Equality and the Quest for Substance in the Jurisprudence of the European Courts

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Abstract

Is equality an empty vessel or is it a sovereign virtue? Perhaps the only way to provide an objective answer to this question is to note that a right to equality and non-discrimination is widely seen as fundamental in democratic legal systems. But even if we agree on the importance of precluding unjustified distinctions based on prohibited grounds, there is still a long way to go before we can concur on *why* this should be the case. Failure to identify the human interest that equality aims to uphold reinforces the argument of those who attack it as morally empty or unsubstantiated and weakens its status as a fundamental human right. At a more practical level, the resulting ambiguity renders the development of correlative duties less predictable as well as harder to defend in the face of conflicting rights and interests.

This research will argue that a common understanding of the human interest that equality aims to uphold is feasible within the jurisprudence of the European Court of Human Rights and the European Court of Justice. A normative analysis will be undertaken in order to demonstrate the purpose that a right to equality should serve. A doctrinal study will follow in order to examine how the two Courts have approached that same question through their case-law. A comparison of the normative and doctrinal findings will show that conceptual convergence within the EU and the ECHR in this area is not as far as it might appear initially. The two bodies of equality law are extremely divergent as to the requirements they impose and yet their interpretation by the international judiciary might be properly analysed under a common light. Under that common light, equality emerges as a sovereign virtue in European law.

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List of Abbreviations

AG	Advocate General
EC	European Community
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECR	European Court Reports
ECtHR	European Court of Human Rights
EEC	European Economic Community
EU	European Union
UK	United Kingdom
OJ	Official Journal of the European Union

Introduction

Let us imagine an employer who publicly announces that he shall not hire any immigrants because his customers are xenophobic. Clearly, the employer in this scenario merely wants to satisfy his customers and make sure that business runs as smoothly as possible; he is not to blame for the fact that the skill of the immigrant is valued less within the market. Moreover, no particular applicant is shown to have been rejected on the ground of her ethnic origin. The court decides that the statement alone is sufficient to find discrimination[1]. Let us also picture a Mayor who publicly declares that he would oppose any homosexual propaganda and who then goes on to disallow a gay pride parade because of concerns relating to traffic control. Again, the court declares that his previous statement renders the treatment discriminatory[2].

At first glance, in each scenario discussed above there seems to be an objective justification for treating people differently[3]. But let us challenge this assumption. In the case of the employer one may reasonably argue that customer demand should not be sufficient to justify differential treatment. The truth of this assertion depends on how we understand the *aim* of equality. If the aim of equal treatment is simply to prevent distortions of competition, there seems to be little -if any- damage done in allowing an employer to rely on the actual market value of his potential employees. Alternatively, one may suggest that market value should constitute an inappropriate consideration when determined by prejudice; in this latter sense, the market is made less free but the individual more autonomous in pursuing an opportunity within it.

By the same token, if we are to understand equality as aiming to guarantee symmetrical enjoyment of other rights, the decision of the Mayor might seem quite justifiable. The application was rejected on (seemingly) legitimate grounds; hence, there was no interference with the consistent enjoyment of freedom of assembly as everyone would be equally disallowed from exercising the right if similar concerns were raised. But once again, the previous statement of the Mayor cannot be neglected if we are to stick with a conception of equality that aims to eliminate prejudice. The case then becomes more about discriminatory motivation rather than unjustified differential treatment. The existence of prejudice in the mind of the Mayor, just like the declared intention of the employer, is sufficient to reverse the burden of proof.

At the end of the day, it is hard to see how either claim, especially the first one, could have succeeded had the statements not been made. These statements were imbued with prejudice

[1] See the judgment of the European Court of Justice in Case C-54/07, Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV [2008] E.C.R. I-5187.
[2] See the judgments of the European Court of Human Rights in Baczkowski and Others v. Poland (Application no. 1543/06), Judgment of 3 May 2007 and Alekseyev v Russia (Applications nos. 4916/07, 25924/08 and 14599/09), Judgment of 21 October 2010.
[3] Business practicality and traffic control respectively.

against a particular social group (ethnic minorities and homosexuals respectively); and some individuals were likely to be denied an opportunity as a result. In both instances, equality was approached as a human right which aims to protect the individual against prejudice; neither market freedoms nor the margin of appreciation enjoyed by domestic authorities could rise above that fundamental human interest. But has equality always been understood this way in European human rights law? And even if it has come to be perceived as such, is it concerned only with the elimination of prejudice? What is the aim of the human right to equality in Europe?

These are the basic questions that this thesis aims to address both from a doctrinal and a normative perspective. The aim of the right to equality is understood here as representing the human interest that must be defended against conflicting rights and interests. The broader goal of this thesis is to determine the extent to which it is possible to achieve convergence within the legal order of the European Convention on Human Rights (ECHR) and the European Union (EU) as to what that human interest is. The issue will be tackled with specific reference to the relevant jurisprudence of the European Court of Human Rights (ECtHR) and the European Court of Justice (ECJ). The primary question here is *why* a right to equality is guaranteed in the first place; answering this will help provide a more coherent platform on which the derivative question of *how* equality should be implemented in practice can be addressed.

It is hard to deny that neither the *why* nor the *how* of equality is a straightforward matter. To say that 'all Men are created equal' does a great service in celebrating the common humanity of all, irrespective of differences that emanate from immutable characteristics or fundamental choices; and yet it tells us little -if anything- as to *how* this virtue is to be upheld in practice. The reason for this is that the answer provided to the *why* is extremely elusive. Conversely, the prohibition of unjustified differential treatment based on immutable characteristics or fundamental choices does inform us of the way in which equal treatment is to be maintained; but it provides only a narrow answer to the question of *why* equality matters.

Surely the idea of consistency in the treatment of analogously situated people is a constituent element of fairness understood as impartiality[4]. It is for this reason that equality before the law has been one of the core features of virtually every legal system in a democratic society. Impartiality demands that rights and duties arising from membership in a society are to be equally enjoyed and enforced; hence, the laws of a state should not favour a particular group of people over another without good reason. Ideas of rationality and freedom from arbitrariness come to reinforce the correlation between fairness and consistent treatment. The case remains, however, that this

[4] The most famous artistic depiction of justice in Western civilization is the one produced by the ancient Romans. For them, Justitia was a blindfolded goddess which would hold a sword on the one hand and a scale on the other. The obvious symbolism behind the blindness of the deity was that Justice should always be impartial, using the sword only when the scale so commanded, irrespective of the status of the person that stood in front of her.

fundamental but limited construction of equality fails to address directly the most invidious form of inequality; the one that results from social norms and attitudes.

Protection against social oppression should be at the centre of any analysis that aspires to approach equality as a fundamental human right[5]; this is so irrespective of whether or not differential treatment is at hand. Such guarantee is the only way to secure that an individual is truly autonomous in choosing from the valuable options that are available to her and to any member of society. In this sense, equality must be perceived less as synonymous to parity and more as a principle that concerns the advancement of individual freedom. It must be seen as entailing a lot more than simply prohibiting unjustified differential treatment (non-discrimination). But even if we embrace this position in theory, it remains to be determined whether or not it can be reconciled with the present state of European equality law.

A voluminous academic literature has been dedicated to expounding the nature and scope of equality in EU law[6]. The issue has been examined in the context of the ECHR as well, albeit not as thoroughly[7]. Attempts have also been made to identify the various goals of equality in each of the two systems separately[8]. However, only a handful of studies have purported to analyse both anti-discrimination regimes side by side; and even these studies have emphasised divergence rather than similarity[9]. This is not surprising given that equality has historically played a very different role in each of the two international legal orders. Still, there exists a unifying theme that has become increasingly relevant throughout the years and the significance of which should not be downplayed.

More specifically, both within the EU and the ECHR, prohibitions against discrimination were initially introduced as instruments for the attainment of other goals, not as ends in themselves. Thus, the primary aim was to secure market integration (EU) and the enjoyment of other rights

[5] As will be explained in ch. 1, social oppression is understood for the purposes of this thesis as manifesting itself in the form of prejudice, stereotyping and failure to provide reasonable accommodation of difference. Freedom from these oppressive attitudes is put forward as the human interest that a right to equality should aim to uphold.

[6] For two of the most elaborate studies, see Mark Bell, *Anti-Discrimination Law and the European Union*, OUP, 2002 and Evelyn Ellis, *EU Anti-Discrimination Law*, OUP, 2005.

[7] The lack of enthusiasm in this area may be due to the fact that the Court itself did not take any drastic steps in the interpretation of Article 14 ECHR for many decades. This attitude began to change in 2000 when indirect discrimination was recognised for the first time as a prohibited form of discrimination: see Thlimmenos v Greece (Application no. 34369/97), Judgement of 6 April 2000; Protocol 12 ECHR was also opened for signatures later that year (4 November). For the most in depth analysis of Article 14 ECHR to date see Oddný Mjöll Arnadóttir, *Equality and Non-Discrimination under the European Convention on Human Rights*, Martinus Nijhoff Publishers, 2003.

[8] For a good example with reference to EU law, see Christopher McCrudden, 'Theorising European Equality Law' in Cathryn Costello and Ellis Barry (eds.), *Equality in Diversity: The New Equality Directives*, Irish Centre for European Law, 2003, pp. 1-38. For the ECHR, see Rory O'Connell, 'Cinderella Comes to the Ball: Art 14 and the Right to Non-Discrimination in the ECHR', *Legal Studies*, Vol. 29, No. 2, June 2009, pp. 211–229.

[9] See, for example, Samantha Besson, 'Gender Discrimination under the EU and ECHR Law: Never Shall the Twain Meet?', *Human Rights Law Review*, Vol. 8, No. 4, 2008, 647-682 and Nicholas Bamforth, 'Prohibited Grounds of Discrimination under EU Law and the European Convention on Human Rights: Problems of Contrast and Overlap', *Cambridge Yearbook of European Legal Studies*, Vol. 9, 2006-2007, pp. 1-42.

(ECHR). But in both legal orders this state of affairs came to be challenged within the courtroom where equality first began to emerge as a substantive aim. An examination of the relevant jurisprudence, therefore, is most valuable in showing how the human rights dimension of equality came into being and how it continues to evolve in European law. This is the main but not the only reason why the present research focuses on the case-law of the two Courts.

A further reason is that if we are to approach equality as a human right it is important to develop an understanding of it that is as universally applicable as possible in theory but also in practice. The judgments of the ECtHR and the ECJ are particularly helpful in this respect as they have serious implications for domestic legal systems throughout Europe. Finally, the absence of detailed rules in the international sphere, and the inertia caused by the need for unanimity among sovereign states in devising those rules, enhance the constitutional role of the international judiciary in the development of fundamental rights standards. The teleological interpretation usually adopted in that context makes it even more essential to determine the *telos* of equality as clearly as possible.

Absence of a clear articulation of the human interest that equality aims to safeguard may compromise its status as a fundamental right. For if there is no agreement as to *why* the individual is entitled to a specific treatment, the balancing of this entitlement against competing considerations is muddled, to say the least. As a consequence, it becomes more likely that recourse to the lowest common denominator (i.e. consistent treatment) will be chosen over a more elaborate conception. It is for this reason that, even if a concrete conclusion as to the aim of equality is seemingly impossible (if not undesirable), it is still important to identify some of its basic tenets. The fact that the quest for substance has no set destination does not mean that it should not have any direction either.

This thesis will suggest a direction, albeit a broad one, for this unending journey. More specifically, a normative analysis will be undertaken in order to demonstrate the purpose that a right to equality should serve. A doctrinal study will follow in order to examine how the two Courts have approached that same question through their case-law. A comparison of the normative and doctrinal findings will show that conceptual convergence within the EU and the ECHR in this area is not as far as it might appear to be in the first place. The two bodies of equality law are extremely divergent as to the requirements they impose and yet their interpretation by the international judiciary is imbued with a similar philosophy. An examination of the jurisprudence of the two Courts under a common light reveals that a shared understanding of equality is feasible in practical terms. Male and female pronouns are used interchangeably throughout the thesis. The relevant law is stated as of August 2012.

The study undertaken here is not directly concerned with comparing the various aspects that guide the implementation of non-discrimination within the EU and the ECHR. Hence, there is no

distinct analysis of how each Court has approached, for example, questions of comparison, justification or burden of proof[10]. Such issues will be touched upon repeatedly in discussing the attitude of the judiciary towards the human interest that equality aims to affirm but they will not be dealt with separately. It is also important to note that discussion is not limited to any specific ground(s) of discrimination or to any particular type of treatment such as indirect discrimination or positive action. This methodological choice gave rise to perhaps the greatest challenge that the present research has had to overcome; namely, taking a holistic approach to what is undoubtedly an extremely complex area.

The analysis is divided into four chapters. The first chapter sets the normative framework that will be used throughout the thesis. It is impossible to proceed with a meaningful enquiry into the role of equality in any legal system unless we first agree on what a claim for equality actually consists of at a more abstract level. This is obviously an immense question, the answer to which cannot be given without further qualifications. It is for this reason that a distinction is drawn between the moral value, the principle and the right to equality. Each of these dimensions is examined separately in an effort to explicate the rationale for sustaining a human right to equality; one that is not limited to requiring only symmetry and impartiality.

The case is made that the moral value of equality should be understood as being inextricably linked to the values of individual dignity and autonomy. Attention then shifts to identifying a theory which is capable of upholding and reinforcing that relationship at a more practical level. Equality of opportunity is presented as a principle that can achieve that aim and discussion is further narrowed down in order to articulate its basic tenets. Following this line of thought, freedom from prejudice and stereotyping, as well as the need for reasonable accommodation of difference, are put forward as those basic capabilities that equality should aim to uphold as a matter of right. The scope of correlative duties arising from such a right is eventually dependent on how these entitlements are balanced against competing rights and policies in various situations.

The next two chapters examine the underlying rationale behind the right to equality and non-discrimination within the ECHR and the EU. The historical evolution of the prohibition of discrimination in the two legal orders is being traced in order to demonstrate how the human interest safeguarded by a right to equality has developed (and continues to develop) within the jurisprudence of the Strasbourg and Luxembourg Courts. It is argued that the conception of (substantive) equality explicated in the first chapter is becoming increasingly relevant in that context. Hence, the two Courts have been willing to move beyond the apparent limitations of the

[10] For such an analysis, see Samantha Besson (ibid); also see the 'Handbook on European Non-Discrimination Law' which the European Union Agency for Fundamental Rights and the European Court of Human Rights published jointly in 2011 (electronic copy available at *http://fra.europa.eu/fraWebsite/media/pr-210311_en.htm*).

written legal framework in several instances with a view to extending the personal and the material scope of what appears to be an emerging human right to equality.

More specifically, the second chapter demonstrates the pivotal role of the ECtHR in giving a more substantive meaning to the prohibition of discrimination contained in Article 14 of the Convention. It is suggested that a great body of the relevant case-law reveals the ongoing transformation of equality as an instrument guaranteeing the consistent enjoyment of other rights (legal equality) to a fundamental right in itself (substantive equality). In this respect, a presentation is made of the various ways through which the Strasbourg Court has tried to liberate the right to equality from the textual limitations of Article 14. While some of the methods employed for this purpose may be characterised as activist, the general approach appears to be reconcilable with the appropriate role of the Court, as will be shown in the fourth chapter.

The third chapter undertakes a similar task to that of the second one, only this time with reference to the EU. Discussion focuses on the critical contribution of the ECJ in creating an equality guarantee which emphasises first and foremost the affirmation of individual autonomy (substantive equality) rather than the smooth operation of economic integration (market equality). The rich dialogue between the judiciary and the legislature of the EU in this area has clearly added impetus to that process. But the ECJ alone has also rendered a great service in interpreting the relevant instruments under the light of substantive equality; conversely, it has at times hesitated to do so when important questions of interpretation were at hand. This bipolar attitude is not completely unexpected if one considers the positioning of the ECJ, as explained in the fourth chapter.

The fourth chapter argues that a common understanding as to the human interest that equality aims to safeguard is now feasible within the ECHR and the EU. But this convergence is far from complete and remains subtle and implicit; it is also more of a historical coincidence rather than the result of a calculated plan. In fact, there has never existed a perfectly consistent approach as to the implementation of equality guarantees in either legal order. Instead, political, socio-economic and even moral considerations have informed time and again the reasoning of the international judiciary. The teleological method of interpretation is capable of accounting for the resulting lack of clarity but it also begs the question of what the *telos* pursued actually is. And that is why it is of utmost importance to decipher a single understanding as to the human interest that equality aims to affirm.

A great part of the case law of the two European Courts is easy to reconcile with the conception of substantive equality put forward in the beginning of this study. The need to secure freedom from prejudice and stereotyping as well as the obligation to provide reasonable accommodation of difference are becoming increasingly relevant within the ECHR and, with added impetus from the legislature, within the EU. In this sense, a certain aim has began to emerge which is capable of

providing a coherent conceptual framework for the further development of equality as a fundamental human right in Europe. The profound differences between the scope of ECHR and EU equality law should not distract attention from this potentiality; besides, conceptual convergence as to the human interest at hand does not necessarily require an identical approach in securing it.

It should not be forgotten that agreement as to the human interest is of great value insofar as it helps consolidate the substance of the right to equality; it is what makes such a right truly fundamental. Nevertheless, the case remains that it is merely a compass for the future development of an effective guarantee. First and foremost, it constitutes a platform for further deliberation in the courtrooms as well as in legislative or treaty-making fora. The quest for substance is a matter of direction more than destination; even if equality is never, in fact, achieved it is important to agree on what we mean by it and why it matters. That way, one step at a time, we will keep getting closer to understanding how it should be implemented in practice.

Chapter 1: Equality and the Quest for Substance

Introduction

The demand for equality constitutes one of the most widely embraced political slogans. People subscribing to different ideologies have strived to benefit from its moral appeal by interpreting it in a way that is compatible with their cause. The resulting complexity of the debate may fairly lead one to conclude that equality means everything and nothing at the same time. Thus, it is hardly surprising that a lowest common denominator which requires symmetry in the treatment of analogous situations has been prevalent. A more substantive or elaborate formulation cannot be sustained without a clear explication of the reasons *why* it should be preferred in the first place. This chapter puts forward such a normative framework for understanding the human right to equality.

The main goal is to identify -at least at a basic level- the human interest that a right to equality should aim to safeguard on the face of conflicting rights and interests. The need for freedom from arbitrary or irrational treatment is sufficient to account for the formal, symmetrical view but it fails to elucidate the whole breadth of potential duties involved in upholding equality; a more substantive perspective is called for in this respect. The proposition is advanced that a human right to equality should be understood as aiming primarily to uphold the basic capabilities that are necessary for the maintenance of equal opportunity; thus, the individual should be free from social oppression in the form of prejudice, stereotyping and failures to accommodate difference. Analysis is built up in three basic levels: the moral value of equality, the legal principle of equality and the human right to equality.

1. Why equality?

In his Philosophy of History, Georg Wilhelm Friedrich Hegel argued that freedom as such 'is an indefinite and incalculable ambiguous term'[11]. The history of mankind depicts, according to Hegel, the constant struggle for the achievement of this 'absolute goal'[12]. But the dialectical nature of the exercise throughout history necessarily means that freedom will probably never be fully realised. Freedom in this sense may be best described as a constant fight for freedom, a never-ending

[11] G.W.F. Hegel, *The Philosophy of History*, Cosimo Classics, 2007, p. 19; freedom in this context was perceived as the achievement of self-consciousness and realisation of one's existence.
[12] Ibid., p. 23.

process of identifying and defeating the barriers to the expansion of human possibilities and powers[13].

Just like freedom, one may fairly describe the moral value of equality as a journey without a set direction or destination. The huge divergence of opinion as to its scope, its purpose and even as to its reason for existence means that equality for all remains largely illusive, albeit widely desired. To use the words of Ronald Dworkin, when it comes to equality 'people who praise or disparage it disagree about what it is they are praising or disparaging'[14]. Still, if we are to touch upon the legal principle and the right to equality, one must necessarily start from adopting a certain understanding of this vaguely defined value.

The most important question to ask in this context is *why* such a value is considered important in the first place. Every human being is different to another in so many ways that it sounds at least naïve to attach any significance to their 'equality'; and it would be completely absurd to argue that all discrepancies between us are cause for concern. In order to trace the essence of the moral value of equality we need to identify why some inequalities are considered reprehensible while others are not. Jean-Jacques Rousseau argued more than 250 years ago that moral inequality came hand in hand with the creation of societies and the interdependence of one individual to another[15]. In this sense, an individual can only be 'unequal' in her relations with other people. That assertion enshrines the most basic criterion according to which one may distinguish between acceptable and unacceptable inequalities.

The fact that some people are born healthier than others cannot reasonably be seen as problematic from a moral point of view. This is so because the inequality which favours the healthier is natural and does not flow from the actions of others; had this not been the case, the unhealthy individual would have a moral as well as a legal claim against those responsible for her condition. By the same token, the ability of some people to excel in sports is openly celebrated in athletic events around the world. This is so because the inequality between the winner and her opponents is the result of personal effort and talent as demonstrated in the day of the competition; it has not been imposed arbitrarily by external social factors.

Still, if we were to decree that football is a men's sport which women should not be allowed to play under any circumstances whatsoever, this would hardly constitute a morally sensible assertion. The resulting inequality between women and men would emanate neither from nature nor from lack of

[13] See Mieczyslaw Maneli, *Freedom and Tolerance,* New York: Octagon Books, 1984, p.49.
[14] Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality*, Harvard University Press, 2000, p. 2.
[15] See Jean-Jacques Rousseau, *Discourse on Inequality*, translated by Franklin Philip, Oxford World's Classics, 1994.

personal effort or any other reasonable explanation[16]. Instead, it would stem purely from social prejudice and stereotyping against women. One can easily imagine that all women would be grossly offended by such a measure even if they do not care at all about playing football. This would be so because being treated with equal respect is an important entitlement in itself, and the measure at hand is grossly disrespectful against women.

Accordingly, it seems reasonable to argue that inequalities of form annoy us only when they are indicative of inequalities of substance; i.e. when individuals are made to suffer a disadvantage because of oppressive attitudes directed against certain social groups defined by reference to sex, race, or other personal characteristics. To trace the substantive reasons for sustaining a fundamental human right to equality is to identify the basic capabilities which will allow the individual to operate free from such social oppression. As will be shown later on, this understanding of substantive equality is based on the idea of equal opportunity. The goal is not to achieve equal achievement, either by way of quotas or favourable treatment, but to foster personal enablement by way of eradicating externally imposed barriers to human development.

But before moving on to articulating this conclusion in more specific terms, first as a matter of principle and then as of right, we would have to explicate as clearly as possible the arguments that point towards it. Perhaps the best starting point is to construe equality in its broadest sense, as a moral value which purports to affirm that (i) all members of the human race equally share a need for a life of dignity and, (ii) such a need must be universally (i.e. equally) acknowledged and respected. But then one has to identify what this entitlement to a 'life of dignity' consists of and what role it plays in understanding the value of equality.

2. Human dignity and personal autonomy

The very first sentence of the preamble to the Universal Declaration of Human Rights 1948 heralds that the 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world'[17]. The requirement for the protection of human dignity has pride of place in several national and international documents which purport to protect the rights of man. Very often it is spotted next to the proclamation of the equality of all human beings. According to Immanuel Kant, dignity constitutes the attribute which renders human beings ends in themselves (as opposed to means for

[16] For example, the fact that women are not allowed to play in men's football and vice versa does not annoy us because of natural dissimilarities in the physique of the two sexes.

[17] Also see the Preamble of the Charter of the United Nations 1945 (: 'to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small').

the achievement of other aims), thereby granting them unconditional and incomparable worth and bringing them to the centre of the categorical imperative which permeates his kingdom of ends[18].

In a very basic sense, the notion of dignity encapsulates the intrinsic worth of all human beings by virtue of their common humanity. The very fact of being human creates an entitlement to have this intrinsic human worth recognised and respected[19]. This fundamental urge stems directly from the fact that personal development is inextricably linked to the attitudes of others towards the person[20]. All humans are entitled to respect for their dignity because they all desire to be recognised as possessing equal intrinsic human worth in the eyes of the society. It is in this sense of treating everybody with 'equal respect' for their common humanity that the notion of human dignity closely interacts with the value of equality[21].

As illustrated by the preamble to the UDHR, human rights seek first and foremost to protect this intrinsic worth (dignity) of every individual. But human dignity is best understood as a value which by its very nature is incapable of concrete definition. It represents the moral absolute which the ever-developing human rights system aims to define and safeguard, having regard to the morality which prevails in a given society at a given time[22]. It may fairly be argued for example that the European human rights system itself is a process of constantly re-examining what the protection of this 'intrinsic worth' entails, having regard to developing trends in transnational morality. The interpretation of the European Convention on Human Rights as a 'living instrument' and the application of a 'margin of appreciation' in matters where not sufficient agreement exists may reinforce this view.

David Feldman has helpfully proposed that it is wrong to talk of a 'right to dignity' since the very notion of dignity refers to an aspect of every man's personality which cannot be separated from the person[23]. Instead, Feldman suggests, we have rights which promote respect for human dignity. Thus, while dignity itself is not a right, all human rights are somehow linked to the protection of

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[18] See Immanuel Kant, *The Moral Law: Groundwork of the Metaphysic of Morals*, translated by H.J. Paton, Routledge Classics, 2005, pp.104-115. For a critique of this thesis, see Arthur Schopenhauer, *On the Basis of Morality*, translated by E.F.J. Payne, Hackett Publishing, 1998.

[19] For a similar definition, see Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights', *The European Journal of International Law*, Vol. 19, no. 4, 2008, pp. 655-724 at 723.

[20] This view has considerably informed the work of prominent western philosophers such as Jean-Jacques Rousseau (supra, n. 15) and Georg Hegel (infra, n. 34).

[21] See, for example, Bernard Williams, 'The Idea of Equality', in Peter Laslett and W.C. Runciman (eds.), *Philosophy, Politics and Society (second series)*, Basil Blackwell, 1962, pp. 110-131 where the author refers to this 'desire for self-respect' as an important element of the common humanity which equality aims to affirm.

[22] For a very interesting discussion of this proposition, see Christine Sypnowich, *The Concept of Socialist Law*, OUP, 1990, Chapter 4. By way of example, the author argues that 'the kinds of human rights valued by socialists reflect a socialist conception of human dignity' (p. 109).

[23] See David Feldman, 'Human Dignity as a Legal Value: Part 1', *Public law*, Winter 1999, pp. 682-702 at 689-691; also see Denise G. Reaume, 'Discrimination and Dignity', *Louisiana Law Review*, Vol. 63, 2002-2003, p. 645 at 676.

dignity of individuals[24]. In this sense, the affirmation of human dignity can be perceived as the basis of fundamental rights. Albeit not uncontroversial[25], this approach is also consonant with various international human rights documents[26].

Reaching a similar conclusion, Oscar Schachter has interestingly distinguished between the 'historical' and the 'philosophical' conception of dignity[27]. According to Schachter, the former defines dignity as merely a value which 'reflects the socio-historical conceptions of basic rights' rather than generating them while the latter, which is presented as preferable, maintains that rights are indeed generated by the inherent dignity of people[28]. According to another proposition, the concept of human dignity flows from rights in the sense that 'what is called human dignity may simply be the recognizable capacity to assert claims'[29]. This approach actually affirms the primary role of dignity since it is only natural that dignity, being the foundational value of rights, will be impaired when somebody is excluded for no good reason from making use of his rights.

It follows that the affirmation of human dignity is, like equality, a fundamental moral value informing the structure of democratic legal systems. Moreover, again like equality, it is notoriously difficult to particularise. But both dignity and equality seem to share a common link which makes them inseparable. This link is the idea of individual autonomy which is understood here as 'refer[ring] to the capacity to be one's own person, to live one's life according to reasons and motives that are taken as one's own and not the product of manipulative or distorting external forces'[30]. In other words, all individuals should be able to develop themselves freely.

This need for free personal development necessarily requires respect for one's intrinsic worth; and one's intrinsic worth cannot be affirmed where people are guided by reasons and motives which are not their own. It seems to be the case then that individual autonomy and human dignity are very closely connected, if not completely confluent, for neither of them can be fully realised or

[24] Ibid.
[25] See, for example, Joseph Raz, 'Human Rights Without Foundations', *University of Oxford Faculty of Law Legal Studies Research Paper Series*, No. 14/2007, March 2007; cf. Amartya Sen, 'Elements of a Theory of Human Rights', *Philosophy & Public Affairs*, Vol. 32, Issue 4, October 2004, pp. 315-356.
[26]See the Preamble of the International Covenant on Civil and Political Rights 1966 and the Preamble of the International Covenant on Economic, Social and Cultural Rights 1966 which both state that the rights contained therein 'derive from the inherent dignity of the human person'. Also see the 'Explanations relating to the Charter of Fundamental Rights of the European Union' (2007/C 303/02), where it is affirmed that '[t]he dignity of the human person is not only a fundamental right in itself but constitutes the real basis of fundamental rights'.
[27] Oscar Schachter, 'Human Dignity as a Normative Concept', *The American Journal of International Law*, Vol. 77, No. 4, 1983, pp. 848-854 at 853.
[28] Ibid.
[29] Joel Feinberg, 'The Nature and Value of Rights', *The Journal of Value Inquiry*, Vol. 4, 1970, p. 243 at 252.
[30] See John Christman, 'Autonomy in Moral and Political Philosophy', *Stanford Encyclopedia of Philosophy*, Spring 2011 (available at *http://plato.stanford.edu/entries/autonomy-moral/*).

even explicated without reference to the other[31]. The value of equality is similarly attached to the idea of individual autonomy insofar as equality prescribes the freedom of the individual from adverse social norms and attitudes. Equality then implies the personal autonomy which is also an inextricable component of a dignified life.

This close relationship between equality, dignity and personal autonomy is highlighted when examined through the lens of the 'politics of recognition'[32]. Recognition of everyone's equal worth is often perceived as necessary in order to form one's identity unobstructed from the demeaning behaviour of other people, thereby realizing one's full potential[33]. Such a conception of freedom is deeply rooted in the work of Hegel who has conceived the very existence of self-consciousness as conditional on it being acknowledged by other people[34]. In the words of Jurgen Habermas, 'persons, and legal persons as well, become individualised only through a process of socialization'[35]. Of course, this emphasis on recognising the 'equal worth' of all people is not generally accepted as enough in itself to bring about equality.

For example, the view has been put forward that to focus on the 'symbolic' idea of recognition, as opposed to redistribution, may distract attention from serious injustices which take place in the socioeconomic sphere[36]. Hence, it has been argued that feminists cannot valorise gender specificity while asking simultaneously for the abolition of gender differentiation in the distribution of socioeconomic goods[37]. This assertion seems to be inherently problematic as it presupposes that a fair distribution is about eliminating difference rather than recognising and respecting it. Moreover,

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[31] Dignity and autonomy have been defined with reference to each other time and again: see, for example, Bernard Williams, 'The idea of Equality' (supra, n. 21), p. 114; also see Conor Gearty, *Principles of Human Rights Adjudication*, OUP, 2004, p. 84.

[32] See Charles Taylor, 'The Politics of Recognition' in Amy Gutmann (ed.), *Multiculturalism: Examining the Politics of Recognition*, Princeton University Press, 1994, p. 25 where the author argues that 'our identity is partly shaped by recognition or its absence, often by the misrecognition of others, and so a person or group of people can suffer real damage, real distortion, if the people or society around them mirror back to them a confining or demeaning or contemptible picture of themselves'.

[33] For a similar proposal, see Axel Honneth, 'Recognition or Redistribution? Changing Perspectives on the Moral Order of Society', in Scott Lash and Mike Featherstone (eds.), *Recognition & Difference: Politics, Identity, Multiculture*, SAGE Publications, 2002, pp. 43-55 at 51. It is worth noting, however, that Isaiah Berlin has expressed the view that 'craving for status' should be understood as being 'more closely related to solidarity, fraternity, mutual understanding [and the] need for association on equal terms' rather than to individual liberty: see Isaiah Berlin, *Liberty,* edited by Henry Hardy, OUP, 2002, p. 204.

[34] See G.W.F. Hegel, *Phenomenology of Spirit*, translated by A. V. Miller, Motilal Banarsidass Publishers, 1998 where it is argued (at p.111) that 'self-consciousness exists in and for itself when, and by the fact that, it so exists for another; that is, it exists only in being acknowledged'.

[35] Jurgen Habermas, 'Struggles for Recognition in the Democratic Constitutional State', in Amy Gutmann (ed.), *Multiculturalism: Examining the politics of recognition*, Princeton University Press, 1994, pp. 107-148 at 113 where the author also goes on to argue that 'a correctly understood theory of rights requires a politics of recognition that protects the integrity of the individual in life contexts in which his or her identity is formed'.

[36] See Nancy Fraser, 'From Redistribution to Recognition? Dilemmas of Justice in a "Post-Socialist" Age', *New Left Review*, Vol. I/212, July-August 1995, pp. 68-93 at 68.

[37] Ibid., at 79-80.

such criticisms fail to separate between the aim pursued and the means employed[38]. Recognition defeats the 'cultural denigration of groups' which constantly reinforces 'structural economic oppressions'[39]. Thus, the affirmation of group specificity should be seen as a decisive step towards the mitigation of socioeconomic injustices. Such an approach serves to indicate that unjust distributive patterns are closely intertwined with a failure to recognise the equal worth of all irrespective of cultural or other differences.

Recognition of that equal worth (dignity) secures the personal autonomy which, in turn, is necessary for a dignified life to be sustained. This cyclical relationship between autonomy and dignity emanates from the fact that both eventually demand freedom of the individual to develop herself according to her own inclinations, irrespective of oppressive norms and attitudes. This freedom also lies at the heart of the moral value of equality as understood here. Personal autonomy then brings dignity and equality together in that neither of the latter values can be fully realised without reference to the former.

Understanding equality as a moral value which aims to affirm human dignity by promoting individual freedom from oppressive attitudes provides a strong foundation for explicating the substantive human interest at hand. The acknowledgment of such an assertion is valuable as a road map in our quest for substantive equality; but it is nothing more than a map, the road still lying ahead. The next important step must be to identify how this moral value can be implemented in a legal system. In this context, the *moral value* has to be construed as a *legal principle* of equality.

3. The principle of equality

For our purposes, it is useful to think of a principle as the medium through which moral values infiltrate a legal system. In this sense, the main difference between a principle and a value is that the former operates within a specific institutional framework while the latter does not. According to Ronald Dworkin, principles are 'requirement[s] of justice or fairness or some other dimension of morality'[40]. A legal principle (as opposed to a legal rule) does not provide for a specific course of action under specific circumstances but it constitutes a consideration that officials must take into

[38] See Iris Marion Young, 'Unruly Categories: A Critique of Nancy Fraser's Dual Systems Theory', *New Left Review*, Vol. I/222, March-April 1997, pp. 147-160 at 148 and 156-158.
[39] Ibid., at 159.
[40] Ronald Dworkin, *Taking Rights Seriously*, Gerald Duckworth & Co. Ltd., 1977, p. 22.

account in reaching a particular decision[41]. It follows that the application of a legal principle is context specific; much will depend on how it intersects with conflicting principles and policies[42].

Perhaps the most basic manifestation of equality as a principle of a legal system is the one which heralds the equal status of all under the law. This principle of equality before the law (or 'legal equality') is commonly understood as entailing that the laws of the state should not make any arbitrary or irrational distinctions between different individuals or groups[43]. For example, a law which holds that only males have a right to social benefits is blatantly unfair to women, thereby violating this principle of legal equality; but a rule which gives prolonged maternity leave only to women may not be perceived as equally problematic, equal treatment in this case giving way to the best interests of the mother and the child.

Such a narrow conception of legal equality would be sufficient if we were to accept that equal application of the laws automatically guarantees the elimination of all forms of inequalities in the wider social sphere. Still, if we want to adhere to a more pragmatic version of equality, we need to move beyond this basic form. The mere fact of equality before the law does not necessarily imply that everyone will be able to exercise his rights on equal terms. For example, the fact that everyone has a right to self-determination does not mean that, without assistance, a disabled person will always be able to function on equal terms with the rest of the society.

The general point to be made here is that adverse social norms and practices may entrap some people by denying them the chance to lead their life in accordance with their abilities; that is, without reference to their personal characteristics. A more elaborate conception of equality is needed if the discrepancies in the situation of different individuals are to be considered truly the result of individual choices. But the question of where we go when we move beyond requiring

[41] To use the words of Ronald Dworkin (ibid., pp. 22-28), both legal principles and legal rules 'point to particular decisions about legal obligation in particular circumstances, but they differ in the character of the direction they give'; only the latter are 'applicable in an all-or-nothing fashion' (p. 24). By way of example, the principle that 'no man may profit from his own wrong' does not mean that no one will ever be allowed to do so; adverse possession constitutes a clear example of this (p. 25). In contrast, a rule which says that 'a will is invalid unless signed by three witnesses' cannot be deviated from without being violated (p. 24). Perhaps the most prominent critique of Dworkin's theory is the one put forward in Joseph Raz, 'Legal Principles and the Limits of Law', *The Yale Law Journal*, Vol. 81, No. 5, 1972, pp. 823-854. It is worth noting that arguments against Dworkin's analysis have stretched so far as to deny even the need for legal principles altogether, holding that 'legal methodology requires only […] correct moral principles and posited legal rules' (see Larry Alexander and Ken Kress, 'Against Legal Principles', *Iowa Law Review*, Vol. 82, 1996-1997, pp. 739-786 at 785).

[42] In contrast to legal principles which have this 'dimension of weight or importance', two legal rules cannot conflict with each other without one of them being invalidated: Dworkin, *Taking Rights Seriously* (supra, n. 40), pp. 26-27.

[43] Such a requirement of equal treatment may reasonably be perceived as a rule which specifically prohibits unjustified distinctions whenever they occur. But since the justifiability of a distinction heavily depends on the context within which it has taken place, equal treatment comes closer to constituting a legal principle rather than a rule.

consistency in treatment, either before the law or the society as a whole, has not as of yet received an answer that is widely accepted. In practice, the principle of equality can be said to be torn between its formal and its substantive identity.

Formal equality is based on the Aristotelian notion of treating equals equally, demanding that similarly situated individuals receive symmetrical treatment unless an objective justification can be put forward[44]. Insofar as it guarantees equal treatment before the law, formal equality is an indispensable element of the rule of law and a vital component of every democratic society[45]. It is primarily based on the ideas of impartiality, neutrality, rationality and freedom from arbitrariness. Setting other problems aside[46], understanding asymmetrical treatment of analogous situations as deplorable in itself precludes any meaningful consideration of the causes leading to it. By the same token, this approach fails to assess properly the effects of a particular treatment -symmetrical or not- on the individual autonomy of those affected.

The substantive facet of equality has arisen as a response to the inadequacies of the formal conception. It can fairly be described as emanating from the assumption that inequalities of form are in reality the end result of inequalities of substance that persist in a given society. Hence, concern lies primarily with the causes of a particular treatment rather than with its form. In this context, asymmetrical treatment of vulnerable groups may be necessary in order to alleviate disadvantage suffered by them because of adverse social dynamics. The emphasis here is not on consistency, but on the enhancement of personal autonomy.

The principle of equality should not be limited to requiring impartiality and freedom from arbitrariness through the prohibition of unjustified asymmetrical treatment. A more substantive approach is called for if we are to adhere to the broader underlying values involved. Respect for human dignity and personal autonomy constitute the foundations upon which a coherent theory of substantive equality can be developed; but further particularisation of the human interest at hand is needed before we can rely on substantive equality as a distinct legal principle; ideals of personal enablement, respect for basic capabilities and equality of opportunity are particularly helpful in this respect..

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[44] See Aristotle, *The Politics*, translated by Stephen Everson, Cambridge University Press, 1988, Book III, 1282b-1283a; also see Aristotle, *The Nicomachean Ethics of Aristotle*, translated by Sir David Ross, OUP, 1925, Volume III, 1131a-b.

[45] See, for example, Andrew Haywood, *Political Theory: An Introduction*, Palgrave Macmillan, Third edition, 2004, p. 286.

[46] For an excellent and brief overview of the main problems associated with formal equality, see Sandra Fredman, *Discrimination Law*, OUP, 2002, pp. 7-11. Many of these issues will be put forward below.

4. Equality of what?

i) *Enablement vs. achievement*

More than 2,300 years ago, Aristotle noted that the object of equality (i.e. 'equality or inequality of what?') constitutes 'a difficulty which calls for political speculation'[47]. It would seem that the relevance and accuracy of this statement has not withered with time. As Thomas Nagel has noted, people seem to agree that there are some moral claims shared equally by all -hence the need for equality- while simultaneously disagreeing as to what these claims actually consist of[48]. Accordingly, even if one accepts that equality requires more than the symmetrical treatment of analogous situations, it is still extremely difficult to reach convergence of opinion regarding the substantive human interest that must always be guaranteed equally.

The underlying values of individual dignity and autonomy reveal that a substantive approach is needed but they do not provide its specific components. The matter is complicated even further if we consider that equality is inherently multidimensional, potentially informing all sorts of relationships in a given society. In this sense, it is very hard to decipher an exhaustive list of claims which, if equally satisfied, would guarantee equality for all. For example, at least four basic manifestations of equality can be identified with reference to the area of application of the principle[49]. Hence, one may argue for *legal equality*, i.e. equal rights and obligations for all; or *political equality*, i.e. equal ability to participate in democratic processes; or *social equality*, i.e. equal standing as a member of a society; or *economic equality*, i.e. equal prosperity.

Moreover, one may reasonably argue that these different types of equality are interrelated. For example, the promotion of equality in the legal, political and social sphere may prove futile when economic inequalities continue to impinge on the standing of the poorer members of a community[50]. In that sense, economic equality is often perceived as vital for the maintenance of equality in the wider social sphere[51]. Although such an argument is very convincing in theory, and perhaps useful in informing the exercise of social policy, it helps very little in the explication of equality as a legal principle. It is easy to imagine, for example, that a principle heralding that 'everyone is to receive equal income' would grossly oppose personal autonomy, criminalising individual merit and completely neutralising responsibility.

[47] See Aristotle*, The Politics*, translated by Stephen Everson (supra, n. 44), Book III, 1282b.
[48] See Thomas Nagel, *Mortal Questions*, Cambridge University Press, 1979, p. 111.
[49] Ibid., p. 106.
[50] See Anne Phillips, *Which Equalities Matter?*, Polity Press, 1999.
[51] Ibid.; also see Thomas Nagel, *Mortal Questions* (supra, n. 48), pp. 106-107.

It is clear then that not all disturbing inequalities can be addressed as a matter of law because, as argued earlier, a legal principle operates -by definition- with due regard to conflicting principles and interests. Still, while the principle of equality cannot guarantee equal prosperity as a matter of *outcome*, it can guarantee equal ability to enter the economic arena as a matter of *process*. Hence, it is much more plausible to say that an individual should not be forced to remain poor because he was born poor than to say that everyone should be rich. This focus on enablement as opposed to achievement is what makes equality compatible with individual freedom. It is also what highlights the importance of equal opportunity as opposed to equal results.

Indeed, if we were to take a strict egalitarian approach we would conclude that the principle of equality guarantees simply that no one should end up enjoying more resources or, put more abstractly, a higher level of welfare than his fellow human beings. Such an attitude which promotes equality as a matter of outcome is unrealistic and would inevitably victimize those who are more talented or have generally achieved a higher level of performance. Furthermore, consistency in treatment does not necessarily mean that people will lead a dignified life. This is particularly true, for example, in cases where the resources to be administered are not enough to satisfy the basic needs of all individuals; in that case, a strictly equal distribution would leave everybody in an equally poor condition.

This is not to say that equal enablement (as opposed to equal achievement) does not entail a distributive element at all. A distribution which would leave people without enough resources to allow them to retain their personal autonomy cannot be deemed compatible with the principle of equality. In the words of Isaiah Berlin, 'to offer political rights, or safeguards against intervention by the state, to men who are half-naked, illiterate, underfed, and diseased is to mock their condition'[52]. The point is that the primary purpose of equality is not similar distribution of benefits, but sufficient distribution. This argument has been put forward prominently by Harry Frankfurt who has rightly suggested, inter alia, that 'the fundamental error of egalitarianism lies in supposing that it is morally important whether one person has less than another regardless of how much either of them has'[53].

[52] Isaiah Berlin, *Liberty* (supra, n. 33) at 171. However, it is worth noting that Berlin himself actually drew a distinction between liberty and the conditions for its exercise (p. 45). For an excellent presentation of the importance of the socio-economic conditions which make liberty worth having, see Jeremy Waldron, 'Liberal Rights: Two Sides of the Coin' in Jeremy Waldron, *Liberal Rights: Collected Papers 1981-1991*, Cambridge University Press, 1993, pp. 1-34. Waldron rightly argues (at 14) that 'when [leading a life on one's own terms] is undermined through social and economic vicissitude, it is destroyed as decisively, and what is lost is just as valuable, from the liberal point of view, as when someone is tortured, imprisoned, or persecuted for the life he wants to lead'.

[53] Harry Frankfurt, 'Equality as a Moral Ideal', *Ethics*, Vol. 98, No. 1, October 1987, pp. 21-43 at 34; also see Matt Cavanagh, *Against Equality of Opportunity*, Oxford: Clarendon Press, 2002 where the author argues (at 140) that instead of emphasizing the equal opportunity of people 'we should simply focus on making sure

Equal treatment is a meaningless task unless a minimum standard is set beneath which a person is de facto disallowed from enjoying an autonomous and dignified life (albeit not necessarily a prosperous one). This standard is identifiable as a question of sufficiency rather than similarity in outcomes; it refers to the conditions that will allow the individual to make her own choices free from external oppression. This minimum standard is also helpful in setting the limits of the principle of equality whenever necessary. Indeed, to claim in the name of equality more than what is required for the individual to be truly autonomous is to devalue the principle by excessively widening its scope.

ii) *In search of a standard*

So far it has been suggested that the legal principle of equality should be about equal enablement as opposed to equal achievement. Still, equal enablement itself is something that needs to be achieved at a basic level in the sense that the individual should be placed in a position where she will be able to enjoy her personal autonomy. As noted earlier, non-interference is not always enough in guaranteeing such a state of affairs. Therefore, we need to identify the goods that would guarantee equal individual autonomy and a dignified life if distributed equally (i.e. fairly or sufficiently).

Perhaps a proper answer to this question would be to say that all should be entitled equally to individual welfare. In reality, however, this suggestion is far from helpful since the very notion of welfare is extremely subjective and cannot guide any mechanism of distributive justice. What might be crucial for the welfare of one person may be trivial for the welfare of another. This argument is at the centre of Ronald Dworkin's rejection of the principle of 'equality of welfare'[54]. Instead, Dworkin puts forward the principle of 'equality of resources' which requires that in the end of the distribution nobody should be envious of the resources others possess (the 'envy test'[55]) and that subsequently people should be compensated only for instances of 'brute luck', i.e. for inequalities that arise through no responsibility of their own[56]. Dworkin's theory is attractive but the hypothetical auction which he uses to satisfy his envy test, even if theoretically appealing, provides little guidance as to how that distribution could ever be achieved in the real world.

The same is true for John Rawls's hypothetical 'veil of ignorance' which forms the basis of his theory of justice. According to Rawls, every person should enjoy an equal share of 'primary social

that they have enough opportunity, and a good enough starting position, such that they can be said to have some control over their lives'.

[54] Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (supra, n. 14), pp. 11-64.

[55] Ibid., p. 67.

[56] Ibid., pp. 73-83.

goods'[57], the stronger members being allowed to gain more only where this would improve the situation of those who have less ('the difference principle'), provided that equal liberty and fair opportunity will not be offended[58]. While Rawls's theory might also seem appealing, it is by no means beyond criticism[59]. For our purposes, it suffices to point out two aspects of it which undermine its practical value.

First, Rawls's theory is presented as emanating from a hypothetical agreement of people who are put in a situation where they do not possess self-awareness as to their social status and individual talents (the 'veil of ignorance'). It is beyond doubt that such a thought experiment does not readily validate the correctness of the argument, for the objectivity of the exercise relies on the subjectivity of the hypothesis which underlies it. Indeed, no one can objectively say, for example, that the people in Rawls's original position would not decide to gamble as to their individual entitlements. Secondly, and perhaps most importantly, Rawls's approach may impinge on the personal autonomy of the talented by obliging them to view their self-fulfilment as conditional on the amelioration of the situation of the least talented.

On the other end of the spectrum one can find the theory of utilitarianism, prominently put forward by Jeremy Bentham. According to that theory, a distribution would be just if every person's pleasures were given equal weight in determining the aggregate general welfare[60]. It follows that some people's welfare will be sacrificed if this is to increase the total satisfaction of individuals collectively[61]. Setting aside the obvious assault on individualism, it is also quite clear that aggregate utility cannot ever be calculated successfully due to the different tastes and needs of different people[62]. Put simply, utilitarianism seems to fall in the same logical trap as equality of welfare. Furthermore, utilitarianism is clearly problematic insofar as it entails that 'even the minutest gain in total utility sum would be taken to outweigh distributional inequalities of the most blatant kind'[63].

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[57] Rawls defines his primary social goods as broadly including rights, liberties, opportunities, income and wealth, and a sense of one's own worth: see John Rawls, *A Theory of Justice: Revised Edition*, OUP, 1999, p. 79.
[58] John Rawls, *A Theory of Justice: Revised Edition* (ibid.), p. 266.
[59] For a general discussion of the drawbacks of Rawls's theory see Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (supra, n. 14), pp. 109-119; also see Robert Nozick, *Anarchy, State and Utopia*, Oxford: Blackwell, 1974, pp. 183-231; Thomas Nagel, *Mortal Questions* (supra, n. 48), pp. 118-122; Andrew Halpin, *Rights and Law: Analysis and Theory*, Hart Publishing, 1997, pp. 235-241.
[60] See Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, edited by J.H. Burns and H.L.A. Hart, OUP, 1996, page xci.
[61] Ibid.
[62] In the words of John Rawls, 'utilitarianism does not take seriously the distinction between persons': John Rawls, *A Theory of Justice: Revised Edition* (supra, n. 57), p. 24.
[63] See Amartya Sen, 'Equality of What?', *The Tanner Lectures on Human Values*, Vol. 1, 1980, pp. 197-220 at 202.
(*http://www.uv.es/~mperezs/intpoleco/Lecturcomp/Distribucion%20Crecimiento/Sen%20Equaliy%20of%20what.pdf*).

Before moving any further, it is useful to note two particular ideas which operate as 'ticking bombs' in the foundations of virtually every theory of equality. The first one concerns the existence of natural endowments which will necessarily mean that, in a narrow sense, not all people are truly born equal. It is therefore vital that the implementation of equality should not result in what has been referred to as 'slavery of the talented'[64]. The second and perhaps even more problematic idea is the one of individual responsibility. The basic argument behind this idea is that people should be held responsible for the foreseeable consequences of their choices. The whole branch of 'luck egalitarianism' has evolved in order to address this issue of individual responsibility which constitutes, as G.A. Cohen has put it, 'the most powerful idea in the arsenal of the anti-egalitarian right'[65].

Perhaps the most characteristic instance of 'luck egalitarianism' is the one found in Dworkin's work presented above: no one should be protected against inequalities that have arisen because of their own informed choices (option luck). Indeed, to compensate people who willingly take risks runs counter to the rights of the more prudent people who will have to bear the cost of that compensation. However, an overt emphasis on individual responsibility would deprive equality of its very substance. It cannot be just, for example, that somebody who recklessly lost all his money in the casino should be allowed to suffer the inhumane consequences of extreme poverty. Such an approach could negate his 'equal worth' as a human being.

The best solution to this problem would be to reaffirm that there are certain basic standards which should always be enjoyed equally irrespective of personal responsibility. This approach is consonant with Elisabeth Anderson's conception of 'democratic equality' which dictates that everyone should be entitled to 'a set of capabilities necessary to functioning as a free and equal citizen and avoiding oppression'[66]. Following this line of thought, it can be suggested that the minimum standard we are looking for is that of basic capabilities. This idea originates from the work of Amartya Sen according to whom the well-being of a person is sufficiently guaranteed when she enjoys the substantive freedom (*capability*) to achieve alternative combinations of things that she values (*functionings*), ranging from being adequately nourished to being happy and enjoying self-respect[67].

When we assess individual freedom in terms of capability the focus lies on a person's actual ability rather than on a given model of distribution of resources. It follows that the reckless man who has

[64] Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (supra, n. 14), p. 90.
[65] G.A. Cohen, 'On the Currency of Egalitarian Justice', *Ethics*, Vol. 99, No. 4, July 1989, pp. 906-944 at 933.
[66] See Elisabeth S. Anderson, 'What is the Point of Equality?', *Ethics*, Vol. 109, January 1999, pp. 287-337 at 327.
[67] See Amartya Sen, *Inequality Reexamined*, New York: Russell Sage Foundation; Oxford: Clarendon Press, 1992, pp. 39-42. Also see, Amartya Sen, *Development as Freedom*, OUP, 1999, pp. 74-76.

lost his money in the casino should not be allowed to end up being underfed and humiliated (i.e. should not be denied his basic capabilities) even though he is responsible for his loss. The minimum standard of possessing some basic capabilities should be guaranteed even against a background of individual responsibility. To hold otherwise would be to accept that the principle of equality would sit idle against fundamental infringements of a person's dignity and autonomy. However, this is not to suggest that people should always be fully protected against the consequences of their choices.

It is important to keep in mind that some people autonomously decide to act repeatedly in a way that will eventually deteriorate their standing. Imagine, for example, that once we help the man who suffered the loss in the casino to remain capable of pursuing a better life, he goes on to gamble again so as to be faced again with conditions of extreme poverty. Having already experienced the dire consequences of gambling, his action appears now to be even more intentional. The question then appears to be whether or not people who willingly sacrifice their capabilities again and again deserve to have these capabilities restored at the expense of the non-gamblers.

Perhaps the only satisfactory answer to this question is to hold that a minimum level of individual responsibility should be a precondition for guaranteeing the minimum standard mentioned above[68]. Indeed, the exercise of social policy should be seen as a matter of cooperation between the state and the individual; if the state gives B a decent meal and B, who is seriously poor and underfed but mentally healthy, decides to throw it in the river, it is morally unacceptable that he should then complain of suffering the consequences of his action. To say that resources should be used to ameliorate such a person's condition would be strikingly disproportionate to the entitlements of the more prosperous who provide these resources. However, it is fair to argue, for example, that if B were to die because of malnourishment, the proportionality balance would play in B's favour.

It seems that the minimum threshold of responsibility would not effectively allow for blatant devaluations of one's intrinsic worth, for it is almost impossible that this would ever be considered to be a proportionate result. Thus, it remains the case that the persistent gambler should not be left underfed and humiliated although he may reasonably be denied some of the less basic capabilities that might be open to more responsible people (e.g. be excluded from training schemes where there are not enough places for everybody). The idea of reasonable accommodation emerges as a

[68] See Richard J. Arneson, 'Luck Egalitarianism and Prioritarianism', *Ethics*, Vol. 110, No. 2, January 2000, pp. 339-349.

constituent element of equality in this respect; and the import of this finding should not be underestimated.

The most important point to be made here is that the theory of basic capabilities can provide the minimum standard that equality should require as a matter of principle. This is so because it emphasises the actual freedom enjoyed by the individual. Equality should not be confined to demanding the possession of resources (Dworkin) or primary goods (Rawls) because possession of the means to freedom does not necessarily imply equal freedom[69]. By focusing on capabilities, one is able to assess actual individual autonomy 'in the form of alternative sets of accomplishments that we have the power to achieve'[70]. But even if we agree to talk about equality of basic capabilities, a problem persists in determining which capabilities are basic and which are not[71].

Perhaps the best way to tackle this issue is to highlight the close relationship between Sen's theory and that of equality of opportunity. The two theories are identical to the extent that they espouse freedom to achieve one's ends as their central theme. Still, a significant distinction might be drawn between them. The notion of capability informs us of the different abilities a person possesses while opportunity refers to the different choices that are available to her. While capability represents the degree to which one is able to do different things, opportunity reflects the broader potential to further such capabilities; the former cannot logically be shared in absolute equality (since not everyone will be similarly capable to do all the things they value), but the latter should be shared equally if we are to secure an entitlement to personal autonomy and a dignified life.

Of course, this is not to suggest that opportunities and capabilities can be understood separately. Insofar as potency determines potentiality, capability and opportunity are inextricably linked. A person cannot be said to enjoy true opportunity in pursuing a specific goal unless he is sufficiently capable of doing so. It follows that equal opportunity necessarily implies possession of some basic capabilities. Accordingly, it may reasonably be asserted that the basic capabilities we are looking for are those that are necessary for guaranteeing the opportunity to pursue one's personal development without (unjust) restraints.

Perhaps the safest way to proceed towards the identification of these basic capabilities is to enquire into the reasons why a social group is being denied access to a certain opportunity in any particular case. As not all reasons will be equally important, it follows that not all capabilities will be equally

[69] See Amartya Sen, *Inequality Reexamined* (supra, n. 67), pp. 33-34. It is worth noting, however, that Sen does point out the significance of Rawls's and Dworkin's theories in shifting attention 'from achievement to the means of achievement', thereby highlighting the importance of freedom.
[70] Ibid., p. 34.
[71] Sen himself acknowledges this problem in the course of a broader discussion of the limits of the capabilities approach: see Amartya Sen, *The Idea of Justice*, Penguin Books, 2009, pp. 295-298.

basic for the pursuit of the opportunity. Hence, focus on personal enablement (as opposed to achievement) informs us that equality should be concerned with guaranteeing the basic capabilities which are necessary for an autonomous life; and the idea of equal opportunity helps us identify what these basic capabilities should be. But before moving into an examination of those capabilities that may be advanced as forming the crux of equality of opportunity, it is worth taking a broader look into the theory itself.

iii) *Equality of opportunity*

Equality of opportunity is perhaps the most coherent theory of substantive equality as a matter of practice. First and foremost, it acknowledges that different outcomes which result from individual efforts and charismas should not be seen as an anathema, but as the very purpose of equality law. Hence, it correctly encapsulates the idea that inequalities of result are to be considered problematic only if they are caused by a reprehensible attitude of the powers that be towards the person suffering them. In short, it denotes that it is not the unequal outcome that matters, but the reasons leading to it. Seen this way, it also promotes substantive meritocracy by levelling the playing field in which talents and quality of work are to be measured.

Focus on meritocracy and opportunity, as opposed to strict egalitarianism and outcomes, also rules out policies which pursue symmetrical results through positive discrimination, favouritism or quotas. Equality of opportunity aims to lift the barriers that hamper personal development, not to compensate for their adverse effect. Blanket solutions which purport to create artificial symmetry in outcomes through preferential treatment only take us back to the impossible task of achieving equality in terms of similarity rather than sufficiency. The ideas of enablement and respect for individualism support and reinforce this view. Besides, one should not forget that an equal opportunity to participate in social and professional life is fundamental both for those who possess it and for those who lack it; all should enjoy it and none should be excluded from it in favour of the other.

It is also important to note that equality of opportunity manages to overcome some of the most serious problems of individual responsibility as it does not protect people against the loss of the opportunity offered; it heralds simply that all should be capable of claiming the opportunity on relatively equal terms. Therefore, as Anne Phillips has put it, 'the great attraction of opportunity equality is that it is supposed to equalise those things for which people cannot, in fairness, be held responsible, while continuing to hold them accountable for what they do (or fail to do) with their

opportunities'[72]. Unfortunately, this is not to suggest that all problems related to individual responsibility are nullified.

