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Equal Treatment – a Normative Challenge

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INTRODUCTION

EQUAL TREATMENT – A NORMATIVE CHALLENGE

1 INTRODUCTION

In early December 2000 we gathered, some fifty people, at the Law Faculty at Lund University to discuss the multi-faceted and complex normative issues related to equal treatment and non-discrimination in working life, and the challenge which developments in this area represent to social integration and the legal structures of labour law. The starting-point of the conference discussions was made up of a number of articles reflecting equal-treatment dimensions of different research projects within the Norma programme.¹ Presentations, comments and discussions at the conference were organised along the same lines as this anthology, in three blocks on *Non-Discrimination Law and Normative Development in Process*, *Sex-Discrimination and Legal (In-)Efficiency* and *Equal Treatment and the Future of Labour Law*, respectively.

The purpose of this introduction is both to link articles and comments together and to give readers an idea of the sometimes vivid discussions they provoked. It also contains my personal reflections on these contributions and the challenges ahead, as well as a presentation of the ‘Normative Field of Discrimination Law’ – a section linking discrimination law to the theoretical model of law as normative patterns in a normative field, at the core of the Norma programme. Since the issues, as was initially indicated, are of considerable complexity, some of the arguments made in the introduction might require a careful reading of the articles and comments referred to.

¹ The Norma Research Programme – Normative Development within the Social Dimension, Studies on the Normative Patterns and their Development in the Legal Regulation of Employment, Housing, Family and Social Security from a European Integration Perspective – started out in 1996 at the Law Department of Lund University with funding from the Bank of Sweden Tercentenary Foundation. The original Swedish versions of these articles were previously published in Numhauser-Henning, Ann (ed.), *Perspektiv på likabehandling och diskriminering*, Juristförlaget i Lund, Lund 2000.

2 NON-DISCRIMINATION LAW AND NORMATIVE DEVELOPMENT IN PROCESS

The initial block starts out with an article by Anna Christensen developing the Structural Aspects on Anti-Discriminatory Legislation and Processes of Normative Change.

Her point of departure is the Aristotelian principle that ‘like shall be treated alike’ and a feature common in prohibitions against discrimination: a concentration on what is to be regarded as alike (similar cases), not on the treatment as such. She introduces the concept *reference group* to name the group to which the group suffering differential treatment is being compared, and the concept *reference norm* for the underlying rules of treatment. According to Anna Christensen, it is characteristic of the concept of *direct discrimination* that the reference norm is independent of the prohibition against discrimination as such. In cases of direct discrimination, the crucial issue is that members of the marginalised group have a right to be treated exactly the same as members of the reference group, that is, according to established norms. The aim of the prohibition is to change the group to which the norms apply, not the content of the – already and independently established – reference norms as such.

This is not, however, the case as regards *indirect discrimination*. According to Anna Christensen, indirect discrimination comprises ‘a qualitative leap’ in anti-discriminatory legislation. Indirect discrimination may occur when the *allocator of resources* – another useful concept – applies a norm that appears to be neutral, but its practical application results in worse terms for the protected group than for the reference group. In such a situation, the resource allocator must be able to show that the norm he applies is objectively justified and also that it forms an appropriate and necessary means of attaining his aim. An assessment of proportionality is required. This allows a court of law to scrutinise the actual content of the reference norm itself. In order really to come to terms with the differential treatment at the heart of discrimination law, it is often necessary to change the underlying reference norms. Although the concept of indirect discrimination thus contains ‘a tremendous potential’ for bridging the gap between *formal* and *substantive* equal treatment, Anna Christensen’s article reveals a certain disappointment as regards the practical dividends yielded by the concept of indirect discrimination, a disappointment shared by her fellow commentator *Evelyn Ellis*. This kind of inadequacy is also crucial to the second block of this anthology, regarding sex discrimination law and legal inefficiency. While Anna Christensen relates these difficulties – or the (in-)efficiency of anti-discrimination rules – to differences as regards the level and accuracy of the reference norm at issue, Evelyn Ellis chooses to highlight the fact that an application of the concept of indirect discrimination does not necessarily constitute a tool when it comes to changing actual differences between the sexes, such as the distribution of domestic burdens. The concept of indirect discrimination may theoretically

have the potential to overcome traditional and now inadequate structures on the labour market. This potential is, however, restricted in the process of application. Evelyn Ellis ends up by addressing the need for anti-discrimination law to have not only a negative face, but a positive one, too.

