Opinion discussed above.³⁷² In the absence of a general equality clause, the meaning of equal treatment under the Convention should be sought in the Court's Article 14 jurisprudence. This is no easy task, mainly because of the narrow focus of the provision on *non-discrimination* as opposed to equality of treatment. The state obligation stemming from Article 14, therefore, is primarily understood in a *negative* way, as a *prohibition to discriminate*, rather than as a *positive obligation* to actively redress existing inequalities. For a long time the Court's reasoning was geared towards a *formal equality* approach,³⁷³ in line with the famous Aristotelian "treating likes alike" maxim.³⁷⁴ Article 14 was interpreted primarily as a tool to ensure that individuals in *similar* situations received the *same* treatment by the respondent state.³⁷⁵

In recent years, however, there is an apparent *shift* in the Court's conceptualisation of equality under the Convention from a *formal* to a more *substantive* notion.³⁷⁶ Accommodation of *difference* is incorporated as an intrinsic element of the

³⁷² Part of the literature accepts that the Court has indirectly dealt with positive action in its famous *Belgian Linguistics* judgment. See Crawford, J. (1998). *The Rights of Peoples*, Oxford University Press., p. 4-5.

³⁷³ Loenen, T. (1994). "Rethinking sex equality as a human right." *Netherlands Quarterly of Human Rights* 12(3): 253-270.

³⁷⁴ Arnardóttir, O. M. (2002). *Equality and Non-Discrimination Under the European Convention on Human Rights*, Martinus Nijhoff., p. 10.

³⁷⁵ *Fredin v. Sweden*, 18 February 1991, para 60; *Salgueiro da Silva Mouta v. Portugal*, 21 December 1999, 31 E.H.R.R. 47, para 26; *Edoardo Palumbo v. Italy*, 30 November 2000, para 51.

³⁷⁶ Spiliopoulou-Akerman, S. (2002). "The Limits of Pluralism – Recent Jurisprudence of the European Court of Human Rights with regard to Minorities: Does the Prohibition of Discrimination Add Anything?" *Journal of Ethnopolitics and Minority Issues in Europe*(3): 5-20.; O'Connell, R. (2009). "Commentary -

equality rationale. The turning point for this shift was the Court's judgment in a seemingly inconspicuous case, that of *Thlimmenos v. Greece*.³⁷⁷ In *Thlimmenos* the Court, for the first time in almost half a century worth of judgments, states the obvious: "[t]he right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also *violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different*" [emphasis added].³⁷⁸

The Court seems to concede that its case-law up to that point had an almost exclusive focus on instances of different treatment of analogous situations as a breach of Article 14.³⁷⁹ And it is indeed true that the Court has done a good job in extending the protection from such instances of direct discrimination to a wide range of social groups, through adopting an inclusive interpretation of the *rationae personae* scope of Article 14. The textual reference to "any other status" enabled the Court to bring within the scope of the provision distinctions based on rank,³⁸⁰ sexual orientation,³⁸¹ disability,³⁸² marital status³⁸³ and professional status.³⁸⁴ Throughout the years the approach was refined even further so that protection from direct discrimination was extended, among others,³⁸⁵ to

Substantive Equality in the European Court of Human Rights?" *Michigan Law Review First Impressions* 107: 129., at 129.

³⁷⁷ *Thlimmenos v. Greece* [GC], 6 July 2000, Application no. 34369/97, 31 EHRR 411.

³⁷⁸ *Thlimmenos*, para 44.

³⁷⁹ *Inze v. Austria*, 28 October 1987, App. No. 8695/79, Series A no. 126, p. 17, § 36, p. 18, § 41(cited in *Thlimmenos*, para 44).

³⁸⁰ *Engel v. The Netherlands*, 23 November 1976, 1 E.H.R.R. 647.

³⁸¹ *Dudgeon v. United Kingdom*, 12 October 1981, 4 E.H.R.R. 149; *Salgueiro da Silva Mouta v. Portugal*, 21 December 1999; *SL v. Austria*, 9 January 2003, 37 E.H.R.R. 39.

³⁸² *Botta v. Italy*, 24 February 1988, 26 E.H.R.R. 241.

³⁸³ *Sahin v. Germany*, 11 October 2001, 36 E.H.R.R. 241.

³⁸⁴ *Van der Musselle v. Belgium*, 23 November 1983, 6 E.H.R.R. 163.

³⁸⁵ For an extensive list of relevant case-law, including the rulings cited in this section, see Janis, M., R. Kay, et al. (2008). *European Human Rights Law: Text and Materials*, Oxford University Press, p. 470-471.

distinctions between general and specialist trade unions,³⁸⁶ between owners of residential and non-residential housing,³⁸⁷ between victims of intentional and unintentional torts³⁸⁸ and between large and small landowners.³⁸⁹

What the Court does not explicitly admit to in *Thlimmenos*, however, is that this judgment seems to break with the traditional, rigidly formalistic interpretation of the non-discrimination principle that permeates the case-law. In the not so distant past the Court has refused to acknowledge that equal treatment amounts to more than state neutrality, ruling that the disparate impact of formally neutral rules on particular groups did not constitute a breach of Article 14.³⁹⁰ Its attitude towards indirect discrimination as a potential source of violation was equally negative,³⁹¹ although the possibility was never explicitly rejected in principle.

In this climate the reasoning in *Thlimmenos* sounds as a very refreshing change of tune. The Court acknowledges that states are under a *positive obligation* to take account of *difference* when aiming for equality of treatment. This interpretation of article 14 has two important consequences: *indirectly* discriminatory national rules are clearly within the scope of prohibited discrimination³⁹² and the obligation not to discriminate may

³⁸⁶ *National Union of Belgian Police v. Belgium*, 27 October 1975, 1 E.H.R.R. 578.

³⁸⁷ *Spadea and Scalebrino v. Italy*, 28 September 1995, 21 E.H.R.R. 482.

³⁸⁸ *Stubbings v. United Kingdom*, 22 October 1996, 23 E.H.R.R. 213.

³⁸⁹ *Chassagnou v. France*, 29 April 1999, 29 E.H.R.R. 615.

³⁹⁰ *Abdulaziz, Cabales, and Balkandali*, op. cit.

³⁹¹ Tarr, G. A., R. F. Williams, et al., supra no. 318, p. 32.

³⁹² Loenen, T. and A. Hendriks (2000). "Case Note on *Thlimmenos*." *NJCM Bulletin* 25-6: 1095-1105., 1102.

require the state to make *reasonable adjustments*³⁹³ rather than remain notionally neutral through indistinctly applicable rules.

If the interpretative shift in *Thlimmenos* is confirmed,³⁹⁴ the normative consequences of this new equality paradigm will be particularly significant for the purposes of the present enquiry. Insofar as the *Thlimmenos* doctrine requires states to take active steps towards achieving equality of treatment, the possibility of using *positive action* as a legitimate means to that end remains wide open. This does not entail, of course, that an obligation to make reasonable adjustments can be translated into an *obligation* to take positive measures.³⁹⁵ It does, however, mean that Strasbourg and Luxembourg are moving to a similar direction with regard to their respective interpretations of the equal treatment principle. Although it is still too early to draw definitive conclusions, the judgment in *Thlimmenos* has the potential to radically transform the meaning of equality under the Convention.

³⁹³ Vieyetz, E. R. (2009). Immigration and Social Cohesion: Equality of Treatment and Social and Cultural Integration of Immigrant Workers and their Families. European Commission for Democracy through Law, Venice Commission. CDL-UTD (004).

³⁹⁴ Ruiz Vieyetz argues that the *Thlimmenos* doctrine has not been applied again (op. cit., para 4), but this conclusion seems largely unsupported in view of the recent case-law of the Court on the rights of Roma minorities.

³⁹⁵ For the difference between reasonable adjustments or reasonable accommodation and positive action see *infra*, chapter 6.2.3.

5.4 Protocol 12 to the ECHR: A New Dawn for Equality under the Convention?

Protocol 12 to the Convention has clearly the potential of becoming the single most significant legislative development in the field of equality law within the European public sphere for decades. Its objective is to boost the equality profile of the Convention by creating a *free-standing right not to be discriminated against*. As with most legislative steps of this magnitude, however, there is a catch. This is none other than its *optional* character. Although it opened for signature by the Member States of the Council of Europe on 4 November 2000 and entered into force in April 2005 for the first ten Member States that had hitherto ratified it, the total number of ratifications as of October 2009 has risen to no more than 17.³⁹⁶ Significantly, the largest European states in terms of population have either not ratified the protocol³⁹⁷ or refused to sign it in the first place.³⁹⁸

It goes without saying that the reluctance with which Protocol 12 has been met diminishes its short-term practical impact. Even more importantly, it undermines its *raison d'être*, as it effectively creates a double-standard system for citizens of different Member States.³⁹⁹ Nonetheless, the significance of this long-awaited development is multi-dimensional and is not exhausted in its strictly legal consequences. The eloquent symbolism of a reference to *full and effective* equality in its Preamble can hardly be overstated.

³⁹⁶ A comprehensive table of ratifications and signatures is available online from the Council of Europe website (<http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=177&CM=8&DF=&CL=ENG>).

³⁹⁷ Germany and Italy.

³⁹⁸ France, Poland and the UK.

³⁹⁹ It is evident that individuals will have locus standi to bring "independent" discrimination claims before the Court *only* against those national governments that have ratified the Protocol.

One might be tempted to suggest, then, that the most substantial contribution of Protocol 12 is to be found not so much in the establishment of a *free-standing* right not to be discriminated against as in its subtle but crucial adoption of a substantive underlying notion of equality. The Preamble, which sets as a common goal of the States-Parties the attainment of “full and effective equality”, encapsulates an understanding of equality that seems to go well beyond a rigid formal approach. A closer look at this formally non-binding but politically and normatively significant declaration is in order.

The Preamble to Protocol 12 recognises that equality before the law and the equal protection of the laws are fundamental and well-established general principles and essential elements in the protection of human rights.⁴⁰⁰ These principles, although not explicitly enshrined in either Article 14 or Protocol 12, “are closely intertwined” with the principle of non-discrimination.⁴⁰¹ This echoes the famous Belgian Linguistics judgment, where the Court, as early as in 1968, made the first explicit reference to the principle of *equal treatment* as underpinning the prohibition of discrimination in Article 14.⁴⁰²

What is of particular importance for present analytical purposes is the third recital of the Preamble. The drafters assert in no uncertain terms that positive measures taken in order to promote *full and effective equality* shall not be prohibited by the principle of non-discrimination, insofar as an objective and reasonable justification can be provided. This is the first instance of an explicit reference in any of the Convention texts to the positive action as a legitimate mechanism to achieve equality.

⁴⁰⁰ See the Explanatory Report to Protocol 12 to the Convention, para 14.

⁴⁰¹ Ibid.

⁴⁰² Case “Relating to certain aspects of the laws on the use of languages in education in Belgium” v. Belgium [Plenary], 23 July 1968, App. Nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63, 2126/64, Series A, No. 6. It should also be mentioned that the Court has made particular reference to the notion of “equality of the sexes” in the case of • Abdulaziz, Cabales and Balkandali v. the United Kingdom [Plenary], 28/05/1985, no. 9214/80 ; 9473/81 ; 9474/81, A94 (op. cit., para 78).

In itself this appears to be a significant step forward. Although the phrasing seems to reflect the classical understanding of positive action as an *exception* to equal treatment,⁴⁰³ the abandonment of the formal equality paradigm - at least on paper - is uncontested. Abandoning one equality paradigm, however, does not guarantee an automatic substitution by another, especially when the normative distance that needs to be covered is considerable. In other words, when Protocol 12 is seen in the context of the Convention, one cannot avoid being sceptical as to whether full and effective equality can be realised in the absence of structural changes to the Convention system as a whole.

Scepticism stems, first of all, from the fact that the Protocol does not create any *new* state obligations. The substantive provisions of the Protocol have as their primary objective “to embody a negative obligation for the Parties: the obligation not to discriminate against individuals”,⁴⁰⁴ without, of course, excluding altogether the possibility of “limited” positive obligations. Moreover, the phrasing “any right set forth by law” was particularly chosen in order to limit possible indirect horizontal effects⁴⁰⁵ at most to relations between private persons in the public sphere,⁴⁰⁶ since the bearer of the negative obligation not to discriminate is national public authorities. Finally, the use of positive action is “not prohibited”, but there is no encouragement or incentive to adopt such measures, let alone any programmatic obligation imposed on the Parties.⁴⁰⁷

The second source of scepticism relates to pragmatic considerations regarding the way the new provisions can impact on adjudication. Leaving aside the possibility of

⁴⁰³ This is evident not so much in the requirement for an *objective and reasonable justification*, but in the fact that the legitimacy of positive action is defined negatively: positive measures are *not prohibited*.

⁴⁰⁴ Ibid, para 24.

⁴⁰⁵ Ibid, para 29.

⁴⁰⁶ Ibid, para 28.

⁴⁰⁷ Ibid, para 16

further expanding the Protocol's scope of application through bold and open-minded judicial interpretation, the aforesaid objectives of the new provisions appear rather conservative to live up to the high standards of an already well-established system of protection. This is in no way an attempt to undermine the importance of a free-standing general anti-discrimination clause, but rather a way of emphasising that there does not appear to be any *qualitative* differentiation in the protection afforded by the Convention as a whole. On the contrary, it is made clear on many occasions that the new provisions and Article 14 are bound together in a symbiotic relation and cannot be applied separately.

The examples cited by the authors of the Explanatory Report almost beg the question of how useful the additions of Protocol 12 will prove in practice. When a person suffers from discriminatory behaviour "by law enforcement" officers controlling a riot",⁴⁰⁸ the applicability of the new provisions (taken together with Article 14) will inevitably depend on the effects of this behaviour on the enjoyment of the applicant's rights. It is difficult to envisage a scenario in which such behaviour would amount to a breach of rights conferred by national law but not to a simultaneous violation of any of the rights enshrined in the Convention, not even indirectly. In this respect, it can be argued that the suggested behaviour of law enforcement officers, if based on grounds of sex, race etc., would probably fall within the meaning of "degrading treatment" under Article 3 of the Convention. Article 14, then, would be directly applicable anyway, without having to resort to the provisions of Protocol 12. Along the same lines, Article 1 of Protocol 12 will be violated when public authorities of a Member State fail to comply with the principle of equal treatment in terms of a clear *obligation* bestowed upon them

⁴⁰⁸ Explanatory Report, para 22.

by *national law*. In this way, Protocol 12 neither imposes new positive obligations on the States-Parties nor widens the existing ones stemming from Article 14.

It is evident from the preceding analysis that Protocol 12 has relatively little to offer in achieving full and effective equality, other than on a symbolic level. An independent non-discrimination clause does not disengage the Court from the requirements and restrictions inherent in the non-discrimination normative framework, such as the need to identify a *comparator* in every case.⁴⁰⁹ Consequently, forms of inequality that do not fit into the anti-discrimination rationale will not be tackled under Protocol 12. Anti-discrimination law, after all, does not entertain the ambition to eliminate all forms of socio-economic inequality. The existence, therefore, of an independent non-discrimination clause does not *per se* entail endorsement of a more substantive notion of equality, even though the Court's recent case-law encapsulates an interpretative move towards this direction.

⁴⁰⁹ In this respect, an individual applicant would find it equally difficult to prove her claim under the provisions of Protocol 12 as under article 14. The Court's reasoning and conclusions in *Pretty v. UK*, for instance, would remain unaltered even in the light of the new provisions.

PART III: POSITIVE ACTION DISSECTED: ONE SIZE DOESN'T FIT ALL

The analytical objective of Part III is to present and justify one of the principal claims of this thesis, namely that a “one size fits all” approach to positive action is conceptually problematic and normatively confusing. It is conceptually problematic because it fails to take into account philosophically significant nuances in the way the principle of equal treatment is, first, defined and, then, applied in different areas of the public sphere. It is normatively confusing because it entails legal uncertainty with regard to the appropriate test of legality for positive measures that fall outside the “standard” context of employment law.⁴¹⁰

This lack of conceptual clarity, as well as the resulting normative inadequacy, constitutes an inherent flaw in the classical conception of positive action. A more sophisticated alternative, therefore, should begin by distinguishing between different areas of the public sphere and examining how positive action operates in each of them. Accordingly, Part III is premised on an analytical distinction identifying three dimensions of social activity in which positive action may be used as a means towards equality: *employment*, *elected public office* and “*sensitive*” *areas of the public sphere*. The three corresponding chapters⁴¹¹ explore the European status quo, as determined by existing legal rules and the European courts’ interpretations, and highlight the deficiencies that must be addressed. The final chapter in this section provides a schematic representation of how positive action fits into the existing framework and scrutinises what appears to be

⁴¹⁰ Assuming, of course, that in employment the ECJ Badeck formula provides an adequately refined test for the legality of positive measures.

⁴¹¹ Chapters 6, 7 and 8 respectively.

the single most problematic aspect of the discourse, that is to say the relationship between *disadvantage* and *under-representation* as possible justificatory bases for positive action.

CHAPTER 6: POSITIVE ACTION IN EMPLOYMENT

6.1 Introduction

It is no coincidence that this part of the enquiry begins with examining positive action in *employment*. Employment law is *par excellence* the normative framework within which positive action has been established and accepted as a legitimate equality mechanism. Especially when it comes to quota systems, ECJ positive action case-law,⁴¹² as well as most of the relevant European legal instruments, seem to be almost exclusively employment-related.

The chapter will begin by examining the *types* of positive action and the possible *grounds* for the identification of target groups and then delineate the conceptual limits of positive action vis-à-vis *reasonable accommodation*. It will then move on to consider the impact of the test of legality encapsulated in the Badeck formula on national jurisdictions. Finally, the last section will critically evaluate how the notion of *merit* dominates the discourse and identify the problems this presents for the attainment of full equality.

⁴¹² With the exception of *Griesmar*, *Lommers* and *Briheche*. See *infra*, chapter 4.2.5.

6.2 What Kind of Positive Action?

6.2.1 Types of positive action in employment: From training and encouragement to preference and quotas.

In the EU jargon positive action, as already explained, is an “umbrella” term, understood in a deliberately generic manner so that it encompasses a wide range of equality and non-discrimination policies and measures. Although there is no terminological consensus in the literature,⁴¹³ this wider view of positive action is supported by a number of prominent authors⁴¹⁴ and has been adopted throughout the present thesis. Distinguishing, then, between different types of positive measures becomes an analytical necessity in order to accurately assess their success in achieving the aim of equality. Such a distinction is particularly valuable in the field of employment law, given that it is in this area that European legislators and policy-makers have focused most of their efforts.

The most successful recent attempt to provide a comprehensive *typology* of positive action in employment has been undertaken by De Schutter.⁴¹⁵ He identifies *six* types of positive measures in employment:⁴¹⁶

- “Monitoring the composition of the workforce in order to identify instances of underrepresentation and, possibly, to encourage the adoption of action plans and the setting of targets” [type 1].

⁴¹³ See Fredman, *supra* no. 1, pp. 125-136, where further references.

⁴¹⁴ Instead of many see McCrudden, C. (1986). “Rethinking Positive Action.” *Industrial Law Journal* 15(1): 219-243.

⁴¹⁵ O. De Schutter, *supra* no. 283.

⁴¹⁶ *Ibid*, p. 762.

- “Redefining the standard criterion on the basis of which employment or promotion are allocated (in general, merit)” [type 2].
- “Outreach measures, consisting in general measures targeting underrepresented groups, such as the provision of training aimed at members of the underrepresented groups or job announcements encouraging members of such groups to apply” [type 3].
- “Outreach measures, consisting in individual measures such as the guarantee to members of underrepresented groups that they will be interviewed if they possess the relevant qualifications” [type 4].
- “Preferential treatment of equally qualified members of the underrepresented group, with or without exemption clause (also referred to as ‘flexible quotas’)” [type 5].
- Strict quotas, linked or not to objective factors beyond the representation of the target group in the general active population” [type 6].

De Schutter’s typology is meticulous and covers a wide range of measures and schemes. In essence, though, it is premised upon a rather simpler binary distinction. On the one hand there are “true positive measures” that involve some form of *preferential treatment* to members of the disadvantaged groups and, on the other hand, “outreach measures” that aim primarily at improving the competitiveness of the group in the labour market *without* granting preferential treatment. According to this criterion⁴¹⁷ measures of

⁴¹⁷ De Schutter argues that there is a second criterion according to which positive measures can be classified into two categories, namely whether they require that the beneficiary is a *member of the* (disadvantaged) *target group*. Although it is true that, in certain cases, non-members can take advantage of

type 4, type 5 and type 6 fall under the former category, while measures of type 1, type 2 and type 3 fall under the latter.⁴¹⁸

Although the typology is descriptively accurate, the basic dichotomy it is premised on does not cure some of the unavoidable indeterminacies of the current positive action discourse. The most characteristic example is the dubious classification of measures providing targeted *training* to members of a specific under-represented or disadvantaged group [type 3]. As De Schutter himself acknowledges, these “may go beyond a strict definition of ‘outreaching measures’”,⁴¹⁹ since they may consist in granting *preference* in the allocation of training places. It is obvious, then, that the dichotomy along the lines of *preferential treatment* cannot suffice here, unless it is specified that only preference in the *allocation of jobs* counts.⁴²⁰ In that case, however, a similar problem would arise with regard to type 4 measures. It would no longer be possible to characterise these as “true positive measures”, insofar as the preference granted to individual members of the under-represented groups takes place at a preliminary stage of the selection process and does not affect job allocation *per se*.

It is, therefore, preferable for present purposes to seek an alternative classification, devised to specifically reflect the fundamental distinction between softer and stricter forms of positive action in employment. The principal criterion for such a categorisation of positive measures can be none other than the *nature* of the benefit they allocate, which

a programme designed primarily for the benefit of a specific group, it is submitted that this is a direct consequence of the principle of equal treatment understood as proportionality of concern (see *infra*, chapters 10 and 11).

⁴¹⁸ De Schutter, *supra* no.283, p. 762.

⁴¹⁹ *Ibid*, p. 774.

⁴²⁰ Deciding whether a type 3 measure qualifies as preferential treatment is normatively significant in order to determine whether and under which conditions it is permissible under Article 141 (4) EC and the Equal Treatment Directive. See the ECJ ruling in *Badeck*, para 54.

is in turn closely related to the characterisation of the measure as “soft” or “strict”. *Soft* measures aim at *identifying* groups that are under-represented or disadvantaged in particular employment cadres and at *improving* the chances of their members to *compete* in the labour market. They are designed to operate on either an *abstract-general*⁴²¹ level or on a *concrete-individual*⁴²² level. In the former case they consist in *monitoring mechanisms*⁴²³ and *inclusive definitions of merit*,⁴²⁴ corresponding to types 3 and 4 of De Schutter’s typology. In the latter case they consist in *active encouragement*⁴²⁵ of members of disadvantaged or under-represented groups to apply for particular positions, as well as in *training* opportunities that are allocated to members of these groups.

Strict measures, on the other hand, aim at removing existing inequalities and *reducing* visible under-representation of particular groups in the employment field by *favouring individual members* of these groups. This is primarily achieved through the use of *quotas* that are designed with a view to achieving results *in the short term* and can be further subdivided into *flexible*⁴²⁶ and *non-flexible*.⁴²⁷ With flexible quotas the personal characteristic that defines the target group is used as a criterion to grant preference in the form of a *tie-breaker* between otherwise equally qualified candidates, whereas non-

⁴²¹ In the sense that no individual members of the target groups will enjoy *direct* benefits from these measures.

⁴²² In the sense that the application of these measures will necessary involve *individual beneficiaries*.

⁴²³ For concrete examples of monitoring mechanisms and a useful discussion see De Schutter, supra no. 283, pp. 763-771.

⁴²⁴ On how the construction of merit in European law can be gender-biased see Hervey, T. and J. Shaw (1998). "Women, Work and Care: Women’s Double Burden in EC Sex Equality Law." *Journal of European Social Policy* 8(1): 43-63.

⁴²⁵ For concrete examples of encouragement techniques in the drafting of job advertisements see Szyszczak, E. (2006). "Positive Action as a Tool in Promoting Access to Employment." *Roma Rights Quarterly*(1): 25-30., p. 28. Also see De Schutter, supra no. 238, p. 772-773.

⁴²⁶ Corresponding to type 5 measures of De Schutter’s typology.

⁴²⁷ Corresponding to type 6 measures of De Schutter’s typology.

flexible quotas grant preference to individual members of the under-represented group that are *less qualified* than their counterparts.

6.2.2 *Grounds of positive action: From gender to race, ethnicity, religion and age.*

Protection from discrimination is typically organised with reference to certain personal characteristics that traditionally constitute discriminatory grounds. Although the lists of discriminatory grounds contained in prohibitive rules of domestic and international instruments are usually open-ended, in practice certain among these grounds seem to enjoy a privileged status of “*primus inter pares*” on the policy-making agendas of particular jurisdictions. Rather than being available across the spectrum of disadvantaged or under-represented groups, aggressive equality policies such as positive measures are usually adopted for *specific* groups. Realistically, then, some inequalities in the field of employment will be addressed before others, depending on political, socio-economic and historical reasons. While in the United States, for instance, affirmative action was race-oriented from the outset with women’s issues taking a back seat,⁴²⁸ the situation in Europe has been quite the opposite, with gender equality taking the lion’s share of policy and legislative attention.

Historically this can be easily explained when one considers the way gender has shaped the experiences of women workers across the Continent.⁴²⁹ A common pattern of patriarchy, whereby a hierarchy of the sexes with men at the top exists throughout the

⁴²⁸ This is despite the impressive body of feminist jurisprudence coming from the United States, which has had a considerable impact in shaping feminist thinking across the globe.

⁴²⁹ For a very interesting overview of the history of gender in Europe see Timm, A. F. and J. A. Sanborn (2007). Gender, Sex and the Shaping of Modern Europe: A History from the French Revolution to the Present Day, Berg Publishers.

social sphere,⁴³⁰ can be identified in most European countries. Regardless of localised differences in the conceptualisation of gender within a given socio-political context,⁴³¹ or in the way and extent to which feminist movements have managed to influence policy-making, there is no denying that European women in general have long suffered from severe and multi-faceted discrimination in the labour market. And this has been the case even in countries where women have enjoyed equal rights on paper for generations.

The prioritisation of gender in the fight against employment discrimination in Europe, therefore, is understandable.⁴³² And this could not but be mirrored on the legal developments at the EU level. Until the late 1990s EU anti-discrimination law was effectively *one-dimensional* in scope, as it was exclusively⁴³³ focused on gender equality in employment.⁴³⁴ In fact, Community law at the time did not explicitly prohibit discrimination on any grounds other than gender,⁴³⁵ with the exception, of course, of nationality discrimination between EU citizens.⁴³⁶ As it has correctly been pointed out the

⁴³⁰ Wiesner-Hanks, M. E. (2001). *Gender in History*, Blackwell., p. 12-13. It must be noted, however, that there is no consensus on the definition of patriarchy. See Timm and Sandborn, op. cit., p. 13.

⁴³¹ Some European societies, especially in the South of Europe, have traditionally been more "patriarchal" than others, such as the Scandinavian countries.

⁴³² Although this should not be construed as negating the historical experience of race discrimination in the European continent, both historically and as an ongoing problem. See Fredman, S. (2001). "Equality: A New Generation?" *Industrial Law Journal* 30(2): 145-168., at 146.

⁴³³ It is noteworthy, however, that the ECJ on one occasion did extend protection from discrimination in employment to cover transsexuals under the original Equal Treatment Directive. See Case C-13/94, P. v. S. And Cornwall County Council [1996], ECR I-2143.

⁴³⁴ DG Employment, Social Affairs a. Equal Opportunities (2009). *International Perspectives on Positive Action Measures: A comparative analysis in the European Union, Canada, the United States and South Africa*, European Commission Publications Office., p. 22.

⁴³⁵ Szyszczak, E. (1992). Race Discrimination: the Limits of Market Equality. *Discrimination: The Limits of Law*. B. Hepple and E. Szyszczak, Mansell., 125-147.

⁴³⁶ Under the free movement of persons provisions in Articles 39 and 43 of the Treaty.

principle of gender equality is “one of the most developed concepts” in EU law⁴³⁷ and it applies to virtually every aspect of employment through a variety of specifically targeted Directives.⁴³⁸

Provisions on positive action followed suit both in Treaty law and secondary Community law. Article 141 paragraph 4 EC and Article 2 (4) of the original Equal Treatment Directive⁴³⁹ provided for the possibility of positive measures in favour of women designed to promote equal opportunities and remove existing inequalities in working life. It is, thus, no surprise that the literature of the late 1980s and early 1990s is similarly focused on the consideration of gender-oriented anti-discrimination laws and positive measures.⁴⁴⁰

During the last fifteen years, however, the repositioning of European societies towards an increasingly multicultural model has brought about new tensions and inequalities in the workplace. Gender, despite its continued significance as a principal inequality index, is no longer the sole focus of anti-discrimination and equality

⁴³⁷ Torella, E. C. D. (2006). "The Principle of Gender Equality, the Goods and Services Directive and Insurance: A Conceptual Analysis." Maastricht Journal of European and Comparative Law 13(3): 339-350., at 339.

⁴³⁸ The principle of gender equality is applicable to access to employment and employment conditions, apart from equal pay, including training (Directive 76/207/EEC), membership of and involvement in organisations of workers and employers and professional organisations (Directive 76/207/EEC as amended by Directive 2002/73/EC), certain aspects of self employed occupations (Directive 86/613/EEC and Directive 76/207/EEC as amended by Directive 2002/73/EC), as well as social security issues (Directive 79/7/EEC).

⁴³⁹ Directive 76/207/EEC on equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ L 39, 14.2.1976.

⁴⁴⁰ Among many see Landau, E. C. (1985). The Rights of Working Women in the European Community, Office for Official Publications of the European Communities.; McCrudden, C. (1987). Women, Employment and European Equality Law, Eclipse.; Nielsen, R. and E. Szyszczak (1991). The Social Dimension of the European Communities, Handelshøjskolens Forlag.; Ellis, E. (1991). European Community Sex Equality Law, Oxford University Press.; O'Donovan, K. and E. Szyszczak (1988). Equality and Sex Discrimination Law, Blackwell.; Prechal, S. and N. Burrows (1990). Gender Discrimination Law of the European Community, Dartmouth.; More, G. C. (1993). "Equal Treatment of the Sexes in European Community Law: What Does 'Equal' Mean?" Feminist Legal Studies 1(1): 45-74.

legislation. In 1999 the Treaty of Amsterdam marked a significant shift in this regard, with the new Article 13 becoming the cornerstone of a remarkable expansion in the scope of EU anti-discrimination law.⁴⁴¹ Race, ethnic origin, religion or belief, sexual orientation, age and disability have been added to the protected grounds and the Community obtained, thus, the competence to legislate in these areas. A number of secondary law instruments based on Article 13 followed soon after, with the adoption of the Racial Equality Directive⁴⁴² and the Framework Employment Directive.⁴⁴³ The former prohibits discrimination on grounds of race or ethnic origin primarily within the workplace but also, arguably, outside it,⁴⁴⁴ while the latter provides a comprehensive framework of protection against discrimination in the workplace⁴⁴⁵ on grounds of religion or belief, disability,⁴⁴⁶ age or sexual orientation.⁴⁴⁷

These new instruments did not simply broaden the scope of employment anti-discrimination law by transplanting the existing protection against sex discrimination into other areas. Instead they added “new definitions and understandings of key concepts,

⁴⁴¹ M. Bell, “The new Article 13 EC Treaty: a sound basis for European anti-discrimination law?” 6 MJ (1999), 5–23.

⁴⁴² Directive 2000/43/EC implementing the principle of equal treatment irrespective of racial or ethnic origin, OJL 180/22.

⁴⁴³ Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, OJL 303/16.

⁴⁴⁴ Bell, M. (2002). “Beyond European Labour Law? Reflections on the EU Racial Equality Directive.” European Law Journal 8(3): 384-399.; Brown, C. (2002). “The Race Directive: Towards Equality for All the People of Europe?” Yearbook of EU Law 21: 195-227.; Guild, E. (2000). “The EC Directive on Race Discrimination: Surprises, Possibilities and Limitations.” Industrial Law Journal 29(4): 416-423.

⁴⁴⁵ Skidmore, P. (2001). “European development—EC framework directive on equal treatment in employment: towards a comprehensive community anti-discrimination policy?” Industrial Law Journal 30(1): 126-132

⁴⁴⁶ Specifically on disability see *infra*, chapter 6.2.3.

⁴⁴⁷ There is a third instrument adopted under Article 13, namely 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 [2004] OJ L 373/37.

including discrimination and positive action".⁴⁴⁸ More importantly, they paved the way for a *multidimensional* conception of equality law,⁴⁴⁹ whereby the possibility of individual employees being discriminated against on more than a single ground can be acknowledged. It must be pointed out, of course, that this is still more a theoretical possibility rather than normative reality. It is highly debatable whether EU equality law at this point in time can adequately address discrimination at the intersection of two or more personal characteristics.⁴⁵⁰

It must also be highlighted that these developments did not relegate gender equality from its privileged position in EU employment law. Evidence to that was the new Equal Treatment Directive⁴⁵¹ for men and women in employment that introduced both substantial and procedural amendments to the original Equal Treatment Directive,⁴⁵² before taking its current form in 2006 under the Recast Equal Treatment Directive.⁴⁵³

⁴⁴⁸ Bell, M. and L. Waddington (2001). "More Equal Than Others: Distinguishing European Union Equality Directives." *Common Market Law Review* 38(3): 587-611. uality Law", 12 MJ 4 (2005), 427-466., at 588.

⁴⁴⁹ Schiek, D. (2005). "Broadening the Scope and the Norms of EU Gender Equality Law: Towards a Multidimensional Conception of Equality Law." *Maastricht Journal of European and Comparative Law* 12(4): 427-466.

⁴⁵⁰ Ashiagbor, D. (1999). The intersection between Gender and Race in the Labour Market: Consequences for Anti-Discrimination Law. *Feminist Perspectives on Employment Law*. A. Morris and T. O'Donnel, Cavendish.; Hannett, S. (2003). "Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple Discrimination." *Oxford Journal of Legal Studies* 23(1): 65-86., 67.

⁴⁵¹ Directive 2002/73/E.C. of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/E.E.C. 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, O.J. 05.10.2002, L 269, p. 15.

⁴⁵² Masselot, A. (2004). "The New Equal Treatment Directive: Plus Ça Change ...: Comment on Directive 2002/73/EC of 23 September 2002 Amending Council Directive 76/207/EEC 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 " *Feminist Legal Studies* 12(1): 93-104., p. 94.

⁴⁵³ Directive 2006/54/EC of the European Parliament and of the Council on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L 204/23 2006. Directive 2006/54 is a consolidating instrument that replaces the previously separate secondary law instruments on equal pay, equal treatment, occupational social security and the burden of proof. See P. Craig and G. De Burca, *supra* no.154, p. 875.

Eliminating gender inequalities in the workplace continues to be a number one priority and it is no coincidence that all positive action schemes that have been scrutinised by the ECJ up to now involve favourable treatment towards women.

6.2.3 *The case of disability: Positive action v. reasonable accommodation.*

Disability discrimination in employment is one of the most rapidly developing areas of anti-discrimination law in Europe. This is in no small part due to the Framework Equality Directive⁴⁵⁴ that imposed on Member States an obligation to implement anti-discrimination measures for the protection of disabled persons in employment.⁴⁵⁵ In Article 5 the Directive introduces the notion of *reasonable accommodation*, which is intended to occupy centre-stage in eliminating discrimination on grounds of disability. The positive duty⁴⁵⁶ of reasonable accommodation entails that employers should take *ad hoc* measures “to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training”.⁴⁵⁷ The Directive, then, purports to achieve a double aim: first, establish reasonable accommodation as a *general norm* that

⁴⁵⁴ Directive 2000/78/EC, op. cit.

⁴⁵⁵ Lawson, A. and C. Gooding (2005). Introduction. Disability Rights in Europe: From Theory to Practice.

A. Lawson and C. Gooding, Hart., p. 1.

⁴⁵⁶ Fredman, supra no.1, p. 59.

⁴⁵⁷ Article 5 of Directive 2000/78/EC reads 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 undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned.”

applies to all employers in the public and private sectors and, second, affirm that the *absence* of it amounts itself to discrimination.⁴⁵⁸

Domestic legislation in most Member States has also adopted the approach taken in the Directive. A characteristic example is the UK Disability Discrimination Act 1995, as amended in 2005, which introduces the term “reasonable adjustments” as equivalent to reasonable accommodation.⁴⁵⁹ As Fredman correctly points out, through the notion of reasonable adjustments the Act does not simply require employers to conform to the “able-bodied norm” but to modify that norm with a view to “afford[ing] genuine equality to disabled persons”.⁴⁶⁰ The wording of the Directive and of the domestic implementing provisions reveals that the obligations in question are inspired by a conception of *substantive* rather than *formal* equality.

It is exactly this adherence to substantive equality that has led some commentators to regard reasonable accommodation as a form of positive action,⁴⁶¹ although not necessarily as “reverse or positive discrimination”.⁴⁶² This interpretation, however, is seriously contested,⁴⁶³ as it is said to confuse two substantively and procedurally distinct

⁴⁵⁸ United Nations Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, “The Concept of Reasonable Accommodation in Selected National Disability Legislation”, 2005 [available online at: <http://www.un.org/esa/socdev/enable/rights/ahc7bkgrndra.htm>].

⁴⁵⁹ For a more detailed analysis of the UK Disability Discrimination Act and its interpretation by national courts see Gooding, C. (2000). “Disability Discrimination Act: From Statute to Practice.” Critical Social Policy 20(4): 533-549.

⁴⁶⁰ Fredman, *supra* no.1, p. 59.

⁴⁶¹ See for instance Fenwick, H. (2002). Civil Liberties and Human Rights, Cavendish, p. 1043.

⁴⁶² Doyle, B. (1997). “Enabling legislation or dissembling law? The Disability Discrimination Act 1995.” Modern Law Review 60(1): 64-78., p. 74. In the US context see Tucker, B. P. (2001). “The ADA’s Revolving Door: Inherent Flaws in the Civil Rights Paradigm.” Ohio State Law Journal 62(1): 335-390., p. 365.

⁴⁶³ And not only in the European discourse. For a discussion of the matter from a US point of view see Jolls, C. (2001). “Antidiscrimination and Accommodation.” Harvard Law School 115(2): 642-699.

normative techniques.⁴⁶⁴ Reasonable accommodation, in this view, should rather be conceived of as “a particular kind of non-discrimination legislative provision, related to, but not synonymous with, the established forms of *direct* and *indirect discrimination*” [emphasis added].⁴⁶⁵ It is, thus, an instrument designed according to the “difference model of discrimination”, which is in turn premised on an “asymmetric notion” of equality.⁴⁶⁶ In other words, the recognition that disabled persons are in a substantially different situation from able-bodied persons entails that the equal treatment principle in this case requires *different* treatment of the respective groups.

From this point of view, it is evident why reasonable accommodation does not amount to positive action. Whether or not disabled persons can be classified as a disadvantaged or under-represented group in particular employment cadres is *irrelevant*. Reasonable accommodation is, thus, understood as possessing an “individualised character”,⁴⁶⁷ contrary to the group-approach that is instrumental in the conceptualisation and operation of positive action. Admittedly, the boundaries between the two are not always clear. Systems that introduce a *disability quota*, requiring that a minimum percentage of the workforce should consist in disabled persons, as is the case in France, Austria and Sweden,⁴⁶⁸ go beyond reasonable accommodation and into the realm of positive action. This, however, does not undermine the validity of the overall conclusion that the two notions are doctrinally separate.

⁴⁶⁴Waddington, L. (2007). Reasonable Accommodation. Cases, Materials and Text on National, Supranational and International Non-Discrimination Law. D. Schiek, L. Waddington and M. Bell, Hart., pp. 745-752.

⁴⁶⁵ DG Employment, Social Affairs and Equal Opportunities, supra no. 434, p. 27.

⁴⁶⁶ Ibid. See also Fredman, supra no. 1, p. 126-130, esp. 128-129.

⁴⁶⁷ DG Employment, Social Affairs and Equal Opportunities, supra no. 434, p. 28.

⁴⁶⁸ See below, chapter 6.3.

6.3 Quotas in Employment and ECJ Case-Law: The Badeck Formula and its Influence on National Jurisdictions

The legitimacy of quotas in employment under EU law has been thoroughly examined in the relevant section,⁴⁶⁹ with emphasis on a detailed analysis of the ECJ positive action rulings.⁴⁷⁰ The position of EU law on the matter can, therefore, be summarised as follows:

- Community law instruments *permit* preferential treatment in favour of under-represented groups as a means to achieve full and effective equality in the field of employment, but there is no *positive obligation* of Member States to adopt such measures.
- Quotas are permissible under certain conditions: they must a) operate as a tie-breaker between *equally qualified* candidates and b) contain a *proviso* that will allow for an ad hoc suspension of the quota's application, if there are reasons specific to the candidate from the "dominant group" that tilt the balance in his favour.