It is still very difficult, for example, to determine when a person is actually responsible for letting an opportunity go. This issue is vividly illustrated by the example of the mother who sacrifices her career in order to look after the child: even though there is a choice ('option luck') in this scenario, sexist social norms may cast doubt as to whether or not that choice was made freely[73]. Determination of what lies within a person's control is not always apparent. Thus, distinguishing clearly between 'option luck' and 'brute luck' is often an impossible task, unless one adopts a strict liability approach[74]. Such issues are bound to persist irrespective of what theory of equality one adopts[75].

Even beyond the question of individual responsibility, equality of opportunity is open to criticism on many different accounts. Perhaps the most basic criticism is that -inevitably- not everybody will succeed in exploiting their opportunity[76]. In reality, this argument does little to impinge on the principle of equality as explicated so far; to say that equality should guarantee equal success is to go back to the impossible task of securing equality of outcome or welfare. It is far more reasonable and realistic that the pursuit of equality should focus on the minimum standards necessary for the individual to be able to take advantage of the opportunities offered. To hold otherwise would raise issues of unwarranted paternalism and, most importantly, would overburden the exercise of social policy.

It is also natural that not all people can put to good use their opportunities for it might often be the case that the resources available are not sufficient to be distributed equally among them. Imagine, for example that everyone wants to have one unit of X where there are only 10 units to

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[72] Anne Phillips, 'Really Equal: Opportunities and Autonomy', *The Journal of Political Philosophy*, Vol. 14, No. 1, 2006, pp. 18-32 at 19.

[73]See Andrew Mason, 'Equality, Personal Responsibility and Gender Socialisation', *Proceedings of the Aristotelian Society*, 2000, vol. 100, pp. 227-246.

[74] John Roemer has put forward a sensible proposal with regard to this problem. According to Roemer, society should determine, in any particular context, what factors are beyond a person's control and then use these factors to categorise people in different groups. Individual responsibility is subsequently determined by a person's deviance from the median level of behaviour in his group: see John Roemer, 'Equality and Responsibility', *Boston Review*, April/May 1995 Issue; also see John Roemer, *Theories of Distributive Justice*, Harvard University Press, 1996, pp. 276-279. There are, however, very reasonable objections that one can raise in relation to such a scheme, the most obvious being that not all personal choices are imposed upon a person due to the fact that he might be said to belong in a certain category: see T.M. Scanlon, 'A Good Start', *Boston Review*, April/May 1995 Issue; also see, in the same issue of the review, the interesting commentaries of Samuel Scheffler, Robert Sollow, Nancy L. Rosenblum, S. L. Hurley, Eric Maskin, Arthur Ripstein, Elizabeth Fox-Genovese and Richard A. Epstein as well as John Roemer's response to these commentaries.

[75] Unless one were to put forward the radical view that the idea of responsibility should not inform any distributive pattern: see Susan Hurley, 'Roemer on Responsibility and Equality', *Law and Philosophy*, Vol. 21, No. 1, January 2002, pp. 39-64.

[76] Anne Phillips, 'Really Equal: Opportunities and Autonomy' (supra, n. 72), at 30-31.

be distributed among them. Equality of opportunity secures that in such a situation, where a strictly equal distribution is impossible, the outcome will be fair and just even though not everybody will be equally satisfied[77]. The only other, quite unfortunate, option would be to say that no one should be given any units of X (levelling down).

A further argument against equality of opportunity is that in the process of equalising opportunities the very grounds which should be considered irrelevant (sex, race, etc.) are emphasised, only this time against the better off[78]. It is sufficient to say in this respect that social dynamics cannot be reversed unless the very evil that substantive equality has to face is put at the centre of the procedure. Behaving as if these grounds were unimportant cannot be part of the solution. As argued earlier, proportionate positive action must be understood as an inherent element of the principle of equality.

Moreover, equality of opportunity is vulnerable to the criticism that 'no one has a right to something whose realization requires certain uses of things and activities that other people have rights and entitlements over'[79]. Indeed, the enhancement of one's entitlement to equal opportunity will entail very often the use of resources which belong to other people. For example, if one is to take free basic training in order to be able to compete in the market on equal terms, this means that other people (i.e. the more privileged or talented) will have to let go of the resources necessary for the funding of the training program. Indeed, there appears to be some unfairness in this line of thought.

Still, it is only natural that there will be times when the entitlements of people will clash; and when this happens, the question of whose claim is to prevail should be decided according to the urgency of the demand as measured by an objective assessment of the reasons which underlie it[80]. It is only fair that sometimes the entitlements of some people should be given secondary attention when this is for the benefit of those whose position becomes overtly unfavourable[81]. Of course, the principle of proportionality must be adhered to in these cases; but there are some basic capabilities that should be given added weight in doing so. These will always be necessary in upholding equal opportunity and they represent the human interest that the principle of equality should aim to safeguard when construed in its substantive sense.

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[77] See Nicholas Rescher, *Distributive Justice: A Constructive Critique of the Utilitarian Theory of Distribution*, Indianapolis: Bobbs-Merrill, 1966, pp. 93-95.
[78] See P.G. Polyviou, *The Equal Protection of the Laws*, Duckworth, 1980, p. 13.
[79] See Robert Nozick, *Anarchy, State and Utopia* (supra, n. 59), p. 238.
[80] For further discussion, see T.M. Scanlon, 'Preference and Urgency', *The Journal of Philosophy*, Vol. 72, No. 19, November 6, 1975, pp. 655-669.
[81] Perhaps such a conclusion can be viewed as emanating from what H.L.A. Hart described as the 'social morality of societies which […] always includes certain obligations and duties, requiring the sacrifice of private inclination or interest which is essential to the survival of any society': see H.L.A. Hart, *The Concept of Law*, OUP, Second edition, 1994, pp. 171-172.

iv) *Freedom from social oppression: prejudice, stereotyping and accommodation*

In line with the theory of equality explicated so far, Iris Marion Young has helpfully suggested that 'opportunity is a concept of enablement rather than possession; it refers to doing more than having'[82] . According to Young, a theory of social justice which focuses on distributive outcomes is insufficient insofar as it fails to consider the *causes* of unequal distributions, i.e. the institutionalised oppression and domination which reflect the tyranny and restraints imposed by some social groups over others[83]. Such systemic injustice is commonly manifested in the form of unfavourable treatment on account of being affiliated with a social group, defined by reference to sex, race or other ground. Specific instances of discrimination then can be described as deriving directly from relationships of oppression in the social sphere; they are the symptom which reaffirms the cause.

Social oppression is not a term that can be defined exhaustively; it might be accorded many different meanings. For example, Young describes it as manifesting itself in the form of exploitation, marginalization, powerlessness, cultural imperialism and violence[84]. This interpretation offers a valuable insight into the operation of social oppression. But manifestations such as powerlessness and cultural imperialism remain too elusive to inform the practical application of the principle of equality. A more specific (albeit not necessarily narrow) description of the oppressive attitudes at hand is called for if we are to take the elimination of social oppression as the basic human interest safeguarded by substantive equality.

As indicated in the beginning of this chapter, when A is treated less favourably than B it is not necessarily the unequal treatment itself that is seen as potentially conflicting with the principle of equality; rather, it is the possibility that A's treatment has been informed by adverse social structures. By the same token, A's personal autonomy is not hampered simply because she is being denied a specific benefit; it is hampered because the continuing operation of social dynamics, reinforced by very instance of discrimination, has affected A's ability to develop herself freely. In the heart of all this lies the demand that people should be seen for what they are and not for what socially fabricated group they are deemed to belong to.

A basic implication of this finding is that no one should be subjected to *prejudice* and *stereotyping*. Prejudice may be distinguished from stereotyping in that the latter does not necessarily imply hatred or disrespect. Hence, one may reasonably argue that prejudice is based on hostile attitudes while stereotypes emanate from inaccurate generalisations of certain characteristics of a particular

[82] Iris Marion Young, *Justice and the Politics of Difference*, Princeton University Press, 1990, p. 26.
[83] Ibid., Ch. 1.
[84] Ibid., pp. 48-65.

group[85]. For example, B may think that people with long hair are not serious human beings (prejudice) and/or B may believe that people with long hair invariably listen to heavy metal because there were a lot of them in the latest concert (stereotyping). In both cases, the subject of the analysis is denied proper recognition of his true identity.

But prejudice and stereotyping are not enough in themselves to render a treatment discriminatory. The individual must also be denied access to a range of *valuable options* by reason of a *personal characteristic*, be it an immutable status or a fundamental choice[86]. Thus, a person should enjoy the valuable options that are open to all without suffering disadvantage because of a characteristic she did not choose (e.g. sex, race) or a choice she was entitled to make as of right (e.g. religion)[87]. The social context in which an option arises determines whether or not it should be considered valuable. For example, you cannot disallow the taking into account of personal characteristics in the (very personal) sphere of friendship but you can do so in the (very public) sphere of employment; even in this latter case, reliance on a personal characteristic may be allowed where an objective justification is advanced (e.g. genuine occupational requirement)[88].

Freedom from prejudice and stereotyping requires that everyone be recognised as equal when pursuing a valuable option, irrespective of personal characteristics. It constitutes an inextricable element of individual freedom understood in the negative sense (non-interference). But absence of prejudice and stereotyping alone is not enough in itself to guarantee freedom in the positive sense (enablement) as well. Some people may still be denied recognition and the equal ability to pursue a valuable option because their special needs, which emanate from their immutable characteristics or fundamental choices, are not sufficiently taken into account[89]. It is in this area of *reasonable accommodation* that the principle of equality becomes most susceptible to conflicting principles, interests and considerations.

The duty to protect the individual against prejudice and stereotyping is easier to implement than the obligation to accommodate the different needs of different people. This is because the latter obligation is significantly harder to reconcile with the rights and freedoms of others as well as with the (potentially huge) implications for the exercise of socio-economic policy. For example, the proper accommodation of the disabled with regard to access to public amenities cannot be

[85] For a good discussion, see Denise G. Reaume, 'Discrimination and Dignity' (supra, n. 23) at 679-686.
[86] Some statuses, such as sexual orientation, may fall under both these categories: see, for example, Robert Wintemute, *Sexual Orientation and Human Rights*, OUP, 1995, p. 17.
[87] In this sense, equality is practically inseparable from the need to affirm individual autonomy: see John Gardner, 'On the Ground of Her Sex(uality)', *Oxford Journal of Legal Studies*, Vol. 18, No. 1, 1998, pp. 167-187.
[88] For further discussion along these lines, see Sophia Moreau, 'What is Discrimination?', *Philosophy & Public Affairs*, Vol. 38, No. 2, 2010, pp. 143-179.
[89] D. Reaume makes a similar point with regard to the 'dignity-constituting benefits' which have entered the dialectics of Canadian equality jurisprudence: see 'Discrimination and Dignity' (supra, n. 23) at 686-694.

guaranteed without the provision of a complex infrastructure[90]. Such defences of undue hardship in accommodation claims have been criticised as meaning that 'some people can be discriminated against because it is considered efficient and economical'[91].

Furthermore, it is important to remember that the word *reasonable* does not refer only to the proper balancing between accommodation and opposing rights and policies. Instead, the requirement for reasonableness also sets intrinsic limits to the duty to provide accommodation. In other words, a claim for reasonable accommodation should be limited to addressing (so far as this is possible) only those hardships which are linked to a personal characteristic and which inevitably lead to marginalisation and loss of opportunity. A demand for accommodation with a view to enhancing convenience cannot generate a proper equality claim as personal autonomy is not significantly endangered in such cases.

These limitations should not be construed as meaning that a positive duty to provide reasonable accommodation is a less valued element of the principle of equality. Even though that duty is not as absolute as the one calling for protection against prejudice and stereotyping, failure to fulfil it can have the same effects as those flowing from intentional discrimination. That is to say that insufficient accommodation also results to loss of opportunity because of social exclusion which is due to a personal characteristic of the individual[92]. The only difference is that this time the damage is not done by reason of social animus (prejudice) or wrongful fixations (stereotyping), but because of the wider 'physical or social environment' which fails to provide for those who have special needs by reason of a personal characteristic[93].

To conclude, this thesis suggests that the capability of a person to function free from social oppression in the form of prejudice, stereotyping and lack of reasonable accommodation will always be necessary in securing the equal opportunity that allows for a dignified and autonomous life. Accordingly, it must always be given special weight in the balance of proportionality. It can reasonably be put forward as constituting the basic human interest that equality should aim to safeguard as of right when we move beyond the (formal) prohibition of unjustified differential

[90] Even if one agrees that special needs must always be accommodated, the question of degree remains; see, for example, the admissibility decision of the European Court of Human Rights in Farcas v Romania (Application no. 32596/04), Admissibility Decision of 14 September 2010.

[91] See Shelagh Day and Gwen Brodsky, 'The Duty to Accommodate: Who Will Benefit?', *The Canadian Bar Review*, Vol. 75, 1996, pp. 433-473 at 463-465.

[92] For an excellent discussion, see Christine Jolls, 'Antidiscrimination and Accommodation', *Harvard Law Review*, Vol. 115, No. 2, 2001, pp. 642-699 at 695-697; also see Lisa Waddington and Aart Hendriks, 'The Expanding Concept of Employment Discrimination in Europe: From Direct and Indirect Discrimination to Reasonable Accommodation Discrimination', *The International Journal of Comparative Labour Law and Industrial Relations*, Vol. 18, No. 3, 2002, pp. 403-427 at 409.

[93] Lisa Waddington and Aart Hendriks (ibid) have helpfully noted that 'on occasions the interaction between the physical or social environment and an individual's inherent characteristics […] can result in the inability to perform a particular function or job in the conventional manner […]' (at 409).

treatment of analogous situations. This finding is of utmost importance in guaranteeing a proper construction of the *right to equality*.

5. The right to (substantive) equality

The principle of equality provides the basis for the right to equality. Once we agree that equality should prevail in a society as a matter of principle, it remains to be seen how this is to be guaranteed for every individual in the face of opposing forces as a matter of right. According to Joseph Raz, rights are based on interests that are considered so important as to create a duty for other people to protect or even promote them; when such duties of conduct prove to be vital for the protection and promotion of the interest at hand, the interest gives birth to a right[94]. In this sense, if we are to think of the principle of equality as the interest we want to protect, a right to equality describes the correlative duties of the state and other individuals in upholding it.

This *correlativity* of rights and duties has traditionally been understood as the best way of distinguishing between rights and other legal relations[95]. A legal right, strictly speaking, will exist only insofar as another person or entity is under a duty to protect or promote the underlying interests of the right-holder. It follows that the proper scope of a right can only be determined with reference to the duties it generates. Of course, just like principles, the application of a right is context specific. It is impossible to make a concrete list of correlative duties which will vary according to the circumstances[96]. Most importantly, again like principles, the scope of the legal right will depend heavily on its interaction with conflicting rights and interests.

John Stuart Mill famously claimed that '[t]he only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it'[97]. An understanding of equality as protective of one's individual autonomy and dignity necessarily implies that the individual dignity and autonomy of others must also be safeguarded in the process. Accordingly, even though a person might have a right against the state to have his equal worth affirmed, the correlative duty of the state or other individuals should never extend so far as to negate the equal worth of those who do not suffer a disadvantage. In this regard, policies of 'positive discrimination' should not be tolerated as a way of promoting substantive equality.

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[94] Joseph Raz, *The Morality of Freedom*, OUP, 1986, p. 183.
[95] For a classic example, see Wesley Newcomb Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning', *The Yale Law Journal*, Vol. 23, No. 1, November 1913, pp. 16-59 at 31.
[96] This ability of old rights to generate new duties, according to changing circumstances, has been referred to as the 'dynamic aspect of rights': Joseph Raz, *The Morality of Freedom* (supra, n. 94) at 171.
[97] See John Stuart Mill, *On Liberty and Other Essays*, Oxford World's Classics, 2008, p. 17.

At a basic level, the right to substantive equality entails that everyone should be guaranteed the capabilities referred to earlier; i.e. freedom from prejudice and stereotyping as well as reasonable accommodation of difference. These are the requirements necessary for a person to be identified for who she is and not for the characteristics she possesses. If such entitlements are to be seen as constituting the core elements of a human right to equality one should expect that mere convenience or aggregate utility will never be enough to override them[98]. Instead, a competing fundamental right would be required or proof that the cost for the society in upholding this right in particular circumstances is so high that it is more reasonable to impinge on the individual dignity of the right-holder[99].

This analysis leads us to conclude that, as suggested earlier, the duty to refrain from prejudice and stereotyping is more easily upheld than the duty to provide proper accommodation; the latter often entailing costly interference with the interests of others or the society as a whole. Thus, the view has been advanced that demands for accommodation are not rights claims but 'weighty policy *arguments* to receive resources'[100]. The main problem with this thesis is that it misconstrues the role of balancing in the proper interpretation of rights. Being an inextricable component of a right to equality, reasonable accommodation should never give way to aggregate utility or economic efficiency as such. The duty can be legitimately narrowed down only when a wide interpretation would interfere disproportionately with the fundamental rights of others or would entail truly unbearable costs for the society as a whole; but this will not always be the case.

The fact that reasonable accommodation lies at the heart of the right to equality is evidenced by its close relationship with the (widely accepted) duty to refrain from indirect discrimination. Although the two are usually understood as conceptually distinct[101], it may reasonably be suggested that indirect discrimination is actually only the 'negative' facet of reasonable accommodation. When a seemingly neutral provision disproportionately affects a group of people (indirect discrimination), in reality it fails to provide accommodation for the different situation they find themselves in by

[98] This is in accordance to Ronald Dworkin's famous analysis of 'rights as trumps': see Dworkin, *Taking Rights Seriously* (supra, n. 40) at 184-205. According to Dworkin, '[i]ndividual rights are political trumps held by individuals. Individuals have rights when, for some reason, a collective goal is not a sufficient justification for denying them what they wish, as individuals, to have or to do, or not sufficient justification for imposing some loss or injury upon them' (ibid, p. xi). For a critique of this view, see Richard H. Pildes, 'Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism', *The Journal of Legal Studies*, Vol. 27, No. S2, June 1998, pp. 725-763; for a defence of Dworkin's thesis, see Jeremy Waldron, 'Pildes on Dworkin's Theory of Rights', *The Journal of Legal Studies*, Vol. 29, No. 1, January 2000, pp. 301-307.

[99] Dworkin (Ibid.), pp. 193-205.

[100] See Mark Kelman, 'Market Discrimination and Groups', *Stanford Law Review*, Vol. 53, No. 4, April 2001, pp. 833-896 at 893.

[101] Ibid.; nevertheless, the existence of a significant overlap between them has been stressed repeatedly: see, for example, Olivier De Schutter, *The Prohibition of Discrimination under European Human Rights Law*, European Commission, 2011, p. 23 and Christine Jolls, 'Antidiscrimination and Accommodation' (supra, n. 92) at 651.

reason of a personal characteristic. Hence, the prohibition of indirect discrimination can fairly be described as a generally applicable duty to accommodate difference, albeit one that can be avoided where an objective justification is put forward. Thus understood, reasonable accommodation is a wide concept that covers instances of indirect discrimination but that may also extend beyond them.

When it does so, it may also generate an obligation to accommodate the distinct needs of certain people where differential treatment is justified or even where no specific treatment is to blame for the disadvantage at hand. In this latter sense, the focus is no longer on those who have been disproportionately affected by a particular policy but on those who cannot pursue an opportunity due to the way their personal characteristics interact with the social and physical environment. In contrast to indirect discrimination which aims primarily to guarantee equal freedom from external interference (negative freedom), this 'positive' facet of reasonable accommodation emphasises the equal enablement of the individual as such (positive freedom). The question here is one of reasonableness in imposing the duty, not of objective justification in avoiding it.

If we are to understand an equality provision this way, it is then up to the courts to determine the scope of the right enshrined therein, that is, the width of the correlative duties. Much, therefore, will depend on a choice between judicial deference and activism in balancing the basic capabilities against competing considerations. Balancing of different rights and interests is an inherent element of such an exercise and that is why, just like freedom, equality will always be a process of trying to achieve more equality, rather than a solid state of affairs. The interest of protecting the individual against social oppression in the form of prejudice, stereotyping and lack of reasonable accommodation can provide a strong direction for this unending journey.

Proper identification of the interest at hand helps us make sense of the immense debate that surrounds the right to equality. Perhaps, the most important issue in this respect concerns its conflation with the right to non-discrimination. This erroneous conflation has resulted from the historical prevalence of formal, symmetrical equality over the substantive understanding. In reality, a closer examination of the relationship between equality and non-discrimination reveals that the former is far wider than -and inclusive of- the latter. It also serves to highlight the (often overlooked) positive dimension of the right to equality. Both these claims are the corollary of acknowledging equality as aiming to eliminate the different forms of social oppression identified above.

6. Equality and non-discrimination

According to the Universal Declaration of Human Rights 1948 (UDHR), 'all are equal before the law and are entitled without any discrimination to equal protection of the law […]'[102]. The wording of the declaration shows that the right to equality and the right to non-discrimination are closely linked. Indeed, the two have been used so interchangeably from time to time that it would not be illogical for somebody to suppose that 'non-discrimination' is just another name for 'equality'. It remains true, however, that they are far from tautological.

Perhaps the best way to determine the propinquity of the two notions is to say that the prohibition of discrimination derives from the need to uphold equality, serving as a formula for its particularization and effective implementation. This is because through the mechanism of anti-discrimination the purpose of the general and open-ended value of equality can be realised in a legally sensible way. It is not really surprising that the most obvious (albeit not the only) way to move towards the affirmation of the equal worth and autonomy of individuals is to prohibit unjustified differential treatment among them. However, this should not be taken to mean that a non-discrimination approach is always sufficient or preferable.

It has been suggested that emphasis on prohibiting discrimination may help us avoid the adverse effects of strict egalitarianism[103]. To say 'you should not discriminate' may allow for a more meaningful examination of the reasons behind differential treatment than to say 'everybody is to receive equal treatment'[104]. This argument seems valid insofar as the term 'discrimination' implies an underlying morally reprehensible attitude; not every distinction is unjustified and, therefore, discriminatory. Strict egalitarianism does focus more on differential treatment rather than on the reasons behind it. But there is absolutely no reason why such a stringent approach to equality should prevail in the first place.

Moreover, it is not always safe to assume that a right to non-discrimination would mitigate the effects of general adherence to strict egalitarianism. Adoption of a strictly egalitarian view of equality would inevitably inform the application of non-discrimination. This is because the understanding of the prohibition of discrimination in any legal system depends on the (wider) conception of equality espoused therein[105]; and the development of anti-discrimination norms

[102] Article 7 of the Universal Declaration of Human Rights.
[103] See Elisa Holmes, 'Anti-Discrimination Rights Without Equality', *The Modern Law Review*, Vol. 68, No. 2, March 2005, pp. 175-194 at 185-187.
[104] Ibid.
[105] For example, a very formal approach to equality will mean that the non-discrimination analysis will over-emphasise the need for a comparator.

through the practice of the courts might also generate a new conception of equality. The resulting cyclical relationship means that equality and non-discrimination are inherently interrelated.

Nevertheless, it is most important to realise that non-discrimination focuses primarily on a negative understanding of the right to equality. It refers first and foremost to what the state or even other individuals should refrain from doing in order to safeguard a society of equals. The fact that equality and non-discrimination have evolved side by side is indicative of the wide acceptance of the negative facet of the former. But if we are to understand equality as aiming to promote freedom from social oppression in the form of prejudice, stereotyping and lack of accommodation, we must also recall that freedom is not a one-dimensional concept. Individual freedom possesses a *negative* as well as a *positive* identity, the former consisting of freedom from interference by others and the latter referring to the freedom to function as one's own master[106].

Any meaningful deliberation as to the meaning and scope of equality must acknowledge the significance of positive freedom. Perhaps the simplest way to achieve this is through a re-conceptualisation of negative freedom and, more specifically, the notion of *interference*. This we can do by acknowledging that freedom can be interfered with both internally and externally. That is to say that realising one's self freely does not only imply freedom from external coercion, but also demands freedom from inner fears and false consciousness[107]. Being allowed to do what one wants is not always tantamount to being able to do it. Negative freedom is contingent on positive freedom in that a person's internal obstacles may stop her from enjoying the (negative) freedom generated by the inexistence of external barriers[108].

By way of example, one may fairly argue that a person who is being subjected to systemic prejudice is not equally capable (albeit equally allowed) of going to university. Prejudice operates as a form of external coercion in this instance, but it may also operate internally to inform his own understanding of himself. Thus, an immigrant might 'freely' choose not to go to the university in a xenophobic society when he feels that he is likely to be victimised by his colleagues and teachers if he chooses to do so. By the same token, an individual might be prevented from exercising a certain freedom because of inadequate provision for her special needs; thus, a disabled person might 'freely' choose not to go to college where no such provision is made.

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[106] See Isaiah Berlin, *Liberty* (supra, n. 33) at 166-217 ('Two Concepts of Liberty').
[107] See Charles Taylor, 'What's Wrong With Negative Liberty' in Alan Ryan (ed.), *The Idea of Freedom: Essays in Honour of Isaiah Berlin*, OUP, 1979, pp. 175-193 at 176.
[108] Negative freedom is concerned with the existence of opportunity but such opportunity is rendered meaningless if a person is not capable of pursuing it because he is not actually in control of himself. To use the words of Charles Taylor, an individual does not really have an opportunity 'if he is totally unrealised, if for instance he is totally unaware of his potential, if fulfilling it has never arisen as a question for him, or if he is paralysed by the fear of breaking with some norm which he has internalized but which does not authentically reflect him' (ibid., p. 177).

Absence of direct interference, therefore, does not necessarily imply that one is a truly autonomous member of society. Instead, the affirmation of personal autonomy may occasionally entail 'duties to provide the conditions of autonomy for people who lack them'[109]. To argue that the immigrant or the disabled students in the above example are truly autonomous because no one barred their access to education is illusory. If the right to equality is to be understood as protective of individual dignity and autonomy through the elimination of social oppression, then, positive action might at times be required in order to avoid harm.

To conclude, it is always important to remember that the right to equality is sovereign and the right to non-discrimination derivative, the latter being only one part of the former; a part that has been understood traditionally as emphasising the need for non-interference as opposed to equal enablement. Still, in an era when the positive protection of fundamental rights is increasingly put forward, we need to reaffirm that equality is concerned with actively defeating structural discrimination as much as it is with protecting against individual acts of differential treatment[110]. In this sense, it may often entail a duty to treat people differently, especially when lack of reasonable accommodation is at hand.

Drawing a clear distinction between equality and non-discrimination is perhaps the most significant step in properly demarcating the scope of a human right to equality; but it is by no means the only step that needs to be taken. There remain four particular characteristics of equality which might work to complicate or devalue its status as a fundamental right if not sufficiently clarified. Again, reliance on the interest of eliminating the different manifestations of social oppression advanced earlier is particularly useful in helping us make sense of these persisting conceptual ambiguities.

7. The 'unconventional' right to equality

In concluding our discussion, it should be noted that the right to equality has been criticised as being particularly hard to reconcile with traditional fundamental rights. The first and most prominent argument that has been advanced to support this thesis is that equality is an instrument for the achievement of other goals, not a goal in itself. A second difficulty relates to the close relationship between equality and dignity which risks rendering the former particularly hard to implement. Third, the right to equality may differ from other fundamental rights in that -if construed properly- its application is contingent to a great extent on the social dynamics that

[109] See Joseph Raz, *The Morality of Freedom* (supra, n. 94) at 415.
[110] See Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties*, OUP, 2008, p. 178.

inform the situation of specific individuals. Finally, equality is commonly deemed to be different from other fundamental rights because of its comparative nature. All four considerations presented here will be discussed in turn with a view to demonstrating the importance of equality as a fundamental human right.

i) *The moral identity of equality*

The first argument concerns the actual moral and practical value of equality. The main accusation has been that, in contrast to other rights, equality does not readily inform us of the human interest that we need to safeguard by virtue of it. Thus, according to the well-known argument most prominently put forward by Peter Westen, equality is actually an 'empty idea'[111]. Westen maintains that 'equality is an empty vessel with no substantive moral content of its own. Without moral standards, equality remains meaningless, a formula that can have nothing to say about how we should act'[112]. It is true that formal, symmetrical equality cannot function unless attached to another goal.

To say that 'A is equal to B' does not seem to imply much about the moral or legal entitlements of either A or B. However, if we were to say that A should have equal voting rights to B, then equality acquires a true meaning which derives not from itself, but from the extrinsic value of the right to vote. Now let us, for example, contrast this with the right to be free from torture; it is obvious that when somebody is being tortured his right is blatantly violated because the right itself explicitly dictates the protection of physical (and, sometimes mental) integrity as the human interest that it is set to safeguard. To take things even further, in formulating the right to be 'equally free from torture', the word 'equally' adds nothing to the moral substance of the right in this case. That is to say that the rule still indicates, as it did before, that no one is to be tortured.

Taking a similarly sceptical stance, Joseph Raz has argued that 'what makes us care about various inequalities is not the inequality but the concern identified by the underlying principle'[113]. Thus, Raz perceives equality as merely a mechanism for determining whose suffering is greater so that they will be given priority in the benefits they will receive; but, according to Raz, it is the human suffering that matters, not the inequality[114]. Such an approach, even though seemingly rational, is

[111] See Peter Westen, 'The Empty Idea of Equality', *Harvard Law Review*, Vol. 95, 1981-2, p. 537.
[112] Ibid. at 547. For a similar attitude towards the concept of equality see Graig L. Carr, 'The Concept of Formal Justice', *Philosophical Studies*, Vol. 39, 1981, pp. 211-226.
[113] See Joseph Raz, *The Morality of Freedom* (supra, n. 94) at 240.
[114] Ibid.

not totally unproblematic for it seems to presuppose that inequalities themselves can never be the actual cause of harm[115].

These criticisms are well founded insofar as they serve to highlight the distinctiveness of a right to equality from other fundamental human rights. But one can hardly draw from these arguments the conclusion that equality is an empty vessel which is logically posterior to rights and, therefore, serves no useful purpose[116]. Both Westen and Raz seem to reject equality as a goal in itself because, failing readily to inform us about a specific human interest we need to protect, it serves no useful purpose. This argument is considerably weakened if we focus instead on the fundamental role that equality plays in the proper administration of rights.

To use again the example of the right to vote, a modern understanding of democracy would make little sense if women were not allowed to have equal voting rights. Equality, therefore, can be perceived as a form of corrective justice in the sense that it defines, where necessary, the proper scope of rights in a normatively sensible (albeit not always uncontroversial) way. The reason then that we do not need to talk about people being equally free from torture is that the absolute nature of such a fundamental freedom is not negotiable in any democratic society[117]. A state can reasonably decree that children should not have a right to vote but it would be completely absurd to suggest that naughty children should be tortured.

So, as equality is an empty vessel which cannot operate outside the scope of particular moral values and rights, one may fairly say that rights cannot function in a consistent way if not applied equally; for then the application of the law would become random, unpredictable and, consequently, unjust. Even some of the people who generally militate against equality admit that it is of practical value in securing the uniform administration of the law[118]. This 'administrative value' of equality also defeats Westen's assertion that since a rule by its very nature applies to all cases anyway, the need for a separate principle of equality is redundant[119].

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[115] For an interesting discussion of the evils that inequalities themselves can give rise to, see T.M. Scanlon, 'The diversity of objections to inequality' in T.M. Scanlon, *The Difficulty of Tolerance: Essays in Political Philosophy*, Cambridge University Press, 2003, pp. 202-218.

[116] See Westen, 'The Empty Idea of Equality' (supra, n. 111) at 548-551; contrast with Steven J. Burton, 'Comment on "Empty Ideas": Logical Positivist Analyses of Equality and Rules', *The Yale Law Journal*, Vol. 91, No. 6, May 1982, pp. 1136-1152 at 1147; also see Peter Westen, 'On "Confusing Ideas": Reply', *The Yale Law Journal*, Vol. 91, No. 6, May 1982, pp. 1153-1165, where the author replies to Steven Burton's criticisms.

[117] Save for debates as to what the term 'torture' actually entails.

[118] See J. R. Lucas, 'Against Equality', *Philosophy*, Vol. 40, Issue 154, Oct 1965, pp. 296-307 at 301.

[119] See Westen, 'The Empty Idea of Equality' (supra, n. 111) at p.551 (:'[t]o say that a rule should be applied "equally" or "consistently" or "uniformly" means simply that the rule should be applied to the cases to which it applies').

First, this argument does nothing to safeguard against a rule which is discriminatory itself[120]. Take, for example, a rule which dictates that only men can vote; this rule will be applied equally to all men and will be enough to satisfy Westen's contention. Still, it is obvious that such a rule would be unjust to women. Second, Westen's approach would make the application of rights extremely stringent, i.e. practically unworkable, as it would leave no space for justifiable limitations in their scope of application or, even if it did, it would not provide for a general framework in doing so[121]; and if it did provide for such a general framework, that would be the one already set out by the right to equality. Thus, equality cannot be considered secondary or disposable on account of its attachment to other rights.

Christopher Peters has also suggested that equality is morally empty because its value lies in the non-egalitarian principles of justice which underpin it[122]. For example, Peters argues that when a doctor refuses to give treatment to a sick patient because he is black, the injustice lies on the criterion he chooses to base his decision, i.e. colour, rather than on the differential treatment itself[123]. So, since it is not the differential treatment but the underlying injustice that matters, equality is normatively empty. This stance fails to pay attention to the substantive dimension of equality which moves beyond merely spotting cases of differential treatment between analogous situations. This second dimension of equality does not concern the administration of other rights, but constitutes a fundamental right in itself.

In this latter sense, equality informs us directly of the human interest it protects. It constitutes a form of corrective justice which affirms the universal respect for the equal value of every individual in those cases where rights themselves fail to do so. For example, if somebody is excluded from a certain post merely because he or she is black or white, a woman or a man, the right which has been infringed is not the right to occupy that post, since that right does not exist in the first place; the infringement emanates from the denial of the opportunity to demonstrate his/her abilities and be judged solely on that basis just like other human beings of different colour, sex and so on.

This suggestion is not based on an abstract notion of egalitarian justice. It is worth recalling in this respect the distinction drawn by Ronald Dworkin between the right to 'equal treatment' and the right to 'treatment as equal': the former entails the right to an equal distribution of some opportunity or resource or burden and the latter denotes the right to be treated with the same

[120] See Erwin Chemerinsky, 'In Defense of Equality: A Reply to Professor Westen', *Michigan Law Review*, Vol. 81, No. 3, January 1983, pp. 575-599 at 583.
[121] Ibid. at 580 where it is rightly suggested that 'once there is discretion in applying laws, we can no longer simply say the law applies to the cases to which it applies. It is imperative to develop a concept of equality to insure consistent, non-discriminatory application of the laws'.
[122] Christopher J. Peters, 'Equality Revisited', *Harvard Law Review*, Vol. 110, No. 6, April 1997, pp. 1210-1264.
[123] Ibid. at 1256.

respect and concern as anyone else[124]. According to Dworkin, 'the right to treatment as an equal is fundamental, and the right to equal treatment derivative'[125]. This analysis illustrates that the primary goal of equality is the protection of individual dignity and autonomy, the distributive aspect being merely means towards the achievement of this wider end.

To conclude, equality is far from being a disposable or a morally meaningless right. The reason for this is twofold. First, a right to (*formal*) equality serves to guarantee the fair administration of other rights; it requires freedom from arbitrary or irrational differential treatment which might inhibit their enjoyment. Second, a right to (*substantive*) equality aims to affirm the dignity and autonomy of the individual as end in itself; in this latter sense it demands freedom from social oppression in the form of prejudice, stereotyping or lack of reasonable accommodation. Thus understood equality may operate as a fundamental right that ensures the proper administration of other rights without ceasing -at the same time- to constitute a broader fundamental right in itself.

ii) *The role of dignity*

The right to equality has been put forward time and again as flowing naturally from the need to ensure respect for human dignity[126]. Indeed, as argued earlier, securing the inherent 'equal worth' of human beings would be a futile task without a right to equality which would guarantee the (equal) individual autonomy that is necessary for a dignified life. Such an understanding is vividly illustrated by the jurisprudence of the Supreme Court of Canada on section 15 of the Canadian Charter of Rights and Freedoms.

According to the Canadian Court, 'the purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration'[127]. The approach of the Canadian Jurisprudence echoes the words of L'Heureux-Dubé J. according to whom '[e]quality […] means nothing if it does not represent a commitment to recognizing each person's equal worth as a human being, regardless of

[124] Ronald Dworkin, *Taking Rights Seriously* (supra, n. 40) at 227.
[125] Ibid.
[126] See, for example, Article 1 of the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, Proclaimed by General Assembly resolution 1904 (XVIII) of 20 November 1963, which states that 'discrimination between human beings on the ground of race, colour or ethnic origin is an offence to human dignity and shall be condemned as a denial of the principles of the Charter of the United Nations […]'.
[127] Iacobucci J. in Law v. Canada (Minister of Employment and Immigration) [1999] 1 S.C.R. 497 at para. 51.

individual differences'[128]. This interpretation of equality has also been cited with approval by the South Africa Constitutional Court which has maintained a similar attitude[129].

But it should not be forgotten that, like equality, dignity is not an easily determinable concept. As Christopher McCrudden has pointed out, 'in the judicial interpretation of human rights there is no common substantive conception of dignity, although there appears to be an acceptance of the concept of dignity'[130]. To that effect, there have been criticisms according to which reliance on human dignity can devalue equality by adding to its complexity, thus turning it into a subsidiary right of narrow and indeterminate scope of application[131]. These arguments, however, are far from irrefutable. One may reasonably suggest, for example, that since equality law should aim to deal with complex social structures it is only natural that a normatively flexible system will be required to tackle the issue properly[132].

The indeterminate nature of dignity can be perceived as an advantage for the maintenance of an effective equality guarantee. Being open-ended, it can be adapted more easily to the needs of a particular society. For example, it has been suggested that in South Africa 'the meaning of dignity as a concept is determined at a general level and determinable at an historical level through understanding what was denied to people under apartheid'[133]. Indeed, dignity can be sufficiently particularised to identify the socio-historical realities that foster inequality in different societies; in this sense, the abstract universal norm can be transformed into a code of community values. Such an understanding of dignity may also address some of the criticisms relating to the judicial discretion it allows for[134]. The identification of past impairments of dignity would make the

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[128] See Egan v Canada [1995] 2 S.C.R. 513 at 543.

[129] See The President of the Republic of South Africa and Another v Hugo (CCT11/96) [1997] ZACC 4 at para. 41; also see Prinsloo v Van der Linde and Another (CCT4/96) [1997] ZACC 5 at para. 32.

[130] Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (supra, n. 19) at 712. The author notes that the popularity of dignity in human rights adjudication stems from the lack of a precise substantive meaning which allows for 'a much looser coordination of human rights to take place, [enabling judges] to justify how they deal with issues such as the weight of rights, the domestication and contextualization of rights, and the generation of new or more extensive rights' (at 724).

[131] See, for example, D. M. Davis, 'Equality: The Majesty of Legoland Jurisprudence', *South African Law Journal*, Vol. 116, 1999, p. 398 where the author claims (at p. 413) that through the use of dignity in equality jurisprudence, 'the [South African] Constitutional Court has rendered meaningless a fundamental value of [the] Constitution and simultaneously has given dignity both a content and a scope that make for a piece of a jurisprudential Legoland – to be used in whatever form and shape is required by the demands of the judicial designer'; also see Anton Fagan, 'Dignity and Unfair Discrimination: A Value Misplaced and a Right Misunderstood', *South African Journal on Human Rights*, Vol. 14, 1998, p. 220.

[132] In the words of Donna Greschner, 'discrimination takes many different forms in our society, and requires a complex response': see Donna Greschner, 'Does Law Advance the Cause of Equality?', *Queen's Law Journal*, Vol. 27, 2001-2002, p. 299 at 317.

[133] Susie Cowen, 'Can Dignity guide South Africa's Equality Jurisprudence?', *South African Journal on Human Rights*, Vol. 17, 2001, p. 34 at 54.

[134] For an example of such criticisms, see Gay Moon and Robin Allen, 'Dignity Discourse in Discrimination Law: A Better Route to Equality?', *European Human Rights Law Review*, Vol. 6, 2006, pp. 610-649 at 616-618.

exercise of defining the grounds of discrimination, and the level of scrutiny they require, more coherent[135].

A further interesting argument against the use of dignity in equality discourse is that dignity calls for an individualistic conception of equality which moves attention away from the need to transform social structures[136]. This criticism seems to be ill-founded insofar as it suggests that the protection of the 'inherent human dignity' entails a more individualistic approach than the recognition of 'the equal worth' of every individual. It is useful in this respect to remember that dignity may acquire multiple different meanings, depending on our point of view: a) the dignity of the whole human species, b) the dignity of groups and c) the dignity of the individual[137]. There appears to be little scope for arguing that dignity -contrary to equality- is not concerned with the transformation of social structures[138]. Besides, a person can never feel individually dignified unless the social structures allow her to do so[139]. To suggest otherwise would be to separate individual feelings from the external influences which, to a great extent, determine them.

The link between equality and dignity also adds to the practical implementation of the former, dealing with some of its inherent problems, most notably the 'levelling down' effect according to which discrimination cannot exist where people are treated equally badly[140]. By seeing equality as a means of protecting dignity, the possibility of treating people 'equally badly' is avoided as it would contradict the guarantee of a dignified treatment for all. To use an often quoted example, a male employer will not be able to escape a discrimination claim when sexually harassing a woman by harassing a man as well. The conduct will be considered discriminatory even though there will be no differential treatment, for the core of substantive equality is the protection of human dignity[141].

So, while equality alone tells us nothing more than to treat people equally, combined with dignity it tells us to treat people 'equally well'. Moving beyond the formal view, dignity indicates a

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[135] For a similar argument, see Sandra Fredman, *Disrimination Law* (supra, n. 46) at 18.
[136] See Cathi Albertyn and Beth Goldblatt, 'Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality', *South African Journal on Human Rights*, Vol. 14, 1998, p. 248 at 272.
[137] See David Feldman, 'Human Dignity as a Legal Value: Part 1' (supra, n. 23) at 684.
[138] For a further discussion of this proposition, drawing from the South African and German jurisprudence, see Evadne Grant, 'Dignity and Equality', *Human Rights Law Review*, Vol. 7, No. 2, 2007, pp. 299-329 at 325-328.
[139] In the words of Oscar Schachter, 'a person in abject condition, deprived of adequate means of subsistence, or denied the opportunity to work, suffers a profound affront to his sense of dignity and intrinsic worth. Economic and social arrangements cannot therefore be excluded from a consideration of the demands of dignity': see Oscar Schachter, 'Human Dignity as a Normative Concept' (supra, n. 27) at 851.
[140] This valuable aspect of the connection between Dignity and Equality is also put forward in Sandra Fredman, *Disrimination Law* (supra, n. 46) at 18.
[141] See, for example, Art. 2(3) of the EU Race Directive (Council Directive 2000/43/EC of 29 June 2000) which provides that '[h]arassment shall be deemed to be discrimination […] when an unwanted conduct related to racial or ethnic origin takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment'.

substantive conception of equality which pays close attention to what a person actually needs in order to enjoy a dignified life; and very often entails positive action to correct the social dynamics which may operate to deny it. The link between equality and dignity also emphasises the need for a freestanding right to equality, i.e. one that will not be rebuttable by virtue of not falling within the ambit of another right[142]. Thus, it highlights the role of equality as a right in itself rather than simply as a right which secures the proper (that is, the equal) enjoyment of other rights.

This, of course, is not to suggest that an approach based on dignity should be used to guide discrimination claims; because dignity and equality, even though closely interlinked, remain two discrete concepts. Besides, as suggested earlier, it should not be forgotten that conceptions as to what constitutes an infringement of human dignity (save for blatant violations) differ from one country to another and even from one person to another. Consequently, a dignity-driven approach, being dangerously subjective, can occasionally produce unfair results which negate the right to equality instead of affirming it[143].

To conclude, it should be kept in mind that while dignity might offer a great service in advancing the substantive facet of equality, it is the latter and not the former that should be the guiding consideration in a discrimination claim. The focus of a right to equality should lie primarily on accommodating difference and protecting the individual against prejudice and stereotyping; because this is the specific human interest that equality aims to promote in securing a dignified life. To rely directly on the abstract notion of human dignity would weaken equality jurisprudence by making it unnecessarily complex and unpredictable.

iii) *The structural value of Equality*

A further peculiar attribute of a right to equality concerns its focus. Equality (mainly in its substantive sense) is often perceived as protecting the individual in a way that emphasises the wider social circumstances that surround her. Thus, the subject is usually categorised into a certain group, commonly defined by reference to sex, race or other personal characteristics; the ground for

[142] The often cited example of a non-freestanding right to Equality is Article 14 of the European Convention on Human Rights according to which only 'the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination'. This has led to many discrimination claims being defeated merely by virtue of not falling 'within the ambit' of a convention right: see, for example, the case of Botta v Italy (Application No. 21439/93), Judgment of 24 February 1998.

[143] See, for example, the controversial Canadian case of Gosselin v Attorney General of Quebec [2002] 4 S.C.R. 429. It has been rightly argued in this context that 'while there is little harm that can be done by invoking dignity to expand the scope of equality law, the same is not true when it is used to limit equality claims': see Rory O'Connell, 'The Role of Dignity in Equality Law: Lessons from Canada and South Africa', *International Journal of Constitutional Law*, Vol. 6, No. 2, 2008, pp. 267-286 at 285-286.

discrimination will often be of great significance in the evaluation of the claim[144]. The reason behind the emphasis on this categorisation is that a proper understanding of equality operates simultaneously on the individual and collective level.

An instance of unequal treatment in the case of one individual may be indicative of a systemic disadvantage suffered by other people who belong to the same group. This, in turn, means that to focus on the situation of a particular individual does not always do much good in fighting the cause which lies behind differential treatment. Consequently, it has been rightly suggested that 'there is […] a collective dimension to every discrimination case which it is difficult to fit within the traditional processes of law'[145]. The only way to defeat adverse social structures is to reverse the dynamics that constantly reproduce them. As Iris Marion Young has pointed out, 'comparing groups on measures of inequality is necessary in order to discover such social structures and make judgments that inequalities grounded in those structures are unjust'[146].

This group-driven approach to equality can also be illustrated by John Rawls's 'difference principle' according to which the strong members of the society can only be allowed to earn more as long as this is for the advantage of the weakest members[147]. To make this principle workable one should distinguish between different social groups according to the benefits they enjoy[148]. Still, the idea of perceiving the individual as part of a broader category stands, prima facie, against liberal theories which emphasise the separateness of each citizen's characteristics and needs[149]. Indeed, much of the weight of the argument advanced here depends on whether or not one adopts an individualised approach.

For example, Ronald Dworkin has rightly observed that equality is primarily concerned with the individual[150]. According to him, the mere purpose of taking group considerations into account is to help us form 'probability judgments about particular people's particular tastes and ambitions, in the interest of giving them what they are, as individuals, entitled to have'[151]. This analysis is helpful in demonstrating the fundamental significance of individualism in the theory of equality; but it should not be seen as completely negating the collective component. In fact, the individualistic and collective facets of equality are confluent rather than mutually exclusive.

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[144] See, for example, the different levels of scrutiny employed by the US Supreme Court with respect to the equal protection clause of the 14th Amendment to the United States Constitution.
[145] Laurence Lustgarten, 'Racial Inequality and the Limits of Law', *The Modern Law Review*, Vol. 49, No. 1, January 1986, pp. 68-85 at 73.
[146] See Iris Marion Young, 'Equality of Whom? Social Groups and Judgments of Injustice', *The Journal of Political Philosophy*, Vol. 9, No. 1, 2001, pp. 1-18 at p. 6.
[147] See John Rawls, *A Theory of Justice: Revised Edition* (supra, n. 57), pp. 65-70.
[148] Ibid., p. 67 (for example).
[149] See F.A. Hayek, *The Constitution of Liberty*, Routledge & Kegan Paul, 1960.
[150] Ronald Dworkin, *Sovereign virtue: The Theory and Practice of Equality* (supra, n. 14), pp. 114-115.
[151] Ibid.

The main purpose of liberal equality law is to protect the individual identity of every person separately but in order to do so it is also crucial to identify and protect the groups which are being denied the basic capabilities identified earlier. When it comes to protecting the individual from unwarranted social dynamics it is impossible to avoid taking account of her social position, i.e. the implications that flow from her belonging to a particular social group. Put more simply, a collective approach towards the implementation of the right to equality is important in bringing the historical realities of discrimination at the centre of the political and legal debate[152].

It is true that fundamental human rights are usually understood as directly concerned with the protection of the individual; but the right to equality must also be perceived as inherently concerned with the freedom of the whole group. Prejudice, stereotyping or lack of reasonable accommodation, they usually come about as general trends which eventually lead to individual injustices. When a fundamental right is breached, one can usually identify -one way or another- the party or parties who violated the entitlements of the individual[153]. Identification of the culprits is not always possible with regard to violations of the right to equality where social structures themselves might be to blame. The example of a person who is being denied access to public amenities by reason of a disability that could easily be accommodated attests to this.

To conclude, a proper analysis of a discrimination claim should look beyond the individual, taking into account the actual positioning of specific social groups as well. The systemic implications of particular instances of adverse treatment should not be underestimated or overlooked. Unfortunately, this point is more normative than it is descriptive of a generally adopted approach; tendency to analyse equality claims with reference to comparisons has proven particularly damaging in this respect.

iv) *The comparative nature of equality*

A right to equality is often perceived as being of an inherently comparative nature. This is not really surprising if one considers that it is impossible to treat like cases alike (according to the formal view) unless one knows, through a comparative analysis, which cases are to be regarded as equal and which are not. As a consequence, the potential for drawing an analogy between people who have been treated differently might turn out to be decisive in the evaluation of a discrimination

[152] See Nicola Lacey, 'From Individual to Group?' in Bob Hepple and Erika M. Szyszczak (eds.), *Discrimination: The Limits of Law*, Mansell Publishing, 1992, p. 99 at 115-116.
[153] Still, especially in the case of social and economic rights, such as the right to water, it is not always apparent who might be responsible for their violation.

claim[154]. One can easily contrast this with conventional fundamental human rights; let us take freedom of expression as an example.

An individual's right to freedom of expression cannot be weakened by the mere fact that this freedom is not equally enjoyed by other members of the society. For example, if A wants to publish an article opposing the policies of the government she cannot, as a matter of principle, be disallowed from doing so merely on the grounds that other people are equally forbidden to express their views; a comparative exercise has no place in the implementation of the right. In contrast, the right to be treated equally, because of its comparative nature, is the only right that can be legitimately 'levelled down' as to the entitlements that it encapsulates[155].

Still, there might be a strong argument against differentiating equality from traditional rights on the grounds of its comparative nature. First, if we are to accept that a right which is not applied equally is inherently problematic, then the comparative exercise is called for by rights themselves and is merely 'brought to life' by the right to equality. Such an approach would once again highlight the role of equality in the proper administration of rights. Second, all rights can be said to be comparative from a certain point of view. That is to say that a comparative analysis of the application of a right in different circumstances is crucial in determining what should be the actual scope of that right.

To illustrate this argument, it is worth noting Steven Burton's reply to Westen's arguments as to the emptiness of equality. Burton argues that the interpretation of all rights depends on an analogical analysis which is external to them[156]. Burton perceives fundamental rights as general principles which can only be particularized, thereby acquiring a concrete value, through the comparison of their application in different situations. He uses, inter alia, the principle of *stare decisis* to illustrate that the scope of rights is determined through analogical reasoning[157]. Thus, he concludes that 'if [statements of rights] are given the same kind of intensive logical analysis that Westen gives to equality, they too stand empty and collapse into equality'[158].

The significance of comparisons with regard to the implementation of equality is not self-evident, at least not from a normative point of view. Rather, the importance of finding the proper

[154] See, for example, the judgment of the European Court of Human Rights in Van der Mussele v Belgium (Application no. 8919/80), Judgment of 23 November 1983, para. 46.
[155]See, for example, the case of Abdulaziz, Cabales and Balkandali v United Kingdom (Applications nos. 9214/80; 9473/81; 9474/81), Judgment of 28 May 1985 to which the United Kingdom reacted by doing it equally hard for foreign women to join their spouse in the United Kingdom; see Donald W. Jackson, *The United Kingdom Confronts the European Convention on Human Rights*, University Press of Florida, 1997, p. 93.
[156]See Steven J. Burton, 'Comment on "Empty Ideas": Logical Positivist Analyses of Equality and Rules' (supra, n. 116) at 1147.
[157] Ibid. at 1144.
[158] Ibid. at 1147.

comparator in a discrimination claim depends on the conception of equality one adopts. To that effect, a separate requirement to find an analogously situated comparator is commonly observed in legal systems which adopt a strictly formal (i.e. symmetrical) approach to equality[159]. But if we are to embrace a substantive understanding of the right to equality, then we necessarily have to acknowledge that the reasons and effects of the distinction matter more than the distinction itself[160]. Indeed, taking a heavily comparator-driven approach to a discrimination claim may occasionally produce unfair results, moving attention away from other salient aspects of a case[161].

The comparative aspect of equality might be used, as it has been, to differentiate it from other fundamental rights[162]. However, this particularity appears to be rather superficial, not really offering grounds for such a distinction. If we accept that equality aims to eliminate social oppression in the form of prejudice, stereotyping or lack of accommodation there is very little scope for arguing that an analogously situated comparator is always necessary before the claim can proceed. The point is illustrated further by the often cited theoretical example whereby a pregnant woman cannot ever be discriminated against a male comparator when she is being refused a certain benefit on the grounds of pregnancy or childbirth[163].

To conclude, the comparative aspect of equality should be seen as determinative only when one adopts a strictly egalitarian view. However, adopting such a view would entail the danger of diminishing the strength of a right to equality. While useful in identifying instances of differential treatment, a comparative exercise cannot be used as a basic criterion for determining whether or not an unfavourable treatment is also discriminatory. In the words of Christopher Peters, 'if a particular theory incorporates the belief that the treatment given [to] a person is itself a moral

[159] See, for example, the United Kingdom case of R. (On the Application of Carson) v Secretary of State for Work and Pensions [2005] UKHL 37 where the House of Lords allowed the comparative aspect of the claim to block a claim. In essence, the Court used the very ground for discrimination (i.e. the difference in residence) to hold that the claimants were not in an analogous situation with the UK residents even though they had paid the contributions required to qualify for the benefits of the pension scheme. Lord Carswell (dissenting) rightly pointed out that 'much of the problem stems from focusing too closely on finding comparisons' (at para. 97 of the judgment); also see the European Court of Human Rights in the case of Carson and others v United Kingdom (Application no. 42184/05), Judgment of 4 November 2008 (especially the dissenting opinion of Judge Garlicki which has many similarities to that of Lord Carswell). Contrast this with Canadian jurisprudence which takes a substantive approach towards equality, thereby not imposing such a separate requirement (see Law v Canada (Minister of Employment and Immigration) [1999] 1 S.C.R. 497).

[160] See Elisa Holmes, 'Anti-Discrimination Rights Without Equality' (supra, n. 103) at 185-190, where the author emphasises the importance of the ground on which the distinction is based as opposed to the need to establish comparability.

[161] See Aileen McColgan, 'Cracking the Comparator Problem: Discrimination, "Equal" Treatment and the Role of Comparisons', *European Human Rights Law Review*, 2006, Vol. 6, pp. 650-677. Also see Aaron Baker, 'Comparison Tainted by Justification: Against a "Compendious Question" in Art.14 Discrimination', *Public Law*, 2006, pp. 476-497.

[162] See Westen, 'The Empty Idea of Equality' (supra, n. 111) at 551.

[163] See Bob Hepple and Catherine Barnard, 'Substantive Equality', *Cambridge Law Journal*, 2000, Vol. 59, No. 3, pp. 562-585 at 563.

reason to give the same treatment to an identically situated person, then that theory cannot be correct'[164].

8. Conclusion

The very sound of the term 'equality' opens the floodgates of an immense moral, political and legal debate. It is, indeed, quite ironic how there can be so much controversy surrounding a right which is prominently put in the forefront of virtually every national and international document as fundamental. In this chapter I have put forward an understanding of equality that extends beyond the guarantee of freedom from arbitrariness and irrationality in the form of unjustified differential treatment of analogous situations (formal equality). I argued that the value of equality aims to affirm the individual dignity and autonomy to which every human being is equally entitled. I then examined what this standard entails in more practical terms. Thus, the focus of analysis moved from the moral value to the legal principle of equality.

Following an examination of various theories, the argument was advanced that approaching equality in terms of securing the capabilities that are necessary for guaranteeing equal opportunity is the best way forward. This construction of substantive equality was particularised even further as requiring freedom from social oppression in the form of prejudice, stereotyping and lack of reasonable accommodation. Subsequently, these basic capabilities were presented as constituting the basic human interest that a right to (substantive) equality should aim to affirm. It was shown that this understanding of equality helps us address some of the basic criticisms that have been mounted against it and which have jeopardised its status as a fundamental right.

Following this normative examination of the human interest that equality should aim to affirm, I will now move on to address the same question from a doctrinal perspective, with reference to the jurisprudence of the European Court of Human Rights and the European Court of Justice. The purpose of the next two chapters will be to show how the two Courts have strived themselves to explicate a substantive understanding of the human interest that equality aims to affirm; that is, an understanding which is not limited to requiring protection against unjustified asymmetrical treatment. The fourth and final chapter will conclude that the normative framework set out in this chapter can provide a common language on the basis of which the correlative duties as well as the limits of the right to equality can develop in the two courtrooms.

[164] Christopher J. Peters, 'Equality Revisited' (supra, n. 122) at 1259.

Chapter 2: Substantive Equality in the European Court of Human Rights

Introduction

The purpose of this chapter is to examine the human interest safeguarded by the right to equality as developed within the jurisprudence of the European Court of Human Rights. A distinction will be drawn between legal equality and substantive equality. The former is envisaged on the face of Article 14 ECHR and reflected on the Court's traditional approach; the latter is a judicial construction which has become increasingly relevant in the interpretation of Article 14, especially during the last decade. Legal equality is understood here as aiming to guarantee symmetrical treatment before the law of the Convention, its primary purpose being to increase the effective enjoyment of (other) rights enshrined therein. In contrast, substantive equality is a goal in itself, safeguarding the personal autonomy that is necessary for the maintenance of equal opportunity. In doing so, it demands the elimination of prejudice and stereotyping as well as the proper accommodation of difference.

A study of the relevant case-law will reveal that the Court has made several attempts (either implicit or explicit) to give an autonomous meaning to the prohibition of discrimination contained in Article 14 ECHR. In doing so, it has moved beyond examining whether or not similarly situated people are being treated symmetrically as a matter of form. Thus, for example, it has taken systemic disadvantage suffered by particular groups into account in analysing individual applications; and it has accepted that inequalities of fact may demand positive steps to be taken even where no legal distinction has been drawn formally. The guarantee of formal, legal equality remains prominent; but there is little doubt that substantive equality as well has come to play an important role in the jurisprudence of the Court.

1. The nature of the Convention

In 1950, the fourteen member states of the Council of Europe came together in adopting the European Convention on Human Rights (ECHR)[165] which entered into force on 3 September 1953, following its eighth ratification. Today, the Council of Europe consists of forty-seven member states all of which abide by the ECHR and the jurisprudence of the European Court of

[165] The Convention is formally referred to as 'Convention for the Protection of Human Rights and Fundamental Freedoms'.