Another important feature in Anna Christensen's article is the way in which she puts the development of anti-discrimination legislation in different areas (and the non-development in others) in its historical context – the processes of normative as well as material change in society. In respect of differential treatment on the grounds of sex, she describes a development from complementarity to equality. As regards the ban on differential treatment on the grounds of nationality within Community law, however, the normative development must be described in another way. The *normative circle* defining those who 'belong' is widened. This approach was especially appreciated by Evelyn Ellis, who remarks that a better understanding of the historical context of anti-discrimination law has the power to take 'much of the antagonism out of the debate'.

The article by Per Norberg, *Non-Discrimination as a Social and a Free Market Value*, may also be said to deal with interrelations between protected groups, reference groups and reference norms – though in terms of the 'relativity problem of discrimination law'. He notices that a ban on discrimination lacks an immanent point of departure: it always relates to what Anna Christensen calls an independent reference norm. Per Norberg digs deeply into the ECJ cases *Du Pont de Nemours*² and *Dekker*³ with regard to the definition of the protected group, showing how the question of what forms the relevant situation of comparison is ultimately decided by the domestic law concerned. Consequently, the contents of domestic law may also be decisive when it comes to drawing the line between direct and indirect discrimination.⁴

Per Norberg's hypothesis is that the deepened understanding of discrimination law that comes from parallel studies on its application in the social dimension of European law and in competition law, respectively, provides us with new possibilities to develop each one of these areas. Per Norberg is especially keen on the concept of indirect discrimination as elaborated within competition law and its implications for the social dimension.

² Case C-21/88 *Du Pont de Nemours Italiana SpA v Unità sanitaria locale No 2 di Carrara* [1990] ECR I-889.

³ Case C-177/88 *Elisabeth Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV-centrum) Plus* [1990] ECR I-3941.

⁴ Cf. also Nielsen, Ruth, Case C-177/88, *Elisabeth Johanna Pacifica Dekker v. Stichting Vormingscentrum voor Jong Volwassenen (VJV Centrum) Plus*; Case C-179/88, *Handels- og Kontorsfunktionærernes Forbund Danmark v. Dansk Arbejdsgiverforening*, *Common Market Law Review* volume 29 pp. 160–169 1992.

Both Anna Christensen and Per Norberg emphasise the ways in which a comparison between groups in relation to a relevant reference norm can be said to be immanent in the very normative structure of discrimination law – not to be mistaken for a requirement that there be a concrete person to compare with.⁵ Such a requirement is to be regarded as a rule on *onus* and can – both in theory and practice – be substituted by a hypothetical comparison.

Niklas Bruun, in his comments, calls for a further elaboration of the conceptual framework of different elements in discrimination law as well as a thorough analysis of the preconditions for a comparison of different types of discrimination, prior to research attempts as those advocated by Per Norberg (making analogies from market law and competition law to social law). He especially stresses the interaction between market and social law as stated in the Treaty of Amsterdam, but also some fundamental differences as regards the victim of discrimination in market law as compared to social law.

The general question of how far we should go in using the term discrimination when assessing different legal issues was raised in the discussions – by Bruun and others. According to Bruun all laws can be said to deal with issues of discrimination, a point also made by Anna Christensen. Thus, according to Anna Christensen, any ‘legal order’ has its area of application – its normative circle of subjects to which it applies – and is, within this area of application, built on the notion that ‘like shall be treated alike’. However, in this context we are dealing with a general principle of equality which is not geared to any particular group, but rather entails a general instruction to act in the norm-based objective manner that is associated with all forms of exercising authority/laying down normative regulations. Here, the pertinent discrimination-law dimension is the matter of how we define the group that is within – *i.e.* protected by – the application area of the rules at issue. The starting-point of a typical prohibition against discrimination is that it can be established that a certain group is not included in the area of application of certain norms (and, thus, does not belong), or – though formally belonging – is treated differently and worse than what follows from a relevant reference norm in the area concerned. As was already touched upon with reference to the article by Anna Christensen, and as will be further developed later on, we have a situation where the purpose of legal intervention is to change the pattern of (formal or actual) belonging – the normative circle of application of a certain set of (reference) norms.