The delineation of permissible quotas in employment, referred to as the Badeck formula, sets the tone for national authorities. As long as preference to members of the under-represented group is neither *automatic* nor *unconditional*, in other words when *flexible result quotas* are at issue, national legislation will pass the threshold of legality set by the Court. Clear as these limits may seem, however, they do not entail that the

⁴⁶⁹ Infra, chapter 4.

⁴⁷⁰ Infra, chapter 4.2.

relationship between EU law on positive action and national jurisdictions is equally unambiguous.

Ambiguity begins with the fact that EU law in this area is *permissive* rather than *prescriptive* in nature. The obvious consequence is the lack of uniformity across Member States in addressing similar situations. Most national legislators⁴⁷¹ will *abstain* from directly introducing quotas in order to remedy under-representation in particular employment cadres,⁴⁷² while others will establish compulsory quota systems. Some among these will only apply in areas of the public service, such as the Greek gender quota introduced by Law 2839/2000. The aim of this law is to ensure the balanced participation of men and women in the decision-making process in public administration, as well as in the local administration agencies (municipalities). Article 6 stipulates that the departmental boards throughout the public sector will be comprised to a minimum of 1/3 by members of each sex.⁴⁷³ Although the scope of the relevant provision formally covers entities of the private sector as well, it only does so as far as *appointments or recommendations made by the Administration* are concerned. In reality, therefore, the quota leaves the private sector essentially unaffected.

⁴⁷¹ DG Employment, Social Affairs and Equal Opportunities, *supra* no. 434, p. 29.

⁴⁷² It will be argued, however, later on in this thesis that the obligation to achieve a state of *full and effective equality* may in fact entail, in certain cases, an *obligation* on the part of the state to introduce quotas in order to address severe under-representation in particular employment cadres.

⁴⁷³ Article 6 reads as follows: “a. In every departmental board of state organisations, of entities of the public sector and of local administration agencies, the number of members of each sex nominated by the Administration shall be equal to at least 1/3 of those nominated [...]. b. In cases of appointment or recommendation by the public Administration to entities of the public sector or local administration agencies of members of the board or of other collective managing bodies of entities of the public sector or of local administration agencies, the number of appointed or recommended persons of each sex shall correspond to at least 1/3 of those appointed or recommended [...]” [translated from Greek].

Arguably the most well-known example of such a scheme is the Police (Northern Ireland) Act 2000,⁴⁷⁴ which established a quota system on grounds of religious belief in the recruitment of police officers. The severe under-representation of the Catholic community in the police force led to the creation of this rule, whereby an even number of “persons who are treated as Roman Catholic” and “persons who are not so treated”⁴⁷⁵ will be appointed.⁴⁷⁶ On the contrary, when it comes to the private sector, Northern Irish equality legislation imposes only *monitoring* duties on employers.⁴⁷⁷

In other Member States, however, such as France, Austria and Sweden,⁴⁷⁸ statutory quota systems explicitly cover private employers alongside public authorities.⁴⁷⁹ It is obvious that this lack of uniformity in the normative responses to inequalities creates further inequalities, only this time between EU nationals from different Member States. Disabled employees in France, for instance, may benefit from the quota establishing that at least 6% of the workforce across the public and private sectors⁴⁸⁰ is comprised by disabled persons,⁴⁸¹ while disabled employees in Greece do not enjoy a similar entitlement. Although in principle this is a reflection of the margin of appreciation doctrine that guarantees national regulatory autonomy in the EU institutional edifice, the

⁴⁷⁴ HMSO 2000, chapter 32.

⁴⁷⁵ Police (Northern Ireland) Act 2000, section 46 (1), under (a) and (b) respectively.

⁴⁷⁶ It is evident that the system in question introduces a *parity* requirement, in the sense that the quota will only be satisfied if the members of the under-represented community selected amount to the 50% of the total number of appointees.

⁴⁷⁷ Under Article 55 (2) of the Fair Employment and Treatment (Northern Ireland) Order 1998 employers with more than ten employees have an obligation to monitor the religious composition of their workforce.

⁴⁷⁸ DG Employment, Social Affairs and Equal Opportunities, *supra* no. 434, p. 29.

⁴⁷⁹ It should be noted that the legislation in question involves quotas in favour of disabled persons. Despite the general conclusion reached in section 6.2.3 above regarding the correct characterisation of measures in favour of disabled persons, it is quite clear in both these cases that the measures should be classified as “positive action” rather than “reasonable accommodation”, as they require that disabled persons constitute at least a *minimum percentage* of the workforce.

⁴⁸⁰ For employers that occupy at least twenty full-time employees.

⁴⁸¹ Article L.5212-2 of the French Labour Code.

normative discrepancy is difficult to justify when the factual circumstances of the target groups in the respective Member States are identical. In other words, if under-representation of women in decision-making bodies of the Civil Service is equally severe in the UK as in Greece, it is difficult to see how the aggressive legal initiative of the Greek legislator, with the introduction of a gender quota, and the normative inertia of the UK legislator, with the absence of a similar quota, can both be legitimate answers to the same question.

Following on from that remark, there is yet another possibility with regard to the way Member States internalise EU positive action law and put into effect the ECJ interpretation of it. National anti-discrimination legislation may, in fact, *prohibit* the use of quotas as a form of positive action in employment, as is the case in the UK. With the possible exception of the Disability Discrimination Act,⁴⁸² UK equality instruments do not permit the use of quotas in favour of any disadvantaged or under-represented group in the employment field.⁴⁸³ The resulting state of affairs is, inevitably, an oxymoron. An interpretation of the Race Relations Act [RRA] or the Sex Discrimination Act [SDA] that leaves no room for flexible result quotas is at odds with EU law, insofar as it prohibits an equality device that has been declared legitimate - at least in the context of gender - by the ECJ.⁴⁸⁴ What is even more disturbing is that, in practice, this incompatibility cannot be effectively challenged, either domestically or at an EU level, as under Community law Member States are *under no obligation* to introduce quotas.

⁴⁸² Collins, H., K. D. Ewing, et al. (2005). Labour Law: Text and Materials, Hart., p. 307.

⁴⁸³ This is true under the Race Relations Act 1976 [RRA], even in its current form as the Race Relations Amendment Act 2000, as well as under the Sex Discrimination Act 1976 [SDA].

⁴⁸⁴ A. McColgan, *supra* no. 249, chapter 3.

The only way this schema may result in a justiciable claim is if a British *employer* wishes to introduce a flexible results racial quota in order to achieve a more diverse workforce and is prevented from doing so in view of the RRA or the SDA.⁴⁸⁵ It is submitted that such a claim would have a high probability of success under the new Equality Directives, as discussed earlier.⁴⁸⁶ But even if this prediction is accurate, successful individual claims by private employers are not envisaged in Community law as the appropriate mechanism through which the goal of full and effective equality is to be pursued and eventually accomplished. In fact, these considerations bring to the fore another significant dimension of the tenuous relationship between Community law and national jurisdictions in this area, namely the normative gap between the *public* and *private* sectors.

Although the basic normative framework, as set out in primary law,⁴⁸⁷ has been long found capable of bearing *horizontal* effect,⁴⁸⁸ the preceding analysis has made it clear that a number of domestic jurisdictions opt for a “conservative” approach that leaves the private sector outside the regulatory scope of positive action schemes. From a purely statistical point of view this already poses serious difficulties for the achievement of full and effective equality in employment, given that a very significant portion of employees works in the private sector. What is even more important is that a female

⁴⁸⁵ The other possibility would be for the European Commission to institute Article 226 proceedings against the British government with a view to identifying the UK’s failure to comply with the Community equality regime. This, however, seems a rather unlikely option, because of its dubious practical effects. Unless there is some evidence that British employers wish to introduce quotas and are prevented from doing so by domestic law, it is doubtful whether the Commission would be willing to treat the matter as a priority on an already busy agenda.

⁴⁸⁶ It should be noted once again, however, that the new Equality Directives have not as yet been placed under the scrutiny of the ECJ.

⁴⁸⁷ For instance Article 141 (1) EC on equal pay.

⁴⁸⁸ Case 43/75 Defrenne v. Sabena (No. 2) [1976] ECR 455.

employee in the public sector may be *treated differently* compared to a female employee in the private sector, despite the fact that their respective personal circumstances may be *identical* for all intents and purposes.⁴⁸⁹

⁴⁸⁹ At least insofar as equality considerations are concerned.

6.4 The Problem of Merit: Meritocracy v. Full Equality in Europe

What distinguishes employment from the other two categories of social activity identified in Part III of this thesis⁴⁹⁰ is, above all else, the nature, content and significance of the *merit principle* in determining equality rights and obligations. The relationship between merit and equality is a rather complicated one and cannot be fully deciphered in the limited space of this section. What can be answered, however, is whether certain interpretations of the merit principle constitute an obstacle to the accomplishment of *full and effective* equality.

First of all, there is little, if any, disagreement that in the field of employment merit is a key consideration that informs both general policy and concrete decisions. Within a liberal political and theoretical framework it is the “best person for the job” that should, in principle, be preferred. Who actually *is* the best person for the job, however, is the subject of significant controversy, as there is no consensus in the literature regarding the correct interpretation of merit.

Merit, therefore, can easily be classified as an essentially contested concept.⁴⁹¹ Although there appears to be relative consensus on its role as an indispensable criterion of selection between individual candidates applying for a job,⁴⁹² there is no agreement either on the *types* of attributes that should count towards constructing its actual content

⁴⁹⁰ Namely elected public office and sensitive areas of the public sphere. See *infra* chapters 7 and 8 respectively.

⁴⁹¹ On the notion of essentially contested concepts see W.B. Gallie, “Essentially Contested Concepts”, *Proceedings of the Aristotelian Society*, Vol.56, (1956), pp.167-198.

⁴⁹² See, however, *contra* J. Rawls, *supra* no. 20, pp. 101-104. Rawls argues that, insofar as merit is premised on natural talents, its use as a criterion of selection or appointment is no less *arbitrary* than the use of gender or race, given that distribution of talents is not down to individual *choice*. For a forceful critique of merit see also I. M. Young, *Justice and the Politics of Difference*, *supra* no.2, p. 200 et seq. (“The Myth of Merit”).

or on the relative *weight* each of these attributes should carry. Dworkin's famous distinction between *concepts* and *conceptions*⁴⁹³ has undeniable resonance with this conundrum: the *concept* of merit seems to be common to all those who use it or refer to it, but the *meaning* each actor or commentator ascribes to it may differ substantially, depending on the particular *conception* at play.

Any attempt to identify the place of merit in the new equality paradigm under European law, therefore, should begin by examining the basic theoretical formulations of merit. McCrudden has done some important work in this area, presenting a detailed typology of "merit principles" that comprises five different models.⁴⁹⁴ For present purposes, however, it would be more useful to adopt an alternative categorisation that will reveal more clearly the problems each of the main approaches poses in the pursuit of full and effective equality. Four main categories can be identified in this regard: *procedural*, *contributory*, *functionalist* and *constructivist* approaches to the definition of merit.

Procedural approaches understand merit as a principle of *due process*.⁴⁹⁵ They postulate that merit guarantees a "widespread procedural fairness in the evaluation of qualifications for positions".⁴⁹⁶ The intellectual affinity of this view with formal equality is self-evident. It is inevitable, then, that such a conception of merit is entirely inadequate to ensure full and effective equality. As Young eloquently puts it, "normatively and

⁴⁹³ Dworkin, R. (1972). "The Jurisprudence of Richard Nixon." *The New York Review of Books* 18(8), pp. 27-28. For a recent analysis of the notion see Collier, D., F. D. Hidalgo, et al. (2006). "Essentially contested concepts: Debates and applications." *Journal of Political Ideologies* 11(3): 211-246.

⁴⁹⁴ McCrudden, C. (1998). "Merit Principles." *Oxford Journal of Legal Studies* 18(4): 543-579.

⁴⁹⁵ For a prime example see Fishkin, J. (1983). *Justice, Equal Opportunity and the Family*, Yale University Press.

⁴⁹⁶ *Ibid*, p. 22.

culturally neutral measures of individual performance do not exist for most jobs".⁴⁹⁷

Assuming, then, that procedural safeguards in the selection process are somehow enough to ensure equality of treatment, is reflective of a naive view of employment relations that completely disregards the reality of endemic inequalities in the workplace.

Contributory approaches, on the other hand, conceptualise merit as *desert*⁴⁹⁸ or *reward*.⁴⁹⁹ They view merit as the encapsulation of individual worth, which should be the ultimate criterion of selection. According to Hayek, for instance, merit should be conceived as reward for past "attributes of conduct that make it deserving of praise, that is, the *moral character of the action* and *not the value of the achievement*" [emphasis added].⁵⁰⁰ Merit, then, stems from attributes an agent *has* rather than from the value of what the agent *does*.⁵⁰¹ This understanding of merit is undoubtedly counter-intuitive, at least insofar as allocation of jobs is concerned, and the objections against it from a point of view of efficiency and productivity costs are obvious.⁵⁰² For present purposes one could add to these that a conception of merit as reward or desert does not seem to promote in any way the objective of full and effective equality, especially since it is generally hostile to positive action as a legitimate mechanism to achieve equality.⁵⁰³

Functionalist approaches to merit appear to be more in tune with liberal normative reality and are, consequently, worthy of more analytical attention. Merit here is

⁴⁹⁷ I. M. Young, *Justice and the Politics of Difference*, supra no.2, p. 202.

⁴⁹⁸ Sandell, M. (1982). *Liberalism and the Limits of Justice*, Cambridge University Press., pp. 72-76.

⁴⁹⁹ Hayek, F. A. (1960). *The Constitution of Liberty*, University of Chicago Press., p. 94.

⁵⁰⁰ Ibid, as cited by McCrudden, supra no. 494, p. 552.

⁵⁰¹ Lucas, J. (1993). *Responsibility*, Oxford University Press. What the agent *does*, according to Lucas, is reflected in the notion of *desert*.

⁵⁰² McCrudden, supra no. 494, p. 553.

⁵⁰³ Kamp, A. R. (2002). "The Missing Jurisprudence of Merit." *The Boston University Public Interest Law Journal* 11(2-3): 141-166.

understood as a combination of *ability and effort*⁵⁰⁴ or *effort and achievement*.⁵⁰⁵ The content of merit is, in this view, strictly job-related and involves the capacity to produce either specific job-related results or beneficial results for the organisation as a whole.⁵⁰⁶ The “best person for the job”, then, is whoever possesses “precisely those qualities of excellence needed to perform a functionally defined task”.⁵⁰⁷ In order to make accurate predictions of future performance, it is essential to make use of “performance proxies”,⁵⁰⁸ such as taking account of formal *qualifications* acquired through education and *testing* results of abilities and skills. Functionalist approaches, therefore, are primarily concerned with what might be termed *substantive objectivity*: individual candidates “compete” with each other with a view to achieving the highest possible *score* on a set of criteria designed to measure their potential success in the role awaiting them.

In theory this may, indeed, sound as a straightforward, almost mechanical exercise, no more difficult than counting the score in a football match in order to declare the winner. Without a doubt, however, comparing the “merits” of two or more individual candidates for a particular job is an immensely complicated task.⁵⁰⁹ It involves an elaborate “adding-up” of both visible and subtle qualities, some of which are easily identifiable and measurable and some of which are not, with a view to comparing

⁵⁰⁴ Jacobs, L. A. (2004). *Pursuing Equal Opportunities: The Theory and Practice of Egalitarian Justice*, Cambridge University Press, p. 88. See also Daniels, N. (1996). *Justice and Justification: Reflective Equilibrium in Theory and Practice*, Cambridge University Press, p. 303.

⁵⁰⁵ Nielsen, K. (1985). *Liberty and Equality*, Rowman and Allanheld., pp. 104-112.

⁵⁰⁶ This categorisation encompasses the three latter models of merit that McCrudden distinguishes (under C, D and E). See McCrudden, *supra* no. 494, p. 559 et seq., 562 et seq. and 566 et seq.

⁵⁰⁷ Fallon, R. (1980). “To Each According to His Ability, From None According to His Race: The Concept of Merit in the Law of Antidiscrimination.” *Boston University Law Review* 60: 815-878. Also cited by McCrudden, *supra* no. 494, p. 559.

⁵⁰⁸ I. M. Young, *Justice and the Politics of Difference*, *supra* no. 2, p. 206.

⁵⁰⁹ Kelman, M. (1991). “Concepts of Discrimination in ‘General Ability’ Job Testing.” *Harvard Law Review* 104(6): 1157-1247.; Selmi, M. (1995). “Testing for Equality: Merit, Efficiency and the Affirmative Action Debate.” *University of California Los Angeles Law Review* 42(5): 1251-1314.

individual “total scores”. Simply put, when the ability to lead and the ability to work as part of a team are both deemed *essential* qualifications for a particular job, there is no *objective* metric system through which to choose between a slightly better leader over a slightly better team-player.⁵¹⁰

From an equality of treatment point of view this indeterminacy alone is enough to undermine the celebrated objectivity of such metric systems.⁵¹¹ What must be highlighted is that *functionalist* approaches are susceptible to the same objection that was raised against *procedural* approaches, regarding their attachment to a formal conception of equality. In this case, the problem arises when one considers that formal educational qualifications, for instance, may have been obtained against the backdrop of different individual circumstances, which may have been shaped, to an extent, by discrimination. In other words, functionalist approaches leave no room whatsoever to consider the obstacles that women of ethnic minority candidates may have faced in the process of acquiring what is now measured as merit. A notion of full and effective equality in employment must surely be sensitive to such personal differences and, for this reason, functionalist approaches to merit seem too narrowly constructed to be of any use in this respect.

The final category encompasses *constructivist* approaches to merit. These are characterised by a “bipolar” understanding of merit, which reflects a *middle of the road approach* in comparison to the other three categories. Procedural and contributory approaches seem to be more concerned with the *individual*: they involve safeguards against biased selection criteria and consideration for past individual attributes

⁵¹⁰ See also McCrudden, *supra* no. 494, p. 561.

⁵¹¹ For a well-founded and more detailed criticism along these lines see McCrudden, *supra* no. 494, p. 520; I. M. Young, *Justice and the Politics of Difference*, *supra* no.2, p. 206 et seq.

respectively. Functionalist approaches, on the contrary, are geared towards maximising the benefits for either the *employer* or *society* as a whole,⁵¹² through ensuring the highest possible level of performance according to reasonable predictions. *Constructivist* approaches cut across this dichotomy by asserting that merit consists in the possession of qualities of *general value*, combined with the *probability* that these qualities will be useful in carrying out a *specific function*.⁵¹³ It is evident that constructivist approaches have a basic *functionalist* element but do not stop at that. Qualities, such as *intelligence* or *integrity*, that are generally considered useful in any area of the employment field also come into the equation when assessing who is the most meritorious candidate.

These approaches have been labelled constructivist exactly because they seem to be implicitly premised on the assumption that persons construct their own knowledge and understanding as they go along. They are, thus, *forward-looking*, as the principal question they pose is who can *learn* to do the job better.⁵¹⁴ They are more concerned with what individual candidates can *achieve in the future* on the basis of who they are, rather than on what they have achieved in the past as a measure of their true abilities.

The principal benefit, then, of such conceptions of merit is that they are capable of breaking the vicious circle of discrimination, whereby the obstacles that women or ethnic minorities faced in the process of acquiring their qualifications impact on their opportunities in the labour market. Factors that indirectly discriminate against particular groups, therefore, are either absent from this definition of merit or given much less

⁵¹² Depending on the overall social significance of the functionally defined tasks related to the job. It is fair to assume, for instance, that selecting the best candidate for the job of a neurosurgeon in a public hospital will be beneficial both to the employer-hospital and to the general public.

⁵¹³ See R. Fallon, *supra* no. 507, p. 826. See also McCrudden, *supra* no. 494, p. 557, where he describes his notion of *general "common sense" merit*.

⁵¹⁴ Miller, D. (1999). *Principles of Social Justice*, Harvard University Press., p. 156 et seq.

weight in selection processes.⁵¹⁵ On the contrary, factors such as the *diversity* of experiences and insights one can bring into the workforce,⁵¹⁶ for instance, become part of this wider definition of merit.

Constructivist approaches are, consequently, very attractive for present purposes, as they seem compatible with the objective of full and effective equality. This, however, does not entail that the current normative framework is inspired by a constructivist conception of merit. The reason is primarily down to the legal uncertainty that such a broad definition is bound to create. If it is difficult to objectively measure skills and abilities that have been or can be formally tested, it should be conceded that it is even more difficult to evaluate qualities that are not easily quantifiable. Moral judgments concerning a person's integrity, for instance, are subjective, if not arbitrary. Selections processes based on such judgments, consequently, are prone to relativism. The problem is accentuated further when the need of ascribing different weight to different qualities is taken into account.

What the preceding analysis has demonstrated, then, is that the lack of consensus on the definition of merit may be, to a certain extent, justified due to the inherent philosophical difficulties in finding a compromise with regard to essentially contested concepts. This conclusion leaves us none the wiser as to how full and effective equality in employment can be attained through positive action, without the latter being curtailed by the uncompromised primacy of individual merit. However, there is one aspect of the debate for which the lack of consensus may be illuminating. Once it has been accepted that there is no single and uniform conception of merit operating across the employment

⁵¹⁵ McCrudden, *supra* no. 494, p. 558.

⁵¹⁶ See generally L. Barmes and S. Ashtiany, *supra* no. 307.

spectrum, the most important question that arises is *who* determines what merit means in each case, either for a particular job or within a sector.

From a normative point of view this is primarily a question of *state intervention*, pertaining to the extent to which the latter is permissible in determining the content of merit. The range of possible answers to this question is, again, indicative of deeper philosophical allegiances regarding the appropriate role of the state in a liberal democratic framework. An ultra-liberal or libertarian free market approach, for instance, as encapsulated in Nozick's thinking,⁵¹⁷ would firmly deny the legitimacy of imposing a state-made definition of merit on private employers, who should be left to decide for themselves what kind of qualifications and abilities best suit their business.⁵¹⁸ It is difficult, however, to see how such a minimalist understanding of the state's regulatory powers can uphold the commitment to full and effective equality. This is especially true in view of the fact that the use of quotas or preferential treatment may be the only effective means of addressing severe under-representation of particular social groups in employment cadres.

The fact of the matter, then, is that full and effective equality cannot materialise into normative reality in the absence of a more nuanced and well thought-out approach to the types of measures that are permissible within each particular context. This will enable a conceptual compromise regarding the way merit should influence selection processes in different areas of the public sphere.

⁵¹⁷ Nozick, R. (1974). *Anarchy, State and Utopia*, The Perseus Books Group.

⁵¹⁸ R. A. Epstein, *Forbidden Grounds: The Case Against Employment Discrimination Law*, Harvard University Press, 1992, p.163 .

CHAPTER 7: POSITIVE ACTION IN POLITICS⁵¹⁹

7.1 Introduction

Within the existing normative framework it is generally accepted that positive action in employment is, in principle, a legitimate weapon in the fight for full and effective equality. When it comes to *elected public office*, however, the issue seems to be doctrinally unclear and politically controversial. Although a number of European countries have implemented some form of positive action in favour of women in politics, the dominant position in the literature appears to be that candidature for political office does not constitute “employment” in the sense of EU law. The matter, therefore, remains at the first instance outside the scope of Article 141 EC and the provisions of the Equal Treatment Directive, and is, consequently, left to the regulatory discretion of Member States. The tension is obvious: achieving full gender equality forms part of the main objectives of the Union; yet the laws of the latter are seen as imposing no positive obligation to that effect in the one area of the public sphere where individual actors are vested with the authority to exercise state power at the highest level. If this is true, then how can the goal of *full* gender equality ever be truly accomplished?

Justifying the use of quotas in the realm of politics, however, is far from easy and straightforward. Candidates here are not *selected* but *elected through public vote*, the latter being the ultimate expression of the democratic principle. *Prima facie*, then, an interference with the expression of public will seems unwelcome and should, in principle,

⁵¹⁹ This chapter relies heavily on Kapotas P. (2010). "Gender Quotas in Politics: The Greek System in the Light of EU Law." European Law Journal 16(1): 29-46.

be kept to a bare minimum. The issue becomes more complicated when one takes into account that the *merit* of candidates for elected office is largely irrelevant. Or, to put it more accurately, individual qualifications are only as relevant as the electorate perceives them to be when choosing the representative of their choice. As it has been correctly pointed out, there is no job description setting out the essential qualities of a successful MP.⁵²⁰

It is evident, then, that positive action in politics cannot operate in the same way as in employment. Starting from this assumption, this chapter will pursue three analytical goals: first, to identify the types of positive measures that can be used to address under-representation of particular social groups in elected public bodies. Second, to examine the position of EU law and, more specifically, to answer whether and under what conditions the Badeck formula may determine the conditions of legitimacy in this context. And, third, to consider how quotas in politics fit into the larger Union project to achieve full and effective equality, even outside the framework of employment.

⁵²⁰ See Rogers, R. and R. Walters (2006). How Parliament Works, Pearson., p. 92.

7.2 What Type of Positive Action? Classical Quota Systems and Parity.

One of the main reasons behind the analytical distinction between employment and politics relates to the *types* of measures that can be used in each context. Although the full range of measures is in principle available in both cases, *softer* forms of positive action are either irrelevant or ineffective when it comes to addressing under-representation of social groups in elected public bodies. Training of candidates, at least in a literal sense, seems inconceivable and does not come into the equation at all. Encouragement, on the other hand, of women or other under-represented groups to stand for election may indeed be useful to an extent. Measures that aim to improve the infrastructure of supporting social services⁵²¹ or to take account of specific needs and preferences related to group identity can go some way into removing possible *disincentives* for candidates from under-represented groups. Nonetheless, such measures can have little more than a peripheral effect and only once candidates have already been elected in office. They are unlikely, in other words, to make any difference with regard to “access” to candidatures and, consequently, they are bound not to have a substantial impact on the imbalanced composition of representative bodies.

It is unsurprising, then, that the present enquiry focuses exclusively on *quotas*, as the only truly significant form of positive action in politics. This methodological choice is rooted in normative reality, as European jurisdictions tend to use variations of quota systems in order to address *gender* under-representation in elected offices.⁵²² For present analytical purposes these variations are classified into two large categories: “*classical*”

⁵²¹ Such as adequate childcare facilities for parents that are the primary caretakers in their family.

⁵²² Caul, M. (2001). Political Parties and the Adoption of Candidate Gender Quotas: A Cross-national Analysis, *Journal of Politics*, 63:(4), 1214-1229

quota systems and *parity systems*. In order to assess whether these systems are compatible with the principle of equal treatment and to evaluate their success in pursuing the goal of full equality the following sections will examine a paradigmatic example of each category.

7.2.1 *The Greek and French positive action systems for elected public office*

Since the early 1980s Greek theory and case-law have struggled with the notion of positive measures as a possible means to achieve a more balanced participation of the sexes in politics. The situation was further complicated by the introduction of *restrictive quotas* designed to *limit* the participation of women in certain employment areas, the legality of which was upheld by the Supreme Administrative Court (hereinafter SAC).⁵²³ All doubts regarding the constitutionality of genuine positive measures and the illegality of restrictive quotas in Greece have definitively ended since April 2001, when the revised Constitution entered into force.⁵²⁴ Alongside the constitutional reform, a new piece of legislation introducing quotas in favour of female candidates for election entered into force in 2000 and 2001. Law 2910/2001 in its article 75 para 2 provides that the number of candidates of each sex in the local and regional elections (for the 1st and 2nd degrees of

⁵²³ Until 1998 the Greek courts were, indeed, quite comfortable with upholding the constitutionality of differential treatment towards women on account of their biological differences to the male sex. As early as in 1977 the SAC held that 'derogations from this principle [of equal treatment], [are] lawful [...], provided that they are stipulated by a formal law and justified by sufficient reasons concerning either the necessity to accord increased protection to women, especially in the fields of maternity, marriage and family [...] or the purely biological differences that require the adoption of particular measures of differential treatment according to the subject matter or the relation to be regulated' (SAC 3217/1977).

⁵²⁴ Its new article 116 para 2 settles the issues by providing that: a) the adoption of positive measures for the promotion of equality between men and women does not constitute gender discrimination and b) the State undertakes the obligation to abolish all de facto existing inequalities, especially against women.

local administration) must be equal to at least 1/3 of the total number of candidates in each party list.

The rationale and aim of Law 2910/2001 are *prima facie* quite straightforward: under-representation of women in elected office can only be logically explained by reference to institutional, covert or indirect discrimination. The Greek Parliament, then, introduces an uncomplicated system intended to regulate one of the hottest topics of political and legal debate throughout Europe in a “reasonable” and relatively “uncontroversial” way. In the justificatory report of article 75 the legislator invokes the notion of substantive equality and proclaims the necessity of positive measures for its accomplishment. Moreover, it is made clear that positive measures should not be understood as derogations from substantive equal treatment but as a *necessary* means for its effective accomplishment and application. The quota in favour of female candidates in the regional and municipal elections, then, is in compliance with the state obligations arising from international conventions and from EU Law.

The quota in question can be described as “rigid” and “soft” at the same time. It is a “soft” quota as it does not - and cannot - include a *proviso* limiting the scope of its application. In other words, the political parties are under an *absolute obligation* to abide by the quota, on pain of nullity of their electoral lists. The issue of individual qualifications is here irrelevant, since the quota, on the one hand, does not correspond to a *tie-break* type of rule and the concept of *merit*, on the other, does not resonate with political participation in the same way as with employment.

Since the late 1990's most Greek political parties had already incorporated some form of quota in favour of women in their internal selection procedures,⁵²⁵ following the trend in most EU Member States.⁵²⁶ As a result, the implementation of the new provision did not meet with considerable resistance within the parties. The use of quotas in principle, however, as a mechanism to remedy the problem of under-representation in the political field brings forth unresolved tensions with the fundamental democratic principle, especially in the context of representative democracy. Before turning to examine these issues more closely, let us look at the other type of positive action system designed to tackle women's under-representation in elected office, namely French parity.

The positive action provisions of the French electoral legislation are inspired by the principle of parity, which was introduced by the constitutional reform of 1999.⁵²⁷ Although the term parity itself appears in neither the French Constitution nor the Electoral Act, it is used more often than not in the academic literature to describe the French system of positive action in politics. This system comprises two sets of measures applying respectively to elections using *lists* and elections in *single member constituencies*.⁵²⁸ For the former the law requires equal numbers of male and female candidates within every six-name sequence on the party electoral list, on pain of nullity

⁵²⁵ See Stratigaki, M. (16 July 2000). Ποσοτώσεις: Ένα αναγκαίο κακό” [Quotas: A necessary evil]. Κυριακάτικη Αυγή [newspaper]. Greece.

⁵²⁶ In the year 2000, fifty three political parties in the EU had specific policies in order to ensure stronger participation of women in their decision-making bodies and thirty one among them implemented specific quotas ranging from 20% to 50% (source: www.db-decision.de).

⁵²⁷ See generally Sineau, M. (2002). Institutionnalisation de la parité : L'expérience française. Les femmes au parlement : au-delà du nombre, International IDEA.

⁵²⁸ This is the equivalent of the British “first past the post” electoral system.

of the list. For the latter, the law provides that a party's state *funding* will be reduced, if less than 49% of its total candidates belong to each sex.⁵²⁹

On the face of it, French parity does not appear to be all that different from the more "conventional" and straightforward Greek quota system in terms of its actual *results*, despite the obvious disparity in the scope of application⁵³⁰ and the ultimate "threshold" of gender equality they aim to achieve.⁵³¹ Careful scrutiny, however, reveals that the concept of parity, properly understood and analysed, has a number of consequences that render its justification more difficult than that of the Greek quota system. The arguments against parity attack, in turn, its relationship with equality and with democracy.

7.2.2 Comparative analysis: Classical quotas systems and parity as mechanisms for full equality

Parity should be understood as an operational mechanism intended to guarantee the effectiveness of the principle of gender equality. This definition of parity does not distinguish it conceptually from classical positive action: it is designed to address the same problem as any quota system, namely the unjustifiable under-representation of women that can only stem from institutionalised indirect discrimination. Moreover, the fact that the scope of most quota systems in Europe, including the Greek one, is generally narrower in that it excludes national parliamentary elections constitutes a conscious

⁵²⁹ For a more detailed analysis see Lépinard, E. (2006). "Identity without Politics: Framing the Parity Laws and Their Implementation in French Local Politics." *Social Politics: International Studies in Gender, State & Society* 13(1): 30-58.

⁵³⁰ Parity covers all elections, including general elections, while the Greek law applies only to municipal and local elections.

⁵³¹ Parity aims at an optimum of 50-50 gender representation, while the Greek quota system sets the more modest goal of a minimum 1/3 participation of each sex in the electoral lists.

policy choice that reflects socio-political particularities in each individual country. It is safe to assume that the Greek legislation in question would encounter more political resistance in Parliament and social resistance in various fora, were it to impose the same strict quota on Parliamentary seats. There is nothing, however, to suggest that a more widely applicable quota would not be equally compatible with EU law as the existing system. It follows that the difference in scope between French parity and the Greek electoral legislation in force is irrelevant for the purposes of the present enquiry or, to put it more accurately, it is insufficient to sustain any meaningful analytical distinction between the two systems.

What seem to be more important in this context are the *conceptual premises* and the corresponding *objectives* of parity.⁵³² The philosophical underpinnings of parity are inspired by a conception of *equality of outcome*:⁵³³ since women comprise roughly half of the population, the *optimum* model of political representation is one in which half of the elected positions in all political institutions are occupied by women. Any inequality in representation thereof must be amended by means of legal intervention, which will be tailored to ensure an absolute balance between the sexes. In this regard, parity is much more “ambitious” than the Greek quota system in that it sets out to accomplish this optimum and not merely to establish an “acceptable” minimum of representation in the democratic polity, which is the principal objective of the Greek quota system.

⁵³² For a detailed analysis see Milard, E. (2005). *Constituting Women: The French Ways. The Gender of Constitutional Jurisprudence*. B. B. a. R. Rubio-Marin, Cambridge University Press., p. 122-148, esp. at 143 et seq.

⁵³³ A. Phillips, *supra* no. 23, esp. pp. 11-12.

This commitment to a single optimum model of political representation is problematic in that it is prone to *essentialism*,⁵³⁴ since it implicitly presupposes that women's interests are best represented by women on account of their common group-membership.⁵³⁵ Such a presumption shifts the emphasis from qualitative to quantitative considerations and, thus, may bring to the forefront of the analysis the notion of formal equality. In other words, at the core of the concept of parity lies the simplistic idea that gender equality can be achieved and measured solely on grounds of *numbers*. Although it is undeniable that numbers do matter, most advocates of positive action are always quick to point out that increasing female participation is not panacea. It is commonplace to assert that during the Thatcher premiership in the UK women, if anything, did not benefit from the policies and legislative priorities of the female-led government.

This is not to deny any value whatsoever to the increased participation of women in politics by means of positive action, especially given that all quota systems are designed to achieve primarily an increase in numbers. The fundamental problem with parity, however, which seems to be particular to this version of positive action, is that it does not simply set minimum quantitative requirements with a view to probe a qualitative change - as, for instance, the Greek quota system does. Instead, it assumes that if numbers reach the desired maximum, the change in the gender balance of power will *automatically* be a qualitative one. Its conceptual flaw, then, consists in the confusion between *visibility* - which is, of course, desirable but not nearly enough in itself - and

⁵³⁴ See *contra* Ruiz, B. R. and R. Rubio-Marin (2008). "The Gender of Representation: On Democracy, Equality and Parity." International Journal of Constitutional Law 6(2): 287-316.

⁵³⁵ Siim, B. (2000). Gender and Citizenship: Politics and Agency in France, Britain and Denmark, Cambridge University Press., pp. 68-69.

genuine *representativeness* - which is a precondition for accomplishing full and effective gender equality.

Arguably the most problematic aspect of parity, then, is its tenuous relationship with the principle of democracy. Parity undertakes the cost of limiting individual freedom of choice with a view to ensuring a “fairer” representation of the gender composition in society. In this way, anything below a 50 percent female participation in elected office is deemed unsatisfactory, because it is conceived of as a product of indirect discrimination. This is particularly apparent with the measures applying to elections using *lists*, where state funding will be proportionally curtailed if the number of female candidates fails to reach the threshold of 49 percent. Simply put this entails that a political party presenting a list of candidates comprised by female candidates in 40 or 45 percent is deemed to *fall short of full gender equality*.

7.3 Gender Quotas in Elected Public Office and EU Law: Does The Badeck Formula Apply?

As it has already been explained in detail,⁵³⁶ it is now generally accepted that positive action in employment is *permitted in principle* as a matter of EU law. After a period of trial and error the ECJ has formalised its approach and standardised the set of conditions that positive action schemes need to satisfy in order to pass the test of legality. The *Badeck formula* affirms that gender quotas in employment are compatible with Community law when they operate as a *tie-breaker* between *equally qualified* candidates and insofar as they are neither *automatic* nor *unconditional*.

When it comes to political candidature the issue becomes considerably more complex. Both Article 141(4) EC and article 2(4) of the Equal Treatment Directive⁵³⁷ as amended,⁵³⁸ which set the principal legal framework for positive action in the EU, are primarily designed to apply to employment. Although positive measures in political candidature have not yet been challenged before the ECJ, it is fair to assume that, if the Court were to classify the selection of party candidates as an employment matter, there are potential problems of compatibility with Community law in view of *Badeck*.⁵³⁹ The Greek quota system does not provide for an objective assessment of all candidates in the selection process and appears to be imposing an obligation on political parties to give automatic preference to female candidates solely on grounds of their gender. The first set

⁵³⁶ See *infra*, chapter 4.

⁵³⁷ Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [1976], OJ, L39/40.

⁵³⁸ Directive 2002/73/EC.

⁵³⁹ For the British concerns on the matter see Strickland, P., O. Gay, et al. (2001). "Sex Discrimination (Election Candidates) Bill." House of Commons Library, Research Paper 01(75).

of questions that arise, then, requires us to consider whether candidature for elected public office does fall within the ambit of the “employment law” provisions of EU law and, if it does, whether quotas in favour of female candidates fail to satisfy the Badeck test.

Since 1998 the European Commission has expressed the opinion that neither article 141(4) [then article 119] nor the Equal Treatment Directive apply to candidature for election, given that the latter is not an employment relationship covered by a contract between employer and employee.⁵⁴⁰ A further argument supporting this position can be drawn from the definition of “worker” under article 39 EC. According to the relevant ECJ case-law there are three conditions that a Member State national must fulfil in order to qualify as a worker: she must perform services of an economic value, she must perform them *under direction* and she must receive payment for these services.⁵⁴¹ Even if we assume that candidates for political office satisfy the first and third criteria,⁵⁴² it is difficult to see how the second condition can be met. Candidates should be viewed as *potential office* holders, given that some of them will eventually be elected. Political office holders in a democratic society enjoy personal independence and they are not under a constitutional obligation to follow the “official party line” on any issue.⁵⁴³ If

⁵⁴⁰ Commissioner Padraig Flynn, in answer to question E-1556/98 in the European Parliament from Nal van Dijk MEP, June 1998.

⁵⁴¹ Case C-66/85, Lawrie-Blum v Land Baden-Wurtemberg [1986], ECR I-2121.

⁵⁴² This is rather doubtful: as the Commission suggests, political candidates do not have a contractual relation with the party they belong to. Even in view of the Court’s over-inclusive and non-exhaustive definition of “worker”, it is difficult to see how article 39 could apply in this case.

⁵⁴³ It is an entirely different matter that MPs - or even local councillors in some cases - may be “expected” to abide by the general principles and policies adopted by their party. Failure to act “under the direction” of the party leadership may result in internal sanctions of a disciplinary nature or in disapproval by the general public in the following elections, but there exists *no legal obligation* to follow the official party line.

political candidates cannot be classified as workers under article 39 EC, then employment law provisions should *prima facie* be inapplicable altogether.

In the absence, however, of a binding determination by the ECJ the matter remains open to debate,⁵⁴⁴ in the sense that it can still be plausibly argued that the Court may adopt a broader interpretation of the relevant provisions than the one offered by the Commission.⁵⁴⁵ What is more important is that the conclusion reached above, if theoretically sound, allows for potential challenges to positive measures in politics from a different angle. By leaving candidate selection outside the scope of article 141(4), it eliminates the problem of meeting the Badeck requirements on the one hand, but it infers that positive action may not be a legitimate means to achieve “full equality” *in politics* on the other. In other words, if we accept that preference to the member of the under-represented sex is legitimate only in employment and that political candidature does not fall within this framework, we can no longer deduce that positive action in politics is legitimate in principle.

It is true that many EU Member States have already incorporated such provisions in their electoral legislation and that the competent national bodies – particularly so in the UK - have been extremely careful in the drafting of this legislation in order to avoid the possibility of a legal challenge before national courts or the ECJ.⁵⁴⁶ It is equally true, however, that the idea of *legally enforceable* positive measures in candidate selection is

⁵⁴⁴ Russell, M. and C. O’Cinneide (2003). "Positive Action to Promote Women in Politics: Some European Comparisons." *International and Comparative Law Quarterly* 52: 587-614., at 607.