Human Rights (ECtHR)[166]. According to its preamble, the purpose of the ECHR has been to proliferate 'justice and peace' through the systemisation of those fundamental human rights which were seen as necessary for the maintenance of an 'effective political democracy'.

In examining the text of the European Convention, it becomes readily apparent that its focus lies on the protection of civil and political rights such as the right to life and the right to freedom of thought, conscience and religion. The main characteristic of this 'first generation of human rights' is that they are based on the idea of liberty, primarily requiring non-interference by the State[167]. The emphasis on civil and political rights in the ECHR is not surprising considering that the Convention was drafted in the light of the atrocities of the Second World War, at a time when international law was still at the beginning of its blossoming. To that effect, the ECHR was introduced as constituting only 'the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration'[168].

The protection of social, economic and cultural rights found a place in the Convention only in its 1st Protocol and is limited to the protection of property and education rights[169]. This 'second generation of human rights' have been described as aiming to promote equality, demanding the interference of the state for their effective realisation[170]. The limited attention paid by the Convention to social, economic and cultural rights can be said to be illustrative of a cautious approach towards the creation of positive obligations which could interfere with the exercise of a member state's socio-economic policy. This reluctance is most vividly reflected on the text of the main (albeit not the only[171]) anti-discrimination provision of the Convention, i.e. Article 14 ECHR.

An important singularity of Article 14 is that it prohibits only those forms of discrimination which hamper the equal enjoyment of rights enshrined in the ECHR. Accordingly, given that the Convention emphasises the protection of civil and political rights, there is a wide area of equality issues arising in the socio-economic sphere on which the Court is not, prima facie, authorised to adjudicate. For example, a disabled individual who could not access the beach because the State had not provided for the relevant infrastructure could not proceed with the discrimination claim

[166] Henceforth also referred to also as 'the Court'.
[167] Karel Vasak, 'Pour Une Troisième Génération des Droits de l' Homme', in Christophe Swinarski (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, Martinus Nijhoff Publishers, 1984, pp. 837-845 at 839.
[168] See the preamble of the ECHR. It is worth noting that the Convention does not follow the Universal Declaration of Human Rights (UDHR) which offers wide protection of social, economic and cultural rights (Articles 22-27 of the latter).
[169] Articles 1 and 2 of the Protocol respectively.
[170] See supra, n. 167 ('Il s' agit des droits de l' égalité […] qui sont donc exigibles de l' Etat pour pouvoir être réalisés').
[171] Protocol 12 ECHR, establishing a general prohibition of discrimination, entered into force on 1 April 2005. As of August 2012, it has been signed and ratified only by 18 member states.

because there was no 'direct and immediate link' between the right he sought and his private life (Article 8 ECHR)[172]. In this sense, Article 14 encapsulates a limited conception of 'legal equality' which guarantees only equal treatment before the law of the Convention; it is not directly concerned with all instances of social oppression which are based on a personal characteristic ('substantive equality').

It will be argued throughout this chapter that the Court has strived -especially during the last decade- to create a right to substantive equality in its jurisprudence. This right extends beyond requiring the equal enjoyment of other rights and is pursued as end in itself. The goal is not to prohibit unjustifiable differential treatment but to make sure that individuals will pursue their valuable options in an autonomous manner; free from social oppression in the form of prejudice, stereotyping and lack of reasonable accommodation relating to their personal characteristics. The interpretations which indicate the emergence of a right to substantive equality are not always easy to reconcile with the letter of Article 14. It is preferable then to begin our analysis with a brief examination of the role that the Court plays in upholding (as well as developing) the standards enshrined in the Convention.

2. The role of the Court

Since the entry into force of Protocol 11 on 1 November 1998, the Strasbourg Court has been entitled to receive applications directly from more than 800 million people resident in the member states of the Council of Europe[173]. Granting relief to those applicants has always been of primary concern and the substantive content of Convention rights has also been elucidated through this process[174]. The Court has never enjoyed a power to strike down domestic legislation but the stigma of a violation clearly generates significant political pressure for any member state. It is not really surprising then that it has been referred to repeatedly as the 'European Constitutional Court'[175].

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[172] See Botta v Italy (Application No. 21439/93), Judgment of 24 February 1998, paras. 34-35.

[173] Before that date individual petitions had to be filed with the European Commission of Human Rights which would decide whether or not to refer the matter to the Court. Protocol 11 abolished the European Commission of Human Rights; for further discussion, see Iain Cameron, 'Protocol 11 to the European Convention on Human Rights: the European Court of Human Rights as a Constitutional Court?', *Yearbook of European Law*, Vol. 15, 1995, pp. 219-260.

[174] For an analysis of what has been described as the ongoing tension between individual and constitutional justice, see Steven Greer, 'What's Wrong with the European Convention on Human Rights?', *Human Rights Quarterly*, Vol. 30, No. 3, 2008, pp. 680-702; also see Jonas Christoffersen, 'Individual and Constitutional Justice: Can the Power Balance of Adjudication be Reversed?' in Jonas Christoffersen and Mikael Rask Madsen (eds.), *The European Court of Human Rights Between Law and Politics*, OUP, 2011, pp. 181-203.

[175] See Steven Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects*, Cambridge University Press, 2006 at 317; for a similar view, see Rolv Ryssdal, 'The Coming of Age of the European Convention on Human Rights', *European Human Rights Law Review*, Vol. 1, 1996, pp. 18-29 at 22. For an excellent exposition of the reasons why the Court may properly be described as Constitutional, see Alec Stone Sweet, 'On the Constitutionalisation of the Convention: The European Court of Human Rights as a

In essence, the mission of the Court is to set the minimum core of protection guaranteed by human rights in Europe and -by implication- to draw 'the margin within which States may opt for different fundamental balances between government and individuals'[176]. But neither the core nor the margins of these rights are static. The general way in which the various Articles of the Convention are formulated clearly denotes that the international judiciary was entrusted not only with enforcing, but also with developing common human rights norms[177]. Inability to adopt secondary instruments in order to specify the criteria to be applied -coupled with the difficulties involved in amending the Convention- also implies that a certain degree of judicial creativity is practically required.

In this context, the Court has chosen to construe the Convention as a *living instrument* to be interpreted in the light of present-day conditions, that is, with due regard to the development of commonly accepted standards among member states[178]. Still, the somehow vague criterion of convergence or divergence may not always be the guiding factor in practice. For example, the Court has been praised for interpreting the Convention in a way that emphasises 'the moral character of the project' as well[179]. Thus, commentators often conclude that judicial activism prevails over self-restraint in Strasbourg case-law[180]. It is indeed hard to deny that a strictly legalist construction of the Convention cannot be sustained either as an actuality or a potentiality; but this is not really problematic.

Perhaps the best way to describe the Strasbourg system as a whole would be to identify the Court as a norm-setting body whose powers are formally restrained by the (widely formulated) letter of the Convention, the (not always clear) state of consensus among member states and, finally, the (distant) possibility of amending the ECHR. In this context, judicial activism ensures that fundamental rights are construed in a dynamic manner and judicial self-restraint is employed to preserve legitimacy by securing that, in moving forward, the Court will not go too many steps

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Constitutional Court', *Revue Trimestrielle des Droits de l' Homme*, Vol. 80, 2009, p. 923 (available in English at *http://works.bepress.com/alec_stone_sweet/33*).

[176] See J.H.H. Weiler, *The Constitution of Europe: 'Do the New Clothes Have an Emperor?' and Other Essays on European Integration*, Cambridge University Press, 1999, pp. 102-107.

[177] For an excellent discussion, see Danny Nicol, 'Original Intent and the European Convention on Human Rights', *Public Law*, 2005, Spr, pp. 152-172.

[178] See Tyrer v United Kingdom (Application no. 5856/72), Judgment of 25 April 1978, para. 31; for further discussion, see Alastair Mowbray, 'The Creativity of the European Court of Human Rights', *Human Rights Law Review*, Vol. 5, No. 1, 2005, pp. 57-79.

[179] See George Letsas, 'Strasbourg's Interpretative Ethic: Lessons for the International Lawyer', *The European Journal of International Law*, Vol. 21, No. 3, 2010, pp. 509-541.

[180] See, for example, J.G. Merrills, *The Development of International Law by the European Court of Human Rights*, Manchester University Press, 1988, p. 211.

ahead of the member states[181]. But it is not always easy to maintain a proper balance between these two seemingly contradictory and yet essentially complimentary approaches[182]. The evolution of the right to non-discrimination under Article 14 attests to this.

3. The text of Article 14: reflections on the traditional approach

Article 14 ECHR provides that '*the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status*'. Insofar as its application is dependent on the situation at hand affecting the enjoyment of other Convention rights this anti-discrimination provision may fairly be understood as forming a constituent part of those rights rather than containing a separate, autonomous right[183]. It is mainly because of this limitation that it has often been described as 'parasitic'[184]. Perhaps the best way to identify the conception of equality that stems from the text of Article 14 is to focus on this parasitic nature and the purpose it serves.

By calling for non-discrimination in the enjoyment of commonly accepted prized public goods (i.e. the Convention rights), Article 14 necessarily implies that symmetrical treatment must be guaranteed in their distribution[185]. In this sense, the parasitic nature of the provision seems sufficient to denote that equals (i.e. similarly situated people) should be treated equally (i.e. symmetrically) in their entitlements under the Convention unless differential treatment is objectively justified. This formal understanding of equality is inherently dependant on externalities given that A can be treated symmetrically to B only with reference to an external standard.

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[181] See Paul Mahoney, 'Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin', *Human Rights Law Journal*, Vol. 11, 1990, pp. 57-88.

[182] See, for example, Dragoljub Popovic, 'Prevailing of Judicial Activism Over Self-Restraint in the Jurisprudence of the European Court of Human Rights', *Creighton Law Review*, Vol. 42, 2009, pp. 361-396.

[183] See, for example, Rasmussen v Denmark (Application no. 8777/79), Report of the Commission adopted on 5 July 1983, where the European Commission of Human Rights noted (at para. 68) that '[i]t is as if Art. 14 formed an integral part of each of the provisions laying down specific rights and freedoms'. This view was originally expressed by the Court in the Belgian Linguistic Case (Application no. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64), Judgment of 23 July 1968, section I(B), para. 9 (formally referred to as Case 'relating to certain aspects of the laws on the use of languages in education in Belgium').

[184] See, for example, Aileen McColgan, 'Principles of Equality and Protection from Discrimination in International Human Rights Law', *European Human Rights Law Review*, 2003, No. 2, pp. 157-175 at 159; also see Stephen Livingstone, 'Article 14 and the Prevention of Discrimination in the European Convention on Human Rights', *European Human Rights Law Review*, 1997, No. 1, pp. 25-34.

[185] See Christopher McCrudden and Haris Kountouros, 'Human Rights and European Equality law' in Helen Meenan (ed.), *Equality law in an Enlarged European Union: Understanding the Article 13 Directives*, Cambridge University Press, 2007, pp. 73-116; the authors call this conception 'Equality as protective of public goods'. They observe that discrimination in this sense 'is objectionable because it is an unacceptable way of limiting access to the `prized public good` (at 76)'. Also see Christopher McCrudden, 'The New Concept of Equality', *ERA-Forum*, Vol. 4, No. 3, September 2003, pp. 9-29.

Formal equality before the law of the Convention is truly fundamental insofar as it guarantees the impartial administration of other rights; but it is also limited to the extent that it does not provide for a distinct human interest (i.e. one that does not relate to other rights) to be safeguarded by virtue of the right to equality. It constitutes primarily an instrument for the attainment of other goals, not a goal in itself. The seemingly limited potential of Article 14 is also implicit in the fact that it contains a rule prohibiting discrimination ('without discrimination'). Non-discrimination is mostly linked to the negative facet of equality as it is confined to describing what the state should refrain from doing; absence of any reference to positive duties on the face of Article 14 further attests to this.

This approach has little to do with a free standing right to substantive equality which aims to affirm the valuable options of the individual in the face of social oppression. In this latter case there is no need for a distinct set of rights or other 'public goods' which should be enjoyed in a symmetrical manner. Instead, those basic capabilities which are necessary for pursuing opportunities become paramount. Thus, a right to substantive equality requires freedom from all forms of prejudice and stereotyping, as well as proper recognition and accommodation of special needs emanating from personal characteristics. The traditional attitude of the Court in relation to Article 14 has been anything but reflective of such an understanding.

Given the emphasis on anti-discrimination norms and the parasitic nature of Article 14, the Court has historically insisted on a formal approach to equality, holding that discrimination means 'treating differently, without an objective and reasonable justification, persons in relevantly similar situations'[186]. As a consequence, it may refuse to look into a claim where a similarly situated comparator has not been identified thereby allowing the form of the treatment to overshadow the examination of its actual consequences. For example, the claim of a lawyer who was required to provide services without compensation for indigenous clients was blocked because he was deemed not to be in an 'analogous situation' (i.e. equal) to pharmacists, dentists or even judges and paralegals, who were not under such obligation[187]. In effect, the ground of discrimination at hand (professional status) was used to defeat the applicant's case without fully examining whether or not the treatment was properly justified[188].

[186] See Fredin v Sweden (Application no. 12033/86), Judgment of 18 February 1991, para. 60.

[187] See Van der Mussele v Belgium (Application no. 8919/80), Judgment of 23 November 1983, para. 46. The claim in that case was brought under Article 4 (prohibition of slavery and forced labour) in conjunction with Article 14.

[188] For a general analysis and criticism of the use of comparisons in discrimination cases see Aileen McColgan, 'Cracking the Comparator Problem: Discrimination, "Equal" Treatment and the Role of Comparisons', *European Human Rights Law Review*, 2006, No. 6, pp. 650-677.

Indeed, to say that differential treatment between professionals is not discriminatory simply because the nature of the professions is different is tantamount to saying that men should be treated differently to women simply because they belong to a different sex[189]. This superficial analysis may operate to set aside another fundamental aspect of the Court's methodology in relation to Article 14, namely the requirement for an objective and reasonable justification. According to this criterion, a differential treatment will only be discriminatory if it does not pursue a 'legitimate aim' or if there is no 'reasonable relationship of proportionality between the means employed and the aim sought to be realised'[190]. The examination of relevant similarities and dissimilarities, if useful at all, would make more sense if formally assimilated into this broader justification enquiry instead of being used as a precondition for its applicability, i.e. as a fast-track way to dismiss cases[191].

The Court has also held consistently that it will only deal with discrimination claims that fall 'within the ambit' of Convention rights. At first glance, this requirement seems to constitute nothing more than an unequivocal acknowledgment of the parasitic character of Article 14. In reality, however, the ambit of a human right, understood as a wide area in which an individual can be said to enjoy it, may operate to expand the reach of Article 14 far beyond the protective core of the fundamental rights enshrined in the Convention[192]. This potentiality is traced to the early days of the Court's jurisprudence when it was held that, although Article 14 must relate to a Convention right, it is autonomous to the extent that it does not presuppose a breach of this right[193]. Hence, a member state will be obliged not to discriminate in the distribution of a benefit which relates to the enjoyment of a Convention right, even when the Convention right itself does not provide for an entitlement to such a benefit[194]. For example, a right to claim social benefits irrespective of nationality may arise as a result of a combined reading of Article 14 in conjunction with Protocol 1, Article 1 (right to property)[195].

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189 For a brief discussion of the cyclical logic of this approach with reference to the case discussed here see Mark W. Janis, Richard S. Kay and Anthony W. Bradley, *European Human Rights Law: Text and Materials*, OUP, Third edition, 2008, p. 478.

190 See Lithgow and others v United Kingdom (Application no. 9006/80; 9262/81; 9263/81; 9265/81; 9266/81; 9313/81; 9405/81), Judgment of 8 July 1986, para. 177.

191 For a similar argument, see Pieter Van Dijk, Fried Van Hoof, Arjen Van Rijn and Leo Zwaak (eds.), *Theory and Practice of the European Convention on Human Rights*, Intersentia, Fourth edition, 2006, p. 1039. It has been rightly argued that the comparator requirement has often been employed to summarily justify differential treatment without examining the proportionality of the measure at hand: see Aaron Baker, 'Comparison Tainted by Justification: Against a "Compendious Question" in Art. 14 Discrimination', *Public Law,* 2006, Aut, pp. 476-497.

192 For a very good discussion, see Aaron Baker, 'The Enjoyment of Rights and Freedoms: A New Conception of the 'Ambit' under Article 14 ECHR', *Modern Law Review*, Vol. 69, No. 5, 2006, pp. 714-737.

193 See Belgian Linguistic Case (supra, n. 183).

194 Ibid.

195 See Gaygusuz v Austria (Application no. 17371/90), Judgment of 16 September 1996.

Moreover, the words 'other status' imply that there is practically no limitation as to the different types of distinctions that may be covered by Article 14. The term has been defined broadly as signifying a 'personal characteristic by which persons or groups of persons are distinguishable from each other'[196]. As a result, the Court has adopted an extremely wide interpretation of what may constitute a prohibited ground ranging from disability and nationality[197] to former KGB employment and ownership of small pieces of land[198]. Accordingly, Article 14 may also be described as autonomous in the sense that it covers a non-exhaustive list of discriminatory grounds as long as these grounds are considered to be 'personal characteristics' in a very wide sense.

Another interesting aspect of Article 14 is that it appears to be conferring an absolute right to non-discrimination, rather than a qualified right[199]. This point, of course, is to be taken with much caution since it has been firmly established that a difference in treatment will not breach Article 14 if it pursues a legitimate aim in a proportionate manner[200]. Still, this justification analysis does not substantively undermine the absolute nature of the prohibition of discrimination because a distinction which has been properly justified cannot be seen as discriminatory. So, in contrast to other fundamental rights (such as those contained in Articles 8-11) Article 14 does not allow for deviations from non-discrimination. Such a conclusion is important in highlighting that, although limited in scope, Article 14 encapsulates a right which does not leave much space for compromises. Having that in mind, the fact that the Court has occasionally allowed the states a certain 'margin of appreciation' in determining whether or not a difference in treatment is justified is not readily consonant with the text of Article 14.

The doctrine of the margin of appreciation is the result of two fundamental aspects of the Court's methodology. First, it emanates from the notion that 'the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights'[201]. Second, it accords with the understanding of the Convention as a 'living instrument' which should be interpreted in the light of common developments in the practice of member states[202]. In essence, the margin of appreciation aims to ensure that where no consensus exists among member states on

[196] See Kjeldsen, Busk Madsen and Pedersen v. Denmark (Application no. 5095/71; 5920/72; 5926/72), Judgment of 7 December 1976, para. 56.
[197] See Botta v Italy (supra, n. 172) and Gaygusuz v Austria (supra, n. 195) respectively.
[198] See respectively Sidabras and Dziautas v Lithuania (Applications nos. 55480/00 and 59330/00), Judgment of 27 July 2004 and Chassagnou and others v France (Applications nos. 25088/94, 28331/95 and 28443/95), Judgment of 29 April 1999.
[199] This appears to be even more so if one consults the French version of Article 14 ('sans distinction aucune').
[200] The Court itself was fast to explicate this test immediately after clarifying that 'Article 14 does not forbid every difference in treatment': see Belgian Linguistic Case (supra, n. 183), section I(B), para. 10.
[201] See Handyside v United Kingdom (Application no. 5493/72), Judgment of 7 December 1976, para. 48.
[202] See Tyrer v United Kingdom (supra, n. 178), para. 31.

a controversial issue, the view of the defending state will prevail as long as the measure in question pursues a legitimate aim and the principle of proportionality is adhered to[203].

In the context of Article 14, the margin of appreciation has been employed to give leeway to the state in assessing 'whether and to what extent differences in otherwise similar situations justify a different treatment in law'[204]. In such cases, the Court has maintained that the scope of the margin 'will vary according to the circumstances, the subject-matter and its background'[205]. There is no doubt that the margin of appreciation restricts considerably any aspirations to adopt a firmer approach towards the protection of equality in Europe. The reason is that under this doctrine the Court only follows an ambiguous European consensus rather than help create it[206]. Accordingly, when a male applicant complained that he had been discriminated against in not being granted parental leave allowance which was available to women, the Court decided to grant the defending state a wide margin of appreciation[207]. Judges Bernhardt and Spielmann rightly argued in their dissenting opinion that 'traditional practices and roles in family life alone do not justify a difference in treatment of men and women'[208].

As a matter of fact, the case law of the Court suggests that a wide margin is more likely to be allowed where the discrimination claim affects the exercise of socio-economic policy[209]. However, even in such instances, a wide margin will not be allowed where absolutely no reasonable justification can be put forward for the differential treatment[210]. There is no doubt that the margin

[203] See Handyside (supra, n. 201), para. 49. This, of course, does not mean that a clear European consensus will always be required as a matter of practice: for an interesting analysis of the different uses of the doctrine see George Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, OUP, 2007, pp. 80-98.
[204] See Inze v Austria (Application no. 8695/79), Judgment of 28 October 1987, para. 41.
[205] Ibid.
[206] For a discussion of the Court's failure to create a coherent theory regarding the measuring of the consensus among member states, see Laurence R. Helfer, 'Consensus, Coherence and the European Convention on Human Rights', *Cornell International Law Journal*, Vol. 26, 1993, p. 133; for an interesting analysis of the role of consensus in the jurisprudence of the Court, see Kanstantsin Dzehtsiarou, 'Does Consensus Matter? Legitimacy of European Consensus in the Case Law of the European Court of Human Rights', *Public Law*, July 2011, pp. 534-553.
[207] See Petrovic v Austria (Application No. 20458/92), Judgment of 27 March 1998; for an earlier example of a similarly deferential attitude, see Rasmussen v Denmark (Application no. 8777/79), Judgment of 28 November 1984.
[208] Fortunately, this view appears to find support within the previous as well as within the later jurisprudence of the Court: see, for example, Schuler-Zgraggen v Switzerland (Application no. 14518/89), Judgment of 24 June 1993, para. 67 and Weller v Hungary (Application no. 44399/05), Judgment of 31 March 2009, paras. 34-35; for a more recent example, see Konstantin Markin v Russia (Application no. 30078/06), Judgment of 22 March 2012, para. 143.
[209] For recent examples, see Carson v United Kingdom (Application no. 42184/05), Judgment of 4 November 2008 and Stec and others v United Kingdom (Applications nos. 65731/01 and 65900/01), Judgment of 12 April 2006; for a further illustration, see Gillow v United Kingdom (Application no. 9063/80), Judgment of 24 November 1986.
[210] See, for example, Andrejeva v Latvia (Application no. 55707/00), Judgment of 18 February 2009; also see P.M. v United Kingdom (Application no. 6638/03), Judgment of 19 July 2005 and Gaygusuz v Austria (supra, n. 195). The Court has admitted that 'finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, [the Court] will respect the

of appreciation serves primarily to protect the interests of the state rather than the interests of individual applicants[211]. In this sense, it is an expression of judicial deference more than it is a tool for the effective adjudication of a claim[212]. One can only hope that the constant evolution of the Court's jurisprudence combined with the ever-growing tendency of European states to agree on common human rights standards will slowly but steadily contribute to limiting the application of the doctrine[213].

Overall, the text of Article 14 -coupled with the traditional interpretation given to it- is not conducive to maintaining a substantive vision of the right to equality. Nevertheless, this is not to exclude the possibility that such a vision may have infiltrated the reasoning of the Court without being expressly acknowledged. As a matter of fact, it will be argued that this is exactly what has happened. In this respect, perhaps the best starting point is the jurisprudence of the Court on Article 8 ECHR taken alone and in conjunction with Article 14.

4. Article 8 + 14: the beginning of substance

The complementary nature of Article 14 implies that it is relatively easy for the judiciary to lose sight of its importance by mixing the discrimination claim with the claim brought under the substantive Article. The Court has historically tried to clarify its position on the matter by declaring that when a breach of the substantive Article has been established it will not proceed to the examination of the discrimination claim unless 'a clear inequality of treatment in the enjoyment of the right in question is a fundamental aspect of the case'[214]. In the case of Dudgeon v United Kingdom[215], for example, the Court found a violation of Article 8 and refused to examine the

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legislature's judgment as to what is 'in the public interest' unless that judgment be manifestly without reasonable foundation' (See James and Others v United Kingdom (Application no. 8793/79), Judgment of 21 February 1986, para. 46).

[211] This, of course, is not to suggest that it serves no useful purpose at all. For a thorough discussion of the defensibility of the doctrine, see Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, Intersentia, 2002, pp. 231-249; also see Paul Mahoney, 'Judicial Activism and Judicial self-restraint in the European Court of Human Rights: Two Sides of the Same Coin', *Human Rights Law Journal*, Vol. 11, 1990, pp. 57-88.

[212] See Rabinder Singh, 'Is There a Role for the "Margin of Appreciation" in National Law After the Human Rights Act?', *European Human Rights Law Review,* 1999, No. 1, pp. 15-22. To use the words of Judge Martens, 'states do not enjoy a margin of appreciation as a matter of right, but as a matter of judicial self-restraint': see his dissenting opinion in Cossey v United Kingdom (Application no. 10843/84), Judgment of 27 September 1990.

[213] See Christos Rozakis, 'Is the Case-Law of the European Court of Human Rights a Procrustean Bed? Or is it a Contribution to the Creation of a European Public Order? A Modest Reply to Lord Hoffmann's Criticisms', *UCL Human Rights Review*, Vol. 2, 2009, pp. 51-69 at 65.

[214] See Airey v Ireland (Application no. 6289/73), Judgment of 9 October 1979, para. 30. For a discussion of the complexity and unpredictability of this approach, see Pieter Van Dijk, Fried Van Hoof, Arjen Van Rijn and Leo Zwaak (eds.), *Theory and Practice of the European Convention on Human Rights* (supra, n. 191) at 1031-1034.

[215] Application no. 7525/76, Judgment of 22 October 1981.

Article 14 claim on the grounds that it was practically the same complaint as that brought under the substantive Article 'albeit seen from a different angle'[216]. Given that this case concerned the criminalisation of private homosexual behaviour between consenting adults, it is hard to see why the issue of inequality was not deemed fundamental[217].

Now let us compare this case with the one of Chassagnou and others v France[218] where the applicants were obliged under French law to join a hunter's association, granting it hunting rights over their land. Owners of large pieces of land were able to avoid membership to the association. The applicants, however, being small landowners, had no other choice but to tolerate people hunting on their land. Having established a breach of Article 11 (Freedom of assembly and association) and Protocol 1, Article 1 (Protection of property) taken alone, the Court also went on to find a violation of Article 14 taken in conjunction with them. Thus, the distinction drawn between large and small landowners constituted discrimination on the ground of property[219].

Following a combined examination of Dudgeon v United Kingdom and Chassagnou v France, one may be led to conclude that 'the discrimination aspect in relation to hunting rules and their application to small landowners should be more important than in respect of the application of the criminal law to homosexuals'[220]. Such a conclusion is manifestly absurd considering that the criminalisation of homosexual behaviour constitutes a serious interference with the personal autonomy, dignity and standing of gay people in society. Perhaps a more logical approach in explaining the discrepancy between the two cases with regard to Article 14 is to focus on the fact that the former case concerned an Article 8 claim.

Given that Article 8 aims to secure respect for one's private life, many instances of discriminatory treatment will impinge on the enjoyment of that Article as well. This is so because the concept of 'private life', as understood in the context of the ECHR, has come remarkably close to being another name for 'personal autonomy'[221]. As the European Commission of Human Rights once put it, 'the scope of the right to respect for private life is such that it secures to the individual a sphere within which he can freely pursue the development and fulfilment of his personality'[222]. The

[216] Ibid., para. 69; also see Smith and Grady v United Kingdom (Applications nos. 33985/96 and 33986/96), Judgment of 27 September 1999, para. 115.
[217] To that effect, see the dissenting opinion of Judges Evrigenis and García de Enterría.
[218] See supra, n. 198.
[219] Ibid., para. 95.
[220] Luzius Wildhaber, 'Protection Against Discrimination under the European Convention on Human Rights: A Second-Class Guarantee?', *Baltic Yearbook of International Law*, Vol. 2, 2002, pp. 71-82 at 80.
[221] For a discussion of the very close relationship between Article 8 and the idea of individual autonomy see Jill Marshall, 'A Right to Personal Autonomy at the European Court of Human Rights', *European Human Rights Law Review*, 2008, No. 3, pp. 337-356.
[222] Niemietz v Germany (Application No. 13710/88), Report of the Commission adopted on 29 May 1991, para. 55. The Court followed a similar attitude, concluding that 'it would be too restrictive to limit the notion

Court has come to acknowledge that this conception of private life cannot be exhaustively defined and that factors 'such as gender identification, name and sexual orientation and sexual life are important elements of the personal sphere protected by Article 8'[223]. Given the common emphasis on the right to develop oneself freely, it is not surprising that the Court has often subjected the examination of an Article 8 claim to that of the complementary Article 14 and vice versa[224].

Accordingly, when a transsexual complained of the state's failure to grant full legal recognition of her new gender, thereby forcing her time and again to face the anxiety and humiliation involved in disclosing her transsexual status, the Court eventually found that Article 8 was violated[225]. In doing so, it emphasised 'the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society'[226]. It then moved on to say that there was no reason to look into the Article 14 claim which involved the same issues as those dealt with under the rubric of Article 8. Indeed, the prejudice that the applicant had to face in disclosing her previous gender and the resulting failure to accommodate her special situation had already formed the crux of the Article 8 claim. In effect, the disadvantage suffered by the applicant because of her transsexual status had been addressed without reference to norms of symmetry in treatment or comparability of situations.

A similar argument may be advanced with regard to homosexuality. The Court had been dealing with instances of systemic prejudice against homosexuals since 1981, long before sexual orientation was formally introduced as a protected ground under Article 14. By holding that 'sexual life' is an aspect of private life, it enabled itself to conclude that the criminalisation of private homosexual acts between consenting adults violated Article 8[227]. This was so because the interference at hand was largely based on the moral condemnation of homosexuality which prevailed in society rather than on a real 'pressing social need'[228]. Moreover, in September 1999 it found that the discharge of

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[of private life] to an 'inner circle' in which the individual may live his own personal life as he chooses' and that '[r]espect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings': see Niemietz v Germany (Application No. 13710/88), Judgment of 16 December 1992, para. 29.

[223] Bensaid v United Kingdom (Application no. 44599/98), Judgment of 6 February 2001, para. 47.

[224] See, for example, the cases of X and Y v The Netherlands (Application no. 8978/80), Judgment of 26 March 1985, Smith and Grady v United Kingdom (supra, n. 216) and A.D.T. v United Kingdom (Application no. 35765/97), Judgment of 31 July 2000 in all of which the Court decided that since a breach of Article 8 had been established, no need for separate examination of Article 14 arose. Contrast that with cases such as the ones of Hoffmann v Austria (Application no. 12875/87), Judgment of 23 June 1993, Burghartz v Switzerland (Application no. 16213/90), Judgment of 22 February 1994, Salgueiro Da Silva Mouta v Portugal (Application no. 33290/96), Judgment of 21 December 1999 and Wolfmeyer v Austria (Application no. 5263/03), Judgment of 26 May 2005 where the Court considered it unnecessary to examine Article 8 taken alone after having found a violation of Article 14 in conjunction with Article 8.

[225] See Christine Goodwin v United Kingdom (Application no. 28957/95), Judgment of 11 July 2002 and I. v United Kingdom (Application no. 25680/94), Judgment of 11 July 2002.

[226] See Christine Goodwin, para. 90 and I. v United Kingdom, para. 70.

[227] See Dudgeon v United Kingdom (supra, n. 215), para. 41.

[228] Ibid., paras. 60-61.

military personnel simply because of their sexual orientation violated Article 8[229]. In doing so, it noted that sexual orientation is 'a most intimate aspect of an individual's private life' and the state had failed to prove that the blanket ban of homosexuals in the army could be sufficiently justified on any ground other than 'a predisposed bias on the part of a heterosexual majority against a homosexual minority'[230].

But even though the dialectics of systemic prejudice and stereotyping slowly started to emerge in relation to homosexuality, the Court consistently refused to examine the discrimination aspect of these cases, maintaining that the issues raised by Article 14 had already been addressed through a finding of violation of Article 8. This trend changed in December 1999, when the Court formally added sexual orientation in the list of the grounds protected under Article 14[231]. As a consequence, subsequent cases concerning the age of consent for homosexual relations were dealt with under Article 14 taken together with Article 8, this time being unnecessary to examine Article 8 taken alone[232]. Not surprisingly, the Court employed elements of its Article 8 jurisprudence on homosexuality in addressing the discrimination claim[233].

It is true that the conflation of discrimination with private life may generate some concerns with regard to the protection of equality in the ECHR. It has been argued, for example, that an understanding of homosexuality as an as aspect of private life may have the effect of downplaying the significance of addressing discriminatory attitudes in the wider social sphere[234]. The recent finding that homosexual partnerships may fall under the rubric of 'family life' is surely a step away from this dangerous path[235]. Perhaps the most important problem that may arise is the one of fragmentation of the normative framework of equality which will not be developed solely by reference to Article 14. But since Article 14 is inherently parasitic, it seems only natural that the prohibition contained therein will eventually draw from the essence of other Convention rights. A

[229] Smith and Grady v United Kingdom (supra, n. 216); also see Lustig-Prean and Beckett v United Kingdom (Applications nos. 31417/96 and 32377/96), Judgment of 27 September 1999.
[230] See Smith and Grady, paras. 90 and 97; also see Lustig-Prean, paras. 64 and 90.
[231] Salgueiro Da Silva Mouta v Portugal (supra, n. 224); it is worth noting that this case concerned the protection of family life (not private life) under Article 8.
[232] See L. and V. v Austria (Applications nos. 39392/98 and 39829/98), Judgment of 9 January 2003 and S.L. v Austria (Application no. 45330/99), Judgment of 9 January 2003; also see Ladner v Austria (Application no. 18297/03), Judgment of 3 February 2005.
[233] See, for example, L. and V. v Austria, para. 52 and S.L. v Austria, para. 44.
[234] See Paul Johnson, 'An Essentially Private Manifestation of Human Personality: Constructions of Homosexuality in the European Court of Human Rights', *Human Rights Law Review*, Vol. 10, March 2010, pp. 67-97; also see Michele Grigolo, 'Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject', *European Journal of International Law*, Vol. 14, 2003, pp. 1023-1044 where the author notes (at 1038) the 'obvious split between a legitimate *private* decriminalized homosexual subject and his/her unacceptable *public* demands to establish relationships and families'.
[235] See the judgment of the Court in Schalk and Kopf v Austria (Application no. 30141/04), Judgment of 24 June 2010.

very positive implication of such an interaction is that the evolution of equality in the ECHR will not necessarily remain trapped within the strict textual limitations of Article 14.

Dealing with cases of systemic prejudice and stereotyping through Article 8 has been instrumental in highlighting that anti-discrimination is not only about treating people similarly; rather, it is more widely about securing that an individual will be able to lead her life without suffering social oppression based on sex, race or other personal characteristic. Such an emphasis on the need to maintain individual autonomy in the face of adverse social structures may also be discerned in the jurisprudence of the Court with regard to other Articles of the Convention, most notably Article 3 ECHR. There, it has been stressed repeatedly that systematic exposure to disadvantage stemming from discriminatory attitudes may go so far as to violate human dignity, thereby amounting to degrading treatment[236].

This construction of equality as a right that extends beyond securing symmetrical treatment in the enjoyment of other rights eventually imbued the interpretation of Article 14, diluting the traditional approach. As a consequence, the Court has occasionally stretched the ambit of Convention rights so far as to practically apply Article 14 in an autonomous manner. One way this has been achieved is by emphasising the reason behind the discriminatory treatment so as to hold that the situation at hand falls within the ambit of a Convention right. In such cases, the scope of application of Article 14 has been extended 'internally', given that the ground of discrimination is an aspect of Article 14.

5. Twisting the ambit

i) *Emphasis on the ground*

The case of Frette v France[237] concerned the claim of a homosexual man whose application for an authorisation to adopt was refused by the relevant authorities. Mr Frette brought a claim under Article 14 in conjunction with Article 8, claiming that he had been treated differently due to his sexual orientation. The Court acknowledged that the Convention does not provide for a right to adopt or a right to create a family and the refusal of the authorities to grant Mr Frette such a right

[236] See East African Asians v United Kingdom (Applications Nos. 4403/70–4419/70, 4422/70, 4434/70, 4443/70, 4476/70–4478/70, 4486/70, 4501/70 and 4526/70–4530/70), Report of the Commission adopted on 14 December 1973, para. 207; for a more recent example, see Cyprus v Turkey (Application no. 25781/94), Judgment of 10 May 2001, paras. 309-311. Still, mere distress and humiliation will not necessarily be enough to attain the 'minimum level of severity' that is required for Article 3 to come into play in such cases: see, for example, Smith and Grady (supra, n. 216), paras. 121-122.

[237] Application no. 36515/97, Judgment of 26 February 2002 (Third Section).

did not affect either his personal autonomy or his freedom to enjoy the sexual life he wanted[238]. Still, even though there was admittedly no interference with either the applicant's private life or family life, the Court decided to proceed with the Article 14 claim anyway. The reason put forward was that the French authorities allowed single people to adopt but disallowed the applicant from doing so because of his sexual orientation[239]. Eventually the claim failed as the state was afforded a wide margin of appreciation in balancing the best interests of the child against those of the applicant[240].

In order to understand fully what happened in Frette, it is useful to draw a comparison with the case of Salgueiro Da Silva Mouta v Portugal where Article 14 in conjunction with Article 8 was found to have been violated when the applicant, a homosexual man, was denied custody of his child on the basis of his sexual orientation. The claim in that case was allowed to proceed because i) there was an interference with the applicant's family life and, ii) this interference was based solely on his sexual orientation. The reasoning in Frette seems to set aside completely the first limb of this analysis. There are essentially two ways to explain this attitude. The first would be to say that the Court implicitly accepted that the situation at hand (application to adopt) fell within the ambit of Article 8. But the judgment itself, coupled with previous jurisprudence on the matter, suggests that intended family life does not fall within the ambit of Article 8[241].

A second option would be to infer that the ground at hand (sexual orientation) fell within the ambit of Article 8. Although this view was not followed explicitly, it seems to be easier to reconcile with the reasoning in Frette; this is due to the emphasis placed by the Court on the fact that the applicant was not allowed to adopt because of his sexual orientation[242]. This idea of relying on the ground of discrimination in order to bring a claim within the ambit of a convention right has been advocated as a potentially effective method of enhancing the reach of Article 14[243]. Still, setting other problems aside, it is very hard to see how a freedom which is not guaranteed by the Convention and which does not relate to the enjoyment of Convention rights can legitimately be safeguarded under the terms of the parasitic Article 14.

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[238] Ibid., para. 32.
[239] Ibid.
[240] Ibid., paras. 41-42.
[241] The Court itself referred to cases such as X v Belgium and the Netherlands (Application no. 6482/74), Decision of the Commission rendered on 10 July 1975 and Di Lazzaro v. Italy (Application no. 31924/96), Decision of the Commission rendered on 10 July 1997 which support the view that there is no right to adopt under Article 8. It also referred, inter alia, to the case of Marckx v Belgium (Application no. 6833/74), Judgment of 13 June 1979 where it had clearly accepted that '[b]y guaranteeing the right to respect for family life, Article 8 […] presupposes the existence of a family' (para. 31).
[242] For a similar view, see Joan Small, 'Structure and Substance: Developing a Practical and Effective Prohibition on Discrimination under the ECHR', *International Journal of Discrimination and the Law*, 2003, Vol. 6, No. 1, pp. 45-67 at 50-51.
[243] For an interesting discussion, see Robert Wintemute, '"Within the Ambit": How Big Is the "Gap" in Article 14 European Convention on Human Rights? Part 1', *European Human Rights Law Review*, 2004, No. 4, pp. 366-382.

The argument has been put forward that this alternative approach had been applied in the case of Thlimmenos v Greece where denying an opportunity to access a profession on the grounds of religious belief was held to violate the Convention[244]. In that case the applicant was debarred from becoming a chartered accountant because he had been convicted of insubordination when, while in the army, he refused to wear a uniform due to his religious beliefs. The Court was unanimous in finding that there had been a violation of Article 14 in conjunction with Article 9 emanating from the Greek authorities' failure to take into account the fact that the applicant's conviction was inextricably linked to his religious beliefs. In reality, it is hard to draw an analogy between this case and the one of Frette in that Thlimmenos does not seem to imply a departure from the traditional interpretation of what falls within the ambit of a right. The very exercise of his freedom of religion was used by the Greek government as a ground for the applicant's exclusion from the profession; hence, it was the type of interference, not the reason underlying it, which was found to fall within the ambit of Article 9 in that case[245].

It is vital that any attempt to extend the scope of Article 14 is made in a principled and coherent manner, having regard to the text of Article 14. Unfortunately, the case of Frette v France is not an example of such an attitude. The ambit of Article 8 is concerned only with the existence of an interference with the enjoyment of the freedoms enshrined therein, not with the reason underlying the interference[246]. By relying on the ground of discrimination, the Court used an aspect of Article 14 to make the provision applicable thereby treating it as an autonomous prohibition[247]. In this respect, it can fairly be argued that it did little more than taking the methodology applied in cases like Dudgeon just one step further. Thus, instead of merely using the ground of discrimination (sexual orientation) to explain why a case falls within the protective core of Article 8, the Court employed it to bring a state of affairs within the ambit of the same Article, enabling itself to proceed with the discrimination claim.

Nevertheless, sidestepping methodological considerations, the decision of the Court to proceed with the Article 14 claim in Frette is a clear example of its willingness to address social oppression suffered by homosexuals. The assumption is reinforced if we consider that sexual orientation was deemed to be the reason for the refusal even though the authorities did not expressly cite it as

[244] Ibid. at 372. See Thlimmenos v Greece (Application no. 34369/97), Judgement of 6 April 2000.
[245] A puzzling element of Thlimmenos is that 'religion provided both the basis for distinction and the right whose enjoyment suffered a distinct burden': see Aaron Baker, 'The Enjoyment of Rights and Freedoms: A New Conception of the 'Ambit' under Article 14 ECHR' (supra, n. 192) at 724-725.
[246] See the partly concurring opinion of Judge Costa, joint by Judges Jungwiert and Traja, where it is argued that 'it is not enough to state […] that a person's sexual orientation is part of his or her private life […] given that there is no right to (adopt) children and the Convention does not safeguard the desire to found a family, there was […] no interference by the State in Mr Fretté's private or family life'.
[247] This view was also expressed in the partly concurring opinion of Judge Costa joined by Judges Jungwiert and Traja.

such; instead, they simply referred to the applicant's 'choice of lifestyle', among other factors[248]. This was enough to convince the Court that the treatment at hand 'was based decisively on the [applicant's] avowed homosexuality', the other circumstances appearing to be 'secondary grounds'[249]. In essence, the Court tried to go against a decision which was based largely on social prejudice and stereotyping and which was bound to reproduce such structural disadvantage[250].

A similar spirit permeates the practically identical case of E.B. v France[251] where the Court went even further six years later to find a violation of Article 8 in conjunction with Article 14 (majority decision, 10-7). The case concerned the rejection of a lesbian woman's application for adoption. The majority concluded that repeated references to the lack of a 'paternal referent' were enough to denote that the sexual orientation of the applicant was 'a decisive factor' in blocking her application[252]. Hence, given that very weighty reasons would be required to justify a differential treatment based on sexual orientation, a narrow margin of appreciation applied in this case[253]. This, of course, is in direct contrast to the decision in Frette where a wide margin of appreciation was awarded due to the lack of consensus among member states as to whether adoption by homosexuals served the best interests of the child[254].

The Grand Chamber in E.B. decided to set a common standard on a matter where widespread prejudice was likely to prevent a consensus from arising among member states. The decision demonstrates that the Court may not apply the margin of appreciation doctrine strictly where the denial of an opportunity appears to have been based largely on prejudice against homosexuals[255]. Ironically, this attitude was also echoed in the views of the majority of the judges who expressed their opinion on the merits of Article 14 in Frette[256]. But again, the methodology employed in E.B. with regard to the application of the ambit requirement is not beyond reproach. The Court actually completed a cycle of jurisprudential innovation which it had started six years earlier. In doing so,

[248] See Frette (supra, n. 237), para. 32.
[249] Ibid., para. 37.
[250] The submissions of the applicant reveal that this line of thought lay in the heart of his claim (see para. 35 of the judgment in Frette). Thus, it has been pointed out quite accurately that 'the applicant's claim seems to have been that one of the main causes of potential psychological problems of children adopted by homosexuals is the very existence of social prejudice against homosexual parenthood. If this is the case, then prohibition against homosexuals adopting only reinforces this social prejudice': see George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (supra, n. 203) at 98.
[251] Application no. 43546/02, Judgment of 22 January 2008.
[252] Ibid., paras. 87-89. This was so despite the fact that lack of paternal referent was not the only consideration taken into account by national authorities nor was it necessarily indicative of homophobic attitudes. All seven dissenting judges criticised this view of the majority.
[253] Ibid., para. 91.
[254] See para. 41 of the Judgment in Frette (supra, n. 237).
[255] For an interesting discussion, see George Letsas, 'No Human Right to Adopt?', *UCL Human Rights Review*, Vol. 1, 2008, pp. 135-154 at 148-152.
[256] Ibid., pp. 143-148. The author rightly notes that of the four judges (out of seven) who thought that Article 14 was applicable in Frette three said that they would have found a violation. The remaining three judges who thought that Article 14 was not applicable did not move on to examine whether a violation could be established as a matter of principle and, as a result, the view that there was no violation prevailed.

the decision in Frette was practically affirmed as to the question of applicability of Article 14 and reversed as to the level of scrutiny applied.

Nevertheless, the reasoning of the Grand Chamber as to why Article 14 was applicable is not the same as the one put forward by the Third Section in Frette. The Grand Chamber in E.B. expressly relied on the positive obligation of the states not to discriminate in going beyond what the core of Convention rights requires[257]. So, it found that while there is no obligation under Article 8 to allow single people to adopt (i.e. no right to create a family), there was an obligation not to discriminate should the state decide to allow such adoptions[258]. The majority effectively suggested that the applicant should have a right to be able to fall within the ambit of Article 8 only because the state has also afforded the same right to similarly situated people. But it remains hard to see, given the absence of any legal or de facto ties with the adoptee, how the enjoyment of E.B.'s family life was interfered with when she was refused authorisation to adopt[259].

As was the case in Frette, the true objective of the Court in E.B. was to make sure that homosexuals will not be subjected to social oppression because of their sexual orientation. Emphasis on the ground of discrimination had the effect of diluting the traditional approach as to what falls within the area of enjoyment of a Convention right. In that context, the efforts of the Court to present its methodology as compatible with the text of Article 14 were at least ambiguous. Problematic as it may be, the manipulation of the ambit of a Convention right in order to deal with a discrimination claim has not occurred only in relation to homosexuality and Article 8 ECHR. In fact, a further blatant example of this attitude can be found in the case of Karlheinz Schmidt v Germany[260] which concerned sex discrimination in a claim brought under Article 14 in conjunction with Article 4.

Article 4(2) provides that 'no one shall be required to perform forced or compulsory labour'. According to Article 4(3)(d), forced or compulsory labour shall not include 'any work or service which forms part of normal civic obligations'. The applicants in Karheinz were required under German law to serve in the fire brigade of their municipality or pay a financial contribution instead. This obligation applied only to male members of the municipality (aged between 18 and 50) and not to women who, albeit eligible for service, were not obliged to support the fire brigade in any

[257] See Belgian Linguistic case (supra, n. 183).
[258] See paras. 47-49 of the judgment.
[259] The Court has suggested in the past that intended family life can fall within the ambit of Article 8 'even if family life has not yet been fully established': see Pini and others v Romania (Applications nos. 78028/01 and 78030/01), Judgment of 22 June 2004, para. 143. The problem, however, with the case of E.B. is that family life had not been even partly established. Thus, Judge Mularoni was right to suggest in her dissenting opinion that the Court should have expressly modified its old case law before 'assert[ing] that the possibility of applying to adopt a child under the domestic law falls within the ambit of Art. 8'.
[260] Application no. 13580/88, Judgment of 18 July 1994.

way whatsoever. The majority of the Court found that the measure was in breach of Article 14 in conjunction with Article 4(3)(d) in that the fact that only men were obliged to serve or pay the financial contribution in lieu of service constituted discrimination on the grounds of sex. According to the Court, the case fell within the ambit of Article 4(3)(d) because compulsory fire service was one of the 'normal civic obligations' envisaged in the Article[261]. However, Article 4(3)(d) itself provides that normal civic obligations do not fall within the scope of protection afforded by Article 4(2).

The Court in Karlheinz actually ruled that a particular state of affairs which is expressly excluded from the sphere of application of a right can still be enough to bring the claim 'within the ambit' of the right. It is fair to argue that it would take an extremely broad definition of what the ambit of a right is to support this approach. In fact, the court seems to have misled itself as to the ambit requirement in order to address the discriminatory treatment at hand[262]. Judge Morenilla rightly suggested in his concurring opinion that 'the true object of the applicant's complaint is […] a general right to equality between the sexes, as groups which should receive equal treatment, rather than the enjoyment of the specific freedom guaranteed under Article 4 (art. 4) […]'. The decision in Karlheinz constitutes a manifestation of judicial activism which goes so far as to undermine the legitimacy conferred upon the Court by the member states[263].

Even though problematic from a strictly legal perspective, cases like Frette, E.B and Karlheinz are important in denoting that an autonomous understanding of equality lingers within the jurisprudence of the Court. This understanding emphasises the reason behind a treatment and is not limited to securing the equal enjoyment of Convention rights. Instead, it might operate as a generally applicable duty to maintain equal treatment before the law (Karlheinz). Moreover, it might help us identify a distinct human interest that equality aims to affirm as of right; that is, freedom from prejudice and stereotyping (Frette, E.B.). This 'internal' extension of the ambit of the Convention with reference to the ground of discrimination is not the only mechanism through which the Court has strived to mitigate the parasitic nature of Article 14.

A far more coherent method employed by the Court is the 'external' extension of the scope of application of Article 14, through the widening of the ambit of Convention rights themselves. For example, in a recent case where the right of homosexuals to marry was at stake, the Court reversed its previous jurisprudence, holding that 'family life' might now be understood as covering the

[261] Ibid., para. 23.
[262] See the dissenting opinion of Judge Mifsud Bonnici.
[263] The same reasoning seems to have been applied by the Court twelve years later in the case of Zarb Adami v Malta (Application no. 17209/02), Judgment of 20 June 2006.

situation of homosexuals who are in a de facto partnership[264]. Thus, it *externally* extended the scope of application of Article 14. This can be contrasted with Frette and E.B. where the Court did not (formally) accept that the right to adopt fell within the ambit of Article 8; there, the scope of Article 14 was extended *internally*.

The Court has proven generous in extending the reach of Article 14 externally. Of particular importance in this context is its refusal to embrace a 'watertight' division between civil and political rights and socio-economic rights. This attitude has paved the way for Article 14 to encompass a much wider breadth of valuable options (or 'opportunities') than the one envisaged on the face of the Convention. Some aspects of the traditional methodology, most notably the comparator requirement and the need for a personal characteristic, have also been diluted during this process.

ii) *The integrated approach and the widening of opportunity*

Given the parasitic nature of Article 14, one may reasonably conclude that only rights which are civil and political in nature may fall within its scope. This would mean that opportunities lying in the socio-economic sphere could be hampered by discriminatory attitudes, unless protected incidentally[265]. Such a stance does not fully accord with the jurisprudence of the Court which supports the view that 'there is no watertight division separating [social and economic rights] from the field covered by the Convention'[266]. Hence, for example, refusal of the state authorities to provide a person suffering from severe disability with accommodation may in certain circumstances impact on the private life of the individual, bringing Article 8 into play[267]. By the same token, failure to provide sufficient medical treatment may come to amount to a violation of Article 3[268].

This indirect protection of social rights becomes particularly significant in the context of Article 14 because the ambit of a Convention right, as opposed to its protective core, allows for great latitude in determining what falls within its scope[269]. Hence, even though there is no right to housing under

[264] See Schalk and Kopf v Austria (supra, n. 235), paras. 91-95; cf. Mata Estevez v Spain (Application No. 56501/00), Admissibility Decision of 10 May 2001. The claim in Schalk and Kopf eventually failed on the grounds that the Convention should be read as a whole and the right to marry enshrined in Article 12 was clearly limited to heterosexual relations (para. 101).

[265] For example, the freedom to access a profession (socio-economic) could be safeguarded incidentally where one is being denied an equal opportunity in doing so because he exercised his freedom of religion (civil and political): see Thlimmenos v Greece (supra, n. 244).

[266] See Airey v Ireland (supra, n. 214), para. 26.

[267] See Marzari v Italy (Application no. 36448/97), Admissibility Decision of 4 May 1999.

[268] See Keenan v United Kingdom (Application no. 27229/95), Judgment of 3 April 2001.

[269] For a very good discussion of the methods employed for the protection of social rights in the jurisprudence of the Court, with specific reference to the important role of non-discrimination, see Eva Brems, 'Indirect Protection of Social Rights by the European Court of Human Rights', in Daphne Barak-

Article 8, when a person is denied succession to a tenancy simply because of his sexual orientation there might be a discriminatory interference with the enjoyment of his right to respect for his home[270]. Similarly, even though the right to property does not encompass a right to acquire property, if a state decides to create a benefits or pension scheme it must operate it in a non-discriminatory manner[271]; this is so irrespective of whether or not the scheme is based on the prior payment of contributions[272]. The Court has been criticised in this respect as occasionally extending the ambit of a right so far as to cover instances of discrimination which do not fall within the scope of the Convention, illegitimately circumventing the limitations of Article 14[273].

This eagerness to use the ambit criterion as a way of extending the opportunities covered by the prohibition of discrimination is important in highlighting that Article 14, as developed in the jurisprudence of the Court, entails more than guaranteeing equality before the law of the Convention. By extending the protection of the individual within the wider socio-economic sphere, the Court has strived to safeguard equality as a matter of practice, not only as a matter of legal form. The case of Sidabras and Dziautas v Lithuania[274] constitutes a good example on the basis of which this view can be supported. In that case, Lithuanian law debarred, for a period of ten years, the applicants from applying for a job in the public sector and in various posts in the private sector due to the fact that they were former KGB agents. The applicants brought a claim, inter alia, under Article 8 and Article 14 of the Convention.

The Court noted that the Convention does not guarantee a right to have access to a particular profession and that the state had a legitimate interest, national security, in excluding from the civil service people who have shown disloyalty to their country by serving an oppressive regime[275]. Nevertheless, the Court considered that the 'far-reaching ban on taking up private-sector employment' seriously hampered the ability of former KGB agents to develop relationships with the outside world and earn a living, thereby interfering with the enjoyment of their private life[276]. This interference was held to be disproportionate on the grounds that loyalty to the state was not

Erez and Aeyal M. Gross (eds.), *Exploring Social Rights: Between Theory and Practice*, Hart Publishing, 2007, pp. 135-167.

[270] See Karner v Austria (Application no. 40016/98), Judgment of 24 July 2003, para. 33; also see Kozak v Poland (Application no. 13102/02), Judgment of 2 March 2010.

[271] See Stec and others v United Kingdom (supra, n. 209), para. 53.

[272] See Carson and others v United Kingdom (Application no. 42184/05), Judgment of 16 March 2010, para. 64.

[273] See, for example, the concurring opinion of Judge Borrego Borrego in Stec and Others v United Kingdom (supra, n. 209).

[274] See supra, n. 198.

[275] Ibid., paras. 52 and 57 respectively.

[276] Ibid., paras. 47-50.

essential for employment in the private sector[277]. Accordingly, there was a violation of Article 14 taken together with Article 8.

An initial interesting element about this judgment is that the Court used the ambit of Article 8 in order to adjudicate on a discrimination claim in the employment sphere even though it acknowledged that such an area is not directly covered by the Convention. Subsequently, it moved on to find that there was a disparity between the treatment of former KGB agents and those people who had never worked for the KGB[278]. But accepting KGB employment as constituting a personal characteristic for the purposes of Article 14 indicates an extremely wide interpretation, to say the least, of what a personal characteristic is[279]; and even if we agreed that this is a valid ground of discrimination, it is anything but obvious that people who worked for the KGB are in a 'relevantly similar situation' to those who never did so[280].

Perhaps the best way to explain this wide interpretation of the different aspects of Article 14 is to say that it was the result of the Court's willingness to extent the scope of non-discrimination so as to protect former KGB agents from the social hostility that their past attracted. The ban on private sector employment was essentially instigated by such hostility. In this sense, Article 14 was employed in order to prevent systemic prejudice from controlling an intimate aspect of personal development, i.e. ability to work. Hence, the Court in Sidabras focused first and foremost on 'a person's opportunity to find employment with a private company'[281], not simply on non-discrimination in applying for a job.

The Article 14 claim seems to have been almost exclusively informed by the need to secure that the socio-economic conditions necessary for the maintenance of a dignified private life will not be taken away. Given the overt emphasis on the protection of private life and individual autonomy, one may reasonably wonder why the claim was not examined under Article 8 taken alone. In this respect, it would not be unreasonable to suggest that the Court preferred to rely on the ambit,

[277] Ibid., paras. 57-58.
[278] Ibid., para. 41.
[279] This wide approach adopted by the majority can be contrasted with the more tight interpretation provided by Judge Thomassen in her partly dissenting opinion. Judge Thomassen argued that the prohibition of discrimination only safeguards against denial of opportunities which is based on '*personal choices*' or '*personal features*', the former encompassing 'these choices [that] should be respected as elements of someone's personality, such as religion, political opinion, sexual orientation and gender identity' while the latter indicating 'features in respect of which no choice at all can be made, such as sex, race, disability and age'. According to Judge Thomassen, working for the KGB could not fall within either of these two categories.
[280] See the partly dissenting opinion of Judge Loucaides.
[281] See para. 58 of the judgment.

rather than on the protective core of Article 8, in order to avoid the far reaching consequences of allowing employment claims to be brought under Article 8 where no discrimination is involved[282].

The ability of Article 14 to safeguard socio-economic opportunities which do not fit easily within the protective core of Convention rights is illustrative of what has come to be referred to as an 'integrated approach' to human rights[283]. The integrated approach is based on the premise that political rights are of no use where the socio-economic conditions for their enjoyment are absent[284]. Thus, the conclusion is drawn that social, economic and cultural rights should be perceived as equally crucial for the protection of human dignity as civil and political rights[285]. With regard to the ECHR, such a conclusion appears to be fully consonant with the well established principle that 'the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective'[286].

The broadening of the ambit of Convention rights towards this direction is most valuable in securing that opportunities which belong to the socio-economic sphere will not be taken away because of adverse social norms and attitudes. In this sense, the prohibition of discrimination contained in Article 14 has evolved to be the provision that is least attached to the enjoyment of civil and political rights even though its text appears to suggest just the opposite. The parasitic operation of Article 14 has the potential of transcending generations of rights, offering a wider protection of individual autonomy and opportunity than the one directly promised by the substantive Articles of the Convention.

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[282] As a matter of fact, Judges Mularoni, Loucaides and Thomassen expressed their regret in their separate opinions for the decision of the majority not to examine the substantive Article separately and they submitted that they would have found a violation of Article 8 in the case before them.