Not all situations (legal regulations) that fit this description are articulated in terms of discrimination – can it still be fruitful to discuss them in such terms? In my opinion, this is not a question that can be answered with a simple yes or no. It must be answered

⁵ Cf. the former Section 16 of the Swedish Equal Opportunities Act.

by the analysis itself in its proper context. If the analysis provides us with a deeper understanding of the normative complex studied, and of its societal functions, it must be regarded as fruitful. Indeed, this entire anthology may be said to rest on the general hypothesis that an analysis in terms of discrimination adds to our understanding of law even in (some) areas that have not as yet been generally articulated in such terms. It is, of course, for the reader to decide whether this is correct or not.

The article by *Mattias Malmstedt*, *From Employee to EU Citizen – a Development from Equal Treatment as a Means to Equal Treatment as a Goal?*, may serve as a test case (as does the article by Samuel Engblom; see further below).

Mattias Malmstedt's article deals with the Community-law ban on discrimination on the grounds of nationality and the – somewhat confusing – developments with regard to the relevant normative circles (groups to which the rules apply) in relation to social benefits. At the centre we find the ECJ's case law in relation to the Regulations No. 1612/68 and 1408/71. Malmstedt criticises the 'market-functional' argument that generally accompanies this case law, tying the application of the rules to the promotion of free movement of workers. As case law has developed, this argument tends to look increasingly far-fetched. With the introduction of EU citizenship, he sees a possibility to apply the rights to social benefits equally to all EU citizens – and possibly also to third-country nationals lawfully residing within the EU – on the basis of the principle of equal treatment 'in its own right', not 'subordinated to a certain goal or utilitarian morality'.

During the discussions, it was clear that Clare McGlynn shared Mattias Malmstedt's concern with the overt connections between a right to equal treatment and market-economic efficiency.⁶ *Frans Pennings*, however, in his comments on Mattias Malmstedt's article, challenges the assumption that it is 'fundamentally wrong to subordinate an equality norm to a certain goal'. Pennings looks at the ways in which different aspects (including economic and efficiency-related ones) must be taken into account when determining the relevant group of protection (that is the scope of a right to equal treatment) in different situations, which is what Malmstedt's article is all about. Ultimately, though, Frans Pennings seems to share Malmstedt's view that the normative circle concerning Regulation 1408/71 must be extended to include non-economically active persons and third-country nationals.

Thus, Malmstedt seems to promote the Aristotelian concept of equal treatment as a fundamental and basic moral standard – or what I would call equal treatment as a fundamental human right. However, as Pennings rightly shows, and as the discussion

⁶ See also Fredman, Sandra, *The Concept of Equality: A General Framework*, unpublished paper for a work-shop in Brussels 6–7 November 2000 arranged by the Swedish National Institute for Working Life.

of Malmstedt himself on the relevance of residence-based and work-based rules indicates, the Aristotelian equal-treatment concept itself does not give us any lead with regard to the definition of the groups to be protected by certain rules (*i.e.* what is to be regarded as ‘alike’). Malmstedt’s hypothesis on equal treatment as an end in itself, an end which is not subordinated to utility goals, seems to apply to the implementation of a rule once its ‘normative circle’ has been determined.⁷

One might also question Mattias Malmstedt’s thesis that the application of the equality principle in ECJ case law has hitherto been ‘subordinated’ to the goal of free movement for workers. As he himself rightly points out, in *Therhoeve*⁸ the ‘market-functional’ argument was used to change the protected group to migrant workers, a move which amounted to a departure from the ban on discrimination on the grounds of nationality. In the judgment itself nothing was said about the principle on non-discrimination – it was all about national rules interfering with the free movement of workers. It seems to me that the linkage (‘subordination’) of the equal-treatment issue to a certain instrumental goal in the *Therhoeve* case has made it possible to overcome a limitation inherent in traditional Aristotelian non-discrimination regulation itself, namely the matter of deciding as to which group(s) the regulation is to be applied. The non-discrimination implications of the *Therhoeve* situation can, however, only be revealed when analysed precisely in terms of discrimination law. Of course, such a ‘change of protected group’ cannot come about so easily when we deal with explicit anti-discrimination law, for instance sex-discrimination law, where the relevant groups are explicitly stated. However, there are cases which evince a certain resemblance to *Therhoeve*, namely *Dekker and v S*.⁹

I hope that the preceding review has revealed some of the complexities of anti-discrimination law while suggesting that exciting discussions ensue whenever legal issues are placed in a discrimination-law setting – not least where this is not generally done.