⁵⁴⁵ This is not to argue, of course, that a possible ECJ ruling would prevent academic commentators from continuing to discuss the matter in its deontological dimension, possibly criticising the interpretation adopted by the Court.

⁵⁴⁶ For instance the Sex Discrimination (Election Candidates) Act 2002 amended the Sex Discrimination Act 1975 in order to enable political parties to voluntarily adopt positive measures in favour of women in their internal selection procedures.

not extremely popular and that it is more difficult to theoretically justify, compared to positive action in employment or University education. If, therefore, the scope of article 141(4) is thought to exclude candidature for political office, the presumption of legitimacy of positive measures may no longer apply. What needs to be considered in this regard, then, is the possibility that candidature for elected office is regulated by *non-employment provisions of EU law*.

7.4 If not Employment, Then What? Positive Action and 'Full' Equality in Europe.

Despite its primary law status Article 141 remains in fact *lex specialis* in terms of its scope of application. It is an anti-discrimination provision designed specifically for the employment field and with a correspondingly precise wording. Ever since the Treaty of Amsterdam, however, the principle of anti-discrimination has become a centrepiece of the Treaty. *Article 13* enables the Council to take appropriate measures to combat discrimination on grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.⁵⁴⁷ Under Article 13, therefore, positive action seems to be *permissible in principle*, since it is explicitly stated that this provision will be “[w]ithout prejudice to the other provisions of this Treaty”. Given that there is nothing in the wording or spirit of Article 141 para 4 to suggest that positive action is an idiosyncratic exception to equal treatment applicable *only* to the field of *employment*, it must be concluded that Article 13 can uphold the legitimacy of positive measures even *outside the narrow confines of employment law*.⁵⁴⁸

The prospect of using Article 13 as a direct legal basis for introducing gender quotas in politics appears to be rather enticing. Article 13 encapsulates a general equality principle and, insofar as this is the case, it seems appropriate to cover every individual equality claim regardless of the particular area of social activity this arises. To the extent, therefore, that preferential treatment to female candidates for election is a *response* to a

⁵⁴⁷ Article 13 para 1 EC reads as follows: “Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation”.

⁵⁴⁸ Bell, M. (2002). *Anti-Discrimination Law and the European Union*, Oxford University Press., p. 136.

legitimate equality claim of the *candidates themselves*, Article 13 should be a *sufficient* justificatory premise. In other words, national positive action schemes such as the Greek or the French one are in principle compatible with EU law because they constitute a legitimate⁵⁴⁹ policy by means of which the Member State *observes its obligation under Article 13*.

Although one might be tempted to regard Article 13 as a solid normative foundation for positive action in politics, careful scrutiny reveals that such optimistic views cannot be justified. The matter is indeed far more complex than it initially appears to be, mainly because of the *purpose* and *modus operandi* of this provision. Despite the explicitly stated views of the European Parliament⁵⁵⁰ the final version of Article 13 has *no direct effect*.⁵⁵¹ The Council is empowered with the *discretion* to take appropriate measures to combat discrimination, but it is under *no positive obligation* to do so.⁵⁵² If this applies to the Council, it is *a fortiori* the case for Member States and their national legislatures.

The lack of direct effect of Article 13 entails that existing positive action schemes in politics remain largely unaffected. This is a qualified blessing. National positive measures will remain immune to possible challenges from male candidates that were omitted from party electoral lists in favour of female candidates in order to satisfy a quota. On the same token, however, the *absence* of national measures guaranteeing a fair participation of the sexes in the electoral process will also be impossible to challenge on

⁵⁴⁹ The legitimacy of these schemes, of course, also depends upon their satisfying the criteria of *necessity* and *proportionality*.

⁵⁵⁰ *Parliament Resolution on racism, xenophobia and anti-semitism and on the results of the European Year against racism (1997)*, 1998, OJ C56/13, paragraph 4.

⁵⁵¹ Bell, *supra* no. 548, p. 125.

⁵⁵² *Ibid.*

grounds of Article 13. This provision, then, does little more than reiterating a generic equality obligation of Member States, leaving the choice of particular policies to the non-reviewable *margin of appreciation* of the Member States.

From a “pro-equality” point of view this is by no means a satisfactory state of affairs. National legislatures appear to be free to *repeal* existing quota systems at will, even if this is bound to bring about a dramatic decline in female participation in elected bodies of the public sphere. National courts will not be able to rely on Article 13 in order to uphold the legitimacy of positive measures in politics. Given the insufficient degree of harmonisation across national jurisdictions and without the “safety net” of European law, there is a real possibility that some national positive action programmes will be stricken down. This is all the more true in view of the absence of a standardised test, such as the Badeck formula, that would act as an interpretative yardstick for national judiciaries when dealing with positive action in politics.

The importance of leaving quotas in favour of female candidates outside the regulatory scope of EU law is often underestimated by the advocates of substantive equality. They seem to assume that taking article 141(4) and the Badeck test out of the equation will suffice to insulate positive measures in politics from legal challenge at a European level. This is not entirely accurate. According to Article 6 para 1 TEU “[t]he Union is founded on the principles of liberty, *democracy, respect for human rights and fundamental freedoms*, and the rule of law” [emphasis added]. The second paragraph of this Article denotes that fundamental rights are to be respected “as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms”. Article 3 Protocol 1 of the ECHR imposes on Signatory Parties the obligation to hold

democratic elections at regular intervals, under conditions that guarantee the “*free expression of the will of the people as to their choice of representatives*”.

The combined interpretation of this set of provisions leads to the conclusion that *at least* the ECtHR has a clear mandate to determine whether a compulsory quota system in political candidature violates the right of citizens to freely choose their representatives through democratic elections.⁵⁵³ Since the Convention has a special status as a source of EU fundamental rights law, as confirmed by the case-law on a number of occasions,⁵⁵⁴ it is also plausible to suggest that *the ECJ as well* is in principle vested with the authority to decide on the matter. It is, therefore, a *mistake* to claim that positive action in elected public office falls outside the regulatory scope of EU law altogether. Even if Article 141(4) EC is inapplicable in this case, a legal challenge on the basis of EU law is still *possible*. Without the presumption of legitimacy that article 141(4) provides, however, quotas in politics will be more difficult to justify and the debate will be open to old arguments against the use of positive action that have already been rehearsed and defeated in most international fora. In this regard, it will be difficult to suggest that the state is under a *positive obligation* to promote gender equality by means of positive action in the political spectrum.⁵⁵⁵

An alternative outlook on the matter seems necessary for the sake of normative consistency and legal certainty. At the centre of the proposed analytical framework is the relationship between positive action and equality. According to the crystallised position

⁵⁵³ *Matthews v. The United Kingdom* [Grand Chamber], 18 February 1999, Application no. 24833/94, (1999) 28 EHRR 361.

⁵⁵⁴ See inter alia Case C-299/95, *Kremzow v Austria* [1997], ECR I-2629; Case C-109/01 *Akrich v Home Office*, Judgment of 23 September 2003.

⁵⁵⁵ It should be noted, however, that the argument that the positive state obligation to promote gender equality in the political field requires the use of positive measures is a main point of reference in the justificatory report of the Greek law in question.

of the ECJ "[...] the general principle of equality [...] is one of the fundamental principles of Community law".⁵⁵⁶ In this respect, it should be understood as being *applicable across the spectrum of Community law*. As already explained, since the entry into force of the Treaty of Amsterdam the promotion of gender equality has been identified as an essential task of the Community (Article 2 EC), alongside the establishment of the common market. It is, therefore, plausible to assert that *gender* equality should be regarded as a *general principle of Community law on its own right*, which can *no longer be limited to the employment field*. The prohibition of gender discrimination is now enshrined in the *Treaty itself*,⁵⁵⁷ supplemented by secondary legislation.⁵⁵⁸ Articles 21 and 23 of the Charter of Fundamental Rights also encapsulate this broadening of the gender equality principle by requiring that the latter is ensured in "all areas".

What is, though, the true meaning of this principle of gender equality within Community law? Another Treaty provision, Article 141(4), offers ample proof that "formal" equality, guaranteed through state neutrality,⁵⁵⁹ is not the answer; a *substantive* element of pro-active state attitude needs to be introduced in order for *full* equality to be achieved, as required by the wording of Article 141(4). There is no reason to support that such interpretation should be confined to employment. If gender equality is, indeed, a general principle of Community law, then its interpretation should be consistent throughout the field of its application. Any other solution would be impossible to justify normatively and would create a fundamental anomaly in the Community system.

⁵⁵⁶ Joined Cases *Ruckdeschel & Hansa-Lagerhaus Ströh*, at 1769.

⁵⁵⁷ Article 13(1) EC.

⁵⁵⁸ Most notably the new Equal Treatment Directive (op. cit.)

⁵⁵⁹ For a discussion on the notion of formal equality within the context of anti-discrimination law see Fredman, *supra* no.1, p. 7-11.

Within this analytical framework the place of positive action becomes clearer. In view of the notion of *full* equality, positive action is a legitimate means to attain a lawful public aim. Given that the accomplishment of gender equality cuts across all areas of Community law, it follows that *positive action in candidature for elected public office should be regarded as legitimate in principle*. Tackling under-representation of women in the political arena must be a priority, if the declared Community objective of genuine ('full') gender equality is to be achieved. It would be a mistake, therefore, to rule out quotas as a mechanism that can facilitate the pursuance of this goal. It would also be unwise to cast unnecessary doubts on systems that, after all, have already been used successfully in many Member States.

Of course, these systems will not be immune to legal challenge, since all the relevant provisions of Community law stop short from giving Member States unqualified discretion as to the type of positive measures they can legitimately introduce. Ultimately, the compatibility of each national quota system in politics with EU law is a matter falling within the jurisdiction of the ECJ. Sooner or later the Court will have to develop a set of criteria of legality for positive measures in political candidature in a similar logic to the one used for positive action in employment.

This exercise in legal reasoning, however, could never result in a Badeck-type formula. The very essence of democratic elections is to prioritise the collective will of the people over individual merit. Simply put, in a democracy no candidate 'deserves' to be elected. The real question, then, is whether quotas in politics cancel or unjustifiably hinder this public expression of preference as to who should be one's representative. And although this question cannot be definitively answered at this stage, one preliminary

conclusion seems possible. If the commitment of European law in all its dimensions to full and effective equality is to be meaningful, then it needs to encompass all areas of social activity and not be exhausted to employment in the strict sense. Quotas cannot be ruled out as a possible means to achieve the end of full equality. The problem, however, lies with the inadequacy of the classical conception of positive action to explain and justify when and how quotas can be legitimately used in the realm of political representation.

CHAPTER 8: POSITIVE ACTION IN “SENSITIVE” AREAS OF THE PUBLIC SPHERE: DIVERSITY ON THE BENCH

8.1 Introduction

Being a judge in a democracy is a blessing and a curse. Judges bear a colossal responsibility, not matched even by that of the political leaders that legislate and govern. They are destined to perform a noble but difficult - and arguably self-effacing - balancing act between maintaining their *objectivity* and being adequately sensitive towards the *subjective* circumstances of each particular case. They enjoy personal and functional independence and they are free from bonds of either hierarchy or representation. At the same time, however, they must remain in direct contact with social reality and ensure that their interpretations, reasoning and decisions make sense in the socio-political context in which they are born and they are intended to apply.

It is this latter point that has been at the centre of a growing debate over the need for diversity on the bench. Although the framing of the issue in terms of gender or racial equality is relatively new, the underlying concerns echo traditional debates surrounding the nature of liberal democracy and the legitimacy conditions of its institutional settlements. Historically, the judiciary has been the object of a certain degree of mistrust by a large part of the population in continental Europe throughout the 18th and 19th century. Judges were almost invariably perceived of as the torch-bearers of conservatism, the living institutional relics of the “ancien regime” after the French revolution, the unofficial yet powerful spokespersons of a social elite wishing to uphold and perpetuate

the status quo. Unsurprisingly, the roots of this mistrust are to be found in the inevitable legitimacy concerns arising from the fact that the members of the judiciary are appointed rather than elected.

Apart from the ongoing philosophical debate regarding the appropriate boundaries of the courts' prerogative to interpret rather than make or shape the law, the institutional score of the judiciary on the democratic board has also been a point of contention for other, more literally visible reasons. The typical image of the bench, with white, middle to upper-class men as its sole occupants, has always troubled those who traditionally associate democracy with the respect to difference.⁵⁶⁰ Although this image of uniformity is not a product of modernity, the homogeneity in the composition of the judiciary is considerably more problematic today than it was up to a couple of centuries ago, both in terms of public perception and, as it will be argued, in terms of substance.

In the context of modern-day Europe the discrepancy between the relatively homogeneous image of the judiciary and that of the society it serves has grown to alarming proportions. With legal education no longer being the reserve of the privileged classes and with increasing numbers of women and ethnic minority University graduates across European law faculties, under-representation of these social groups on the bench has no resonance with social reality. This is not to argue, of course, that the iconic figure of the white male judge could ever be justified from a point of view of social justice, as it was always the product of gender or race discrimination, direct or indirect. The point is, though, that the problem is exacerbated simply because in 21st century Europe there are

⁵⁶⁰ Benhabib, S. (1996). Democracy and Difference: Contesting the Boundaries of the Political, Princeton University Press.; A. Phillips, *supra* no. 67.

no longer any serious pragmatic reasons, such as the lack of qualified candidates for the bench, that could *explain*, if not justify, this imbalance even in the short term.

Given the cardinal institutional importance of the judiciary within the apparatus of the democratic state, it is hardly surprising that this undeniable imbalance calls for immediate attention. Positive action, then, automatically emerges as the front-runner in the relevant debate, being the obvious candidate to address under-representation of women and ethnic minorities on the bench swiftly and aggressively. As with elected public offices, however, the legitimacy of positive action in this sensitive area of the public sphere is not a given. The issues involved are complex and require careful consideration that will result in a clear justificatory rationale, which in turn will determine with precision the types of measures that are legitimate.

Accordingly, the aim of this section is to explore the specific theoretical arguments that support the need for positive action in the judiciary, provide a coherent analytic framework and identify whether and under what conditions positive measures in the form of quotas are legitimate in this context.⁵⁶¹ Although the normative framework is once again European law in a broad sense, the possibility of applying “soft” or “hard” quotas to increase the numbers of female or minority judges will also be examined with reference to the British system of judicial appointments. The latter will serve as a useful case study to test the legitimacy of its equality strategies against the backdrop of European law. It will also provide a concrete normative platform upon which to consider what constitutes a fair balance of social representation on the bench, what the ultimate

⁵⁶¹ Focusing the enquiry on quotas in this area of the public sphere is a justified methodological choice, on the basis of the fact that the legitimacy of less obtrusive forms of positive action is not under any serious doubt.

goal in a democratic society should be in this regard and where to draw the line between lawful and unlawful means of achieving the desired goal.

8.2 Four Arguments in Favour of Diversity in the Judiciary

Most arguments regarding the unbalanced composition of the judiciary and the necessity to address the issue inevitably tend, in a European academic and political context at least, to focus on the gender dimension.⁵⁶² However, as it will become clear in what follows, the philosophical foundations of these arguments are wide enough to encompass the equality claims of other social groups and can justify by the same token positive action on grounds other than gender. For methodological reasons⁵⁶³ and with this crucial remark in mind the discussion that follows will adhere to the “norm” and consider gender under-representation on the bench. It should be noted, though, that gender under-representation is in principle understood here as a proxy for all aspects of inequality that cannot be justified and should be dealt with as a matter of political and legislative priority.

Let us now turn to a review of the main types of arguments that have been articulated. Across the literature and especially in feminist writings a number of voices have been raised in favour of increased representation of women on the bench drawing upon different philosophical underpinnings. The conceptual differences between these positions, however, which in some cases may involve arguments contradictory or mutually exclusive, have not yet received adequate scholarly attention.⁵⁶⁴ Malleon has gone some way into providing theoretical consistency to the discourse, with an attempt to

⁵⁶² The reasons for such a pragmatic choice have already been identified and discussed at an earlier point. See *infra*

⁵⁶³ As most of the literature on the matter and most of the current policy initiatives are designed to tackle gender under-representation in the judiciary,

⁵⁶⁴ Feenan, D. (2008). "Women Judges: Gendering Judging, Justifying Diversity." *Journal of Law and Society* 35(4): 490-519., at 491.

systematise the various arguments and come up with a basic typology.⁵⁶⁵ She proposes a binary distinction between *difference-based* and *equity-based* arguments.⁵⁶⁶ The former largely support the thesis that increased numbers of women judges will bring a “new dimension”⁵⁶⁷ to the adjudication process by drawing upon their personal life-experiences, which are different from those of the traditional male judge.⁵⁶⁸ Equity-based arguments, on the other hand, posit that female under-representation in the judiciary can only be explained as “the result of unfair arrangements, both past and present, which disadvantage women”⁵⁶⁹

Malleson’s proposed typology is useful in that it juxtaposes the two most easily identifiable sources of argument in favour of positive action in the judiciary. Despite this apparent advantage, this classification is by no means exhaustive. Because of its principally descriptive purpose, it seems to overlook or underestimate arguments that have not yet been forcefully articulated or have not received the attention they merit. Naturally, the bulk of academic writing on the matter comes from feminist legal theorists and, consequently, it reflects an ideologically-laden view centred on the need to overcome male stereotypes that undervalue the female perspective. As a result, Malleson’s binary analytical scheme leaves out distinct lines of defence that cannot comfortably fit in either of the two categories.

A more comprehensive analytical framework is, therefore, proposed here in order to examine the justificatory rationale of positive action in the judiciary. Four types of

⁵⁶⁵ Malleson, K. (2003). “Justifying Gender Equality on the Bench: Why Difference Won’t Do.” *Feminist Legal Studies* 11(1): 1-24.

⁵⁶⁶ Ibid, p. 1.

⁵⁶⁷ Goldman, S. (1999). Should There be Affirmative Action for the Judiciary? *Judicial Politics: Readings from the Judicature*. E. Slotnick, American Judicature Society.

⁵⁶⁸ McGlynn, C. (1998). *The Woman Lawyer*, Butterworths., p. 187.

⁵⁶⁹ Malleson, *supra* no.566, p. 15.

arguments are distinguished, the first two types being *difference-based* and *equity-based* arguments, as per Malleson's account, and the last two being *democracy-based* and *efficiency-based* arguments.

Difference-based argument: The essence of the difference-based argument is that diversity in the judiciary is inherently valuable, because it will enable a plurality of ethical views, philosophical approaches and personal experiences to inform legal reasoning and, hence, improve the quality of justice in a democratic society. The gender version of the argument dominates the relevant discourse.⁵⁷⁰ Echoing traditional views of second generation feminists like Carol Gilligan that celebrate the "different voice" of women,⁵⁷¹ it is premised on the assumption that women approach issues of justice with a distinctively female approach, usually referred to as an ethic of care.⁵⁷² The latter can underpin a more suitable normative framework to provide concrete answers to moral dilemmas⁵⁷³ compared to a typically male rights-based approach.⁵⁷⁴ Bertha Wilson, the first woman judge to be named to the Supreme Court of Canada, is credited with the most powerful articulation of the argument in the context of the judiciary.⁵⁷⁵

From a pragmatic point of view difference-based arguments claim that female judges will help restore genuine gender neutrality in the law, which suffers from the

⁵⁷⁰ Malleson, *supra* no.566, p. 2.

⁵⁷¹ C. Gilligan, *supra* no.87.

⁵⁷² R. Tong, *supra* no.84, p. 162-165.

⁵⁷³ Noddings, N. (1984). *Caring: A Feminine Approach to Ethics and Moral Education*, University of California Press, p. 3-4.

⁵⁷⁴ Menkel-Meadow, C. (1985). "Portia in a Different Voice: Speculations on a Woman's Lawyering Process." *Berkeley Women's Law Journal* 1: 39-63., pp. 39-63.

⁵⁷⁵ Wilson, B. (1990). "Will Women Judges Really Make A Difference?" *Osgoode Hall Law Journal* 30(1): 506-522.

prevalence of stereotypical assumptions⁵⁷⁶ and inherent gender biases that shape supposedly neutral principles.⁵⁷⁷ Women judges will be able to achieve this exactly because they have a different take on normative questions. It is, then *what* women judges will actually *do* and *how* they will do it that matters. Once on the bench women judges will bring about both *substantive* change, by prioritising gender equality issues,⁵⁷⁸ and *procedural* change, by moving away from a “male” model of adjudication focused on formalism, universalism and objectivity⁵⁷⁹ towards a feminine, problem-solving rather than adversarial ethos.⁵⁸⁰

Increased female participation in the judiciary, therefore, would allow for the “female voice” to be heard and this, in turn, would ensure that women’s issues are promoted near the top of the agenda. In its most sophisticated versions the difference-based argument does not suggest that women judges will *necessarily* find in favour of female plaintiffs or defendants or that they will *always* be more liberal than their male colleagues. It asserts rather that they will be in a position to understand the gender perspective or gender implications of a given situation and, thus, will be more sympathetic to non-majoritarian views and open to arguments that deviate from traditional patterns of adjudication.

The difference-based argument for diversity on the bench has attracted severe criticisms, no less from within the feminist jurisprudence circle. Senior female judges

⁵⁷⁶ Sherry, S. (1986). “The Gender of Judges.” *Law and Inequality* 4: 159-169., at 161.

⁵⁷⁷ Thornton, M. (1996). *Dissonance and Distrust: Women in the Legal Profession*, Oxford University Press.

⁵⁷⁸ Wickler, N. J. (1987). Identifying and Correcting Judicial Gender Bias. *Equality and Judicial Neutrality*. S. M. a. K. Mahoney, Carswell.

⁵⁷⁹ Malleon, supra no.566, p.3.

⁵⁸⁰ Menkel-Meadow, C. (1987). “The Comparative Sociology of Women Lawyers: The ‘Feminization’ of the Legal Profession.” *Institute for Social Science Research, Working Paper Series* 3.

both in the United States and in the United Kingdom have led the charge against what they perceive of as a slippery slope for the feminist cause. According to a famous excerpt by former US Supreme Court Justice Day O'Connor, the first woman to have been appointed to the highest judicial office in the US, "[a]sking whether women attorneys speak with a 'different voice' than men do is a question which is both *dangerous* and *unanswerable*" [emphasis added].⁵⁸¹

The question is dangerous because it polarises the normative discourse, stereotypically dividing values into traditionally female and traditionally male ones.⁵⁸² Such a divide has an obviously essentialist premise in two respects, since it not only posits that women will judge differently from men but also that all women will judge in the same way.⁵⁸³ Baroness Hale, the first woman to join the House of Lords as a Lord of Appeal in Ordinary, unequivocally states that, if this were true, "it would make [women] less well qualified to be judges".⁵⁸⁴ This line of thought risks reviving traditional discriminatory assumptions of merit, whereby men and women are respectively more suitable for different categories of work.⁵⁸⁵ If this is projected on to the judiciary, women might, therefore, end up being regarded as better qualified to deal with Family law or Employment law cases but not equally well qualified to decide on Criminal law or Constitutional law matters.⁵⁸⁶

⁵⁸¹ O'Connor, S. D. (1991). "Portia's Progress." New York University Law Review 66: 1546-1558., at p. 1557.

⁵⁸² Ibid.

⁵⁸³ Fraser, N. (1997). Justice Interruptus: Critical Reflections on the 'Postsocialist' Condition, Taylor & Francis., p. 102.

⁵⁸⁴ Hale, B. (2001). Equality and the Judiciary: Why Should We Want More Women Judges?, Public Law., p. 489-504.

⁵⁸⁵ Day O'Connor, supra no.582.

⁵⁸⁶ Ibid. See also Malleon, supra no.566, p. 13

The question is also unanswerable simply because there is no conclusive evidence as to whether women judges *do* actually bring to the bench a distinctly feminine quality of adjudication. Baroness Hale has argued that it would be “manifestly inaccurate in many cases” to claim that female judges have a different outlook on normative questions compared to their male colleagues.⁵⁸⁷ Empirical studies have generally struggled to identify a statistically significant gender difference.⁵⁸⁸ Conclusions of academic commentators extrapolating the “feminine voice” from the reasoning of particular rulings, in which female judges were involved,⁵⁸⁹ have been challenged as flawed even by the protagonist herself, as in the case of Justice Day O’Connor.⁵⁹⁰

In view of the weaknesses of the difference-based argument, therefore, it is difficult to accept it as an adequate justificatory rationale to uphold positive action for the judiciary, at least insofar as it is taken on its own. Even if diversity on the bench is desirable, there seems to be no guarantee under the difference approach that this diversity will be effectively achieved through quotas or less invasive forms of positive measures.

Equity-based argument: The deficiencies and controversial assumptions of the difference-based argument have led to a gradual shift of the emphasis in the literature towards an equity-based rationale for gender diversity on the bench.⁵⁹¹ According to the most straightforward version, presented by Malleeson, the basic claim boils down to that “it is inherently unfair that men enjoy a near monopoly of judicial power”.⁵⁹² Under-

⁵⁸⁷ Hale, *supra* no.585, p. 502.

⁵⁸⁸ Feenan, *supra* no.565, p. 492.

⁵⁸⁹ Sherry, *supra* no.577

⁵⁹⁰ Day O’Connor, *supra* no. 582. See also Malleeson, *supra* no.566. p. 5.

⁵⁹¹ Feenan, *supra* no.565, p. 493.

⁵⁹² Malleeson, *supra* no.566, p. 15.

representation of women on the bench cannot be justified from a perspective of justice, as no biological or socially constructed quality exists that makes men more suitable to serve in the judiciary. As in any other area of employment, in the absence of other plausible explanations it must be assumed that under-representation of women in the judiciary stems from systemic discrimination against them. Discrimination, direct and indirect, overt and covert, past and present, has resulted in “unfair arrangements” that “disadvantage women”⁵⁹³ and deprive them of “a fair crack of the whip and an equal chance of appointment” on the bench.⁵⁹⁴

The focus of the equity-based argument, therefore, is on the unfairness *against women*. Unlike the different-based approach, the underpinnings of this rationale are entirely disengaged from *actual outcomes* of a more proportionate gender balance. Regardless of whether increased female participation will improve the *quality of justice* or not, regardless of what women judges will *actually achieve* and of *how* they will adjudicate,⁵⁹⁵ correcting the imbalance in participation is *a matter of principle*. Equal participation is a requisite of *equal treatment* and has little, if anything, to do with where the allegiances of female judges will lie.

It goes without saying that the equity-based argument is tailored to justify and promote the use of positive action in judicial appointments. Women, both individually and as a group, have a *right* to participate on an equal footing with men in all decision-making processes in the public sphere. When this basic gender equality right is being breached, there is a strong case for addressing the injustice dynamically and at its core. Preference to *equally qualified* female candidates for the bench, therefore, is generally

⁵⁹³ Ibid.

⁵⁹⁴ Hale, *supra* no. 585.

⁵⁹⁵ Malleon, *supra* no.566, p. 17.

considered to be a legitimate means of increasing participation without jeopardising the *merit* principle.⁵⁹⁶ There is no reason to believe that this conclusion could be successfully challenged under EU law in view of the Badeck test,⁵⁹⁷ although the ECJ has not as yet had an opportunity to consider a national positive action scheme designed for judicial appointments.

Merit is, of course, a critical concern here, even more so than in other areas of employment, given the institutional importance of the function of judges in a democracy and the complexity of the tasks they are expected to perform. Equity-based arguments do not deny that the merit principle should play a central role in judicial appointments. Instead they usually attempt to *reconstruct* the notion of merit in a more *comprehensive* way, so that it includes non-traditional criteria that may not automatically, albeit indirectly, favour white male candidates. Arguably, an example of such an inclusive definition of merit can be found in the South African Constitution, where *diversity* of the judiciary is a *collective* requirement of competence for candidates and it is, thus, taken into account alongside individual qualifications.⁵⁹⁸ The extent to which the South African system of judicial appointments supports the equity-based argument is highly debatable and it will be examined in more detail later on in this section.

The principal question for present purposes, however, is whether positive action of the *tie-break* type, whereby *equally qualified* women are given priority over their male counterparts, will be *enough* to make a difference in the short term. If discrimination is the reason behind female under-representation in the judiciary, then it is reasonable to assume that women will be faced with obstacles not only when they arrive at the position

⁵⁹⁶ Ibid, p. 16.

⁵⁹⁷ Badeck

⁵⁹⁸ Ibid, p. 17.

of being considered for appointment but also *during* the period of acquiring the appropriate *qualifications* to enter the pool of candidates. It is, then, logical to expect that there will be few female candidates as well qualified as their male counterparts, because of the barriers that the former had to face when building up their academic and professional credentials. Ensuring that these few female candidates are given preference will, consequently, have only minimal impact on the gender balance. As Malleson puts it “the only prospect for equality on the bench is if women *with less experience* than their male counterparts are appointed” [emphasis added].⁵⁹⁹

Whether or not equity-based arguments are sufficient to justify such a claim is undoubtedly a question of considerable theoretical interest. *De lege lata*, however, and insofar as European equality law is concerned the equity-based argument has failed to convincingly prove its case. In its Abrahamsson ruling⁶⁰⁰ the ECJ has flatly denied the compatibility of national positive action provisions giving priority to less qualified female candidates with the principle of equal treatment under primary and secondary EU law. It is, thus, imperative to move on and consider alternative arguments that may provide a more comprehensive justificatory basis for aggressive gender equality policies in the judiciary.

Democracy-based argument: Apart from the usual challenges pertaining to the unreasonableness of under-representation from a perspective of fairness to *individuals* and *under-represented groups*, the domination of the judiciary by white male judges arguably also involves a profound unfairness to the democratic *citizenry as a whole*. The

⁵⁹⁹ Malleson, *supra* no.566, p. 16.

⁶⁰⁰ Abrahamsson

principal claim is that the composition of the judiciary in a democratic society must reflect, at least up to an extent, the composition of the society itself it purports to serve.⁶⁰¹

Before exploring this rationale further it is essential to delineate its analytical boundaries so that to distinguish it from the previous category of equity-based arguments. Prima facie there is an overlap between the two, as both seem to deal with gender under-representation on the bench from a perspective of justice. Equity-based arguments, however, conceptualise the unfairness of under-representation in a *monistic* way, centred on the disadvantage this creates for women themselves. The democracy-based rationale, on the contrary, proposes a more *holistic* understanding of the unfairness resulting from gender imbalance on the bench, one that places equal value to *individual fairness* and *social justice*. Whether positive action, therefore, is a permissible means to boost female participation in the judiciary is assessed here against the backdrop of wider societal concerns about democracy and justice and not solely within the narrower framework of satisfying the legitimate claims of a particular disadvantaged group.

The claim that under-representation of women in the judiciary constitutes an affront to the democratic principle can be analytically distinguished into three basic propositions: the imbalance in the composition of the judiciary is at odds with the principle of *self-government*, it is difficult if not impossible to justify under the rule of law in view of the *natural judge* principle and, finally, it deprives the institution of its *external legitimacy* that stems from public confidence in its democratic qualities. Let us turn to examine these in more detail.

⁶⁰¹ Hale, *supra* no.585

The principle of self-government is usually associated with the legislative and executive branches of state power. It is the most literal affirmation of the meaning of democracy, as it asserts that “[c]onstitutional arrangements [...] enable and warrant *government by the people*”.⁶⁰² Respect to this fundamental principle ensures that the political institutions in Western parliamentary democracies remain true to their role as prescribed by their representative mandate. Citizen *participation* in the decision-making processes of the public sphere, either *directly*, through the exercise of the right to stand for election, or *indirectly*, through voting and getting involved in public deliberations and will formation processes, is the lever by which this principle moves from the territory of abstract political theory into the realm of applied policy and normative practice.

This basic definition begs the question of how self-government relates to the judiciary, given that the latter’s role is to remain an impartial arbiter and to provide democratic checks and balances. Although it is true that the institutional nature and purpose of the judiciary is such that public participation in its decision-making processes is neither available nor desirable,⁶⁰³ this does not entail a complete disengagement from the democratic principle. Since the judiciary is part of the state apparatus and wields state power, citizens as the constituents of a democratic polity have a legitimate expectation that the exercise of this power is *subject to the same democratic guarantees* as any other form of state power.

Suggesting otherwise would be to accept that the judiciary is entrusted with the task to perform democratic control, while being itself insulated from such control. Judges enjoy, of course, personal and operational independence and they are not directly

⁶⁰² Eriksen, E. O. (2003). "The EU and the Right to Self-Government." ARENA, University of Oslo Working Paper 17/03.

⁶⁰³ With the unique exception of *juries* in certain criminal law systems.

accountable to the public as elected officers are. They do not represent the people in the same way and with the same mandate that politicians do. But that is all the more reason why the *composition* of the judiciary should be reflective to an extent of the polity it is part of. Rather than a symbolic statement about equality, this balance constitutes a substantive affirmation of the principle of self-government. Without some degree of statistical approximation between the judiciary and the citizenry in terms of gender, ethnicity or race, this principle would seem to only selectively apply to the white, male, middle or upper class part of the populace. As a result, the *democratic legitimacy* of the institution is partly *contingent upon* its balanced composition and it is, thus, threatened when certain social groups are unjustifiably under-represented.

It goes without saying that this line of argument has significant affinities with the debate on the fair distribution of power within a democratic society. A number of influential theorists from various schools of thought, ranging from Michel Foucault⁶⁰⁴ to Jurgen Habermas⁶⁰⁵ and Hannah Arendt,⁶⁰⁶ have explored the matter thoroughly and have produced important works that continue to inspire the legal and political discourse. Across the various strands of feminist jurisprudence the issue of power is also a focal point, either from a phenomenological perspective, as the epitome of oppression,⁶⁰⁷ or from a radical perspective, as the concomitant of patriarchy and male domination.⁶⁰⁸ With regard to the more narrow issue at hand, however, the principal argument, which is

⁶⁰⁴ Foucault, M. (1979). The History of Sexuality, Volume 1: An Introduction, Vintage.

⁶⁰⁵ Habermas, J. (1994). Hannah Arendt's Communications Concept of Power. Hannah Arendt: Critical Essays. L. P. H. a. S. K. Hinchman, SUNY Press.

⁶⁰⁶ Arendt, H. (1970). On Violence, Harcourt Brace & Co.

⁶⁰⁷ Young, I. M. (1990). Throwing Like a Girl And Other Essays in Feminist Philosophy and Social Theory, Indiana University Press.; I. M. Young, Justice and the Politics of Difference, supra no.2; Bartky, S. (1990). Femininity and Domination: Studies in the Phenomenology of Oppression, Routledge.

⁶⁰⁸ C. MacKinnon, supra no.87; Allen, A. (1999). The Power of Feminist Theory: Domination, Resistance, Solidarity, Westview Press.

compatible with the claims and conclusions of most of the works cited here, boils down to this: when judges come from a narrow demographic background⁶⁰⁹ that does not reflect the composition of society, under-representation of particular social groups in the judiciary fails to respect the democratic principle.

The second proposition of the democracy-based argument relates to the rule of law and the requirements this poses to the operation of the justice system within the democratic polity. One of the fundamental principles of the rule of law in most continental European jurisdictions is the principle of *natural or legal judge*. The principle is established in the form of a constitutional clause in Italy,⁶¹⁰ Germany,⁶¹¹ Greece,⁶¹² the Netherlands⁶¹³ and Turkey⁶¹⁴ among other countries.⁶¹⁵ It is encapsulated in a constitutionally embedded right to be tried by *ordinary courts*, as prescribed by the laws determining jurisdiction, competence and assignments of cases. The principle is also recognised in international law as the *ius de non evocando*, which is usually conceived of as a dimension of the right to fair trial and prohibits trial of ordinary citizens by military tribunals or special courts and judicial committees.⁶¹⁶

The connection between this principle and the need for diversity on the bench is contingent upon the definition of what constitutes an *ordinary court* in a democratic

⁶⁰⁹ This seems to be the case not only in most European countries, but also in European institutions. For the appointment of female judges to the ECJ see Kenney, S. J. (2002). "Breaking the Silence: Gender Mainstreaming and the Composition of the European Court of Justice." *Feminist Legal Studies* 10: 257-270. For an analysis of the situation in the UK see Griffiths, J. A. G. (1997). *The Politics of the Judiciary*, Fontana.

⁶¹⁰ Article 25 of the Italian Constitution.

⁶¹¹ Article 103 of the German Basic Law.

⁶¹² Article 8 of the Greek Constitution.

⁶¹³ Article 17 of the Dutch Constitution.

⁶¹⁴ Article 142 of the Turkish Constitution.

⁶¹⁵ However it does not seem to be present in the constitutional law of the United Kingdom or France.

⁶¹⁶ Lauterpacht, E. and C. T. Greenwood (1997). *International Law Reports*, Cambridge University Press.

polity. Initially, the primary aim was to insulate the right to a fair trial from the possibility of governmental intervention through an ad hoc change of jurisdiction. The meaning of this right that no person may be denied the court to which she is *normally entitled*, however, is arguably broader. An *ordinary* court is not simply one that has been set up according to the general rules establishing the judicial system of a constitutional legal order. Apart from this element of due process, there is also a *substantive* component to the principle. An ordinary court should also be understood as one that respects the democratic principle in terms of its *composition*. An almost all white male bench in a multicultural society where half of the population is women cannot be described as ordinary in any meaningful sense. And this democratic deficit will still exist, even if the actual outcomes of judicial decision-making are generally perceived of as unbiased and fair.

The third proposition of the democracy-based argument involves the relationship between the balanced composition of the judiciary and the perception of the latter in public opinion. The relationship between the democratic principle and public opinion is a rather complex one⁶¹⁷ and cannot be explored in depth at this point. It is, however, possible to sketch out the basic premise that the democracy-based argument utilises to support increased female participation on the bench.

Public perception is a key legitimating factor for all public institutions in a democratic society. Social acceptance of the rules governing the *establishment*, *composition* and *operation* of public institutions lends *external legitimacy* to these institutions. This perception of fairness in its three afore-mentioned dimensions is

⁶¹⁷ For an interesting exploration of certain aspects of the issue see Splichel, S. (2001). Public Opinion and Democracy: Vox Populi-vox Dei?, Hampton Press.

considerably more important when it comes to the judiciary, due to the inherently limited democratic accountability of judges. In systems where judges are selected exclusively through appointment rather than election, as in most European countries, it is evident that the deficit in democratic accountability does not threaten the legitimacy of the institution insofar as no significant social challenge exists. Even in systems where a number of judicial offices are reserved for election rather than appointment, as in the United States for instance,⁶¹⁸ the relationship between elected judges and their “constituents” is neither one of direct representation nor one of accountability in the classic sense.

Judicial *independence*, both in a personal capacity and from an institutional point of view, remains the defining difference of the judiciary compared to the other branches of state power. And, indeed, one of the reasons that European systems have opted for an appointed rather than elected judiciary is down to the need to safeguard judicial impartiality against the pressures of public opinion. Within the framework of democratic governance models founded on the *separation of powers* doctrine, it is exactly this guarantee that makes it possible for judges to fulfil their institutional role. Nevertheless independence does not amount to segregation from the body politic. A homogeneous judiciary that seems disengaged from the multicultural and polymorphic polity that it serves will most likely lose the confidence of the public in its democratic credentials.

This form of external legitimacy is not simply a matter of subjective perceptions. It is a confirmation of the authority of the institution, an implicit vote of confidence in its democratic nature. As such, the balanced participation of social groups in all decision-

⁶¹⁸ Under the US system, although federal judges are appointed with life tenure, most state judges are elected for short terms. See Choi, S. J., G. M. Gulati, et al. (2007). "Professionals or Politicians: The Uncertain Empirical Case for an Elected Rather than Appointed Judiciary." John M. Olin Law & Economics Working Paper No. 357.

making bodies of the public sphere is the most visible index of democracy. Especially with regard to the unelected judiciary, where the public cannot express its collective will directly, balanced participation is the principal factor that will determine the attitude of the public towards the state.

Democracy-based arguments are undoubtedly appealing, as they carry a rhetoric force that cannot be underestimated. What is more, these arguments resonate across the political spectrum. It is, thus, difficult to deny the premise that the judiciary should be to some extent reflective of the polity it operates in, given that this seems to be a reasonable corollary of the democratic principle. Under this rationale, therefore, positive action to address under-representation of women on the bench is not only permissible, but it may also constitute an *obligation* of the state. It follows that positive measures of the tie-break type are clearly and unquestionably justified. The obvious question, however, regarding the possibility of going even further and appoint *less* qualified female candidates remains open and needs to be examined in detail.

Efficiency-based argument: Increasing female participation on the bench will arguably have significant efficiency benefits for the judiciary in more than one respects. The basic argument is twofold: a better gender balance will inevitably improve the overall quality of justice, on the one hand, and will enhance the external legitimacy of the system, on the other.