[283] See Virginia Mantouvalou, 'Work and Private Life: Sidabras and Dziautas v Lithuania', *European Law Review*, Vol. 30, No. 4, 2005, pp. 573-585; also see Hugh Collins, 'The Protection of Civil Liberties in the Workplace', *The Modern Law Review*, Vol. 69, No. 4, 2006, pp. 619-631. Finally, for an interesting discussion of the integrated approach, with reference to the Court's case law, see Martin Scheinin, 'Economic and Social Rights as Legal Rights' in Asbjorn Eide, Catarina Krause and Allan Rosas (eds.), '*Economic, Social and Cultural Rights*', Martinus Nijhoff Publishers, 1995, pp. 41-62 and Ida Elisabeth Koch, 'Economic, Social and Cultural Rights as Components in Civil and Political Rights: A Hermeneutic Perspective', *The International Journal of Human Rights*, Vol. 10, No. 4, 2006, pp. 405-430.

[284] In other words, 'part of what it means to be able to enjoy any other right is not to be prevented from exercising it by lack of security or of subsistence. To claim to guarantee people a right that they are in fact unable to exercise is fraudulent, like furnishing people with meal tickets but providing no food': see Henry Shue*, Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy*, Princeton University Press, Second edition, 1996, p. 27.

[285] See Chisanga Puta-Chekwe and Nora Flood, 'From Division to Integration: Economic, Social, and Cultural Rights as Basic Human Rights', in Isfahan Merali and Valerie Oosterveld (eds.), *Giving Meaning to Economic, Social, and Cultural Rights*, University of Pennsylvania Press, 2001, p. 39-51 were the authors argue that such an approach is called for by Article 28 UDHR which provides that '[e]veryone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized'.

[286] Airey v Ireland (supra, n. 214) at 314, para. 24; this has come to be referred to as 'the principle of effectiveness': see Robin White and Clare Ovey, *Jacobs, White, and Ovey: The European Convention on Human Rights*, OUP, Fifth edition, 2010, pp. 73-78.

Clearly, the Court has strived to enhance the autonomy of Article 14 through the 'internal' or the 'external' widening of its scope of application. In this sense, it is fair to argue that equality is no longer concerned only with guaranteeing symmetrical treatment in the enjoyment of rights contained in the ECHR. In Sidabras, for example, the ambit of Article 8 was stretched far beyond its protective core and discrimination was established despite the lack of an analogously situated comparator. The crux of the case seems to have been that the damage suffered by the applicants was the result of systemic prejudice (partly understandable) against former KGB agents rather than the necessary consequence of preserving national security.

As suggested earlier, freedom of the individual from social oppression in the form of prejudice and stereotyping may be seen as a distinct human interest informing the implementation of Article 14. The Court has been particularly eager to address such instances of social oppression also when examining (seemingly objective) justifications put forward by member states. Thus, it has maintained time and again that a prima facie valid justification for differential treatment may be contaminated by the existence of deeper motives or adverse social structures.

6. Dissecting justifications

i) *Addressing prejudice and stereotyping: motives under the magnifying glass*

It was noted earlier that the Court may occasionally infer a discriminatory intention on the part of domestic authorities even when the treatment at hand is not formally based on a prohibited ground. Hence, the treatment in Frette and E.B. was found to have been based on the sexual orientation of the applicants despite the fact that the official decisions actually relied on the applicants' *choice of lifestyle* (former case), *lack of paternal referent* and *the ambivalence of the commitment of each member of the household* (latter case), having regard to the best interests of the child. This analysis necessarily implies that the presence of a legitimate aim will not always exclude the possibility of finding a treatment to have actually been motivated by prejudice or stereotyping.

It is important to clarify that this search for malevolent motivations is a separate element of the jurisprudence of the Court, not necessarily dependent on the existence of direct or indirect formal distinctions[287]. This is so because the emphasis here lies on the intention of the perpetrator, hard as this may be to prove. Hence, when the applicants in Abdulaziz, Cabales and Balkandali v United

[287] For a similar analysis see Rory O'Connell, 'Cinderella Comes to the Ball: Art 14 and the Right to Non-Discrimination in the ECHR', *Legal Studies*, Vol. 29, No. 2, June 2009, pp. 211-229 at 219-220.

Kingdom[288] argued that the history and background of UK immigration legislation revealed a racist motivation, the Court found that this was not the case because the rules simply purported to curtail immigration in order to protect the labour market in a time of unemployment[289]. In fact, the Court will require 'proof beyond reasonable doubt' before it concludes that a specific treatment is motivated by prejudice[290]. The mere existence of systemic prejudice will not be enough to satisfy this standard of proof which will vary according to the facts, the nature of the complaint and the Convention right involved[291]. But such proof may be established even when an authority has provided completely objective grounds for treating an individual in a particular way. The case of Baczkowski and Others v. Poland[292] serves as a clear illustration of this approach.

The applicants in that case, who campaigned in support of homosexuals, were refused permission for stationary assemblies and a march they intended to hold on the streets of Warsaw. The refusal to hold the march came from the traffic officer, acting on behalf of the Mayor of Warsaw, and was based on the applicants' failure to submit a traffic organisation plan under the terms of the relevant legislation. Subsequently, the Mayor himself disallowed the stationary assemblies on the grounds that they had to be organised away from roads used for traffic, again in accordance with relevant legislation, and that there was a chance of violent clashes with other groups which had already been granted permission. In the meantime, permissions were granted by the Mayor and municipal authorities acting on his behalf to various other groups. The domestic appeal authorities eventually quashed the bans imposed on the applicants which were held to be based on a wrongful interpretation of the law; but since the dates for the demonstrations had passed by that time, the proceedings stopped.

The Court relied on previous public statements made by the Mayor of Warsaw to find that his decision was actually motivated by prejudice against homosexuals, even though such an inference could not be drawn from the reasons articulated in the administrative decision itself[293]. More specifically, just a few weeks before rejecting the applications the Mayor had stated in an interview that he 'will ban the demonstration regardless of what they have written' and that 'there will be no public propaganda about homosexuality'. These homophobic statements were also deemed to have operated as instructions to his subordinates whose career depended on the Mayor's approval. Accordingly, there was a unanimous finding of a violation of Article 14 taken together with Article

[288] Applications nos. 9214/80; 9473/81; 9474/81, Judgment of 28 May 1985.
[289] Ibid., para. 85.
[290] See Nachova and others v Bulgaria (Applications nos. 43577/98 and 43579/98), Judgment of 6 July 2005, para. 147.
[291] Ibid., paras. 147 and 155; the Court specifically noted that 'proof beyond reasonable doubt' has an autonomous meaning under the Convention, different from the one employed by domestic courts.
[292] Application no. 1543/06, Judgment of 3 May 2007.
[293] Ibid., paras. 97-100.

11[294]. The same conclusion was reached three years later in relation to similar public statements made by the Mayor of Moscow[295].

The effort of the Court to trace covert prejudiced motives indicates that a treatment can be discriminatory not only with regard to its form, but also with reference to the deeper forces that generate it. Problematic as it may be to establish with certainty the true reasons behind an objectively justified decision[296] this approach remains valuable from a normative perspective. Besides, as will be shown later on, this aspect of interpretation of Article 14 has been extended so far as to generate a positive obligation on member states to investigate the discriminatory overtones of violent attacks.

ii) *Addressing prejudice and stereotyping: systemic examination of the discrimination claim*

An alternative way to address social oppression is to take its systemic implications into account in deciding whether or not a particular treatment is objectively justified. Thus, the Court may choose to analyse a specific case with reference to the position of the whole group to which the applicant belongs. In fact, the Court has declared time and again that predisposed bias on the part of a majority against a minority will never constitute sufficient justification for interfering with individual freedom[297]. It is clear then that systemic prejudice or stereotyping directed against particular groups will not be tolerated under Article 14. A basic example of such an approach may be traced in the early jurisprudence of the Court.

Back in the 1970's, an unmarried mother complained that Belgian law discriminated against her and her daughter by requiring mothers of children born out of wedlock to take legal proceedings if they wished to establish maternal affiliation[298]. No such requirement applied for children born within wedlock where maternal affiliation was established automatically after birth. The government put forward the argument that unmarried mothers are more likely to be irresponsible and that by giving them a chance to dissociate themselves from their child, the state purported to safeguard the child's best interests. The Court refused to accept that generalisations on the attitude of unmarried mothers (stereotyping) could justify the treatment at hand[299]. The generally accepted goal of promoting the traditional family (majority) should not impinge on the integrity of

[294] There was also a violation of Articles 11 and 13 taken alone.
[295] See Alekseyev v Russia (Applications nos. 4916/07, 25924/08 and 14599/09), Judgment of 21 October 2010.
[296] See the dissenting Judgments in E.B. (supra, n. 251).
[297] See, Dudgeon (supra, n. 215), para. 60 and Smith and Grady (supra, n. 216), para. 97.
[298] See Marckx v Belgium (supra, n. 241).
[299] Ibid., para. 39.

illegitimate families (minority)[300]. Thus, the differential treatment was unjustified and Article 14 taken together with Article 8 had been violated.

Similarly, a view that has been generally upheld for many years may legitimately be called into question when it is reflective of an outdated understanding of the role of women in society. This has been indicated most clearly in the case of a married Turkish woman who was not allowed to bear only her maiden name[301]. She claimed that she had been treated unfavourably because of her sex, since men were allowed to keep their surname after the wedding. The Government argued that its goal was to preserve the 'traditional arrangement whereby family unity was reflected in a joint name'[302]. The Court replied that this tradition derived from 'the man's primordial role and the woman's secondary role in the family' rather than from a need to safeguard family unity[303]. Accordingly, imposing such a tradition to women was against the principle of equality of sexes, leading to a violation of Article 14 taken together with Article 8 (name being an aspect of private and family life).

In both cases discussed so far the Court has refused to accept a justification which is undermined, in its opinion, by a stereotyped image of the group in which the individual applicant belongs[304]. But the connection between the predisposed attitude involved and the justification provided is looser in the second case that it is on the first. In the case of the unmarried mother, the justification (irresponsible behaviour) was expressly based on a stereotyped image of unmarried mothers in general; such generalisation was enough to negate the justification. By contrast, in the case of the Turkish woman there was only an implied connection between the seemingly objective justification (family unity) and the tradition of stereotyping against women on which the Court relied.

The increasing willingness of the Court to examine the claim of individual applicants with reference to wider social structures has led to further detachment of the link between objective justifications and bias against a particular group. More specifically, the Court has relied on the history of stereotyping and prejudice against specific groups to narrow the margin of appreciation to such an extent as to make it extremely difficult for a state to provide any valid justification at all. In this sense, it has undertaken a 'systemic examination' of the discrimination claim at hand instead of focusing solely on the case of the individual before it. A very clear example of this approach can

[300] Ibid., para. 40. Of course, this position is not necessarily limited to illegitimate families. For example, it will also be hard to justify differential treatment based on grounds such as sex or homosexuality with reference to the goal of promoting the traditional family: see Karner v Austria (supra, n. 270), para. 41.
[301] Unal Tekeli v Turkey (Application no. 29865/96), Judgment of 16 November 2004 (cf. Burghartz v Switzerland, supra, n. 224).
[302] Ibid., para. 45.
[303] Ibid., paras. 62-66.
[304] For further examples see Schuler-Zgraggen v Switzerland and Weller v Hungary and Konstantin Markin v Russia (supra, n. 208).

be seen in the recent case of Kiyutin v Russia[305] where the Court was unanimous in finding a violation of Article 14 in conjunction with Article 8.

The case concerned the claim of an Uzbek national who, after moving to Russia, married a Russian national and had a daughter. Mr Kiyutin applied for a residence permit in order to stay with his family in Russia but was refused because he tested HIV positive. He claimed that disallowing him to reside in Russia with his family solely because of his health status constituted a discriminatory interference with his private and family life. The Russian government argued that the policy of deportation of HIV-infected foreign nationals was justified because of 'concerns about the massive spread of the HIV epidemic and its socio-economic and demographic consequences in the Russian federation'[306]. It also argued that the applicant could still leave Russia and return every ninety days or he could move with his family in Uzbekistan[307]. In examining the validity of these justifications, the Court began by declaring emphatically that because of the history of stigmatisation, prejudice and social exclusion suffered by people living with HIV, states only enjoyed a narrow margin of appreciation in restricting their rights with reference to their health status; hence, the justification would have to be 'particularly compelling'[308].

The Court held that protection of public health was a legitimate justification but it was based on a general assumption about the 'unsafe behaviour' of people with HIV. This generalised approach was not supported by expert evidence and failed to take into account the situation of the specific applicant who did not lead a promiscuous lifestyle[309]. Then, the Court scrutinised closely a sensitive area of domestic socio-economic policy (protection of public health) and concluded that the justification put forward was not 'particularly compelling'[310]. The justification in this case was examined against the existence of systemic prejudice and stereotyping suffered by a historically disadvantaged group. The strict scrutiny applied because of this state of affairs made it extremely hard for the state to defend itself. In this sense, the fact that Mr Kiyutin belonged to a group which had 'suffered from stigma and exclusion' contributed to a considerable extent towards a finding of violation.

[305] Application no. 2700/10, Judgment of 10 March 2011.
[306] Ibid., para. 40.
[307] Ibid., para. 41.
[308] Ibid., paras. 63-65.
[309] Ibid., paras. 67-68.
[310] Ibid., paras. 69-71. Exclusion of people infected with HIV was deemed by the Court to create a false sense of security, pushing immigrants to stay in Russia illegally, avoiding HIV screening, thereby making the decease even harder to control. Furthermore, the fact that short term visitors could come and go every ninety days irrespective of health status was found to 'cast doubt' on the government's concerns. Finally, the fact that foreign nationals were not entitled to free medical assistance meant that Russian socio-economic policy would not be overburdened.

The trend of applying a narrow margin of appreciation to claims involving suspect classifications is not uncommon in Strasbourg jurisprudence. For many decades it has been maintained that some grounds of discrimination are particularly insulting to human dignity, having historically formed the basis of marginalisation of certain social groups[311]. For example, as early as 1973, the European Commission of Human Rights held that 'special importance should be attached to discrimination based on race'[312]; and in 1985, the Court noted that the advancement of sex equality was a major goal among the member states and that very weighty reasons would have to be put forward in order to justify differential treatment on the grounds of sex[313]. Grounds which are not expressly referred to in Article 14, such as birth out of wedlock and sexual orientation, have also attracted close scrutiny[314]. It is clear then that, while the Court formally reaches decisions only with respect to particular instances of discrimination, it has not hesitated to take account of (past or present) systemic prejudice or stereotyping when examining specific claims.

But this does not mean that all instances of prejudice or stereotyping falling within the scope of the Convention will always be examined properly or even with reference to Article 14. For example, when a person of Roma origin complained that a book and two dictionaries that were funded by the state contained insulting comments about Roma people, the Court refused to examine the claim under Article 14[315]. This was so despite the fact that the dictionaries referred (inter alia) to the term 'Gypsiness' as a metaphor for 'being miserly or greedy' and defined the expression 'becoming a Gypsy' as 'displaying miserly behaviour'[316]. Moreover, the book referred to Roma as 'a marginal group which is excluded and despised everywhere' and who, at some parts of the country, 'earn their living from stealing, begging, door-to-door selling, fortune-telling, zercilik (robbing jewellery stores) and making magical charms'[317].

The claim was construed as involving an interference with private life on the basis that 'negative stereotyping' may reach the level 'capable of impacting on the group's sense of identity and the feelings of self-worth and self-confidence of members of the group'[318]. The Court found that the two dictionaries merely reflected the language used by society and, since the one that was directed

[311] For an interesting discussion with extensive reference to the Court's case law, see Oddný Mjöll Arnadóttir, *Equality and Non-Discrimination under the European Convention on Human Rights*, Martinus Nijhoff Publishers, 2003, pp. 141-172.
[312] East African Asians (supra, n. 236), para. 207.
[313] Abdulaziz, Cabales and Balkandali v United Kingdom (supra, n. 288), para. 78.
[314] See Inze v Austria (supra, n. 204), para. 41 and L. and V. v Austria (supra, n. 232), paras. 38-39 respectively.
[315] See Aksu v Turkey (Applications nos. 4149/04 and 41029/04), Judgment of 15 March 2012 (Grand Chamber). Judge Gyulumyan dissented, finding that there was a breach of Article 8 taken alone and in conjunction with Article 14.
[316] Ibid, para. 28. It is worth noting that 'Gypsy' and 'Gypsiness' were first explained in their normal meaning (belonging to the ethnic group) and only secondarily as metaphors for misery and/or greed.
[317] Ibid, paras. 11-12.
[318] Ibid, para. 58.

to students was neither distributed to them nor recommended by the ministry of education, the state had not exceeded its margin of appreciation in allowing publication[319]. It was also of the opinion that the book aimed to shed light to the life of Roma 'who had been ostracised and targeted by vilifying remarks based mainly on prejudice' and the negative comments contained therein referred only to a fraction of the Gypsy population[320]. Thus, failure of Turkish authorities to ban its publication did not amount to a violation of Article 8.

Even if one were to accept that the specificities of this case justified the margin of appreciation afforded to the state, it is very hard to concede that the prohibition of discrimination was irrelevant. The Court said that it could not examine Article 14 because 'the case [did] not concern a difference in treatment, and in particular ethnic discrimination, as the applicant [had] not succeeded in producing prima facie evidence that the impugned publications had a discriminatory intent or effect'[321]. One may understand this as denoting simply that there was no difference in treatment because no comparator was treated more favourably. Nevertheless, one may also conclude that there was no difference in treatment in the broader sense of there being no 'discriminatory intent or effect'. This second, substantive approach is more or less a summary of the findings that were subsequently relied upon to justify interference with Article 8; and might serve to denote that the Article 14 claim was practically conflated (as has happened so often in the past) with the one brought under Article 8 rather than bypassed altogether.

This case reveals the problems that may arise when a right to equality is perceived as aiming only to protect the individual against unjustified differential treatment. A strong discrimination claim would be at hand had the case been examined in terms of protection against prejudice or stereotyping. The latter approach is far from being expressly adopted by the Court but the seeds for its development are in place[322]. Systemic examination of specific claims signals that the prohibition of discrimination is now concerned with the wider social oppression suffered by particular groups as much as it is with guaranteeing equal treatment as a matter of form. This tendency becomes most evident in the latest positive obligations created under Article 14.

[319] Ibid, paras. 84-85. Nevertheless, the Court did observe (at para. 85) that 'in a dictionary aimed at pupils, more diligence is required when giving the definitions of expressions which are part of daily language but which might be construed as humiliating or insulting. In the Court's view, it would have been preferable to label such expressions as "pejorative" or "insulting", rather than merely stating that they were metaphorical'.
[320] Ibid, para. 70.
[321] Ibid, para. 45.
[322] For a discussion of the Court's approach to stereotyping with some useful suggestions see Alexandra Timmer, 'Toward an Anti-Stereotyping Approach for the European Court of Human Rights', *Human Rights Law Review*, Vol. 11, No. 4, 2011, pp. 707-738.

7. Positive obligations

The text of Article 14 does not clearly provide for the possibility of imposing positive obligations on member states. Perhaps the only aspect which can be taken to imply that member states may occasionally be obliged to promote the prohibition of discrimination actively is the expression 'shall be secured'. Given the lack of a clear textual reference, it is not surprising that the greatest part of positive obligations flowing from Article 14 has been developed only in the dawn of the 21st century. The rise of the substantive dimension of equality within the jurisprudence of the Court has surely played an important role in this respect. Protecting individual autonomy against social oppression (as opposed to simply guaranteeing equal enjoyment of other rights) goes hand in hand with the imposition of a positive obligation on the states to do so.

A clear distinction needs to be drawn here between the imposition of *positive obligations* to promote equality and the assessment of voluntarily undertaken *positive action* schemes purporting to do the same. The latter category is most likely to fall within the wide margin of appreciation that is attributed to member states on matters of socio-economic strategy. For example, when the Czech Republic decided to lower the pensionable age for women who had raised children without making the same provision for similarly situated men the Court emphasised that the measure 'was originally designed to compensate for the factual inequality and hardship arising out of the combination of the traditional mothering role of women and the social expectation of their involvement in work on full-time basis'[323]. It concluded then that there was no violation as national authorities enjoy a wide margin of appreciation with regard to 'such a complex issue relating to economic and social policies'[324]. A less deferential attitude appears to be developing within the jurisprudence of the Court in the area of positive obligations arising under Article 14.

At least four different forms of positive obligations emanating from Article 14 can be identified. The first two accord with the protection of formal equality. The former entails that the state should not discriminate when it goes beyond what the core of Convention rights requires; and the latter indicates that a finding of a specific violation should result to general corrective action taken by the state. The third branch of positive obligations refers to the protection against indirect discrimination and demands that different cases should be treated differently, thereby departing from the rule of symmetry in treatment and formal equality.

It is in the context of this third category of positive obligations that the duty to provide reasonable accommodation has entered the jurisprudence of the Court. The social inclusion of ethnic

[323] See Andrle v The Czech Republic (Application no. 6268/08), Judgment of 17 February 2011, para. 53.
[324] Ibid, para. 56.

minorities has been a guiding consideration throughout this process. But the obligation to take the distinct features of vulnerable ethnic groups into account is not sufficient to guarantee effective social inclusion. As a result, the Court might also oblige member states to actively trace and address instances of prejudice and stereotyping. This much is revealed by the fourth and final type of positive obligations which impose a duty to investigate whether or not incidents of violent behaviour are the result of degradation or intolerance directed against the personal characteristics of those victimised.

i) *Benefit for one – benefit for all*

The genesis of positive obligations emanating from Article 14 can be traced back to the Court's judgment in the Belgian Linguistic Case[325]. In that case, the Court ruled that when a state decides to provide certain people with a benefit which falls within the ambit of a Convention right, it must do so in a non-discriminatory manner[326]. Hence, when the state treats some people more favourably so as to enhance their 'enjoyment' of a Convention right, it is under a positive obligation to make sure that people not receiving that treatment are not discriminated against; this is so despite the fact that the more favourable treatment is not called for by the Convention[327].

This first category of positive obligations serves to promote equality in areas which are not directly covered by the Convention. Thus, for example, even though the state is not obliged under Article 8 to provide child benefits in order to promote respect for family life, it must, where it chooses to do so, not discriminate in the distribution of such benefits[328]. It is obvious that positive obligations of this kind will occasionally interfere with the exercise of domestic socio-economic policy where the considerably wide margin of appreciation enjoyed by the state is found to have been overstepped[329].

It is worth noting, however, that this positive obligation is closely linked to a formal understanding of equality, its purpose being to ensure symmetrical treatment in the enjoyment of Convention rights. As a consequence, the state can avoid responsibility by levelling down the playfield, i.e. by securing that everybody is equally disallowed to enjoy extra benefits. For example, when the Court held in Abdulaziz, Cabales and Balkandali v United Kingdom that immigration rules which made it

[325] See supra, n. 183.
[326] Ibid, section I(B) of the judgment, para. 9.
[327] Ibid.
[328] See, for example, the case of Okpisz v Germany (Application no. 59140/00), Judgment of 25 October 2005.
[329] Ibid.

easier for men to be joined by their non-national spouse discriminated against women, the defending state replied by changing the law so as to extend the restriction to men as well[330].

ii) *Duty to change the law following a finding of a violation*

A further, more subtle, category of positive obligations in relation to Article 14 can be said to flow from the case of Vermeire v Belgium[331] where the Court unanimously found a violation of the Convention due to the fact that the defending state failed to change its legislation so as to comply with the principle enunciated by the Court in Marckx v Belgium[332]. The Marckx judgment prohibited, inter alia, discrimination between 'legitimate' and 'illegitimate' children as to their inheritance rights on intestacy. The fact that one of the successions in Vermeire had taken place after the ruling of the Court in Marckx was decisive in establishing a violation of Article 14 in conjunction with Article 8[333]. The judgment of the Court in Vermeire has been put forward as potentially generating 'a more general positive obligation under Article 14 on states parties to the Convention to remedy lacunae in legislative protection against discrimination'[334]. This general obligation, however, would be subject to a previous finding of a violation of Article 14.

iii) *Dawn of a new era: duty to accommodate difference and foster social inclusion*

A third branch of positive obligations flowing from Article 14 came into existence thirty two years after the decision in Belgian Linguistic, in the seminal case of Thlimmenos v Greece[335]. In that case the Court ruled that Article 14 'is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different'[336]. A state, therefore, is obliged to refrain from adopting prima facie neutral measures that disproportionately affect some people by reason of their personal characteristics. This is so irrespective of whether or not the measure was actually directed against that group[337].

The main implication of the Thlimmenos judgment has been that 'indirect discrimination' in the enjoyment of the Convention rights is also prohibited under Article 14 of the Convention[338]. This

[330] See Donald W. Jackson, '*The United Kingdom Confronts the European Convention on Human Rights*', University Press of Florida, 1997, p. 93.
[331] Application no. 12849/87, Judgment of 29 November 1991.
[332] See supra, n. 241.
[333] See para. 25 of the judgment.
[334] Oddný Mjöll Arnadóttir, *Equality and Non-Discrimination under the European Convention on Human Rights* (supra, n. 311) at 100.
[335] For facts, see supra, section 5(i) of this chapter.
[336] See para. 44 of the judgment in Thlimmenos (supra, n. 244).
[337] See Hoogendijk v Netherlands (Application no. 58641/00), Admissibility Decision of 6 January 2005.
[338] The Court, however, did not expressly used the term 'indirect discrimination' until seven years later in the case of D.H. v Czech Repblic (infra, n. 343).

effectively opened the gates for a category of positive obligations which is closer to a substantive rather than a formal model of equality. The reason for this is that indirect discrimination focuses on the actual impact that the impugned measure has on the individual. Thus, symmetrical treatment as a matter of form can be deemed problematic when in reality it disadvantages some people by reason of their personal characteristics; this is a distinction based on substance rather than form.

Perhaps the most valuable aspect of this obligation to refrain from indirect discrimination concerns its strong correlation with the duty to reasonably accommodate difference[339]. Indeed, it is not hard to see that adherence to the former practically entails fulfilment of the latter. When a seemingly neutral measure adversely affects some people simply because it fails to take account of their distinct situation which is due to a personal characteristic (indirect discrimination), in reality it fails to provide proper accommodation of that difference. Hence, for example, failure of the Greek authorities in Thlimmenos to create an exception for people who had been convicted for insubordination because of their religious beliefs may fairly be seen as amounting to improper accommodation of the applicant's special case[340].

Thus understood, the prohibition of indirect discrimination is a manifestation of the wider need to accommodate difference. But reasonable accommodation extends further. It implies that even in situations where disparate impact is properly justified a separate question remains as to whether or not its adverse effects can be counteracted in a manner that is reasonable, i.e. not disproportionate to the rights of others or too expensive for the society as a whole[341]. In such instances, the goal is to enable some individuals to function on equal terms with others rather than simply to disallow unjustified indirect distinctions. Of course, such an analysis is lacking in the jurisprudence of the Court. As a result, the duty to provide reasonable accommodation appears to have been subsumed conceptually within the prohibition of indirect discrimination. Cases such as D.H. attest to this.

More than thirty years ago, the Court expressed the view that 'certain legal inequalities tend only to correct factual inequalities'[342]. Back then, this meant simply that the state was at liberty -but not under obligation- to treat different cases differently with a view to correcting inequalities of fact. That liberty came to be construed as a duty in D.H. and others v Czech Republic[343] where it was held that not only does Article 14 allow differential treatment aimed at correcting factual

[339] This relationship between reasonable accommodation and indirect discrimination has also been addressed in Ch. 1, section 5.
[340] See, for example, Olivier De Schutter, 'Reasonable Accommodations and Positive Obligations in the European Convention on Human Rights' in Anna Lawson and Caroline Gooding (eds.), *Disability Rights in Europe: From Theory to Practice*, Hart Publishing, 2005, pp. 35-63 at 53.
[341] See ibid. for a similar argument.
[342] Belgian Linguistic case (supra, n. 183), section I(B), para. 10.
[343] (Application no. 57325/00), Judgment of 13 November 2007.

inequalities, but also 'in certain circumstances a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of the Article'[344].

The applicants in D.H. were Roma children who had been placed in special schools because the Czech authorities had concluded, following psychological tests, that they were not mentally capable of attending an ordinary school. These special schools were also attended by non-Roma children who had been diagnosed with similar learning disabilities; and the parents of all the children (Roma and non-Roma) had consented to the placement of their children in these institutions. The applicants complained that they had been indirectly discriminated against in the enjoyment of their right to education (Protocol 1, Article 2) in that they were more likely than similarly situated non-Roma children to be placed in these special schools. Thus, they brought a claim under Article 14 in conjunction with Protocol 1, Article 2.

The Grand Chamber heavily emphasised the 'turbulent history' of the Roma people in concluding that they require 'special protection'[345]. It also noted that there had been an 'emerging international consensus' among the member states as to the need to recognise and accommodate the special needs of minorities[346]. The Court then concluded that statistical evidence showing that the Roma children were more likely than non-Roma children to be placed in special schools were enough to shift the burden of proof to the state[347]. Subsequently, it was held that the educational system as it stood indirectly discriminated against Roma people. Therefore, the claim of the applicants was upheld (majority decision, 13-4).

The judgment of the Grand Chamber in D.H. can be characterised as groundbreaking for several reasons. First, attention was drawn to the past disadvantage suffered by all Roma rather than merely concentrating on the particularities of the specific claim. The Court found a violation of the rights of Roma people in general, concluding that since the applicants belonged to this group they had also been discriminated against[348]. This systemic examination of the discrimination claim, criticised by Judge Borrego Borrego in his dissenting opinion as being discordant to the role of the Court, constitutes a most substantive approach towards the right to equality; it construes social exclusion and lack of opportunity as a disadvantage that is suffered not only by individual applicants, but also by the group as a whole.

The fact that the Court accepted statistical evidence as conclusive in shifting the burden of proof is also indicative of its willingness to address structural disadvantage. The shift towards acceptance of

[344] Ibid., para. 175.
[345] Ibid., para. 182.
[346] Ibid., para. 181.
[347] Ibid., para. 188.
[348] Ibid., para. 209.

statistics as evidence of discriminatory treatment is quite recent, stemming from the recognition of indirect discrimination and signifying the coming of a new age in which the protection against actual, as opposed to formal, disadvantage is forcefully put forward[349]. However, this is not to suggest that such a radical change has been completely unopposed. For example, only two months after D.H. Judge Zupancic noted in his dissenting opinion in E.B. v France that the issue of systemic discrimination against homosexuals wishing to adopt a child could not be examined in that case since 'it would probably not be possible to even admit […] statistical proof in support of the allegation'[350].

A second important aspect of the judgment in D.H. is the emphasis placed on providing the accommodation that is necessary for securing the integration of minorities in society. The educational system was found to be indirectly discriminatory against Roma children because no adaptations were made to take their distinct cultural background into account. To use the words of the Court, Roma children 'received an education which compounded their difficulties and compromised their subsequent personal development instead of tackling their real problems or helping them to integrate into the ordinary schools and develop the skills that would facilitate life among the majority population'[351].

The main implication of the D.H. case seems to be that member states will be expected under Article 14 to foster the social inclusion of minority groups by properly accommodating their special needs. In this sense, the Court has politicised its role even further, drastically extending its ability to interfere with the socio-economic policies of member states[352]. This development flows naturally from the judgment in Thlimmenos which emphasised for the first time that regard must be given to the distinct situation of different people in assessing whether or not their right to equality has been infringed. Hence, for example, it was held in D.H. that psychological tests had to take Roma specifics into account[353]. The first branch of positive obligations also proved useful in enabling the

[349] See, for example, the case of Hugh Jordan v United Kingdom (Application no. 24746/94), Judgment of 4 May 2001 where it was held (at para. 154) that 'the Court does not consider that statistics can in themselves disclose a practice which could be classified as discriminatory within the meaning of Article 14'. For a similar attitude, see Shanaghan v United Kingdom (Application no. 37715/97), Judgment of 4 May 2001 and McShane v United Kingdom (Application no. 43290/98), Judgment of 28 May 2002, para. 135. The Grand Chamber in D.H. departed from this approach, affirming the view adopted almost three years earlier in Hoogendijk v Netherlands (supra, n. 337).

[350] It is worth noting that Judge Zupancic voted against the majority of the Grand Chamber in D.H. as well.

[351] See para. 207 of the judgment in D.H. (supra, n. 343).

[352] See Ralph Sandland, 'Developing a Jurisprudence of Difference: The Protection of the Human Rights of Travelling Peoples by the European Court of Human Rights', *Human Rights Law Review*, Vol. 8, No. 3, 2008, pp. 475-516 at 513; the author is also right to suggest (at 511-512) that cases such as the one of Chapman v United Kingdom (Application No. 27238/95), Judgment of 18 January 2001, where the Court was unanimous in not finding a violation of Article 14, would probably be decided differently in the post-D.H. era.

[353] See para. 200 of the Grand Chamber judgment in D.H. (supra, n. 343).

Court to review the potentially discriminatory effects of the special-school system even though Protocol 1, Article 2 did not call for the creation of such a system.

But the seeds for the reasoning in D.H. may also be traced outside the context of positive obligations. A good example is provided by the case of Stec and others v United Kingdom[354] which was decided by the Grand Chamber about a year and a half earlier. The applicants were women who received a 'reduced earnings allowance' because of their inability to work due to an injury they sustained at work. The state decided that they should stop receiving these benefits when they reached the pensionable age which was 60 for women and 65 for men. The applicants complained that, had they been men, they would be entitled to receive the benefits for 5 more years. Hence, they brought a claim under Article 14 in conjunction with Protocol 1, Article 1 alleging that the impugned measure discriminated against them on the ground of sex.

The Court noted that the different pensionable ages were not discriminatory against women since they had been adopted in order to 'to mitigate financial inequality and hardship arising out of the woman's traditional unpaid role of caring for the family in the home rather than earning money in the workplace'[355]. Consequently, it was primarily up to the state to decide when the social dynamics would have been sufficiently reversed so as to conclude safely that the differential treatment of women will no longer be justified[356]. Finding that there was no consensus among the member states on the matter[357], and focusing on the 'extremely far-reaching and serious implications, for women and for the economy in general', the Court afforded a wide margin of appreciation to the defending state[358].

The effect of the decision in Stec is that the state will be allowed to tackle systemic discrimination issues through differential treatment and it will be given great latitude in determining how best to do so. To this extent, the attitude of the Court appears to be quite deferential in terms of its effects on the exercise of domestic social policy. Nevertheless, it should not be overlooked that in Stec the Court adjudicated on the appropriateness of a policy which was aimed at tackling an instance of social oppression (stereotyping) operating at a systemic level. Moving on to find a violation where another manifestation of social oppression (failure to accommodate) operated in a similar fashion, but where no steps were taken for its eradication, was only a matter of time and judicial will. This assumption may be strengthened by the fact that the Grand Chamber in D.H. reversed the

[354] See supra, n. 209.
[355] Ibid., para. 61.
[356] Ibid., para. 62.
[357] Ibid., paras. 63-64.
[358] Ibid., para. 65.

decision of the Second Section which had been reached two months before the delivery of the Stec judgment[359].

In assessing the overall effect of the D.H. case, one should not forget that the implications of that judgment for the exercise of the defending state's socio-economic policy were actually minimal since the Czech Republic had already at the time of the Grand Chamber's decision abolished special schools and provided that all children should be educated in ordinary schools[360]. Thus, the judgment might not have been as brave and intrusive as it appears to be from the outset. Of course, this should not distract attention from its significant implications for the development of the right to (substantive) equality in the ECHR. A good illustration of the consequences of D.H. can be found in the subsequent case of Sampanis and others v Greece[361] where the Court unanimously found a violation of Article 14 in conjunction with Protocol 1, Article 2.

The applicants in Sampanis were people of Roma origin whose children, who attended a public primary school in Greece, had been put in special classes, located in a different building than the one in which ordinary classes were held. The Greek government maintained that the separation was due to the special needs that these older Roma children had in order to be able to catch up, eventually, with ordinary classes. The Court, however, considered that the differential treatment appeared to have been the result of violent complaints of Greek parents who would not allow their children to attend the same school as Roma children[362]. The Court also observed that almost all the students educated in special classes were of Roma origin[363]. Hence, the burden of proof shifted to the state.

The Court in Sampanis emphasised that it was necessary for the state to set up an 'adequate system' for securing that separate classes for ethnic minorities were not the result of segregation motivated by racial prejudice[364]. The pressing need for 'transparency and clear criteria as regards transfer to mixed classes' was also stressed by the Grand Chamber in the subsequent and very similar case of Orsus and Others v. Croatia[365]. These cases serve to highlight perhaps the most significant implication of the D.H. case; namely, that reasonable accommodation is meaningless unless it actually serves to promote social inclusion. Accommodating the different cultural background of ethnic minorities by forcing them into separate schools does nothing to achieve this goal. Thus, it violates the Convention.

[359] See D.H. and others v Czech Republic (Application no. 57325/00), Judgment of 7 February 2006 (Second Section).
[360] See para. 209 of the Grand Chamber judgment in D.H. (supra, n. 343).
[361] Application no. 32526/05, Judgment of 5 June 2008 (First Section).
[362] Ibid., para. 82.
[363] Ibid., para. 81.
[364] Ibid., para. 92.
[365] Application no. 15766/03, Judgment of 16 March 2010; see paras. 182-186.

The duty to provide reasonable accommodation has not been confined only to cases concerning ethnic minorities. It has also affected, for example, the area of disability discrimination where the Court has historically hesitated to intervene in a drastic manner[366]. The recent case of a man who was deemed sufficiently disabled to be unfit for military service but not enough so to be excluded from paying the military service exemption tax attests to this[367]. The Court ruled that this state of affairs amounted to discrimination since the authorities failed to take account of the fact that he was prevented from joining the army because of his physical disability which was beyond his control[368]. In essence, the applicant was obliged to pay the tax because he suffered from diabetes. The Court noted that, had the state provided for an alternative sort of service for people in the applicant's situation, there would not have been a finding of discrimination[369].

By the same token, failure to accommodate people with no religious convictions was found to infringe Article 14 in conjunction with Article 9 ECHR. This happened in a case where an agnostic couple withdrew their son from religion classes at school and the education authorities failed to provide an (alternative) ethics class because there was not a sufficient number of parents and students interested in it[370]. The child was allowed to abstain but he was given no mark for 'religion/ethics' as a result. The absence of a mark was taken by the Court to foster stigmatisation of the child as a person without religious beliefs[371]; it also denied him the chance to increase his average mark (unless he joined religious education)[372]. The resulting difference in treatment between believers and non-believers was discriminatory. Again, this violation would have been avoided had an ethics class been available.

The ruling of the Grand Chamber in Sejdic and Finci v Bosnia and Herzegovina[373] constitutes yet another example of the increased willingness to examine whether or not the needs of powerless minority groups are properly taken into account. Both applicants in that case were holders of public offices in Bosnia and Herzegovina who were barred from standing for election to the second chamber of the state Parliament (the 'House of Peoples') and the tripartite Presidency of

366 The Court has traditionally adopted a narrow interpretation of 'private life' when called upon to adjudicate on claims relating to the proper accommodation of disability under Article 8: see, for example, Botta v Italy (supra, n. 172), para. 35 and Zehnalova and Zehnal v Czech Republic (Application no. 38621/97), Admissibility Decision of 14 May 2002.

367 See Glor v Switzerland (Application no. 13444/04) Judgment of 30 April 2009.

368 The case can fairly be seen as one that involves indirect discrimination, albeit it was not analysed as such. More specifically, the Court found (paras. 77-80) that -albeit analogously situated- the applicant was treated differently than people deemed to be more than 40% disabled (who were exempted from paying the tax) or conscientious objectors (who could avoid the tax by undertaking an alternative public service). In other words, the applicant's situation (also) called for special treatment that the state failed to provide.

369 Ibid., para. 94.

370 See Grzelak v Poland (Application no. 7710/02), Judgment of 15 June 2010.

371 Ibid., paras 95 and 99.

372 Ibid., para. 96.

373 Applications nos. 27996/06 and 34836/06, Judgment of 22 December 2009.

the state. More specifically, the constitution of Bosnia and Herzegovina required that in order for a candidate to be eligible for election to either of these positions, he or she should have proclaimed affiliation with either the Bosnian, Serbian or Croat ethnic group (described as the 'constituent peoples')[374]. The applicants failed to comply with this condition as they had classified themselves in the Roma and Jewish minorities respectively[375].

They claimed that they had been directly discriminated against in that the constitution provided for a difference in treatment which was based exclusively on their ethnicity or race[376]. Not surprisingly, the D.H. case was prominently put forward to support their application. The Grand Chamber found, inter alia, that there had been a violation of Article 14 in conjunction with Article 3, Protocol No. 1 (right to free elections) with regard to the constitutional requirements dealing with membership to the House of Peoples. The Court acknowledged that the purpose of the impugned constitutional provisions was to secure 'a very fragile cease-fire'[377]. Nonetheless, it stressed that when it comes to matters of race or ethnicity 'the notion of objective and reasonable justification must be interpreted as strictly as possible'[378].

A combined reading of the Stec and the Sejdic and Finci judgments seems to imply that the Court will allow for a margin of appreciation when the purpose of the measure is to promote gender equality but will not do so when the goal is to secure social and political stability. This conclusion is obviously problematic. It is preferable then to examine a different point of view. The need for symmetrical treatment of men and women could be set aside in Stec because the measure at hand operated to dismantle those patterns which perpetuated the social oppression of women (stereotyping). Albeit perhaps unfair to the individual applicants, the measure aimed to address a structural disadvantage suffered by a social group. Hence, a margin of appreciation was granted.

In contrast, the measure in Sejdic and Finci did nothing to prevent the social oppression of vulnerable groups. Sejdic and Finci were still to be treated as second class citizens simply because that was the price to pay for preserving peace. Of course, unequal distribution of political privileges in order to preserve peace is not illegitimate as such; but the goal could be achieved without completely excluding some people from political process. In this sense, the constitution failed to

[374] Articles IV and V of the Constitution.
[375] Classification in that case had traditionally been a matter for the individual to decide. No specific criteria or requirements applied.
[376] It is worth noting that, according to the Court, '[e]thnicity and race are related and overlapping concepts. Whereas the notion of race is rooted in the idea of biological classification of human beings into sub-species according to morphological features such as skin colour or facial characteristics, ethnicity has its origin in the idea of societal groups marked by common nationality, tribal affiliation, religious faith, shared language, or cultural and traditional origins and backgrounds': Timishev v Russia (Application no. 55762/00), Judgment of 13 December 2005, para. 55.
[377] Sejdic and Finci (supra, n. 371), para. 45.
[378] Ibid., para. 44.

provide sufficient accommodation for those who were practically irrelevant in terms of peace-keeping[379]. Given the sensitive issues involved, it is quite remarkable that the Court put itself in the place of the national authorities in assessing whether or not the socio-political circumstances were ripe for a constitutional reform[380].

It is hard to accept that the right of the two applicants to stand for election in these circumstances was so fundamental as to herald such a decisive interference by the Court[381]. It is fair to argue then that it was the systemic implications for a vulnerable group rather than the circumstances of the individual applicants or the nature of the right to stand for election that founded the violation[382]. Thus, it is not really surprising that the Court placed heavy emphasis on the obligation of national authorities to combat racism by making sure that different racial or ethnic groups are treated equally, not only as a matter of law, but also as a matter of social reality[383].

This third branch of positive obligations emphatically signifies that the Court is steadily moving towards a substantive understanding of the right to equality. Protection of individual autonomy against social oppression is pushed in the forefront as a result. The reasonable accommodation of difference on the one hand and freedom from prejudice and stereotyping on the other are put forward as paramount, autonomous goals. Still, the latter goal is pursued far more actively than the former, since proper accommodation of special needs will often have to be weighed against particularly serious conflicting rights and interests due to the expenses usually involved[384]. Moreover, no principled approach has been put forward by the Court in determining *when* failure to correct factual inequalities through differential treatment amounts to discrimination[385].

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[379] This point was not made explicitly by the Court but it does seem to underpin its proportionality analysis: 'while […] there is no requirement under the Convention to abandon totally the power-sharing mechanisms peculiar to Bosnia and Herzegovina and […] the time may still not be ripe for a political system which would be a simple reflection of majority rule […] there exist mechanisms of power-sharing which do not automatically lead to the total exclusion of representatives of the other communities' (ibid, para. 48).

[380] Ibid., para. 47. In a strong dissenting opinion, Judge Bonello opposed the idea that the Strasbourg Court can replace the national authorities in determining whether 'national peace and reconciliation' should give way to 'values of equality and non-discrimination'. It is also worth noting that member states normally enjoy a wide margin of appreciation in setting out the rules for standing in general elections (under Article 3, Protocol 1 ECHR): see Podkolzina v Latvia (Application no. 46726/99), Judgment of 9 April 2002, para. 35 and Melnychenko v Ukraine (Application no. 17707/02), Judgment of 19 October 2004, paras. 57-59.

[381] Although the jurisprudence of the Court on political equality is (generally speaking) quite encouraging: see Rory O'Connell, 'Realising Political Equality: the European Court of Human Rights and Positive Obligations in a Democracy', *Northern Ireland Legal Quarterly*, Vol. 61, No. 3, 2010, pp. 263-279.

[382] Following D.H. a narrow margin of appreciation is most likely to be applied when examining a restriction on the political rights of vulnerable social groups: see, for example, Alajos Kiss v Hungary (Application no. 38832/06), Judgment of 20 May 2010, para. 42.

[383] In this respect, the Court referred specifically, inter alia, to its judgments in Nachova (supra, n. 290) and D.H. (supra, n. 343): see Sejdic and Finci (supra, n. 373), paras. 43-45.

[384] See, for example, Nikky Sentges v Netherlands (Application No. 27677/02), Admissibility Decision of 8 July 2003.

[385] For further discussion, see Catherine J. Van de Heyning, 'Is It Still a Sin to Kill a Mockingbird? Remedying Factual Inequalities Through Positive Action – What Can Be Learned from the US Supreme

It is quite regrettable that it took until 2000 for indirect discrimination (and the need for reasonable accommodation) to be recognised in the jurisprudence of the Court. This is even more so if one considers that there is nothing on the face of Article 14 which expressly prevents the Court from examining cases of indirect discrimination. The delay seems to have been the result of traditional adherence to the more cautious, formal approach to equality. But symmetry in treatment is no longer pursued as a goal in itself nor is equality concerned exclusively with the impartial enjoyment of other rights. A substantive rationale is emerging for enforcing the right enshrined in Article 14. This most significant finding also lies at the heart of the remaining category of positive obligations.

iv) *Duty to investigate*

Five years after Thlimmenos the Court relied on it to give birth to a fourth kind of positive duties emanating from Article 14. Thus, in Nachova v Bulgaria[386] the Grand Chamber established unanimously that, by virtue of Article 14 in conjunction with Article 2 ECHR, national authorities are obliged 'to investigate the existence of a possible link between racist attitudes and an act of violence'[387]. This was so because racially motivated violence should not be treated on equal terms with ordinary violence ('treat different cases differently')[388]. Hence, failure of domestic authorities to conduct a proper investigation on the existence of racist motives with regard to the killing by the police of two people of Roma origin amounted to a violation of the 'procedural aspect' of Article 14[389]. An apparent limitation of this decision is that the Court refused to find a substantive breach of Article 14; proof 'beyond reasonable doubt' of racial prejudice was deemed necessary for such a breach to be established[390]. But this should not distract attention from the importance of the case.

The Court emphasised that 'racial violence is a particular affront to human dignity' and that public authorities must 'use all available means to combat racism and racial violence'[391]. Failure to examine whether or not the killing was the result of systemic prejudice (as this was manifested in the case at hand) was tantamount to legitimising such prejudice. Denial of an effective inquiry into the motives underlining violent behaviour was problematic in itself. Hence, there was a breach of Article 14 irrespective of whether or not actual racist motivation had been proven[392]. Later on, this

Court and the European Court of Human Rights Case Law?', *European Human Rights Law Review*, 2008, No. 3, pp. 376-390 at 386-390.

[386] See supra, n. 290.

[387] Ibid, para. 161.

[388] Ibid, para. 160.

[389] Ibid., para. 168.

[390] Ibid., paras. 147-159; the reason for such a requirement seems to be the difficulty that a State would suffer in having 'to prove the absence of a particular subjective attitude on the part of the person concerned [i.e. the perpetrator]' (para. 157).

[391] Ibid., para. 145.

[392] For a further example, see Cobzaru v Romania (Application no. 48254/99), Judgment of 26 July 2007.

obligation to look for possible racist overtones to violent attacks was found to be applicable even where the perpetrators were private individuals[393].

The subsequent case of Stoica v Romania[394] took this approach even further. In that case the Court ruled that -due to the racist motivations behind the attack suffered by the applicant- there had been a 'substantive breach' of Article 14 in conjunction with Article 3[395]. In ruling so, the Court emphasised once again that combating racial violence is crucial in 'reinforcing democracy's vision of a society in which diversity is not perceived as a threat but as a source of its enrichment'[396]. There is nothing to suggest that this duty to investigate and address the discriminatory causes of violent behaviour should be limited to tracing racist motivations.

For example, in the case of Opuz v Turkey[397] the Court found that there was a breach of Article 14 in conjunction with Articles 2 and 3 due to 'the general and discriminatory judicial passivity in Turkey [which] created a climate that was conducive to domestic violence [against women]'[398]. The applicant in that case had been denied effective protection either by domestic courts or the police against the threats and violent behaviour of her husband; this violence escalated to the point where he assassinated her mother. The indifference shown by domestic authorities resulted to rendering the applicant and her mother victims of 'gender-based violence which is a form of discrimination against women'[399]. Clearly, a stereotypical image as to the secondary role of women in society was pivotal in sustaining the violent behaviour at hand. The Court has also relied on Article 14 to impose a duty to investigate violence stemming from religious hatred[400].

This progressive emphasis on addressing prejudice and stereotyping under the terms of Article 14 is most vividly illustrated if we contrast the cases discussed here with the earlier judgment of the Court in Velikova v Bulgaria[401]. There, it was held that failure to undertake an effective investigation of the death of a person of Romany ethnic origin while in custody amounted to a breach of the state's positive obligations arising under Article 2, but not of the ones arising under Article 14 as well. Nevertheless, it is worth noting that even in Velikova the Court took account of

[393] See Secic v Croatia (Application No. 40116/02), Judgment of 31 May 2007, para. 67.
[394] Application no. 42722/02, Judgment of 4 March 2008.
[395] Ibid., paras. 125-132. The Court, however, admitted once again that proving discrimination in practice is an 'extremely difficult' task (para. 119).
[396] Ibid. para. 117. Also see the judgment of the Grand Chamber in Nachova (supra, n. 290), para. 145.
[397] Application no. 33401/02, Judgment of 9 June 2009 (Third Section).
[398] Ibid., para. 198.
[399] Ibib., para. 200.
[400] See Members (97) of the Gldani Congregation of Jehovah's Witnesses v Georgia (Application No. 71156/01), Judgment of 3 may 2007, paras. 140-142 and Milanovic v Serbia (Application No. 44614/07), Judgment of 14 December 2010, paras. 96-101.
[401] Application no. 41488/98, Judgment of 18 May 2000 (Fourth Section); also see Anguelova v Bulgaria (Application no. 38361/97), Judgment of 13 June 2002.

the fact that the government was 'actively working on maintaining a climate of ethnic tolerance and social cohesion'[402].

It becomes clear from the analysis so far that the emerging right to substantive equality widens the entitlements of the individual against the member state responsible for the protection of her human rights. Protection from prejudice, stereotyping and lack of reasonable accommodation are becoming increasingly relevant as a result. But this autonomous and distinct human right cannot be fully realised with reference to a prohibition which is clearly concerned with the symmetrical enjoyment of other rights. The Court has gone a long way in trying to highlight the substantive dimension of equality but it is ultimately the member states that will have to make the letter of the Convention compatible with it; and it is quite noticeable that member states do not look favourably upon giving more powers to a Court which has already strived to make the most of the parasitic Article 14. The conspicuous lack of enthusiasm with regard to Protocol 12 ECHR attests to this.

8. Protocol 12

The liberation of Article 14 from its 'parasitic' status has been attempted through the opening for signatures, on 4 November 2000, of Protocol 12 to the ECHR[403]. Article 1(1) of Protocol 12 provides that 'the enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'.

The new Protocol proscribes differential treatment in relation to the enjoyment of any right set forth by the law of a defending State. Thus, the ambit requirement will not affect discrimination claims brought under Protocol 12. Still, as of August 2012 only eighteen out of the forty-seven member states of the Council of Europe have signed and ratified the new Protocol[404]. Prima facie, it makes little sense for member states which have ratified the Charter of Fundamental Rights of the European Union and the International Covenant on Civil and Political Rights to refuse to do the same for Protocol 12[405]. This is so because a similar free-standing prohibition against discrimination is contained in all three international human rights instruments.

[402] Ibid. para. 93.
[403] The new Protocol came into force on 1st April 2005, following its 10th ratification.
[404] Ten countries have refused even to sign Protocol 12: Bulgaria, Denmark, Lithuania, Malta, Monaco, Poland, Sweden, Switzerland, France and the United Kingdom.
[405] As a matter of fact, the European Parliament itself has encouraged the member states of the EU to sign and ratify the new protocol: see European Parliament resolution on the situation as regards fundamental rights in the European Union (2002) (2002/2013(INI)), [2004] O.J. C 76E/412 at 421.

It seems, therefore, that the problem is not one of disagreeing with the existence of a free-standing human right to equality and non-discrimination in the international sphere. Instead, the issue is one of accepting such a right in the context of the ECHR. The ability of the Court to deal with individual petitions directly and its ever-growing status as the ultimate guardian of European human rights makes member states think twice before extending their obligations under the ECHR. This is even more so in the vast and sensitive area of equality law where the wide interpretation given to the parasitic Article 14 may reasonably discourage member states from granting the Court even more flexibility than it has already acquired unilaterally. In this sense, the Court seems to be paying the price for repeatedly stretching the boundaries of Article 14.

Allowing a powerful and creative international Court to adjudicate on every single instance of domestic socio-economic policy is, perhaps understandably, not a very appealing option for sovereign states. From all the arguments which have been put forward for the refusal of most member states to sign and ratify the new Protocol, this seems to be the most pragmatic[406]. A further realistic concern relates to the 'explosion of litigation' that the new Protocol could trigger due its very wide scope of application[407]; but such an administrative difficulty cannot reasonably be conceived as a decisive factor on its own for restraining the evolution of the right to equality in Europe. For now, the new Protocol seems to be trapped in an awkward situation where most member states expect to see how the Court will interpret it while, in the meantime, refusing to take part in the process.

[406] Taking the United Kingdom as a case study, arguments against acceding to the Protocol have included the lack of any express allowance for objective and reasonable justifications (something which is not expressly provided for in the text of Article 14 either) and the possibility of an expansive interpretation of the words 'any right set forth by law' so as to include other international obligations of the member states (even though such obligations cannot reasonably be seen as law of the member state unless they have actually been incorporated as part of domestic law). It is worth noting that these reasons have been met with suspicion within the UK Parliament itself: see House of Lords and House of Commons Joint Committee on Human Rights, 'Review of International Human Rights Instruments - Seventeenth Report of Session 2004-05', HL Paper 99, HC 264, pp. 14-16. A further argument which has been put forward is that the new Protocol does not expressly allow for positive action aiming to correct factual inequalities (even though both the preamble to the Protocol and its explanatory report especially provide that it does not inhibit member states from taking such action): see Hansard Volume 618 (House of Lords Debates), written answer of Lord Bassam of Brighton, 9 November 2000: Column WA174. For a critique of these arguments, see Sandra Fredman, 'Why the UK Government Should Sign and Ratify Protocol 12', *Equal Opportunities Review*, Issue 105, 2002; also see Nicholas Grief, 'Non Discrimination under the European Convention on Human Rights: A Critique of the United Kingdom Government's Refusal to Sign and Ratify Protocol 12', *European Law Review*, Vol. 27 (Human rights survey 2002), 2002, pp. 3-18; also see Urfan Khaliq, 'Protocol 12 to the European Convention on Human Rights: A Step Forward or a Step too Far?', *Public law*, Autumn 2001, pp. 457-464. For an assessment of the French approach, see Christophe Pettiti, 'Le Protocole no 12 à la Convention de Sauvegarde des Droits de l'Homme et des Libertés Fondamentales: Une Protection Effective Contre Les Discriminations', *Revue Héllenique des Droits de l' Homme*, 2006, Vol. 31, pp. 805-818.

[407] See Joint Committee on Human Rights, 'Review of International Human Rights Instruments - Seventeenth Report of Session 2004-05' (ibid.); the Committee itself characterized this argument as 'alarmist' (p. 15).

9. Conclusion

It is fair to argue that there are essentially two views of equality informing the application of Article 14 ECHR. On the one hand, the traditional understanding of formal, legal equality emanates directly from the text of the provision. This conception focuses on guaranteeing symmetrical treatment before the law of the Convention. It draws its power from the rights enshrined in the ECHR which constitute the human interest it aims to protect. On the other hand, a conception of substantive equality has also been developed by the Court. This latter understanding has been the product of conciliating the apparent limitations of Article 14 with the need to protect individual autonomy against social oppression. Freedom from prejudice, stereotyping and lack of reasonable accommodation comprise the human interest that equality aims to safeguard in that context.

Substantive equality imbued the interpretation of Article 14 mainly, but not exclusively, as a result of the Court's jurisprudence on Article 8. Throughout this process the Court has had to loosen up not only the restrictive scope of Article 14, but also its own established methodology in interpreting it. Naturally, the parasitic nature of Article 14 came to constitute the greatest challenge. Efforts to overcome the ambit requirement in order to deal with interferences which -although based on protected grounds- were not directly related to the rights enshrined in the Convention led to several innovative interpretations. Not all these interpretations are legally coherent (the case of Frette being a notorious example) but they served to indicate that the substantive goal of defending vulnerable social groups against social oppression can inform the application of Article 14.

This substantive goal has influenced the assessment of objective and reasonable justifications in such a way that the covert motivations of public authorities as well as the history of disadvantage suffered by particular groups have become increasingly relevant. As a result, inequality is no longer understood as merely prohibiting formal, legal distinctions in the enjoyment of other rights. This has been most evident in the context of positive obligations where social inclusion and reasonable accommodation of difference are pushed forward as substantive goals. But this relaxation of the restrictive scope of Article 14 has not been welcomed by the member states whose obligations are increasing as a result. The non-ratification of Protocol 12 by the majority of the member states seems to attest to the fact that the Court's deeds during the last decades have not gone unnoticed.

Twisted as it might have been from time to time, the traditional approach to the interpretation of Article 14 has not been formally revised. Instead, a right to legal, or formal, equality and a right to substantive equality coexist within the jurisprudence of the Court without a distinction having been drawn between the two. As a consequence, it is very hard to decipher a perfectly coherent theory of interpretation of Article 14. This ambiguity stems from the on-going tension between the

judicially created substantive conception of equality and the formal conception envisaged by the Convention. Nevertheless, it is of utmost importance to acknowledge that protection from social oppression in the form of prejudice, stereotyping and lack of reasonable accommodation is emerging as a substantive goal pursued by the right to equality contained in Article 14.

Chapter 3: Substantive Equality in the European Court of Justice

Introduction

This chapter will enquire into the human interest safeguarded by the right to equality as developed within the jurisprudence of the European Court of Justice. The numerous pieces of legislation concerning the material scope of equality and non-discrimination in EU law may work to obscure the pivotal role the judiciary has played, and continues to play, in this area. In reality, the underlying rationale for upholding a right to equality had been shaped through case-law at least as much as it has resulted from legislative action. The truth of this assertion will be examined from a historical perspective with a view to showing how a substantive conception of equality, aiming to protect individual freedom from social oppression, began to spring in the process of upholding market equality, aiming to protect individual freedom only insofar as necessary for sustaining economic integration. This analysis will be outlined in the first of the two main sections.