⁷ Note that the Aristotelian (formal) concept of equal treatment in many situations also fails to meet the normative – and instrumental – interests behind non-discrimination rules, *i.e.* to integrate hitherto marginalised or differently treated groups in society. This is especially true with regard to the legitimate scope of positive action, to be dealt with in the next section.

⁸ Case C-18/95 *F. C. Therhoeve v Inspecteur van de Belastingdienst Particulieren/Ondernemingen Buitenland* [1999] ECR I-345.

⁹ Case C-13/94 *P v S and Cornwall County Council* [1996] ECR I-2143.

3 SEX-DISCRIMINATION AND LEGAL (IN-)EFFICIENCY

Like Anna Christensen, Karin Lundström in her article *Indirect Sex Discrimination in the European Court of Justice's version* starts out from the assumption that the concept of indirect discrimination is linked to the promotion of *substantive* equal treatment in a special way and that it embodies 'at least a theoretical potential to achieve true sex equality'. However, having scrutinised the ECJ's application of the concept of indirect discrimination, she – just like Evelyn Ellis – ends up with the rather disappointing conclusion that this case law rather counteracts the aim of the legislation concerned. For Karin Lundström, an important point of departure is the contention that as a consequence of the ECJ's case law on direct discrimination, the concept of indirect discrimination has grown increasingly important. However, excessive requirements of statistical evidence on the part of the ECJ to prove a case of indirect discrimination have prevented the regulation from becoming genuinely effective. These requirements contrast with the ones upheld in other areas, such as indirect discrimination on the grounds of nationality when it comes to freedom of movement for workers and the right to social benefits.

Karin Lundström and Lynn Roseberry, the colleague who comments on her contribution, seem to disagree on most issues when it comes to the interpretation of ECJ case law as regards indirect discrimination on the grounds of sex. While Lynn Roseberry agrees that there are problems with EC sex discrimination law, she finds them in other places than Karin Lundström.¹⁰ I leave it to the reader to follow her carefully elaborated line of argument in relation to the arguments put forward by Karin Lundström.

My own reflections in relation to Karin Lundström's article are as follows. One line of argument might consist in saying that if a woman suffers differential treatment which is, when it occurs to more than 90% to the detriment of women, it could seem natural to understand this as a *prima-facie* case of direct discrimination in the individual case. However, when there is – according to traditional values – a seemingly neutral criterion for this treatment (such as part-time employment), the concept of direct discrimination does not apply, says the ECJ. In addition, when applying the concept of indirect discrimination in sex-discrimination cases the ECJ requires statistical evidence to the effect that the differential treatment is systematic and structural and not an occasional or random phenomenon. In these cases, so far, such evidence must also refer to the practices of the actual employer. Quite contrary to what is frequently said in relation to the concept of indirect discrimination – that it is the detrimental *effect* for the protected group, not the intention of the employer, that matters – a conclusion to be drawn from

¹⁰ See further, Roseberry, Lynn, *The Limits of Employment Discrimination Law in the United States and European Community*, Jurist- og Økonomforbundet, Copenhagen, 1999.

the case law described is that indirect discrimination also requires (if not intent then at least) proven ‘responsibility’ for discriminating practices on the part of the individual employer. Thus, so far, any comparison must refer to the practices of the employer himself, reflecting the whole ‘pattern’ of differential treatment – both the negative and the positive side.¹¹ It is not enough that the differential treatment at issue is notorious throughout society in general. This requirement might at the same time explain why the application of the concept of indirect discrimination is ‘less effective’ when it comes to sex-discrimination law, as compared to regulations on nationality discrimination and the free movement of workers. In the first case there is a ban on discriminatory practices as such, implying an obligation to observe equal treatment basically according to the Aristotelian concept of formal equal treatment on the part of a subject who is ‘responsible’.¹² In the latter case we deal with equal treatment as a means of fulfilling (‘subordinated’ to) the instrumental goal of the free movement of workers.¹³ In this respect, too, everything would change if the ECJ were to accept the ban on (indirect) discrimination as an instrument to be used in promoting *substantive* equality between the sexes – as Karin Lundström rightly puts it, the *raison d’être* of sex-equality regulation.