The first facet of the argument is rather straightforward as it echoes the classic pro positive action efficiency rationale. On the premise of the assumption that *talent* is relatively equally distributed across the population, fewer women on the bench amounts

to a loss in human capital. A significant number of female candidates that could potentially make excellent judges are deprived of the opportunity to fulfil this potential for a number of reasons, discrimination being a determinant factor. The quality of justice, reflected on the judgments delivered by all-male courts, suffers as a result.

Obviously the argument here needs further refinement, given that the pool of potential candidates for judicial appointment is much smaller compared to that for most strands of employment. Although it is the case across the employment spectrum that employability is delineated on grounds of basic qualifications, training and personal preference,⁶¹⁹ judicial service involves a higher threshold for those that wish to make it into the pool of potential applicants. General legal education is, of course, a *conditio sine qua non*, but a number of European countries operate a system whereby an additional educational curriculum is tailored to the specific requirements of the job, much in the same way that Solicitors in the United Kingdom must undertake additional training before achieving the status of a Barrister. Not all fully qualified lawyers, therefore, will automatically be eligible for judicial appointment.

Even among fully qualified lawyers there is no guarantee as to how many will be willing to trade a potentially lucrative career in the private sector for the honourable but financially not as enticing prospect to serve on the bench of a district court. What is more, the choice of a career path in the public sector has traditionally been perceived of as the “default” option for women, with standard working hours, longer maternity leave and guaranteed social benefits. Gender equality developments in the past half century, both domestic and international, have substantially improved the status of women in the

⁶¹⁹ Preferences consisting in the personal choice as to whether one wishes to pursue this particular line of work or not.

employment field, but their impact is considerably more significant in the public sector, as the horizontal application of many of these rules is still unavailable or disputed. Without adopting any stereotypes, then, as to the “typical” female preferences, it seems reasonable to expect a higher proportion of female lawyers⁶²⁰ to express serious interest in a career in the judiciary if given the opportunity.

With these elements factored in, the total or partial exclusion or severe under-representation of specific social groups in the judiciary deprives the institution from an invaluable human resource. What needs to be understood here is that the notion of the “good judge” cannot be construed solely on the basis of existing merit. *Potential to become* a good judge is equally if not more important to the formal qualifications one holds. *Talent* in this sense is as much an image of present capabilities and accomplished skills as it is a reflection on the possibility of future development and achievement. Statistical probability, therefore, suggesting that talent is not the monopoly of male white citizens cannot but form an important dimension of any meaningful assessment of the current composition of the courts from a perspective of efficiency.

Prima facie there seems to be an overlap between this aspect of the efficiency argument and the difference-based argument. Ultimately the principal claim in both cases is that the quality of justice delivered would be substantially enhanced, if a more balanced composition of the judiciary were to be achieved. Difference-based arguments, however, are centred on the benefits of bringing a distinctly female perspective to the bench, which will result in an alternative, more nuanced approach to legal reasoning and to decision-making. Female judges, then, *regardless of how talented they individually are*, will inevitably contribute to a diversification of the ideas on the basis of which the

⁶²⁰ Compared to the respective proportion of male lawyers.

task of interpreting the law will be carried out. For the efficiency-based argument, on the contrary, it is *talent* as an untapped human resource that drives the rationale forward. Women are not seen as the privileged bearers of a distinctive insight in legal reasoning. It is rather a matter of statistical probability, arrived at through an unbiased scientific method, suggesting that there is a higher number of talented individuals to be found in those social groups that are severely under-represented in the judiciary. Whether or not female judges, therefore, end up reinvigorating the process of adjudication and opening up judicial reasoning to new ideas is irrelevant. Insofar as they are talented, increasing their participation will provide a net benefit in terms of quality of justice simply by ensuring that this talent does not go to waste.

The second facet of the efficiency-based argument is more sophisticated and perhaps less often articulated in its present formulation. The premise of the argument is that the homogeneous image of the judiciary damages public confidence in the institution.⁶²¹ A high degree of public confidence strengthens the democratic *legitimacy* of the judiciary, as already discussed, but it also enables the justice system to operate more *effectively* as a result. In other words, this *external legitimacy* of the judiciary is not just an essential proof of its democratic institutional credentials but also a precondition for its unhindered operation within the democratic edifice.

This relationship between public confidence and judicial efficiency, mediated as it is by the notion of legitimacy, calls for further exploration. Public perception is a key legitimating factor for all state institutions in a democratic society. As explained earlier social recognition of the fairness of rules governing the establishment, composition and

⁶²¹ Russell, P. H. (2006). Conclusion. Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World. K. Malleon and P. H. Russell, University of Toronto Press., p. 434.

operation of public institutions is a necessary condition for the external legitimacy of the latter. Apart from this connection between legitimacy and democracy, lack of public confidence in the judiciary will also inevitably influence the reasoning and arguably the outcomes of adjudication.

Interpretation of legal rules is a complex task that does not take place in a social vacuum but needs to ensure that the law can adapt to shifting social circumstances. Although this is usually manifest in a more tangible or explicit manner in areas of the law that are by default in a state of constant evolution, such as European Law, it is nonetheless true across the spectrum of provisions that are even remotely connected to fundamental value choices in any given society. A number of distinct but inter-connected mechanisms or tools have been envisaged to guarantee that judges have in practice the power to factor in ever changing social circumstances in the adjudication process, so that the general public is satisfied that the legal system is not out of touch with social reality.

Judicial discretion, which is a common place across European jurisdictions, is an umbrella concept specifically designed to serve this purpose. The same is true about the more concrete German notion of *indefinite legal concepts*,⁶²² which has influenced public law in many other European countries that follow the German administrative law model and is coined to describe commonly used legal terms such as “public interest”, “public security” or “reasonableness”.⁶²³ By far the most characteristic mechanism of this sort is the power of Continental European courts to engage with a *constitutionality* review of every legal provision enacted by Parliament, either as part of their general judicial review

⁶²² *Unbestimmte Rechtsbegriffe*.

⁶²³ Singh, M. P. (2001). *German Administrative Law in Common Law Perspective*, Springer., p. 176 et seq.

purview or in the form of a centralised constitutionality control.⁶²⁴ It should be noted that these systems allow for the possibility of judicial review of the constitutionality of laws not only on procedural⁶²⁵ but also on substantive⁶²⁶ grounds.

What the existence of all these mechanisms proves is that the judiciary is not only democratically empowered but also under an obligation to interpret the law so that it remains always fit to address the exigencies of social actuality. Public confidence in the judiciary, then, is not simply about trusting that each *individual judge* is fully qualified or that the *process* of their *appointment* was formally compatible with procedural rules and regulations and with general principles. It is also about maintaining a belief in the *ability* and *willingness* of the judiciary to take wider societal concerns into account when resolving specific legal conflicts.

Maintaining this link of trust between the citizenry and the judiciary is by default a mutual responsibility. In a democratic society people are expected to recognise the legitimacy of an institution even when faced with actions or decisions that are perceived of as wrong or detrimental to individual interests.⁶²⁷ *Diffuse support*⁶²⁸ of this kind is “a reasonable indication of underlying confidence in the courts”.⁶²⁹ When this is lost or lacking, however, most judges will inevitably succumb to the pressure created and enter a cycle of introspection and self-doubt. Performing the job *efficiently* does not depend, of

⁶²⁴ When a Constitutional Court sits at the top of the judicial pyramid, as is the case among others in France, Italy and Germany.

⁶²⁵ That is when there is a fault with the due *process* in the enactment of the law under scrutiny.

⁶²⁶ That is when the *content* of the challenged provision violates or is incompatible with a constitutional clause.

⁶²⁷ Olson, S. M. and D. A. Huth (1998). "Explaining Public Attitudes Towards Local Courts." *The Justice System Journal* 20(1): 41-61., p. 42.

⁶²⁸ Genn, H. G. and S. Beinart (1999). *Paths to Justice: What People Do and Think About Going to Law*, Hart Publishing., p. 228.

⁶²⁹ *Ibid*, p. 229.

course, on dealing with the law through moral or normative absolutes. On the contrary, a degree of institutional and intellectual flexibility that will allow the judge to consider his position from all possible angles on a matter is actually desirable. But this is not to be done under the strain of public mistrust in the authority of the judge, which is exactly why European jurisdictions opted for judicial appointment rather than election in the first place.

The argument here may admittedly seem controversial as its validity rests upon sociological and psychological assumptions, the full exploration of which lies beyond the ambitions of this analysis. For present purposes, though, it is sufficient to reformulate the argument in a more concrete fashion. An *a priori* lack of public confidence in the judiciary *because of its homogeneous composition* constitutes a burden on judges that may affect the efficient operation of the adjudication process, regardless of the outcome of any particular ruling.⁶³⁰ An all-male panel of judges deciding on an abortion case, for instance, is bound to be faced with some degree of suspicion or mistrust from a considerable portion of the population as to the unbiased nature of any decision they arrive at, even if it is generally accepted that the judges sitting on the panel are of impeccable personal integrity. And if judges are under an obligation to remain impartial *and* in touch with social reality at the same time, it is reasonable to argue that they should *take into account* the social fact of mistrust towards them.

This is not an analytically constructed vicious circle for the sake of a theoretical hypothesis. Empirical evidence in the UK reveals a statistically significant gender divide in public opinion with regard to confidence in the courts, with women being relatively

⁶³⁰ This, of course, does not exclude the possibility of the *outcome* of the ruling being affected as well.

less inclined than men to respond positively to the relevant question.⁶³¹ It is suggested that this discrepancy “may be a reflection of the domination of the courts by males”.⁶³² Similar studies on the perception of ethnic minorities suggest that lower levels of confidence in the judiciary also result from its racially imbalanced composition.⁶³³

⁶³¹ H. G. Genn and S. Beinart, *supra* no.629, p. 249.

⁶³² *Ibid.*

⁶³³ Shute, S., R. Hood, et al. (2004). A Fair Hearing?: Ethnic Minorities in the Criminal Courts, Cullompton.

8.3 Diversity in the Judiciary: Are Quotas Legitimate? Are They Effective?

Before turning to consider the appropriateness of positive measures to increase female representation in the judiciary it is essential to explain how the four types of arguments presented above can fit together in a single justificatory rationale. First of all, it should be underlined that the four types of argument may be more or less convincing but they are *not mutually exclusive*. In fact, the analytical framework is designed in such a way so that the justification of increased female or minority participation on the bench is predicated on two separate premises. Equity-based arguments are focused on *disadvantage of the under-represented groups themselves*, while democracy-based and efficiency-based arguments claim that an imbalanced judiciary is *disadvantageous for the society as a whole*. Difference-based arguments, on the other hand, seem to tread a middle ground, suggesting that the recognition and utilisation of the distinctively female approach to law will have an overall net benefit for the justice system.

It is submitted, therefore, that a balanced composition of the judiciary should be understood as a policy priority that requires immediate attention. Under-representation is an acute problem, both because it constitutes a violation of the right of certain social groups to be treated equally and because it is inconsistent with the democratic principle, and as such it should be addressed through measures that will produce results in the short-term. Preference to *equally qualified* female or minority candidates seems to fall easily within the threshold of legality as delineated by all four types of justificatory arguments.

There are, however, two serious problems that none of the arguments presented here, with the possible exception of the democracy-based argument, appears capable of resolving automatically. First, from a pragmatic point of view there is not enough evidence to suggest that quotas of the tie-break type in favour of women and ethnic minorities will suffice to make a difference in the short term. If not enough *equally* qualified minority candidates are found, this kind of positive action will simply fail to achieve any substantive results. Second, even if increased female presence on the bench were to be accomplished, this *diversity of characteristics* does not guarantee a *diversity of characters*. In other words, if diversity is predicated on a relationship of representation between the people and the judiciary, the notion of representation at play, no matter how thin, cannot only involve biological characteristics. Choosing a candidate from an under-represented group who, as an individual, is entirely *unrepresentative* of the group she belongs to would be self-defeating in that it would only satisfy the need for diversity in a purely *formalistic* sense.

The first problem seems, indeed, difficult to address in the short term. Individual merit cannot be easily overridden, not only due to the importance attached to it by liberal theory but also because of the crucial nature of the judiciary's institutional role. Simply put, in positions with such responsibility and where so much is at stake it is imperative to ensure that the best person for the job will ultimately be selected. Even if the cost for making a choice on grounds of merit alone is that certain social groups may end up being under-represented, the solution to under-representation cannot be to select less qualified candidates or to lower the quality of appointed judges.

Reasonable as this approach may sound, it is nonetheless premised on an unjustifiably rigid conception of the interpersonal comparison of qualifications in judicial appointments and promotions. As discussed earlier, the process of identifying a *good judge* should be *forward-looking* and not confined to a mechanical assessment of past achievements. It should aim at determining which candidates have the *potential* of using their competences and abilities so that they perform the tasks entrusted to them and fulfil their role to the highest standard.

Although this is generally true for any line of work, a number of elements distinguish the judiciary from “standard” employment. Apart from public responsibility that judges bear coupled with the fact that they wield state power, arguably the most significant difference is the inherent difficulty to measure the *success* of a judge in concrete terms. It is possible, of course, to measure the *failure* of a judge to perform his tasks adequately by reference to the amount of judgments or opinions delivered combined with the time frame within which these are announced. Scoring high in these indexes, however, is not a benchmark of actual success, as it does not involve an assessment of the actual *quality* of work produced. And it seems unrealistic, if not unintelligible, to even attempt to establish an objective metric system of quality of judgments. Quite characteristically the most common yardstick of success appears to be the *respect* a judge commands in legal circles, the academia and the community at large.

For this reason the threshold of *formal qualifications* required to even be *considered* for a position on the bench is already very high. Without any tangible success standards, this is the only safeguard that the candidates selected will live up to the expectations of the role. When this latter point is taken into account the notion of *merit* at

play here needs to be conceived in a different way compared to any other area of employment. It is reasonable to assume that at least all candidates that have been shortlisted are *fully qualified* to serve on the bench. If this is the case, all fully qualified candidates should be regarded as *equally capable of excelling as judges*. Giving preference, then, to a *fully qualified* female candidate for the bench, even if she is not equally qualified to her male counterparts, does not violate the merit principle.

The second problem is arguably more complex, as it echoes the failings of the “classical” group-approach under the traditional conception of positive action. Even if one is willing to accept that aggressive quotas in favour of under-represented social groups are legitimate in order to achieve a fairer balance in the composition of the judiciary, there is a danger that the *individuals* selected through such a process are much closer to the “mainstream” than expected. Obviously, if this is the case, the balance that the quotas aim to achieve will only be superficial. No real change can ensue from programmatic statements about equality that are put into practice without appropriate safeguards that will ensure *substantive* results. In this case, it is difficult to see how the promotion of a female judge hostile to feminist views - understood in the broadest possible sense - is in any way capable of differentiating the existing balance.

Indeed, there is evidence to suggest that this is not simply a theoretical concern. The position of Justice Day O’Connor, for instance, on issues regarding the Equal Protection Clause has been reported to be identical or similar to that of her male colleagues on forty cases over the course of a decade.⁶³⁴ What is even more interesting is that Day O’Connor dissented in only 10% of the rulings on gender or race discrimination

⁶³⁴ Alliotta, J. (1995). "Justice O’Connor and the Equal Protection Clause: A Feminine Voice?" *Judicature* 78(5): 232-235.

issues over the course of her 25-year career, despite the fact that the US Supreme Court was male-dominated throughout this period.⁶³⁵ Insisting on the minutiae of Day O'Connor's record is not coincidental. For better or worse the first female judge in the history of the US Supreme Court was the one that wrote the majority opinion in the infamous *Grutter v. Bollinger* ruling, which held that the University of Michigan's undergraduate admissions program was unconstitutional as its affirmative action clauses amounted to reverse discrimination.

Diversity here, therefore, should be conceived of as *diversity of characters*, that is diversity of *opinions and ideas*, rather than *diversity of characteristics*, such as sex, race or colour. Obviously, some of the traits that qualify as the "usual suspects" for discrimination - which, in turn, are usually at the root of under-representation or social exclusion - by definition involve opinions and ideas, such as religious or philosophical beliefs. This, however, does not alter the fact that diversity is meaningful when it is *internal* rather than *external*, when it involves the way people *think* and *act* rather than where people *appear to belong*.

It goes without saying that this latter point needs further elaboration. One might be quick to note that women do not simply *appear to be* women; they *are* women in a very real and normatively meaningful sense. For the purposes of the present discussion women constitute a distinct social group that is under-represented in a particular strand of employment or in a high stratum within this strand that engages with decision-making or with the exercise of power. And this should be understood as a social fact rather than as an essentialist statement about womanhood in general. Regardless, then, of the small or

⁶³⁵ Bender, P. and C. S. Durkin (2007). "Justice O'Connor's Race and Gender Jurisprudence." *Arizona State Law Journal* 39(3), at 830.

large differences amongst individual women, the point of the matter remains that *no woman* or relatively too few women make it to the top of the judicial hierarchy and that this is not due to their lack of talent, abilities, knowledge or desire to succeed.⁶³⁶

Even if this latter point is valid, partially or even in its entirety, it does not account for the *substance* of the matter. It is inspired by a formal conception of equality, in that it places the emphasis on inter-group equality based on traditional group allegiances rather than on *substantive* infra-group differentiations. In a nutshell, it fails to resonate with the multicultural nature of modern-day western societies, where a white middle-class woman might be much closer to the social mean and, hence, much closer to the “white male” norm than an ethnic minority man. If the composition of the judiciary must reflect and resonate with social reality, it is the *ideological, political or philosophical* allegiances of individual judges that we must be looking at. Otherwise, if we put all our faith on the image alone, positive measures in favour of women will most likely re-create a distorted version of the current state of affairs and risk ending up with a much more “conservative” set-up than we bargained for.

This is not to deny either the legality or the necessity, for that matter, of positive measures in favour of women and other under-represented social groups. Even in European countries that have been dealing with gender equality as a matter of priority in the field of employment the problem seems to be particularly severe in the judiciary. Britain appointed its first woman to its highest appellate court, Lady Brenda Hale, in 2003 nearly 25 years after the United States and Canada.⁶³⁷ An imperfect system,

⁶³⁶ Although this final point might raise some controversy, in view of the stereotypical idea that seems to be shared by quite a few women as well regarding the relationship between career and motherhood.

⁶³⁷ Kennedy, S. J. (2008). "Gender on the Agenda: How the Paucity of Women Judges Became an Issue." *The Journal of Politics* 70(3): 717–735., at 717.

therefore, is still preferable to the alternative of staying idle and it may well serve as the starting point for further refinements in the near future.

CHAPTER 9: GENERAL OVERVIEW AND CRITICAL EVALUATION: THE UNDERLYING RATIONALE OF POSITIVE ACTION IN EUROPEAN LAW

This concluding chapter of Part III has a double purpose: first, to present a relatively coherent overview of how positive action in the three areas of social activity identified earlier fits into the normative framework of European law, according to the position adopted by the ECJ. Second, to explore a key theoretical problem regarding the justificatory rationale of positive action as an equality mechanism, namely the relationship between under-representation and disadvantage as possible bases for the identification of target groups.

9.1 Making Sense of the Tripartite Distinction: The Modus Operandi of Positive Action in Employment, in Politics and in the Judiciary

The exclusive objective of this section is to succinctly summarise the preceding analysis and present a graphic representation that encapsulates the dominant position of EU equality law on positive action, as interpreted by the ECJ.⁶³⁸ Table 1 will employ the tripartite distinction between employment, politics⁶³⁹ and sensitive areas of the public sphere⁶⁴⁰ established in this Part of the thesis and it will hopefully provide an accurate frame of reference for approaching the issue.

⁶³⁸ The position of the ECtHR on the matter does not differ from that of the ECJ. As a result, the latter is taken to be reflective of the position of the European Legal Order of Rights, as described in chapter 3.

⁶³⁹ Or elected public office.

⁶⁴⁰ Exemplified in the case of the judiciary.

POSITIVE ACTION IN:	EMPLOYMENT	POLITICS	JUDICIARY
TYPE SOFTER FORMS (encouragement / training)	PERMISSIBLE for under-represented groups in a particular employment cadre	NOT UNLAWFUL as falling outside the scope of EU law and the ECHR	PERMISSIBLE for under-represented groups
TYPE QUOTAS / PREF. TREATMENT	PERMISSIBLE as a tie-breaker between <i>equally</i> qualified candidates (subject to Badeck conditions)	NOT UNLAWFUL as falling outside the scope of EU law and the ECHR	PERMISSIBLE as a tie-breaker between <i>equally</i> qualified candidates (subject to Badeck conditions)
CRITERION to trigger quota and determine target groups	UNDER-REPRESENTATION as a proxy for DISADVANTAGE of the target group in the specific cadre	UNDER-REPRESENTATION as a proxy for DISADVANTAGE of the target group in the particular elected body	UNDER-REPRESENTATION as a proxy for DISADVANTAGE of the target group in the specific cadre

Table 1: De Lege Lata – positive action under the dominant conception of equal treatment in Europe

Generally speaking, the table is self-explanatory and does little more than bring together the conclusions of the preceding sections. There is, however, one dimension of these preliminary conclusions that presents considerable theoretical interest and needs to be explored further. The analysis up to this point has demonstrated that target groups are selected on the basis of their *under-representation* in a particular area of the public sphere. This criterion of selection rests on the assumption that under-representation is indicative of group disadvantage, the redress of which constitutes the ultimate aim of positive action. The relationship between under-representation and disadvantage, however, is neither straightforward nor adequately theorised. What follows is an attempt

to contribute to the discourse by identifying the conceptual problems and laying down the groundwork for the alternative conception of equal treatment and positive action exposed in chapters 10 and 11.

9.2 Under-Representation and Disadvantage: Does the Former Always Amount to the Latter?

Throughout the literature on positive action the terms disadvantaged (or under-privileged) groups and under-represented groups are used interchangeably, in accordance with what seems to fit best in each particular case. This is understandable considering the diversity of the aims that positive action entertains, which range from providing a specific remedy for invidious race or sex discrimination to the more general purpose of increasing participation of excluded or visibly under-represented groups in important public spheres.⁶⁴¹ Disadvantage and under-representation, then, are understood as variations of the consequences than may befall upon social groups or ethnic minorities, which have been victims of direct or indirect discrimination. This interpretation, convenient though it may sound, fails to go past a superficial level of analysis and underestimates the complexity of the issues involved.

When positive measures taken in a specific area of law are unclear as to their rationale in targeting disadvantaged instead of simply under-represented groups or vice versa, the two obviously non-tautological terms seem to collapse into one another. The problems arising in this connection are not confined to academic concerns about theoretical clarity and consistency or linguistic accuracy. Apart from the obvious issue of

⁶⁴¹ See Fredman, *supra* no.1, p.126.

accommodating competing claims from groups equally entitled in principle to special protection or preferential treatment, the lack of legal integrity in selecting beneficiaries imperils the legitimacy of positive action due to potential conflict with the underlying principle of equal treatment. What is more, when dealing with under-representation the theoretical validity of many traditional defence lines for positive action⁶⁴² becomes questionable, since they appear to presuppose some sort of tangible social disadvantage resulting from past discrimination. The way these two terms operate within the group-approach becomes, then, a cardinal factor in evaluating the merits of positive action in its classical conception.

The notion of disadvantage within the conceptual framework of positive action is difficult to define concretely. However, a useful distinction can be drawn between natural and social disadvantage, with the latter being exclusively in the foreground of our interest. In this regard, disabled persons may fall within the normative scope of positive action only insofar as they are victims of discrimination on the grounds of their natural condition and, therefore, suffer from social disadvantage. In other words, a natural disability is the basis for discriminatory behaviour against its bearer but it is discrimination that constitutes the grounds for taking adequate legal measures, which, in turn, allocate special protection or benefits.

By and large, social disadvantage denotes a state of affairs in which the group is unjustifiably⁶⁴³ deprived of rights or opportunities. To the extent that positive action is restricted within the normative framework of discrimination law, a causal link should

⁶⁴² Especially in relation to arguments invoking compensation as a legitimate aim of positive action.

⁶⁴³ Prisoners, for instance, constitute the paradigm case of justified disadvantaged or social exclusion. On the contrary, discrimination against former convicts may be a legal basis for entitlement to positive action, depending on whether they qualify as a social grouping accordance with the preceding analysis.

exist between the lower social position of the group and the discriminatory practices against it. In other words, entitlement to benefits is justified on the legal basis not only of disadvantage but also of its causes⁶⁴⁴ and, in fact, the latter consideration should be taken into account first in adjudication.

Although in practice the identification process may prove extremely complicated, the legitimacy of affording special protection to disadvantaged social groups cannot be seriously contested in principle. Of course, a purely individualistic version of liberalism may be uncomfortable with the group-approach altogether and accept only measures taken on a case-by-case basis. But the actual beneficiaries of positive action, especially when it consists in allocating preference, are indeed individuals and their group-membership is used, in fact, as a qualification or an index. The primacy of the individual is not threatened and the ECJ, as noted earlier, has been prudent enough to make this explicitly clear. When it comes to under-representation, however, things become significantly more complex.

Tackling under-representation of women and ethnic minorities in several aspects of social life has been a primary concern in Europe for many years and is hailed nowadays as positive action's main goal. The moral justification of such measures seems relatively straightforward, since social exclusion contradicts the fundamental precepts of the democratic polity. From a more pragmatic point of view, it is reasonable to assume that, statistically, talents and natural abilities are evenly spread across the populace,⁶⁴⁵

⁶⁴⁴ The analytical process, then, comprises three stages, answering to corresponding questions: Which clusters of individuals constitute social groups? Which social groups are or have been discriminated against? Which of the latter groups are disadvantaged suffer from detrimental effects of discrimination)?

⁶⁴⁵ Hernes, H. (1987). *Welfare state and women power: Essays in state feminism*, Norwegian University Press.; Helgesen, S. (1990). *The female advantage: Women's ways of leadership*, Doubleday.

which renders the absence of certain social groups from employment areas irrational and counter-productive.

Confusion begins, however, when under-representation is used as a proxy to locate social disadvantage. Although the two are not mutually exclusive and, in practice, they often coincide or even causally relate to one another,⁶⁴⁶ under-representation does not necessarily entail disadvantage and vice versa. To mention but a simple example, the fact that there are more female than male nurses is neither a necessary nor a sufficient condition to characterise men as a disadvantaged group in this specific employment area. The issue, then, is whether under-representation requires positive measures irrespective of its actual negative consequences for the affected group.

To come back to the view of under-representation as undemocratic and counter-productive, a further remark has to be made. The classical conception of positive action, contrary to the conclusion drawn above, seems to implicitly adopt an understanding of under-representation as amounting per se to social disadvantage. If the latter consists in the deprivation of rights and opportunities, under-representation falls comfortably within the scope of the definition. The argument, then, that rules out the absurd result of “disadvantaged male nurses” invokes that under-representation matters only insofar as it is not the outcome of free and genuine choice in a state of equal opportunities. In this respect, women’s under-representation in Parliament constitutes disadvantage if and only if there are not enough female candidates in party shortlists, in which case the voters are

⁶⁴⁶ Groups that are excluded from decision-making processes or from certain areas of employment, either horizontally (total absence from certain areas) or vertically (absence from the higher ranks within a certain area), are inevitably more likely to suffer from relative disadvantages compared to the rest of the population, even if their exclusion per se is not regarded as such (which, of course, seems rather implausible).

presented with an unlawfully limited set of options that restrains their freedom of choice.⁶⁴⁷

Individual choice is apparently instrumental to the liberal notion of equal opportunities, which dominates the discourse in the European legal order, and the emphasis on it is far from surprising. What is quite surprising, on the contrary, is the self-defeating nature of the relevant arguments in the context of positive action. If our primary legal (and political) concern is to provide citizens with the widest possible set of options,⁶⁴⁸ result-oriented quotas that secure a number of Parliamentary seats – or any other elected public offices in decision making bodies – for a specific group inhibit one's freedom to select one's representatives. Favours members of under-represented groups may be to some extent a "legitimate sacrifice" of freedom of choice and, for this reason, the latter cannot be plausibly used as a justification for positive measures.

The matter is quite different, though, when quotas apply to the selection of candidates for elected offices. Clearly, all-male shortlists affect substantially the outcome of the process and predetermine an uneven landscape in terms of representation. The reasoning applies equally now to any selection process, even when the position in question is not an elected public office, and the arguments in favour of positive action can be classified under the headline of diversity. As mentioned earlier, if under-representation

⁶⁴⁷ In the opposite case, when equal opportunities are ensured for all candidates and the widest possible set of options is provided to voters, a potentially unbalanced representation of social groups in Parliament reflects the democratically expressed choice of the electorate body and cannot be subject to further legal scrutiny.

⁶⁴⁸ This is, by and large, the principle claim of liberal egalitarianism that appears to inspire much of the literature in defence of positive action. On the question how far does equality of opportunity require that the cultural values and commitments of different groups be taken into account when public policy on access to jobs, educational places and so forth is being decided see the debate between Brian Barry (Barry, B. (2001). *Culture and Equality: An Egalitarian Critique of Multiculturalism*, Polity Press.) and his critics (Kelly, P. (2002). *Multiculturalism Reconsidered: 'Culture and Equality' and its Critics*, Polity Press/Blackwell Publishers.)

is not only unfair but also irrational and at odds with social utility, diversity ought to be conceived of as inherently valuable, hence a legitimate pursuit for the democratic state.

The relation between diversity and representation, unfortunately, is one of unresolved tension. The classical conception of positive action assumes that a group's under-representation entails its lower position in the social hierarchy. But whether preferential treatment to any one member of the group is the answer depends on the underlying understanding of representation and its functioning. The distinction between social representation and opinion representation⁶⁴⁹ sets the tone of the discourse. The terms are self-explanatory and they have been omnipresent in the positive action debate, either explicitly or implicitly. Early feminists and civil rights activists dismissed the dilemma relatively easily by firmly supporting social representation as the only available way to end years of discrimination and oppression against women. Social exclusion was an apparent as well as appalling reality and positive action presented an excellent opportunity to deal with the situation effectively and immediately.

Historical experience, however, has been disillusionary, proving that the actual difference made by positive action programmes was nowhere near the initial ultra-optimistic predictions. More women (and minority members) were accepted in previously excluded areas and, if anything, this was a sign of progress. But the extent to which this change reflected to the group as a whole was significantly less than intended. The mere presence of women or blacks in positions of power or in the same occupational groups as men does neither mean that they are all on the same footing⁶⁵⁰ nor that the former are willing and able to contribute towards enhancing the overall social status of their

⁶⁴⁹ Perkins, J. and D. L. Fowlkes (1980). "Opinion Representation versus Social Representation; or Why Women Can't Run as Women and Win." *The American Political Science Review* 74(1).

⁶⁵⁰ Bergmann, B. (1996). *In Defence of Affirmative Action*, Basic Books., pp. 42-43.

respective groups.⁶⁵¹ By far the most eloquent example of the latter is the former U.S. National Security Advisor, Condoleezza Rice. During her term of office she explicitly backed the Bush administration in its campaign against preferential treatment for minorities in University admission policies,⁶⁵² although she acknowledged that, in her opinion, race should be taken into account as a morally relevant factor.⁶⁵³ Her reluctance to voice a strong dissenting opinion is rather ironic, considering her public acknowledgement that she was herself a beneficiary of positive action when admitted to Stanford University.⁶⁵⁴

This is not to argue that one's rejection of positive action as ineffective or even unfair signifies automatically the betrayal of one's allegiance to the disadvantaged group. The concept of representation in itself, however, requires a minimum degree of solidarity between the individual "representative" and the rest of the group. A reflection of this should be the existence of shared fundamental beliefs and interests; otherwise positive measures against under-representation would be pointless. To put it differently, commitment to the conception of social representation is inadequate to account for quotas in candidate selection for public offices, because it allows only for a superficial diversity of gender, race or ethnicity and not for a substantial and meaningful diversity in opinions, interests and ideas.

⁶⁵¹ Fredman (supra no.1) contends that the position of many women in Britain declined during the premiership of Margaret Thatcher. The U.S. Secretary of State, Collin Powell, who incidentally has voiced publicly his disagreement with the White House's negative stance on positive action in University admission policies (see Younge, G. (21/01/03). "Powell opposes Bush line on race." The Guardian.), has been the target of similar criticism for his lack of support to the black community (see Younge, G. (23/11/02). "Different class." The Guardian., where the singer and one-time civil rights activist Harry Belafonte is quoted to compare the Secretary of State to a "house slave, permitted to come into the house of the master").

⁶⁵² See Younge, G. (27/01/03). America is a class act. The Guardian.

⁶⁵³ See G. Younge, "A supreme showdown" in The Guardian, 21/06/03.

⁶⁵⁴ See Younge, G. (21/06/03). A supreme showdown. The Guardian.

Many opponents of positive action falsely suggest that under-representation is not an issue as long as democratic institutions ensure in principle that all voices are heard. The very fact that specific social or ethnic groups have always been disproportionately represented in or completely absent from the higher ranks of socio-political hierarchy, far from being coincidental, echoes the fundamental institutional deficit that reproduces a subtle pattern of discrimination, defying equal opportunities and equal treatment. The legal enquiry undertaken here is whether quotas insensitive to the beneficiaries' connectedness with their group are effectively cancelling under-representation. And since it seems impractical to seek a metric system of "group loyalty", the solution is to rethink the group-approach with a view to making it more consistent with the theoretical premises of positive action that encompass both disadvantage and under-representation, as well as more effective in achieving the expected results.

To this end a plausible analysis of under-representation must distinguish between a political sphere (elected public offices, decision-making bodies) and a non-political one. The implications of ignoring opinion representation within the former as a constitutive element of any successful legal provision have already been discussed. As regards the latter, which covers the best part of the employment field, it is apparent that representation does not bear the connotation of political deliberations and expression of group interests. In this respect, under-representation in employment is legally significant for positive action only insofar as it designates disadvantaged social or ethnic groups, which in turn brings about the unresolved questions concerning benefit distribution within the group. Therefore, the classical conception of positive action proves inadequate as a theoretical framework, if the celebrated purpose of "full and effective equality" is to

be achieved. What follows will hopefully provide a viable, coherent and more efficient alternative.

PART IV: POSITIVE ACTION RECONSTRUCTED: A THEORY OF EQUALITY THAT FITS

The final part of the thesis intends to put forward an alternative conceptual framework for equality in Europe and determine the place of positive action within this framework. Constructing a theory of equality is, undeniably, a philosophical task of massive proportions. It goes without saying that such a task cannot be successfully undertaken within the relatively narrow parameters of the present thesis without certain analytical compromises. The main compromise here consists in the conscious methodological decision to construct the alternative conceptual framework against the backdrop of the *specific research questions* constituting the backbone of the thesis. Positive action, therefore, retains its central position and is used as the analytical yardstick to determine the meaning of full equality in Europe.

Instead of attempting to present a fully-fledged theory of equality, then, the following chapters will focus on presenting *a theory of equality that fits*. The objective, in other words, is primarily *normative* rather than purely philosophical. Full equality is translated into a principle of equal treatment, which is premised on *indistinctibility of respect* and *proportionality of concern* as its two conceptual limbs. After establishing the basic framework in chapter 10, the penultimate chapter of the thesis will reconstruct positive action as an integral element of a truly European conception of full equality.

10. The Right to Equal Treatment: *Indistinctibility of Respect* and *Proportionality of Concern*

10.1 Introduction

This section purports to examine equality as an individual right to equal treatment and explore the abstract normative content of this right. Utilising Dworkin's notion of equal concern and respect as a starting point, it will put forward a modified version of this conception, introducing the notions of *indistinctibility of respect* and *proportionality of concern* as the two complementary dimensions of the basic right to equal treatment.

The section will be divided into two parts. The first part will begin by discussing the right to equal treatment as a liberal notion. Throughout its history the concept of equality admittedly presents an interesting paradox: treating persons *as equals* may require treating them *unequally*. This fundamental precept of liberal egalitarianism is, arguably, at its most prominent in Dworkin's theory of equality, who defines the principle of equal treatment as encapsulating a right to equality of concern and respect, requiring the state to remain neutral among different conceptions of the good. Placed within a liberal theoretical framework, this construct should be understood with reference to an omnipresent bipolarity in the equality discourse between formal and substantive equality. Regardless of nuances, refinements and sub-categorisations, the primordial dichotomy between these two has dominated the discourse in one form or another. In this regard, the principal question explored here is whether equality of resources can provide a compelling interpretation of equality that rises above this distinction by combining

procedural and substantive elements and, most importantly, by placing the emphasis on an overarching right to equal respect and concern.

The latter part of the section will investigate the link between the abstract legal principle of equal treatment and the concrete individual right to respect and concern. Its principal aim will be to propose an alternative understanding of the right to equal treatment, one that retains the emphasis on the individual right to respect and concern but is designed to address the major criticisms levelled against liberal egalitarianism in a more convincing way than Dworkin's equality of resources. In this regard, it will be conceded that equality of respect is, by and large, a misleading term, as respect for human worth, encapsulated primarily in the right to human dignity, cannot be susceptible to degrees and, hence, it is not a matter of equality in the first place. The result of this Kantian analysis is that equality of respect collapses into a notion of formal equality, which in turn is, in this context, indistinguishable from what is usually referred to as our common humanity. In reality, then, what is required from the state is *indistinctibility of respect*.

On the contrary, when it comes to equality of concern, state neutrality is not an option. Fair allocation of concern, with a view to protecting and promoting the corresponding individual right, necessarily involves considerations of distributive justice. In this regard, differing amounts of concern shown to each individual or *group* - which is an important difference between the notion of equal concern and that of proportional concern - are not only possible but also essential for realising equal treatment. The claim put forward, therefore, is that the state is under a positive obligation to demonstrate

proportional concern by actively intervening in favour of those more in need of concern, with a view to redressing unjustified inequalities.

10.2 Liberal Equality Revisited: Formalism, Difference and Equality of Resources

10.2.1 *Equality and difference: is there really any room for formalism?*

Modern theories of justice or equality⁶⁵⁵ seem to share a basic Aristotelian assumption:⁶⁵⁶ it is fair to “treat likes alike”. Although this proposition is generally understood as the most eloquent representation of *formal equality*, it is in fact a double-edged sword for the proponents of the latter. Treating likes alike necessarily entails that those in different situations *should* be treated differently. This acknowledgement is shared by advocates of all conceptions of equality and is inevitably one of the precepts of European equality law.⁶⁵⁷ *Difference* should be taken into account *when it matters* in order to achieve equality of treatment. The key question, of course, which constitutes the main point of theoretical and political controversy, is when it *actually does* matter. And, one might add, *what is that which matters* (or matters more) in any particular context and *how* (in what way) or *how much* (to what extent) *it matters*.

Despite their fundamental differences, therefore, contemporary theories of equality and justice must accept that, at least in certain areas of the law, interpersonal comparisons are necessary to determine who is entitled to what. In other words, there is

⁶⁵⁵ It is accepted that “virtually all the approaches to the ethics of social arrangements that have stood the test of time [...] want equality of *something*”. See Sen, A. K. (1979). “Utilitarianism and Welfarism.” The Journal of Philosophy 76(9): 463-489.p. ix.

⁶⁵⁶ Winthrop, D. (1978). “Aristotle and Theories of Justice.” The American Political Science Review 72(4): 1201-1216.

⁶⁵⁷ For an eloquent example see the discussion on the *Thlimmenos* ruling of the ECtHR (infra, chapter 5.3).

consensus on the need of the law to treat certain personal differences as *factual* differences and allocate rights and obligations accordingly. Distinctions and differentiations in the legal treatment of persons, therefore, are perfectly legitimate in principle, insofar as they are not irrelevant or arbitrary. Not only that: such distinctions constitute, in fact, one of the essentialia of the concept of justice itself. In ancient Greek the root of the terms “δίκαιον” and “δικαιοσύνη” - which are translated as “fair”, “fairness” or “justice” - is the word “δίχα” or “δίκᾱ”, which is best translated as “*distinction*”.⁶⁵⁸ *Nomos* or “νόμος”, the Greek term for “the law”, derives from the verb “νέμω”, which means to *distribute* or to *divide*. It is the work of (s)he who is responsible for administering justice and interpreting the law, that is the work of the judge - “δικαστής”,⁶⁵⁹ to make sure that the necessary *distinctions* are part of the interpretive process so that legal treatment of persons is reflective of their normatively relevant differences.

Acceptance of differentiation as an expression of fair and equal treatment is usually linked to the concept of distributive justice. Most major theories of justice and equality appear to be premised upon a common assumption:⁶⁶⁰ a *fair* distribution is one that involves in principle some form of differentiation on the basis of a set of pre-agreed and thus objective criteria.⁶⁶¹ Social benefits and burdens, rights and obligations are allocated, therefore, according to some notion that reflects the recipient’s *desert* however that may be construed or measured. *Merit*, *worth* and *need* are the most commonly used

⁶⁵⁸ And it is also the root of the term *dichotomy*.

⁶⁵⁹ The term “δικαστής” also comes from the linguistic root *δίχα* or *δίκᾱ*.