The second section will focus on showing how a guarantee of substantive equality has been implemented in practice by the Court, especially after the coming into force of the Treaty of Amsterdam. In this context it will be maintained that politics often operate to prevent a consistent approach from being formed. The jurisprudence of the Court with regard to the assessment of positive action schemes most clearly attests to this. Nevertheless, the case law concerning the scope of application of the general principle indicates that deference towards member states will not always prevail. Finally, it will be argued that -although limited in scope- the Charter of Fundamental Rights does a great service in highlighting the importance of a substantive understanding of equality in EU law. This symbolic force is certain to imbue the unwritten, judge-made constitution of the Union.

A. From market unifier to substantive right

1. Introduction

The goal of this first section is to explain how a human right to equality first began to develop within the jurisprudence of the European Court of Justice. A distinction will be drawn between market equality and substantive equality in order to signify the two seemingly contradictory, and

yet actually complementary, interests that the principle of equality has aimed to uphold in European Union law. It will be argued that the original understanding of non-discrimination as an instrument for the attainment of market-related goals began to evolve into a substantive human right within the case-law of the Court. This latter, substantive goal demands the protection of the individual from adverse social dynamics even at the expense of business efficacy.

2. The nature of the EU

If we are to understand equality as constituting a fundamental legal right, then its realisation must be at least partly contingent on the nature of the legal system within which it operates. History has shown that the European Union (EU) polity is constantly in motion. Its priorities and its efficacy in implementing them have been reshaped time and again, always with a view to fostering integration among member states. Perhaps the most appropriate way to appreciate the true identity of what has now become the EU would be to look back to the Treaty of Rome (EEC Treaty) which set its foundations[408]. Article 2 EEC provided that the primary purpose of the European Economic Community was to establish a common market through the approximation of economic policies. This process purported to generate increased stability as well as 'an accelerated raising of the standard of living and closer relations between the States belonging to it'.

It is fair to say then that the European Union has been pursuing a dual goal since its early days: to achieve economic integration and, through it, foster political integration. The direct aim of the Community was to bring about closer economic cooperation which in time would lead, as it did, to the attainment of the broader political aspiration ('closer relations'). Accordingly, the Community was founded on an economic contract, not a social one. This economic contract was the EEC Treaty itself which proclaimed the free movement of persons, goods, services and capital thereby establishing the common European market. The Treaty came to be seen as 'the basic constitutional charter' of the Community[409] and the rule of law was identified as the fundamental principle which protected against abuses of that -largely economic- constitution either by the member states or the institutions of the Community[410].

Under these circumstances, legal equality had to be narrowed down to market equality in order to accord with the constitutional framework of the common market. Legal equality is understood here as indicating formal equality before the law, providing for the invalidation of measures which

[408] The Treaty of Rome, which brought the European Economic Community into existence, was signed on 25 March 1957 and entered into force on 1 January 1958.
[409] See Case 294/83, Parti Ecologiste Les Verts v European Parliament [1986] E.C.R. 1339, para. 23.
[410] Ibid.; also see Opinion 1/91 of the Court [1991] ECR I-6079, para 1.

differentiate between individuals 'on grounds which appear irrelevant, unacceptable or offensive'[411]. In domestic legal systems these grounds will usually include sex, race, ethnic origin, sexual orientation, religion, and many others. This is because impartiality and freedom from all forms of arbitrary treatment are perceived as inextricable components of the rule of law. Thus, distinctions based on a wide range of personal characteristics offend the morality of democratic societies. But in the context of the international marketplace a different morality had to apply. The economic constitution emphasised the sustainability of the common market and the only relevant grounds of discrimination were those contributing to that aim.

Market equality protected individual freedom only to the extent necessary for securing the sustainability of market integration, the individual being seen as an instrument for the attainment of that end. The idea was to promote equally free workers, not equally free citizens. Hence, for many decades the only not intrinsically market related grounds of discrimination covered by the 'constitutional charter' of the Community were nationality and sex. As will be shown later on, even these two grounds were originally included in the Treaty solely for the facilitation of economic integration. As a consequence, equality came to require consistency in treatment with a view to eliminating any arbitrary distinctions that could hamper interstate trade.

But this is not to suggest that protection of the individual in the wider social sphere did not play any role whatsoever in the original EEC project. The social goal of the common market -calling for an improvement of the standard of living within the Community- meant that the achievement of economic growth was not an end in itself but merely a mechanism for the amelioration of the lives of member state nationals[412]. In other words, maximisation of wealth should not be pursued without a social ethos which would ensure that disadvantaged groups would not be excluded from the process[413]. Nevertheless, the limited obligations directly imposed by the EEC Treaty in the area of social policy[414] attested to the fact that the social ethos of the Community would have to evolve outside its written constitutional charter.

The main aspects of this social ethos have now been codified in the EU Charter of Fundamental Rights. The Charter construes equality as a free-standing human right rather than as an instrument for market integration. Thus, it contains a prohibition of discrimination which refers to a long list

[411] A W Bradley & K D Ewing, *Constitutional & Administrative Law*, Longman, 15th edition, 2011, p. 94.
[412] The heads of member states confirmed this position at a conference in Paris in October 1972 and invited the institutions of the Community to draw the Community's first social action programme, pursuant to Article 2 EEC: see Council Resolution of 21 January 1974 concerning a social action programme, [1974] O.J. C 13/1.
[413] For a very good discussion of the necessity of, as well as the problems associated with, the formation of that social ethos, see Miguel Poiares Maduro, 'Europe's Social Self: "The Sickness Unto Death"', in Jo Shaw (ed.), *Social Law and Policy in an Evolving European Union*, Hart Publishing, 2000, pp. 325-349.
[414] See mainly Articles 117-122 EEC.

of personal characteristics which are seemingly unrelated to the market. But the provisions of the Charter cannot be read in isolation from other instruments of EU law and the interpretation given to them by the European Court of Justice (ECJ)[415]. Moreover, in order to understand the goal of this substantive dimension of equality one must also look at the unwritten, judge-made constitution within which it was first born and where it still evolves. An examination of these areas will reveal the pivotal role that the ECJ has played in the emergence of a right to substantive equality alongside market equality in the EU.

Substantive equality is understood here as demanding freedom from social oppression in the form of prejudice, stereotyping and lack of reasonable accommodation. In contrast to market equality which emphasises the furtherance of economic integration, substantive equality aims to further individual autonomy as end in itself. When applied to the marketplace, this right to substantive equality creates correlative obligations not only for the state (vertical) but also for other individuals (horizontal). This is so because in a free market personal autonomy might be infringed not only by public authorities, but also by those private commercial entities which exercise direct control over the valuable options and opportunities of the individual[416].

The first part of this chapter will demonstrate how a right to substantive equality first emerged within the jurisprudence of the ECJ. The point will be approached initially from a normative perspective in order to show that the *market* and the *substantive* dimensions of equality are not as contradictory as they might appear to be from the outset. Focus will be drawn then on the unwritten, judge-made constitution of the EU within which an understanding of equality as end in itself first began to spring. Finally, it will be argued that the prohibitions of nationality and sex discrimination -even though originally intended to protect the market- contributed drastically to transforming the market interest that equality traditionally aimed to safeguard into a human interest. This finding is not surprising if we accept the subtle interrelation between equality as an instrument for market integration and equality as a substantive human right.

3. Substantive equality in the marketplace

A liberal economist might argue that free competition will always be enough to protect against discriminatory treatment given that emphasis on maximization of productivity would render

[415] Henceforth also referred to as 'the Court'.

[416] See, for example, Lawrence E. Blades, 'Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power', *Columbia Law Review*, Vol. 67, No. 8, 1967, pp. 1404-1435 where the author follows this approach in highlighting the threat that employer power poses to individual freedom.

considerations such as race or sex redundant[417]. It is true that economic growth is hampered whenever a group of people that could contribute to productivity is marginalised in the marketplace simply because of sex, race or other personal characteristics. But still, it is not clear that market actors will always choose to forego of their discriminatory feelings in order to enhance efficiency and productivity nor is it always self-evident that the market will reward them for this choice (especially when systemic prejudice or stereotyping is involved). In fact, market dynamics may force even an unbiased employer to discriminate in order to remain competitive; let us examine two illustrative examples of such a state of affairs[418].

First, an employer may refuse to hire an individual belonging to a specific group (defined with reference to a personal characteristic) because the business operates in a society that is predisposed against members of that group[419]. So, for example, the manager of a store located in a xenophobic neighbourhood, would not make a sound decision in economic terms if he were to hire immigrants to deal with customer services. The customers would be anything but enthusiastic about this choice and business would drop. In this case, the prejudice of customers is likely to imbue (quite understandably) the attitude of the employer who will have to espouse their bigotry in order to remain competitive.

Second, an employer might be inclined to rely on stereotypes as a form of assessing the qualities of prospective employees. An example of such 'statistical discrimination' would be to refuse to hire a woman for fear that she is more likely than a man to leave her job in order to take care of her child[420]. A further example could be the refusal to hire an individual because he/she might belong to a social group in which a high rate of criminal conduct is observed. Rather than examining each case individually, it might be less costly to rely on generalisations which, even if statistically justifiable, entrap the individual into a stereotyped image. In such instances, stereotyping may prove to be a reasonable option in order to gain efficiency in doing business.

If we were to impose a duty on the employer not to discriminate in the two examples provided here, we would effectively enforce a right of the employee not to be subjected to prejudice (in the case of costumer animus) or stereotyping (in the case of statistical discrimination). But we would also come remarkably close to imposing a duty of accommodation to the employer. This is so because in both cases he/she will be required to incur loss of profit in order to safeguard the equal

[417] See Milton Friedman, *Capitalism and Freedom* (Fortieth anniversary edition), University of Chicago Press 2002 (originally published in 1962), pp. 7-21.
[418] For an excellent analysis of the ways in which competitive markets may actually foster discriminatory attitudes, see Cass R. Sunstein, *Free Markets and Social Justice*, OUP, 1997, pp. 151-166.
[419] Ibid., p. 153.
[420] Ibid., p. 155.

opportunity of prospective employees[421]. Such obligations to accommodate may become most apparent in cases where the decision of an employer does not clearly stem from either prejudice or stereotyping. For example, it has been argued that discrimination in the form of segregation may well result from a 'rational' assessment according to which people from the same social group would be able to work together more efficiently[422].

In all cases described here, a right to (substantive) equality would force the employer to let go of what he may reasonably consider to be an efficient way of doing business. The apparent objectivity of justifications advanced would not be enough to outweigh the fact that the valuable options of some people were interfered with because of adverse social norms. At first glance then, substantive equality cannot be furthered without placing some restrictions on the free market. And if we accept that market equality aims to sustain the smooth operation of the free market, then, it might fairly be seen as opposing substantive equality. Still, the validity of such a point is necessarily contingent on the way one defines a free market. If we accept that a free market is one where freedom of contract is the general rule, then, we need to determine what this freedom entails.

One view would be to say that freedom of contract is simply 'a principle that allows all persons to do business with whomever they please for good reason, bad reason, or no reason at all'[423]; hence, antidiscrimination has no place in free markets[424]. Such a formal approach which is limited to securing the equal civil capacity to contract has been criticised as failing to take into account the requirements of fairness which inform our modern understanding of contractual relations[425]. According to this second view, the principle of non-discrimination should be seen as a welcome addition to existing contract law rules such as those prohibiting fraud or duress which aim to ensure the substantive fairness of contracts[426]. These two conflicting interpretations of freedom of contract are in essence indicative of a tension between a formal, market-oriented and a substantive, value-oriented philosophy[427].

Rationalising discrimination with reference to the freedom of others to maximise productivity as they see fit is to allow a fundamental market freedom to be equated with -and practically override-

[421] See Christine Jolls, 'Antidiscrimination and Accommodation', *Harvard Law Review*, Vol. 115, No. 2, 2001, pp. 642-699 at 686-687; cf. Mark Kelman, 'Market Discrimination and Groups', *Stanford Law Review*, Vol. 53, No. 4, April 2001, pp. 833-896 at 847-849.
[422] Richard A. Epstein, *Forbidden Grounds: The Case Against Employment Discrimination Laws*, Harvard University Press, 1992, pp. 67-69.
[423] Ibid., p. 3
[424] Also see Richard A. Epstein, *Equal Opportunity or More Opportunity? The Good Thing About Discrimination*, Civitas, 2002, pp. 5-6.
[425] Dagmar Schiek, 'Freedom of Contract and a Non-Discrimination Principle – Irreconcilable Antonyms?', in Titia Loenen and Peter R. Rodrigues (eds.), *Non-Discrimination Law: Comparative Perspectives*, Martinus Nijhoff Publishers, 1999, pp. 77-89 at 86-87.
[426] Ibid.
[427] Ibid.

a fundamental human value[428]. In this sense, not only is the free market likely to leave adverse social dynamics intact, but it may also reinforce them. Still, if we adopt a value oriented interpretation of freedom of contract, the ability of the individual to operate within the market free from oppressive attitudes becomes paramount; freedom of access for all is more important than freedom to profit for some. Such a conception of the free market not only does not oppose, but it actually demands a right to substantive equality to be in place.

Moreover, asserting the primacy of human values as against market dynamics does not necessarily imply a decrease in the efficiency of economic activities. It has already been shown that personal characteristics which are deemed morally irrelevant in a political society might become relevant as a matter of expediency in the course of business. But short term expediency does not necessarily amount to long term efficiency. This is so because discriminatory norms are certain to perpetuate a vicious cycle of socio-economic marginalisation which will eventually be harmful to the market; as people from affected groups will become less and less motivated to enter the marketplace, a decrease in human capital is certain to occur[429]. Long term efficiency will be jeopardized as truly meritorious people will be prevented from contributing to it by reason of their personal characteristics.

Following this line of thought, a right to equal treatment may be introduced initially as a way of preventing the damage that the market suffers when an individual whose marginal value product is greater than marginal cost is not allowed to access it freely[430]. In this context, the direct aim would be to address situations where characteristics that are irrelevant to productivity may, in reality, come to be valued by the free market[431]. But even this conception of equality would aim to safeguard primarily an economic freedom, i.e. the freedom the individual should enjoy in order for the market to operate effectively. It is in essence the application of formal, symmetrical equality in commercial transactions: those who contribute equally to the market should be treated equally by the market. The main focus lies on guaranteeing symmetrical treatment for all 'units of production', thereby maintaining genuine competition and general efficiency[432].

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[428] Such an approach would accord with the market oriented approach according to which '[f]reedom of contract is an aspect of individual liberty, every bit as much as freedom of speech, or freedom in the selection of marriage partners or in the adoption of religious beliefs or affiliations' (see Richard A. Epstein, 'In Defense of the Contract at Will', *The University of Chicago Law Review*, Vol. 51, No. 4, 1984, pp. 947-982 at 953).

[429] For a brief discussion, see Cass R. Sunstein, *Free Markets and Social Justice* (supra, n. 418) at 157.

[430] See Gary S. Becker, *The Economics of Discrimination*, The University of Chicago Press, Second edition, 1971, p. 39.

[431] See Kenneth J. Arrow, 'The Theory of Discrimination', in Orley Ashenfelter and Albert Rees (eds.), *Discrimination in Labor Markets*, Princeton University Press, 1973, p. 3.

[432] See Helen Fenwick and Tamara K. Hervey, 'Sex Equality in the Single Market: New Directions for the European Court of Justice', *Common Market Law Review*, Vol. 32, 1995, pp. 443-470 at 444-445.

Now let us go back to the above examples of the employer who discriminates because it is profitable. Under a formal understanding of equality such differential treatment may well be justified objectively as being based, not on a prohibited ground, but on purely economic considerations. Alternatively, one may argue that profit will never be enough in itself to justify differential treatment based on a prohibited ground. But then formal equality is no longer about the existence of an objective justification per se; something more is involved. This additional element appears to be the desire to prevent the marginalisation of a particular ('non-profitable') group. The aim would be to prevent prejudice, stereotyping or lack of reasonable accommodation from determining the opportunities of the individual within the market.

In this case, the freedom from discrimination which is necessary for the achievement of market efficiency (economic freedom) seems to coincide with the need to protect an individual's dignity and autonomy against social oppression (substantive freedom). This is so because social exclusion and market exclusion usually go hand in hand, the one reinforcing the other[433]. Discriminatory norms which imbue the marketplace will almost certainly result in a decrease in trade between different social groups[434]. Hence, social oppression may easily lead to economic disintegration. It seems then that the substantive and the market dimensions of equality and non-discrimination are closely related. This is so because it is eventually impossible to distinguish clearly between the types of disadvantage that affect the economic freedom of the individual and those that affect her substantive freedom.

In this sense, a proper understanding of market equality may reasonably evolve into one of substantive equality; and the primary focus may shift from furthering economic integration through symmetrical treatment to fighting social oppression in the form of prejudice, stereotyping and failures to accommodate. As a matter of fact, this is precisely what has happened in the course of evolution of the right to equality within the European Union. A principle which was inserted into the original treaty framework in order to guarantee the smooth operation of the market came to evolve into a fundamental human right. Perhaps the best starting point in examining how this transformation occurred is to enquire into how a human right to equality came to be relevant for the Economic Community in the first place. Such a brief analysis will demonstrate the crucial role of the ECJ in forming the moral identity of the international marketplace through the 'unwritten constitution'.

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[433] For a brief discussion of different theories regarding this thesis, see Thomas F. D'Amico, 'The Conceit of Labor Market Discrimination', *The American Economic Review*, Vol. 77, No. 2, Papers and Proceedings of the Ninety-Ninth Annual Meeting of the American Economic Association, May 1987, pp. 310-315.

[434] This phenomenon has been referred to as 'economic segregation': see Gary S. Becker, *The Economics of Discrimination* (supra, n. 430) at 22.

4. The judge-made constitution: human rights, equality and market integration

The constitutional structure of what has become today the European Union is not, and has never been, based solely on the text of the Treaties. Perhaps the most important doctrines of Community law have emerged as part of the unwritten, judge-made constitution of the Community which supplements the codified one. Doctrines such as the one of supremacy and direct effect, without which Community law would have been a 'dead letter'[435], derive from it. This unwritten constitution has been at least as instrumental as the Treaties in shaping the constitutional identity of the Union[436]. In this respect, it is hard to deny that the ECJ has traditionally acted as a Constitutional Court and only secondarily as a typical international Court which supervises compliance with the letter of the Treaties[437].

The Court has opted for a purposive (or teleological) interpretation of written EU law, resolving any ambiguity with reference to the objectives pursued by the provision at hand and the Union as a whole[438]. This view has been reflective of the fact that the EU itself is a project permeated by a specific objective[439]. Hence, the teleology of integration that imbues the Treaties renders the *effects* of a legislative act more important than the (presumed) intention of the legislator[440]. In this sense, it is hard to maintain that the ECJ has been just an objective interpreter of the written provisions of EU law[441]. Instead, it is fairer to acknowledge that judicial creativity has been necessary in order to remedy the (disintegrating) political and legislative impasses that often occur in a pluralist legal system[442]. The introduction of human rights in the Community provides a most illustrative example.

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435 See Case C-430/93 Van Schijndel v Stichting Pensioenfonds voor Fysiotherapeuten [1995] E.C.R. I-4705, AG Jacobs's opinion, para. 24.

436 See J.H.H. Weiler, The Transformation of Europe, *The Yale Law Journal*, Vol. 100, No. 8, 1991, pp. 2403-2483 at p. 2413-2419; also see J.H.H. Weiler, 'A Quiet Revolution: The European Court of Justice and Its Interlocutors', *Comparative Political Studies*, Vol. 26, 1994, pp. 510-534.

437 See Eric Stein, 'Lawyers, Judges and the Making of a Transnational Constitution', *American Journal of International Law*, Vol. 75, 1981, pp. 1-27.

438 See, for example, Anthony Arnull, *The European Union and its Court of Justice*, OUP, 1999, pp. 515-527. The Court itself has acknowledged that 'every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied' (see Case 283/81, Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health [1982] E.C.R. 3415, para. 20).

439 That is, 'to lay the foundations of an ever closer union among the peoples of Europe' (the very first sentence of the preamble to the TFEU).

440 See Takis Tridimas, 'The Court of Justice and Judicial Activism', *European Law Review*, Vol. 21, No. 3, 1996, pp. 199-210 at 205-207.

441 See Trevor Hartley, *Constitutional Problems of the European Union*, Hart Publishing, 1999, pp. 22-42. For a broader overview of the significant political role played by the Court, see Alec Stone Sweet, 'The European Court of Justice and the Judicialization of EU governance', *Living Reviews in European Governance*, Vol. 5, No. 2, 2010 (available at *http://www.livingreviews.org/lreg-2010-2*).

442 See Hjalte Rasmussen, *On Law and Policy in the European Court of Justice*, Martinus Nijhoff Publishers, 1986, p. 381.

The unwritten constitution of the EEC played a major role in mitigating the rigidity of the Treaties with regard to the protection of human rights. This was a matter of political necessity, if nothing else, in order to increase legitimacy in the actions of the Community, thereby securing its efficient operation and paving the way for future integration[443]. Indeed, while the common market was to be sustained by democratic member states whose constitutional traditions were built on the ideals of freedom, equality and human rights, there was nothing in the text of the early Treaties which entrenched these values in the legal framework governing the functioning of the Community. To maintain that the constitutional identity of the international organisation could be seen as indifferent to those principles would mean that the 'closer relations' referred to in the Treaty of Rome would hardly ever become a reality in the political sphere.

The enunciation of the principle of supremacy by the ECJ[444] only exacerbated the need to address the mismatch between the economic and the -practically nonexistent at the time- moral constitution of the Community[445]. Unless the ECJ could guarantee a framework for the protection of fundamental rights, conceding to the absolute supremacy of Community law would automatically jeopardise the rule of law as understood in domestic constitutions[446]. In other words, just like the common market was doomed without the doctrine of supremacy, the doctrine of supremacy itself was doomed without a judicially enforceable code of fundamental rights in the Community[447]. The Court took up the task and respecting human rights came to be seen as a

[443] For a good discussion, see Grainne de Burca, 'The Language of Rights and European Integration', in Jo Shaw and Gillian More (eds.), *New Legal Dynamics of the European Union*, OUP, 1995, pp. 29-54.

[444] See Case 6/64, Flaminio Costa v E.N.E.L. [1964] E.C.R. 585.

[445] See, for example, Case 40/64, Marcello Sgarlata and others v Commission of the EEC [1965] E.C.R. 215 where the Court refused to examine whether or not there was an interference by the Community with the right of individuals to protection by the courts which formed one of the 'fundamental principles governing all the member states'. For a further instance of the Court distancing itself from the fundamental constitutional rights protected by domestic constitutions, see Joined cases 36, 37, 38/59 and 40/59, Geitling Ruhrkohlen v High Authority of the European Coal and Steel Community [1960] E.C.R. 423.

[446] Such concerns triggered the reaction of the German Constitutional Court which refused to accept the supremacy of EC law over the fundamental rights enshrined in the German constitution: see Internationale Handelsgesellschaft von Einfuhr- und Vorratsstelle für Getreide und Futtermittel (Case 2 BvL 52/71), Bundesverfassungsgericht (Germany), 29 May 1974, [1974] 2 C.M.L.R. 540 – also known as Solange I. This decision was later reversed by the same Court which, nevertheless, warned that it will not question the compatibility of EC law with domestic fundamental rights only for as long as it remains satisfied that 'the European Communities, and in particular [...] the European Court, generally ensure an effective protection of fundamental rights as against the sovereign powers of the Communities which is to be regarded as substantially similar to the protection of fundamental rights required unconditionally by the Constitution': see Re the Application of Wünsche Handelsgesellschaft (Case 2 BvR 197/83), Bundesverfassungsgericht (Germany), 22 October 1986, [1987] 3 C.M.L.R. 225 at 265 – also known as Solange II. It has been rightly argued that Solange I was decisive in motivating the ECJ and the EC institutions to create a framework for the protection of fundamental freedoms in the Community: see Karen J. Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe*, OUP, 2001, pp. 87-98; also see Eric Stein, 'Lawyers, Judges and the Making of a Transnational Constitution'(supra, n. 437) at 14. For a similar challenge to the supremacy of EC law in cases of tension with fundamental rights guaranteed by national constitutions see Frontini v Ministero delle Finanze (Case 183), Corte Costituzionale (Italy), 27 December 1973, [1974] 2 C.M.L.R. 372.

[447] For a good discussion, see Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe*, OUP, 2000, pp. 170-174. This reality is obviously linked to the wider position according to which 'human rights

condition for the legitimacy of the actions of the Community[448] and the actions of member states when implementing Community rules[449].

The medium through which human rights first became part of the EU constitutional order was the general principles of law. These general principles form one of the most basic components of the judge-made constitution. They have been described as those fundamental unwritten principles which have evolved in the jurisprudence of the ECJ and which 'derive from the legal systems of the Member States but their content as sources of Community law is determined by the distinct features of the Community polity'[450]. The general principle of respect for fundamental rights was identified for the first time by the Court in 1969[451] and was employed just one year later in the course of establishing the supremacy of EU law over provisions of national constitutions[452].

Still, this general principle did not find its way into the text of the Treaties until 1986[453]. It took even longer for a comprehensive Charter of Fundamental Rights of the Union to come into being[454]. This uncodified and relatively unclear nature of the general principle paved the way for the smooth introduction of human rights in the constitutional landscape of the Community. Amending the Treaty in the early days so as to include a human rights charter would constitute a radical change in the nature of the international agreement as it then stood[455]. The general principles of law offered a practical alternative, introducing a framework for the protection of

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provide the sole recognised basis of legitimation for the politics of the international community': see Jurgen Habermas, *The Postnational Constellation*, Polity Press, 2001, p. 119.

[448] Case 11/70, Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel [1970] E.C.R. 1125.

[449] Case 5/88, Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft [1989] E.C.R. 2609, para. 19.

[450] Takis Tridimas, *The General Principles of EC Law*, OUP, Second edition, 2006, pp. 5-6; also see the dicta of the ECJ in Case 11/70, Internationale Handelsgesellschaft mbH v Einfuhr (supra, n. 448), para. 4.

[451] Case 29/69, Stauder v City of Ulm [1969] E.C.R. 419, para. 7 where the Court stipulated for the first time that it would safeguard 'the fundamental human rights enshrined in the general principles of community law'.

[452] See Case 11/70, Internationale Handelsgesellschaft mbH v Einfuhr (supra, n. 448), where the Court found that 'the validity of a community measure or its effect within a member state cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that state or the principles of a national constitutional structure' (para. 3); it then went on, right away, to confirm that 'respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice' (para. 4).

[453] An early reference to fundamental rights protection is traced in the preamble to the Single European Act (1986) which expressed the determination of the member states 'to work together to promote democracy on the basis of the fundamental rights recognized in the constitutions and laws of the Member States'. The jurisprudence of the Court on the matter was codified by the legislature of the EU for the first time in 1992, in Article F(2) TEU (now Article 6(3) TEU) which heralded that '[t]he Union shall respect fundamental rights, as guaranteed by the [ECHR] and as they result from the constitutional traditions common to the Member States, as general principles of Community law'.

[454] The Charter of Fundamental Rights of the European Union was solemnly proclaimed by the European Parliament, the Council of the European Union and the European Commission on 7 December 2000 and entered into force on 1 December 2009.

[455] See J.H.H. Weiler, 'Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights Within the Legal Order of the European Communities', *Washington Law Review*, Vol. 61, 1986, p. 1103-1142 at 1110-1113.

human rights which would gradually evolve in the Court's case law until the member states considered that the time was ripe for the introduction of a codified charter.

The general principle of respect for human rights came to add a substantive meaning to the general principle of equality[456]. The latter principle has dwelled within the jurisprudence of the Court for almost as long as the Court has existed, constituting one of the cornerstones of market integration[457]. Like all general principles of EU law, the general principle of equality is a creation of the ECJ and for this reason it may accurately be described as part of EU common law[458]; but this common law status does not imply a lower place in the EU hierarchy of norms[459]. In fact, the general principle can be seen as constituting the pre-existing imperative to which EU equality legislation gives specific legal effect[460].

As a consequence of this view, many anti-discrimination provisions contained in primary and secondary EU law have been referred to by the Court as *specific enunciations* of the general principle of equality. This stance is important, inter alia, in confirming that EU equality law is not a matter of contingency, but a pre-existing aspiration which is being fulfilled gradually as the Union's multiple identities (economic, social, political) solidify on the face of the Treaties. Indeed, the Court had been using the term *equality*, rather than simply *non-discrimination*, in describing the general principle of EU law long before the term expressly appeared in any of the provisions of the Treaty framework[461]. This on its own seems to denote that a more elaborate conception of equality began

[456] The principle has also been referred to as 'the general principle of equal treatment' (e.g. Case C-292/97, Kjell Karlsson and others [2000] E.C.R. I-2737, para. 39) or 'the principle of non-discrimination' (e.g. Case C-354/95, National Farmers' Union and Others [1997] E.C.R. I-4559, para. 61). The title 'general principle of equality' is preferred here because, as well as being used by the Court most regularly, it is deemed to encapsulate the full essence of the broader principle which includes the requirement for non-discrimination and equal treatment.

[457] See, for example, Case 8-57, Groupement des hauts fourneaux et aciéries belges v High Authority of the European Coal and Steel Community [1958] E.C.R. 245 where the Court drew from the legal systems of the member states a general principle of 'equality of treatment in the matter of economic rules' which (being based in the Aristotelian notion) '[did] not prevent different prices being fixed in accordance with the particular situation of consumers or of categories of consumers provided that the differences in treatment correspond to a difference in the situation of such persons' (at p. 256).

[458] See the dicta of Laws J. in R. v Ministry of Agriculture, Fisheries and Food and Another [1997] 1 C.M.L.R. 250 at 267 (Judgment of the British High Court).

[459] The Court has time and again confirmed that this general principle 'is one of the fundamental principles of Community law': see, for example, Case 1-72, Rita Frilli v Belgian State [1972] E.C.R. 457, para. 19.

[460] To use the words of AG Mazak, 'the concept of general principle relates to a particular form of rule rather than to a particular content: it describes a source of law which may embrace rules of widely varying content and degree of completeness […]': Case C-411/05, Félix Palacios de la Villa v Cortefiel Servicios SA [2007] E.C.R. I-8531, para. 134 of the AG's opinion.

[461] While containing references to the principles of non-discrimination (e.g. Article 7 EEC) and equal treatment (e.g. Article 119 EEC), the original EEC Treaty did not contain a single reference to the wider principle of equality as such. This, however, did not prevent the Court from referring to the 'general principle of equality' as the wider principle which constituted the source of the various anti-discrimination provisions: see, for example, Joined cases 117-76 and 16-77, Albert Ruckdeschel & Co v Hauptzollamt Hamburg-St Annen; Diamalt AG v Hauptzollamt Itzehoe [1977] E.C.R. 1753, para. 7.

to form within the jurisprudence of the Court long before it was espoused by the legislators of the EU.

The fact that no reference was made to human rights norms in the original Treaty framework led to the adoption of a formal understanding of the general principle of equality; this interpretation purported to maintain rationality and predictability in the functioning of the market. Accordingly, the general principle came to require 'that comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified'[462]. A treatment will be objectively justified if it pursues a legitimate aim and employs no more than the appropriate and necessary means to achieve it (i.e. if it accords with the principle of proportionality)[463].

Of course, the legally enforceable scope of this principle is strongly tied to the ever developing content of written EU legislation, i.e. it will not be enforced against a member state in an area which is the subject of national legislation and for which the EU has not assumed responsibility either through primary or secondary legislation[464]. But within these boundaries, the general principle has developed through the examination of an extremely versatile range of affairs ranging from the common organisation of agricultural markets[465] to the protection of an individual's dignity and autonomy[466]. As a result, it has proven to be a powerful tool in the hands of the Court.

Like all general principles of EU law, the general principle of equality may perform several different functions. First, it operates as a ground for reviewing actions of the institutions of the Union[467]. Second, it is a rule that should be respected by the member states when i) they implement EU law[468], ii) they invoke a permitted derogation under EU law[469] or, iii) they otherwise

[462] See Case C-56/94, SCAC Srl v Associazione dei Produttori Ortofrutticoli [1995] E.C.R. I-1769, para. 27; for a more recent example, see Case C-101/08, Audiolux SA v Groupe Bruxelles Lambert SA [2009] E.C.R. I-9823, para. 54.

[463] See Case C-476/99, H. Lommers v Minister van Landbouw [2002] E.C.R. I-2891, para. 39.

[464] See Case 149/77, Gabrielle Defrenne v SABENA [1978] E.C.R. 1365 where the Court found that 'as regards the relationships of employer and employee which are subject to national law, the Community had not [...] assumed any responsibility for supervising and guaranteeing the observance of the principle of equality between men and women in working conditions other than remuneration' (para. 30); hence, the Court concluded that at the time when the events of the case occured there was 'no rule of Community law prohibiting discrimination between men and women in the matter of working conditions other than the [Article 119] requirements [...]' (para. 33).

[465] See, for example, Case 245/81, Edeka Zentrale AG v Federal Republic of Germany [1982] E.C.R. 2745.

[466] See Case C-13/94, P v S and Cornwall County Council [1996] E.C.R. I-2143 (discussed below).

[467] For early examples, see Case 20-71, Luisa Sabbatini, née Bertoni, v European Parliament [1972] E.C.R. 345 and Joined cases 75 and 117/82, C. Razzouk and A. Beydoun v Commission of the European Communities [1984] E.C.R. 1509. For a more recent example, see Case C-25/02, Katharina Rinke v Ärztekammer Hamburg [2003] E.C.R. I-8349.

[468] See, for example, Case 5/88, Hubert Wachauf (supra, n. 449), para. 19 and Case C-2/92, The Queen v Ministry of Agriculture, Fisheries and Food, ex parte Dennis Clifford Bostock [1994] E.C.R. I-955, para. 16.

act within the field of application of EU law[470]. Third, it is employed by the court as an instrument for the interpretation of EU legislation, filling in, when necessary, the lacunae in written EU law[471].

The interaction between the general principle of respect for human rights and the general principle of equality logically encouraged the recognition of a substantive, human rights dimension of the latter within the judge-made constitution of the EU. As a consequence, the general principle of equality came to be seen as aiming to secure a fundamental human value as well as a market freedom[472]. In the next two sections, this substantive reading of market equality will be examined with reference to nationality and sex discrimination respectively.

5. Nationality discrimination: from equal worker to equal citizen

Advocate General Sharpston accurately noticed that the material scope of the principle of equality evolves with society[473]. Given that the political goals of the Union have been pursued historically through the process of economic cooperation, it is no surprise that a substantive understanding of equality came into being gradually through the pursuit of an integrated market. Indeed, although market equality and substantive equality might come to contradict each other in terms of the goals they pursue, it can fairly be argued that the former has contributed a great deal towards the emergence of the latter in EU law. It would not be an exaggeration to suggest that the two dimensions of equality have, to a great extent, developed in a continuum.

At this point, it is useful to draw a distinction between what has been described as the 'market integration model' and the 'social citizenship model' of EU social policy[474]. The market integration model perceives equality and the social policy measures designed to give effect to it as a means towards the achievement of a more efficient market. The social citizenship model, on the other hand, 'foresee[s] a social policy as vibrant and autonomous as the Union's activities in the

[469] See, for example, Case C-260/89, Elliniki Radiophonia Tileorassi AE (ERT) v Dimotiki Etairia Pliroforissis (DEP) [1991] E.C.R. I-2925, paras. 41-44 and Case C-368/95, Vereinigte Familiapress Zeitungsverlags- und Vertriebs GmbH v Bauer Verlag [1997] E.C.R. I-3689, para. 24.
[470] See, for example, Case C-299/95 Friedrich Kremzow v Republik Österreich [1997] ECR I-2629, para. 15 and Case C-71/02, Herbert Karner Industrie Auktionen GmbH v Troostwijk GmbH [2004] E.C.R. I-3025, para. 49.
[471] For a good example, see Case C-13/94, P v S and Cornwall County Council (supra, n. 466).
[472] See, for example, Case C-442/00, Ángel Rodríguez Caballero v Fondo de Garantía Salarial (Fogasa) [2002] E.C.R. I-11915, paras. 30-32.
[473] See C-427/06, Birgit Bartsch v Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH [2008] E.C.R. I-7245, para. 46 of the AG's opinion.
[474] See Mark Bell, *Anti-Discrimination Law and the European Union*, OUP, 2002, pp. 6-23.

economic sphere'[475]. There is no doubt that the principle of equality was originally based solely on the market integration model.

Non-discrimination was considered vital in securing the smooth harmonization of member states' policies and the removal of obstacles which would impinge on the exercise of the fundamental economic freedoms on which the newly established common market was founded[476]. Hence, for example, both direct and indirect discrimination between producers or consumers was prohibited in the context of the common organisation of agricultural markets[477]. The role of equality in these circumstances can broadly be described as twofold. First, it aimed to promote free trade and solidarity by ensuring an equal right of access for persons, services and products irrespective of national origin ('market-unifying role')[478]. Second, it purported to prevent distortions of competition by making sure that no discriminatory measures would be adopted by the institutions of the Community when regulating the common market ('regulatory role')[479].

Even in its usage as a tool for the enhancement of economic efficiency, this market oriented conception of equality contributed a great deal to strengthening the social and political face of the European Community. This much is demonstrated through a brief analysis of Article 7 EEC (now Article 18 TFEU) which prohibited any discrimination on the ground of nationality within the field of application of the Treaty[480]. For more than forty years[481], nationality was the only not inherently market based ground which was covered by a general prohibition of discrimination on the face of the Treaty; discrimination on grounds of sex was also prohibited, but only with regard to the provision of equal pay for equal work[482].

In contrast to the equal pay provision, the prohibition of discrimination on grounds of nationality was, prima facie, nothing more than a rule (albeit one expressed in the language of equality) which secured freedom of movement within the Community. Indeed, the free movement provisions

[475] Ibid., p. 7.
[476] Free movement of persons, capital, services and goods.
[477] See Article 40(3) EEC; also see the decision of the ECJ in Case 106/83, Sermide SpA v Cassa Conguaglio Zucchero and others [1984] E.C.R. 4209, para. 28.
[478] See Gillian More, 'The Principle of Equal Treatment: From Market Unifier to Fundamental Right?' in Paul Craig and Grainne de Burca (eds.), *The Evolution of EU Law*, OUP, 1999, pp. 517-553 at 521-530; also see Grainne de Burca, 'The Role of Equality in European Community Law' in Alan Dashwood & Siofra O'Leary (eds.), *The Principle of Equal Treatment in EC Law*, Sweet & Maxwell, 1997, pp. 13-34 at 24-29.
[479] Gillian More (ibid.) at 530-535.
[480] This prohibition was given specific effect in relation to workers in Articles 48-51 EEC; especially Article 48(2).
[481] That is until the introduction of Article 13 EC by the Treaty of Amsterdam in 1999. Of course, Article 13 itself did not provide for a direct prohibition of discrimination on the various grounds it referred to (sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation). It simply allowed for such prohibitions to be created by 'the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament'.
[482] Article 119 EEC (now Article 157 TFEU). As will be argued below, this prohibition proved to be instrumental in the emergence of substantive equality in the Union.

would make little sense if an individual taking advantage of them was not afforded the same rights as those enjoyed by nationals of the host member state. Accordingly, the primary purpose of the rule was to prohibit discrimination against individuals who exercised their free movement rights[483]. But as time went by, the significance of this prohibition proved not to be limited to the advancement of economic integration.

The prohibition of discrimination on grounds of nationality was instrumental in reinforcing the place of the individual in the common market. By highlighting the capability to enter the market and function within it as an equal, it demonstrated that 'the Community is not just a commercial arrangement between the governments of the member states but is a common enterprise in which all the citizens of Europe are able to participate as individuals'[484]. In other words, the prohibition legally affirmed that the protection of the individual went hand in hand with the success of the EC project. Such an acknowledgment was most important in the context of a supra-national economic organisation whose direct subjects were the member states, rather than their nationals.

Moreover, one may reasonably maintain that the right to equal treatment irrespective of nationality cultivated the dynamics that led to the emergence of EU citizenship in the Treaty of Maastricht[485]. Cases like Cowan[486] support the argument that the transformation of the Community worker into a Union citizen had been initiated by the Court through the principle of non-discrimination on grounds of nationality before EU citizenship actually found its way into the text of the Treaties. Following the introduction of EU citizenship, even those member state nationals who do not pursue an economic activity can move and reside in another member state free from discrimination on grounds of nationality[487]. Hence, the scope of the prohibition was extended to protect

[483] See, for example, Joined cases 35 and 36/82, Morson and Jhanjan v Netherlands [1982] E.C.R. 3723, para. 15; also see Case C-10/90, Masgio v Bundesknappschaft [1991] E.C.R. I-1119, paras. 13, 18 and 25.

[484] F.G. Jacobs, 'An Introduction to the General Principle of Equality in EC Law' in Alan Dashwood & Siofra O'Leary (eds.), *The Principle of Equal Treatment in EC Law*, Sweet & Maxwell, 1997, pp. 1-12 at 2.

[485] Article 8 EC (now Article 21 TFEU) as amended by the Treaty of Maastricht. The prohibition of discrimination on grounds of nationality obviously lies at the heart of EU citizenship; besides, national and EU citizenship are closely interrelated both conceptually and practically: see Dora Kostakopoulou, 'European Union Citizenship: Writing the Future', *European Law Journal*, Vol. 13, No. 5, September 2007, pp. 623-646.

[486] Case C-186/87, Cowan v Tresor Public [1989] E.C.R. 195. In that case, a British tourist who was attacked in Paris claimed criminal injuries compensation. He was refused on the grounds that he was neither a national of a state which had concluded a reciprocal agreement with France for the application of the scheme nor did he hold a residence permit. The ECJ found that tourists may fall within the ambit of the principle of non-discrimination on grounds of nationality in that they are persons who receive services in another member state and, therefore, should be treated on equal terms with nationals of that state (para. 17); this was so even though the matter concerned domestic criminal legislation which falls outside the scope of the Treaty (paras. 18-19).

[487] Such was the effect of a combined reading of Articles 6 (ex 7 EEC), 8 and 8a of the EC Treaty as amended by the Treaty of Maastricht; the ECJ has found that 'a citizen of the European Union […] lawfully resident in the territory of the host Member State, can rely on Article 6 of the Treaty in all situations which fall within the scope ratione materiae of Community law': Case C-85/96, María Martínez Sala v Freistaat Bayern [1998] E.C.R. I-2691, para. 63; also see Case C-184/99, Rudy Grzelczyk v CPAS [2001] E.C.R. I-

individuals operating outside the strict limits of the market[488]. In this context, a principle which initially aimed to facilitate free movement of workers was used increasingly by the Court to safeguard political and social rights which did not appear to fall within the material scope of the Treaty[489].

The effects of the prohibition of discrimination on grounds of nationality sustain the view that the process of economic integration itself has contributed to the development of the social and political character of the Union. In this sense, the social citizenship model (substantive equality) might fairly be seen as part of the natural evolution of the market integration model (market equality). The truth of this assertion and the crucial role of the ECJ in this process become most evident in the context of sex discrimination. What began as an interpretation of Article 119 EEC has now evolved into one of the most basic principles of the EU Charter of Fundamental Rights.

6193. It is worth noting that the Court also found that, due to the emergence of European citizenship, the right of residence itself would no longer be subject to the carrying of an economic activity within the meaning of the Treaty provisions concerning free movement of workers, freedom of establishment and free supply of services: see Case C-413/99, Baumbast v Secretary of State for the Home Department [2002] E.C.R. I-7091, para. 81. This is not, however, to suggest that economic activity became completely irrelevant in relation to EU citizens' right of residence in the territory of another member state: see, for example, Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, [2004] O.J. L 158/77, Article 7.

[488] For a good discussion, see James D. Mather, 'The Court of Justice and the Union Citizen', *European Law Journal*, Vol. 11, No. 6, November 2005, pp. 722-743. To use the words of Paul Craig, 'Article 12 [now Article 18 TFEU] in conjunction with the citizenship provisions has been used to break down the pre-existing dichotomy between free movement *qua* worker and free movement *qua* citizen. The necessary corollary of this development has been that greater emphasis has been placed on the social as opposed to the economic rationale for free movement': see Paul Craig, *EU Administrative Law*, OUP, 2006, p. 576.

[489] See, for example, C-148/02, Carlos Garcia Avello v Belgium [2003] E.C.R. I-11613 where the Court found that, in the circumstances of the case, Articles 12 EC (now Article 18 TFEU) and 17 EC (now Article 20 TFEU) prevented a national authority from refusing to change the surname of EU citizens with dual nationality; also see Case C-274/96, Criminal Proceedings against Bickel [1998] E.C.R. I-7637 where, while accepting that Member States are responsible for rules of criminal procedure, the Court affirmed the right of an Austrian lorry driver and a German tourist to have criminal proceedings brought against them in Italy in the German language. The reasoning of the Court was based on the interpretation of Article 6 EC (now Article 18 TFEU) combined with Article 8a EC (now Article 21 TFEU) and Article 59 EC (now Article 56 TFEU). The crucial factor was that this particular right was guaranteed to citizens who belonged in the German-speaking community residing in the particular province of Italy. But even before EU citizenship was introduced, the ECJ had employed Article 7 EEC (now Article 18 TFEU) to confer on an individual rights which did not, prima facie, seem to fall within the material scope of the Treaty: see Case C-186/87, Cowan (supra, n. 486). For a good discussion of the significance of nationality discrimination and free movement for the emergence of social rights protection in the jurisprudence of the ECJ, see Koen Lenaerts and Petra Foubert, 'Social Rights in the Case-Law of the European Court of Justice', *Legal Issues of Economic Integration*, Vol. 28, No. 3, 2001, pp. 267-296.

6. Sex discrimination: from equal pay to equal dignity

The first specific manifestation of the general principle of equality which was recognised and enforced by the Court was the 'general principle of law prohibiting any discrimination on grounds of sex'[490]. The main reason why this general principle merited special attention was the existence of Article 119 EEC (now Article 157 TFEU) which was deemed to be part of it[491]. Article 119 EEC played a major role in enabling the Court to introduce a conception of equality that placed the protection of the individual over market concerns. This may not come as a surprise considering that it encapsulated the only prohibition of discrimination (included in the original EEC Treaty) which was not related to free movement.

In contrast to the general prohibition of discrimination on grounds of nationality, Article 119 was limited to the requirement that women and men should receive equal pay for equal work. Its inclusion in the EEC Treaty was considered necessary in order to ensure that countries benefiting from the exploitation of cheap female labour would not enjoy a competitive advantage over countries which did not do so[492]. Nevertheless, notwithstanding the economic rationale behind its adoption, Article 119 EEC formed part of the social policy title of the EEC Treaty and it was the only provision therein that imposed a direct positive obligation on the member states. Hence, albeit narrow in scope, Article 119 contained a prohibition which was strong enough to signal that the elimination of sex discrimination was a priority in the social agenda of the EEC.

In a famous judgment delivered in 1976, the ECJ demonstrated that it would not take this matter lightly. Thus, the Court confirmed that Article 119 generated a right which the individual could enforce not only in relation to actions of public authorities, but also with regard to 'all agreements which are intended to regulate paid labour collectively, as well as to contracts between individuals' (horizontal direct effect)[493]. This finding was anything but clearly compatible with the text of Article 119 which provided explicitly that the obligation contained therein was directed to the member states[494].

Some commentators have justified the judicial creativity demonstrated by the Court on the ground that member states and the Commission had systematically neglected the proper implementation

[490] Case 20-71, Luisa Sabbatini (supra, n. 467).
[491] Ibid., para. 3
[492] For a good discussion, see Catherine Barnard, 'The Economic Objectives of Article 119', in Tamara K. Hervey and David O' Keefe (eds.), *Sex Equality Law in the European Union*, John Willey & Sons, 1996, pp. 321-334; also see Christine Boch, 'The European Community and Sex Equality: Why and How?', in David Hume Institute, *Sex Equality: Law and Economics*, Hume Papers on Public Policy, Vol. 1, No. 1, Edinburg University Press, 1993, pp. 1-21.
[493] Case 43/75, Gabrielle Defrenne v SABENA [1976] E.C.R. 455, para. 39.
[494] 'Each Member State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work […]'.

of Article 119 in domestic law[495]. Others have described the decision simply as a 'most grave judicial policy involvement'[496]. Irrespective of whether or not one agrees with the attitude of the ECJ, it is hard to resist the conclusion that this finding contributed greatly to the emergence of a wider construction of the right to equality under the rubric of Article 119. The point is reinforced significantly if we consider that the Court established in the same case that the principle of equal pay for equal work regardless of sex pursued both an economic *and a social aim*. The social aim referred to the need 'to ensure social progress and seek the constant improvement of the living and working conditions' of the people of the Community[497].

Following the same spirit, again in a case concerning the interpretation of Article 119 EEC, the Court acknowledged two years later that protection against sex discrimination constituted part of the 'fundamental personal human rights' safeguarded by the general principles of EC law[498]. This fundamental human right could also extend beyond the requirements imposed by Article 119 EEC or the relevant directives[499]. This tendency of the Court to make the most of what was originally conceived as a purely economic provision also paved the way for generous interpretations of the equal pay requirement. Thus, for example, 'pay' was construed so widely as to include a plan set up by an employer to provide retired employees with special travel facilities[500].

Most importantly, the Court recognised that Article 119 prohibited indirect forms of discrimination as well. Let us take the scenario of a pay scheme which disadvantages part-time workers but which applies equally to all such workers, irrespective of sex. As a matter of form the measure does not create any arbitrary distinctions based on sex; but in reality women may eventually be more likely than men to cover these posts due to social structures relating to their role in childcare. Acknowledging that such instances of differential treatment between full-time and part-time workers could amount to covert sex discrimination under Article 119 meant that the

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[495] See Oreste Pollicino, 'Legal Reasoning of the Court of Justice in the Context of the Principle of Equality: Between Judicial Activism and Self-restrained', *German Law Journal*, Vol. 5, No. 3, 2004, pp. 283-317 at 299; also see Rachel A. Cichowski, 'Judicial Rulemaking and the Institutionalization of European Union Sex Equality Policy', in Alec Stone Sweet, Wayne Sandholtz, Neil Fligstein (eds.), *The Institutionalization of Europe*, OUP, 2001, pp. 113-136 at 118. The Court itself took 'exceptionally into account the fact that, over a long period, the [member states] have been led [by the Commission] to continue with practices which were contrary to Article 119': see Case 43/75, Gabrielle Defrenne (supra, n. 493), paras. 72-73.

[496] See Hjalte Rasmussen, *On Law and Policy in the European Court of Justice* (supra, n. 442) at 29.

[497] Case 43/75, Gabrielle Defrenne v SABENA (supra, n. 493), para. 10. This interpretation drew inspiration from the preamble of the EEC Treaty which set the improvement of the people's living and working conditions as an 'essential objective' of the Community. It is worth noting that the dual aim pursued by Article 119 had also been stressed five years earlier by AG M. Alain Dutheillet de Lamothe in Case 80/70, Gabrielle Defrenne v Belgium [1971] E.C.R. 445.

[498] Case 149/77, Gabrielle Defrenne v SABENA (supra, n. 464), paras. 26-27.

[499] In cases concerning the relationship between Community institutions and their employees: see Joined cases 75 and 117/82, C. Razzouk et A. Beydoun (supra, n. 467), para. 17.

[500] See Case 12/81, Eileen Garland v British Rail Engineering Limited [1982] E.C.R. 359; this was so despite the fact that the employer was not under a contractual obligation to confer those benefits in the first place (paras. 10-11).

actual effects of a treatment were the guiding factor, not simply its form[501]. Thus, equal treatment will not always amount to treatment as an equal; instead, account must be taken of the specific conditions that women might find themselves in as opposed to men. This form of reasonable accommodation is limited to proscribing unjustified disproportionate impact of specific measures on a protected group.

But the ECJ has also imposed duties of reasonable accommodation where women are denied an opportunity simply because of the way their sex interacts with the wider social and physical environment; that is, in cases where an objective justification is at hand or where no specific treatment is to blame for the resulting disproportionateness. More specifically, the Court relied on the prohibition of sex discrimination contained in Articles 2(1) and 3(1) of Council Directive 76/207 (Equal Treatment Directive)[502] to establish that a refusal to hire a woman on grounds of pregnancy amounted to sex discrimination which could not be justified on the grounds of the financial damage the employer would suffer during the period of maternity leave[503]. This was so despite the fact that the directive made no specific provision for pregnancy, except for Article 2(3) which was limited to clarifying that the directive was to be construed as being 'without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity'.

In essence, the ECJ transformed that exception into an obligation to provide reasonable accommodation for pregnancy and maternity in employment. This duty was subsequently espoused by the legislature of the EU[504] and described by the Court as signifying that 'the result pursued by the [Equal Treatment] Directive is substantive, not formal, equality'[505]. Today, under the terms of

[501] See Case 96/80, J.P. Jenkins v Kingsgate (Clothing Productions) Ltd. [1981] E.C.R. 911; also see Case 170/84, Bilka-Kaufhaus GmbH v Karin Weber von Hartz [1986] E.C.R. 1607. The jurisprudence of the Court on the matter was codified for the first time in the Burden of Proof Directive (Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex, [1998] O.J. L 14/6).

[502] Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, [1976] O.J. L 39/40.

[503] See Case C-177/88, Elisabeth Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus [1990] E.C.R. I-3941, para. 12; on the same day, the Court found that dismissal of a female worker on account of pregnancy also constitutes direct sex discrimination under the terms of Directive 76/207: see Case C-179/88, Handels- og Kontorfunktionaerernes Forbund i Danmark v Dansk Arbejdsgiverforening [1990] E.C.R. I-3979, para. 13. Also see Case C-32/93, Carole Louise Webb v EMO Air Cargo (UK) Ltd [1994] E.C.R. I-3567 where the Court concluded that Articles 2(1) and 5(1) of Directive 76/207 precluded dismissal of an employee on grounds of inability to perform her duties due to pregnancy (para. 27).

[504] See Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, [1992] O.J. L 348/1.

[505] See Case C-136/95, Caisse nationale d'assurance vieillesse des travailleurs salariés (CNAVTS) v Evelyne Thibault [1998] E.C.R. I-2011, para. 26.

Directive 2006/54 (Recast Directive)[506], proper accommodation of pregnant women is no longer understood as being external to the principle of equality as was originally the case ('without prejudice'). Instead, failure to provide such accommodation is perceived as a specific form of discrimination[507]. But the Court has not contributed to promoting a substantive understanding of equality only in terms of reasonable accommodation requirements.

The ECJ has played a significant role in demonstrating that equality also aims to protect individual dignity and autonomy against prejudice and stereotyping. Perhaps the most prominent example of this stance is to be found in the case of P v S[508] which concerned the interpretation of Art. 5(1) of Council Directive 76/207. The Equal Treatment Directive expanded for the first time the scope of Community law so as to include sex discrimination in matters other than equal remuneration for equal work. Article 5(1) provided that '[a]pplication of the principle of equal treatment with regard to working conditions, including the conditions governing dismissal, means that men and women shall be guaranteed the same conditions without discrimination on grounds of sex'.

In April 1992 P, who was working for an education establishment, informed the institution's director (S) that he was planning to undergo gender reassignment. In September 1992, after the beginning but before the completion of the necessary surgical operations, P was given a notice of dismissal. The question that the ECJ had to deal with was whether or not P could qualify as the victim of sex discrimination for the purposes of the aforementioned provision of the directive if it was proven that he had been fired because of the gender reassignment.

The Court emphasised that 'the directive is simply the expression, in the relevant field, of the principle of equality, which is one of the fundamental principles of Community law'[509] and reaffirmed that 'the right not to be discriminated against on grounds of sex is one of the fundamental human rights whose observance the Court has a duty to ensure'[510]. It concluded that the purpose of the directive was to protect against any discrimination on grounds of sex in general and its effect should not be 'confined' only to issues of differential treatment between men and women[511]; accordingly transsexuals would be protected. This finding is quite striking considering that Art. 5(1) ETD specifically referred to 'men and women'.

[506] Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), [2006] O.J. L 204/23.
[507] Article 2(2)(c) of Directive 2006/54/EC.
[508] Case C-13/94, P v S and Cornwall County Council (supra, n. 466).
[509] Ibid., para. 18.
[510] Ibid., para. 19.
[511] Ibib., para. 20.

The Court in P v S essentially employed the general principle of non-discrimination on grounds of sex in order to widen the scope of the directive. But, given the extremely wide interpretation achieved, one may reasonably argue that the Court did not apply the letter of the directive, but that of 'a general principle of unwritten Community human rights law'[512]. Following the formal conception of equality espoused under the general principle, it held that the proper comparators were persons of the sex to which a transsexual was deemed to belong prior to the operation[513]. Of course, this reasoning is based on a tautology in that it implies that the proper comparator is essentially the applicant himself, only before the operation. That's then another way to say that it was the reason behind the treatment (i.e. the carrying out of the operation) that was offending to the principle of equality, not the differential treatment itself[514]. It was the fact that prejudice prevented a transsexual from enjoying equal respect with non-transsexuals simply because he or she chose to be a transsexual in the first place.

This substantive reading of equality which aims to protect individual autonomy against social oppression in the form of prejudice was acknowledged by the ECJ which stressed that 'to tolerate such discrimination would be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled, and which the Court has a duty to safeguard'[515]. The need for departure from formal equality was also stressed by the Advocate General who maintained that the true essence of the principle at hand was 'the irrelevance of a person's sex with regard to the rules regulating relations in society'[516]. Indeed, the Advocate General himself seemed to acknowledge that a strict adherence to the formal understanding of equality would probably not offer effective protection to P[517].

This case constitutes a very good example as to how human rights values may be upheld in the course of safeguarding market freedoms. One would expect that the provisions of the directive were designed purely to protect the ability of an individual to enter the market and function freely within it[518]. Indeed, the directive itself was adopted under Article 235 EEC which allowed the Council to take measures to facilitate the achievement of Community objectives in the operation of

[512] See Takis Tridimas, 'The Application of the Principle of Equality to Community Measures', in Alan Dashwood & Siofra O'Leary (eds.), *The Principle of Equal Treatment in EC Law*, Sweet & Maxwell, 1997, pp. 214-242 at 217.

[513] P v S (supra, n. 466), para. 21 .

[514] As the United Kingdom submitted, this case could hardly be described as discrimination on grounds of sex because P would have also been dismissed had he been a woman undergoing operation to become a man. Hence, women and men were treated equally badly (levelling down).

[515] P v S (supra, n. 466), para. 22.

[516] Para. 24 of the opinion of AG Tesauro in P v S; also see para. 17 of the judgment of the Court ('the principle of equal treatment "for men and women" to which the directive refers [...] means [...] that there should be "no discrimination whatsoever on grounds of sex"').

[517] Para. 20 of the AG's opinion in P v S.

[518] The official purpose of the Directive, as provided in its title, was to implement 'the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions'.

the common market. Protecting human dignity and autonomy of individuals against prejudice hardly seemed to have been part of this initial plan. Moreover, the finding in P v S was not limited to the directive at hand, but it extended the scope of the whole body of EU sex equality law, including the rule originally contained in Article 119 EEC[519]. So, post P v S, transsexuals would be able to benefit fully from all provisions guaranteeing equality between women and men.

Nevertheless, safeguarding human dignity and autonomy hardly became the new rule of interpretation of the general principle of equality understood as a human right. Almost two years after P v S, the Court refused to extend the same protection to homosexual people. The case of Grant[520] concerned a female employee (G) who was in a stable relationship with a person of the same sex. G's employer allowed travel concessions for the long-term partners of the employees as long as they were of the opposite sex; accordingly, G was refused travel concessions for her partner solely on the grounds of her sexual orientation. The Court had to decide whether this treatment constituted discrimination within the meaning of Article 119 EEC or Directive 75/117[521].

It would be reasonable to expect that having found sexual identity to fall within the scope of sex discrimination the Court would be inclined to take the same stance towards sexual orientation. Besides, there seems to be little doubt that Ms Grant suffered a disadvantage because of the prejudice or the stereotypes of her employer against homosexuals. The ECJ started by accepting that the travel concessions constituted pay for the purposes of Article 119. Nevertheless, this time the Court decided to revert to the formal notion of equality, finding that there was no sex discrimination involved in that 'the condition imposed by the undertaking's regulations applies in the same way to female and male workers'[522].

One of course might safely retort that the employer in P v S also did not discriminate between women and men. P was not fired because he was a man, but because he wanted to have a sex change operation; both women and men deciding to undergo sex change operation would probably be 'equally fired' by S. It is also fairly reasonable to argue that there was sex discrimination in Grant because had G been a man or had her partner been a man, she would have gotten the travel concessions[523]. The fact remains that both P and Ms Grant exercised a democratic

[519] See Case C-117/01, K.B. v NHS Pensions Agency [2004] E.C.R. I-541.
[520] Case C-249/96, Grant v South West Trains Ltd [1998] E.C.R. I-621.
[521] Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women, [1975] O.J. L 45/19.
[522] Grant (supra, n. 520), para. 28.
[523] This view is echoed in the opinion of AG Elmer who submitted in Grant that the requirement that the partner should be from the 'opposite sex' meant that the discrimination at hand was 'exclusively gender-based' (para. 23 of the opinion). For a good discussion of this argument see Robert Wintemute, *Sexual*

freedom and suffered disadvantageous treatment as a consequence. How can, then, anyone suggest that the interference with the dignity and autonomy of P was more serious than that suffered by Ms Grant? What was the element that distinguished these two cases?

The common underlying theme of the two decisions was the heavy reliance on the jurisprudence of the European Court of Human Rights which was used by the ECJ as one of the main indicators of the existence of a common European approach espoused by the member states of the Union[524]. Hence, in P v S both the Advocate General and the Court referred to the Strasbourg Court's decision in Rees v United Kingdom[525] in finding that there was an agreement as to the need to afford protection to transsexuals as a distinct social group. In Grant, the Court relied again on Strasbourg jurisprudence which provided at the time that 'stable homosexual relationships do not fall within the scope of [...] Article 8 of the Convention'[526] and that Article 12 ECHR only covered 'traditional marriages'[527]. From these observations the Court drew the conclusion that 'in the present state of the law of the Community, stable relationships between two persons of the same sex are not regarded as equivalent to marriages or stable relationships outside marriage between persons of opposite sex'[528].

It becomes clear then that the problem the Court faced in Grant was one of legitimacy as well as practicality. First, the recognition of sexual orientation discrimination would have much deeper implications for the exercise of domestic social policy, given the overwhelmingly greater number of gay people as opposed to transsexuals[529]. Second, and most importantly, even if the Court was willing to take the extra step there was no jurisprudence of the ECtHR to legitimize such an action (in contrast to the situation in P v S). The human rights facet of the general principle of equality emanates from the general principle of respect for fundamental rights the material scope of which

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Orientation and Human Rights, OUP, 1995, pp. 202-204. For a critique see John Gardner, 'On the Ground of Her Sex(uality)', *Oxford Journal of Legal Studies*, Vol. 18, No. 1, 1998, pp. 167-187 at 179-183.

[524] For a similar view, see Catherine Barnard, 'The Principle of Equality in the Community Context: P, Grant, Kalanke and Marshall: Four Uneasy Bedfellows?', *Cambridge Law Journal*, Vol. 57, No. 2, 1998, pp. 352-373 at 357-358. For a discussion of the early dialogue between the two European Courts, see Dean Spielmann, 'Human Rights Case Law in the Strasbourg and Luxembourg Courts: Conflicts, Inconsistencies, and Complementarities' in Philip Alston (ed.), *The EU and Human Rights*, OUP, 1999, pp. 757-780.

[525] Application no. 9532/81, Judgment of 17 October 1986. The case concerned a claim brought under Articles 8 and 12 by a female to male transsexual who could not get married to a woman due to the fact that he had been refused a change in his birth certificate to reflect the changed gender. The ECtHR, while acknowledging 'the seriousness of the problems affecting these persons and the distress they suffer' (para. 47) found that there was no violation of Article 8 in the circumstances of the case due to the fact that the decision as to the alteration of the register of birth or the issuing of birth certificates whose contents and nature differed from those of the birth register fell into the margin of appreciation of the State (para. 35); it also found that Article 12 only concerned 'traditional marriage between persons of opposite biological sex' (para. 49).

[526] Grant (supra, n. 520), para. 33.

[527] Ibid., para. 34.

[528] Ibid., para. 35.

[529] See Oreste Pollicino, 'Legal Reasoning of the Court of Justice in the Context of the Principle of Equality: Between Judicial Activism and Self-restrained' (supra, n. 495) at 313.

has historically been dependant, to a great extent, on the jurisprudence of the ECtHR[530]. Reliance on the case law of the ECtHR, albeit welcome to the extent that it affords protection to the individual, may be seen as one of the main factors which have contributed to the illusiveness of the human rights facet of the general principle of equality in EU law; this is because it has allowed the ECJ to refrain from stepping forward where the ground has not been prepared by the human rights Court[531].

The case of P v S constitutes the first example of the Court employing the principle of equality to safeguard the dignity and autonomy of a vulnerable social group. In doing so, it strongly affirmed that promoting market efficiency was not the only goal of equality in EU law. In fact, it would be very hard to deny that the main concern of the Court in P v S was to avoid reaching a decision which would be tantamount to what Advocate General Tesauro described in his opinion as 'moral condemnation' of transsexualism[532]. This reading of equality was unequivocally based on human rights norms, clearly highlighting in practice the substantive dimension of the general principle of equality and rebutting allegations as to its moral emptiness[533].

The rise of the substantive over the market dimension of equality in EU law was expressly emphasised by the Court less than five years after the judgment in P v S when it was held that the economic aim of Article 119 was 'secondary to the social aim pursued by the same provision, which constitutes the expression of a fundamental human right'[534]. Accordingly, the aim of ensuring social progress and improving working conditions through Article 119 should be pursued irrespective of their impact on the economics of the common market[535]. The case seems to be

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[530] See, for example, Case 4/73, J. Nold , Kohlen- und Baustoffgroßhandlung v Commission of the European Communities [1974] E.C.R. 491, para. 13; also see Case C-260/89, Elliniki Radiophonia Tileorassi AE (supra, n. 469), para. 41 where the ECJ specifically emphasised the 'special significance' of the Convention. For a more recent example, see Case C-94/00, Roquette Frères SA v Directeur général de la concurrence, de la consommation et de la répression des fraudes, and Commission of the European Communities [2002] E.C.R. I-9011, para. 29. For a general overview of the relationship between the ECJ and the ECHR see S. Douglas-Scott, 'A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis', *Common Market Law Review*, Vol. 43, 2006, pp. 629-665 and Guy Harpaz, 'The European Court of Justice and Its Relations with the European Court of Human Rights: The Quest for Enhanced Reliance, Coherence and Legitimacy', *Common Market Law Review*, Vol. 46, 2009, pp. 105-141.

[531] A similar view is echoed in Mark Bell's critique of the ECJ's decision in Case C-117/01, K.B. v NHS (supra, n. 519). Bell rightly argues that 'the overall impression emerging from this [...] judgment is that the Court of Justice found its path cleared by the earlier ruling of the Court of Human Rights. It floats issues relating to equality and human rights, but fails to articulate exactly how these lead to its decision [...]. The vague reasoning seems an opportunity missed [...] to define more rigorously the scope of human rights protection flowing from E.U. law': see Mark Bell, 'A Hazy Concept of Equality', *Feminist Legal Studies*, Vol. 12, 2004, pp. 223-231 at 227.

[532] See para. 24 of the opinion of AG Tesauro in P v S.

[533] For a very good discussion, see Catherine Barnard, 'P v. S: Kite Flying or a New Constitutional Approach?' in Alan Dashwood & Siofra O'Leary (eds.), *The Principle of Equal Treatment in EC Law*, Sweet & Maxwell, 1997, pp. 59-79 at 69-73.

[534] Case C-50/96, Deutsche Telekom AG v Lilli Schröder [2000] E.C.R. I-743, para. 57.

[535] See, for example, Case C-243/95, Kathleen Hill and Ann Stapleton v The Revenue Commissioners and Department of Finance [1998] E.C.R. I-3739, para. 40 where the Court acknowledged that the imposition of

then, that the general principle of non-discrimination on grounds of sex was the medium which allowed the Court to initiate, first in theory and then in practice (through the interpretation of the relevant Community law), the transformation of market equality to substantive equality, highlighting the need to protect individual freedom against adverse social dynamics operating in the marketplace.

A formal conception of equality that demanded symmetrical treatment of similarly situated women and men was indeed valuable for the prevention of arbitrariness which could distort genuine competition. But once equality came to be understood as an aim in itself, as opposed to an instrument for the attainment of market integration, it became necessary to look beyond this narrow formal construction. The provisions in EU law that allowed for positive action with a view to promoting equality between sexes provided an ideal terrain for a more substantive understanding of the values underlying equality to be expounded clearly. The Court did take up the task but it failed remarkably to maintain a clear and consistent philosophy on the matter.

B. Implementing substantive equality

1. Introduction

It has been maintained so far that EU equality law developed in two separate dimensions. The former, market dimension was originally established by the member states while the latter, substantive dimension owes a lot to the ECJ which first acknowledged the value of a human rights based approach. The main distinguishing element between these two facets of equality concerns the interest at hand. As argued earlier, the goal of protecting individual freedom (substantive) is not as such contradictory to the goal of securing economic integration (market); but the two remain distinct ends.

This second section aims to examine more closely the ways in which substantive equality has been implemented within the jurisprudence of the ECJ and the relevant pieces of written EU law. It will be argued that the human interest of protecting individual autonomy against social oppression in the form of prejudice, stereotyping and lack of reasonable accommodation is becoming increasingly relevant; the coming into being of the Framework and Race directives has been particularly valuable in this respect. Nevertheless, there is nothing to suggest that a consistent

increased costs on the employer cannot, on its own, constitute an objective justification for indirect sex discrimination.

philosophy has been embraced with regard to the implementation of the right to (substantive) equality in EU law. The case law on positive action clearly attests to this.

2. Substantive equality and positive action

i) *Positive action in the EU*

Given that the Court referred to the general principle as one which called for 'non-discrimination' between women and men, one might have expected that the mere prohibition of differential treatment would have been enough to satisfy the requirement. The fact that the Court has unequivocally espoused a formal notion of equality would only reinforce this assumption. Hence, when the Belgian state allowed only 'married women, widows and students' to benefit from an exemption from contributions to social security, there was direct discrimination against married men or widowers for the purposes of Article 4(1) of Council Directive 79/7/EEC[536]. The Court did not even consider the possibility that the differential treatment at hand could have been an attempt to mitigate a particular disadvantage suffered by married women or widows.

The starting point therefore must be that positive action measures which provide for special treatment aiming to accommodate factual inequalities have traditionally been dealt with by the ECJ as exceptions to the general principle of equality rather than as part of it. A necessary implication of this finding is that member states will not be able to implement such positive action measures within the scope of EU law unless they can rely on a specific provision which provides otherwise. The first and perhaps most prominent example was the one included in Article 2(4) of Directive 76/207 (Equal Treatment Directive) which provided that the Directive was 'without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities in the areas [covered by the Directive]'. The provision was carefully drafted so to affirm the need for positive measures without creating any direct obligations for member states.

Positive action clauses in EU equality legislation made sure that the prevailing formal equality approach would not be used to defeat substantive equality measures adopted by member states within the scope of EU law. In this way, the positive implementation of equality of opportunity

[536] See Case C-373/89, Caisse d'Assurances Sociales Pour Travailleurs Independants "Integrity" v Rouvroy [1990] E.C.R. I-4243. Article 4(1) of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, [1979] O.J. L 6/24 provided that 'the principle of equal treatment means that there shall be no discrimination whatsoever on ground of sex either directly, or indirectly by reference in particular to marital or family status [...]'.

within the common market was recognised as a goal which should be pursued primarily by member states themselves, but with the supervision of the institutions of the Community[537]. This is not surprising considering that it is remarkably hard to decipher an all-encompassing formula as to the specific measures that need to be taken in distinct societies in order to rebut the effects of social oppression. Perhaps this is the main reason why adhering to a formal equality model has been the tradition in most national and international legal systems[538]; it is legally coherent, setting clear criteria for the identification of unequal treatment ('likes must be treated alike').

The Court was willing to afford to the state 'a reasonable margin of discretion as regards both the nature of the protective measures and the detailed arrangements for their implementation'[539]. But it would also be prepared to find a breach of formal equality when it concluded that a positive action measure did nothing, in practice, to correct factual inequalities[540]. This was so because the exception contained in Article 2(4) ETD was seen as referring exclusively to 'measures which, although discriminatory in appearance, are in fact intended to eliminate or reduce actual instances of inequality which may exist in the reality of social life'[541]; if a measure did not have that effect, it would not fall within the exception.

ii) *Defining substance: equality of opportunity and equality of results*

The Court had to make a crucial choice in determining how far a positive action measure could go. Essentially, it had to decide whether -in departing from formal equality- it would espouse a model based on 'equality of opportunity' or one based on 'equality of results'[542]. The main difference between these two formulations of substantive equality lies at the aim they pursue. Equality of opportunity is concerned with the removal of barriers which might impinge on an individual's capability to function as an equal in claiming a social good. Therefore, it is achieved when the procedural safeguards for a fair distribution of such goods have been put in place. Fairness in this

[537] This view was clearly reflected on the third recital of the preamble to Council Recommendation 84/635/EEC of 13 December 1984 on the promotion of positive action for women, [1984] O.J. L 331/34 which provided that '[...]existing legal provisions on equal treatment [...]are inadequate for the elimination of all existing inequalities unless parallel action is taken by governments, both sides of industry and other bodies concerned, to counteract the prejudicial effects on women in employment which arise from social attitudes, behaviour and structures'.

[538] For an example with regard to UK labour law, see Catherine Barnard, Simon Deakin and Claire Kilpatrick, 'Equality, Non-Discrimination and the Labour Market in the UK', *International Journal of Comparative Labour Law and industrial Relations*, Vol. 18, Issue 2, 2002, pp. 129-147. For a further example with regard to German labour law, see Dagmar Schiek, 'Torn Between Arithmetic and Substantive Equality? Perspectives on Equality in German Labour Law', *International Journal of Comparative Labour Law and industrial Relations*, Vol. 18, Issue 2, 2002, pp. 149-167.

[539] See Case 184/83, Hofmann v Barmer Ersatzkasse [1984] E.C.R. 3047, para. 27.

[540] See Case C-312/86, Commission of the European Communities v France [1988] E.C.R. 6315 (also see Case C-366/99, Joseph Griesmar v Ministre de l'Economie [2001] E.C.R. I-9383).

[541] Ibid., para. 15.

[542] For a brief discussion of these two models, see Sandra Fredman, *Disrimination Law*, OUP, 2002, pp. 11-15.

context requires that the individual should be free to succeed and free to fail; as long as adverse social norms do not determine success or failure.

On the other hand, equality of results demands a fair, usually understood as symmetrical, distribution of social goods in terms of outcome. Its purpose is not fulfilled until such a distribution has been achieved as a matter of statistical reality. This might be done by affording vulnerable groups special advantages which can go so far as to include the adoption of reverse discrimination policies. Perhaps the best way to summarize the difference between the two models of substantive equality is to say that equality of opportunity aims to remove disadvantage while equality of results seeks to compensate for it.

The fact that Article 2(4) ETD referred to 'real equality of opportunity' meant that the Court would, in all probability, be very sceptical towards measures providing for equality as to the end result (e.g. quotas). The equal opportunity rhetoric employed by the Court and other institutions of the Community also attested to that[543]. This inference was confirmed in the seminal case of Kalanke[544]. The case concerned a provision of Bremen law on equal treatment for men and women in the public service. The rule provided that when men and women are shortlisted for a post and the two are equally qualified, priority should be given to women in sectors where they were under-represented (less than 50% of the workforce). Mr Kalanke was passed over for promotion by reason of this provision, the post being given to an equally qualified woman instead. The question before the Court was whether or not Article 2(4) ETD allowed a national provision such as the one at hand.

Advocate General Tesauro emphasised that 'the only inequalities authorised [by virtue of Article 2(4)] are those necessary to eliminate the obstacles or inequalities which prevent women from pursuing the same results as men on equal terms'[545]. The fact that male and female candidates had to be equally qualified for the scheme to operate meant that they already had an equal opportunity to get the job. Accordingly, the national legislation went beyond the limits of the Article 2(4) exception in that it purported to 'achieve equality as regards the result'[546]. The ECJ upheld the Advocate General's dichotomy between guaranteeing opportunity and guaranteeing results. A system which 'substitutes 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' was held to be unacceptable[547].

[543] See, for example, Case 79/83, Dorit Harz v Deutsche Tradax GmbH [1984] E.C.R. 1921, para. 17 where the Court said that the purpose of Directive 76/207 (ETD) was to implement 'real equality of opportunity'; also see Council Resolution of 12 July 1982 on the promotion of equal opportunities for women, [1982] O.J. C 183/3.
[544] Case C-450/93, Kalanke v Freie und Hansestadt Bremen [1995] E.C.R. I-3051.
[545] See para. 15 of the AG's opinion for Kalanke.
[546] Ibid., para. 13.
[547] Para. 23 of the judgment in Kalanke.

Hence, giving unconditional priority to equally qualified women in sectors where they were under-represented was discriminatory against men in that it went 'beyond equal opportunities', thereby overstepping the limits of the exception[548].

The Court in Kalanke remained loyal to the well-established formal conception of equality according to which every individual has a right not to be treated differently with reference to sex; a policy contradicting this rule of symmetry in treatment would be precluded irrespective of its actual effects[549]. This finding is not particularly surprising given that positive action was dealt with as an exception to the general principle of equality and, as such, it should be construed narrowly[550]. Under this view, equality of opportunity strictly prohibited any form of preferential treatment but it was still open to gender-specific policies aiming (inter alia) to provide vocational guidance and training for women or to bring balance between career and family responsibilities[551]. A similar analysis was put forward by Advocate General Jacobs in his opinion for the case of Marschall[552] two years later.

The national rule in Marschall was practically identical to that in Kalanke except for the fact that it expressly provided that priority would be given to equally qualified women 'unless reasons specific to an individual male candidate tilt the balance in his favour'. This condition was referred to in the judgment of the Court as the 'saving clause'. The ECJ acknowledged that the contested provision did nothing to enhance the ability of women to compete in the labour market but, instead, it prescribed a result[553]. Nevertheless, in a surprising move, the Court went on to find that the scheme fell within the scope of Article 2(4) ETD in that it could have the effect of counteracting prejudice thereby reducing 'actual instances of inequality which may exist in the real world'[554]. Kalanke was distinguished on the ground that the provision in that case did not contain a saving clause[555]. The saving clause meant, according to the ECJ, that an objective assessment of individual candidatures would take place - one which could override the priority given to women[556].

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[548] Ibid., paras. 22-24.
[549] See Erika Szyszczak, 'Positive Action After Kalanke', *The Modern Law Review*, Vol. 59, No. 6, Nov. 1996, pp. 876-883 at 883; also see Helen Fenwick, 'Perpetuating Inequality in the Name of Equal Treatment', *Journal of Social Welfare and Family Law*, Vol. 18, No. 2, 1996, pp. 263-270 at 267; also see Tamara Hervey and Jo Shaw, 'Women, Work and Care: Women's Dual Role and Double Burden in EC Sex Equality Law', *Journal of European Social Policy*, Vol. 8, No. 1, pp. 43-63 at 59; and Ursula A O'Hare, Positive Action Before the European Court of Justice, *Web Journal of Current Legal Issues*, No. 2, 1996 (*http://webjcli.ncl.ac.uk/1996/issue2/ohare2.html*)
[550] See para. 21 of the judgment in Kalanke.
[551] AG's opinion for Kalanke, para. 9.
[552] Case C-409/95, Hellmut Marschall v Land Nordrhein-Westfalen [1997] E.C.R. I-6363.
[553] Ibid., para. 12.
[554] Ibid., para. 31.
[555] Ibid., para. 33.
[556] Ibid.

In his opinion, Advocate General Jacobs firmly advised the ECJ against distinguishing Kalanke 'on narrow technical grounds'[557]. He emphasised that the national court in Kalanke had also interpreted the provision at hand as being subject to an implied saving clause but this did not prevent the ECJ from ruling against the measure[558]. The ruling in Kalanke clearly indicated, according to him, 'that any rule which goes beyond the promotion of equal opportunities by seeking to impose instead the desired result of equal representation is similarly outside the scope of Article 2(4)'[559]. Hence, the provision in Marschall should be seen as falling outside the scope of the exception. Essentially, what the Advocate General tried to do was to prevent the Court from blurring the line between equality of opportunity and equality of results in EU law; he failed.

The emphasis on the dichotomy between equality of results and equality of opportunity which formed the main crux of the reasoning in Kalanke was conspicuously absent from the judgment of the Court in Marschall. Instead, the ECJ practically conflated the two by holding that the policy at hand -albeit based on equal outcomes- promoted equal opportunity insofar as it contributed to the elimination of prejudice and stereotyping against women. More specifically, it found that 'even where male and female candidates are equally qualified, male candidates tend to be promoted in preference to female candidates particularly because of prejudices and stereotypes concerning the role and capacities of women in working life and the fear, for example, that women will interrupt their careers more frequently, that owing to household and family duties they will be less flexible in their working hours, or that they will be absent from work more frequently because of pregnancy, childbirth and breastfeeding. For these reasons, the mere fact that a male candidate and a female candidate are equally qualified does not mean that they have the same chances'[560].

Through this reasoning the Court practically abandoned the individualistic, symmetry-based spirit of Kalanke in favour of a more substantive approach which took account of systemic disadvantage and allowed for preferential treatment in order to address it[561]. Prejudice and stereotypes as to the role of women in society were understood as socially imposed hurdles which prevented female workers from pursuing professional opportunities on equal terms. The preferential treatment at hand was acceptable insofar as it aimed to secure that such adverse social norms would not affect

[557] Ibid., AG's opinion, para. 37.
[558] According to AG Jacobs, the national Court in Kalanke had found that the rule should be interpreted 'with the effect that, even if priority for promotion is to be given in principle to women, exceptions must be made in appropriate cases' (quoting the national Court in para. 28 of his opinion).
[559] See para. 32 of the AG's opinion in Marschall.
[560] See paras. 29-30 of the judgment in Marschall. It is worth noting the similarity of this reasoning with the text of Council recommendation 84/635/EEC on the promotion of positive action for women (supra, n. 537) which, inter alia, called upon member states 'to promote a better balance between the sexes in employment' in order 'to eliminate or counteract the prejudicial effects on women in employment or seeking employment which arise from existing attitudes, behaviour and structures based on the idea of a traditional division of roles in society between men and women'.
[561] See Dagmar Schiek, 'More Positive Action in Community Law', *Industrial Law Journal*, Vol. 27, No.2, June 1998, pp. 155-161 at 157-159.

the opportunity of equally qualified women in areas where under-representation prevailed. In this process, the saving clause was introduced to maintain proportionality in weighting a woman's right to substantive equality against a man's right to symmetrical, formal equality[562].

But the fact that the measure potentially advanced equality of opportunity does not mean that it was not entirely results-oriented as to its form; women would be promoted over similarly situated and equally qualified men until they were no longer the minority. It seems then that while Marschall constitutes a triumph of substantive over symmetrical equality, it also constitutes an example of the Court's failure to clearly distinguish between equal opportunity and equal outcomes. Still, the same failure may also be attributed to the institutions of the EU which introduced the dialectics of equal opportunity in Article 2(4) ETD without being prepared to support them in practice.

Indeed, it would be a mistake to focus only on the legal dimension of Kalanke and Marschall as the inconsistency between the two judgments was, to a great extent, the result of political pressure as well. The ruling in Kalanke threatened the existence of any positive action scheme that prescribed a result within the scope of EU law, something which was not welcome either by the Commission or the member states[563]. Thus, it took only five months for the former to declare that the ruling should be understood as being limited to 'rigid, unconditional quota system[s]'[564]. The Commission went so far as to propose an amendment of Article 2(4) ETD in order to make it absolutely clear that 'measures envisaged by this provision include actions favouring the recruitment or promotion of one sex in circumstances where the latter is under-represented, on condition that the employer always has the possibility of taking account of the particular circumstances of a given case'[565]. Twenty months after the Commission's communication, the ECJ declared exactly the same thing in Marschall.

[562] See Dagmar Schiek, 'Sex Equality Law After Kalanke and Marschall', *European Law Journal*, Vol. 4, No. 2, June 1998, pp. 148-166 at 163.
[563] The judgment of the European Court in Kalanke was seen as creating the conditions for yet another conflict between the ECJ and the German Constitutional Court in the area of fundamental human rights: see Sacha Prechal, 'Case C-450/93, Kalanke v. Freie Hansestadt Bremen, [1995] ECR I-3051', *Common Market Law Review*, Vol. 33, 1996, pp. 1245-1259 at 1259. For a wider discussion of the negative political impact of Kalanke on member states, see Linda Senden, 'Positive Action in the EU Put to the Test. A Negative Score?', *Maastricht Journal of European and Comparative Law*, Vol. 3, No. 2, 1996, pp. 146-164 at 153-157.
[564] 'Communication from the Commission to the European Parliament and the Council on the interpretation of the judgment of the Court of Justice on 17 October 1995 in case C-450/93, Kalanke v Freie Hansestadt Bremen', COM (96) 88 final, 27 March 1996, p. 9. The pressures exercised by the powerful women's lobby should also not be underestimated: see, for example, Jo Shaw, 'The Problem of Membership in European Union Citizenship', in Zenon Bankowski and Andrew Scott (eds.), *The European Union and Its Order: The Legal Theory of European Integration*, Blackwell Publishers, 2000, pp. 65-90 at 85.
[565] Ibid., p. 10.

A further source of political pressure was the signing of the Treaty of Amsterdam which took place only one month before the judgment in Marschall[566]. The fourth paragraph of Article 141 EC (now Article 157 TFEU), introduced by the Treaty, stipulated that '[w]ith 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'[567]. The lack of any reference to equality of opportunity combined with the absence of any express limitations as to the form of positive action signified that the legislature of the Community was anything but enthusiastic about the ruling in Kalanke.

The effects of that political pressure are decipherable in the unclear conceptualisation of positive action that followed Kalanke. In essence, the Court failed to resolve properly the tension among the various conceptions of equality developed in its own prior jurisprudence as well as in the written law of the Union[568]. Such conceptions include the formal prohibition of asymmetrical treatment which is based on strict individualism as well as the substantive, opportunity or result oriented models which are open to collective, group-based approaches[569]. Adherence to proportionality in departing from each of these conceptions in favour of another turned out to be the guiding factor in securing equality through positive action.

iii) *Substantive equality and proportionality*

The provision in Marschall indicated that a woman 'of equal suitability, competence and professional performance' would be given priority subject to the saving clause. But if a woman was as successful as a man in satisfying these (practically all-encompassing) criteria, what could possibly be the specific reason which would 'tilt the balance' in favour of the male candidate? Is it possible that the rule actually meant that equally qualified women will be given priority unless they are not equally qualified? The only possible way to avoid this tautological interpretation is to accept that the specific reason under the saving clause would have nothing to do with a man's job performance and suitability for the post. But once one takes merit out of the equation, it is hard to

[566] The Treaty of Amsterdam, which entered into force on 1 May 1999, was signed on 2 October 1997. The judgment in Marschall was delivered on 11 November 1997.
[567] Although Article 141(4) refers to 'the under-represented sex', Declaration No 28 (annexed to the Treaty of Amsterdam) stated that measures adopted under the Article 'should, in the first instance, aim at improving the situation of women in working life'.
[568] See Anne Peters, 'The Many Meanings of Equality and Positive Action in Favour of Women under European Community Law – A Conceptual Analysis', *European Law Journal*, Vol. 2, No.2, July 1996, pp. 177-196; also see Sandra Fredman, 'Affirmative Action and the European Court of Justice: A Critical Analysis', in Jo Shaw (ed.), *Social Law and Policy in an Evolving European Union*, Hart Publishing, 2000, pp. 171-195.
[569] Ibid.

imagine how giving priority to a woman would not be discriminatory against an equally qualified man[570].

As a result, the provision could fairly be understood as demanding that men will be discriminated against unless there is a specific reason to discriminate against women. This reading would be based on a formal understanding of equality which prohibits reliance on a prohibited ground for any reason whatsoever. Alternatively, the provision could be read as requiring that women's interests should be promoted save for situations where this would become unfair towards a man[571]. This latter interpretation is reflected in the jurisprudence of the Court. Hence, where 'the candidates possess equivalent or substantially equivalent merits', a rule giving priority to those who belong to the underrepresented sex will be upheld as long as 'the candidatures are subjected to an objective assessment which takes account of the specific personal situations of all the candidates'[572]. Measures granting unconditional priority will not be allowed[573].

The purpose of the saving clause then is not to transform the policy into one which prohibits preferential treatment. Instead, it is to ensure that corrective action taken in favour of women will not adversely affect a man who faces 'social situations that are just as difficult as those normally faced by women'[574]. An illustration of this approach is provided by the case of Mr Lommers, a male employee of the Dutch Ministry of Agriculture who was refused a nursery place for his child[575]. The Dutch Ministry of Agriculture decided to provide a nursery service for its female staff in order to address the severe underrepresentation of women in its workforce (2,792 women out of 11,251 staff). Nursery places were to be available to male staff only in 'emergency cases', to be determined by the Minister.

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[570] A similar view was put forward by AG Jacobs in his opinion in Marschall (para. 36). Also see Sandra Fredman, 'Affirmative Action and the European Court of Justice: A Critical Analysis' (supra, n. 568) at 179.

[571] In Marschall, for example, 'length of service' and 'social reasons' would be taken into account in determining whether or not it would be fair to tilt the balance in favour of the equally qualified man instead of the woman: see para. 8 of the AG's opinion.

[572] Case C-407/98, Katarina Abrahamsson v Fogelqvist [2000] E.C.R. I-5539, para. 61; also see Case C-158/97, Georg Badeck and others v Landesanwalt beim Staatsgerichtshof des Landes Hessen [2000] E.C.R. I-1875, para. 23.

[573] See Case C-407/98, Abrahamsson (ibid.). The case concerned a measure which gave priority to 'sufficiently qualified' candidates from the underrepresented sex in situations where they were less qualified than those from the opposite sex (who would normally have been selected), provided that the difference in qualifications was 'not so great as to give rise to a breach of the requirement of objectivity in making appointments'. The Court found that the proviso (not 'so great' difference in merit) did nothing to affect the automatic and unconditional preference given to less - but sufficiently - qualified candidates from the underrepresented sex (para. 53 of the judgment). This, combined with the lack of an objective assessment taking account of specific personal situations, meant that the measure did not fall within the scope of Article 2(4) of the Equal Treatment Directive. The ECJ then went on to find that the policy was also not justified by Article 141(4) EC because it was 'on any view' disproportionate to the aim pursued (para. 55 of the judgment).

[574] See paras. 29-32 of the opinion of A-G Saggio in Case C-158/97, Georg Badeck (supra, n. 572).

[575] Case C-476/99, H. Lommers v Minister van Landbouw (supra, n. 463).

The Court concluded that the policy was in line with Article 2(4) ETD because it promoted women's ability to enter the labour market and compete within it on equal terms with men; this it did by ensuring that child care responsibilities would not force them to give up their job as had usually been the case[576]. In essence, the Court accepted that the scheme at hand aimed to accommodate the special needs of women with regard to childcare[577]. Still, the importance of not totally excluding men from such schemes was also emphasised. Had the Ministry done so, it would mean that the measure would be a disproportionate interference with men's right to equal treatment[578].

This reasoning clearly indicates that the reality of a structural disadvantage suffered by women should not be addressed by a measure which would overlook instances of personal disadvantage suffered by men. Since women's underrepresentation was linked to the lack of nursery services and since the places available were limited (128 places), it was only fair that the rule gave priority to women. In other word, Mr Lommers was refused a place not because he was a man, but because his personal circumstances did not indicate a serious hardship (not an 'emergency case'). The (in)existence of disadvantage was the controlling factor, not the sex. Hence, individual justice gave way to group justice but, at the same time, respect for individualism remained a condition for the legitimacy of collectivist approaches.

A similar philosophy underlined the saving clause in Marschall. If a man can prove that there is a specific reason which demonstrates that hiring an equally qualified woman would be unfair towards him, then the measure would not apply. Let us imagine, for example, the case of a man who has been unemployed for a year as compared to an equally qualified woman who has just quit her previous job[579]. It would hardly seem fair, in this case, to hire the woman because of a positive action scheme without taking account of the individual circumstances of the man. The personal disadvantage suffered by the former (who belongs to the underrepresented group) is manifestly smaller than the one suffered by the latter. Accordingly, priority conferred upon the woman under a positive action scheme should be rebutted in these circumstances.

It seems then that positive action in the EU is formally based on a model of equality of opportunity but measures which pursue equality of results will be allowed where they aim to

[576] Ibid., paras. 37-38.
[577] This view of course is anything but unproblematic. The argument can easily be put forward that by allowing for accommodation in this context the Court only reinforces stereotypes concerning the role of women as primary carers of the child. For a criticism along these lines with reference to earlier case-law of the Court see Clare McGlynn, 'Ideologies of Motherhood in European Community Sex Equality Law', *European Law Journal*, Vol. 6, No. 1, March 2000, pp. 29-44.
[578] Lommers (supra, n. 463), paras. 42-48.
[579] Putting an end to a long period of unemployment was one of the five specific reasons that were put forward by the government as capable of overriding the rule giving priority to women in Georg Badeck (supra, n. 572), para. 35.

correct inequalities that may exist in the reality of social life, as long as they are not disproportionate to the aim pursued. Proportionality is guaranteed by making sure that the specific situation of all is taken into account before granting priority. In this context, result-oriented measures have been perceived by the Court as promoting *systemic* equality of opportunity. They denote adherence to a broadly construed model of equality of opportunity rather than to a model of equality of results. This is because numerical equality (i.e. equal representation) is perceived by the ECJ as means to an end (i.e. reasonable accommodation of difference, elimination of widespread prejudice and stereotyping), not as an end in itself. But distinguishing between the means employed and the aim pursued is not always easy. The case of Badeck[580] which involved a positive action plan to address the underrepresentation of women in the public service attests to this.

The advancement plan in Badeck provided, inter alia, that a minimum percentage of fixed term academic posts should be occupied by women. This minimum percentage had to reflect the proportion of women graduates, holders of higher degrees and students in the discipline. The Court found that this measure was not precluded by Article 2(4) ETD, given that a saving clause was in place with regard to the appointment procedure and that the quota (to which the Court referred to as 'ceiling') was fixed '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'[581]. Indeed, the criterion for fixing the quota was not arbitrary, but this hardly means that the mere existence of the quota did not amount to arbitrary and unfair asymmetrical treatment against men. As a matter of fact, a specific percentage of women would be guaranteed access to the job while no similar requirement was in place for equally qualified men.

In that context, the existence of a saving clause seemed to be a contradiction in terms, if not a mere cloth of legality. While the rule in Badeck did not automatically guarantee the result of each appointment (due to the saving clause), paradoxically so, it did require a specific outcome with regard to the general percentage of those hired in fixed term academic posts (due to the 'ceiling'). This, of course, can fairly be contrasted with the rule in Marschall which merely gave priority to women in specific cases, rather than guaranteeing that women's underrepresentation will be addressed directly as a matter of outcome. The 'ceiling' in Badeck may fairly be seen as a triumph of equality of results (which merely compensates for a disadvantage) as against a model of equality of opportunity (which purports to remove the disadvantage). The finding of the Court constitutes a clear example of the problems that may arise when the two models of substantive equality are conflated.

[580] C-158/97, Georg Badeck (supra, n. 572).
[581] Ibid., para. 42.

Still, Badeck also provides a useful insight as to how even strict result quotas might actually promote equality of opportunity. More specifically, one of the provisions required half the training places for trained occupations where women were underrepresented to be reserved for them provided that enough female applicants existed to fill them. Fortunately, the Court contradicted the finding it had made in the previous paragraphs by noting that the quota (this time referred to as such) was not problematic because it merely 'form[ed] part of a restricted concept of equality of opportunity' that guaranteed training places, not places in employment[582]. The Court also paid attention to the fact that individual men who would be excluded as a result of the scheme would not suffer a serious disadvantage since they would still be able to find training in the private sector[583]. Accordingly, the underrepresentation of women would be dealt with without interfering with the opportunity of male applicants.

By relying heavily on the feigned notion of individualism guaranteed by saving clauses, the Court has practically allowed for collectivist approaches that might impinge on the opportunity of men with a view to promoting equal opportunities for women. This unfortunate state of affairs has been the result of the failure to create a clear distinction between policies that foster equal opportunities and those that pursue equal outcomes. This unresolved tension between the different conceptions of equality restricts predictability as to the permissible scope of positive action but it also allows for great flexibility[584]. In fact, the Court has given in to political pressure by adopting a formula that is blurry enough for it to manipulate as it wishes, on a case-by-case basis, instead of binding itself (and the member states) to a particular conception as it did in Kalanke. The only positive side of this ambivalence is the resulting implication that derogations from symmetrical equality have a value in themselves and will not always be construed narrowly as a matter of practice[585].

The argument has been made that over-reliance on 'the largely symbolic value of individualised review' may actually have been the way in which the ECJ signalled its subsidiary role in matters of social policy[586]. The fact that positive action is only encouraged -not required- under EU law may also have been a factor which has contributed to this state of affairs. Still, perceiving proactive strategies as social policy measures which ultimately rest on political discretion undermines their

[582] Ibid., para. 52.
[583] Ibid., para. 53.
[584] See Cathryn Costello, 'Positive Action' in Cathryn Costello & Ellis Barry (eds.), *Equality in Diversity: The New Equality Directives*, Irish Centre for European Law, 2003, pp. 177-212 at 186.
[585] This is, of course, contrary to the formal position maintained by the Court on this matter; see, for example, Case 222/84, Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary [1986] E.C.R. 1651, para. 36.
[586] See Sean Pager, 'Strictness and Subsidiarity: An Institutional Perspective on Affirmative Action at the European Court of Justice ', *Boston College International & Comparative Law Review*, Vol. 26, 2003, pp. 35-76 at 51 and 73.

status as instruments which aim to affirm a fundamental human right to equality[587]. Initiatives of the EU with regard to the promotion of gender equality, most notably gender mainstreaming policies, have also been criticised accurately as being plagued by this 'uncertain and fluctuating commitment to substantive equality principles'[588].

Nowadays, Directive 76/207 has been replaced by Directive 2006/54 (Recast Directive). The positive action provision of the Recast Directive provides that 'Member States may maintain or adopt measures within the meaning of [Article 157(4) TFEU] with a view to ensuring full equality in practice between men and women in working life'[589]. Such an amendment was not surprising given that Article 157(4) TFEU[590] and Article 2(4) ETD overlapped, the former being examined when the latter was found not to be applicable[591]. As a matter of fact, Article 157(4) TFEU may fairly be seen as the 'descendant' of Article 2(4) ETD. Hence, for example, a policy affording unconditional priority to the underrepresented sex will also be precluded by Article 157(4) TFEU as 'disproportionate to the aim pursued'[592].

Positive action clauses providing for departure from equal treatment in order to ensure full equality in practice are now included in both the Race Directive and the Framework Directive which allow for 'specific measures to prevent or compensate for disadvantages linked [to the grounds contained therein]'[593]. In addition to that, the Race Directive and the Recast Directive impose a positive duty on member states to create a national body, or bodies, for the promotion of equal treatment irrespective of race or ethnic origin and sex respectively[594]. No similar requirement is put forward by the Framework Directive which, nevertheless, follows the Race and Recast Directives in requiring member states to foster social dialogue for the advancement of equal treatment[595].

The lack of a principled approach to positive action both within and outside the courtroom seems to explain why equality in this area has been described 'as a byproduct of the politics of a multi-

[587] See Sandra Fredman, 'Changing the Norm: Positive Duties in Equal Treatment Legislation', *Maastricht Journal of European and Comparative Law*, Vol. 12, No. 4, 2005, pp. 369-397.
[588] See Colm O'Cinneide, 'Positive Action and the Limits of Existing Law', *Maastricht Journal of European and Comparative Law*, Vol. 13, No. 3, 2006, pp. 351-364 at 359; for a very good discussion as to how gender mainstreaming has been employed in the EU as an excuse for 'neutralising' positive action, see Maria Stratigaki, 'Gender Mainstreaming vs Positive Action: An Ongoing Conflict in EU Gender Equality Policy', *European Journal of Women's Studies*, Vol. 12, No. 2, 2005, pp. 165-186.
[589] Article 3 of the Recast Directive (supra, n. 506).
[590] Ex 141(4) EC.
[591] See, for example, Case C-319/03, Serge Briheche v Ministre de l'Interieur [2004] E.C.R. I-8807; the reason for this was that, given that Article 157(4) TFEU has a wider scope, it was possible that a positive action measure could be allowed by it even if it fell outside the scope of Article 2(4) of Directive 76/207 (Briheche, para. 31).
[592] See Abrahamsson (supra, n. 572), para. 55. Also see Briheche (supra, n. 591), para. 31.
[593] See Race Directive (infra, n. 600), Article 5; Framework Directive (infra, n. 601), Article 7.
[594] See Race Directive (infra, n. 600), Article 13; Recast Directive (supra, n. 506), Article 20.
[595] See Race Directive (infra, n. 600), Article 11; Framework Directive (infra, n. 601), Article 13; Recast Directive (supra, n. 506), Article 21.

level governance system with a dispersed pattern of sovereign powers and weak legitimacy at the supranational level'[596]. But a valuable finding of principle may still be made. The allowance for positive action in EU law denotes that equality is no longer understood as entailing only a negative duty to abstain from asymmetrical treatment of identified individuals on the basis of a prohibited ground. The elimination of systemic prejudice and stereotyping, as well as the proper accommodation of difference, is increasingly becoming the guiding factor not only as a matter of rhetoric, but also as a matter of practice. The two Article 13 Directives and their interpretation by the Court came to reinforce this view, serving as a prelude to the Charter of Fundamental Rights in formally extending the scope of the right to substantive equality in EU law.

3. Direct discrimination, indirect discrimination and accommodation redefined

i) *Article 13: widening the scope of EU equality law*

The Treaty of Amsterdam opened the gates for a vast expansion of the material scope of the general principle of equality through the introduction of Article 13 EC (now Article 19 TFEU) which provided that the Council 'may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation'. Up to that point, EU law was concerned only with protection against discrimination based on sex or nationality thereby maintaining a huge 'lacuna in the Community's competence'[597]. This, of course, does not mean that the institutions of the Community would refrain only from discrimination based on sex or nationality[598]. In fact, the Community would even take positive steps to promote awareness and raise concern over wider inequalities[599]. But although the general principle of equality had developed a great deal normatively, there was no legal basis, prior to the introduction of Article 13 EC, for the Community to enable the ECJ to review discriminatory policies of member states on any ground other than sex and nationality.

[596] See Jo Shaw, 'Gender and the Court of Justice', in Grainne de Burca and J.H.H. Weiler, *The European Court of Justice*, OUP, 2001, pp. 87-142 at 130.
[597] Lords select Committee on the European Union, 'Ninth Report: EU Proposals to Combat Discrimination', Session 1999-2000, HL 68, para. 7.
[598] See, for example, Case 130-75, Vivien Prais v Council of the European Communities [1976] E.C.R. 1589 where the Court found, by reference to Article 9 ECHR, that protection against discrimination based on religion was one of the fundamental rights recognised in Community law; also see the Joint Declaration by the European Parliament, the Council and the Commission against Racism and Xenophobia, 25 June 1986, [1986] O.J. C 158/1; also see the Joint Declaration by the European Parliament, the Council and the Commission concerning the protection of fundamental rights and the European Convention for the protection of human rights and fundamental freedoms, 27 April 1977, [1977] O.J. C 103/1.
[599] See, for example, the Proposal by the Commission for a Council Decision designating 1997 as European Year against Racism, COM (95) 653 final, 26 March 1996, [1996] O.J. C 89/7.

Only one year after the coming into force of the Treaty of Amsterdam, the Council adopted Directive 2000/43 (Race Directive)[600] and Directive 2000/78 (Framework Directive)[601]. The Race Directive prohibits discrimination on grounds of racial or ethnic origin in the areas of employment, social security, healthcare, education and access to and supply of goods and services[602]. The Framework Directive prohibits discrimination on the grounds of religion or belief, disability, age and sexual orientation but is restricted to matters of employment and occupation[603]. The far wider scope of application of the Race Directive is best understood as the result of political pragmatism rather than moral choice[604]. Both directives were seen as 'unequivocal statements of public policy' which would highlight the Community's committal to freedom, justice and fundamental rights while, simultaneously, strengthening the economy by enhancing the ability of individuals to enter the market and function freely within it[605].

It has already been shown that sex and nationality were initially included as grounds for discrimination with a view to promoting market efficiency. But in developing the human rights dimension of equality in EU law, mainly through the process of combating sex discrimination, it became clear that free access to the market could not be established where social exclusion prevailed. By paving the way for a fight against discrimination in so many different levels, Article 13 EC came as a direct acknowledgment of the fact that the social and economic faces of the Union are confluent, not complementary or, even worse, contradictory[606]. To use the words of the Commission, guaranteeing non-discrimination in employment 'contributes to securing social participation and avoiding social exclusion by ensuring that people have the opportunity to fulfil their potential in economic terms'[607].

It may be argued then that the two directives (which apply to both the public and the private sector) are not as closely linked with cross border trade as they are with the protection of individuals against discriminatory treatment from other individuals in the context of the labour

[600] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, [2000] O.J. L 180/22.
[601] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] O.J. L 303/16.
[602] See Race Directive (supra, n. 600), Article 3.
[603] See Framework Directive (supra, n. 601), Article 3.
[604] For an excellent analysis of the factors that led to this 'hierarchy of grounds' within the EU see Mark Bell and Lisa Waddington, 'Reflecting on Inequalities in European Equality Law', *European Law Review*, Vol. 28, No. 3, 2003, pp. 349-369; also see Erica Howard, 'The Case for a Considered Hierarchy of Discrimination Grounds in EU Law', *Maastricht Journal of European and Comparative Law*, Vol. 13, No. 4, 2006, pp. 445-470.
[605] See the Proposal by the Commission for a Council Directive establishing a general framework for equal treatment in employment and occupation, COM (1999) 565 final, 25 November 1999, para. 3.1.1; and the Proposal by the Commission for a Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, COM (1999) 566 final, 25 November 1999, part III.
[606] This approach has formed the basis of the social face of the EU since very early days: Case 43/75, Gabrielle Defrenne v SABENA (supra, n. 493).
[607] COM (1999) 565 final and COM (1999) 566 final (supra, n. 605); see the annexed impact assessment form ('impact of the proposal on companies and in particular on small and medium sized enterprises'), point 4.

market and beyond[608]. Indeed, the very fact that it took so long for grounds such as race and sexual orientation to be covered by EU anti-discrimination law indicates that their protection was not considered vital for the facilitation of free movement and fair competition within the Community. Accordingly, it is not surprising that the new directives drastically expanded not only the personal, but also the material scope of non-discrimination. In this respect, it is useful to examine some novelties that clearly gave new impetus to the pursuit of a substantive approach within the jurisprudence of the Court.

ii) *Harassment and discrimination by association*

An important feature of the Framework and Race Directives has been the introduction of harassment as a form of discrimination covered by EU law. The concept of harassment originally emerged in EU discourse long before the adoption of the two Directives, not surprisingly, in the context of equal treatment between women and men in employment[609]. But it was only two years after the adoption of the Race and Framework Directives that Directive 76/207 was amended so as to include harassment[610] and sexual harassment[611] as prohibited forms of sex discrimination[612].

The inclusion of harassment into the definition of discrimination adds further weight to the interpretation of equality as understood in cases like P v S. Harassment is deemed to take place when conduct which is related to the grounds covered by the directives has the effect or purpose 'of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment'[613]. This formula is not concerned with differential treatment as much as it is with protection against offensive treatment, capable of interfering with one's ability to function within a particular environment. A prominent example of this substantive understanding of equality can be seen in the case of Coleman[614].

This case involved the claim of Ms Coleman, the mother and primary carer of a disabled boy, who was forced to quit her job as a secretary in a firm of solicitors due to the attitude of her employers

[608] Mark Bell, *Anti-discrimination Law and the European Union* (supra, n. 474) at 193.
[609] See Commission Recommendation 92/131/EEC of 27 November 1991 on the protection of the dignity of women and men at work, [1992] O.J. L 49/1
[610] Defined as 'unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment'.
[611] Defined as 'any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment'.
[612] See Article 1(2) of Directive 2002/73/EC of the European Parliament and of the Council 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, [2002] O.J. L 269/15.
[613] Article 2(3) of Directive 2000/43 and Directive 2000/78.
[614] Case C-303/06, S. Coleman v Attridge Law and Steve Law [2008] E.C.R. I-5603.

towards the problems arising from the disability of her child[615]. The Court found that cases such as this involved direct discrimination within the meaning of Article 2(2)(a) of the Framework Directive[616] and also harassment within the meaning of Article 2(3) of the same directive. The reason for this was that the directive 'applies not to a particular category of persons but by reference to the grounds mentioned [therein]'[617]. Hence, discrimination and harassment with regard to disability could arise 'by association', i.e. they are not limited only to people who are disabled themselves.

In a very interesting opinion, Advocate General Maduro emphasised the values of dignity and autonomy as underlying the principle of equality and serving to determine what it requires in any given case[618]. He then moved on to find that the dignity and autonomy of disabled people is equally hampered when they suffer discrimination themselves or when a person associated with them is subjected to discriminatory treatment merely because of this association[619]. Indeed, given that the mother was helping out the child, her autonomy was inextricably linked to his. Accordingly, the Advocate General concluded that '[w]hen the discriminator deprives an individual of valuable options in areas which are of fundamental importance to our lives because that individual is associated with a person having a suspect characteristic then it also deprives that person of valuable options and prevents him from exercising his autonomy'[620].

The behaviour of Ms Coleman's employers was based on prejudice and intolerance towards disability, the mother suffering a disadvantage as a result. To accept such behaviour simply because the mother herself was not disabled would be to allow norms of social oppression to determine the options of both her and the child. Although the Court did not advance a conceptual analysis similar to that put forward by the Advocate General, a combined reading of the two analyses clearly supports the view that the 'valuable options' of the individual should not be interfered with

[615] Ms Coleman was hired in 2001, gave birth to the child in 2002 and accepted voluntary redundancy in 2005. Following her return from maternity leave, she was refused her existing job mainly because she was a parent of a disabled child and was threatened with dismissal for being occasionally late due to problems with her child, in circumstances where no such threat was made to parents of non-disabled children who were late for similar reasons. In addition to that, she was accused of being lazy when she asked for some time off to take care of her child, again in circumstances where parents of non-disabled children would be allowed the time off. Finally, she had to suffer very demeaning comments made in relation to her and her child where, obviously, no such comments would be made to other employees.

[616] The section provides that 'direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation […]'.

[617] See para. 38 of the judgment in Coleman (supra, n. 614).

[618] See para. 8 of the AG's opinion in Coleman (supra, n. 614). Dignity was defined as entailing 'the recognition of the equal worth of every individual' and demanded that people should not be treated less favourably on account of suspect characteristics; autonomy was put forward as a value which 'presupposes that people are given a range of valuable options from which to choose' and demands that such options should not be taken away from people 'in areas of fundamental importance for their lives by reference to suspect classifications' (see paras. 9-11).

[619] Ibid, paras. 12-13.

[620] Ibid., para. 14.

as a result of unfavourable treatment stemming from reliance on a prohibited ground. It is also worth noting that the idea of scrutinizing a work environment for being hostile to the personal characteristics of those affected (harassment) brings non-discrimination closer to imposing a duty of reasonable accommodation of difference.

This substantive approach to equality is nowhere to be found within the text of the Directives; but it does not follow that the legislature of the EU had nothing to do with it. Formal recognition of the close link between discrimination, harassment and the protection of individual dignity signalled the need for a more elaborate conceptual framework with regard to the principle of non-discrimination. The concurrent introduction of new prohibited grounds offered considerable latitude for the development of such framework by the Court. For instance, associative sex discrimination could have come to the rescue of the homosexual woman in Grant many years earlier (treated unfavourably because of the sex of her partner); the fact that sexual orientation was not a prohibited ground at the time surely weighed against this finding[621].

There seems to be no particular reason why this novel type of discrimination should be confined only to cases concerning the carers of the disabled[622]. Discrimination by association may fairly develop to cover other prohibited grounds as well, but the situation is clearly more complicated when it comes to applying it to cases of indirect discrimination[623]. Once again, much will depend on the attitude of the Court. Nevertheless, looking beyond these uncertainties, it remains the case that Coleman constitutes an excellent illustration of how the ECJ relied on the new directives to expand the scope of the right to equality and non-discrimination within its jurisprudence so as to protect individual autonomy against prejudice more effectively. This approach has been taken even further to include situations where bigotry is evident but where no specific victim is identified.

iii) *Speech acts*

The state cannot, and should not try to, police the minds of individuals in order to protect a certain group against structural disadvantage. But what happens when there is a real chance that what an individual says might have the effect of impinging on the opportunity of members of a particular group? Can words be discriminatory, even where there is no identifiable victim of discrimination?

[621] See Marcus Pilgerstorfer and Simon Forshaw, 'Transferred Discrimination in European Law', *Industrial Law Journal*, Vol. 37, No. 4, 2008, pp. 384-393 at 390-391.
[622] Even though it is especially valuable in focusing the relationship between work and care in Europe; see, for example, Ann Stewart, Silvia Niccolai and Catherine Hoskyns, 'Disability Discrimination by Association: A Case of the Double Yes?', *Social & Legal Studies*, Vol. 20, No. 2, pp. 173-190.
[623] For an excellent analysis, see Lisa Waddington, 'Case C–303/06, S. Coleman v. Attridge Law and Steve Law, Judgment of the Grand Chamber of the Court of Justice of 17 July 2008', *Common Market Law Review*, Vol. 46, 2009, pp. 665-681; also see Lisa Waddington, 'Protection for Family and Friends: Addressing Discrimination by association', *European Anti-Discrimination Law Review*, Issue No. 5, July 2007, pp. 13-21.

Moreover, is there discriminatory treatment even when the decision of the employer is based purely on economic considerations? The Court seems to have answered these questions affirmatively[624].

The case concerned a statement by one of the directors of a Belgian company which dealt with the sale and installation of doors. After putting up a large sign which advertised job vacancies, Mr Feryn stated on national television that his firm would not hire any immigrants because clients were not willing to trust them with the security of their house. More specifically, he said that he is not a racist and he did not imply that only immigrants broke into houses but, as a matter of fact, his customers were scared and this was the only way to make sure their demands were met and, consequently, that the company performed well. Interestingly so, there was no identifiable individual who could be shown to have been discriminated against in this case, i.e. there was no applicant who had established that he was denied a job by Mr Feryn on grounds of ethnic origin[625]. Still, the Court had to decide whether or not the public statement itself could constitute direct discrimination on grounds of ethnic origin under the terms of the Race Directive.

Drawing from the 8th recital of the directive's preamble, both the Advocate General and the Court stressed that the directive purported 'to foster conditions for a socially inclusive labour market'. Article 2(2)(a) of the directive, which provides that 'direct discrimination shall be taken to occur where one person is treated less favourably than another […]', had to be read in the light of this goal. Accordingly, there was no need to identify a specific person who was treated less favourably in order to establish direct discrimination under the terms of the directive. This was so because many of the potential victims of this policy would not even apply knowing that their applications would be rejected on grounds of ethnic origin[626]. Hence, disallowing the claim would be tantamount to rewarding Mr Feryn for his openness in expressing the discriminatory attitude of the firm, thereby furthering social exclusion of ethnic minorities[627]. Accordingly, the statement itself was sufficient to give rise to a presumption as to the existence of a directly discriminatory recruitment policy. The burden of proof was then on Mr Feryn who should rebut that presumption by showing that his statement did not correspond to the actual policy of the firm, a matter which was up to the national court to decide.

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[624] Case C-54/07, Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV [2008] E.C.R. I-5187.

[625] The case was brought by a body which (pursuant to Article 13 of the Race Directive) aimed at promoting equal opportunities and opposition to racism and was empowered under Belgian law to be a party in judicial proceedings involving claims for discrimination irrespective of whether or not a prior complaint existed. The Court found that this was not contrary to Article 7 of the Race Directive which only imposed a duty on the member states to ensure that associations with a legitimate interest 'may engage, either on behalf or in support of the complainant'; Article 7 was seen as setting a minimum standard, one which did not prevent the member states from offering even more effective protection.

[626] Feryn (supra, n. 624), paras. 24-25 of the Court's judgment; also see paras. 15-16 of the AG's opinion.

[627] Ibid., see para. 17 of the AG's opinion.

Broadening the scope of direct discrimination so as to include even statements that could have the effect of interfering with a person's ability to function in the labour market as an equal is a further step towards the achievement of substantive equality. This stance affirms that non-discrimination is about the creation of a tolerant and inclusive society as much as it is about the protection of specific persons who have suffered unfavourable treatment. One may empathise with Mr Feryn who could lose several (racist) clients if he hired an immigrant. Indeed, the judgment might fairly be seen as imposing a duty of accommodation on the employer who would have to suffer proportional economic damage in order to secure the equal opportunity for immigrant employees[628]. All that Mr Feryn did was to emphasise the market value of an applicant's capability rather than what he considered to be applicant's actual qualifications for the job; on the face of it, this attitude does not seem to be either unreasonable or deplorable.

There is something to the argument that merit itself should not entitle someone to professional success and that the value that others attach to the service he/she provides must be the guiding factor[629]. This is so because 'in a free society we are remunerated not for our skill but for using it rightly'[630]. The individual should be held responsible for the way that he has exercised the valuable options open to him. But what happens when the value that market actors attach to an individual's skill is actually determined, as in the case at hand, by systemic prejudice and stereotyping? To use a further example already employed, the market value of a woman's skills may be lower than the value attributed to the skills of a man, due to the higher chance of the former quitting or taking breaks related to childcare (not to mention childbirth).

Keeping the market 'morally neutral' with regard to social justice might come to be a self-negating cause. This is so because, as shown in the above examples, the determination of market value by market actors is not always a morally empty process. Standing idle where discriminatory attitudes prevail is not tantamount to remaining morally neutral; rather, it is to approve silently a morality which is based on prejudice and which legitimises external interference with the valuable options of some individuals. Cases like Feryn illustrate that the Court has strongly refused to do so, highlighting the substantive as against the market dimension of equality. This attitude allowed the widening of the scope of the directive so as to cover discriminatory statements, even where no specific instance of unfavourable treatment can be identified[631].