⁶⁶⁰ Or, at least, concede that the assumption is generally correct.

⁶⁶¹ Objectivity here is taken to mean that the criteria will not be such as to *knowingly* favour a single individual or a group of individuals in advance or by default. Rawls’ “veil of ignorance” obviously inspires and informs this proposition, but it should be noted that the current formulation does not accept all the implications of the Rawlsian theory.

generic terms reflecting this idea of desert in the distributions. Each will be scrutinised appropriately in due course. In the meantime, it is possible to draw some preliminary conclusions.

Incorporating *difference* in a theory of equality poses no conceptual problems insofar as the outcomes of distributions are concerned.⁶⁶² The debate, of course, on the appropriate yardstick of desert is still very much on. And so is the substantive question regarding the choice between any number of possible *interpretations* of merit or any other notion of desert.⁶⁶³ Indeed, this is where the thrust of the matter lies both philosophically and politically. For our present purposes, however, it is enough to maintain consensus on the moderate view that, under any plausible account, *automatically dividing the object into equal shares does not by itself amount to a fair distribution*. Even in cases where allocation of equal shares represents the desired distributive outcome, the above statement remains true. The fairness of such a distribution is not a given; it rather depends on whether the outcome can be justified under the specific circumstances as compatible with the principle of equal treatment. In other words, the fairness of the distribution depends on whether *normatively significant differences* have been taken into account.

Counter-intuitive as it may sound, formal equality also shares this premise. Although it is usually thought to be the least “accommodating” of difference conception of equality, the famous maxim lying at its heart points to the opposite direction, if understood properly. “Treating likes alike”, apart from revealing the Aristotelian progeny

⁶⁶² According to John Rawls’ famous and influential theory of justice that has shaped twentieth century jurisprudence, *difference* is one of the two basic principles of justice. See J. Rawls, *supra* no.20, esp. p. 303.

⁶⁶³ Instead of many, for a recent attempt to tackle the issue see Scheffler, S. (2007). *Distributive Justice and Economic Desert*. *Desert and Justice*. S. Olsaretti, Oxford University Press, at p. 69 and Wolff, J. (2007). *The Dilemma of Desert*. *Desert and Justice*. S. Olsaretti, Oxford University Press, at p. 219.

of formal equality, indicates that the latter can only operate on the basis of a fundamental distinction between those who are “like” one another and those who are not. The necessary condition and logical implication of addressing *only* identical situations in the same way is that different situations will have to be treated differently - otherwise the maxim does not make much sense.⁶⁶⁴ Even under this conception, then, equal treatment cannot be in principle satisfied by a blanket policy whereby every individual receives the exact same percentage of the total of distributable resources.

Establishing that the notion of difference is in some way connected or compatible with formal equality is by no means enough to provide us with final answers on its theoretical validity or usefulness. Centuries of philosophical investigation and argumentation, of course, cannot be lightly dismissed in a few paragraphs. Proponents of formal equality will be quick to respond that they do not deny the *possibility* of an uneven distribution of benefits or obligations. On the contrary, this is a desirable result in their eyes, as it affirms the primacy of the individual through allowing personal choices to become the decisive factor in the distribution. Essentially, formal equality is about *process* rather than substance: it is concerned with the fairness of the criteria of distribution, selection or election. It is not concerned with the outcome of these processes because it rests on the assumption that, insofar as due process and the rule of law are observed, the outcome must be regarded as *fair in an objective sense*. Formal equality, therefore, is not about utility, collective or individual, and it is not about reducing inequalities; its purpose is to ensure that such inequalities are *legitimate* and, hence, justified. Legitimacy, in this view, stems from the *impartiality* of the distributing apparatus: the role of the latter is to remain a *neutral guarantor* of procedural objectivity

⁶⁶⁴ Instead of many see Lucas, J. R. (1965). "Against Equality." *Philosophy* 40(153): 296-307.

and fairness. If these conditions are met, no individual will be entitled to “complain” of unequal treatment, even though she might end up being worse-off compared to her fellow citizens.

It has already been stated that such a conception of equality is in tandem with the *primacy of the individual*, one of the traditional building blocks of liberal political theory. A liberal state is expected to set up a normative framework that “treats persons equally” in the first instance and then operates with the minimum intervention in the actuality of their social life.⁶⁶⁵ Substantive questions regarding one’s desired plan of life or one’s perception of happiness are inherently subjective and should thus be left to individual discretion, limited only by the rights of others and, under certain circumstances, by safeguards for the protection of minorities. Depending on the “strictness” or “purity” of the version, liberalism (in its less libertarian formulations) may be open to accepting the notion of the common good as a legitimate restriction to individual freedom.

Equal treatment, in this respect, amounts to a very simple and easy-to-follow principle: *law in itself should be “blind” to difference*. Individual differences, then, will count exactly because the law allows them to count by being indifferent towards them. The emerging paradox should by now be obvious: *formal equality*, allegedly hostile to difference due to the “blindness” argument, appears to *celebrate difference as an expression of individualism*. In doing so, formal equality is self-destructive or, to put it more accurately, *self-deconstructing*. It is premised on a sharp distinction between process and outcome, asserting that the latter is *always* justified in view of the former. But how can this be the case when the inter-personal differences that determine the outcome may have been acquired in an *improper* manner? What if these differences are

⁶⁶⁵ With the possible exception of the realm of criminal law.

the result of *horizontal indirect discrimination* for instance, that is discrimination that cannot be attributed to the fault of state actors or of the distributive process itself?⁶⁶⁶

These two questions point to a direction where procedural approaches to equality and justice seem incapable to follow. Constructing a normative framework that insulates the distributive process from externalities is aimed at regulating the “state v. individual” relationship. *Horizontality*, however, is completely left out of the equation. The fairness of the distribution from an equality point of view cannot be assessed in a vacuum, as equality is not an a priori concept. Personal and social circumstances play a crucial role in defining the actual content of equal treatment in any given situation. What we need, therefore, is a theory of equality that takes into account all these considerations and is centred around an overarching individual right to equal treatment, combining due process with substance, fairness of procedure with tangible outcomes.

Dworkin’s theory of equality seems an obvious candidate. In his latest major work, under the eloquent title *Sovereign Virtue*, Dworkin refines the notions of equal concern and respect that he has introduced in the seventies and places them at the heart of his version of liberal egalitarianism. “No government is legitimate”, he claims, “that does not show equal concern for the fate of all [...] citizens”, given that “[e]qual concern is the sovereign virtue of political community”.⁶⁶⁷ He then explains that “equal concern requires that government aims at a form of material equality”, which he has famously labelled “equality of resources”.⁶⁶⁸ This elaborate construct inspires the analysis that follows, serving at once as its theoretical background and as the starting point of the alternative interpretation proposed later on.

⁶⁶⁶ Assuming that the latter remain impartial.

⁶⁶⁷ Dworkin, R. (2002). *Sovereign Virtue*, Harvard University Press, p. 1.

⁶⁶⁸ Ibid, p. 3.

10.2.2 Equality as the “sovereign virtue”: the right to equal concern and respect

Suggesting that every human being is entitled to the respect and concern of others in general and of the state in particular possesses instinctive appeal. It is a proposition that one should find very difficult to discard, disregard or disagree with in principle. Apart from its obvious moral dimension, relating to a moral duty of care one owes to the fellow members of one’s species, it resonates with a basic idea of social justice. Either as a political or as a normative concept, the latter affirms, first and foremost, the innate value of human beings and underpins a system of governance and a system of law that reflect this common value. The recognition of a right to respect and concern encapsulates, in a sense, the semantic differential between the state of nature and the social condition of humanity.

One might be tempted, at the first instance, to suggest that there is no obvious need to conceive of these two notions as essentially intertwined. It is possible to disengage the right to respect from the right to concern, as the former seems to be a more suitable candidate to attract unreserved support from different political and philosophical camps, when it comes to agreeing on the absolute minimum obligations of a state towards its citizens. Failure to show respect for a person’s worth as a human being definitely deprives a state not only from legitimacy but from its *raison d’être*. A state that disrespects the innate value of human life fails to justify its very existence under any rational explanation of the social condition of humanity. But it may not be equally clear or straightforward why the same is true about the right to concern. One might argue that

the recognition of human worth, coupled with a tangible display of respect, should suffice to delineate the bare minimum obligation of a state towards its citizens.⁶⁶⁹

This is simply false. The right to concern, far from being the mere reflection of a moral duty, stems from a fundamental commitment to the democratic principle. Concern for the well-being⁶⁷⁰ of everyone stems from the realisation that the state - or, at least, the *democratic* state - is the outcome of a society of equals, a society that is comprised by members that claim their membership to it on grounds of their common humanity. If every person, then, comes to this social arrangement as *a priori* equal to everyone else, it is only logical to expect the state to account for the discontinuation of this *preliminary* social relationship of equality. Viewed in this light the right to concern entails a basic state obligation to continually *check* whether the differentiations in individual status are justified despite of common humanity. In this regard and upon further reflection, the right to concern, alongside the right to respect, can be conceived of as the true precondition of the democratic polity.

Consensus ceases to exist, however, when the adjective “equal” is added to the equation. Three major types of disagreement can be identified in this regard. First, there is disagreement as to the necessity of referring to the concept of equality in the first place. If common humanity is the foundation of the right to respect and concern the argument goes, then there is no real equality consideration involved, since the notion of humanity

⁶⁶⁹ Such an argument need not deny that a state might, in actual fact, have more obligations towards its citizens; it could simply suggest that any further obligation that a state has undertaken is a matter of social conventions, either in the typical form of a social contract (in which case state obligations stem from an explicit or implicit pact among citizens) or in any other similar form (as the obligation of a state to protect its citizens from harm that itself has brought upon them in the first place). For the purposes of the present discussion it is easier to think of this argument and of its rebuttal in contractarian terms, so that one can readily rule out the possibility of an authoritarian social arrangement with forced membership.

⁶⁷⁰ Not necessarily for the *welfare* in its commonly used sense in the context of political philosophy.

does not allow for degrees or differentiations. I shall call this the “triviality argument”, with the aim to prove that there is nothing trivial about equality in this regard.

Second, there is disagreement as to the “correct position” of the adjective “equal” within the proposition. Although most people⁶⁷¹ would probably agree that everyone is, in principle, *equally* entitled to respect and concern merely on grounds of their humanity, they would be reluctant to concede that everyone is, in principle, entitled to *equal* respect and concern, if equal here is taken to mean “equal shares” of respect and concern. Given that the notions of respect and concern are by default open to quantitative differentiations, the amount of respect or concern owed to each individual may vary depending on this individual’s attitude, behaviour, qualities or actions. I shall call this the “linguistic argument”, purporting to prove that the difference between “treating equally” and “treating as equals”⁶⁷² is void of normative substance and has been used only because there is linguistic confusion as to the meaning of equal treatment. If the latter is properly understood, it will be argued, then the term “treating equally” collapses into “treating as equals”, as the two should be conceived of as normatively tautological. Any remaining disagreement, therefore, is a disagreement about the concept of equality per se and of its normative consequences.

Third, as explained above, there is disagreement regarding the correct normative content of the proposition specifically with regard to the notions of “respect” and of “concern”. In other words, the actual meaning of “respect” and “concern” within a legal framework may be contested, even if one is willing to accept that there exists a relative state obligation to protect and promote a basic equality right in this context. I shall call

⁶⁷¹ Or, at least, most of those who are not convinced by the triviality argument and would not oppose to equality being a legitimate consideration in this case.

⁶⁷² This distinction, employed by Ronald Dworkin, elucidates the type of disagreement identified here.

this the “normative” argument. This is to signify that the extent of the positive obligation may be open to debate - and a substantive one for that matter. But for all intents and purposes the issue here is primarily one of equal treatment. Regardless of disagreements on the particular distributions of social benefits, therefore, one must acknowledge that the “correct” amount of respect and concern owed to a particular individual or group may in principle depend on the amount of respect and concern shown to another individual or group.

10.3 Interpreting the Legal Principle of Equal Treatment: Indistinctibility of Respect and Proportionality of Concern

10.3.1 Equal treatment as the right to indistinctibility of respect.

Indistinctibility of respect, as one of the two dimensions of the right to equal treatment, denotes a basic obligation to treat every person as a moral agent worthy of respect for her human dignity and her personality *solely* on the basis of her humanity.⁶⁷³ Premised on the assumption that our common humanity is an inalienable feature of individual identity, the right to indistinctibility of respect prohibits *any distinction or grading* of persons as regards their human worth on any grounds.

Indistinctibility of respect *prima facie* mirrors the generally established principle of non-discrimination *minus the possibility of justified exceptions*. This difference can be seen most eloquently in the context of the initial confusion caused by the wording of article 14 ECHR in the French original text. The phrase “*sans distinction aucune*” literally translates into English as “*without any distinction*”, which would effectively entail that *any* differentiation in the enjoyment of rights - be it in terms of their personal scope of application or in terms of possible restrictions or limitations to them - would automatically be contrary the Convention. To avoid such an absurd and clearly undesired outcome the English original text reads “*without any discrimination*”, which covers only those distinctions that are unjustified. Indistinctibility of respect, therefore, can be understood as a notion encapsulating the “French version”, whereby no distinction is legitimate.

⁶⁷³ The Kantian origins of this position are obvious and the influence of Kant’s theory in constructing the category of indistinctibility of respect is duly acknowledged.

This reading of indistinctibility of respect, however, is misleading. Discrimination is not the appropriate conceptual yardstick by which to explain how indistinctibility of respect operates either on a philosophical or on a normative level. The reason is simple: discrimination is intrinsically connected with some form of *comparison*. Its identification requires an actual or, at least, a perceived relationship of inequality between two individuals or groups, namely a *victim* and a *comparator*. In a very real sense, therefore, the existence of a victim presupposes the possibility of a comparison. For a comparison to be *possible* an *identifiable* comparator needs to exist.⁶⁷⁴ Let us label this the “*no comparator, no victim*” principle. When it comes to indistinctibility of respect, this principle is not applicable. Anything but *full* enjoyment of the right to respect will lead to a violation, *irrespective of* any actual or potential comparisons.

The difference, then, between indistinctibility of respect and non-discrimination is more profound than one might recognise at first glance. Being an equal to all other persons in this sense requires a departure from a traditional understanding of equality that accepts, explicitly or implicitly, non-discrimination as a necessary minimum or an inevitable starting-point.⁶⁷⁵ Prohibition of all distinctions within this narrowly defined framework renders discrimination a factual impossibility. Identifying whether and when a violation occurs does not call for anti-discrimination considerations, because anything that would normally qualify as discrimination collapses into a breach of the right to respect *in itself*. Equal treatment as indistinctibility of respect, therefore, is, in reality,

⁶⁷⁴ Note the difference here between *identifiable* and *identified* comparator, which explains why the precondition of victim status is in fact the *possibility* (rather than the actuality) of carrying out a comparison.

⁶⁷⁵ This is primarily the case with formal conceptions of equality, but it is also true for substantive equality and its variations. The latter go, admittedly, much further than non-discrimination, but they still seem to accept it as an inevitable starting-point.

completely disengaged from the anti-discrimination rationale and not just a variation of it.

What is, then, the actual legal content of the right to indistinctibility of respect as defined here? Protection of human dignity in all its forms obviously constitutes the basic normative materialisation of this abstract right. Fundamental rights further substantiating this protection, such as the right to life,⁶⁷⁶ the right not to be tortured or be subjected to inhuman or degrading treatment,⁶⁷⁷ as well as *personality rights*, should also be considered as particular expressions of the general right to respect.

The link between indistinctibility of respect and those rights directly stemming from human dignity seems to be self-explanatory, as they are both “transpositions” of our common humanity into the realm of the law. In other words, insofar as a breach of any of these rights constitutes an affront to human dignity,⁶⁷⁸ the right to respect will also be automatically engaged as the overarching general legal principle. Interrogation practices, for instance, that are found to be contrary to Article 3 ECHR will also be in violation of the right to respect regardless of whether they amount to either torture or inhuman or degrading treatment.

Personality rights, on the other hand, may constitute a somewhat disputed territory, mainly because of the possibility to conceive of personality as an expansionist notion that covers various facets of a person’s social condition. If personality rights, in this regard, extend from protection against libel to participation in the economic life, the notion of indistinctibility of respect may become unintelligible given the rigid prohibition

⁶⁷⁶ Article 2 of the European Convention of Human Rights (ECHR). The rights enshrined in the ECHR are taken here as a proxy of the minimum common denominator of the European constitutional traditions on the protection of rights.

⁶⁷⁷ Article 3 ECHR.

⁶⁷⁸ Which is their common underlying rationale.

of distinctions it involves, as this will render it practically unworkable and normatively undesirable. Undoubtedly, the relationship between indistinctibility of respect and personality rights needs further elaboration, with a view to addressing the pragmatic concerns raised by the latter without jeopardising the theoretical integrity of the former. This is, however, a task that goes beyond the limits of the present enquiry and cannot be undertaken here.

Returning to the main axis of analysis, the proposed working definition of indistinctibility of respect offers a preliminary response to the “normative” argument, as it provides a minimum content of the right to respect. Further refinement, of course, is required in order to specify the particular obligations of the state when the right to respect is at stake either in itself⁶⁷⁹ or in the form of any of its constituent rights. This will also explain why *indistinctibility* of respect is preferable to *equality* of respect, both in terms of terminology (“linguistic” argument) and in terms of substance.

Starting with the substance of the matter, it is necessary to repeat the basic justificatory rationale of the present analytic project. The reason for proposing an alternative to the right to equal respect in the first place is that resource equality fails to encapsulate what the right to respect is really about.⁶⁸⁰ In fact, Dworkin explicitly links resource equality with the right to concern in most of his writings but is considerably more cryptic on its relationship with the right to respect. This is not to say that distributive justice is, in his view, irrelevant to the right to respect. And how could this be, when he advocates for a right to *equal* respect? It follows that the model of equality of

⁶⁷⁹ This would be the case, if the material expression of respect to a particular individual or group was *different* from that offered to others.

⁶⁸⁰ The same justificatory rationale, of course, applies *mutatis mutandis* to the right to concern.

resources that he proposes must be understood as incorporating the right to equal respect as one of its foundational elements.

Arguably the right to equal respect in this light resembles a *negative* or *first generation* right,⁶⁸¹ according to the classical - yet somewhat obsolete - distinction in the human rights discourse. The liberal state is primarily expected to remain a neutral arbiter between different conceptions of the good, different ideas on what constitutes a successful choice in the pursuit of a fulfilling life for every individual. Equal respect, in this view, mirrors a notion of formal equality: since all persons are alike in their common humanity, the right to equal respect entails that they are entitled to be treated in the same way insofar as the constituents of this humanity are concerned.

This account fails on two grounds: first, it commits the right to equal respect to a formal conception of equality, the problems of which have already been thoroughly discussed. Second, through equality of resources it attaches excessive importance to individual choices. In this regard, treating people as equals collapses, in fact, into treating them with equal respect to the *choices* they make. Plausible as this may seem at first glance, it produces undesirable and contradictory outcomes when applied to a number of real life situations.

This latter point needs further elaboration. Respect for human worth, as the essence of our common humanity, should be conceived of as being in principle *independent from individual choices*.⁶⁸² The right to respect, as defined here, does not involve respect for actions or behaviours; it is rather a more profound respect for the human condition that cannot be cancelled, diminished or reduced for any reason

⁶⁸¹ Arat, Z. F. K. (2006). Human Rights Worldwide: A Reference Handbook, ABC-CLIO., pp. 33-37.

⁶⁸² This should not be confused with the classical Kantian view that moral worth is independent from *all contingencies*. For a thoughtful discussion of this point see B. Williams, *supra* no.187.

whatsoever. Arguing to the opposite is conceivable only in an “Old Testament” view of the world, where criminal justice can legitimately deliver sentences as cruel and inhuman as the crimes committed. Modern legal systems, on the contrary, are invariably premised upon a foundational assumption that society (or the state) owes to all persons a minimum of respect mirroring their humanity regardless of or even despite their actions. This Kantian notion⁶⁸³ prevents society from responding to an affront to human worth with another affront. Even perpetrators of crimes against humanity benefit from this minimum of respect that does not depend on reciprocity.

It is particularly interesting to note that the argument holds true even if one accepts the death penalty as a legitimate form of punishment. In that case the right to respect materialises as the determinant factor of the acceptable forms to deliver the punishment and the conditions under which this will be carried out. In its landmark decision in *Soering*⁶⁸⁴ the European Court of Human Rights refrained from proclaiming that the possibility of facing capital punishment was in itself reason enough to deny extradition of the applicant to the United States. It then went on to find in favour of the applicant anyway on grounds of the existence of the death row phenomenon, which “would expose him to a real risk of treatment going beyond the threshold set by Article 3”.⁶⁸⁵

Preference for the notion of indistinctibility rather than equality of respect is further evidenced when one considers the following scenario. A sexually active adult

⁶⁸³ According to Kant’s philosophical construct moral worth (which is very similar but not necessarily tautological to what we have identified here as *human* worth) is independent of contingencies and, hence, equal respect is owed to each person in his or her capacity as a rational moral agent. For the purposes of the present argument it would suffice to accept that every person has the *potential* to act as a moral agent, as a result of his or her humanity, even though not everyone fulfils this potential to the same extent.

⁶⁸⁴ *Soering v. the United Kingdom*, (1989) 11 E.H.R.R. 439.

⁶⁸⁵ *Ibid.*

consciously decides to stop practicing safe sex, despite the fact that he has multiple sexual partners and that he is fully aware of the dangers involved. Assume now that this genuine choice, driven purely by hedonistic considerations, results in the person contracting a life threatening sexually transmitted disease. Is it plausible to deny this person access to the public healthcare system on the basis of his bad individual choices?

Discounting scarcity of resources for the time being, which is a factor pertaining to *concern* rather than to respect, the answer should clearly be a negative one. From a human rights perspective it is simple to justify this answer by reference to the right to life, which involves a positive obligation of the state to provide its citizens with adequate medical assistance when faced with life threatening diseases. The justificatory rationale supported by indistinctibility of respect is equally self-explanatory. Leaving a person unassisted in such a case would violate the right to indistinctibility of respect, provided that the right to health or the right to life are recognised as established legal expressions of the right to respect.

From an equality of resources point of view, however, justification can only stem from the operation of the hypothetical insurance device. “Average people of normal prudence” would have probably purchased insurance against illness and diseases, had they had the opportunity to do so on equal terms. In the context of our example, though, such justification is inadequate for two reasons.

First, the individual in question can hardly be described as a person of “normal prudence”. His choices, at least insofar as the matter at hand is concerned, indicate rather that he is consciously and explicitly willing to undertake a much higher than average risk. It is unclear in this case how exactly equal respect materialises into a positive state

obligation and what the extent of such obligation under resource equality might be. One might be quick to remark that a person in the habit of engaging in risk-prone projects would have had all the more reason to insure himself against the potential adverse effects of such choices. This line of argument is at best debatable, as it presupposes a level of analytical skills and a degree of self-understanding that seem to go beyond those of the average person.

Even if this line of argument is correct, however, there is a second dimension in which resource equality fails to address situations where individual choice should not count against the person. This is particularly evident in the context of cross-border situations, where an individual has the status of a real rather than a hypothetical immigrant. In this case, he may find himself in the position of getting more than he bargained for, especially if he comes from an authoritarian or inegalitarian home state. Consider the facts in another seminal Strasbourg judgment, that of *D v. UK*.⁶⁸⁶ The case concerned the deportation of a terminally ill AIDS patient from the UK to St Kitts. D was detained upon entering the UK in 1993 for possession of a large quantity of cocaine and, while serving his sentence, he was diagnosed with AIDS. Prior to his release and with a deportation order already issued by the immigration authorities, D filed a request to remain in the UK on grounds that his life expectancy would be substantially shortened if he were to be removed to St Kitts, where there existed no appropriate means of medical care for AIDS patients. His request was refused by the administration and the decision was upheld by domestic courts.

The reasoning of the judgment is illuminating. The Court starts off by reminding that it “has repeatedly stressed in its line of authorities involving extradition, expulsion or

⁶⁸⁶ *D v. the United Kingdom*, 2nd May 1997, application no. 30240/96, Reports 1997-III.

deportation of individuals to third countries that Article 3 [...] prohibits in absolute terms torture or inhuman or degrading treatment or punishment and that its guarantees apply *irrespective of the reprehensible nature of the conduct of the person in question*”⁶⁸⁷ [emphasis added]. In other words, the right to respect for the human condition, either as human dignity or as protection from torture and inhuman and degrading treatment, should be understood as *independent from individual choices*. Removing D from the medical and palliative care he has been receiving during his stay in the UK “would expose him to a real risk of dying under most distressing circumstances and would thus amount to inhuman treatment”.⁶⁸⁸

The Court, of course, is fully aware of the disruptive effects of potential free-riding on the national healthcare systems, if the gates are wide open for healthcare or social benefits-shopping. In this regard, it “emphasises that aliens who have served their prison sentences and are subject to expulsion cannot in principle claim any entitlement to remain in the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance provided by the expelling State during their stay in prison”.⁶⁸⁹ The exceptional nature of the circumstances in *D v. UK* is confirmed by the recent judgment in *N v. UK*.⁶⁹⁰ The case concerned N, a Ugandan citizen and AIDS patient, living in London. Her allegation was that her return to Uganda, after the refusal of immigration authorities to grant her asylum, would cause her suffering and lead to her early death due to her illness. The Court reiterated that “the fact that the applicant's circumstances, including [her] life expectancy, would be significantly reduced if [she]

⁶⁸⁷ Ibid, para 47.

⁶⁸⁸ Ibid, para 53.

⁶⁸⁹ Ibid, para 54.

⁶⁹⁰ *N v. the United Kingdom*, Grand Chamber, 27 May 2008, application no. 26565/05.

were to be removed from the Contracting State is not sufficient in itself to give rise to *breach* of Article 3”⁶⁹¹ [emphasis added]. Admitting that “the level of treatment available in the Contracting State and the country of origin may vary considerably”, there is no “obligation on the Contracting State to alleviate such disparities through the provision of free and unlimited health care to all aliens without a right to stay within its jurisdiction” as this would “place too great a burden on the Contracting States”.⁶⁹²

This rationale fits well with the notion of indistinctibility of respect. Note that the Court in *N v. UK* suggests that expulsion or extradition is not in itself enough to find a *violation* of Article 3. It is, however, obviously enough to *engage* Article 3. There appears to be little doubt that the issue may be connected to a fundamental overarching right to respect as presently defined. Although the threshold to find a violation of the constituent rights of the latter is admittedly high, it is sufficient for our goals here that possible affronts to human worth do not involve formal equality considerations and that comparators and comparisons are completely left out of the equation. By the same token, the right to respect is not merely a negative right; under certain circumstances it requires the state to take active steps towards upholding and protecting it, as in the case of *D v. UK*, where the United Kingdom is under an obligation to *continue* the provision of palliative and medical care.

What remains to be examined in this context is the “triviality argument”. This is simultaneously the easiest and the most difficult to deal with at this point. The reason is none other than the partisan nature of the philosophical arguments involved. Equality possesses a peculiar trait as a concept: when invoked, it usually generates instinctive

⁶⁹¹ Ibid, para 42.

⁶⁹² Ibid, para 44.

reactions, positive or negative, to those participating in the discourse. Both opponents and advocates engage in the discourse with the implicit or explicit realisation that whatever conclusion they come to will necessarily pertain to the most basic of questions in political philosophy. Above all else the answers to questions of equality involve a choice about the kind of political society we wish to live in.

Why, then, is it easy to make sense of the “triviality” argument in the context of indistinctibility of respect? The answer is simple: in view of the preceding analysis it is clear that the “triviality” argument is partly accepted as valid. As explained earlier, the right to indistinctibility of respect translates into a basic non-discrimination principle without the possibility of justified exceptions. In this sense, showing anything less than *full* respect to each individual or group should constitute a violation of the right to respect *per se*, without the need to demonstrate an *inequality* compared to any other individual or group. By removing the element of comparison from the equation, indistinctibility of respect will, arguably, be a more satisfactory notion for the critics of equality.

By the same token, however, the “triviality” argument is difficult to deal with properly in the narrow confines of the present chapter. This is because the concession regarding its validity applies only insofar as equality of respect is understood as formal equality. Introducing the notion of indistinctibility of respect as a better analytical alternative does not entail that there is no connection whatsoever between the right to respect and the principle of equal treatment. On the contrary, there exists a dual connection that should suffice to dismiss the “triviality” argument, at least in its strictest formulation for our present purposes.⁶⁹³

⁶⁹³ See for instance P. Westen, *supra* no.188. For a more comprehensive critique of equality see Raz, J. (1986). *The Morality of Freedom*, Clarendon Press (OUP)., ch. 9.

First, indistinctibility of respect endorses the existence of a distributive dimension to the relevant right and the corresponding state obligation. Protecting this right to respect involves active state intervention, when necessary through its mechanisms for redistribution of social and material resources, so that human dignity or personality related rights do not become “theoretical and illusory”⁶⁹⁴ but are fully enjoyed *in practice* by everyone. In this regard, the right to respect cannot be disengaged from the right to concern. Proper evaluation of an issue arising under any of the two requires that the validity of the outcome is tested against the other.

The examples discussed above illustrate this point. Even if the United Kingdom was found to be under an obligation not to deport D on grounds of his right not to be subjected to inhuman treatment, reducing the level or quality of medical treatment offered to D would have been discussed in the related but different context of his right to *concern*. In this regard, scarcity of resources, for instance, or his status as an alien could count as legitimate reasons to justify differentiations in treatment, insofar as these do not fall under a minimum threshold - which would amount to a violation of the right to respect. Allowing for the possibility of differentiations, however, automatically brings equality back into play.

Following on from that point, the second and arguably more concrete link between indistinctibility of respect and equality is a negative one, in the sense that it comes to the fore when the right to respect is violated. The fact that anything less than full respect amounts to a breach of the said right says nothing about the appropriate means of retribution to the victim of the violation. Equality in the form of comparison

⁶⁹⁴ According to the standard terminology employed by the European Court of Human Rights.

between individuals or groups, then, must also be taken into account when considering the appropriate type or level of retribution for such a violation.

It is particularly important to realise that the appropriateness of such retribution involves a sometimes precarious balance between an *external-objective* and an *internal-subjective* point of view. Legislation and policy decisions will be formally compatible with indistinctibility of respect when they assume an objective point of view, when, that is, they do not undervalue the human worth of any individual or group affected by them. This, however, is not sufficient. Decisions should also be *substantively* compatible with indistinctibility of respect, which requires law or policy-makers to value *equally* the *subjective* perceptions of individuals or groups regarding respect for their human worth. For it to be consistent with its liberal pedigree indistinctibility of respect needs to steer clear from *essentialist* evaluations of what constitutes a “worthy” plan of life on the part of the state, which would inevitably lead to an assimilationist - and, for this reason, illiberal - understanding of equal treatment. It is imperative, therefore, that breaches of the right to respect are rectified in a way that mirrors the particular needs and “preferences” of those that suffered the breach.

10.3.2 Equal treatment as the right to proportionality of concern.

Proportionality of concern, as the second dimension of the overarching right to equal treatment, shares the basic philosophical premises of the notion of equal concern in the “traditional” liberal formula. It denotes a commitment to a fundamental duty of care born by the community as a whole towards its individual members. Concern materialises into legislation or policy decisions that allocate various types of social benefits

proportionally, that is on grounds of *desert* or *need*.⁶⁹⁵ These benefits may take the form of specifically tailored rights that are reserved for a particular group,⁶⁹⁶ fluctuating degrees of obligations according to individual capacity⁶⁹⁷ or allocation of *preference* to members of a targeted group, as in the case of positive action.

Aiming to treat people as equals presupposes an interpersonal comparison of situations so that individual attributes,⁶⁹⁸ as well as societal facts,⁶⁹⁹ are taken into account. *Difference*, then, is at the heart of liberal equality. This fascinating paradox, explored thoroughly in strands of the relevant literature - feminism and critical race theory being two prominent examples - is ironically one of the least controversial aspects of a highly debated topic. Liberal egalitarianism, with all its shortcomings, is admittedly correct in attempting to reconcile two fundamental tenets of political community, liberty and equality.⁷⁰⁰ Contentious as the outcomes of this philosophical endeavour may be and leaving aside the extreme ends of the academic and political spectrum,⁷⁰¹ there appears to be a relatively broad consensus that any state intervention should seek to enable rather than frustrate individual autonomy. In most cases, however, this enabling function cannot

⁶⁹⁵ The terms *desert* and *need* are admittedly value-laden and seem to already place the notion of proportional equality within the relevant discourse. Proportionality of concern can, indeed, be classified as a needs-based approach to equality, but the particularities of this classification and the extent to which it is justified will be fully explored later on in this section.

⁶⁹⁶ This is the case, for instance, with the right to *legal aid* in criminal proceedings for defendants who cannot afford legal representation.

⁶⁹⁷ The archetypical example of proportional equality applied across modern legal systems is none other than *tax law*, which is premised upon the basic principle “from one according to one’s financial capacity”. This is, of course, true of *direct* taxation.

⁶⁹⁸ Such as gender or race.

⁶⁹⁹ Such as gender or race *discrimination*.

⁷⁰⁰ J. Rawls, *supra* no. 20.

⁷⁰¹ Ranging from the deification of individual liberty and of the invisible self-regulating powers of the market (Nozick, *supra* no.517) to the total negation of individuality and difference that is symbiotic with tyrannical regimes.

in principle be fulfilled by means of blanket policies that are insensitive to existing inequalities, material or otherwise.

As such, the notion of proportionality of concern introduced here does not pose any challenge to the basic liberal conceptual framework - at least in its non-extreme formulations. Starting from the position that a “one size fits all” approach is generally incompatible with the legal phenomenon,⁷⁰² proportionality of concern advocates that *equal treatment in principle does not amount to uniformity*.⁷⁰³ Crude generalisations about the human condition are incapable of providing a solid foundation for the actions of a liberal state and, as a result, some degree of normative *flexibility* in approaching individual situations is *sine qua non*, if we are to avoid the pitfall of essentialism.

The semantic difference, however, between proportionality of concern and its traditional liberal counterparts consists in its *rationae materiae* and its *rationae personae* scope of application. Egalitarian theories of justice of late seem to favour a clear divide with regard to the material content of concern.⁷⁰⁴ From an analytical point of view it is possible to classify them into two large but distinct categories, namely those advocating *welfare* and those prioritising *resources* as the correct yardstick for concern respectively.⁷⁰⁵ Proportionality of concern cuts through this divide, proposing that the

⁷⁰² This incompatibility obviously does not refer to general principles of law, which, despite their generality, do not constitute a “blanket” approach.

⁷⁰³ Uniformity of treatment, of course, is not in itself impossible or a priori illegitimate. It will be the inevitable outcome in cases where interpersonal comparisons *happen* to involve two individuals in *identical* situations.

⁷⁰⁴ For an insightful analysis see Nussbaum, M. C. and A. K. Sen (2002). Introduction. *The Quality of Life*. M. C. Nussbaum and A. K. Sen, Oxford University Press.

⁷⁰⁵ See generally Rae, D. (1981). *Equalities*, Harvard University Press.. For present purposes Ronald Dworkin is regarded as the leading advocate of equality of resources, while equality of welfare is understood in terms of both its classical utilitarian formulation and its more refined modern variants. For an example of the former see Hare, R. M. (1981). *Moral Thinking. Its levels, Method and Point*, Oxford University Press. For the most eloquent specimens of the latter instead of many see Sen, A. K. (1979).

state should be concerned for *both the welfare and the resources* of its citizens when treating them as equals.⁷⁰⁶ Proportionality of concern also deviates from the standard liberal version in that its personal scope intends to cover individuals *as well as social groups*. In this regard, concern is not understood as being allocated solely on an individual basis, but it explicitly requires provision for the disadvantaged, the underprivileged, the under-represented or the socially excluded.

Let us try to explore these two novel dimensions that proportionality of concern introduces in more detail, starting with the *rationae personae* scope. Liberalism is traditionally focused on the primacy of the individual, so much so that it has become oblivious of a growing social tendency. Multiculturalism is nowadays the norm in a globalised world. This is particularly true for western societies that aspire to take the lead in the protection of human rights and in the recognition of *otherness* as part of our collective self, part of a larger, more comprehensive, common “we”.⁷⁰⁷ Despite the best of intentions, this recognition is carried out in an erroneous way. By allowing individualism to take unconditional conceptual precedence, there is a risk of favouring *assimilation* over equality. Social groups seem to become relevant only indirectly, when discrimination against their individual members is at play.

"Utilitarianism and Welfarism." *The Journal of Philosophy* 76(9): 463-489.; A. K. Sen., supra no.656 (on the “capabilities to achieve functionings” approach); Cohen, G. A. (1989). "On the Currency of Egalitarian Justice." *Ethics* 99(4): 906-944.(on the “equality of access” approach).

⁷⁰⁶ This may have similar normative effects to but it is not the same as suggesting that equality of resources presupposes equality of welfare. For an elaboration of the latter position see Roemer, J. E. (1986). "Equality of Resources Implies Equality of Welfare." *The Quarterly Journal of Economics* 101(4): 751-784.

⁷⁰⁷ Modood, T. (1997). Introduction: The Politics of Multiculturalism in the New Europe. *The politics of multiculturalism in the new Europe: Racism, Identity, and Community*. T. M. a. P. J. Werbner, Zed Books., chapters 1 and 2.

Proportionality of concern addresses this deficiency by requiring that equal consideration is given to both groups and individuals in decision-making. The celebrated primacy of the individual is not compromised, but it is recalibrated so that it mirrors more accurately the reality of identity-formation in modern societies. Instead of being understood as a singular unit, the individual is conceived of as the resultant of various components, including biological characteristics and their potential social connotations, as well as multiple and, at times, overlapping memberships of a plethora of social *groups*. When the state, therefore, shows its concern for its citizens, it must make sure that it knows *who* these citizens really are, what they *perceive* themselves to be and how *strongly* the groups they belong to affect their personality, preferences, opportunities and needs.

Turning to the second novelty of proportionality of concern, namely its rationae materiae scope, one must note that the dichotomy between welfare and resource equality may not be as rigid as their respective advocates usually proclaim. The key to overcome the dilemma this dichotomy poses is to conceive of *disadvantage* as the indisputable focal point of both the philosophical enquiry and the normative instruments of equality law. In a major recent work of political philosophy Wolff and De-Shalit⁷⁰⁸ make a decisive step in this direction. They claim that disadvantage should be understood in a *pluralist* sense,⁷⁰⁹ so that it takes into account the complexity of social relations. In this view, then, the notion of disadvantage may encompass deficits both in terms of welfare and in terms of resources. What is more important is that, according to the authors, it is possible to find consensus on a general idea that governments should gear policy-making

⁷⁰⁸ Wolff, J. and A. De-Shalit (2007). *Disadvantage*, Oxford University Press.

⁷⁰⁹ Ibid, chapter 1, esp. pp. 22-23.

towards giving “priority to the worse-off”,⁷¹⁰ even in the absence of agreement on the actual content or roots of disadvantage.

The general lines of proportionality of concern, then, are in place. A full exposition of the theory in all its dimensions is, of course, an impossible task, given the space limitations of the present project. There is, however, one important aspect of the analysis that moves a step further from the Wolff and De-Shalit position and must be highlighted. Although proportionality of concern fully ascribes to the general views expressed by the authors, it is also explicit as to how *priority* to the worse-off should materialise in the realm of law through the use of positive action.⁷¹¹ The latter, under proportionality of concern, is not only a legitimate means to an end but also an *obligation* of the state in particular areas of the public sphere.⁷¹² It is now time to test this theoretical construct and its implications against the backdrop of the existing European normative framework, as defined in the preceding analysis.

⁷¹⁰ Ibid, p. 155.

⁷¹¹ Wolff and De-Shalit also delve into this issue in chapter 10, but with different conclusions.

⁷¹² See *infra*, chapter 11.5.

CHAPTER 11: POSITIVE ACTION RECONSTRUCTED

11.1 Introduction

The previous chapter had the aim of setting out the basic conceptual framework for a novel interpretation of the legal principle of equal treatment that encapsulates what is termed “full” or “full and effective” equality. It was claimed that equal treatment can only amount to full equality if premised upon the notions of indistinctibility of respect and proportionality of concern. Within this framework it is clear that the classical conception of positive action, whereby “one size fits all”, is monolithic and insufficiently nuanced to account for the legitimate use of positive measures across the spectrum of social activity. What is needed, therefore, is a *reconceptualisation* of positive action: instead of being a legitimate *exception* to equal treatment, it should be rather understood as one of the dimensions of full equality, expressed as proportionality of concern.

It is now time to test these seemingly abstract assertions against the backdrop of tangible normative reality. The analysis will begin by briefly considering the place of equal treatment and positive action in the European Legal Order of Rights, that is the supranational normative *topos* created at the intersection of EU law and the ECHR through their constant dialectic interaction. It will then move on to elucidate why positive action should be regarded as an expression of equal treatment rather than as a form of special treatment. The arguments will once again be gender-oriented, and geared towards an analytical dichotomy between *disadvantaged* groups on the one hand, which may have

a legitimate expectation to be allocated positive action benefits, and *vulnerable* groups on the other, entitled to special treatment.