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[628] See, for example, Christine Jolls, 'Antidiscrimination and Accommodation' (supra, n. 421) at 686-687; cf. Mark Kelman, 'Market Discrimination and Groups' (supra, n. 421) at 847-849.

[629] See F.A. Hayek, *The Constitution of Liberty*, Routledge Classics, 2006 (originally published in 1960), pp. 82-87.

[630] Ibid., p. 72.

[631] Such situations have been described as encompassing 'hypothetical discrimination': see, for example, Andrea Eriksson, 'European Court of Justice: Broadening the Scope of European Nondiscrimination Law', *International Journal of Constitutional Law*, Vol. 7, No. 4, 2009, pp. 731-753 at 748.

iv) *Indirect discrimination*

The Framework and Race Directives also added substance to another element of equality originally conceived within the case-law of the Court; namely, the prohibition of indirect discrimination. While indirect discrimination has been part of the jurisprudence of the Court since the early days of the Economic Community[632], the ECJ had developed a different definition for indirect nationality discrimination and indirect sex discrimination. In the case of nationality, indirect discrimination is prima facie established when an apparently neutral measure is 'intrinsically liable to affect migrant workers more' thereby risking to place them 'at a particular disadvantage'[633]. In the case of sex, however, indirect discrimination would be inferred only where the adverse impact of a policy could be proven as a matter of statistical reality[634].

This disparity between nationality and sex was indicative of the stricter scrutiny applied to the former which is absolutely vital for the maintenance of free movement and market integration as opposed to the latter which is not. The jurisprudence of the Court on indirect sex discrimination was codified by the Burden of Proof Directive which provided that 'indirect discrimination shall exist where an apparently neutral provision, criterion or practice *disadvantages a substantially higher proportion of the members of one sex* unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex'[635].

This view of indirect discrimination was not espoused by the Article 13 Directives which provide that 'indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice *would put persons [possessing one of the characteristics contained therein] at a particular disadvantage compared with other persons*, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary'[636]. This definition of indirect discrimination clearly leans towards the more sensitive approach taken with

[632] For early examples, see Case 15-69, Württembergische Milchverwertung-Südmilch AG v Salvatore Ugliola [1969] E.C.R. 363, para. 6; also see Case 152-73, Giovanni Maria Sotgiu v Deutsche Bundespost [1974] E.C.R. 153, para. 11.
[633] Case C-237/94, John O'Flynn v Adjudication Officer [1996] E.C.R. I-2617, para. 20.
[634] Hence, a difference in hourly pay between part-time and full-time workers would be indirectly discriminatory if the group of part-time workers was 'composed exclusively or predominantly of women': see Case 96/80, J.P. Jenkins v Kingsgate (supra, n. 501), para. 15.
[635] Council Directive 97/80/EC (supra, n. 501), Article 2(2).
[636] Article 2(2)(b) of the Framework Directive and Article 2(2)(b) of the Race Directive.

regard to nationality than the one taken with regard to sex[637]. Indirect discrimination on grounds of sex followed the same path just two years later[638].

Thus, it can fairly be argued that the Article 13 Directives reflect an important legislative choice which allowed for the more effective protection provided by the Court under the rubric of market equality (i.e. nationality discrimination) to imbue the realm of substantive equality as well. Claimants will not have to employ statistical evidence to show that a 'substantially higher proportion' of people belonging to one sex, race etc. have been disadvantaged[639]. In fact, while in some grounds such as sex it would be relatively easy to bring about statistical proof, the same would not be true for grounds such as sexual orientation[640]. The enquiry as to whether or not a 'particular disadvantage' would be suffered by some people on account of a prohibited ground is preferable in that it focuses on substantive implications, not on formal outcomes which are not always clearly discernible.

These legislative developments have been supplemented by a more substantive approach taken by the Court in drawing the line between direct and indirect discrimination. This much can be discerned through a case that involved a claim of indirect discrimination and a finding of direct discrimination[641]. Mr Maruko, who had established a life partnership under German law, was not allowed to receive widower's pension when his partner died. This was so despite the fact that surviving spouses were entitled to such benefits. Both Mr Maruko and the Commission claimed that this treatment amounted to *indirect discrimination* on grounds of sexual orientation since homosexuals could not marry in Germany and life partnership was the closest they could get to formalising their relationship. The Court ruled that this was actually a case of *direct discrimination*[642].

This finding is striking considering that Mr Maruko was treated unfavourably (prima facie) because of his civil status. Pursuant to the formula of indirect discrimination, this seemingly neutral criterion put him at a particular disadvantage compared to heterosexuals who could render themselves eligible for survivor's pension by getting married. The main reason why the Court

[637] For a general discussion of the legislative history and the problems that may arise in the interpretation of indirect discrimination under the relevant directives, see Christa Tobler, *Indirect Discrimination: A Case Study into the Development of the Legal Concept of Indirect Discrimination under EC law*, Intersentia, 2005, pp. 279-304.
[638] See Directive 2002/73/EC (supra, n. 612), Article 1(2); also see Directive 2006/54/EC (supra, n. 506), Article 2(1)(b).
[639] Of course, statistical evidence may still be used to establish indirect discrimination: see Framework and Race Directives, recital 15 of their preambles; also see Directive 2002/73 (supra, n. 612), recital 10 of its preamble.
[640] Evelyn Ellis, *EU Anti-Discrimination Law*, OUP, 2005, p. 94; for further criticism of this focus on statistical evidence see Bob Hepple and Catherine Barnard, 'Indirect Discrimination: Interpreting Seymour-Smith', *Cambridge Law Journal*, Vol. 58, No. 2, 1999, pp. 399-412.
[641] Case C-267/06, Tadao Maruko v Versorgungsanstalt der deutschen Bühnen [2008] E.C.R. I-1757; for a similar approach, see Case C-147/08, Jürgen Römer v Freie und Hansestadt Hamburg [2011] E.C.R. 000.
[642] The ECJ left it for the referring court to determine whether or not 'surviving spouses and surviving life partners are in a comparable situation so far as concerns that survivor's benefit' (para. 72).

preferred to analyse the case in terms of direct discrimination seems to be that -as was the case with pregnancy discrimination- the treatment at hand disadvantaged a particular group not merely disproportionately, but exclusively; it was specifically directed against homosexuals who were the only ones entering into life partnerships[643].

The lesson to be learned from the case of Mr Maruko is that the exclusionary effect of a measure is more important that its form in determining the kind of discrimination involved[644]. The practical implication of this approach is that the level of scrutiny applied in instances of direct discrimination may extend to what could formally be described as an instance of indirect discrimination. This possibility greatly enhances the protection afforded to the individual concerned given that direct discrimination cannot be objectively justified by a legitimate aim (in contrast to indirect discrimination)[645]. Unfortunately, the Court has not appeared as eager to provide effective protection in the context of reasonable accommodation.

v) *Reasonable accommodation*

The cases of Coleman, Feryn and Maruko demonstrate that the coming into force of the Article 13 Directives provided the legal and political legitimacy for the Court to widen the concept of direct discrimination; but this is not all. The Framework Directive also expands the need to promote equality through the accommodation of difference. Hence, Article 5 of the Framework Directive imposes a duty of reasonable accommodation for disabled persons. This 'means that employers shall take appropriate measures, were needed in a particular case, to enable a person with 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 […]'[646].

Obligations to provide for reasonable accommodation first came into being through the jurisprudence of the Court in relation to sex discrimination[647] and were later codified in several pieces of legislation dealing, inter alia, with pregnancy, maternity and parental leave[648]. The continuing expansion of accommodation duties in EU equality law is a further illustrative example

[643] For an excellent analysis, see Christa Tobler and Kees Waaldijk, 'Case C–267/06, Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen, Judgment of the Grand Chamber of the Court of Justice of 1 April 2008', *Common Market Law Review*, Vol. 46, 2009, pp. 723-746 at 735-740.
[644] Ibid.
[645] Direct age discrimination is the infamous exception to this: see Article 6 of the Framework Directive.
[646] Framework Directive, Article 5.
[647] See supra, section A6.
[648] For a brief overview, see Lisa Waddington and Aart Hendriks, 'The Expanding Concept of Employment Discrimination in Europe: From Direct and Indirect Discrimination to Reasonable Accommodation Discrimination', *The International Journal of Comparative Labour Law and Industrial Relations*, Vol. 18, No. 3, 2002, pp. 403-427 at 416-420. The authors rightly point out (at 426) that '[t]he right to be accommodated […] is firmly rooted in European labour and social security (case) law'.

of the ever-increasing eagerness to safeguard individual autonomy and dignity even when this will require private employers who are not prejudiced to forgo quick profit and maximum efficiency. In this context, the human right clearly trumps market dynamics.

But applying this obligation in an effective manner may prove to be a bigger challenge than expected for the Court. This much can be inferred from the case of Ms Chacon Navas who complained that she had been discriminated against on grounds of disability when she was fired after having been on leave of absence for eight months due to illness which rendered her unfit for work[649]. The Court declined to find that 'sickness' could ever amount to 'disability'; it stressed that the legislature deliberately used the latter term over the former and that 'disability must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life […] for a long time'[650].

The narrow interpretation provided by the Court can be contrasted with the position adopted by the Commission which has recognised 'that the circumstances of people with disabilities and the discrimination they face are socially created phenomena which are not directly related to their impairments per se'[651]. This approach clearly encompasses what has been described as the *social* model of disability, as opposed to the *individual* (also referred to as *medical*) model[652]. On the one hand, the social model defines disability as the product of the restrictions that society imposes on the disabled (e.g. individual or institutional prejudice, inaccessibility to mainstream amenities etc.); on the other hand, the individual model perceives disability as resulting from the functional impairment of the person concerned.

The decision of the Court was based on the individual model insofar as disability was defined with reference to the nature of the impairment, not the limitations caused[653]. Because of her sickness, Ms Chacon Navas was absent from work for a long period of time and was not expected to return anytime soon. Ironically, this state of affairs appears to fall within the definition of disability that

[649] Case C-13/05, Sonia Chacón Navas v Eurest Colectividades SA [2006] E.C.R. I-6467.
[650] Ibid., paras. 43-45.
[651] See, for example, Communication from the Commission to the Council and the European Parliament: Towards a United Nations legally binding instrument to promote and protect the rights and dignity of persons with disabilities, COM (2003) 16 final, 24 January 2003, p. 7; also see Communication from the Commission to the Council, the European Parliament, The European Economic and Social Committee and the Committee of the regions: Equal Opportunities for People with Disabilities: A European Action Plan, COM (2003) 650 final, 30 October 2003, p. 4.
[652] For an analysis of this distinction, see Michael Oliver, *Understanding Disability: From Theory to practice*, Palgrave, 1996, pp. 30-42; also see Katie Wells, 'The Impact of the Framework Employment Directive on UK Disability Discrimination Law', *Industrial Law Journal*, Vol. 32, 2003, pp. 253-273.
[653] For a critique along these lines and beyond, see Lisa Waddington, 'Case C-13/05, Chacón Navas v. Eurest Colectividades SA, Judgment of the Grand Chamber of 11 July 2006', *Common Market Law Review*, Vol. 44, 2007, pp. 487-499; also see David L. Hosking, 'A High Bar for EU Disability Rights', *Industrial Law Journal*, Vol. 36, 2007, pp. 228-237.

the Court itself provided; but such interpretation is impossible following the strict distinction that was drawn between sickness and disability[654]. What is even more remarkable is that the Court reached this decision even though it was given no information about the illness of Ms Chacon Navas[655]. It would be fair to argue, therefore, that the ECJ was so concerned not to equate any type of sickness with disability that it actually found that no type of sickness can be treated as disability; in other words, trying to avoid one extreme it fell into another.

The duty to provide reasonable accommodation for the disabled is bound to be seriously weakened if this approach is allowed to prevail with regard to the definition of disability. But unfortunately this is not the only blow that the effectiveness of Article 5 of the Framework Directive has suffered within the jurisprudence of the Court. In Coleman, the provision was analysed as 'concerning positive discrimination measures in favour of disabled persons'[656]. Insistence on the dialectics of positive discrimination and favourable treatment entails the danger of shifting attention away from individual empowerment and alleviation of disadvantage (equality of opportunity), focusing instead on compensatory favouritism (equality of results)[657].

There is no doubt that disability discrimination law is an especially complex area. Given that reasonable accommodation requirements are certain to arise quite often, it raises very hard questions of proportionality, thereby encouraging judicial restraint. Furthermore, disability is clearly not as easily definable as other prohibited grounds such as sex, race, sexual orientation or age. These considerations might provide an explanation for the failure of the Court to create an effective conceptual framework but, of course, they do not provide an excuse. Eventually, the attitude of the Court in this area stands in direct contrast to the crucial role it has played, and continues to play, in strengthening the right to equality in the EU. It is particularly hard to reconcile with the drastic expansion of the general principle of equality which has taken place within the jurisprudence of the Court over the course of the last decade.

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[654] It is worth noting that AG Geelhoed also hesitated to assimilate sickness with disability in his opinion for the case of Chacon Navas (supra, n. 649); but he did accept that a person should be able to rely on the prohibition of disability discrimination when 'it is not the sickness itself, but the resulting long-term or permanent limitations which are the real reason for the dismissal' (para. 85 of the opinion). Unfortunately, the Court overlooked this suggestion.

[655] See para. 17 of the judgment in Chacon Navas (supra, n. 649).

[656] See para. 42 of the judgment in Coleman (supra, n. 614).

[657] Concerns over this possibility of misinterpretation have been expressed since the early days of the Framework Directive: see, for example, Richard Whittle, 'The Framework Directive for Equal treatment in Employment and Occupation: An Analysis from a Disability Rights Perspective', *European Law Review*, Vol. 27, No. 3, 2002, pp. 303-326 at 313.

4. The rise of the general principle

At this later stage of evolution of EU equality law, and with the Charter of Fundamental Rights of the EU (CFR) ready to come into effect, the ECJ decided to use the Article 13 Directives in order to give yet another fundamental twist to the general principle of equality; this it did in the case of Mangold[658]. The Court in that case had to deal with a provision of domestic law which provided that a fixed-term employment contract could be concluded without an objective justification if the worker had reached the age of 52 when his/her employment started. Mr Mangold, 56, who was employed by Mr Helm under such a contract, questioned the compatibility of this rule with the Framework Directive. The question was referred to the ECJ which was called to decide, inter alia, whether the provision was compatible with Article 6(1) of the Framework Directive[659]. A distinctive feature of this case was that the transposition period for the Framework Directive had not lapsed. But even if it had lapsed, it is a well established rule of EU law that Directives do not have horizontal direct effect, so, a finding of breach would hardly be of any use to Mr Mangold[660].

In a groundbreaking decision, the ECJ found that domestic law such as the one at issue was precluded by Article 6(1) of the Framework Directive[661] and should always be set aside by national courts, even in proceedings between private individuals, irrespective of whether or not the transposition period had expired. This was because the Framework Directive was, according to the Court, a specific enunciation of the general principle of non-discrimination on grounds of age which should be adhered to by member states whenever they acted within the scope of EU law. Given that the national rule at hand had come into existence as a means of implementing Council Directive 1999/70, it fell within the scope of EU law. Consequently, the general principle of EU law (as expressed in the Framework Directive) should be applied in order to set aside the incompatible national provision. Put simply, the Directive itself was not enforceable but the general principle of non discrimination on grounds of age (as set out in the Directive) was. Accordingly, the ECJ found that 'it is the responsibility of the national court, hearing a dispute involving the principle of non-discrimination in respect of age, to provide, in a case within its

[658] Case C-144/04, Werner Mangold v Rüdiger Helm [2005] E.C.R. I-9981.

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

[660] See Case 152/84, M.H. Marshall v Southampton and South-West Hampshire Area Health Authority [1986] E.C.R. 723, para. 48.

[661] The objective of the rule was to make it easier for older workers to find employment by allowing for more elastic terms in their contracts. The ECJ found that, within the terms of Article 6(1) of the Framework Directive, this was a legitimate objective (para. 61 of the judgment) but that the national provision went beyond what was 'necessary and appropriate' to achieve it, thereby offending the principle of proportionality; the reason was that the measure applied indistinctively to all persons who had reached 52, irrespective of their personal situation or other considerations linked to the structure of the labour market: para. 65 of the judgment in Mangold (supra, n. 658).

jurisdiction, the legal protection which individuals derive from the rules of Community law and to ensure that those rules are fully effective, setting aside any provision of national law which may conflict with that law'[662].

The ruling in Mangold is, prima facie, limited to the general principle of non-discrimination on grounds of age and the provisions of the Framework Directive. But from a normative point of view the general principle of non-discrimination on grounds of age can hardly be understood as separate from the general principle of equality[663]. The possibility of direct horizontal effect of the general principle of equality creates a whole new dimension for EU equality law. The general principle of equality may no longer be viewed only as a ground for judicial review of national legislation or EU actions, but might also be called upon by individuals who may use it to protect themselves against the actions of other individuals as long as these actions are based on a national provision which falls within the scope of EU law.

This vast expansion of the principle does not come without its problems. Perhaps the greatest problem seems to be the one relating to legal certainty, which is also a general principle of EU law[664]. It is indeed very easy to empathise with Mr Helm who, almost out of the blue, would have to renegotiate the terms of Mr Mangold's employment. Should Mr Helm have checked whether or not the national law was incompatible before making use of it? Even if he did, is it possible that it would still be unclear whether the provision offended the general principle of non-discrimination on grounds of age? Such would probably be the case, if nothing else, because this specific general principle would be nowhere to be found in the jurisprudence of the Court at the time. Ironically, Mangold itself is one of the best examples of the volatile nature and effect of the general principle of equality.

Not surprisingly, the decision instigated criticism both inside and outside of the Court[665]. In a subsequent case, Advocate General Geelhoed accurately noted the 'far-reaching consequences' that the widening of the scope of Article 13 via the general principle of equality could have for the member states by imposing on them obligations of a very complex nature, seriously affecting (inter

[662] See para. 77 of the judgment.

[663] To use the words of AG Sharpston, 'the better reading of Mangold is not that there was in Community law a specific pre-existing principle of non-discrimination on grounds of age, but rather that discrimination on such grounds had always been precluded by the general principle of equality, and that Directive 2000/78 introduced a specific, detailed framework for dealing with that (and certain other specific kinds of) discrimination': para. 58 of the opinion of AG Sharpston for Case C-227/04 P, Maria-Luise Lindorfer v Council of the European Union [2007] E.C.R. I-6767.

[664] For a good brief discussion, see Mirjam de Mol, 'Kücükdeveci: Mangold Revisited – Horizontal Direct Effect of a General Principle of EU Law', *European Constitutional Law Review*, Vol. 6, Issue 2, 2010, pp. 393-308 at 307-308.

[665] See, for example, Editorial Comments, 'Horizontal Direct Effect – A Law of Diminishing Coherence?', *Common Market Law Review*, Vol. 43, 2006, pp. 1-8; cf. Christa Tobler, 'Putting Mangold in Perspective', *Common Market Law Review*, Vol. 44, 2007, pp. 1177-1183.

alia) their employment and social policy[666]. Neither the Treaty nor the legislature of the Community had allowed, according to him, for Article 13 to be used by the ECJ 'as a lever to correct […] the decisions […] of the Member States in the exercise of the powers which they – still – retain'[667]. Later on, Advocate General Mazak seconded this view and went even further in analysing Mangold through a wider examination of the role and nature of the general principles of EU law[668]. He pointed out, inter alia, that Mangold logically implied that all grounds covered by the directive should be understood as reflecting 'already existing' general principles of EU law, something which would obviously be hard to reconcile with the earlier decision of the ECJ in Grant where sexual orientation (now covered by the framework directive) was not recognised as a general principle[669].

Advocate General Mazak himself acknowledged that the principle of non-discrimination on grounds of age was almost nowhere to be found in the international agreements of the member states or their constitutional traditions[670]. This point was also stressed by Roman Herzog, former President of the Federal Republic of Germany and former President of the Federal Constitutional Court of Germany, who called upon the German Constitutional Court to 'stop the European Court of Justice'[671], thereby waking memories of the Solange saga. The German Constitutional Court reviewed the decision of the ECJ in Mangold and ruled that it was not *ultra vires*, mainly because it was seen as not entailing a 'structurally significant shift' in the allocation of competences between member states and the EU[672]. The decision in Kucukdeveci[673] (which came only several months before the decision of the German Constitutional Court) may fairly be seen as the result of the ECJ's determination to defend its supremacy against those who criticised Mangold as *ultra vires*, even if this entailed the continuation of a questionable attitude.

The case concerned a national rule which stipulated that periods of employment before the employee had reached the age of 25 should not be taken into account in calculating the notice period for dismissal. Ms Kucukdeveci was hired by Swedex in 1996, when she was 18 years old. She was given one month's notice of dismissal in December 2006, at the age of 28. In accordance

[666] See paras. 50-56 of the AG's opinion in Case C-13/05, Sonia Chacón Navas (supra, n. 649).
[667] Ibid., para. 54.
[668] Opinion of Advocate General Mazak in Case C-411/05, Félix Palacios de la Villa (supra, n. 460).
[669] Ibid., paras. 95-96; this point is not to be taken without caveat. As will be argued below, the Court in Mangold actually employed the pre-existing general principle of equality, rather than an 'already existing' prohibition against age discrimination.
[670] With the exception of the Finnish and the Portuguese Constitution.
[671] Roman Herzog and Lüder Gerken, 'Stop the European Court of Justice', Published in German on 8 September 2008 by F.A.Z (Frankfurter Allgemeine Zeitung). For English text, see *http://www.cep.eu/fileadmin/user_upload/Pressemappe/CEP_in_den_Medien/Herzog-EuGH-Webseite_eng.pdf*.
[672] See Re Honeywell (Case 2 BvR 2661/06), Bundesverfassungsgericht (Germany), 6 July 2010, [2011] 1 C.M.L.R. 33. For a very good discussion of the decision and its context, see Mehrdad Payandeh, 'Constitutional Review of EU Law After Honeywell: Contextualizing the Relationship Between the German Constitutional Court and the EU Court of Justice', *Common Market Law Review*, Vol. 48, 2011, pp. 9-38.
[673] Case C-555/07, Seda Kücükdeveci v Swedex GmbH & Co. KG [2010] E.C.R. I-365.

with the national rule, the length of the notice period was determined by taking account only of the last three years of her employment; this rule was not intended to implement EU law, as was the case in Mangold. Nevertheless, the Court found that the rule fell within the scope of EU law simply because the situation at hand was covered by the Framework Directive, the transposition period of which had lapsed in this case[674]. It concluded that the measure was disproportionate to the aim pursued[675] and, therefore, the general principle of non-discrimination on grounds of age (as expressed in the Framework Directive) had been violated. The question then turned to how this affected the dispute between Ms Kucukdeveci and her employer.

In this context the Court reiterated that a directive cannot impose obligations on an individual but, given that the transposition period for the directive had lapsed, the domestic court was obliged to interpret the national provision in the light of the directive. Since the national rule was clear and could not be interpreted in conformity with the directive, the ECJ had to resort, once again, to the general principle of non-discrimination on grounds of age. As it did in Mangold, the Court concluded that when the general principle of EU law is involved in a hearing, the national court must 'provide, within the limits of its jurisdiction, the legal protection which individuals derive from European Union law and […] ensure the full effectiveness of that law, disapplying if need be any provision of national legislation contrary to that principle'[676]. Accordingly, the national rule at hand should not be given effect by the national court in the case of Ms Kucukdeveci; the general principle of equality would protect her against the actions of the state and her employer.

It would be wrong to suggest that the ECJ used the directive as the sole ground for the recognition of the general principle of non-discrimination on grounds of age in the Mangold-Kucukdeveci saga. In explicating the new general principle, the Court relied on the 'right of all persons to equality before the law and protection against discrimination' which is, indeed, universally accepted[677]. The equivalent of this right in the EU is the fundamental general principle of equality which could now be extended to cover the grounds which were brought within the scope of EU law through the new directives. Accordingly, as it did earlier with sex, the Court found that age

[674] Ibid., para. 25; cf. Case C-427/06, Birgit Bartsch (supra, n. 473). In this respect, the Court has been criticised for extending the scope of application of the general principle to cases where there exists a mere 'coincidence of subject matter between some measure of Union secondary law and the exercise of national regulatory competence': see Editorial Comments, 'The Scope of Application of the General Principles of Union Law: An Ever Expanding Union?', *Common Market Law Review*, Vol. 47, 2010, pp. 1589-1596 at 1595.

[675] The aim of the measure was 'to afford employers greater flexibility in personnel management by alleviating the burden on them in respect of the dismissal of young workers' (para. 39). This was based on the assumptions that young people could more easily move from one job to another and that more flexible conditions for the employment of young people would make it easier for employers to hire them (para. 35). The Court concluded that the measure was disproportionate to the aim pursued in that it applied to all employees who were hired before they reached 25 years of age, irrespective of their age at the time of the dismissal (para. 40).

[676] See para. 51 of the judgment in Kucukdeveci (supra, n. 673).

[677] Fourth recital of the Framework Directive; referred to by the Court in para. 74 of the judgment in Mangold (supra, n. 658).

discrimination was prohibited by the general principles of law, not because of its place of prominence in international treaties or the constitutional traditions of the member states, but simply because it constituted a specific enunciation of a most fundamental general principle. The Court actually enforced the pre-existing general principle of equality, as realised and fulfilled by the directive[678]. The inclusion of all discrimination grounds covered by primary or secondary EU law in Article 21 of the Charter of Fundamental Rights (which codified the general principle of equality) is perhaps the best proof of the truth of this assertion[679].

The actual problematic aspect of the rulings in Mangold and Kucukdeveci is the way the Court employed the general principle to bypass the rules governing the effect of directives in EU law. The argument has been made that disapplying a provision of national law that conflicts with the directive (exclusionary effect) is not the same as directly applying the directive in horizontal relationships (substitution effect)[680]. Still, it is very hard to maintain this distinction as in both situations the legal relationship of the individuals concerned is drastically reshaped as a matter of fact[681]. Nevertheless, setting aside the ambiguities in the Court's reasoning, the two judgments appear to raise a point of great constitutional significance: namely, that the different manifestations of the general principle of equality are autonomous in the way they evolve, i.e. they are not tied to the constitutional traditions of the member states, and they may go so far as to affect both vertical and horizontal relationships as long as the situation falls within the boundaries of EU law[682].

It has been suggested that the continuation of this expansive interpretation could lead to the recognition of direct horizontal effect of the general principle (as given effect by the various directives) even in cases where discrimination results purely from private behaviour, without reference to any provisions of national law[683]. Conversely, the ECJ could choose to restrain itself and set limits in the circumstances under which direct horizontal effect will be allowed[684]. A logical expansion of the principle in Mangold would be to extent the rule in the other grounds as well,

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[678] For a similar view, see paras. 57-59 of the opinion of AG Sharpston in Case C-427/06, Birgit Bartsch (supra, n. 473).

[679] Besides, the Court itself has acknowledged that the Charter is a legitimate source of inspiration in determining what fundamental rights are protected under the general principles of EU law: see Case C-540/03, European Parliament v Council of the European Union [2006] E.C.R. I-5769, paras. 35-38.

[680] See Dagmar Schiek, 'The ECJ Decision in Mangold: A Further Twist on Effects of Directives and Constitutional Relevance of Community Equality Legislation', *Industrial Law Journal*, Vol. 35, No. 3, September 2006, pp. 329-341 at 337.

[681] See Michael Dougan, 'When Worlds Collide! Competing Visions of the Relationship Between Direct Effect and Supremacy', *Common Market Law Review*, Vol. 44, 2007, pp. 931-963 at 940.

[682] The boundaries of EU law may be broadly defined, as the judgments in Mangold and Kucukdeveci demonstrate.

[683] See, for example, Timothy Roes, 'Case C-555/07, Seda Kücükdeveci v. Swedex GmbH & Co. KG', *Columbia Journal of European Law*, Vol. 16, 2009-2010, pp. 497-519 at 518.

[684] See Mirjam de Mol, 'The Novel Approach of the CJEU on the Horizontal Direct Effect of the EU Principles of Non-discrimination: (Unbridled) Expansionism of EU Law?', *Maastricht Journal of European and Comparative Law*, Vol. 18, No. 1-2, 2011, pp. 109-135 at 121-123 and 135.

bringing them all together under the cover of the general principle of equality[685]. But the restricted scope of application of the EU Charter of Fundamental Rights may operate as a disincentive towards this approach.

In any case, there seems to be little doubt that the possibility of horizontal application of the general principle (and the relevant directives) paves the way for increased interference with freedom of contract in the name of equality[686]. It enables the individual to practically enforce her right to equality against other individuals even where this clearly challenges well established principles of EU law. Thus, it is anything but surprising that Mangold has been described as 'echo[ing] the expansive approach of P v S to the principle of equal treatment'[687]. In essence, the Court employed its biggest weapon, i.e. the general principles of the unwritten constitution, in order to emphasise that it will not strictly follow the legislature of the EU in taking some grounds of discrimination more seriously than others.

Indeed, the fact that the Court chose to take this huge step in the context of age discrimination is highly significant. It is common ground that age lies at the bottom of the 'hierarchy of grounds' created by the various EU equality directives[688]. In recognising the fundamental nature of this prohibition the Court appears to compensate for the lack of enthusiasm on the part of the legislature of the EU. Such instances of judicial creativity seem to be encouraged, if not legitimised, by the absence of a clear methodology as to how general principles come into existence[689]. For now, the social facet of the general principle of equality has begun to rise above and beyond its written enunciations not only as a matter of theory and symbolism but also as a matter of practical application.

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[685] The Court has already relied on Kucukdeveci to imply that there exists a general principle of non-discrimination on the ground of sexual orientation which is applicable as long as the case at hand falls within the scope of EU law: see C-147/08, Jürgen Römer (supra, n. 641), para. 60.

[686] See, for example, Marek Safjan and Przemyslaw Miklaszewicz, 'Horizontal Effect of the General Principles of EU Law in the Sphere of Private Law', *European Review of Private Law*, Vol. 18, No. 3, 2010, pp. 475-486 at 484.

[687] Paul Craig and Grainne de Burca, *EU Law: Text, Cases and Materials*, OUP, Fourth edition, 2008, p. 411.

[688] The fact that the prohibition of direct discrimination on grounds of age stands alone in being subject to a non-exhaustive list of justifications (Framework Directive, Article 6) has been instrumental in leading commentators to this conclusion; see Lisa Waddington and Mark Bell, 'More Equal Than Others: Distinguishing European Union Equality Directives', *Common Market Law Review*, Vol. 38, 2001, pp. 587-611 at 599.

[689] Hence, the judgment in Mangold has been analysed as a clear example of how 'general principles of law may inadvertently turn the rule of law into a rule of judges': see Matthias Herdegen, 'General Principles of EU law – the Methodological Challenge' in Ulf Bernitz, Joakim Nergelius, Cecilia Cardner (eds.), *General Principles of EC Law in a Process of Development*, Kluwer Law International, 2008, pp. 343-355. Of course, the opposite view that general principles are not in reality employed by the Court as an instrument for judicial activism has also been advanced: see Koen Lenaerts and Jose A. Gutierrez-Fons, 'The Constitutional Allocation of Powers and General Principles of EU law', *Common Market Law Review*, Vol. 47, 2010, 1629-1669.

The cases discussed above tell us little about the meaning of equality in EU law but they say a lot about the (activist) attitude of the Court towards it. This tendency of the Court to protect the individual as effectively as possible by expanding the personal scope of the general principle is most important in an era when the furtherance of individual autonomy is being pushed forward as the main goal of equality. Even if we are to set aside considerations as to the elimination of social oppression, the formal conception of equality which informs the application of the general principle still has much to offer in protecting the individual against market dynamics; especially in cases where such dynamics appear to influence the drafting of legislation.

Thus, in a case concerning the interpretation of Regulation (EC) No 261/2004[690], the Court relied on the general principle of equality to rule that when a flight is delayed the passengers may be entitled to compensation[691]. Interestingly, the regulation at hand stipulated that compensation was available only to travelers whose flight had been cancelled; but cancellation and delay were treated as comparable by the Court because passengers in both cases were deemed to 'suffer similar damage, consisting in a loss of time'[692]. This decision was reached '[i]n view of the objective of Regulation No 261/2004, which is to strengthen protection for air passengers by redressing damage suffered by them during air travel'[693]. Neither the principle of legal certainty nor the principle of proportionality could come to the aid of air carriers whose interests were adversely affected by this decision[694].

In essence, the Court stepped in to substitute for the failure of the EU legislature to strike a fair balance between the entitlements of passengers and the interest of air carriers. It employed the general principle of equality in order to reverse the effect of a regulation which gave priority to the latter. This line of thought demonstrates that, as a matter of principle, market interests should not be allowed to prevail over the freedom of individuals. The coming into force of the Charter of Fundamental Rights serves to highlight this position even more, paving the way for the further development of a substantive rationale for enforcing the right to equality.

[690] Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91, [2004] O.J. L 46/1.
[691] See Joined cases C-402/07 and C-432/07, Christopher Sturgeon and others v Condor Flugdienst GmbH; Stefan Böck and Cornelia Lepuschitz v Air France SA [2009] E.C.R. I-10923.
[692] Ibid., para. 54.
[693] Ibid., para. 49.
[694] See Joined cases C-581/10 and C-629/10, Emeka Nelson and Others v Deutsche Lufthansa AG; R. (on the application of TUI Travel plc and others) v Civil Aviation Authority [2013] 1 C.M.L.R. 42, paras. 61-84.

5. The Charter of Fundamental Rights

i) *Substantive interpretation and hierarchy of grounds*

The Charter of Fundamental Rights of the European Union (CFR)[695] widened the material scope of the general principle of equality by extending the list of prohibited grounds[696]. Discrimination based on the new grounds, and on the ones which have already been discussed above, is prohibited under Article 21 CFR. A very positive effect of the Charter is that, for the first time ever, it gives to all the grounds of discrimination a unified scope of application, which is the scope of the Charter itself. On the face of it, this weakens previous allegations as to the creation of a 'hierarchy of grounds' which emanated from the differing scope of the various Directives[697]. But the provisions of the Charter, albeit generally applicable to the institutions of the Union, apply to Member States only when they implement EU law[698]. Hence the scope of the general principle of equality, especially after Mangold and Kucukdeveci, is a lot wider than the scope of the Charter. In this respect, the various directives and the hierarchy they generate still play a crucial role.

In contrast with equality provisions contained in primary and secondary law, the Charter does not in itself bind member states to implement measures for the promotion of equal treatment in specific areas nor does it create, as Article 19 TFEU (ex 13 EC) did, any new legislative powers for the Union[699]. Furthermore, provisions such as the ones contained in Articles 22[700] and 25[701] of the Charter seem to encapsulate general objectives and aspirations with regard to the advancement of substantive equality rather than conventional legal rights and obligations[702]. Of course, this

[695] The Charter acquired legal force on 1 December 2009, when the Treaty of Lisbon came into effect. It was first solemnly proclaimed by the European Parliament, the Council of the European Union and the European Commission in December 2000 ([2000] O.J. C 364/1). The version of the Charter to which the Treaty of Lisbon refers is the one adopted at Strasbourg on 12 December 2007 ([2007] O.J. C 303/1).
[696] The new grounds introduced by the Charter are: colour, social origin, genetic features, political or any other opinion, membership of a national minority, property and birth.
[697] See Dagmar Schiek, 'A New Framework on Equal Treatment of persons in EC Law?', *European Law Journal*, Vol. 8, No. 2, June 2002, pp. 290-314 at 308. In this hierarchy race and ethnic origin comes first, followed by sex and then completed by the grounds contained in the Framework Directive. The Framework Directive, which constitutes the lowest common denominator, provides for non-discrimination in employment and occupation.
[698] Article 51 (1) CFR.
[699] Article 51(2) CFR specifically emphasises that '[t]he Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties'.
[700] 'The Union shall respect cultural, religious and linguistic diversity'.
[701] 'The Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life'.
[702] To this extent, they might come to be seen as provisions containing 'principles' the legal enforceability of which is even more restricted by virtue of Article 52(5) CFR.

'extremely circumscribed' legal effect of the Charter does not negate its significance in heightening the profile of a fundamental human right to equality in the European Union[703].

Emphasis on the human rights facet of equality fosters interpretations which place individual freedom from social oppression above all other goals, especially when closely protected grounds are at hand. This can be clearly illustrated by the recent Test-Achats judgment where the Court interpreted Articles 21 and 23 CFR[704] to hold that taking sex into account in calculating insurance premiums is a violation of the principle of equal treatment between men and women[705]. In that case, the Court struck down Article 5(2) of Directive 2004/113/EC[706] which allowed for 'the use of sex [as] a determining factor in the assessment of risk based on relevant and accurate actuarial and statistical data'. The Court found that the directive aimed to ensure 'the application of unisex rules on premiums and benefits' in the insurance market and that the derogation contained in Article 5(2) could negate this purpose because, not being limited in time, it could go on forever[707].

It is worth noting at this point that the very inclusion of the contended Article in the directive can fairly be seen as the result of pressure exercised by the insurance industry[708]. The Commission itself had accepted in its proposal for the directive that the right to equality between women and men should rise above the freedom of the industry to set tariffs by using any criteria they see fit; accordingly, the commission proposed an allowance of six years, following the lapse of the directive's transposition period, for the member states and the insurance companies to preclude the use of sex as an actuarial factor[709]. These time limitations were nowhere to be found in the final version of the directive.

The intense lobbying that took place does not come as a surprise given that the calculation of insurance premiums with reference to sex is a particularly efficient and profitable way of doing

[703] Evelyn Ellis, 'The Impact of the Lisbon Treaty on Gender Equality', *European Gender Equality Law Review*, No. 1, 2010, pp. 7-13.
[704] Article 23 CFR provides that '[e]quality between women and men must be ensured in all areas, including employment, work and pay. The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex'.
[705] Case C-236/09, Association Belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministres [2011] E.C.R. 000.
[706] Council 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] O.J. L 373/37.
[707] Case C-236/09, Association Belge des Consommateurs Test-Achats (supra, n. 705), paras. 29-32.
[708] See, for example, Erica Howard, 'The Case for a Considered Hierarchy of Discrimination Grounds in EU law' (supra, n. 604) at 452.
[709] See Proposal by the Commission for a Council Directive implementing the principle of equal treatment between women and men in the access to and supply of goods and services, COM (2003) 657 final, 5 November 2003, pp. 6-9.

business[710]. Still, albeit seemingly based on objective statistical grounds, it remains the case that this practice substitutes one's individuality with a collectivist approach where people are identified by reference to the group they belong[711]. Hence, for example, a man could be forced to pay more than a woman for his car insurance simply because men in general have caused more car accidents than women[712]. As a result, cautious individuals would be submitted to unfavourable treatment simply because of their sex, thereby allowing a personal characteristic to justify unequal treatment.

There seems to be little doubt that there is gross stereotyping involved in calculating insurance premiums with reference to sex. But traditionally the ECJ has not been particularly suspicious towards this form of discrimination[713]. This might have been due to the narrower scope of the prohibition of sex discrimination prior to the coming into being of the Directive 2004/113/EC as well as because of the traditional adherence to a market oriented conception of equality. Indeed, even those who describe the neutrality of actuarial calculations as 'an ideological farce' concede that such techniques are in fact an important element of standardised contracting on which the modern market is based[714]. The decision in Test-Achats clearly shows that the activism of the judiciary, coupled with the widening of the scope of EU equality law by the legislature, have now generated a human right to equality which is to be upheld even at the cost of causing serious disruptions to the smooth operation of a huge industry; in this respect, the human right has clearly risen above and beyond the market principle.

But, even after the coming into force of the Charter, it remains the case that the multiple sources of this human right to equality lead to the fragmentation of its scope. It is quite remarkable that even though both the Court and the Advocate General agreed that Articles 21 and 23 CFR were the guiding provisions in this case, neither actually employed them as such. Rather, they said that those Articles enshrine the principle of equal treatment which was then defined by reference to the spirit of the TFEU and TEU as evidenced by their provisions and the previous case law of the

[710] See Dagmar Schiek, '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*, Vol. 12, 2005, pp. 427-466 at 434-436.

[711] Ibid.; a similar view is eloquently put forward in Jonathan Simon, 'The Ideological Effects of Actuarial Practices', *Law and Society Review*, Vol. 22, No. 4, 1988, pp. 771-800 where the author accurately notes, inter alia, that '[t]he ideological power of actuarial practices is their ability to neutralize the moral charge carried by these forms of difference' (at 794). On the opposite side, there are those who argue that disallowing the use of sex as an actuarial factor may result in discriminatory treatment against those belonging to the sex that would normally pay less: see, for example, George J. Benston, 'The Economics of Gender Discrimination in Employee Fringe Benefits: Manhart Revisited', *The University of Chicago Law Review*, Vol. 49, No. 2, 1982, pp. 489-542.

[712] As a matter of fact, insurers were reported to charge men under 21 'significantly more' than they charged women under 21 because the former were considered twice as likely to be involved in a car accident: see Jill Insley and Rupert Jones, 'ECJ Gender Ruling Hits Insurance Costs', *The Guardian*, 1 March 2011 (*http://www.guardian.co.uk/money/2011/mar/01/ecj-gender-ruling-insurance-costs*).

[713] See, for example, Case C-152/91, David Neath v Hugh Steeper Ltd. [1993] E.C.R. I-6935, paras. 25-34.

[714] See Dagmar Schiek, 'Freedom of Contract and a Non-Discrimination Principle – Irreconcilable Antonyms?' (supra, n. 425) at 82-85.

Court. Both the Court and the Advocate General relied on Article 157(1) TFEU and Article 19(1) TFEU in order to demonstrate the fundamental significance of protecting against sex discrimination in the Union. Article 8 TFEU, which dictates that in all its actions the Union shall promote equality between women and men, was also put forward as well as Article 10 TFEU and Article 3(3) TEU which provide respectively for the elimination of sex discrimination and the promotion of equality between women and men.

The existence of all these Articles referring to equality of sexes coupled with the Court's reliance on them denotes that, even within the Charter itself, the elimination of the 'hierarchy of grounds' referred to above is more superficial than it is real. In fact, Article 52(2) CFR provides that Charter rights which are also covered by the Treaties 'shall be exercised under the conditions and within the limits defined by those Treaties'. Accordingly, since Article 21 CFR is not examined in isolation, some grounds enshrined therein remain more important than others. The contrast between the grounds contained in Article 10 TFEU and those contained in Article 21 CFR further attests to this[715].

ii) *Dignity and social inclusion*

The Treaty of Lisbon also continued the process of constitutionalisation of the EU through the introduction of the concept of dignity in the Treaty framework[716]. The concept is prominently put forward in the preamble and in the very first Article of the Charter of Fundamental Rights which provides for the need to protect and respect the 'inviolable' human dignity[717]. In addition to that, Article 2 TEU now provides that '[t]he Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights […]'[718]. This emphasis on human dignity further highlights the need to ensure, as a basic minimum requirement, respect for the 'intrinsic worth' of every individual[719].

[715] Drawing from Article 19 TFEU (ex Article 13 EC), Article 10 TFEU provides that '[i]n defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation'. Discrimination on grounds of social origin, genetic features, language, political or any other opinion, membership of a national minority, property and birth is not included in Article 10 TFEU even though it is covered by Article 21(1) CFR.

[716] For a general account of the philosophical evolution of dignity and its emergence in national and international law, see David Kretzmer and Eckart Klein (eds.), *The Concept of Human Dignity in Human Rights Discourse*, Kluwer Law International, 2002; also see Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights', *The European Journal of International Law*, Vol. 19, no. 4, 2008, pp. 655-724.

[717] References to the concept of dignity can also be found in Articles 25 (rights of the elderly) and 31 (fair and just working conditions) of the Charter.

[718] It is worth contrasting this with Article 6(1) TEU as amended by the Treaty of Amsterdam and maintained by the Treaty of Nice, which provided that '[t]he Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States'.

[719] For further discussion, see Ch. 1, section 2.

Of course, it is practically impossible to discern all constituent elements of this 'intrinsic worth' and set them up in a legally or even morally coherent manner. But this does not mean that instances which hamper the intrinsic worth of the individual are equally unidentifiable. Given the striking resemblance between Article 1(1) of the German Basic Law and Article 1 CFR, it has been suggested that the ECJ may reasonably draw inspiration from the jurisprudence of the German Court on the matter[720]. In interpreting Article 1(1) of the Basic Law, the German Constitutional Court has described the obligation to respect human dignity as being founded on the inherent predisposition of every human being to determine and develop oneself freely[721]. This development of the free human personality is, according to the German Court, 'related to and bound by the community' which must recognise each individual as bearing 'equal rights and value of his own' if personal autonomy is to be safeguarded[722].

Social exclusion emanating from discriminatory attitudes is anything but a legitimate external interference with this personal freedom, demeaning one's 'value' in society. The power of dignity in human rights discourse is that it allows such interferences to be identified and addressed even when they are not always covered by a specific legal provision (something which would be as impossible as defining 'intrinsic worth'). It transforms one's right to freedom from external oppression (legal or social) into a principle of interpretation of human rights[723]. In this way, the introduction of dignity reinforces an understanding of equality as a substantive principle which aims to safeguard individual autonomy against adverse social structures, be it in the form of prejudice, stereotyping or lack of reasonable accommodation. Article 3(3) TEU further attests to this by putting forward the elimination of 'social exclusion and discrimination' as one of the general aims of the Union[724].

It is worth noting that the concept of dignity, as well as its close relationship to the principle of equality, is not novel in the general EU legal framework. As early as 1968, it was conceded on the face of secondary EEC law that equal treatment of workers in the Economic Community was

[720] For an interesting discussion, see Jackie Jones, 'Common Constitutional Traditions: Can the Meaning of Human Dignity under German Law Guide the European Court of Justice?', *Public Law*, 2004, Spr, pp. 167-187.

[721] See Life Imprisonment Case (Case 45 BVerfGE 187), Bundesverfassungsgericht (Germany), 21 June 1977.

[722] Ibid.

[723] This much may also be inferred from the non-legally binding explanatory notes to Article 1 CFR which provide that '[t]he dignity of the human person is not only a fundamental right in itself but constitutes the real basis of fundamental rights […]. It results that none of the rights laid down in this Charter may be used to harm the dignity of another person, and that the dignity of the human person is part of the substance of the rights laid down in this Charter. It must therefore be respected, even where a right is restricted' ([2007] O.J. C 303/17).

[724] Social exclusion was previously mentioned only in Article 137 EC (now Article 153 TFEU) which provided that the Community (now the Union) 'shall support and complement the activities of the Member States' in combating social exclusion.

aimed at ensuring that free movement would be exercised 'in freedom and dignity'[725]. Twenty eight years later, the Court acknowledged that it was under a duty to safeguard the 'dignity and freedom to which [the individual] is entitled' in prohibiting discrimination against transsexuals[726]. Even before the signing of the Treaty of Lisbon, respect for human dignity had been clearly recognised as a general principle of Community law by the Court[727] and acknowledged as such on the face of secondary legislation[728]. The recognition of harassment as a form of discrimination in EU law also served to highlight further the close link between non-discrimination and the protection of human dignity.

C. CONCLUSION

Even before the coming into force of the Charter of Fundamental Rights, the Court of what began as an economic community indicated that -when the two conflict- fundamental economic freedoms will give way to the effective protection of human rights as long as the principle of proportionality is adhered to[729]. The ECJ has not hesitated to defend the overriding constitutional significance of respect for human rights even on the face of a Council regulation which implemented UN resolutions relating to the politically sensitive area of suppression of international terrorism[730]. This tendency to perceive individual freedom as a paramount aim in itself has not left the right to equality and non-discrimination untouched.

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[725] See the preamble to Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community, [1968] O.J. L 257/2.

[726] See Case C-13/94, P v S and Cornwall County Council (supra, n. 466), para. 22. The acceptance of respect for human dignity as a principle of Community law is not a step that the ECJ has taken without caution. Three years before P v S the Court had remained silent when called upon by the Advocate General to employ the principle of respect for human dignity in deciding Case C-168/91, Christos Konstantinidis v Stadt Altensteig-Standesamt [1993] E.C.R. I-1191. The case concerned German rules providing for the transliteration into Roman characters of the name of a Greek national in a way that would lead to wrong pronunciation. A-G Jacobs found that this could constitute an interference with a general principle of respect for 'the dignity, moral integrity and sense of personal identity' of the person who would suffer the 'ultimate degradation' of being stripped of his name (paras. 39-40 of his opinion). The Court did not follow this view, basing its judgment solely on whether or not such transliteration would interfere with an individual's freedom to exercise his right to establishment (para. 15 of the judgment). Even after P v S, the ECJ did not find it necessary to hold that discrimination against transsexuals also amounted to a violation of their right to respect for their freedom and dignity, despite the suggestion of the Advocate General: see Case C-117/01, K.B. v NHS Pensions Agency (supra, n. 519).

[727] See Case C-36/02, Omega Spielhallen- und Automatenaufstellungs GmbH v Bundesstadt Bonn [2004] E.C.R. I-9609, para. 34.

[728] See, for example, the 16th and 38th recital to the preamble of Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions, [1998] O.J. L 213/13.

[729] See Case C-112/00, Eugen Schmidberger Internationale Transporte Planzuge v Austria [2003] E.C.R. I-5659, para. 74; also see Case C-36/02, Omega Spielhallen (supra, n. 727), para. 35.

[730] See Joined cases C-402/05 P and C-415/05 P, Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities [2008] E.C.R. I-6351.

The general principle of equality, as extracted by its written enunciations, originally concerned the maintenance of free movement (nationality) and fair competition (sex). Thus, it encapsulated a conception of *market equality* which was based on norms of symmetry in treatment and which purported to protect individual freedom only insofar as necessary for the sustainability of economic integration; the individual was seen as an instrument towards this end. Still, having introduced human rights within the Community the ECJ embarked on the evolution of a second, substantive dimension of the right to equality in EU law. This conception of *substantive equality* purports to protect individual freedom as an end in itself, focusing on the elimination of social oppression in the form of prejudice, stereotyping and lack of reasonable accommodation.

The prohibitions on nationality and sex discrimination proved to be the platform on which the Court initiated the evolution of a substantive understanding of equality. The Court relied on these rules to strengthen the social dimension of the Community, concluding that the affirmation of human dignity should be the primary focus of a right to equal treatment. The Court also took it upon itself to implement key concepts such as indirect discrimination and reasonable accommodation, the legislature following up in codifying the relevant jurisprudence. But this does not meant that a clear conception of substantive equality has come to exist in EU law. The case-law on positive action, for example, most clearly illustrates the ambivalence between guaranteeing equal opportunities and equal results. Although this state of affairs is valuable in implying that substantive equality is anything but a narrowly construed derogation from formal equality, it also highlights the difficulties of properly defining it, especially where considerable political pressure is involved.

The coming into being of the Race and Framework Directives can fairly be seen as the first major legislative recognition of this need to secure an effective prohibition of discrimination as an end in itself and not merely as an instrument for the attainment of other goals. The Court embraced this stance by extending the concept of direct discrimination within its jurisprudence so as to cover associative discrimination, speech acts and instances which could formally be seen as involving indirect discrimination. Nevertheless, the ECJ also relied on the Framework Directive to challenge well established principles of EU law in order to enable the individual to enforce her right to equality (as enshrined in EU law) against other individuals. Although such findings may fairly be understood as the result of the same enthusiasm which gave birth to substantive equality in the first place, they come dangerously close to amounting to unacceptable manifestations of judicial activism.

This attitude of the Court may be contrasted with the more restrictive approach of the legislature as this is reflected by the limited scope of application of the Charter of Fundamental Rights. The

Charter does a great service in aligning the written with the unwritten constitution but it clearly fails to unify the many fragments of the human right to equality in EU law. Hierarchy of grounds is largely maintained and political expediency seems to prevail over moral values in this context. But the same is not true for the ECJ which has relied -at the very least- on the symbolic power of the Charter in order to gain further momentum in its constant effort to reinforce protection against social oppression[731]. It is clear that the Court keeps running ahead of the legislature, as it has so often done. This is not necessarily problematic given that this process has been instrumental in extracting the human right out of the market principle in the first place.

[731] See Case C-236/09, Association Belge des Consommateurs Test-Achats (supra, n. 705).

Chapter 4: Defining Substance in European Equality Law

Introduction

A prohibition of discrimination was initially introduced in the ECHR and the EU as an instrument for the attainment of other aims. For the ECHR, the purpose has been to maintain the consistent enjoyment of the rights enshrined therein (legal equality); and in the EU the goal was to preclude inconsistent behaviour of market actors thereby preventing distortions of competition and furthering economic integration (market equality). As a consequence, both legal orders were originally based on a formal conception of equality that was limited to requiring symmetrical (i.e. consistent) treatment for analogously situated people. The purpose was not to address the social oppression that underlined differential treatment, but to make sure that differential treatment itself would not hamper the higher goals pursued by the ECHR and the EU.

It has been argued so far that the European Court of Human Rights and the European Court of Justice have played a decisive role in giving rise to a substantive understanding of equality; i.e. one that perceives the protection of the individual as end in itself. The former Court has been alone in sustaining this approach while the latter has also benefited from written provisions of primary and secondary EU law. The aim of the present chapter is to set out the underlying values that may inform the implementation of that human right to equality. Again, emphasis will lie on the jurisprudence of the two Courts. It will be argued that a single vision regarding the human interest that equality aims to uphold as a matter of fundamental human right might actually be possible to achieve. This potentiality can help provide a coherent analytical framework for the future development of the right to equality in European human rights law.

1. The potential for a single vision

It is widely accepted nowadays that a formal understanding of equality which is limited to prohibiting unjustified differential treatment is no longer capable of describing the whole breadth of entitlements and duties arising under European equality law. This state of affairs has led commentators to suggest that it is better to describe the area as an amalgam of tensions among different conceptions of equality[732]. The role of the international judiciary in this context is to

[732] See, for example, Christopher McCrudden, 'Theorising European Equality Law' in Cathryn Costello and Ellis Barry (eds.), *Equality in Diversity: The New Equality Directives*, Irish Centre for European Law, 2003, pp. 1-38; also see Mark Bell, 'The Right to Equality and Non-Discrimination' in Tamara K Harvey and Jeff Kenner

decide which conception is most fit to address each particular situation, having regard to the debates that take place in domestic level[733]. There is much truth to the argument that no single vision of equality is clearly decipherable in European human rights law; but this is not necessarily the result of a wide conceptual fragmentation.

Any theory or conception of equality must be capable of addressing at least two basic questions. First, it must stipulate the purpose of equality (the ends); second, it must provide a method for the realisation of that purpose (the means). But the question of means cannot be addressed properly unless we have already agreed on the ends. In other words, the enquiry as to the human interest that equality purports to secure is the guiding factor in distinguishing between different theories. If we agree on what the interest is then the issue is purely one of determining how it is to be pursued in specific situations, having regard to conflicting interests. This balancing is an inherent element of rights adjudication; it does not mean that the right itself is fragmented into many rights[734].

Failure to articulate the human interest that equality aims to uphold reinforces the argument of those who attack it as unsubstantiated and weakens its status as a fundamental right that extends beyond the prohibition of unjustified differential treatment. As a consequence, conflicting rights and interests are far more likely to trump equality where political convenience so demands. The resulting unpredictability and ambiguity in interpretation makes the judiciary vulnerable to charges of activism and jeopardises any meaningful potential developments. This is because we cannot decide on the appropriateness of different paths unless we have at least a basic idea of where we are heading. Thus is constructed a vicious cycle within which the interests of those in need may remain trapped and silenced.

Protection of individual dignity and autonomy, equal recognition of one's identity, insubordination or equal participation are but a few (interrelated) rationales put forward as capable of underlying a substantive conception of equality. It is true that such values are particularly useful when deliberating on the proper role of equality in a philosophical level. But a more concrete approach is needed when actual decisions are taken by the judiciary in the interpretation of a right. It is important in that context not to limit ourselves to setting out only the ultimate goal(s) pursued; instead, we also have to explicate as clearly as possible the specific norms and attitudes that need to be identified and eradicated in each case separately.

(eds), *Economic and Social Rights under the EU Charter of Fundamental Rights –A Legal Perspective*, Hart Publishing, 2003, pp. 91-110; and Paul Craig, *EU Administrative Law*, OUP, 2006, pp. 545-605.

[733] McCrudden (ibid) at 36.

[734] Hence, for example, a tension between *individual justice* and *group justice* is evident in the positive action jurisprudence of the ECJ; a similar tension can be traced within the jurisprudence of the ECHR where a systemic examination of the claim may tilt the balance in favour of the individual applicant. The resolution of that tension generates different interpretations of the right to equality in specific situations, not different conceptions or theories.

Perhaps it would be more useful then to narrow the discussion to the two broad distinctions that have been advanced most usually in describing the human interest that equality aims to safeguard. First, we need to distinguish between a formal and a substantive conception because the choice one makes between the two determines the purpose of the right to equality in general (freedom from arbitrariness or freedom from social oppression). Second, we need to draw a distinction between equal opportunities and equal outcomes in order to determine the purpose of substantive equality in particular (equal enablement or equal achievement). Neither of these tensions has been clearly resolved by the two Courts. It is true that the substantive approach is becoming more and more relevant in both legal orders; but the problem of properly describing the human interest at hand remains very much alive.

For example, Article 14 ECHR has been analysed as being increasingly concerned with preventing measures that have the effect of 'perpetuat[ing] disadvantage, discrimination, exclusion or oppression'[735]. By the same token, the view has been advanced that 'the pursuit of equality in the Community context is becoming closely linked to ideals such as dignity, participation in society and redress of historical disadvantage'[736]. Even if we accept that social inclusion and protection of individual dignity are now relevant considerations, these criteria remain too elusive to provide a concrete conceptual framework for the implementation of a right to equality; the same is true for the related idea of freedom from social oppression. The challenge here is to see how these underlying values can be translated into more specific goals to be attained.

No absolute answer can be provided in this respect. The best one can do is to look into the reasoning of the two Courts in order to identify the substantive considerations that seem to have informed it from time to time. Such exercise might provide us with a hint of why some distinctions are considered invidious even if seemingly justified. It will be argued here that the goals of protecting the individual against prejudice and stereotyping are capable of providing a substantive rationale for several instances of the relevant case law. The same is true for the idea of reasonable accommodation of difference which, nevertheless, remains underdeveloped if one looks beyond the prohibition of indirect discrimination.

[735] See Rory O'Connell, 'Cinderella Comes to the Ball: Art 14 and the Right to Non-Discrimination in the ECHR', *Legal Studies*, Vol. 29, No. 2, June 2009, pp. 211-229 at 213.

[736] Gavin Barrett, 'The Concept and Principle of Equality in European Community Law – Pouring New Wine into Old Bottles?' in Cathryn Costello and Ellis Barry (eds.), *Equality in Diversity: The New Equality Directives*, Irish Centre for European Law, 2003, pp. 99-134 at 131; for a similar argument, see Claire McHugh, 'The Equality Principle in EU Law: Taking a Human Rights Approach?', *Irish Student Law Review*, Vol. 14, 2006, pp. 31-59 at 58.

2. The role of prejudice and stereotyping

When differential treatment is viewed as discriminatory despite the existence of a seemingly objective and reasonable justification, one cannot help but inquire into why this might be the case. As a matter of fact, the two Courts have not hesitated to find a violation in cases where powerful social or market interests came to justify the distinction at hand. For example, the refusal of Russian authorities to provide a foreign national who was HIV positive with a residence permit amounted to discrimination under the ECHR even though it was based on legitimate concerns about public health[737]. Similarly, the practice of taking sex into account in calculating insurance premiums was prohibited by the ECJ despite the existence of statistical evidence indicating that men and women were not in analogous situations in terms of risk assessment[738].

Neither of the distinctions mentioned above was clearly arbitrary or irrational and yet they were both deemed discriminatory. These two cases denote vividly that in the EU and the ECHR there has emerged a culture of perceiving any unfavourable treatment based on suspect grounds as inherently invidious. The question of *why* this is so is clearly important if we are to understand the human interest that equality aims to safeguard within the two legal orders. In the first case, the ECtHR made it quite clear that the state enjoyed a narrow margin of appreciation because of the 'widespread stigma and exclusion' that people living with HIV have suffered historically[739]. In the second case, the ECJ simply emphasised the importance of sex equality and the undesirability of sustaining for an unspecified length of time what the directive itself seemed to describe as derogation from equal treatment[740].

On the face of it, there appears to be no common light under which the two approaches outlined above may be analysed. But a broader view of their actual outcome might suggest otherwise. The Strasbourg Court took a stance against a decision which was based heavily on a stereotyped image according to which all people living with HIV are promiscuous, irresponsible and dangerous for public health. In order to do so, it did not hesitate to interfere drastically with a sensitive area of domestic policy (public health). By the same token, the Luxembourg Court took it upon itself to prohibit a long-established practice of determining insurance premiums with reference to (statistical) stereotyping. By striking down the provision of secondary legislation which allowed for such practice to persist, the judiciary proved that it was not willing to follow the deferential attitude of other institutions of the EU for the sake of protecting the interests of a huge industry. The point

[737] See Kiyutin v Russia (Application no. 2700/10), Judgment of 10 March 2011.
[738] See Case C-236/09, Association Belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministres [2011] E.C.R. 000.
[739] See Kiyutin (supra, n. 737), para. 64.
[740] See Association Belge des Consommateurs Test-Achats (supra, n. 738), para. 30.

may be made, therefore, that in both cases discussed here the elimination of stereotyping was enough to trump conflicting fundamental interests.

Now let us move to another example. When a French scheme for retirement of civil servants gave additional benefits to women who had raised children but not to men, the ECJ ruled that this amounted to sex discrimination[741]. This was so because there was nothing to justify the underlying assumption that only female civil-servants were likely to suffer disadvantages in their career by reason of bringing up their children[742]. In essence, the measure at hand was based on a stereotyped image of women as carers and men as bread-winners; hence, it was unacceptable. By the same token, the ECtHR found that giving parental leave to women serving in the army but not to men amounted to discrimination as 'the traditional distribution of gender roles in society cannot justify the exclusion of men, including servicemen, from the entitlement to parental leave'[743].

Traditional social norms and attitudes may be relied upon only when the purpose is to mitigate their adverse effect on individual freedom through positive action. Both Courts have been willing to allow this as long as the measure at hand is deemed capable of addressing factual inequalities[744]. Thus, it seems that protection from stereotyping has been acknowledged (either expressly or implicitly) in both legal orders as an aim of non-discrimination; none should suffer a disadvantage because of generalisations regarding the group he is deemed to belong to by reason of a personal characteristic (e.g. women are less likely to engage in a car accident than men). The same is true for yet another consideration which appears to be relevant in assessing whether or not a specific treatment is discriminatory; namely, the (in)existence of prejudice.

When a woman who was in a stable homosexual relationship applied for adoption in France her application was rejected due to 'the lack of a paternal referent and the ambivalence of the commitment of each member of the household'[745]. The ECtHR concluded that behind these seemingly valid justifications there was hidden a condemnation of the applicant's lifestyle and, more specifically, her sexual orientation[746]. Accordingly, the treatment was discriminatory. In another famous case, the ECJ found that the hostility and eventual redundancy faced by a mother at work due to her son's disability amounted to (associative) direct discrimination and harassment

[741] See Case C-366/99, Joseph Griesmar v Ministre de l'Economie [2001] E.C.R. I-9383.
[742] Ibid., paras. 55-56.
[743] See Konstantin Markin v Russia (Application no. 30078/06), Judgment of 22 March 2012, para. 143.
[744] For examples from the jurisprudence of the ECtHR, see Stec and Others v United Kingdom (Applications nos. 65731/01 and 65900/01), Judgment of 12 April 2006, para. 61 and Andrle v The Czech Republic (Application no. 6268/08), Judgment of 17 February 2011, para. 53. For examples from the case-law of the ECJ, see Case C-409/95, Hellmut Marschall v Land Nordrhein-Westfalen [1997] E.C.R. I-6363, para. 31 and Case C-476/99, H. Lommers v Minister van Landbouw [2002] E.C.R. I-2891, para. 38.
[745] See E.B. v France (Application no. 43546/02) Judgment of 22 January 2008, para. 82.
[746] Ibid., paras. 85-89.

on the ground of disability[747]; this was so despite the fact that the mother herself was not disabled. The presumption of intolerance on the part of the defendants towards homosexuality and disability respectively played a decisive role in establishing discrimination in both these cases.

An even clearer example of how a prejudiced motivation against a particular group may give rise to discrimination is provided by the jurisprudence of the two Courts on speech acts. When an employer declared that he will not hire any immigrants because his customers are xenophobic, the statement alone was deemed sufficient by the ECJ to constitute direct discrimination even though there was no specific victim of differential treatment[748]. And when the Mayors of Warsaw and Moscow publically stated that they would not allow any homosexual propaganda in the streets of their cities, the ECtHR found that the subsequent rejection of applications to hold gay-pride parades amounted to discrimination[749]; this was so despite the fact that seemingly objective justifications were put forward by the authorities for their refusal. The Mayors and the employer in these cases violated the right to equality primarily because of their intentions, not their actions.

The case remains, however, that the ECtHR has done a far greater job than the ECJ in pushing forward the elimination of prejudice and stereotyping as underlying values of non-discrimination. This is not surprising if one considers that the written legal framework that the ECJ is called upon to interpret is far more detailed as to its requirements and far more restricted as to its scope of application than the European Convention. Moreover, the primary role of the ECJ is to secure the sustainability of the supranational legal order, not to develop human rights standards. Thus, although it has made valuable contributions to the protection of vulnerable groups, it has done little to explicate the substantive reasons for doing so.

For example, when an employee was dismissed because he decided to undergo sex-change operation the ECJ found this to amount to sex discrimination despite the fact that sexual identity was not set out as a protected ground in written provisions[750]. The Court acknowledged that refusal to protect a transsexual in such cases would constitute 'a failure to respect the dignity and freedom to which he or she is entitled'[751]; but it did not properly explain *why* this would be the case. Instead, it limited itself to concluding that the case fell under the rubric of sex discrimination because a transsexual was 'treated unfavourably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment'[752]. This argument seems to

[747] See C-303/06, S. Coleman v Attridge Law and Steve Law [2008] E.C.R. I-5603.
[748] See Case C-54/07, Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV [2008] E.C.R. I-5187.
[749] See Baczkowski and Others v. Poland (Application no. 1543/06), Judgment of 3 May 2007 and Alekseyev v Russia (Applications nos. 4916/07, 25924/08 and 14599/09), Judgment of 21 October 2010.
[750] See Case C-13/94, P v S and Cornwall County Council [1996] E.C.R. I-2143.
[751] Ibid., para. 22.
[752] Ibid., para. 21.

be circular insofar as it implies simply that transsexuals were treated less favourably than non-transsexuals.

A far more substantive reasoning can be traced in the recommendation of the Advocate General. He suggested, inter alia, that the purpose of sex equality was to protect women from 'negative images' and 'moral judgments' which have nothing to do with their actual ability to work; the exact same impediment was faced by transsexuals[753]. He then went on to propose that the directive on equal treatment between men and women should be interpreted 'in a broader perspective, including therefore all situations in which sex appears as a discriminatory factor'[754]. The ECJ did not expressly adopt any of these two suggestions but its judgment does nothing to contradict them. In fact, the reliance that the Advocate General placed on protection against moral judgments (prejudice) and negative images (stereotyping) relating to any consideration that has to do with sex is surely a more coherent rationale than the one provided by the Court for reaching the same conclusion.

In recent times, the ECJ has been more willing to emphasise that different forms of reliance on a prohibited ground will be discriminatory. Hence, the mother in the case discussed earlier was considered a victim of direct discrimination because she was treated unfavourably by reason of (her son's) disability[755]. Once again, this seemingly technical reasoning becomes far more substantiated if examined under the light of the elaborate analysis provided by the Advocate General. He observed that individual freedom of the disabled to choose from life's valuable options should not be affected by prejudice; the adversities suffered by the mother would have exactly that effect on her dependent child[756]. Even though the ECJ did not follow this line of thought expressly, it is still important to note that its decision is fully compatible with it.

The ECtHR has been clearly more rigorous than the ECJ in explicating the importance of protecting the individual against prejudice and stereotyping. Perhaps the most obvious illustration of this attitude is to be found in the field of race equality. There, the Court has repeatedly stressed that Article 14 gives rise to a positive obligation on the part of domestic authorities to investigate 'possible racist overtones' of violent assaults[757]. By the same token, when faced with a case involving the beating of Roma people by the police, the ECtHR relied expressly on evidence suggesting the existence of racist motivations at the time of the attack (as well as during the

[753] See para. 20 of the opinion of AG Tesauro in P v S.
[754] Ibid., para. 23.
[755] See Coleman (supra, n. 747), para. 50.
[756] See paras. 9-14 of the opinion of AG Maduro in Coleman.
[757] See, for example, Nachova and others v Bulgaria (Applications nos. 43577/98 and 43579/98), Judgment of 6 July 2005, para. 166 and Secic v Croatia (Application No. 40116/02), Judgment of 31 May 2007, para. 67.

subsequent investigation) in establishing a violation of Article 14[758]. The goal of preventing unjustified differential treatment on grounds of race remains pivotal even in this context[759]; but so does the wider need 'to combat racism and racist violence, thereby reinforcing democracy's vision of a society in which diversity is not perceived as a threat but as a source of its enrichment'[760].

What the examples given here aim to show is that the goal of protecting the individual against prejudice and stereotyping has proven capable of informing the reasoning of the two Courts. In this sense, there might be said to emerge a substantive rationale for enforcing the right to equality and non-discrimination. The purpose is no longer only to prevent arbitrary distinctions which affect the smooth operation of the market (EU) or the universal enjoyment of other fundamental rights (ECHR). Of course, the idea of symmetrical treatment irrespective of personal characteristics still dominates the general principle of equality in EU law as well as the traditional methodology applied by the ECtHR to discrimination claims; but guaranteeing such symmetry is not necessarily perceived as an end in itself.

It is not surprising then that differential treatment may actually be called for in the name of equality either through the prohibition of indirect discrimination or the requirement of reasonable accommodation. The latter is understood here as a wide requirement which encompasses the former prohibition but also extends beyond it[761]. The question of how far duties to accommodate difference should go in practice is quite hard to tackle. That is why the idea of reasonable accommodation has remained subtle both within the EU and the ECHR if one looks beyond the prohibition of indirect discrimination. This does not mean, however, that it is not capable of forming a constituent element of the human interest that equality safeguards in European human rights law.

3. The neglected virtue of reasonable accommodation

It was within the jurisprudence of the two Courts that reasonable accommodation first emerged as a constituent element of the right to equality. The ECJ initially introduced de facto accommodation duties (through the prohibition of direct discrimination) in order to ensure that pregnancy would

[758] See Stoica v Romania (Application no. 42722/02), Judgment of 4 March 2008, paras. 128-132.
[759] See, for example, Moldovan and others v Romania (No. 2) (Applications nos. 41138/98 and 64320/01), Judgment of 12 July 2005, paras. 139-140.
[760] See Stoica (supra, n. 758), para. 117.
[761] When an apparently neutral measure or practice disproportionately affects some people because of a personal characteristic (indirect discrimination), in reality it fails to accommodate their difference. But a wider understanding of reasonable accommodation may require positive steps to be taken even when no particular measure is to blame for the disadvantage suffered.

not affect women's employability[762]. The legislature of the Union subsequently espoused this finding and also took further measures to promote women's opportunities in the marketplace by regulating areas such as parental leave and fixed-term employment. Many years later, a duty to provide reasonable accommodation for disabled employees also appeared in written EU law[763]. The situation has been considerably different in the context of the ECHR where the link between reasonable accommodation and equality has been sustained entirely by the ECtHR.

The case law of the Strasbourg Court on Article 14 reveals that reasonable accommodation is strongly correlated to, if not conflated with, the prohibition of indirect discrimination. Hence, accommodation duties have been employed to ensure that differently situated people are treated differently thereby avoiding the charge of indirect discrimination[764]. A positive implication of the absence of clear distinction between indirect discrimination and reasonable accommodation is that the latter is not -at least in formal terms- more restricted than the former as to the areas in which it might touch upon (e.g. sex, race etc.). The same is not true for the EU where accommodation is understood as conceptually distinct to direct or indirect discrimination and where the grounds in relation to which it may apply have been set out (sex, disability).

Therefore, the current situation might be described as follows: a duty to provide reasonable accommodation in the name of equality remains subtle but unrestricted within the ECHR while at the same time it is relatively clear but strictly confined within the EU. It is important to note, however, that in both legal orders reasonable accommodation may now be required as a matter of positive obligation in upholding equality. In contrast to positive action which may (or may not) take place in the course of exercising social policy, a positive obligation imposes a *duty* which must be adhered to by the state (ECHR) and, if possible, even by individuals (EU). Imposing such a duty to respect the interest of some people in having their difference accommodated is tantamount to conferring a legal right on these people. The fact that the duty is still limited in scope (EU) or clarity (ECHR) should not distract attention from this important finding; namely, that the dialectics of reasonable accommodation have imbued the right to equality in European human rights law.

This conclusion is valuable in highlighting the importance of personal enablement as a constituent element of an equally autonomous and dignified life. Indeed, the idea of reasonable accommodation reinforces the view that widely acceptable norms and practices may disadvantage those who are unable to follow them due to a personal characteristic; even where no prejudice or stereotyping is clearly involved. Thus understood, the need for reasonable accommodation may provide a substantive rationale for sustaining the prohibition of indirect discrimination which aims

[762] See Ch. 3, section A6.
[763] See Ch. 3, section B3(v).
[764] See Ch. 2, section 7(iii).

to ensure that seemingly neutral measures will not in practice disadvantage people bearing a particular characteristic[765]. But it may also go as far as to explain why some instances of direct discrimination violate the right to equality.

For example, when provisions of a national constitution excluded the members of certain ethnic groups from standing as candidates in general elections, the ECtHR found the distinction to be directly discriminatory even though its purpose was to secure peace and stability in a post-conflict environment[766]. Clearly, the differential treatment at hand was not instigated from prejudice or stereotyping and an important political interest was advanced as justification. The Strasbourg Court acknowledged the peculiar political situation and the necessity for power-sharing among certain ethnic groups but went on to conclude that this could also be achieved without 'the total exclusion' of other ethnic minorities from public life[767]. In reality then, it can fairly be said that the system failed to provide reasonable accommodation for those ethnic groups that were considered irrelevant in terms of sustaining peace.

Most importantly, the idea of reasonable accommodation can play a pivotal role in guiding the implementation of the right to equality beyond the prohibitions of direct or indirect discrimination. This is so because its focus does not lie only on guaranteeing freedom in the negative sense of preventing direct or indirect external interferences. Instead, the ability of the individual to pursue life's opportunities in a socially inclusive environment is put at the centre of attention. The ensuing emphasis on positive freedom is capable of creating a coherent framework for the imposition of positive obligations but it may also contribute greatly to the evaluation of positive action schemes; this second potentiality is usually neglected as coherence in that field could drastically affect the exercise of domestic social policy.

Adopting a reasonable accommodation approach in assessing the permissibility of positive action would do a great service in fostering respect for individualism and equal opportunity. Insofar as individualism heralds the primacy of the person over the collectivity, the duty to provide reasonable accommodation is inherently individualistic. It does not rely on generalisations and stereotypes about disadvantaged groups nor does it offer blanket solutions to complex problems. Instead, it provides for those adjustments that are necessary and proportionate in each and every distinct case. For these reason, it has been described accurately as 'an individualized form of affirmative action'[768]. Moreover, because proper accommodation aims to alleviate disadvantage -

[765] See Ch. 1, section 5.
[766] See Sejdic and Finci v. Bosnia and Herzegovina (Applications nos. 27996/06 and 34836/06), Judgment of 22 December 2009.
[767] Hence, the treatment was disproportionate: see Sejdic and Finci (ibid.), para. 48.
[768] See Pamela S. Karlan and George Rutherglen, 'Disabilities, Discrimination, and Reasonable Accommodation', *Duke Law Journal*, Vol. 46, 1996, pp. 1-41 at 40.

not to compensate for it- emphasis lies on equal opportunity instead of equal outcomes. Hence, one is properly accommodated when the way a personal characteristic interacts with the physical or social environment does not affect her ability to pursue opportunities on equal terms[769].

In this sense, it is hard to accept that a lower pensionable age for women should be allowed in order to compensate for their 'traditional unpaid role of caring for the family in the home rather than earning money in the workplace'[770]. Such a measure does nothing to enforce the ability (i.e. opportunity) of women to participate in the market. If anything, it affirms the negative stereotypes as to their 'traditional' role. By the same token, respect for individualism is set aside as a professionally successful woman will still get her pension earlier than a man who faced drawbacks in his career by reason of household responsibilities. Positive action in this case seems to be concerned more with appearing to do justice rather than with providing reasonable accommodation to those who need it.

Let us now take the example of a positive action policy that aims to mitigate the underrepresentation of women in the workplace by making provision for childcare facilities[771]. Such a scheme is fully consonant with a vision of equality of opportunity as it aims only to alleviate a specific hurdle that is de facto more likely to affect female employees. Moreover, as long as similarly situated men are allowed to make use of it, the scheme remains open to all individuals who may benefit from accommodation; personal disadvantage is the guiding factor, not sex. Similarly, when a training scheme provides that 50% of places are to be reserved for women in order to address underrepresentation, it still secures equality of opportunity in that it does not actually guarantee that half the employment spots will be given to women[772]; and provided other training programs are available, individualism is respected in that the advancement of women's interests will not take place at the expense of men's opportunities[773].

These examples are in stark contrast with a hiring scheme which provides that -if underrepresented- women take precedence over equally qualified men unless there is a specific reason not to[774]. One may be tempted to accept the argument that such measures purport to accommodate the different position women find themselves in when entering the employment market (e.g. because of stereotypes). Still, this argument is considerably weakened if we consider

[769] See, for example, Lisa Waddington and Aart Hendriks, 'The Expanding Concept of Employment Discrimination in Europe: From Direct and Indirect Discrimination to Reasonable Accommodation Discrimination', *The International Journal of Comparative Labour Law and Industrial Relations*, Vol. 18, No. 3, 2002, pp. 403-427 at 409.
[770] See Stec and Others v United Kingdom (supra, n. 744), para. 61.
[771] See Case C-476/99, H. Lommers (supra, n. 744).
[772] See Case C-158/97, Georg Badeck and Others, interveners: Hessische Ministerpräsident and Landesanwalt beim Staatsgerichtshof des Landes Hessen [2000] E.C.R. I-1875, para. 52.
[773] Ibid., para. 53.
[774] See Case C-409/95, Hellmut Marschall (supra, n. 744).

that reasonable accommodation aims to alleviate disadvantage. Since both men and women are equally qualified, the condition that denies them equal opportunity does not (presumably) affect women in the abovementioned scenario; and if the problem remains that equally qualified women may not be hired because of adverse social norms, there is still little to suggest that preferential treatment of female applicants will dismantle these discriminatory attitudes[775].

The immediate aim of such preferential treatment policies is to compensate for the disadvantage at hand, not to alleviate it. Giving women priority in sectors where they are underrepresented does very little -if anything- to address the specific hurdles that make it harder for them to enter the marketplace in the first place. Increased participation may be said to weaken systemic prejudice or stereotyping but even this possibility is immediately counterbalanced by the reinforcement of the view that women acquired their post by virtue of favouritism rather than merit[776]. In the end, the ineffectiveness of such schemes is bound to persist because underrepresentation is primarily the symptom of adverse social norms, not their source. And even if we were to accept that positive discrimination measures somehow promote the opportunities of women, it is still hard to avoid the conclusion that equally qualified and situated men might be forced eventually to let go of an opportunity simply because of their sex.

It is somewhat paradoxical to suggest that the opportunities of some may sometimes take precedence over the opportunities of others in order to promote equality of opportunity; unless we fall back into the trap of recognising symmetrical treatment as the core interest that equality aims to uphold. But when equality of results triumphs over equality of opportunity, individual justice is repudiated in favour of a collectivist goal. The fact that the ECJ has been willing to uphold such positive action schemes constitutes a most illustrative example of its failure to maintain a consistent approach to substantive equality in the face of opposing politics. The same point can be made with reference to the jurisprudence of the ECtHR where a wide margin of appreciation is most likely to be allowed in determining the permissibility of positive action policies.

Perhaps a certain categorization of the different forms of positive action would help the two Courts identify more clearly the proper boundaries of discretion in this area. For example, it has been suggested that there are essentially five different types of positive action applied in the field of employment: first, there is an obligation to eradicate discrimination in the traditional sense of

[775] The negation of individualism in favour of group rights only reinforces the tendency to think of people with reference to their personal characteristics; that is why individual empowerment through the dismantlement of specific barriers is the only way to pursue equal opportunity. For an interesting discussion of this thesis, see Clint Bolick, *The Affirmative Action Fraud: Can we Restore the American Civil Rights Vision?*, Cato Institute, 1996, pp. 121-143.

[776] This is one of the classic arguments advanced against affirmative action policies: see, for example, Jonathan Wolff, *An Introduction to Political Philosophy*, OUP, 2006, pp. 186-189.

tracing and rectifying unjustified distinctions based on prohibited grounds; second, criteria may be introduced which are facially neutral but are practically capable of ameliorating the chances of those underrepresented; third, outreach programmes can be instigated with a view to encouraging, through information or training, members of specific groups to apply for a job; fourth, those belonging to underrepresented groups may be treated favorably at the stage of hiring, promotion or redundancy; fifth, minority status may become a relevant qualification for the job[777].

Of these five types of positive action, only the first three promote equality of opportunity and respect for individualism. The last two types (especially the last one) are clearly more concerned with achieving equality of results, setting aside individual merit in the course of addressing collective disadvantage through preferential treatment[778]. Even if such policies of preferential treatment are to be allowed in some cases, there have to be some conditions which will guarantee that fairness will not be overridden. In order to determine the nature and scope of these conditions, one will have to espouse eventually some guiding principles indicating what fairness requires when implementing positive action schemes.

Unequivocal acceptance of reasonable accommodation as a constituent element of equality would greatly contribute to achieving more effective protection both for the beneficiaries of positive action and for the de facto benefactors. Besides, the right to equality is not enjoyed exclusively by the disadvantaged nor does it operate in a vacuum where no conflicting rights and interests exist; any balancing must take proper account of the rights of others. The ideals of respect for individualism and equal opportunity are capable of providing an excellent platform for these purposes. But the costs involved as well as the principle of subsidiarity have forced the two Courts and the legislature of the EU to tread lightly in this area.

4. Common ground(?)

Prejudice and stereotyping often manifest themselves in the form of arbitrary differential treatment imposed directly by one person or entity over another. In this sense, their elimination is strongly correlated with a negative understanding of freedom and thus a lot easier to reconcile (or even conflate) with formal equality. The same is not true for the idea of reasonable accommodation which requires positive steps to be taken in order to address inequalities of fact. The circumscribed

[777] See Christopher McCrudden, 'Rethinking Positive Action'*, Industrial Law Journal*, Vol. 15, 1986, pp. 219-243 at 223-225.

[778] As McCrudden points out (ibid, at 225-228), the first three types of positive action use statistical evidence only in order to review and predict the effect of positive action schemes; the last two rely on statistics as ends in themselves and are most likely to impose quotas.

attitude that the two Courts have maintained towards this latter requirement clearly indicates that the formal conception is still dominant -albeit not absolute- in both legal orders. To that extent, one may reasonably conclude that the substantive underlying values of equality remain subtle; and yet they are anything but irrelevant.

Acceptance of harassment as a form of discrimination within the EU is perhaps the clearest indication of the emergence of a more elaborate understanding of equality. Protection of individual dignity is expressly pushed forward in that context as a substantive goal. Moreover, as already argued, the attitude of the ECJ in cases concerning associative discrimination, speech acts or statistical stereotyping seems to support this change of paradigm. Similar examples have been brought with reference to the jurisprudence of the Strasbourg Court where adverse social structures and norms are increasingly taken into account in determining whether or not the case at hand is discriminatory. In this context, even a subtle understanding of equality as a right which aims to eliminate social oppression manifesting itself in the form of prejudice, stereotyping and failures to accommodate difference might prove particularly valuable. It can steer European equality law towards the appropriate direction.

If properly acknowledged, this approach can help mitigate the impediments presented to individual applicants by virtue of the formal understanding. Hence, for example, it will no longer be possible for a claim to fail simply because a proper comparator cannot be identified. In addition, it will become far more likely that instances of intersectional discrimination will be properly addressed as the nature of the disadvantage at hand will be at the centre of analysis. This potentiality is particularly significant as people who suffer social oppression based on a combination of personal characteristics risk being rendered invisible under the current compartmentalised view of discrimination grounds[779]. The case has also been made that intersectional discrimination may be tackled most efficiently through positive action and positive duties[780]. But we cannot properly rely on the positive facet of equality without having determined who should benefit from it and why[781]. The values of impartiality and freedom from arbitrariness are clearly insufficient in this respect.

[779] For a good discussion, see Dagmar Schiek, '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*, Vol. 12, No. 4, 2005, pp. 427-466; also see Sandra Fredman, 'Double Trouble: Multiple Discrimination and EU Law', *European Anti-Discrimination Law Review*, Issue No. 2, 2005, pp. 13-18 and Oddný Mjöll Arnadóttir, 'Multidimensional Equality from Within: Themes from the European Convention on Human Rights' in Dagmar Schiek and Victoria Chege (eds.), *European Union Non-Discrimination Law: Comparative Perspectives on Multidimensional Equality Law*, Cavendish Publishing, 2009, pp. 53-72.

[780] See Sandra Fredman, 'Positive Rights and Positive Duties: Addressing Intersectionality', in Dagmar Schiek and Victoria Chege (eds.), *European Union Non-Discrimination Law: Comparative Perspectives on Multidimensional Equality Law*, Cavendish Publishing, 2009, pp. 73-89.

[781] For these purposes, Fredman herself puts forward 'four goals of equality: removing recognition-based harms of harassment, prejudice, stigma and violence; affirming and accommodating identity; redressing distributive disadvantage; and enhancing participation' (ibid at 83).

Proper recognition of the specific norms and attitudes that need to be eradicated also helps construct a concrete counterweight for balancing equality against competing considerations. It provides a common language for what is becoming an increasingly complex debate, without compromising the flexibility that is necessary for sustaining it. This is because it enshrines a basic understanding of the problems that equality aims to eradicate in each case without setting a fixed framework as to how this aim is to be achieved in practice. Moreover, it helps promote fundamental values such as individual dignity and autonomy without having to rely on them directly. In this sense, equality becomes more concerned with 'searching for, and fighting against, the greatest and most urgent evils of society, rather than searching for, and fighting for, its great ultimate good'[782].

A strong conceptual framework will also enable the two Courts to deal more effectively with the various non-legal considerations that are likely to affect their reasoning. Indeed, the development of a right to equality by the ECtHR and the ECJ has historically been contingent on usually covert political, socio-economic or even moral considerations. For example, the very notion of a social dimension of equality was introduced by the ECJ in the midst of an activist decision that purported to counterbalance the inertia of member states and the Commission with regard to the implementation of the principle of equal pay between sexes[783]. This was so because the Court alone realized from the early days that a substantive prohibition of discrimination was invaluable for the sustainability of social citizenship and political integration.

Similarly, the ECJ in P v S twisted the requirements of formal equality in order to safeguard the individual dignity and autonomy of transsexuals. But this moralist attitude was later subdued in Grant by the political controversy surrounding the status of homosexuals in Europe[784]. The case law of the ECJ on the validity of positive action provides yet another useful example. In these cases, the Court was called upon to determine what promotion of 'real equality of opportunity' entailed under the terms of the Equal Treatment Directive. Pursuant to the wording of the provision, it decided in Kalanke to forbid measures that purported to achieve equality of results as opposed to equality of opportunity. But then political pressure forced it to retract this

[782] See Karl Popper, *The Open Society and Its Enemies*, Routledge Classics, 2011 (originally published in 1945), p. 148. The quote refers to what Popper accurately referred to as the 'piecemeal engineering' that should always be preferred to a 'utopian approach' which addresses complex social problems through sweeping reforms, without proper regard to the complexities involved (pp. 147-157). A similar view to the one advanced here is echoed in the argument that 'the legal understanding of the right to equality should be built around our developing understanding of disadvantage, discrimination and inequality, rather than abstract concepts of equal treatment': see Colm O'Cinneide, 'The Right to Equality: A Substantive Legal Norm or Vacuous Rhetoric?', *UCL Human Rights Review*, Vol. 1, No. 1, 2008, pp. 78-101 at 97.

[783] See Ch. 3, section A6.

[784] The jurisprudence of the ECtHR on the rights of transsexuals and homosexuals surely played an important role in that process.

unambiguous finding of principle[785]. The resulting conceptual ambiguity fostered deference towards the positive action policies of member states.

More recently, under the Framework and Race Directives the Court has been creative enough to bring associative discrimination and speech acts within the scope of EU equality law; but it preferred to take a step back when faced with the challenge of defining disability as encompassing long-term illness[786]. It is worth wondering whether or not this latter decision would have been the same had there not been in place a (costly) duty to provide reasonable accommodation for the disabled. Whatever the answer might be, it remains the case that this attitude is in clear contrast with the challenging of long-established principles in Mangold as well as with the multi-billion loss forced upon the insurance industry in the name of sex equality in Test-Achats[787].

A similar ambivalence can be traced within the jurisprudence of the ECtHR where moral and political claims have worked to inform the interpretation of Article 14. For example, in Frette and E.B. the Court took it upon itself to safeguard the right of homosexuals to adopt even though no right to adopt is guaranteed by the Convention. In essence, the Court went beyond the letter of the law in order to take a stand against the moral condemnation of homosexuality. Nevertheless, this moralist approach came to a halt when faced with the even more politically charged question of same-sex marriage in Schalk and Kopf v Austria[788].

In that case the Court took a decisive step forward in recognizing that stable same-sex relationships may fall under the scope of family life[789]. But then it relied on a strict interpretation of the letter of the Convention in denying homosexuals the right to marry[790]. It also emphasized the lack of consensus in finding that there was no violation when the state had not previously provided for alternative means of legal recognition for homosexual partnerships[791]. For the same reason, it concluded that member states enjoy a margin of appreciation in determining the rights and obligations conferred on homosexual registered partners; thus, there was no requirement that they enjoy the same legal privileges as married couples[792].

The majority of the Court (4-3) gave in to what it considered to be the prevailing morality in the member states; but this is not all. In essence, the Court preferred not to be too harsh on those member states that were moving in the right direction simply because they had not achieved the

[785] See Ch. 3, section B2(ii).
[786] See Ch. 3, section B3(v).
[787] See Ch. 3, sections B4 and B5(i) respectively.
[788] (Application no. 30141/04), Judgment of 24 June 2010.
[789] Ibid., para. 94.
[790] Ibid., para. 101.
[791] Ibid., para. 105.
[792] Ibid., para. 108.

(morally) desired level of protection yet[793]. A similar tactic had been employed previously with regard to the legal recognition of the new sex of post-operative transsexuals where the Court preferred to stress the need for member states to keep the appropriate legal measures 'under review' rather than find an outright violation[794]. In that context, it can be argued that a margin of appreciation was actually granted to the member states in order to give them time to mitigate the problem themselves before the Court would be forced to intervene drastically by finding a violation[795].

It seems then that while overt emphasis on morality caused the Court to take a stand in the matter of homosexual adoption, overriding political controversy and practicality made it tread more lightly on the issue of homosexual marriage. In fact, the deferential attitude maintained on the latter issue eventually imbued the analysis of the former when a woman who entered a civil partnership was barred from adopting the child of her (same-sex) partner[796]. Further to that, the Strasbourg Court is most likely to allow for a wide margin of appreciation when assessing the validity of domestic positive action policies. This is so because it is generally hesitant to interfere with the socio-economic strategy of member states unless absolutely necessary[797]. But this is not to suggest that politics have always acted as a restraining force in the exercise of judicial discretion.

For example, it is hard to resist the conclusion that the political climate following the dissolution of the Soviet Union necessitated the protection of former KGB agents who ran a serious danger of being turned into second class citizens as punishment for their involvement in the previous regime. With that in mind, it is perhaps understandable why the Court opted for a wide interpretation of Article 14 in Sidabras[798]. That instance of politically driven creativity is far from unique or peculiar

[793] Indeed, the majority noted that steps had been taken by the Austrian government to grant legal recognition to same-sex couples (ibid., para. 106).

[794] See Rees v United Kingdom (Application no. 9532/81), Judgment of 17 October 1986, para. 47 and Cossey v United Kingdom (Application no. 10843/84), Judgment of 27 September 1990, para. 42; also see Sheffield and Horsham v United Kingdom (Applications no. 22985/93 and 23390/94), Judgment of 30 July 1998, para. 60.

[795] The voting record in the cases of transsexualism reveals that the finding of violation of Article 8 turned out to be a matter of evolving consensus within the Court itself as much as it was within the member states: see Rees v United Kingdom (ibid.) (No violation, 12-3), Cossey v United Kingdom (ibid.) (No Violation, 10-8), Sheffield and Horsham v United Kingdom (ibid.) (No violation, 11-9), Christine Goodwin v United Kingdom (Application no. 28957/95), Judgment of 11 July 2002 (Violation, Unanimous) and I. v United Kingdom (Application no. 25680/94), Judgment of 11 July 2002 (Violation, Unanimous). Even during this long historical process, the Court would not hesitate to find a breach if it was satisfied that there were no considerable administrative difficulties that needed to be overcome before a member state could provide legal recognition: see B. v France (Application no. 13343/87), Judgment of 25 March 1992, para. 52.

[796] See Gas and Dubois v France (Application no. 25951/07), Judgment of 15 March 2012. Married couples could adopt each other's child but civil partners could not; this obviously amounts to indirect discrimination against homosexuals who are not allowed to marry. The Court restricted itself to repeating that the Convention does not guarantee a right to gay marriage and that Member States enjoy a margin of appreciation in determining alternative modes of legal recognition for homosexual couples (para. 66).

[797] For a recent example, see Andrle v The Czech Republic (supra, n. 744), para. 56.

[798] See Ch. 2, section 5(ii).

as a similar attitude has been (expressly) maintained by the Court in several other occasions. Thus, for example, the particularly difficult position in which ethnic minorities or people with HIV found themselves in was a guiding factor in D.H. and Kiyutin respectively[799].

Moral, political and socio-economic considerations have time and again influenced the exercise of judicial creativity or self-restraint in the development of the right to equality in European human rights law; and they are bound to continue to do so. It is hard then -if not impossible- to decipher a single formula with reference to which all interpretations of the right to equality have taken place. That is why the potential of examining the case-law of the two Courts under a common light would increase coherence and predictability. Even if different decisions are to be taken on a similar issue, at least it will be easier to trace where the disagreement lies. This is because the substantive goal of protecting the individual from social oppression will have to be weighted expressly against the various competing considerations.

So far it has been suggested that the goal of eliminating social oppression in the form of prejudice, stereotyping and failures to accommodate difference could inform the implementation of equality in European human rights law. Examples have been drawn from the jurisprudence of the two European Courts in order to illustrate that such a proposition is reconcilable with their practice. Of course, any actual convergence as to the interest that equality aims to safeguard remains subtle and it has not been the product of conscious choice. But this does not mean that it is any less valuable, especially in a time when the close relationship between the EU and the ECHR is being formalised.

5. Coming closer: the EU and the ECHR

The emergence of two separate systems for the protection of human rights in Europe has been described accurately as 'an accident of history' that is hard to tidy up[800]. The real problem, of course, is not the simultaneous development of human rights norms within the EU and ECHR; it is the fact that the relationship between the two legal orders has not been articulated clearly[801]. Legislative inertia surrounding this area practically forced the two Courts to instigate their own dialogue based on mutual respect[802]. Hence, the Luxembourg Court has been referring to the

[799] See Ch. 2, sections 7(iii) and 6(ii) respectively.
[800] Nicholas Bamforth, 'European Union Law, the European Convention, and Human Rights', *Virginia Lawyer*, Vol. 58, 2010, pp. 38-42 at 41.
[801] It took until 1992 for the (judicially driven) relationship between the EU and the ECHR even to be acknowledged on the face of written EU law: see Article 6(3) TEU (ex Article F(2) TEU).
[802] This mutual respect is most clearly evidenced in the well known decision of the ECtHR in Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v Ireland (Application No. 45036/98), Judgment of 30 June 2005, paras. 155-165 where it was held that there is a presumption of compatibility of EU law with the Convention unless a 'manifest deficiency' is considered to exist having regard to the circumstances of a

ECHR for many decades[803] and the Strasbourg Court has been willing to review domestic measures implementing EU law[804]. This dialogue has surely contributed to 'tidying up' the binary structure of European human rights[805]; but no final solution can be achieved in the judicial arena.

Following the coming into force of the Treaty of Lisbon and Protocol 14 ECHR the road is now wide open for the EU to accede to the ECHR. Even though there are considerable complexities for the drafters to overcome before the terms of this accession are finalised[806], the end result is easily foreseeable: the Strasbourg Court will be able to rule directly on the compatibility of EU law with the ECHR. In essence, the EU will have to adhere to the standards of the Convention just like any other member state of the Council of Europe; but it is not clear that the provisions of the ECHR will benefit from the principles of supremacy and direct effect as a result[807]. It is in this context of further constitutionalisation of the EU that the Charter of Fundamental Rights of the European Union (CFR) came into force.

Article 52(3) CFR refers to the ECHR as providing the minimum standard of fundamental rights protection that must always be upheld in the interpretation of the Charter[808]. This hardly constitutes a surprising development given the prospective accession of the EU to the ECHR. Nevertheless, it is quite remarkable that the explanatory notes of Article 52(3) CFR do not include Article 14 ECHR in the lengthy list of Convention provisions which correspond to those of the Charter[809]. Instead, Article 14 ECHR seems to be perceived (by implication) as having neither the same meaning nor the same material scope as any of the Charter Articles. This is understandable

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particular case. For a general overview of the relationship between the ECJ and the ECtHR see S. Douglas-Scott, 'A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis', *Common Market Law Review*, Vol. 43, 2006, pp. 629–665 and Guy Harpaz, 'The European Court of Justice and its relations with the European Court of Human Rights: The quest for enhanced reliance, coherence and legitimacy', *Common Market Law Review*, Vol. 46, 2009, pp. 105-141.

[803] See Case 36-75, Roland Rutili v Ministre de l'intérieur [1975] E.C.R. 1219, para. 32.

[804] See, for example, Cantoni v France (Application 17862/91), Judgment of 15 November 1996, para. 30; also see Matthews v United Kingdom (Application No. 24833/94), Judgment of 18 February 1999, para. 33 where the ECtHR found that '[t]he United Kingdom, together with all the other parties to the Maastricht Treaty, is responsible ratione materiae […] for the consequences of that Treaty'.

[805] For a good discussion, see Laurent Scheeck, 'The Relationship Between the European Courts and Integration Through Human Rights', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, Vol. 65, 2005, pp. 837-885.

[806] For a good discussion, see Jean-Paul Jacqué, 'The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms', *Common Market Law Review*, Vol. 48, 2011, pp. 995-1023.

[807] See Case C-571/10, Servet Kamberaj v Istituto per l'Edilizia sociale della Provincia autonoma di Bolzano (IPES) and Others [2012] E.C.R. 000, paras 59-63.

[808] More specifically, Article 52(3) CFR provides that '[i]nsofar as th[e] Charter contains rights which correspond to rights guaranteed by the [ECHR], the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection'.

[809] Explanations relating to the Charter of Fundamental Rights (2007/C 303/02), [2007] O.J. C 303/17 at C 303/33.

given that Article 14 ECHR refers only to the enjoyment of other convention rights and contains a non-exhaustive list of prohibited grounds.

In contrast, Article 21(1) CFR forbids any discrimination which is based on the exhaustive list of grounds contained therein[810]; thus, the explanatory notes provide that it shall be applied in compliance to Article 14 ECHR only insofar as it corresponds with it[811]. Of course, the mismatch between EU and ECHR equality law is far wider than the one evidenced in that comparison. The former system is considerably more elaborate than the latter, mainly due to the various legislative interventions that have taken place through primary and secondary law[812]. Besides, a more detailed framework is called for in EU non-discrimination law given that it is capable of applying directly both in vertical as well as in horizontal relationships (especially after Mangold) even though it remains more restrictive than the ECHR as to the areas it covers[813].

Protocol 12 ECHR constitutes a great opportunity to create a free standing prohibition of discrimination under the ECHR, thereby narrowing the gap between the two legal orders; but, as already discussed, the Protocol has been met with very little enthusiasm by the member states of the Council of Europe the majority of which have refused to ratify it[814]. Accession will only exacerbate this problem as the EU seems determined to adopt the contemptuous attitude maintained by the majority of its member states towards Protocol 12[815]. It is most likely then that the interaction between the two non-discrimination regimes will remain minimal, as the explanatory notes of the Charter and the process of accession seem to denote. But this does not exclude conceptual convergence altogether.

As argued so far, the construction of an identical list of obligations emanating from the right to equality is not of primary importance (if at all possible). The quest for substantive equality has no

[810] Article 21(1) CFR: 'Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited'.
[811] Explanations relating to the Charter of Fundamental Rights (supra, n. 809) at C 303/24.
[812] For an excellent comparison of the two systems with specific reference to the prohibition of sex discrimination see Samantha Besson, 'Gender Discrimination under the EU and ECHR Law: Never Shall the Twain Meet?', *Human Rights Law Review*, Vol. 8, No. 4, 2008, 647-682; for further discussion, see Nicholas Bamforth, 'Prohibited Grounds of Discrimination under EU Law and the European Convention on Human Rights: Problems of Contrast and Overlap', *Cambridge Yearbook of European Legal Studies*, Vol. 9, 2006-2007, pp. 1-42.
[813] For a brief account, see Samantha Besson (ibid) at 660.
[814] See Ch. 2, section 8.
[815] As of August 2012, only 7 out of the 27 member states of the EU have ratified Protocol 12 ECHR (Cyprus, Finland, Luxembourg, Netherlands, Romania, Slovenia and Spain). It is quite remarkable that 8 EU member states have refused even to sign it (Bulgaria, Denmark, France, Lithuania, Malta, Poland, Sweden and the United Kingdom). This seems to be the main reason why the draft accession agreement excludes Protocol 12 from the scope of the accession of the EU to the ECHR: see Draft Legal Instruments on the Accession of the European Union to the European Convention on Human Rights, CDDH-UE (2011) 16 [Final Version], Strasbourg, 19 July 2011, Article 1.

set destination; it is the direction that matters the most. This is even more so if we take account of the fact that the two legal orders are profoundly different, the ECHR aiming to provide the bare minimum of human rights protection in Europe and the EU purporting to sustain its ever-expanding supranational legal order. The dialectics of freedom from social oppression in the form of prejudice, stereotyping and lack of reasonable accommodation are capable of providing the right direction, a common vision of equality as a human right.

Therefore, it is important to acknowledge that convergence might be achieved at a conceptual level. And this might have significant practical implications for the implementation of equality guarantees but also for the wider protection of human rights in both legal orders. For example, the Strasbourg system has been criticised for placing too much focus on the circumstances of the individual applicant, thereby limiting the wider constitutional significance of its findings[816]. But the Article 14 jurisprudence of the ECtHR proves that systemic disadvantage may be taken into account and positive duties may be imposed on the state in order to protect vulnerable groups along with the individual applicant[817].

Similarly, the EU human rights system has been criticised as aiming primarily to sustain the legitimacy of the supranational entity rather than to do justice to the individuals affected by a violation[818]. Nevertheless, the evolution of the right to equality in EU law reveals that individual freedom from social oppression might now prevail over business practicality[819]. One may argue, of course, that non-discrimination as an aspect of EU social policy is still directed at securing individual freedom only to protect the market, not the individual[820]. But this argument seems to denote simply that the protection afforded to equality (as to any other fundamental right) is linked

[816] See, for example, Steven Greer and Andrew Williams, 'Human Rights in the Council of Europe and the EU: Towards "Individual", "Constitutional", or "Institutional" Justice?', *European Law Journal*, Vol. 15, No. 4, July 2009, pp. 462-481 at 466.
[817] See Kiyutin (supra, n. 737) and D.H. and others v Czech Republic (Application no. 57325/00), Judgment of 13 November 2007.
[818] For an excellent articulation of this long-lived critique, see Jason Coppel and Aidan O' Neil, 'The European Court of Justice: Taking Rights Seriously?', *Legal Studies*, Vol. 12, 1992, pp. 227-245; also see Steven Greer and Andrew Williams, 'Human Rights in the Council of Europe and the EU: Towards "Individual", "Constitutional", or "Institutional" Justice?' (supra, n. 816) at 478.
[819] See Feryn (supra, n. 748) and Association Belge des Consommateurs Test-Achats (supra, n. 738).
[820] See Alexander Somek, *Engineering Equality: An Essay on European Anti-Discrimination Law*, OUP, 2011.

to the competences of the EU[821]; and this line of thought is further weakened if we accept that social and market exclusion are considerably interrelated[822].

It is true that the importance of non-discrimination is considerably downplayed in the process of accession of the EU to the ECHR; but history suggests that the two Courts are unlikely to maintain a similar attitude. This state of affairs is most likely to give rise to yet another interesting episode in the ongoing tension between legislative restraint and judicial creativity in the evolution of equality in European human rights law. The direct reviewability of EU law by the ECtHR means that the ECJ will be no longer alone in pushing forward a substantive equality guarantee; a similar philosophy as to the purpose of such a guarantee would provide a valuable common direction in this respect. But should the international judiciary continue to play a decisive role in setting that common direction?

6. The role of the Courts

The limits of judicial discretion are particularly hard to draw when it comes to interpreting a constitutional guarantee of equality. This is so because the interaction between law and social policy becomes remarkably strong. Courts, especially the highest ones, can institutionalize oppression or instigate socio-political revolution, depending on whether or not they opt for deference towards prevailing mores and attitudes in interpreting non-discrimination clauses[823]. The situation is made even more complicated by reason of the philosophical controversy (and the resulting ambiguity) that has traditionally surrounded the concept of equality.

The matter may be reframed in more general terms as one referring to the tension between legal formalism and legal realism[824]. On the one hand, legal formalism demands the strict application of the letter of the law and respect for the limits of what is largely perceived as a closed system; on the

[821] The confinement of equality within the market-oriented competences of the EU necessarily implies that 'a bias towards economic rights and market integration is naturally inbuilt': Lisa Waddington, 'The Expanding Role of the Equality Principle in European Union Law', *European University Institute*, Policy Papers Series on the Constitutional reform of the EU, 2003/04, p. 25. But this does not mean that substantive equality itself is subordinate to market equality as a matter of principle. It means only that equality in EU law 'cannot become an entirely autonomous and all-embracing human right': see Sacha Prechal, 'Equality of Treatment, Non-Discrimination and Social Policy: Achievements in Three Themes', *Common Market Law Review*, Vol. 41, 2004, pp. 533-551 at 551.

[822] See Ch. 3, section A3.

[823] For a most blatant illustration of this thesis see the decisions of the US Supreme Court in Plessy v Ferguson 163 U.S. 537 (1896) and Brown v Board of Education 347 U.S. 483 (1954). Of course, the (self) empowerment of the Supreme Court in this area has been neither unnoticed nor free of criticism: see Raoul Berger, *Government by Judiciary: the Transformation of the Fourteenth Amendment*, Liberty Fund, Second edition, 1997.

[824] For a brief discussion of these two themes, see Sharyn L. Roach Anleu, *Law and Social Change*, SAGE Publications, 2000, pp. 6-9.

other hand, legal realism is 'reject[ing] the charge of relativism and amoralism and view[s] the flexibility in law as providing opportunities for courts to be engaged in progressive social reform'[825]. This ongoing tension between formalism and realism means that there can be no rule of thumb for determining the limits of judicial discretion; the truth of the matter seems to lie somewhere between the two extremes[826]. But in practice much may depend on the point of view that one adopts.

Hence, for example, one may opt for a formalist approach to the interpretation of non-discrimination clauses. In doing so, she will refrain from examining the causes or effects of a specific treatment and will go no further that enquiring into whether or not reliance on a prohibited characteristic has resulted in differential treatment; the operation of prejudice and stereotyping or failure to secure reasonable accommodation will not be relevant as such in that context. In fact, the obligation to treat similarly situated individuals in a rational (i.e. consistent) manner has historically provided a safe haven for judges who hesitate to go beyond that widely accepted but limited construction of equality. But is it really surprising or disturbing that a judge may eventually choose to go beyond this formulation? The answer must be no.

In essence, the formalist approach (which sets a very low threshold for judicial activism) fails to describe properly the actual position that a court is likely to find itself in. Even beyond the context of equality law, pieces of legislation are not always -if ever- capable of a single interpretation nor is the intention of the legislator always crystal clear. This means that it is eventually necessary for judges to exercise some discretion as they become involved in a form of law-making within the courtroom[827]. To draw the limits of this discretion, one may fairly argue that *strict* application of the law should amount to *impartial* application of the law; i.e. that judicial discretion must not be informed by controversial social or political considerations the balancing of which lies with the legislature[828]. But this normatively plausible view also fails to describe accurately the reality of judicial practice.

Even if independent and seemingly impartial, the judiciary cannot remain absolutely neutral given that its positioning within the mechanisms of authority will eventually force it to touch upon politically charged issues[829]. This is particularly true in legal systems that possess a written constitutional charter which stands above statute law. There, the political parties composing the

[825] Ibid., p. 8.
[826] For a brief account, see Richard A. Posner, 'Realism About Judges', *Northwestern University Law Review*, Vol. 105, No. 2, 2011, pp. 577-586.
[827] To put it bluntly, 'the law is what the judge says it is': see Lord Reid, 'The Judge as Law Maker'*, Journal of the Society of Public Teachers of Law*, Vol. 12, 1972-1973, pp. 22-29 at 22.
[828] See, for example, Lord Devlin, 'Judges and Lawmakers', *The Modern Law Review*, Vo. 39, No. 1, 1976, pp. 1-16 at 4-9.
[829] See J.A.G. Griffith, *The Politics of the Judiciary*, Fontana Press, Fifth edition, 1997, pp. 292-295.

legislative forum may be described as agents of constitutional judges insofar as the latter can enforce a higher legal norm over the former[830]. That power is obviously increased when the relevant provisions are drafted in wide terms, as is usually the case with international human rights instruments.

An international judge seeking to define the scope of fundamental human rights might be particularly inclined towards judicial creativity given the lack of direct attachment to specific nationalist views or interests. Indeed, the pluralism inherent to the international sphere highlights the need for autonomous interpretations in order to overcome the overwhelming amount of conflicting national perspectives. The situation is far from identical in domestic legal systems where divergence will be narrower given that it will arise within the boundaries of a single society. But this is not the only reason why pluralism is bound to enhance the role of the international judge in the political playing field.

An instrument agreed upon by a plurality of sovereign states normally aspires to enshrine the common denominator of versatile legal and social traditions. This particularity is bound to slow down legislative process as it necessarily implies that divergent national interests must converge as closely as possible; unanimity is a key factor here, whereas in a domestic legislative forum a simple majority will usually suffice. In this context, the international Court may be forced to make hard political choices in order to substitute for the failure of member states to do so. Such an attitude may actually be encouraged in situations where failure to achieve political convergence leads to the adoption of legal provisions which are intentionally left open-ended[831].

This is not to suggest that judicial reasoning is necessarily better than legislative reasoning[832]. But it is hard to deny that a formalist approach cannot be maintained invariably in practice. Both the ECtHR and the ECJ play a (semi) constitutional role and their mission extends far beyond the strict implementation of the letter of the law[833]. The former interprets the Convention with a view to developing the standards enshrined therein; and the latter has construed EU law in accordance with the underlying objectives of economic and political integration. This teleology has contributed drastically to the emergence of a right to equality which aims to affirm individual autonomy as end in itself. The logical next step must be for the two Courts to decide what this end actually consists of. Hence, the choice of a *telos* under the light of which equality clauses should be read is anything but contrary to judicial practice.

[830] See Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe*, OUP, 2000, p. 24.
[831] See Miguel Poiares Maduro, *We the Court: The European Court of Justice and the European Economic Constitution*, Hart Publishing, 1998, p. 18.
[832] See Jeremy Waldron, 'Judges as Moral Reasoners', *International Journal of Constitutional Law*, Vol. 7, No. 1, 2009, pp. 2-24.
[833] See Ch. 2, section 2 and Ch. 3, section A4.

To put the matter as simply as possible, '[a]scertaining and defining the underlying purpose or policy with enough precision to decide concrete cases may require a kind of judicial choice'[834]. When a court is called upon to determine what 'non-discrimination' means in a particular context it is practically obliged to construct its own theory of interpretation. As argued above, the most usual response is to prohibit differential treatment between comparable situations as long as the treatment at hand is based on a prohibited ground and cannot be justified objectively. This understanding is valuable but remains insufficient as it cannot go any further than guaranteeing formal impartiality and freedom from arbitrary treatment. It is ultimately up to the judiciary to explicate the deeper reasons why a right to equality is considered fundamental and should prevail over conflicting rights and interests.

7. Conclusion

It is hard to imagine a world where all individuals will be equally capable of pursuing the various opportunities that are present in society. This is because the maintenance of equality depends primarily on how we defend it against opposing forces, not on how we achieve it as a concrete state of affairs. To say that similarly situated people should be treated similarly irrespective of personal characteristics is only the beginning of tackling an extremely complex question. It does little -if anything- to identify the various forms of social oppression that hamper individual autonomy and deny equal opportunity. Thus it fails to explicate properly the human interest that equality aims to safeguard as a matter of fundamental right.

This chapter has suggested a way in which this gap could be addressed in European Human Rights Law. The need to protect individuals against prejudice, stereotyping and failures to accommodate has already underlined (either expressly or implicitly) the reasoning of the two European Courts in several instances. These values may actually provide a substantive rationale which could guide the future implementation of equality in Europe. They would help construct a coherent conceptual platform on the basis of which discrimination claims could be adjudicated. Thus, the maintenance of impartiality through symmetrical treatment of analogous situations will no longer be the only (clearly articulated) goal of equality.

This piecemeal unravelling of the human right to equality though the examination of particular instances of social oppression might actually be a more effective way of achieving convergence in what is an extremely complex area of rights adjudication, social policy and moral and political

[834] See Archibald Cox, 'The Role of the Supreme Court: Judicial Activism or Self-Restraint?', *Maryland Law Review*, Vol. 47, 1987-1988, pp. 118-138 at 131.

philosophy; especially if one takes account of the fact that unanimity is a lot harder to achieve in the international sphere. The solutions offered by the two Courts on a case by case basis serve to narrow (slowly but steadily) the margin of deference allowed to the member states without impinging on the flexibility that is necessary for the debate to continue. Moreover, this state of affairs makes it more likely that new instances of social oppression will come to be recognized through judicial practice (e.g. associative discrimination).

To conclude, equality in Europe is no longer pursued only with reference to the specific goal of achieving symmetry in treatment. Instead, the far wider aim of eliminating the many faces of social oppression is increasingly pushed forward. The primary issue here is not to enumerate exhaustively the many different manifestations of prejudice, stereotyping and lack of reasonable accommodation. Instead, the goal is to realize that these are the evils that equality aims to eliminate in each and every case. Insofar as the two Courts have appeared (or may appear) willing to follow this line of thought, they are capable of doing a far greater service to equality than an elaborate legislative resolution could ever hope to do.

Conclusion

A right to equality was originally instituted as an instrument for the attainment of other ends in European Law. The rise of an understanding of equality as a substantive goal in itself owes a lot to the interpretations of the ECtHR and the ECJ. This is the main reason why the constituent elements of that goal have been analysed here primarily with reference to the jurisprudence of the two Courts. Of course, it would be a fallacy to suggest that there is a perfectly consistent understanding of substantive equality permeating the case-law of either the Strasbourg or the Luxembourg Court. Instead, it is more accurate to say that there are various indications which, if properly brought together, can help build up a particular view. This is exactly what the present research has aspired to do; suggest a meaning for a theory which has dwelled the relevant case-law but which has never been articulated clearly.

Chapter 1 put forward a normative analysis of the right to substantive equality as protective of individual freedom against social oppression in the form of prejudice, stereotyping and lack of reasonable accommodation. This was presented as the human interest, the aim of a right to equality that extends beyond requiring symmetrical treatment of analogously situated people. After having concluded on the underlying values of the substantive dimension of a right to equality, the focus shifted on determining how the two European Courts have approached this same issue. The various fragments of a substantive approach in several instances of adjudication were put forward in the following two chapters with a view to showing that equality in both legal orders is construed as requiring more than symmetrical treatment in the enjoyment of external standards.

More specifically, chapter 2 demonstrated that guaranteeing symmetrical treatment of analogous situations before the law of the Convention has not always been the guiding consideration in the reasoning of the ECtHR. Instead, the underlying values presented in chapter 1 seem to have been decisive time and again in the analysis of a discrimination claim. Similarly, chapter 3 demonstrated that equality in EU law has moved far beyond requiring symmetrical treatment of analogous situations with a view to securing the sustainability of economic integration. The evolution of the written legal framework has proven invaluable in this respect, but so have the judgments of the ECJ. Again, the constant expansion of the material as well as the personal scope of equality and non-discrimination in the relevant case-law appears to make sense if construed under the light of the findings presented in chapter 1.

It is on these grounds that chapter 4 suggests the feasibility of a unified understanding as to the human interest safeguarded by (substantive) equality in European human rights law. A right to equality should not be limited to guaranteeing impartiality in the enjoyment of other goods; instead,

it should also be understood as aiming to safeguard the valuable options of the individual against prejudice, stereotyping and lack of reasonable accommodation. Such an understanding provides a wide conceptual framework on the basis of which equality claims can be analysed. It furnishes a platform for debating future cases in a meaningful way. By providing an answer to the question of *why* we need equality, it makes it easier for the debate to focus on *how* its purpose can be pursued most effectively in each case separately. Thus, the correlative duties of a right to equality can unfold in a piecemeal fashion rather than with reference to a simplistic formula. Besides, such a formula is impossible to sustain once we move beyond the prohibition of unjustified differential treatment of analogous situations.

Even if there is no way to make sure that equality will always be upheld at a substantive level, there is great value in agreeing on a single vision regarding its goals and aspirations. As argued in the beginning of this thesis, freedom itself is an unending quest for more freedom. By the same token, equality is an endless journey for more equality not only in our laws, but also in our attitudes. It represents the ambition of creating a world where no one is made less free by reason of social oppression in the form of prejudice, stereotyping and lack of reasonable accommodation; a world in which everyone is seen for what they are, irrespective of immutable characteristics or fundamental choices. This world may keep slipping away forever but the quest for substance is bound to persist and be strengthened as long as some agreement is achieved at the level of underlying values. Such an agreement will constitute an invaluable compass, securing the appropriate direction for the journey.

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