The remaining space will be devoted to a substantial reconsideration of the ECJ positive action case-law under the light of proportionality of concern. Using the latter as an analytical tool, the aim here will be twofold: first, to critically evaluate the validity of the common assumption that the case-law reflects a shift from what is usually termed formal equality to a more substantive version of it. Secondly, to consider whether proportionality of concern can prove to be the basis of a more coherent analytic framework that will allow us to identify both the strengths and the lacunae in the equality reasoning of the Court. Finally, the penultimate section will attempt to offer a glimpse of the big picture. It will demonstrate how the interpretation of equal treatment put forward here has the required normative flexibility so that it can at once respect the tripartite distinction between employment, politics and the judiciary and, still, remain an all-encompassing *unifying theory* that accommodates *difference* in all its dimensions without jeopardising legal certainty.

11.2 Equality and Positive Action in the European Legal Order of Rights

One of the innovative propositions of this thesis is that a common European denominator regarding the meaning of equality and its relationship to positive action can be identified. In fact, it has been argued that this is not a matter of academic opinion but one of normative reality. The principle of equal treatment, according to this argument, is one of the foundational principles of a new European Legal Order of Rights that has gradually emerged and now constitutes the *de facto* supranational normative framework for the protection of rights in Europe. On this basis and before moving on to the more substantive analysis of the reconstructed notion of positive action, it is worth clarifying how the existence of the ELOR will affect the law and practice of equality and positive action in Europe.

ELOR can be the trigger for a *race to the top* rather than a race to the bottom. European states will be under an obligation to take active steps in order to *match* the better scores of their neighbours and counterparts on the equality front. Assuming, then, that in both Greece and the UK under-representation of women in the top stratum of a particular cadre in the civil service is comparably severe, when one of these states introduces positive measures in favour of women to rectify the problem the other should in principle follow suit.

Obviously the measures will differ in content from one jurisdiction to another, as they should be designed to fit the particular needs of each country. Ultimately the choice of measures that serve best the common purpose in a given socio-political context lies with national legislatures, falling clearly within their *margin of appreciation*. This well-

established doctrine of Community law, as well as the ECHR system, should continue to play a cardinal role in maintaining the desired balance between national regulatory autonomy and the post-national ELOR structure. States, however, will have an *onus of justification* when failing to match the equality successes of their European counterparts. An *omission* on the part of the UK, for instance, to introduce gender quotas in an area where women are severely under-represented will be subjected to *strict scrutiny* by the European courts, provided that other European countries have already begun addressing similar inequalities by means of specific national legislation and policy initiatives.

Such measures will form part of a *rights acquis*. Reversing them will only be possible if national authorities can provide compelling evidence to the effect that the measures are *ineffective* or *unsuitable* in view of a significant change in the socioeconomic circumstances of the country that require a reorientation of social policy priorities. A gender quota, for instance, could only be *suspended* if the state were in a position to prove that a more pressing social need to increase the representation of ethnic minorities should temporarily take precedence over gender equality. This would only lead to the suspension of the gender quota, of course, if there is satisfactory evidence that it is not possible to pursue both objectives simultaneously.

11.3 Positive Action *qua* Equal Treatment Rather Than Special Treatment: Distinguishing Between Disadvantaged and Vulnerable Social Groups

When equal treatment is understood as proportionality of concern and indistinctibility of respect, positive action is no longer a legitimate *exception* to equality. It rather becomes an *expression* of equality, an indispensable legal tool to accomplish equality of treatment in situations where “conventional” or “neutral” means do not suffice to overcome endemic disadvantage of individuals or groups. Unlike, then, what is often argued under its classical conception, positive action does not constitute a case of special treatment. It is this claim that the thesis turns now to explore, within the theoretical framework of proportionality of concern.

In order to solidify the claim that positive action does not amount to special treatment the following sections will aim to establish a clear dividing line between the two in European equality law on the basis of a proposed distinction between *disadvantaged* groups - that may be entitled to positive action - and *vulnerable* groups - that may be entitled to special treatment. Having said that, the analysis will remain conscious of the underlying concern for equality, which is the common ultimate goal in both cases. The question will be examined in the context of gender equality and with particular reference to *pregnancy* as an exemplification of how disadvantage and vulnerability play out in the field of employment.

11.3.1 Gender equality, disadvantage and vulnerability.

The practical impact of EU gender equality law has been seriously contested from a feminist perspective both at the early stages of its development⁷¹³ and even after the recent additions to the normative framework.⁷¹⁴ Most commentators recognise the contributions of new legislation and of the policy and governance tools that have been employed, such as gender mainstreaming,⁷¹⁵ in improving the socio-economic status of European women, especially during the last decade.⁷¹⁶ Significant gender inequalities across the spectrum, however, continue to exist despite the efforts of European institutions and national legislators.

For some this is the inevitable result of a general institutional mentality that “condemns” EU social policy to the back seat in a primarily market-oriented policy agenda.⁷¹⁷ In feminist writings, however, the problem lies primarily with the conception of equality at play, which fails to recognise and adequately structural disadvantage.⁷¹⁸ This is particularly evident in the case of *pregnancy* and the way the ECJ has interpreted the relevant legal provisions.

⁷¹³ Fredman, S. (1992). "European Community Discrimination Law: A Critique." Industrial Law Journal 21(2): 119-134.

⁷¹⁴ Masselot, A. (2007). "The State of Gender Equality Law in the European Union." European Law Journal 13(2): 152-168.

⁷¹⁵ Beveridge, F. (2007). "Building against the past: the impact of mainstreaming on EU gender law and policy." European Law Review 32(2): 193-212.; Shaw, J. (2005). "Mainstreaming Equality and Diversity in European Union Law and Policy." Current Legal Problems 58(255-312). See, however, a more sceptical view in Beveridge, F. and S. Nott (2002). "Mainstreaming: A Case for Optimism and Cynicism." Feminist Legal Studies 10(3-4): 299-311.

⁷¹⁶ For an overview of the disadvantaged status of women across the EU at the end of the 20th century see Glasner, A. (1998). Gender and Europe: Cultural and Structural Impediments to Change. Social Europe. J. Bailey, Longman.

⁷¹⁷ Prechal, S. (2004). "Equality of Treatment, Non-Discrimination and Social Policy: Achievements in Three Themes." Common Market Law Review 41(2): 533-551., at 533.

⁷¹⁸ Fredman, supra no.714, p. 134.

McGlynn, for instance, accuses the Court for adopting the “dominant ideology of motherhood”⁷¹⁹ across its case-law on gender equality. Although its motives may be benign, the aim of addressing structural discrimination against women is only superficially served. If traditional assumptions about the socially constructed role of women are not shattered, then under-representation of women in positions of power near the top of the socio-political hierarchy will continue to mar any superficial success of equality strategies.⁷²⁰

But what McGlynn goes on to suggest is far more radical than that. In her view the underlying problem is that EU gender equality law revolves around a “paternalistic ‘protection’ principle”⁷²¹ that overrides equal treatment. In other words, the “rhetoric of protection”⁷²² that presents women as a *vulnerable* social group is itself at fault for the perpetuation of vulnerability.⁷²³ If this is true for pregnancy-related legislation,⁷²⁴ then it is true *a fortiori* for positive action. The echoes of the typical social stigma argument are loud and clear.⁷²⁵ It would be redundant to rehearse the full set of counter-arguments, especially in view of the fact that the real point here seems to be more refined compared to its classical formulation in the US literature.

⁷¹⁹ McGlynn, C. (2000). "Ideologies of Motherhood in European Community Sex Equality Law." European Law Journal 6(1): 29-44., at 31-32.

⁷²⁰ On the normative attitudes towards women see generally S. Fredman, *supra* no.28.

⁷²¹ *Ibid.*, at 35.

⁷²² *Ibid.*

⁷²³ The argument here is not a distinctly feminist one, in the sense that it applies equally to other disadvantaged or under-represented social groups.

⁷²⁴ Conaghan, J. (1993). "Pregnancy and the Workplace: a question of strategy?" Journal of Law and Society 20(1): 71-92., at 82-83.

⁷²⁵ For a recent empirical analysis of the argument in its racial dimension see Onwuachi-Willig, A., E. Houh, et al. (2008). "Cracking the Egg: Which Came First - Stigma or Affirmative Action?" California Law Review 96(5): 1299-1352.

To do justice to this critique one needs to move beyond the feminist reluctance of labelling women as vulnerable and understand the thrust of the argument in the following terms: women should be treated as a vulnerable group in need of *special protection* only when they are *actually vulnerable* because of attributes specific to their gender.⁷²⁶ When they are *disadvantaged* because of their gender, on the other hand - that is because of the simple fact that they are women - the matter should be dealt with as a case of direct or indirect *gender discrimination*. Eradicating disadvantage that stems from discrimination or from gender-biased normative perceptions does *not* qualify as special protection, even though it may require “asymmetric” legal tools such as positive action.

Distinguishing between *vulnerable groups* and *disadvantaged groups* is no easy task in practice but it is normatively significant. It is a necessary condition to understand positive action as an *expression of equal treatment*, viewed through the lens of proportionality of concern, and *not* as a form of *special treatment* as in its classical conception.⁷²⁷ Disadvantaged groups, then, are entitled to positive action,⁷²⁸ whereas vulnerable groups are entitled to the special benefits provided for in general policies that promote *social inclusion*,⁷²⁹ according to the basic ideals of the welfare state.

This latter dichotomy between positive action and general welfarist or social inclusion policies is clearly and coherently presented in the recent Report on Positive

⁷²⁶ These attributes are not necessarily - if at all - biological. The argument here refers primarily to *social attributes* that may render women a vulnerable group in a specific social context. Women of a particular ethnic or religious background, for instance, may be subjected to cultural or religious rituals, without their consent, as a matter of custom or religious doctrine. In this case the *external* perception of gender imposes additional burdens on women that need to be taken into account when allocating legal protection.

⁷²⁷ Although it must be pointed out that special treatment is also accommodated within the notion of proportionality of concern. In other words, special treatment as an *exception* to equality is permissible when mandated or justified under proportionality of concern.

⁷²⁸ Or, in any case, can become legitimate target groups for positive action programmes.

⁷²⁹ On social inclusion as the principal goal of anti-discrimination law see H. Collins, *supra* no.70.

Action of the European Commission.⁷³⁰ Drawing insights from the Report one can also make sense of the further distinction between disadvantaged and vulnerable groups introduced here. *Children*, for instance, constitute an emblematic and arguably uncontested case of a vulnerable social group. They are thus allocated special protection exactly because of their perceived vulnerability, without this violating the general principle of equal treatment.⁷³¹ Free education for young persons is a good example of such special protection.⁷³² As cogently pointed out in the Report, the fact that free education is only available for this particular age group does not entail that the education system is “an age-related form of positive action”.⁷³³

Admittedly in some cases there will be inevitable overlap, as disadvantage and vulnerability may appear as concomitant elements of the social condition of the same group. *Ethnic minority children*, for instance, are not simply a vulnerable group but may additionally suffer from disadvantage related to their ethnic origin. In this case, it may be necessary to supplement the “standard” protection reserved for children in general with positive measures specifically designed to cancel the effects of the additional disadvantage this particular group of children is burdened with.

⁷³⁰ DG Employment, Social Affairs and Equal Opportunities, *supra* no.434, p. 28.

⁷³¹ It is interesting to note that this is true under *any* conception of equal treatment and not only under the notion of proportionality of concern put forward here.

⁷³² Commission Positive Action Report, p. 28.

⁷³³ *Ibid.*

11.3.2 Addressing disadvantage through positive action: Why non-discrimination is not the appropriate framework.

It was mentioned in the previous section that the distinction between vulnerability and disadvantage is a precondition for the proper conceptualisation of positive action as an expression of proportionality of concern. The reasoning behind this statement is quite straightforward: the fatal flaw of the classical conception of positive action is that it is firmly locked within an anti-discrimination philosophical and normative framework and lacks a direct link to the principle of equal treatment as such. It thus becomes incapable of acting as an adequate remedy for disadvantage, when this is not possible under an anti-discrimination rationale. In order to make this clearer it is worth putting the dichotomy between vulnerability and disadvantage to the test by examining the case of *pregnancy* in its normative context.

It is evident that, with regard to issues such as pregnancy, there is an even finer line to be drawn between vulnerability and disadvantage. Pregnant women *are* undoubtedly a *vulnerable* group. This is not, however, due to the fact that pregnancy is a uniquely female condition – the latter is true but irrelevant. The key consideration here is that pregnancy entails financially measurable *costs*⁷³⁴ that should not be born by prospective mothers alone but rather be part of a burden-sharing social mechanism. Despite what McGlynn and others suggest, this does not render women vulnerable *because* of their womanhood, but because of the socio-economic consequences of pregnancy, the burden for which is allocated collectively rather than individually.

⁷³⁴ Financial costs may be *direct*, as regular medical care and prescription medication, as well as *indirect*, such as the need for maternity leave.

This, however, is only part of the story. Pregnant women can *also* be classified as a *disadvantaged* group. Pregnancy has often created obstacles to the professional development of women and has been used as an excuse to establish and perpetuate *discriminatory* practices against them in the workplace. This is why there is a well-developed legal framework of protective rules and why pregnancy discrimination has attracted the attention of the ECJ. A closer look at this case-law is in order.

The first noteworthy point is that, unlike the standard methodology used to construct legal reasoning in discrimination cases, pregnancy-related complaints do *not* require a *comparator* to be classified as gender-discrimination. In 1990 in two seminal pregnancy rulings, Dekker⁷³⁵ and Hertz,⁷³⁶ the ECJ held in no uncertain terms that dismissals or failures to offer employment due to pregnancy-related absence from work are by definition gender-discrimination, because they involve a condition that uniquely affects women. During the protected period,⁷³⁷ therefore, dismissal or refusal to hire female employees on grounds of pregnancy would amount to direct discrimination without the need to seek a comparator in a *male* employee that is *absent due to sickness*, as was the dominant view hitherto.⁷³⁸ Although this now seems a commonsensical and relatively uncontroversial approach, it was rightly considered as a major breakthrough at the time.

The early optimism, however, was not fully justified by subsequent developments in the case-law. When matters become more complicated it seems that the Court fails to

⁷³⁵ Case C-177/88, Dekker v. Stichting Vormingcentrum voor Jonge Volwassen (VJV-Centrum) [1990], ECR I-3941

⁷³⁶ Case C-179/88, Hertz v. Aldi Marked [1990], ECR I-3979

⁷³⁷ Which starts with pregnancy and extends to the end of maternity leave. See Sciarra, S. (2001). Labour Law in the courts: National judges and the European Court of Justice, Oxford Hart., p. 87.

⁷³⁸ Ibid.

be equally clear and unequivocal. In its *Webb* judgment,⁷³⁹ a few years later, the Court confirmed that the dismissal of a woman employee on an *indefinite contract* on grounds of her pregnancy was discriminatory, even though this particular employee had been explicitly employed with the initial intention of replacing another employee on maternity leave. Although the principle was established, the Court left open the possibility of an *apparently neutral* reason for pregnancy-related dismissal, if the female employee was recruited on a *fixed-term* contract or on a *temporary* basis.⁷⁴⁰ The comparator approach, therefore, is brought back into play, as in that case the Court would be looking for a male employee that is unavailable to perform the specific tasks he was contracted for.⁷⁴¹

The *Webb* scenario exemplifies why the anti-discrimination normative framework is often too narrow to ensure equality of treatment when vulnerability and disadvantage coincide. As explained earlier, pregnancy entails certain socio-economic consequences for women that should be shared by society as a whole. This welfarist rationale underlies the nexus of legal provisions that protect pregnant women in the workplace and alleviate work-related burdens that may ensue in the short or long term, for instance by guaranteeing extended periods of maternity leave. On this basis it seems reasonable to argue that the *right not to be dismissed* during pregnancy should be *absolute*. The principal claim, then, is this: if pregnant women are not adequately protected as a *vulnerable group*, they will become a *disadvantaged group* in the workplace.

Such an absolute prohibition of dismissal, however, cannot be rooted in an anti-discrimination rationale without contradicting the philosophical precepts of anti-

⁷³⁹ Case C-32/93, *Carole Louise Webb v EMO Air Cargo (UK) Ltd.* [1994], QB 718

⁷⁴⁰ T. Hervey and J. Shaw, *supra* no.424, at 51.

⁷⁴¹ The lack of clarity as to whether pregnancy-related discrimination is *direct* or *indirect* gender discrimination is also evident here and this may create further complications with regard to the means of justifying the exception.

discrimination law itself. In cases of the Webb type it is difficult to see how anti-discrimination law can *prohibit* the dismissal of a pregnant employee that is unable to perform the duties she was specifically contracted for, while at the same time *permitting* the dismissal of a *male employee* who is equally unavailable due to a serious accident. One may be tempted to resort to “acrobatics” in legal reasoning and suggest that this difference in treatment can be justified under an Aristotelian conception of formal equality that inspires anti-discrimination law, because a pregnant woman is *not in the same situation* as a temporarily incapacitated man. Although the latter is, in fact, true, the argument itself is normatively weak and pragmatically dangerous.

It is normatively weak because of its reliance on the need for a *comparator*, even if only to prove the lack of similarity in the respective situations. By adopting a comparative approach the argument effectively cancels the single most important achievement in pregnancy discrimination case-law, namely that pregnancy is recognised as a *uniquely female* condition. Under this interpretation, pregnancy-related rights, such as the right not to be dismissed, are *not dependent* upon the success of a futile search for a potentially analogous male condition. In other words, pregnant women are a vulnerable group in need of protection, expressed among others as immunity from dismissal for a period of time. This immunity should be entirely unrelated to whether or not other individuals or groups may have a legitimate claim for an *expansion of the rationae personae scope* of this entitlement so that they are also recognised as legitimate recipients.

This last point reveals why the argument is also pragmatically dangerous. When pregnancy-related rights are decoupled from the need of a comparator, the only route

available to satisfy equally legitimate claims from other groups is by *levelling-up*. If a male employee that was contracted under the same conditions as Ms Webb, for instance, is temporarily incapacitated through injury or illness, he *may* be entitled to seek temporary immunity from dismissal.⁷⁴² On the contrary, when identifying a comparator is a precondition of granting the right, then *levelling-down* is wide open as a possibility. The inversion of the rationale is obvious: if it is lawful to let go a temporarily incapacitated male employee, then so should be to dismiss Ms Webb. Reasonable as the solution may sound in extreme circumstances, especially from the point of view of the employer, it must be born in mind that levelling-down will open Pandora's box. Once it has been established as a legitimate option, it will be virtually impossible to draw a sharp line between cases in which levelling-down is permissible and those in which it is not.

The solution to this conundrum can be found in the alternative conception of positive action as an expression of proportionality of concern. Temporary immunity from dismissal during pregnancy can be construed as a form of preferential treatment similar to its effects to a *flexible results quota*. Pregnant women are a legitimate target as a *disadvantaged group* in the labour market, because their employment prospects are adversely affected by the fact that they will have to suspend their professional endeavours during a period of time. These prospects would be considerably worsened, if pregnant employees were subject to dismissal from their current employment. Hence, temporary immunity from dismissal during pregnancy is a gender-oriented positive measure designed to avoid the onerous *results* of a possible dismissal. At the same time it is a *flexible* measure, because it does *not* guarantee that pregnant women will be *offered* a job or will retain their position after the expiry of the protected period.

⁷⁴² Assuming, of course, that existing employment legislation on work-related accidents does not suffice.

If equality is understood as proportionality of concern, temporary immunity from dismissal is not special treatment. Pregnant women are a group worthy of *more* protection and this is exactly what they receive. This is not far, in fact, from the ECJ's reasoning in Dekker and Hertz: pregnancy is indeed a *unique* condition and the legal treatment of it should reflect this *uniqueness* by steering clear from forced and often unintelligible comparisons.⁷⁴³ If this is true, the justification of temporary immunity is completely independent from *quantitative* considerations. Simply put, any comparison is, at the first instance, irrelevant.

Comparisons are only permissible *after* the right of pregnant women to temporary immunity from dismissal has been *established* and forms part of an *acquis*, so that levelling-down is no longer an option. At this point, it will be possible for other individuals or groups to claim that they are *exceptionally* entitled to receive the same treatment, insofar as they can prove that any other solution would infringe on their right not to be discriminated against. Of course, in such a case the employer would also be allowed to counter that the *non-extension* of the pregnancy-related benefits to male employees in analogous situations is *objectively justified*.

⁷⁴³ This is not to deny, of course, that pregnancy is a uniquely *female* condition. For the purposes of the argument against a comparative approach, however, the emphasis should be on the *uniqueness* of the condition itself. The fact that only women can find themselves in this condition should be treated as *coincidental*.

11.4 Positive Action in European Law Revisited: The Case-Law of the ECJ through the Lens of Proportionality of Concern

A very considerable portion of the analysis up to this point has been devoted to the case-law of the ECJ, reflecting a conscious methodological choice. This choice will be carried through to this final part of the thesis, with a view to testing the validity of the theoretical propositions advanced earlier regarding the distinctly European understanding of what equality of treatment amounts to. It goes without saying that the success of the theoretical construct of indistinctibility of respect and proportionality of concern hinges on its viability when placed under the Court's scrutiny.⁷⁴⁴

What follows is an attempt to review the ECJ positive action case-law from a proportionality of concern point of view. Since this is a novel interpretation of the principle of equal treatment, the analysis will inevitably balance between an ontological level – what the Court has actually decided that can fit into the proposed conception of equal treatment – and a deontological level – what the Court should have decided in order to maintain interpretative integrity and remain true to the mandate of achieving *full* equality.

⁷⁴⁴ It should be pointed out that the exclusive focus on EU law and on the case-law coming from Luxembourg in this section does not in any way diminish the importance of the ECHR and of Strasbourg case-law in determining the status and meaning of equality in Europe. In view of the inevitable space constraints, however, it would be impossible for the present thesis to thoroughly explore both the ECJ and the ECtHR case-law through the lens of proportionality of concern. ECJ, then, is the obvious choice between the two, since up to date there are no rulings of the Strasbourg court that consider the legality of positive action in view of Protocol 12 of the Convention (with the exception of the Court's Advisory Opinion that was extensively discussed in chapter 5.2).

11.4.1 *The early case-law: Is there any room for proportionality of concern?*

The way proportionality of concern impacts - or should impact - on the Court's reasoning when interpreting the equal treatment principle can be traced back to the very first ruling on positive action. More than twenty years ago,⁷⁴⁵ in *Commission v. France*, the Court decided to strike down the French legislation implementing the Equal Treatment Directive because it created instances of unequal treatment in favour of women that fell outside the limits laid down by the Directive.⁷⁴⁶ As explained in the previous section, the Court based its finding on two reasons: the *generality* of the French positive action scheme and its *ineffectiveness* in specifically addressing existing inequalities in the workplace between men and women. Positive action is understood by the Court as an exception to equal treatment and, as a result, the relevant provisions are to be interpreted narrowly and they must have a limited and clearly defined lifespan in order to pass the legality threshold.

Against this position the typical critique, already rehearsed in the previous sections, emphasises the distinction between competing conceptions of equality. Adopting a formal equality - or non-comparative formal equality - point of view, the argument goes, is the real problem with the Court's rationale, and one that is carried through to the inevitable conclusions. There is no disagreement that, in a normative interpretive environment, exceptions and derogations should be narrowly construed as a matter of principle. But the socio-political developments of the last decades in Europe have proved that achieving true equality requires, first of all, an understanding of equality

⁷⁴⁵ For a very interesting overview of the ECJ case-law since then and up until *Badeck* see Mancini, G. and S. O'Leary (1999). "The new frontiers of sex equality law in the European Union." *European Law Review* 24(4): 331–353.

⁷⁴⁶ *Commission v. France*, para 16.

in substantive rather than formal terms. In turn, this entails that positive action, where needed, cannot be regarded as derogation from equality but as a precondition for its accomplishment.

Although this line of argument has certain undoubted merits, it has little practical significance when it comes to this particular ruling. The position of European law on the matter has admittedly shifted in the last decade or so, from considering positive action as a “necessary evil” to realising that it is a fully legitimate means of achieving effective equality, at least in the field of employment. An advocate of the Court’s interpretive integrity, therefore, would easily dismiss the attack by pointing out that the position of the case-law gradually changed, following the move of the law from a formal to a substantive understanding of equality.⁷⁴⁷

A discussion of this sort, however, may inadvertently conceal a more substantial issue regarding the Court’s rationale here. It is debatable whether the Court in *Commission v. France* is actually reading the equal treatment principle solely through the lens of non-comparative formal equality. This would indeed constitute not simply a “conservative” interpretive choice - that may or may not accurately reflect legislative intentions - but a serious philosophical mistake. As explained earlier, the category of formal equality, understood as indistinctibility of respect, is not the appropriate analytical framework to discuss and test the legality of positive action. The latter is rather an expression of concern for the welfare and needs of individuals or groups, which may have been compromised because of discrimination.

But is the Court really liable for such a failure? Is it, in other words, unaware in the late 1980s of the two co-existing yet distinct dimensions of equal treatment, identified

⁷⁴⁷ Which is, arguably, the case with the new Equality Directives.

here as indistinctibility of respect and proportionality of concern? Let us try to reconsider the issue under the light of the claim that these two notions together formulate the normative content of the general principle of equal treatment in Europe.

Although often ignored by commentators, the main defence of the French government calls for thorough consideration. Under French constitutional law, the state bears a positive obligation to ensure gender equality in every area of the law. This obligation, however, is not one that can be met through procedural adjustments alone. Implementation of the constitutional guarantee involves not only different treatment of different situations, but also the use of *special rights* where necessary to remove inequalities and cancel their effects. The underlying rationale justifying the use of special rights is particularly illuminating: “[t]he existence of special rights favouring women is nevertheless considered compatible with the principle of equality when those special rights derive from a *concern for protection*” [emphasis added].⁷⁴⁸

The significance of this quote for our present analytical purposes cannot be overstated. Protection of the laws should be allocated with equality in mind, but this does not necessarily entail that every person or group of people is entitled to the exact same “amount” or type of protection. The reason is that *concern for protection* may be the same for everyone in principle, but *in practice* it differs according to the relative situations of each individual or group. The state, therefore, “owes” its citizens different levels of concern corresponding to *actual* disadvantage, which encapsulates the essence of proportionality of concern.

Read in this way the French position is more “radical” than it appears to be at first sight. It goes beyond a mere recognition of *difference* as a structural element of the

⁷⁴⁸ Commission v. France, para 10.

principle of equal treatment when applied in practice. Maternity leave, for instance, is a right guaranteed in principle to every female employee, but whether extended leave should be awarded in certain cases will depend on personal circumstances.⁷⁴⁹ The *right* in question, then, is the *same* and the *difference* in the content, type or intensity of protection is the logical result of factual dissimilarities.⁷⁵⁰ The French constitutional clause, however, further allows the use of *special rights* that are reserved for a particular category of persons deemed to deserve a greater degree of concern on the part of the state. Concern for protection, then, can only be allocated *proportionally*, as it inevitably fluctuates according to actual necessities. And it is exactly proportionality of concern that turns gender equality from a procedural venture into a substantive one.

Despite the outcome of the ruling, the reaction of the Court to this approach was neither dismissive nor as negative as one might expect. It is true that the Court regards positive action as a justified exception to equal treatment,⁷⁵¹ but this is arguably a direct implication of the phrasing and general tone of the Equal Treatment Directive itself. When identifying the *generality* of the French legislation as a source of incompatibility, though, the Court does not consider this to be the whole story. On the contrary, it explicitly states that it is not satisfied with certain of the examples of special rights cited in the pleadings.

The major problem with the French positive action scheme, therefore, appears to be that “some of the special rights preserved relate to the protection of women in their capacity as older workers or parents - categories to which both men and women may

⁷⁴⁹ Medical reasons, for instance, such as post-natal depression may justify extended maternity leave.

⁷⁵⁰ This seemingly obvious analysis becomes particularly pertinent when it comes to determining, for example, whether a female employee who *adopts* an infant has the same right to maternity leave as a natural parent.

⁷⁵¹ *Commission v. France*, para 13.

equally belong”.⁷⁵² It is the concrete provisions of the scheme, then, that fail to “add up”, rather than the underlying rationale regarding the equal treatment principle. There is nothing here to suggest that concern for protection should not be allocated proportionally. But, as the Court correctly implies, the French legislator seems to be inconsistent in the identification of the appropriate target groups for such allocation. Indeed, if older female workers are entitled to a greater degree of concern on the part of the state that materialises into special rights, it is imperative to fully account for the non-extension of this concern to older *male* workers or *older* workers in general. The legitimacy of granting special rights or preferential treatment to a particular category of disadvantaged employees becomes dubious when another disadvantaged group is excluded from the benefits. Without full and concrete justification of this policy decision, it remains elusive whether the aim of equal treatment will be accomplished.

One should note, of course, that the purpose of the French legislation in question, as well as of the Equal Treatment Directive itself, was to achieve gender equality in employment and not to introduce an all-encompassing equality policy across the social field. A measure designed to promote gender equality, therefore, may not be deemed unlawful, ineffective or unsuccessful on the basis of its “modest” ambitions. Accepting this, however, is still not enough to exonerate the French positive action scheme. The reason is simple, even though the Court’s ruling is somewhat obscure in that respect. There is lack of clarity as to the particular *disadvantage* that triggers the need for “additional” state concern. In other words, it is unclear whether older female workers are disadvantaged - and, hence, in need of special protection - *because* they are *female* or *because* they are *older*. And although it may be the case that older female workers face a

⁷⁵² Ibid, para 14.

double disadvantage, France surprisingly fails to bring this compelling argument to the attention of the Court.

The notion of proportionality of concern entails a more comprehensive outlook on equality that can adequately address the problem of double⁷⁵³ or multiple disadvantage⁷⁵⁴ in a programmatic way. Disadvantage becomes the centre of the discourse and the definitive criterion to select the appropriate target groups and to prioritise equally valid claims and corresponding policy choices. Under proportionality of concern the legislators and, eventually, the courts would have to test the legality of positive action schemes on grounds of their effectiveness in performing a redistributive function. Although the Court in *Commission v. France* does not advance from this theoretical position, there is no real evidence that it is opposed to it.

Unfortunately, the same cannot be said about the infamous *Kalanke* ruling. By interpreting the text of the Equal Treatment Directive as an endorsement of a superficial equal opportunities rhetoric, the Court misses the point entirely. Improving the ability of women “to compete on the labour market and to pursue a career on an equal footing with men”⁷⁵⁵ through positive measures, according to Article 2(4) of the Directive, involves some form of priority or preference being given to female candidates at the expense of some of their male counterparts. Priority or preference in this context is logically necessary *only when the female candidate is not already more qualified*, in which case the quota system becomes redundant. And if such priority is ruled out as discriminatory even in its softest form, it is difficult to imagine what other “measures relating to access

⁷⁵³ The typical example of a group suffering from double disadvantage is *minority women*. See S. Spiliopoulou-Akerman, *supra* no.376, p.12.

⁷⁵⁴ Corresponding to but not collapsing into the notion of *multiple discrimination*. See D. Schiek, *supra* no.449, at 454.

⁷⁵⁵ *Kalanke*, para 19.

to employment, including promotion”⁷⁵⁶ may be legitimately employed by the Member States to pursue the aims of the Directive.

Kalanke is, thus, usually identified by pro-equality lawyers as an anomaly in the jurisprudence of the Court. Despite the truth in this statement, it is worth mentioning that the German quota system under scrutiny raises interesting questions that were not adequately explored by the Court. Proportionality plays no part in the reasoning, in a rather striking omission, especially since the German court explicitly refers to it in the formulation of its second question.⁷⁵⁷ There is, of course, one obvious explanation: if the intention of the Court all along was to convey a strong and clear message that *quotas*, irrespective of their form, fall outside the limits set by Article 2 (4) of the Directive, then the illegitimacy of the German scheme does not stem from a violation of the proportionality principle. Positive action of this type is not permitted *in principle* under Community law, according to the Court, and there is nothing the German legislator could have done differently to render the scheme compatible.⁷⁵⁸ Simply put, the problem for the Court is not one of disproportionate preference but one of preference that is illegitimate altogether under the conception of *formal equality of opportunities* that seems to permeate its rationale.

By disregarding the principle of proportionality, however, the Court commits a serious interpretive mistake. It substitutes the *intentions* or ultimate aims of the German scheme for its *actual effects*. The scheme provides that a female candidate with the *same qualifications* as her counterparts will be given priority in sectors where women are

⁷⁵⁶ Ibid.

⁷⁵⁷ Ibid, para 11.

⁷⁵⁸ Other than, of course, to alter the scheme altogether and opt for a less “aggressive” type of positive action to pursue gender equality.

under-represented.⁷⁵⁹ Under-representation, for the purposes of the law, exists when women “do not make up *at least half of the staff* in the individual pay, remuneration and salary brackets in the relevant personnel group within a department” [emphasis added].⁷⁶⁰ It is clear from the above that the Court confuses the *modus operandi* of the scheme with its *underlying rationale*: what the tie-break quota *actually* does is allocate preference to an *equally qualified* female candidate. This policy is justified through the equation of under-representation to disadvantage, which will cease to exist when *parity* has been finally achieved. But the application of the scheme itself *in practice* does not ensure equality of outcome - at least not in the short term - as it only operates as tie-breaker in cases of equally qualified candidates. Equality of outcome would be the *modus operandi* of the scheme only if the quota was triggered *irrespective of any consideration of individual qualifications*.

More than an anomaly *Kalanke* is, therefore, a missed opportunity. Individual candidates are not promoted simply because they belong to the under-represented gender, as the Court seems to imply. Nor is the merit principle automatically overridden simply because of the application of the quota. The scheme requires an interpersonal comparison of individual merit to be carried out prior to the final decision and, should the female candidate prove to be equally qualified, only then does the quota kick in. If the German scheme, then, is incompatible with Community law, the Court should have looked for the problem elsewhere. Under-representation of a social group in a particular sector of employment, and especially in the higher echelons within the sector, may indeed be an index of disadvantage stemming from indirect or covert discrimination. Such

⁷⁵⁹ Paragraph 4, Recital 1 of the Bremen Law on Equal Treatment for Men and Women in the Public Service, as cited in *Kalanke*, para 3.

⁷⁶⁰ *Ibid*, in Recital 5.

disadvantage should, in principle, attract a greater degree of *concern* on the part of the legislator for the members of this specific group, which automatically brings positive action into play as a legitimate policy option to address this discrepancy.

In practice, though, the issue is far more complex and calls for a detailed analysis of how proportionality of concern should inform positive action schemes and solidify their legality. The Bremen law in *Kalanke* begs the question of whether and under which circumstances under-representation amounts to *disadvantage*. When *parity* forms the philosophical underpinnings of gender equality policy, as with the German legislation in question, anything below an even 50% of gender representation, reflecting an absolute balance between male and female employees in any given employment cadre, falls short of the ultimate equality goal. For present purposes and in view of its normative effects parity operates as the equivalent of a sunset clause. If this goal of absolute balance is not reached, positive measures will continue to remain in force.

Parity, however, as a conception of equality is of dubious philosophical credibility. It seems to be awfully close to non-comparative formal equality, an affinity its proponents would not be very proud of. Although parity is typically classified as a proactive egalitarian notion, thriving in a considerable portion of feminist academic circles,⁷⁶¹ it rests upon essentialist presumptions about the “human condition” of particular social groups, and most notably women. If a 50% of female representation in an area of the employment field constitutes a rigid target, then there is no room to account for specific preferences that may reflect a collective idiosyncrasy different from

⁷⁶¹ On the parity model in feminist jurisprudence see generally Atkins, S. and B. Hoggett (1984). Women and the Law, Blackwell.

the common “standard”.⁷⁶² Such preferences should be enough to justify at least a small deviation in numbers. If this is true, how can 45% of female presence in a particular sector count as under-representation that *needs* to be rectified through positive action?

Applying the principle of proportionality to the allocation of concern allows for a fine-tuning or even a re-calibration of positive action so that it answers real challenges and remedies real inequalities. A scheme such as the one at issue in *Kalanke* should, therefore, include some *prioritisation* mechanism, which would allow for a more rigorous enforcement of the quota in sectors of *severe under-representation*. On the other hand, where under-representation is marginal, the system should provide for milder forms of positive action and allow for the emphasis to be placed on other, more pressing instances of inequality. Most importantly, it should be designed in such a way so as to target primarily the higher echelons within each sector, where decision-making that may affect future employment prospects - such as participation in boards responsible for recruitment or promotions - is actually taking place. After all, one needs to be mindful of the fact that the higher up in the employment hierarchy one goes the more difficult it will be to find *equally* qualified female candidates for promotion.

From a proportionality of concern point of view the *Kalanke* scheme also raises another important question. Even if one is willing to accept parity as the optimum equality outcome, there is no escaping the social reality of variegated inequalities across the spectrum. Assuming again that women in a particular bracket of the sector are *marginally* under-represented, the investment of resources, material or “normative”, in redressing this minimal abnormality is legally questionable. Satiability of resources

⁷⁶² The collective element here refers to particular “sub-groups” within the social group itself. For instance, the preferences of *minority women* may substantially differ from those of the “average” white woman.

entails that some *prioritisation* of targets is necessary in order to ensure that equality policies, apart from serving long-term goals, will also be effective in the short-term. When *scarcity* of resources is added to the equation the need to prioritise becomes a categorical imperative.

Choosing between equally valid claims of under-represented social groups, then, is a matter of pragmatism but also a matter of *fairness*. Legislators need to premise their policy choice of which inequalities to address first or more actively on considerations of *effectiveness* - selecting the type of measure that fits better with the particular needs of each group or each employment section - as well as on considerations of *justice* - placing the most pressing inequalities at the top of the agenda. Measures promoting gender equality, therefore, must be understood as part of a comprehensive equality project and their ad hoc legality will additionally⁷⁶³ depend upon whether they adhere to the principle of proportionality, applied to the distribution of concern between equally qualified equality claims.

This is particularly pertinent, of course, when dealing with cases of *double* or *multiple* disadvantage.⁷⁶⁴ A female employee that belongs to an ethnic or social minority is likely to face significantly higher obstacles compared to a female national of the home state, especially if the latter has no affinities to social minorities or comes from the middle or upper socio-economic strata. Treating these two women identically, as being equally disadvantaged, solely on the simplistic grounds that women are under-represented in a particular employment field, constitutes a misplacement of state concern. A quota that fails to take this differentiation into account and accord a higher degree of

⁷⁶³ That is in addition to the “standard” criteria of legality of positive action schemes.

⁷⁶⁴ See D. Schiek, *supra* no. 449.

priority to the female candidate that is a victim of double or multiple disadvantage, is inevitably peripheral and, for this reason, self-defeating.

These concerns are absent from the rationale of the Kalanke scheme. To cut a long story short, the problem with the Bremen quota system lies in the fact that it is *not* nearly as refined or as elaborate as it should be. It fails to provide a comprehensive justification as to why even marginal gender under-representation qualifies as disadvantage. Equally unrefined, however, is the Court's rationale in striking down the scheme as incompatible with the Equal Treatment Directive. "Absolute and unconditional priority for appointment or promotion"⁷⁶⁵ of women is contrary to Community law, but this is not the case with the Kalanke quota. The outright rejection of tie-break quotas as a legitimate form of positive action deprives the Court of an opportunity to engage in an in-depth analysis of the relationship between equality and proportionality.

11.4.2 The Marschall ruling revisited: A return to what kind of logic?

Such an opportunity presented itself in Marschall, only this time the Court was prepared to approach the matter in a more thorough and meticulous manner. This was to no small degree due to the German quota at issue, which was more carefully designed than the one in Kalanke. As already explained at an earlier point, the semantic differential of the Marschall positive action scheme that renders it compatible with the Equal Treatment Directive is, in the Court's view, the existence of a saving clause.⁷⁶⁶ The latter allows for "an objective assessment which will take account of all criteria specific to the

⁷⁶⁵ Kalanke, para 22.

⁷⁶⁶ Marschall, paras 3 and 5.

individual candidates”⁷⁶⁷ so that the priority accorded to the equally qualified female candidate can be overridden ad hoc.

There is no doubt, then, that the “failings” of the Kalanke system are not repeated here. Priority to the members of the under-represented gender within a particular career bracket, in this case, is neither *automatic* nor *unconditional*. The quota is not *automatic* in that it will only come into play *after* an interpersonal comparison of all candidates that establishes the female candidate as being of “equal suitability, competence and professional performance”⁷⁶⁸ to her male counterparts.⁷⁶⁹ It is not *unconditional*, given that the equally qualified male candidate can “tilt the balance to his favour”,⁷⁷⁰ if his personal circumstances so merit.

In this regard, then, the underlying rationale of the Marschall scheme seems to be very close to what has been labelled here proportionality of concern. Under-representation of women within a particular career bracket constitutes disadvantage resulting from indirect gender discrimination. According to the observations of the German government “where qualifications are equal, employers tend to promote men rather than women because they apply traditional promotion criteria which in practice put women at a disadvantage, such as age, seniority and the fact that a male candidate is a head of household and sole breadwinner for the household”.⁷⁷¹ A quota system, therefore, in favour of women exemplifies the active concern on the part of the state to redress this

⁷⁶⁷ Marschall, para 33.

⁷⁶⁸ Marschall, para 3.

⁷⁶⁹ It is worth reminding the reader, of course, that the Kalanke scheme was unfairly attacked as according automatic priority to the female candidate.

⁷⁷⁰ Marschall, para 3.

⁷⁷¹ Marschall, para 4.

inequality. Showing *more* concern to the disadvantaged gender is an expression of equal treatment in accordance with the principle of proportionality.

The *proportionate*, and thus fair, character of such an uneven allocation of state concern is eloquently supported by the submissions of the Finnish, Swedish and Norwegian governments, intervening in the case. Two distinct arguments are used to substantiate the justificatory basis for positive action under the circumstances. Labour markets “are still broadly partitioned on the basis of gender”⁷⁷² with a glass ceiling effect.⁷⁷³ even when women are adequately represented in the “lower positions in the occupational hierarchy”,⁷⁷⁴ they are almost absent from the higher echelons. Moreover, “softer” forms of legislative action, such as occupational training, guidance and initiatives to share the burden of occupational and family responsibilities between men and women,⁷⁷⁵ have proved, according to the Finnish government, insufficient to heal the gender bias of the labour market. The German scheme at issue, therefore, respects proportionality of concern both in terms of accurately targeting *existing* disadvantage in particular career brackets and in terms of being the *least onerous effective* alternative.

An important clarification is necessary at this point regarding the relationship between Marschall and Kalanke and how they fit into the theoretical construct of proportionality of concern. As with Marschall, the Bremen scheme in Kalanke is also designed to target particular career brackets. In this way both schemes avoid, at least in theory, the danger of being insensitive to the glass ceiling phenomenon, given that gender representation is not counted against the total number of employees in the sector. In the

⁷⁷² Marschall, para 16.

⁷⁷³ Giele, J. Z. and L. F. Stebbins (2003). Women and Equality in the Workplace: A Reference Handbook, ABC-CLIO Ltd.

⁷⁷⁴ Marschall, para 16.

⁷⁷⁵ Ibid.

absence of a saving clause, however, the Kalanke scheme falls short of adhering to proportionality of concern at the point of its application in practice. When the “chips are down” the Kalanke scheme allows for a *less disadvantaged individual* to be accorded *more concern* simply because she nominally belongs to an under-represented group. Especially in cases where under-representation of women is marginal this apparent inconsistency becomes seriously problematic, so much so that it undermines the overall legitimacy of the scheme.

Marschall, on the other hand, is not guilty of such a fault. The key issue, therefore, in view of proportionality of concern is the saving clause. Although the Court’s rationale manifestly revolves around it, this is done for the wrong reasons. The Court appears to be relieved in the realisation that it has a chance to reverse Kalanke without having to denounce it for what it was, that is a conservative and unsophisticated interpretation of the general principle of equal treatment. The saving clause allows for ad hoc interpersonal comparisons of qualifications, which is, in the eyes of the Court, an unambiguous reaffirmation of the *primacy of the individual*. At the end of the day and with all things considered, the ultimate decision between the male and the female candidate, found to be equally qualified, will be premised upon *individual* characteristics, since *personal circumstances* can tramp *gender* in concreto and cancel the effect of the quota.

What the Court fails to see, however, is that the ultimate criterion is *disadvantage*. The German scheme is designed in such a way so as to favour the candidate *actually* suffering from disadvantage in each particular case. There is a *presumption* in favour of women because “the mere fact that a male candidate and a female candidate are equally

qualified does not mean that they have the same chances".⁷⁷⁶ But this presumption is *reversible* exactly because proportionality of concern requires *flexibility* in assessing the particularities of individual situations. Ideally, positive action programmes should ensure that concern is allocated proportionally even *within* the target group itself. When this is not possible, there must, at least, be a safeguard in favour of the *disadvantaged person*, who may or may not belong to the under-represented gender.

This is, once again, the direct result of understanding equality as a holistic imperative, whereby under-representation *per se* is a necessary but insufficient condition to justify preferential treatment. A *male candidate suffering from socio-economic disadvantage* may be given priority over an *otherwise non-disadvantaged female candidate*.⁷⁷⁷ This is the essence of proportionality of concern and this is why the proviso is central to its materialisation into legal provisions tailored to pursue equal treatment. Without negating the primacy of the individual its deserved importance in a liberal theoretical framework, the real issue here is quite different.

The saving clause constitutes a *bridge that connects gender-targeted measures with the mainframe of equality law and policy*. Positive measures in favour of women have the principal aim of promoting gender equality in areas where this is most needed. But, at the same time, they remain part of a comprehensive equality project. In this regard, their function cannot be independent from other equality considerations, regarding race, ethnicity, age or even socio-economic status. When the quota is triggered, therefore, it is imperative that its ad hoc application is also justified from the perspective of prioritising gender equality over competing equality claims.

⁷⁷⁶ Marschall, para 30.

⁷⁷⁷ That is other than the fact that women are generally under-represented in the particular career bracket.

On the face of it this may seem as allowing an individual claim of a disadvantaged *person* to trump the collective claim of a disadvantaged *group*. This schematic depiction may be rather simplistic and inadequate to tell the whole story, but it is not in itself contrary to proportionality of concern. In fact, one of the main deficiencies of the group-approach under the “classic method” of positive action⁷⁷⁸ is its conceptual commitment to “standardised” notions of what constitutes a social group.⁷⁷⁹ For the purposes of positive action, however, it is socio-economic *disadvantage* that should count as the ultimate decisive criterion for the identification of beneficiaries, as it is the inequalities created by disadvantage that positive action is intended to address. An individual worker that suffers from such disadvantage should not be deprived of the chance to have his personal circumstances - i.e. his state of disadvantage - tilt the balance in his favour, even if he cannot be formally “classified” as a member of a disadvantaged group.

More often than not, however, a male employee will be disadvantaged for reasons that will make group classification possible. As the Court shrewdly observes in *Kalanke*, older candidates may be disadvantaged vis-à-vis their younger colleagues regardless of gender. Although this does not in any way affect the legitimacy of a gender quota *per se*, especially if one takes account of the possibility of double-disadvantage for older female workers, it does offer a common scenario of conflict, whereby rules promoting gender equality may clash with the need to counter age discrimination. In view of the recent ruling in *Mangold*,⁷⁸⁰ where the Court declared protection from age discrimination to be among the general principles of Community law, it seems plausible to treat such a clash

⁷⁷⁸ D. Caruso, *supra* no.248.

⁷⁷⁹ See *infra*, chapter 2.4.

⁷⁸⁰ *Mangold v Rudiger Helm* [2005], European Anti-Discrimination Law Review, (C-144/04)

as a genuine possibility with indeterminate consequences. Interestingly, a while before Mangold was decided there was an *actual* opportunity for the Court to review the issue in the context of the Badeck positive action scheme.

What is important for our present analytic purposes is that the “loser” of preferential treatment allocated through gender quotas is not simply the *individual* candidate that did not get the job or the promotion. This candidate is highly likely to belong to a multitude of social groups, one or more of which may also be under-represented and, hence, disadvantaged within a particular career bracket. Through this *group v. group* schema it is easier to realise how the saving clause really operates *within the conceptual framework of positive action* and as an exemplification of *proportionality of concern*. Instead of circumventing the quota altogether in favour of a return to unqualified individualism, the saving clause enables the selection panel to take a step back, look at the bigger picture and follow a comprehensive and consistent equality paradigm.

This harmonious coexistence of competing equality claims under the conceptual “aegis” of proportionality of concern is not reflected in the Court’s reasoning. Although the operative part of the ruling in Marschall is unimpeachable, the Court still makes minimal use of the principle of proportionality to test and solidify the legality of the positive measures it examines. One might be tempted to suggest that, after the disaster that was Kalanke, the Court was right to keep things uncomplicated and allow for the Marschall scheme to pass the legality test with flying colours. Even with these benign intentions taken into account, there is one rather striking omission from the analysis. As with Kalanke, the scheme in Marschall is designed to tackle under-representation of

women without any consideration for the *severity* of the problem and without any corresponding adjustments according to the *degrees* of under-representation. From a proportionality of concern point of view, therefore, the Marschall quota is equally unsophisticated to the Kalanke one and is liable to lead to a situation where a *marginally* under-represented group enjoys unnecessary preference.

Unlike Kalanke, the Marschall scheme does not set absolute parity as its ultimate goal. This may have made it easier to for the Court to “look the other way” and ignore the absence of “success standards” either in the form of a sunset clause or in the form of specified targets, the accomplishment of which would satisfy the equality requirement and render the quota redundant. It is exactly on these grounds that the *Badeck* positive action system thrives over its German predecessors. And it is no coincidence that the Court found the opportunity in this case to further refine its approach on positive action and to standardise its test of legality with direct links to proportionality.

11.4.3 The Amsterdam “revolution”: Is Badeck a step closer to proportionality of concern?

The positive action scheme in *Badeck* introduced a wider array of positive measures compared to the previous German schemes brought before the Court. Apart from a flexible results quota⁷⁸¹ in favour of equally qualified female candidates in areas of the public service where women were under-represented, it also included binding targets of female participation in particular areas of employment and timetables for the

⁷⁸¹ *Badeck*, para 28.

attainment of these targets.⁷⁸² Although Badeck was decided ten years ago, the fact that this was the first time that the national measure challenged did not merely consist in a straightforward gender quota calls for precise analysis of each component of the programme from the perspective of proportionality of concern.

Specifically, the *Law of the Land of Hesse on equal rights for women and men and the removal of discrimination against women in the public administration*⁷⁸³ was a comprehensive five-pronged legislative plan to incorporate the Equal Treatment Directive into the national legal order. It provided for:

- *Priority to equally qualified* female candidates in areas of the public sector where women were *under-represented*, unless *reasons of greater legal weight* that emerge through an *objective assessment* of all candidates tilt the balance in favour of another candidate [measure 1].
- *Binding targets* guaranteeing a *minimum percentage* of women for temporary posts in the academic service and for academic assistants, which is *at least equal to the percentage of women among graduates, degree- holders and students in each discipline* [measure 2].
- *At least half of training places* to be allocated to women in occupational areas where they are *under-represented* and where the State does not hold a monopoly of training, *unless* there are *not enough* applications from women despite appropriate measures to draw their attention to available training positions [measure 3].

⁷⁸² Schiek, D. (1998). "Sex Equality Law After Kalanke and Masrshall." *European Law Review* 4(2): 148-166.

⁷⁸³ Hessisches Gesetz über die Gleichberechtigung von Frauen und Männern und zum Abbau von Diskriminierungen von Frauen in der öffentlichen Verwaltung, 21 December 1993, GBVBl. I, p. 729.

- *Equally qualified* female candidates to be *called for interview* in sectors where women are *under-represented*, insofar as the female candidates satisfy *all the conditions required* [measure 4].
- *Recommendation* that the *objective* of the advancement plan to ensure that *at least half* of the members of representative, administrative and supervisory bodies are *women* must be *taken into account* when adopting *implementing* legislative measures [measure 5].

All these measures share a basic conceptual premise, as they form part of a women's advancement plan designed to actively promote gender equality in employment and eliminate the under-representation of women in particular sectors of the public service. Two elements can be singled out as the common denominator of these five measures: first, *under-representation* of women is a *conditio sine qua non* for any of the provisions to come into play; second, wherever *merit* is an issue,⁷⁸⁴ female candidates need to be *equally qualified* to take advantage of the benefits provided. At first sight, therefore, the Badeck scheme appears to be more refined and wide-ranging than the Marschall one, but it does not substantially deviate from the principles constituting the theoretical backbone of the latter. This is particularly obvious with regard to measure 1, which is very similar to the Marschall quota.

A more detailed analysis of the Badeck measures, however, reveals that the differences with previous schemes are more far-reaching than one would suspect. Starting with the flexible result quota itself, one is bound to notice the terminological novelty with regard to the phrasing of the saving clause. Instead of referring to "*reasons specific to an*

⁷⁸⁴ This is clearly the case for measures 1 and 4. The way merit operates with regard to measures 2 and 5 will be explored in detail in what follows.

individual [male] candidate [that may] tilt the balance in his favour”⁷⁸⁵ the Badeck quota stipulates that the female candidate will be given preference “*if no reasons of greater legal weight are opposed*”.⁷⁸⁶

Quite understandably this choice of wording drew the attention of the Court, which asked the German authorities for clarifications on the meaning and content of the clause. In his written submission the German Prime Minister explained that “those reasons of greater legal weight concern *various rules of law*, governed partly by statute and partly by decree, which make *no reference to sex* and are often described as *social aspects*” [emphasis added].⁷⁸⁷ These social aspects “are based, from a constitutional point of view, partly on the principle of the social State”,⁷⁸⁸ which is the equivalent of the Anglo-Saxon welfare state principle.⁷⁸⁹

This direct reference to the welfare state principle as the normative source of reasons that could override the quota has a multilayered significance that cannot be underestimated. Its principle effect is the decoupling of the saving clause from unqualified individualism. Instead of being of a purely *individualistic* nature, the saving clause is tailored in such a way so that broader social considerations can also be taken

⁷⁸⁵ Second sentence of Paragraph 25(5) of the Beamten-gesetz für das Land Nordrhein-Westfalen (Law on Civil Servants of the Land), in the version published on 1 May 1981 (GVNW, p. 234), as last amended by Paragraph 1 of the Seventh Law amending certain rules relating to the civil service, of 5 February 1995 (GVNW, p. 102).

⁷⁸⁶ Badeck, para 26.

⁷⁸⁷ Badeck, para 34.

⁷⁸⁸ Ibid. Article 20 (1) of the Basic Law for the Federal Republic of Germany (Grundgesetz, GG) provides: “The Federal Republic of Germany is a democratic and social Federal state.” Article 28 (1) of the Basic Law stipulates: “The constitutional order in the Laender must conform to the principles of republican, democratic, and social government based on the rule of law, within the meaning of this Basic Law”. The social aspects are also partly based on “the fundamental right of protection of marriage and the family (Article 6 of the Basic Law)” (Badeck, para 34).

⁷⁸⁹ The German term *sozialstaat* or the Italian equivalent *stato sociale* are literally translated into English as social state. The term, however, never really caught on despite certain early twentieth century attempts. Smith, M. (1901). “Four German Jurists IV.” *Political Science Quarterly* 16(4): 641-679

into account. Five groups of rules that can justify the override of the quota are explicitly identified in the German authorities' written response, including "the possibility of ending a period of *long-term unemployment* by an appointment" [emphasis added], as well as the preference to persons who have been unable to commit to full-time employment in the public service because of *family work* engagements.⁷⁹⁰

Gender equality, therefore, may be a priority policy objective, but not one that operates in a social vacuum. Concern for *disadvantage* is the driving force behind positive action and, if the circumstances so require, the gender quota will give way to preference for those who are deemed to need it the most. The goal of equal treatment, then, is attained when concern is allocated proportionally to individuals as well as groups. This is arguably the most interesting element of the Badeck scheme: it manages to put forward a holistic view of equality by introducing "social aspects" into the equation, but at the same time it reinforces the centrality of disadvantage as the underlying rationale and, hence, the ultimate criterion of deciding who is entitled to the benefits. In this way, the saving clause is formally disengaged from pure individualism, but it ensures that, at the end of the day, it is the more disadvantageous candidate in any given set of circumstances that will have the better chance to be given priority.

This simultaneous concern for the disadvantage of both groups and individuals is particularly evident when it comes to disability. The latter also constitutes one of the grounds that may lead to the override of the quota, with the German authorities stating that the "possibilities of advancement are *more flexible* for *seriously* disabled persons" [emphasis added].⁷⁹¹ The careful choice of wording echoes the notion of proportionality

⁷⁹⁰ Badeck, para 35.

⁷⁹¹ Ibid.

of concern. Disability does not take automatic priority over gender, nor does it cancel the priority of addressing gender disadvantage through the Badeck scheme. Gender positive action, however, remains above all an equality instrument and as such it is open to adjustments when another equality dimension has a reasonable claim to ad hoc priority. This is the case when *seriously* disabled candidates are up for appointment or promotion, which would be granted to them if it weren't for the quota. It is worth noting that the *degree* of disability plays an obviously significant role in whether the disabled candidate will take precedence over the female candidate. Although not explicitly identified as such, this is a typical *proportionality test* that will govern the relationship between disability and gender in this context and will determine the more desirable outcome in equality terms.

Prima facie the submission that gender equality programmes must take account of other equality dimensions as well may seem as innovative and, thus, not applicable *de lege lata*. This is, however, far from the truth. Adding a *gender dimension* into all Community policies under the strategy of *gender mainstreaming* is now an established priority of the Union and one of its Treaty-based central objectives.⁷⁹² What is argued for here, therefore, is the other side of the mainstreaming coin, whereby the objective of addressing gender inequalities is not decoupled from the obligation to protect and promote equality of treatment in all its dimensions.

The suggestion that the saving clause in the Badeck scheme is not a return to unqualified individualism is further supported by social facts. Two of the five types of “reasons of greater legal weight” than the gender quota involve candidates that wish to

⁷⁹² Hafner-Burton, E. M. and M. A. Pollack (08/2008). Mainstreaming Gender in the European Union: Getting the Incentives Right. *Jean Monnet Working Paper* [<http://www.jeanmonnetprogram.org/papers/08/documents/JMWP08-08PollackandHafner-Burton.pdf>]

“return” to full-time employment in the public service after spending time on “family work”. Traditionally, of course, it is women for the most part that undertake the bulk of family responsibilities and, for this reason, find themselves temporarily unavailable for full-time work. The Badeck saving clause, therefore, is not only “innocent” of indirect discrimination as the Court requires.⁷⁹³ More than that, it is construed in such a way that it may serve social policy objectives without ignoring the gendered reality of the employment sphere, as influenced by the corresponding roles that the sexes assume at home.

Closely linked to that is the scheme’s inclusive conception of what counts as *merit*. The German law, in the first paragraph of its article 10, explicitly states that “[w]hen qualifications are assessed, capabilities and experience which have been acquired *by looking after children or persons requiring care in the domestic sector (family work)* are to be taken into account, in so far as they are of importance for the suitability, performance and capability of applicants” [emphasis added].⁷⁹⁴ A standard feminist critique that attacks the metric systems of professional qualifications is taken seriously here and it seems to inform the Badeck scheme. Criteria of appointment or promotion such as seniority or previous work experience tend to be gender-biased and to indirectly favour male candidates.

By adding family work to the pool of potential qualifications the scheme directly addresses one of the most serious competitive disadvantages that female candidates usually face. In doing so, it reinforces the link between equal treatment and

⁷⁹³ With a possible question-mark in this regard next to one of the grounds put forward by the German government, namely the possibility to give preference to “former temporary soldiers, that is, those who voluntarily served for a limited period longer than compulsory military service” (Badeck, para 35).

⁷⁹⁴ See Badeck, para 9.

proportionality, as it allows for the assessment of *relevant* experience to go beyond formal credentials. This is, of course, premised on the assumption that the protection of the right to family life constitutes a legitimate state priority. Given that time is not an inexhaustible resource, contributions in the form of family work are likely to have a knock-on adverse effect on the person's availability and performance⁷⁹⁵ in the employment field. These contributions, however, cannot but have some added value for the person undertaking family responsibilities, leading to the inevitable improvement of skills and capabilities that may be useful in other areas of social activity as well. The principle of proportionality, then, is the most suitable normative tool by means of which to draw the necessary analogies and measure the *value* of qualifications that candidates have acquired from different sources and backgrounds.

Is, then, the Badeck positive action scheme a flawless legislative initiative that should serve as a model for national governments? Despite all the encouraging evidence that has been produced to this point, the answer is not that simple. The key issue once again is that of defining *under-representation*. This time, however, the scheme was apparently tailored with this problem in mind. Although no actual *definition* is laid down in the law, measure 2 directly links under-representation of women in employment sectors with the *percentage of female degree-holders or students* in the corresponding discipline. The idea is rather straightforward and quite appealing to common sense: the *discrepancy* between the numbers of female employees and those of female degree-holders or students in the relevant discipline leads to a *presumption* of indirect discrimination against women. Such a presumption is the most reasonable explanation for

⁷⁹⁵ Or, more accurately, on the possibility to perform.

the discrepancy and it is, thus, the justificatory basis for positive measures aimed at redressing the unfair imbalance.

On this ground alone it is possible to conclude that the Badeck scheme scores much higher than its predecessors. It sets out an *objective* frame of reference by virtue of which to measure under-representation and, consequently, gauge the *actual* scale of inequality that needs to be addressed. One should not disregard that this objective connection of academic qualifications to professional potential allows us to avoid *formally valid but substantively absurd* claims of groups that may be under-represented in absolute terms within a particular employment sector. The statistical fact, for instance, that *male nurses* are a relatively “rare bread” does not entail that men should be understood as a *disadvantaged group* in this context. Under the Badeck scheme this would only be the case if it could be shown that the number of male nurses is lower than the number of male degree-holders or students in the relevant discipline.

Having said that, the Badeck approach to under-representation is still not immune to criticism. As discussed earlier, in view of the Marschall ruling, *apparently objective* criteria to determine under-representation are usually prone to essentialism. In the absence of any qualitative data weighing up the *genuine willingness* of the under-represented group to participate in a particular sector and, most importantly, an assessment of the *reasons* leading to a possible unwillingness, the objectivity of the Badeck criterion is not beyond question. Although it is accepted that this criterion will more often than not accurately predict that under-representation is the result of institutionalised discrimination, this is *not necessarily always* the case. The radical feminist argument, suggesting that the most invidious form of gender bias is the

calculation of women's desires and ambitions by male standards,⁷⁹⁶ is of particular relevance here. So is, though, the internal critique against several feminist accounts that treat women as some sort of "collective" with a single voice that can adequately speak for everyone's interests, needs or desired life-choices.⁷⁹⁷

This is not to argue, of course, that the Badeck approach is unsuccessful or that it should be abandoned. On the contrary, it is undoubtedly the most useful metric system of under-representation that national legislatures have managed to come up with to date. One should note that the intentions of the German legislators are admittedly benign in creating a legislative platform to effectively address a genuine instance of social inequality. However, this is not enough to insulate the scheme from all fault or flaw and, even more importantly, it is not necessarily enough to effectively achieve the objective of gender equality.

Some elaboration with regard to this latter point is in order. Across the five measures introduced by the Badeck scheme, wherever merit is an issue, female candidates must satisfy the condition of being *equally qualified* to other candidates. As explained earlier, an important innovation of this positive action scheme is that it opens up the notion of merit to include experience and aptitudes that have been achieved outside typical employment. It thus becomes relatively easier, in theory, for women to be deemed equally qualified for the purposes of most job descriptions. In practice, however, the application of this extended notion of merit may prove more difficult than on paper. Do women develop their leadership skills, for instance, through running a household?

⁷⁹⁶ See generally Barnett, H. (1998). *Introduction to Feminist Jurisprudence*, Routledge., p. 168 et seq.

⁷⁹⁷ Gilligan, supra no.87; N. Fraser (on the criticism), supra no.584

And do their organisational skills improve through setting up and maintaining a schedule of their daily household and childcare related activities?

Answering these questions to the affirmative *in principle* may be enough to guarantee that women will be called for an interview under measure 4 of the scheme, but it does not seem to amount to a definitive determination of their equal qualifications for the purposes of measure 1. Insofar as the relationship between measures 1 and 4 in this regard remains unclear, it may be argued that the scheme is not radical enough to solve the problem of under-representation of women in the public service. Real progress, at least in the short term, can only be achieved through more aggressive positive action schemes that will allow for the possibility of giving preference to *sufficiently qualified* candidates from the disadvantaged group.

Nevertheless, it must not be overlooked that the Badeck scheme is a very promising start and a step to the right direction. Its comprehensiveness alone constitutes an impressive sign of progress compared to earlier legislative attempts and raises the bar for national authorities. This is well in tandem with the theory of proportionality of concern advanced here, which is admittedly quite demanding in that it requires a multitude of equality dimensions to be taken into account. In this respect, however, it is essential to make two important remarks.

First, the *legitimacy* of positive action schemes such as the one in Badeck is *not in any way compromised* either according to the Court's reasoning or under the rationale of proportionality of concern. The latter does not put in jeopardy the legitimacy of gender quotas of the *Marschall* variant either, because the deficiencies of the programme

regarding the accurate identification of disadvantage⁷⁹⁸ do not affect the *basic entitlement* that women have to the positive action benefits. What it does is to allow for a *stricter review of the positive state obligation under equal treatment*, which may lead to an additional state obligation to *extend positive action benefits to other disadvantaged groups* as well.

This brings us to the second remark, which is closely linked to the body of literature that inspires proportionality of concern. In Ronald Dworkin's theory of equality of concern the judge occupies a central position, ingeniously named "Hercules" as a reflection on the magnitude of the task he is faced with. Proportionality of concern, on the other hand, attributes this role of Hercules to the *legislator* rather than the judge. It is the national and European legislatures that are primarily entrusted with the task of transforming equal treatment from an abstract principle into normative reality. And it is part of this duty to ensure that positive measures enacted to actively eliminate disadvantage are the product of a well thought out and carefully designed policy that carries out an efficient, fair and justifiable *prioritisation* of equally valid claims.

⁷⁹⁸ Due to the fact that under-representation is treated as a "black box", without any reference to degrees of under-representation and corresponding adjustments in terms of equality priorities.

11.5 Positive Action in Employment, Politics and the Judiciary: Proportionality of Concern as a Unifying Theory?

The purpose of this penultimate section of the thesis is to provide a clear image of the types of permissible quotas and of the conditions of legitimacy these need to fulfil under the principle of equal treatment understood as proportionality of concern. The tripartite distinction between *employment*, *politics* and *sensitive areas of the public sphere*, put forward in Part III, remains a pertinent analytical tool. As a result, the table that follows⁷⁹⁹ and which summarises the main points of the analysis will offer a graphic representation of how positive action should operate in each of these three areas.

The key contribution of the table to the analysis is this: the underlying assumption that, when it comes to positive action, “one size doesn’t fit all” is at once *challenged* and *reinforced*. Equal treatment as proportionality of concern constitutes the basis of a coherent theoretical framework, which adds a *common equality dimension* across the spectrum of human activity. In other words, equal treatment as proportionality of concern entails that, in all areas of the public sphere, there will be an *equality obligation* on both public and private actors, specified through the appropriate normative instruments. This equality dimension, however, does not entail that the *actual content* and the degree of the obligation will be the same across the spectrum. In other words, what equal treatment requires and - most importantly for present purposes - whether and under what conditions positive action forms part of these requirements will *vary according to the area* in which it operates.

⁷⁹⁹ The structure of the table deliberately mirrors that of Table 1, presented in chapter 9.1.

Before presenting and considering the table itself, it is important to flesh out an important distinction that has implicitly permeated the analysis of the ECJ case-law on employment quotas⁸⁰⁰ and of the merit principle.⁸⁰¹ This is the distinction between *equally*, *fully* and *sufficiently* qualified candidates for promotion or appointment. Although these terms seem relatively self-explanatory in theory, it is worth providing more precise definitions that correspond to standard employment practices.

In this regard, the differentiation between the three degrees of merit reflects the candidates' possession of the competencies necessary to fulfil the duties and responsibilities typically listed on the *job description*, as well as of the *essential* and *desirable* qualifications typically listed on the *person specification* for the job. The term essential qualifications generally refers to the minimum requirements without which the candidate would not be able to perform the tasks involved, whereas possession of desirable qualifications would enable the candidate to achieve a high standard of job performance.

Two or more candidates, then, are deemed to be *equally* qualified to one another when their scores are *identical* with regard to both *essential* and *desirable* qualifications. Furthermore, candidates that possess all the *essential* qualifications should be considered as *sufficiently* qualified for the job in question, as was the case with the Abrahamsson quota scheme. Finally, it is submitted that there is a *threshold* of qualifications beyond which candidates should be regarded as *fully* qualified for the job, in the sense that they

⁸⁰⁰ See *infra*, chapter 4.2.

⁸⁰¹ See *infra* chapter 6.5.

possess a combination of essential and desirable qualities and qualifications that will enable them to perform the job at a high standard.

The relationship between the three degrees of merit is rather complex and cannot be examined thoroughly within the framework of the present enquiry. It is, however, possible and necessary to explain those elements that are of particular importance for the justification of quota systems under the alternative conception of equality proposed here. More specifically, it is crucial to try and delineate the conceptual boundaries between the novel term *fully* qualified and the competing two terms that also describe degrees of merit, with a view to determining the most appropriate threshold of legality for quotas in employment.⁸⁰²

First of all, *fully* qualified candidates possess by definition *more* qualifications compared to *sufficiently* qualified candidates. While the latter fulfil only the *essential* requirements of the job description, *fully* qualified candidates possess *all essential* qualifications *and* a number of *desirable* qualifications. The exact combination is, of course, a matter of interpretation and, insofar as the distinction between fully and sufficiently qualified candidates is concerned, it need not be pursued any further at this point.

The relatively more controversial aspect of the tripartite classification proposed here involves the relationship between *fully* and *equally* qualified candidates. It goes without saying that two fully qualified candidates are not necessarily equally qualified to

⁸⁰² The term employment here encompasses two of the three categories identified in Part III, namely “standard” employment and employment in sensitive areas of the public sphere. For reasons that have already been explained in the relevant section (chapter 7), the legality of positive action in politics is not affected by the present analysis.

one another and vice versa.⁸⁰³ Let us consider the simplest possible example, which would entail to assume that two candidates possess the totality of both essential *and* desirable qualifications. Two applicants for a University lectureship, then, may satisfy *all* the conditions set out in the job description, such as holding a doctoral degree or having the required teaching experience and publications, but may still not possess *identical* sets of qualifications. The difference may either be purely *quantitative*, such as in the number of publications and in the years of previous teaching experience, or encompass seemingly *qualitative* elements as well, such as the academic “ranking” of the institutions of prior employment and the academic reputation of the journals of publications.

The preliminary conclusion that may be drawn from the preceding analysis is evident. From a pragmatic point of view it is in fact more difficult to determine when two candidates are equally qualified than deciding whether or not they are *fully* qualified according to an agreed standard. In other words, making comparative evaluations of qualitative elements of merit is an exact science that requires in theory an extremely refined metric system, with inbuilt guarantees of objectivity, which will be capable of processing an almost infinite number of data.⁸⁰⁴ In the absence of such a system, it should be conceded that any interpersonal comparison of candidates that acknowledges them as equally qualified is inherently prone to a certain degree of subjectivity.

If what the interpersonal comparison, however, is looking for is *fully* qualified candidates, it is possible to manage the potentially infinite and indeterminate data in a

⁸⁰³ Although it must be noted that in the latter situation, that is when two candidates are equally qualified but neither is fully qualified, may in fact result in neither candidate being ultimately selected.

⁸⁰⁴ Corresponding, in our example, to the almost infinite number of Higher Education Institutions, undergraduate and postgraduate degrees and academic journals that may feature in a candidate’s CV.

more objective way. Insofar as a specific selection process is concerned both quantitative and qualitative differences, as in the case of the aforementioned example, must be understood as *purely quantitative* for the purposes of reasonably describing candidates as *fully qualified* for the position. In other words, the term *fully* qualified - read in juxtaposition with the term *equally* qualified - intends to signify that the candidates are *qualitatively at a tie* at the final stage of the selection process, when all their relevant qualifications have been taken into account. Any differences that may remain between them have no bearing on the standard of performance they are expected to attain if given the job, since both are comfortably above the threshold of a projected high standard performance.⁸⁰⁵

With these remarks in mind let us now turn to consider Table 2. This summarises the basic propositions of this thesis regarding the place of positive action within the theoretical framework of equal treatment as proportionality of concern. Although the table is intended to cover the whole spectrum of social activity where positive action may operate, it is worth recapitulating the ECJ position on employment quotas as it currently stands. According to the Court only flexible result quotas allocating preference to *equally* qualified candidates from the target group may pass the test of legality.⁸⁰⁶ This is further evidenced by the fact that the *Abrahamsson* quota scheme, whereby preference was allocated to a *sufficiently* but *not equally* qualified female candidate, was struck down by the Court. It is further submitted that the current interpretation of equality law and principles by the ECJ is unlikely to permit quota systems designed to favour *fully* qualified candidates.

⁸⁰⁵ This is clearly in line with the forward-looking understanding of merit discussed in chapter 9.

⁸⁰⁶ According to the Badeck formula and under its celebrated and fully explained conditions.

POSITIVE ACTION IN:	EMPLOYMENT	POLITICS	JUDICIARY
TYPE - SOFTER FORMS (encouragement / training)	COMPULSORY targeted encouragement and training policies	COMPULSORY encouragement of individual candidates and of political parties to increase participation rates of under-represented groups (training: N/A)	COMPULSORY targeted encouragement and training of individual candidates from under-represented groups
TYPE - QUOTAS / PREF. TREATMENT	COMPULSORY as a tie-breaker between <i>fully</i> or even <i>sufficiently</i> qualified candidates (depending on nature of job)	PERMISSIBLE in candidate selection processes NON-PERMISSIBLE in election processes	COMPULSORY as a tie-breaker between <i>fully</i> qualified candidates
CRITERION to trigger quota and determine target groups	DISADVANTAGE + UNDER-REPRESENTATION of the target group in the specific cadre	UNDER-REPRESENTATION of the target group in the particular elected body	UNDER-REPRESENTATION of the target group in the specific cadre

Table 2: De Lege Ferenda – positive action under equal treatment as proportionality of concern

When Table 2 is read in juxtaposition to the previously presented Table 1,⁸⁰⁷ which reflected the position of European law on positive action *de lege lata*, there are two immediate remarks that set the tone of the analysis. First, in two out of the three areas of

⁸⁰⁷ See *infra*, chapter 9.1.

the public sphere quotas are not only permissible but *compulsory*.⁸⁰⁸ This is hardly surprising. Positive action under equality as proportionality of concern is an *expression* of equal treatment and not an exception to it. Existing inequalities, then, must be addressed as a matter of urgency and in the short term. Inevitably this involves an *obligation* to take active steps towards achieving a more balanced participation of social groups in the fields of “standard” employment and in the sensitive areas of the public sphere, such as the judiciary. In these areas tie-break quotas should be a *compulsory* and not just a permissible legal tool to effectively accomplish *full* equality.

The second remark relates to the *criterion* of identifying both the need for positive measures and the target groups that will reap the benefits of these measures. Positive action under its classical conception is an anti-discrimination law mechanism, aiming to cancel the on-going effects of past or present discrimination against particular social groups. Current legislative and judicial practice accordingly considers under-representation as a proxy for disadvantage stemming from discrimination. In other words, when a social group is under-represented in a particular section of the social sphere, there is an assumption that this under-representation is the result of discrimination against the group, which leads to the group being socially disadvantaged.⁸⁰⁹ In the alternative interpretative construct put forward here under-representation is *decoupled* from disadvantage. Instead, the criterion is different in the three distinct areas of social activity that have been identified. Employment quotas are legitimate - and, indeed, compulsory - for social groups that are both under-represented *and* socially or economically

⁸⁰⁸ With regard to elected public office see further below.

⁸⁰⁹ Unless, of course, it can be proved that under-representation in a particular area of the public sphere is actually *not* the result of discrimination.

disadvantaged, without the former being automatically regarded as a proxy for the latter. In this way, there is no need to explain why under-representation of white men in a particular employment cadre does *not* give rise to gender quotas in favour of male candidates.

The legitimacy of quotas in elected public office and in sensitive areas of the public sphere, on the contrary, is linked *only* to under-representation of the groups, and it is *not dependent* on whether this under-representation amounts to socio-economic group disadvantage. In view of the preceding analysis the reason should be obvious. Equal treatment as proportionality of concern in these contexts entails that the law should be sensitive not only to the needs and entitlements of each particular group, but also to those of the society as a whole. It is this wider societal concern to address group disadvantage while maintaining social equality⁸¹⁰ that acts as a guideline for the normative framework on equal treatment. And it is this concern that will ultimately determine whether quotas in politics and the judiciary are justified or not.

In this regard, an imbalanced electoral list from the perspective of gender, for instance, deprives the electorate from the full set of options that should be available to it in a democratic society. Under-representation of particular groups, then, is primarily detrimental to the democratic polity itself. Similarly, a judiciary that is primarily, if not exclusively, comprised by white, middle-aged male judges fails to resonate with the polity it purports to serve in a way that a democratic institution should. In both cases, then, quotas are justified as a means to achieve full equality not only between the under-

⁸¹⁰ Wolff and De-Shalit, *supra* no. 709., chapter 10.

represented groups and the rest of the citizenry, but also between all citizens with regard to their participation in the democratic processes through which state power is wielded.

In elected public office, however, quotas remain *permissible* rather than compulsory even under proportionality of concern. Contrary to what happens in sensitive areas of the public sphere, which organically belong to the core of the state apparatus, the realm of politics in a democratic society is dominated by the free and unfettered will of the people. Political parties are, undoubtedly, significant institutional actors in this democratic process and should be allowed an adequate margin of discretion to put forward their strategic plans for the accomplishment of the goals they wish to pursue. Ultimately their choices both on matters of principle and on matters of policy are the object of public scrutiny, expressed through elections. In view of the inherently participatory nature of the democratic process, then, introducing *compulsory* quotas at any stage of the process would amount to an unmerited and, in any case, self-defeating lack of *trust* to the democratic system itself.

To put it in more concrete terms, democracy cannot be externally imposed. If the electorate of a particular European state wishes to vote in office a political party that does not fully commit to gender or race equality in its philosophy or in its political practice, this is the price the European society has to pay in order to maintain its democratic integrity. A top-to-bottom approach, involving an obligation of national legislatures to impose rigid positive action requirements on national political parties, would be completely at odds with the principle of proportionality of concern. The latter is designed in such a way as to allow a maximum degree of sensitivity to national idiosyncrasies and democratically construed collective decisions of European societies.

Quotas in politics, therefore, cannot be compulsory, because this would seriously undermine the principle of equality understood in a pluralist way and within a democratic philosophical environment. They are, nonetheless, *permissible*. It is up to national legislatures and to national political parties themselves, in other words, to adopt a more proactive stance towards imbalances in representation and address them in the short term through quotas. It must be pointed out, however, that under proportionality of concern such quotas are permissible *only* in *candidate selection* processes, and not in the actual election process. The reasons have already been explored in depth⁸¹¹ and will not be reiterated here. Suffice it to say that the *rejection* of quotas in elections⁸¹² is premised on the same underlying rationale as the *justification* of quotas in candidate selection and in the judiciary. It is the wider equality interest of society as a whole that takes priority over the narrower equality interests of particular individuals or groups. Strict quotas that would predetermine to an extent the *outcome* of the electoral process inevitably amount to a heavy-handed and unwarranted interference with the constitutionally established right of citizens to *freely elect the representatives of their choice*.

In lieu of a conclusion, this thesis will end with a conditional recognition of its own limitations. A comprehensive theory of equality cannot possibly fit in a doctoral thesis, let alone in a single chapter of it. Proportionality of concern, therefore, is admittedly not yet a complete theory. However, it was never an ambition of the analytical project undertaken here to present such a complete theory. The contribution of proportionality of concern to the discourse, even at this embryonic stage, is that it can act

⁸¹¹ See *infra*, chapters 7.3, 7.4 and especially 9.2.

⁸¹² That is quotas providing that a minimum number of members of the target group will *necessarily* be elected in office, possibly ahead of non-target group candidates with higher numbers of votes.

as a philosophical canvass upon which to interpret the notion of full and effective equality and explain its relationship to positive action. The existence of such a canvass validates the claim that a distinctly European conception of equality inspires an overarching principle of equal treatment that permeates the European normative space. It enables a critical evaluation of European equality instruments and of positive action measures that conform to an unsupported “one size fits all” approach. It allows, instead, the adoption of an alternative view on positive action, one that is at the same time holistic and flexible so that it takes account of the different tensions that arise in different areas of social activity. Most of all, proportionality of concern encapsulates an understanding of equality as a *process* rather than as a *fait accompli*. It requires nothing less than the unassailable commitment of law-makers, judges, stake-holders and citizens to a continuous fight against practices that perpetuate inequalities, disadvantage and social exclusion.

BIBLIOGRAPHY

Books

- Adkins, A. W. H. (1960). Merit and Responsibility: A Study in Greek Values, Oxford: Clarendon Press.
- Allen, A. (1999). The Power of Feminist Theory: Domination, Resistance, Solidarity, Westview Press.
- Anzaldúa, G. (1990). Making Face, Making Soul: Haciendo Caras, Aunt Lute Foundation.
- Arendt, H. (1970). On Violence, Harcourt Brace & Co.
- Aristotle (2004). Nicomachean Ethics (translated by W.D. Ross), Kessinger Publishing.
- Aristotle (2004). Politics, (translated by D. Jowett), Nuvision.
- Arnardóttir, O. M. (2002). Equality and Non-Discrimination Under the European Convention on Human Rights, Martinus Nijhoff.
- Ashiagbor, D. (1999). The intersection between Gender and Race in the Labour Market: Consequences for Anti-Discrimination Law. Feminist Perspectives on Employment Law. A. Morris and T. O'Donnel, Cavendish.
- Atkins, S. and B. Hoggett (1984). Women and the Law, Blackwell.
- Barber, B. (1984). Strong Democracy, University of California Press.
- Barnard, C. (2007). The Substantive Law of the EU: The Four Freedoms, Oxford University Press.
- Barnett, H. (1998). Introduction to Feminist Jurisprudence, Routledge.
- Barry, B. (2001). Culture and Equality: An Egalitarian Critique of Multiculturalism, Polity Press.
- Bartky, S. (1990). Femininity and Domination: Studies in the Phenomenology of Oppression, Routledge.
- Bell, M. (2002). Anti-Discrimination Law and the European Union, Oxford University Press.
- Benhabib, S. (1996). Democracy and Difference: Contesting the Boundaries of the Political, Princeton University Press.
- Bergmann, B. (1996). In Defence of Affirmative Action, Basic Books.

- Blackburn, R. and J. Polakiewicz (2001). Fundamental Rights in Europe: The ECHR and its Member States 1950-2000, Oxford University Press.
- Calliess, C. (2007). The Fundamental Right to Property. European Fundamental Rights and Freedoms. D. Ehlers, De Gruyter.
- Chalmers, D., C. Hadjiemmanuil, et al. (2006). European Union Law: Text and Materials, Cambridge University Press.
- Chalmers, D. and G. Monti (2008). European Union Law - Updating Supplement, Cambridge University Press.
- Craig, P. and G. D. Burca (2007). EU Law Text, Cases and Materials, Oxford University Press.
- Crawford, J. (1998). The Rights of Peoples, Oxford University Press.
- D'Emilio, J. (2002). The World Turned: essays on gay history, politics and culture, Duke University Press.
- Dahl, R. A. (1956). A Preface to Democratic Theory, Chicago University Press.
- Daniels, N. (1996). Justice and Justification: Reflective Equilibrium in Theory and Practice, Cambridge University Press.
- Dworkin, R. (2002). Affirmative Action: Does It Work? Sovereign Virtue R. Dworkin, Harvard University Press.
- Dworkin, R. (2002). Sovereign Virtue, Harvard University Press.
- Dworkin, R. (2005). Taking Rights Seriously, Harvard University Press.
- Ellis, E. (1991). European Community Sex Equality Law, Oxford University Press.
- Farber, E. and S. Sherry (1997). Beyond All Reason: The Radical Assault on Truth in American Law, Minnesota Law Review.
- Fenwick, H. (2002). Civil Liberties and Human Rights, Cavendish
- Fishkin, J. (1983). Justice, Equal Opportunity and the Family, Yale University Press.
- Foucault, M. (1979). The History of Sexuality, Volume 1: An Introduction, Vintage.
- Fraser, N. (1997). Justice Interruptus: Critical Reflections on the 'Postsocialist' Condition, Taylor & Francis.
- Fredman, S. (2002). Discrimination Law Oxford University Press
- Fried, A. (1996). McCarthyism, The Great American Red Scare, Oxford University Press.

- Fullwinder, R. K. (1980). The Reverse Discrimination Controversy: A Moral and Legal Analysis Rowman and Littlefield.
- Genn, H. G. and S. Beinart (1999). Paths to Justice: What People Do and Think About Going to Law, Hart Publishing.
- Giddens, A. (1998). The Third Way: The Renewal of Social Democracy, Polity Press.
- Gilligan, C. (1982). In a Different Voice: Psychological Theory and Women's Development, Harvard University Press.
- Glasner, A. (1998). Gender and Europe: Cultural and Structural Impediments to Change. Social Europe. J. Bailey, Longman.
- Goldhaber, M. D. (2009). A People's History of the European Court of Human Rights, Rutgers University Press.
- Goldman, A. H. (1979). Justice and Reverse Discrimination, Princeton University Press
- Goldman, S. (1999). Should There be Affirmative Action for the Judiciary? Judicial Politics: Readings from the Judicature. E. Slotnick, American Judicature Society.
- Greider, W. (1992). Who Will Tell the People?, Simon & Schuster.
- Griffiths, J. A. G. (1997). The Politics of the Judiciary, Fontana.
- Guild, E. (2004). The Legal Elements of European Identity: EU Citizenship and Minority Law, Kluwer Law International.
- Gutman, A. (1980). Liberal Equality, Cambridge University Press.
- Habermas, J. (1994). Hannah Arendt's Communications Concept of Power. Hannah Arendt: Critical Essays. L. P. H. a. S. K. Hinchman, SUNY Press.
- Hale, B. (2001). Equality and the Judiciary: Why Should We Want More Women Judges?, Public Law.
- Hare, R. M. (1981). Moral Thinking. Its levels, Method and Point, Oxford University Press.
- Hayek, F. A. (1960). The Constitution of Liberty, University of Chicago Press.
- Helgesen, S. (1990). The female advantage: Women's ways of leadership, Doubleday.
- Henrard, K. (2000). Devising an Adequate System of Minority Protection: Individual Human Rights, Minority Rights and the Right to Self-Determination, Martinus Nijhoff.

- Hernes, H. (1987). Welfare state and women power: Essays in state feminism, Norwegian University Press.
- Jacobs, L. A. (2004). Pursuing Equal Opportunities: The Theory and Practice of Egalitarian Justice, Cambridge University Press.
- Janis, M., R. Kay, et al. (2008). European Human Rights Law: Text and Materials, Oxford University Press
- Kaltsoya-Tournaviti, N. (1997). Υποαντιπροσώπευση γυναικών και δημοκρατία [Under-representation of women and Democracy], A. N. Sakkoulas.
- Kelly, P. (2002). Multiculturalism Reconsidered: 'Culture and Equality' and its Critics, Polity Press/Blackwell Publishers.
- Kumm, M. (forthcoming 2009). Internationale Handelsgesellschaft, Nold and the New Human Rights Paradigm. The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of Rome L. A. M. Maduro, Hart.
- Kymlicka, W. (1989). Liberalism, Community and Culture, Oxford University Press.
- Kymlicka, W. (1990). Contemporary Political Philosophy, Oxford Clarendon Press.
- Kymlicka, W. (1995). Multicultural Citizenship: A Liberal Theory of Minority Groups, Oxford Clarendon Press.
- Landau, E. C. (1985). The Rights of Working Women in the European Community, Office for Official Publications of the European Communities.
- Lauterpacht, E. and C. T. Greenwood (1997). International Law Reports, Cambridge University Press.
- Lavin, C. (2008). The Politics of Responsibility, University of Illinois Press.
- Lawson, A. and C. Gooding (2005). Introduction. Disability Rights in Europe: From Theory to Practice. A. Lawson and C. Gooding, Hart.
- Loughlin, M. (2003). The Idea of Public Law, Oxford University Press.
- Lucas, J. (1993). Responsibility, Oxford University Press.
- MacKinnon, C. (1987). Feminism Unmodified: Discourses on Life and Law, Harvard University Press.
- Martin, D. (2006). Egalite et Non-Discrimination dans la Jurisprudence Communautaire – Etude Critique a la Lumiere d'une Approche Comparatiste, Bruylant.
- McColgan, A. (2005). Discrimination Law: Text, Cases and Materials, Hart Publishing.

- McCrudden, C. (1987). Women, Employment and European Equality Law, Eclipse.
- McCrudden, C. (2004). Equality and Non-Discrimination. English Public Law. Feldman, Oxford University Press.
- McGlynn, C. (1998). The Woman Lawyer, Butterworths.
- Milard, E. (2005). Constituting Women: The French Ways. The Gender of Constitutional Jurisprudence. B. B. a. R. Rubio-Marin, Cambridge University Press.
- Miller, D. (1999). Principles of Social Justice, Harvard University Press.
- Modood, T. (1997). Introduction: The Politics of Multiculturalism in the New Europe. The politics of multiculturalism in the new Europe: Racism, Identity, and Community. T. Modood and P. J. Werbner, Zed Books.
- Modood, T., R. Berthoud, et al. (1997). Ethnic Minorities in Britain: diversity and Disadvantage. The Fourth National Survey of Ethnic Minorities in Britain Policy Studies Institute.
- Mouffe, C. (2005). The Return of the Political, Verso.
- Newton, L. H. (1995). Reverse Discrimination as Unjustified. The Affirmative Action Debate. S. M. Cahn, Routledge.
- Nielsen, K. (1985). Liberty and Equality, Rowman and Allanheld.
- Nielsen, R. and E. Szyszczak (1991). The Social Dimension of the European Communities, Handelshojskolens Forlag.
- Noddings, N. (1984). Caring: A Feminine Approach to Ethics and Moral Education, University of California Press.
- Nozick, R. (1974). Anarchy, State and Utopia, The Perseus Books Group.
- Nussbaum, M. C. and A. K. Sen (2002). Introduction. The Quality of Life. M. C. Nussbaum and A. K. Sen, Oxford University Press.
- O'Donovan, K. and E. Szyszczak (1988). Equality and Sex Discrimination Law, Blackwell.
- Parekh, B. (2001). Integrating Minorities, Institute of Contemporary Arts.
- Phillips, A. (1993). Democracy and Difference, Pennsylvania State University Press.
- Prechal, S. and N. Burrows (1990). Gender Discrimination Law of the European Community, Dartmouth.
- Rae, D. (1981). Equalities, Harvard University Press.

- Rawls, J. (1999). A Theory of Justice, Harvard University Press.
- Raz, J. (1986). The Morality of Freedom, Clarendon Press (OUP).
- Roemer, J. (1998). Equality of Opportunity, Cambridge University Press.
- Rogers, R. and R. Walters (2006). How Parliament Works, Pearson.
- Russell, P. H. (2006). Conclusion. Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World. K. Malleson and P. H. Russell, University of Toronto Press.
- Sandell, M. (1982). Liberalism and the Limits of Justice, Cambridge University Press.
- Scheffler, S. (2007). Distributive Justice and Economic Desert. Desert and Justice. S. Olsaretti, Oxford University Press.
- Schopenhauer, A. (1970). On Women. Arthur Schopenhauer: Essay and Aphorisms. R. J. Hollingdale, Penguin.
- Schutter, O. D. (2007). Positive Action. Cases, Materials and Text on National, Supranational and International Non-Discrimination Law. D. Schiek, L. Waddington and M. Bell, Oxford, Hart Publishing.
- Sciarra, S. (2001). Labour Law in the courts: National judges and the European Court of Justice, Oxford Hart.
- Sen, A. (1992). Inequality Reexamined, Harvard University Press.
- Shute, S., R. Hood, et al. (2004). A Fair Hearing?: Ethnic Minorities in the Criminal Courts, Cullompton.
- Siim, B. (2000). Gender and Citizenship: Politics and Agency in France, Britain and Denmark, Cambridge University Press.
- Sineau, M. (2002). Institutionnalisation de la parité : L'expérience française. Les femmes au parlement : au-delà du nombre, International IDEA.
- Singh, M. P. (2001). German Administrative Law in Common Law Perspective, Springer.
- Spellman, E. (1988). Inessential Woman, Beacon Press.
- Splichel, S. (2001). Public Opinion and Democracy: Vox Populi-vox Dei?, Hampton Press.
- Steele, S. (1994). A Negative Vote on Affirmative Action. Debating Affirmative Action: Race, Gender Ethnicity and the Politics of Inclusion N. Mills, Delta.

- Stratigaki, M. (16 July 2000). Ποσοτώσεις: Ένα αναγκαίο κακό” [Quotas: A necessary evil]. Κυριακάτικη Αυγή [newspaper]. Greece.
- Szyszczak, E. (1992). Race Discrimination: the Limits of Market Equality. Discrimination: The Limits of Law. B. Hepple and E. Szyszczak, Mansell.
- Tarr, G. A., R. F. Williams, et al. (2004). Federalism, Subnational Constitutions and Minority Rights, Praeger.
- Thernstrom, S. and A. Thernstrom (1997). America in Black and White Simon and Schuster.
- Thomas, L. (2001). Group Autonomy and Narrative Identity: Blacks and Jews. Race and Racism. B. Boxill, Oxford University Press.
- Thomas, L. (2001). Sexism and Racism: Some Conceptual Differences. Race and Racism. B. Boxill, Oxford University Press.
- Thornton, M. (1996). Dissonance and Distrust: Women in the Legal Profession, Oxford University Press.
- Timm, A. F. and J. A. Sanborn (2007). Gender, Sex and the Shaping of Modern Europe: A History from the French Revolution to the Present Day, Berg Publishers.
- Tong, R. (2009). Feminist Thought: A More Comprehensive Introduction, Westview Press.
- Truman, D. (1951). The Governmental Process, Knopf.
- Veldman, A. G. (1999). Preferential treatment in European Community Law: Current Legal Developments and National Practices. Non-Discrimination Law: Comparative Perspectives. T. Loenen and P. R. Rodrigues, Kluwer Law International.
- Waddington, L. (2007). Reasonable Accommodation. Cases, Materials and Text on National, Supranational and International Non-Discrimination Law. D. Schiek, L. Waddington and M. Bell, Hart.
- Wall, S. and G. Klosko (2003). Introduction. Perfectionism and Neutrality: Essays in Liberal Theory
- S. Wall and G. Klosko, Rowman & Littlefield: 1-30.
- Wasserstrom, R. A. (2001). Racism and Sexism. Race and Racism. B. Boxill, Oxford University Press.

- Wickler, N. J. (1987). Identifying and Correcting Judicial Gender Bias. Equality and Judicial Neutrality. S. M. a. K. Mahoney, Carswell.
- Wiesner-Hanks, M. E. (2001). Gender in History, Blackwell.
- Wolff, J. (2001). Leveling Down. Challenges to Democracy: The PSA Yearbook 2000. K. Dowding, J. Hughes and H. Margetts, Palgrave.
- Wolff, J. (2007). The Dilemma of Desert. Desert and Justice. S. Olsaretti, Oxford University Press.
- Wolff, J. and A. De-Shalit (2007). Disadvantage, Oxford University Press.
- Young, I. M. (1990). Justice and the Politics of Difference, Princeton University Press.
- Young, I. M. (1990). Throwing Like a Girl And Other Essays in Feminist Philosophy and Social Theory, Indiana University Press.

Journal Articles

- Abram, M. (1986). "Affirmative Action: Fair Shakers and Social Engineers." Harvard Law Review 99(6): 1312-1326
- Alliotta, J. (1995). "Justice O'Connor and the Equal Protection Clause: A Feminine Voice?" Judicature 78(5): 232-235.
- Barnes, L. and a. W. S. Ashtiany (2003). "Diversity Approach to Achieving Equality: Potential and Pitfalls." Industrial Law Journal 32(4): 274-296.
- Barnard, C. (1998). "The Principle of Equality in the Community Context: P, Grant, Kalanke and Marschall: Four Uneasy Bedfellows?" Cambridge Law Journal 57(2): 352-373.
- Barnard, C. and B. Hepple (2000). "Substantive Equality." Cambridge Law Journal 59(3): 562-585.
- Bell, M. (1999). "The new Article 13 EC Treaty: a sound basis for European anti-discrimination law?" Maastricht Journal of European and Comparative Law 6: 5-23.

- Bell, M. (2002). "Beyond European Labour Law? Reflections on the EU Racial Equality Directive." European Law Journal 8(3): 384-399.
- Bell, M. and L. Waddington (2001). "More Equal Than Others: Distinguishing European Union Equality Directives." Common Market Law Review 38(3): 587-611.
- Bell, M. and L. Waddington (2003). "Reflecting on Inequalities in European Equality Law." European Law Review 28(3): 349-369
- Bender, L. (1988). "Lawyer's Primer on Feminist Theory and Tort Law." Journal of Legal Education 38(1-2): 3-46.
- Bender, P. and C. S. Durkin (2007). "Justice O'Connor's Race and Gender Jurisprudence." Arizona State Law Journal 39(3).
- Besson, S. (2006). "The European Union and Human Rights: Towards a Post-National Human Rights Institution?" Human Rights Law Review 6(2): 323-360.
- Besson, S. (2008). "Gender Discrimination under EU and ECHR Law: Never Shall the Twain Meet?" Human Rights Law Review 8(4): 647-682.
- Beveridge, F. (2007). "Building against the past: the impact of mainstreaming on EU gender law and policy." European Law Review 32(2): 193-212.
- Beveridge, F. and S. Nott (2002). "Mainstreaming: A Case for Optimism and Cynicism." Feminist Legal Studies 10(3-4): 299-311.
- Bickford, S. (1999). "Reconfiguring Pluralism: Identity and Institutions in the Inegalitarian Polity." American Journal of Political Science 43(1): 86-108.
- Brown, C. (2002). "The Race Directive: Towards Equality for All the People of Europe?" Yearbook of EU Law 21: 195-227.
- Burrows, N. and M. Robinson (2006). "Positive Action for Women in Employment: Time to Align with Europe?" Journal of Law and Society 33(1): 24-41.
- Cabral, P. (1998). "A Step Closer to Substantive Equality." European Law Review 23(5): 481-488.
- Cain, P. (1989-1990). "Feminism and the Limits of Equality." Georgia Law Review 24: 803-847.
- Caruso, D. (2003). "Limits of the Classic Method: Positive Action in the European Union After the New Equality Directives." Harvard International Law Journal 44(2): 331-386.

- Caul, M. (2001). Political Parties and the Adoption of Candidate Gender Quotas: A Cross-national Analysis, Journal of Politics, **63**(4), 1214-1229
- Clayton, A. (1998). "Hellmut Marschall v. Nordrhein-Westfalen: Has Equal Opportunity Between the Sexes Finally Found a Champion in European Community Law?" Boston University International Law Journal **16**(2): 423-450.
- Cohen, G. A. (1989). "On the Currency of Egalitarian Justice." Ethics **99**(4): 906-944.
- Collier, D., F. D. Hidalgo, et al. (2006). "Essentially contested concepts: Debates and applications." Journal of Political Ideologies **11**(3): 211-246.
- Collins, H. (2003). "Discrimination, Equality, and Social Inclusion." Modern Law Review **66**(1): 16-43.
- Collins, H., K. D. Ewing, et al. (2005). Labour Law: Text and Materials, Hart.
- Conaghan, J. (1993). "Pregnancy and the Workplace: a question of strategy?" Journal of Law and Society **20**(1): 71-92.
- Cooper, D. (1968). "Collective Responsibility." Philosophy **43**(165): 258-268.
- Cornell, D. (1990). "The Doubly-Prised World: Myth, Allegory and the Feminine." Cornell Law Review **75**(3): 644.
- Costello, C. (2006). "The Bosphorus Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe." Human Rights Law Review **6**(1): 87-130.
- Crenshaw, K. (1988). "Race, Reform and Retrenchment: Transformation and Legitimation in Anti-Discrimination Law." Harvard Law Review **101**(7): 1331-1387.
- Delgado, R. and J. Stefancic (1993). "Critical Race Theory: An Annotated Bibliography." Virginia Law Review **79**(2): 461-516.
- Doskey, C. (1991). "The Principle of Equality Between Women and Men as a Fundamental Right Under Community Law." Industrial Law Journal **20**(4): 258-280.
- Douglas-Scott, S. (2006). "A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis." Common Market Law Review **43**(3): 629-665.

- Doyle, B. (1997). "Enabling legislation or dissembling law? The Disability Discrimination Act 1995." Modern Law Review 60(1): 64-78.
- Dworkin, R. (15 May 2003). "The Court and the University." The New York Review of Books 50(8).
- Dworkin, R. (1972). "The Jurisprudence of Richard Nixon." The New York Review of Books 18(8).
- Dworkin, R. (2002). "Sovereign Virtue Revisited." Ethics 113 106-143.
- Eaton, M. (1994). "At the Intersection of Gender and Sexual Orientation: Toward Lesbian Jurisprudence." Southern California Review of Law and Women's Studies 3: 183.
- Fallon, R. (1980). "To Each According to His Ability, From None According to His Race: The Concept of Merit in the Law of Antidiscrimination." Boston University Law Review 60: 815-878.
- Feenan, D. (2008). "Women Judges: Gendering Judging, Justifying Diversity." Journal of Law and Society 35(4): 490-519.
- Ferber, M. (1997). "In Defense of Affirmative Action." Industrial & Labor Relations Review 50(3): 516-518.
- Finley, L. (1988). "Nature of Domination and the Nature of Women: Reflections on Feminism Unmodified." North Western University Law Review 82: 352-386.
- Fredman, S. (1992). "European Community Discrimination Law: A Critique." Industrial Law Journal 21(2): 119-134.
- Fredman, S. (1997). "Reversing Discrimination." Law Quarterly Review 113(Oct): 575 - 600
- Fredman, S. (1997). Women and the Law, Oxford University Press.
- Fredman, S. (1998). Equality Issues. The Impact of the Human Rights Bill on English Law. B. S. Markesinis, Oxford University Press.
- Fredman, S. (1999). After Kalanke and Marschall: Affirming Affirmative Action. The Cambridge Yearbook of European Legal Studies - Volume One, 1998. A. Dashwood and A. Ward, Hart.
- Fredman, S. (2001). "Equality: A New Generation?" Industrial Law Journal 30(2): 145-168.

- Fredman, S. (2005). "Changing the Norm: Positive Duties in Equal Treatment Legislation." Maastricht Journal of European and Comparative Law **12**(4): 369-398.
- Gallie, W. B. (1956). "Essentially Contested Concepts." Proceedings of the Aristotelian Society **56**: 167-198.
- Gardner, J. (1998). "On the Grounds of her Sex(uality)." Oxford Journal of Legal Studies **18**(1): 167-187.
- Gaus, G. F. (2003). Liberal Neutrality: A Compelling and Radical Principle. Perfectionism and Neutrality: Essays in Liberal Theory. S. Wall and G. Klosko, Rowman & Littlefield: 137-166.
- Ginsberg, M. (1963). "The Concept of Justice." Philosophy **38**(143): 99-116.
- Goldman, A. H. (1975). "Reparations to Individuals or Groups?" Analysis **35**(5): 168-170.
- Gooding, C. (2000). "Disability Discrimination Act: From Statute to Practice." Critical Social Policy **20**(4): 533-549.
- Guild, E. (2000). "The EC Directive on Race Discrimination: Surprises, Possibilities and Limitations." Industrial Law Journal **29**(4): 416-423.
- Halley, J. E. (1988-1989). "The Politics of the Closet: Towards Equal Protection for Gay, Lesbian and Bisexual Identity." UCLA Law Review **36**: 915-976.
- Hannett, S. (2003). "Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple Discrimination." Oxford Journal of Legal Studies **23**(1): 65-86.
- Harris, A. (1990). "Race and Essentialism in Feminist Legal Theory." Stanford Law Review **42**(3): 581-614.
- Hervey, T. and J. Shaw (1998). "Women, Work and Care: Women's Double Burden in EC Sex Equality Law." Journal of European Social Policy **8**(1): 43-63.
- Jolls, C. (2001). "Antidiscrimination and Accommodation." Harvard Law School **115**(2): 642-699.
- Kamp, A. R. (2002). "The Missing Jurisprudence of Merit." The Boston University Public Interest Law Journal **11**(2-3): 141-166.
- Kapotas, P. (2010). "Gender Quotas in Politics: The Greek System in the Light of EU Law." European Law Journal **16**(1): 29-46

- Kelman, M. (1991). "Concepts of Discrimination in 'General Ability' Job Testing." Harvard Law Review **104**(6): 1157-1247.
- Kennedy, R. (1990). "A Cultural Pluralist Case for Affirmative Action in Legal Academia." Duke Law Review **660**: 705-757.
- Kennedy, S. J. (2008). "Gender on the Agenda: How the Paucity of Women Judges Became an Issue." The Journal of Politics **70**(3): 717-735.
- Kenney, S. J. (2002). "Breaking the Silence: Gender Mainstreaming and the Composition of the European Court of Justice." Feminist Legal Studies **10**: 257-270.
- Koppelman, A. (2001-2002). "Why Discrimination against Lesbians and Gay Men Is Sex Discrimination." UCLA Law Review **49**: 519-538.
- Krisch, N. (2008). "The Open Architecture of European Human Rights Law." Modern Law Review **71**(2): 183-216.
- Kuhner, K. (2006). "Bosphorus - Double Standards in European Human Rights Protection?" Utrecht Law Review **2**(2).
- Lenoir, N. (2001). "The Representation of Women in Politics: From Quotas to Parity in Elections." International and Comparative Law Quarterly **50**: 217-247
- Lépinard, E. (2006). "Identity without Politics: Framing the Parity Laws and Their Implementation in French Local Politics." Social Politics: International Studies in Gender, State & Society **13**(1): 30-58.
- Loenen, T. (1994). "Rethinking sex equality as a human right." Netherlands Quarterly of Human Rights **12**(3): 253-270.
- Loenen, T. and A. Hendriks (2000). "Case Note on Thlimmenos." NJCM Bulletin **25-6**: 1095-1105.
- Loury, G. (1992). "Incentive effects of Affirmative Action." Affirmative Action revisited: Annals of the American Academy of Political and Social Science **523**: 19-29.
- Loury, G. (1997). "How to mend Affirmative Action." The Public Interest (107): 33-43.
- Lucas, J. R. (1965). "Against Equality." Philosophy **40**(153): 296-307.
- Malleson, K. (2003). "Justifying Gender Equality on the Bench: Why Difference Won't Do." Feminist Legal Studies **11**(1): 1-24.
- Mancini, G. and S. O'Leary (1999). "The new frontiers of sex equality law in the European Union." European Law Review **24**(4): 331-353.

- Masselot, A. (2004). "The New Equal Treatment Directive: Plus Ça Change ...: Comment on Directive 2002/73/EC of 23 September 2002 Amending Council Directive 76/207/EEC 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 " Feminist Legal Studies 12(1): 93-104.
- Masselot, A. (2007). "The State of Gender Equality Law in the European Union." European Law Journal 13(2): 152–168.
- McCrudden, C. (1986). "Rethinking Positive Action." Industrial Law Journal 15(1): 219-243.
- McCrudden, C. (1998). "Merit Principles." Oxford Journal of Legal Studies 18(4): 543-579.
- McGlynn, C. (2000). "Ideologies of Motherhood in European Community Sex Equality Law." European Law Journal 6(1): 29-44.
- Menkel-Meadow, C. (1985). "Portia in a Different Voice: Speculations on a Woman's Lawyering Process." Berkeley Women's Law Journal 1: 39-63.
- Menkel-Meadow, C. (1988). "Feminist Legal Theory, Critical Legal Studies and Legal Education or "The Fem Crits Go to Law School"." Journal of Legal Education 38(1-2): 61-85.
- More, G. C. (1993). "Equal Treatment of the Sexes in European Community Law: What Does 'Equal' Mean?" Feminist Legal Studies 1(1): 45-74.
- Mowbray, A. (2004). "Protocol 14 to the European Convention on Human Rights." Human Rights Law Review 42(2): 331-354.
- Mowbray, A. (2008). "The Consideration of Gender in the Process of Appointing Judges to the European Court of Human Rights." Human Rights Law Review 8(3): 549-559.
- O'Connell, R. (2009). "Commentary - Substantive Equality in the European Court of Human Rights?" Michigan Law Review First Impressions 107: 129.
- O'Connell, R. (2009). "Substantive Equality in the European Court of Human Rights?" Michigan Law Review First Impressions 107(129).
- O'Connor, S. D. (1991). "Portia's Progress." New York University Law Review 66: 1546-1558.

- Olson, S. M. and D. A. Huth (1998). "Explaining Public Attitudes Towards Local Courts." The Justice System Journal 20(1): 41-61.
- Onwuachi-Willig, A., E. Houh, et al. (2008). "Cracking the Egg: Which Came First - Stigma or Affirmative Action?" California Law Review 96(5): 1299-1352.
- Perkins, J. and D. L. Fowlkes (1980). "Opinion Representation versus Social Representation; or Why Women Can't Run as Women and Win." The American Political Science Review 74(1).
- Peters, A. (1996). "The Many Meanings of Equality and Positive Action in Favour of Women under European Community Law - A Conceptual Analysis." European Law Journal 2(2): 177-196.
- Phillips, A. (2004). "Defending Equality of Outcome." Journal of Political Philosophy 12(1): 1-19.
- Posner, R. (1974). The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities. Affirmative Action and the Constitution. G. Chin. 1.
- Prechal, S. (1996). "Case C-450/93, Kalanke v. Freie Hansestadt Bremen, [1995] ECR I-3051." Common Market Law Review 33(6): 1245-1259.
- Prechal, S. (2004). "Equality of Treatment, Non-Discrimination and Social Policy: Achievements in Three Themes." Common Market Law Review 41(2): 533-551.
- Roemer, J. E. (1986). "Equality of Resources Implies Equality of Welfare." The Quarterly Journal of Economics 101(4): 751-784.
- Ruiz, B. R. and R. Rubio-Marin (2008). "The Gender of Representation: On Democracy, Equality and Parity." International Journal of Constitutional Law 6(2): 287-316.
- Russell, M. and C. O'Cinneide (2003). "Positive Action to Promote Women in Politics: Some European Comparisons." International and Comparative Law Quarterly 52: 587-614.
- Scheeck, L. (2005). "The Relationship between the European Courts and Integration through Human Rights." ZaoRV 65: 837-885.
- Schiek, D. (1998). "Sex Equality Law After Kalanke and Masrshall." European Law Review 4(2): 148-166.

- Schiek, D. (2005). "Broadening the Scope and the Norms of EU Gender Equality Law: Towards a Multidimensional Conception of Equality Law." Maastricht Journal of European and Comparative Law 12(4): 427-466.
- Selmi, M. (1995). "Testing for Equality: Merit, Efficiency and the Affirmative Action Debate." University of California Los Angeles Law Review 42(5): 1251-1314.
- Sen, A. K. (1979). "Utilitarianism and Welfarism." The Journal of Philosophy 76(9): 463-489.
- Shaw, J. (2005). "Mainstreaming Equality and Diversity in European Union Law and Policy." Current Legal Problems 58(255-312).
- Sherry, S. (1986). "The Gender of Judges." Law and Inequality 4: 159-169.
- Sigelman, L. and J. Todd (1992). "Clarence Thomas, Black Pluralism and Civil Rights Policy." Political Science Quarterly 107(2): 231-248.
- Skidmore, P. (2001). "European development—EC framework directive on equal treatment in employment: towards a comprehensive community anti-discrimination policy?" Industrial Law Journal 30(1): 126-132
- Smith, M. (1901). "Four German Jurists IV." Political Science Quarterly 16(4): 641-679
- Sowell, T. (1999). "The Other Side of Affirmative Action." Jewish World Review 8.
- Spiliopoulou-Akerman, S. (2002). "The Limits of Pluralism – Recent Jurisprudence of the European Court of Human Rights with regard to Minorities: Does the Prohibition of Discrimination Add Anything?" Journal of Ethnopolitics and Minority Issues in Europe(3): 5-20.
- Stratigaki, M. (2005). "Gender Mainstreaming vs Positive Action: An ongoing Conflict in EU Gender Equality Policy." European Journal of Women's Studies 12(2): 165-186
- Strickland, P., O. Gay, et al. (2001). "Sex Discrimination (Election Candidates) Bill." House of Commons Library, Research Paper 01(75).
- Szysczak, E. (1996). "Positive Action After Kalanke." Modern Law Review 59(6): 876-873.
- Szysczak, E. (2006). "Positive Action as a Tool in Promoting Access to Employment." Roma Rights Quarterly(1): 25-30.

- Torella, E. C. D. (2006). "The Principle of Gender Equality, the Goods and Services Directive and Insurance: A Conceptual Analysis." Maastricht Journal of European and Comparative Law 13(3): 339-350.
- Tucker, B. P. (2001). "The ADA's Revolving Door: Inherent Flaws in the Civil Rights Paradigm." Ohio State Law Journal 62(1): 335-390.
- Veldman, A. (1998). "The Lawfulness of Women's Priority Rules in the EC Labour Market." Maastricht Journal of European and Comparative Law 5(4): 403-414
- West, R. (1988). "Jurisprudence and Gender." The University of Chicago Law Review 55(1): 1-72.
- Westen, P. (1982). "The Empty Idea of Equality." Harvard Law Review 95(3): 537-596
- Wilson, B. (1990). "Will Women Judges Really Make A Difference?" Osgoode Hall Law Journal 30(1): 506-522.
- Winthrop, D. (1978). "Aristotle and Theories of Justice." The American Political Science Review 72(4).
- Wishik, H. (1985). "To Question Everything: The Inquiries of Feminist Jurisprudence." Berkeley Women's Law Journal 1.
- Young, I. M. (1989). "Polity and Group Difference: A Critique of the Ideal of Universal Citizenship." Ethics 99(2): 250-274.

Others

- Arat, Z. F. K. (2006). Human Rights Worldwide: A Reference Handbook, ABC-CLIO.
- Choi, S. J., G. M. Gulati, et al. (2007). "Professionals or Politicians: The Uncertain Empirical Case for an Elected Rather than Appointed Judiciary." John M. Olin Law & Economics Working Paper No. 357.
- DG Employment, S. A. a. E. O. (2009). International Perspectives on Positive Action Measures: A comparative analysis in the European Union, Canada, the United States and South Africa, European Commission Publications Office.
- Eriksen, E. O. (2003). "The EU and the Right to Self-Government." ARENA, University of Oslo Working Paper 17/03.

- Fredman, S. (1999). A Critical Review of the Concept of Equality in UK Anti-Discrimination Law. Independent Review of the Enforcement of UK Anti-Discrimination Legislation, Cambridge Centre for Public Law and Judge Institute of Management Studies. **Working Paper no. 3.**
- Giele, J. Z. and L. F. Stebbins (2003). Women and Equality in the Workplace: A Reference Handbook, ABC-CLIO Ltd.
- Hafner-Burton, E. M. and M. A. Pollack (08/2008). Mainstreaming Gender in the European Union: Getting the Incentives Right. Jean Monnet Working Paper
- Jacobs, F. (1992). Human Rights in Europe – New Dimensions. Paul Sieghart Memorial Lecture British Institute of Human Rights.
- McCrudden, C. and H. Kountouros (2006). "Human Rights and European Equality Law." University of Oxford Faculty of Law Legal Studies Research Paper Series Working Paper 8.
- Menkel-Meadow, C. (1987). "The Comparative Sociology of Women Lawyers: The 'Feminization' of the Legal Profession." Institute for Social Science Research, Working Paper Series 3.
- Vieyetz, E. R. (2009). Immigration and Social Cohesion: Equality of Treatment and Social and Cultural Integration of Immigrant Workers and their Families. European Commission for Democracy through Law, Venice Commission. CDL-UTD (004).
- Williams, B. (1962). The Idea of Equality. Philosophy, Politics and Society P. Laslett and W. G. Runciman, Blackwell. **2nd Series.**
- Young, I. M. (2001). Social Movements and the Politics of Difference. Race and Racism B. Boxill, Oxford University Press.
- Younge, G. (21/01/03). "Powell opposes Bush line on race." The Guardian.
- Younge, G. (21/06/03). A supreme showdown. The Guardian.
- Younge, G. (23/11/02). "Different class." The Guardian.
- Younge, G. (27/01/03). America is a class act. The Guardian.

TABLE OF CONTENTS

ECJ

- Abrahamsson and Anderson v. Foguelqvist [2000], ECR I-5539, (Case C-407-98)
- Akrich v Home Office, Judgment of 23 September 2003, (Case C-109/01)
- Albert Ruckdeschel & Co. And Hansa-Lagerhaus Ströh & Co. V Hauptzollamt Hamburg-St. Annen: Diamalt AG v Hauptzollamt Itzehoe [1977] ECR 1753, (Joined Cases 117/76 and 16/77)
- Badeck v. Landesanwalt beim Staatsgerichtshof des Landes Hessen [1999], ECR I-1875 (Case C-158/97)
- Briheche (Serge) v. Ministère de l'intérieur, de la sécurité intérieure et des libertés locales [2004], ECR I-8807 (Case C-319/03)
- Carole Louise Webb v EMO Air Cargo (UK) Ltd. [1994], QB 718, (Case C-32/93)
- Commission v. France Republic [1988], ECR 6315, (Case C-312/86)
- Defrenne v Sabena [1978], ECR 1365, (Case C-149/77)
- Dekker v. Stichting Vormingcentrum voor Jonge Volwassen (VJV-Centrum) [1990], ECR I-3941, (Case C-177/88)
- Griesmar v. Ministre de l'Economie [2001], ECR I-9383, (Case C-366/99)
- Hertz v. Aldi Marked [1990], ECR I-3979, (Case C-179/88)
- Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel (Solange I) [1970], ECR 1125, (Case C-11/70)
- Italian Finance Administration v. Simmenthal [1978], ECR 629 (Case C-106/77)
- Kalanke v. Freie Hansestadt Bremen [1995] ECR I-3051 (Case C-450/93)
- Kremzow v Austria [1997], ECR I-2629, (Case C-299/95)
- Lawrie-Blum v Land Baden-Württemberg [1986], ECR I-2121, (Case C-66/85).
- Lommers v Minister van Landbouw, Natuurbeheer en Visserij [2002], ECR I-2891 (Case C-476/99)
- Mangold v Rudiger Helm [2005], European Anti-Discrimination Law Review, (C-144/04)
- Marschall v. Land Nordrhein Westfalen [1997], ECR I-6363, (Case C-409/95)
- P. v. S. And Cornwall County Council [1996], ECR I-2143 (Case C-13/94)
- Unibet (London) Ltd, Grand Chamber [2007], ECR I-2271, (Case C-432/05)

ECTHR

- Abdulaziz, Cabales and Balkandali v. the United Kingdom [Plenary], 28/05/1985, no. 9214/80 ; 9473/81 ; 9474/81, A94
- Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland [GC], 30/06/2005, no. 45036/98, Reports of Judgments and Decisions 2005-VI
- Botta v. Italy, 24/02/1998, no. 21439/93, Reports 1998-I
- Burghartz v. Switzerland, 22/02/1994, no. 16213/90, A280-B
- Chassagnou And Others v. France [GC], 29/04/1999, no. 25088/94 ; 28331/95 ; 28443/95, Reports of Judgments and Decisions 1999-III
- D v. the United Kingdom, 02/05/1997, no. 30240/96, Reports 1997-III.
- Dudgeon v. The United Kingdom, 24/02/1983, no. 7525/76, A59
- Engel and Others v. The Netherlands [Plenary], 23/11/1976, no. 5100/71 ; 5101/71 ; 5102/71 ; 5354/72 ; 5370/72, A22
- Leyla Sahin v. Turkey [GC], 10/11/2005, no. 44774/98, Reports of Judgments and Decisions 2005-XI
- Lustig-Prean and Beckett v. The United Kingdom, 27/09/1999, no. 31417/96 ; 32377/96
- Matthews v. The United Kingdom [GC], 18/02/1999, no. 24833/94, Reports of Judgments and Decisions 1999-I
- National Union of Belgian Police v. Belgium [Plenary], 27/10/1975, no. 4464/70, A19
- Petrovic v. Austria, 27/03/1998, no. 20458/92, Reports 1998-II
- Pretty v. United Kingdom, 29/04/2002, no. 2346/02, Reports of Judgments and Decisions 2002-III
- Relating to certain aspects of the laws on the use of languages in education in Belgium" v. Belgium [Plenary], 23/07/1968, no. 1474/62 ; 1677/62 ; 1691/62 ; 1769/63 ; 1994/63 ; 2126/64, A6
- Sahin v. Germany, 11/10/2001, no. 30943/96, Reports of Judgments and Decisions 2003-VIII
- Salgueiro da Silva Mouta v. Portugal, 21/12/1999, no. 33290/96, Reports of Judgments and Decisions 1999-IX
- Schuler-Zraggen v. Switzerland, 24/06/1993, no. 14518/89, A263

- S.L. v. Austria, 09/01/2003, no. 45330/99, Reports of Judgments and Decisions 2003-I (extracts)
- Soering v. the United Kingdom [Plenary], 07/07/1989, no. 14038/88, A161
- Spadea And Scalabrino v. Italy, 28/09/1995, no. 12868/87, A315-B
- Stubbings and Others v. The United Kingdom, 22/10/1996, no. 22083/93 ; 22095/93, Reports 1996-IV
- Thlimmenos v. Greece [GC], 06/04/2000, no. 34369/97, Reports of Judgments and Decisions 2000-IV
- Van der Mussele v. Belgium [Plenary], 23/11/1983, no. 8919/80, A70
- Van Raalte v. the Netherlands, 21/02/1997, no. 20060/92, Reports 1997-I