Karin Lundström’s conclusion is thus that the ECJ’s case law as regards indirect discrimination in this field has basically failed its potential to re-evaluate and change the underlying reference norms in working life to the benefit of real (substantive) equality. The next article, *A Blessing or a Ban? About the Discrimination of Pregnant Job-Seekers* by Jenny Julén, may also be said to deal with the inability of equal-treatment regulation to come to terms with substantive inequality between the sexes. Here the fundamental issue is the struggle of powers behind the construction and application of the ban on sex discrimination in relation to the reproductive functions of women – and making the problem ‘invisible’ proves to be a crucial strategy.

Jenny Julén’s article concerns, as she puts it, ‘the pregnant woman’s right not to be discriminated against versus the employer’s valid wish to avoid economic loss’. It focuses on the (possibly) pregnant job-seeker and examines Swedish regulations in the light of EC law. In the famous *Dekker* case, the ECJ found an employer’s decision not to hire a pregnant woman to be direct discrimination. Jenny Julén questions this judgment, regarding it as ‘a misapplication of the concept of direct discrimination [which] may

¹¹ Not so according to the Council Directives 1997/80/EC and 1999/70/EC on part-time and fixed-term work, respectively: see Article 4 in both directives.

¹² Another line of argument here would be, at least as regards equal wages etc., that when there is no legal standard but freedom of contract prevails, it takes a comparison of modes of treatment to prove discrimination; compare Anna Christensen’s article in this anthology.

¹³ Compare the discussion above in relation to Mattias Malmstedt’s article.

help to preserve gender preconceptions that contribute to the discrimination of women'. Pregnancy and parenthood, and how these functions are generally distributed among men and women, are important reasons for the differential treatment of women – *i.e.* the 'statistical' discrimination that affects women job-seekers. 'The typical woman's reluctance to give priority to work before family is to some extent a characteristic of every female employee until the opposite has been proved'. Such preconceptions in combination with the ways in which the social-security-based parental benefits actually work to strengthen – at the structural level – the interplay between experience and concepts. Thus, 'a decision to the effect that discrimination on the ground of parenthood is to be considered as direct discrimination of women also implies the unchangeability of the fact that women have to shoulder the main responsibility for children' and inhibits the necessary reform of the reference norms underlying working life. According to Jenny Julén, employers' unresponsive attitude towards women who are, or are presumed to become, pregnant is actually first and foremost directed towards woman in her role as a caring parent and not in her capacity of woman.

Whereas on the surface there appears to be a satisfying legal protection against the discrimination of pregnant women, cases where the existing protection does not work are actually frequent. Jenny Julén here identifies 'the power strategy of making things invisible'. What is made invisible is parenthood, and it is done by referring parenthood to private life, while working life belongs to the public sphere. The psychological effects that follow from the structural division between public and private help to preserve structures in society which are unfavourable for parents with very young children. By accepting a level of protection against the discrimination of pregnant job-seekers that is actually much lower than the level guaranteed by formal law, the employer and the applicant are thrown upon their own resources when it comes to solving their conflict of interests. This provides room for an application of the rules that in fact meets the interests pursued by the employer to a larger extent than those benefiting the applicant. This can also partly be explained by reference to the structural division according to which the employer's interests belong to the public sphere and imminent parenthood to the private sphere. Jenny Julén suggests new ways of dealing with parenthood in the public sphere, something which is – in the long run – expected to make a contribution to change in the prevailing power structures.

The question of whether pregnancy discrimination is properly conceptualised as direct or indirect sex discrimination – together with the requirement (or not) to use a comparator and the special case of fixed-term contracts – are the issues that *Clare McGlynn* has chosen to highlight in her comments. Jenny Julén's argument according to which turning pregnancy discrimination into a case of direct discrimination reinforces traditional assumptions about women and men's roles within families, and in relation to childcare, appeals to *Clare McGlynn* as well. Nevertheless, she finally ends up with the concept of

direct discrimination as the better solution. One reason is McGlynn's fear that if decisions in cases like *Dekker* and *Webb*¹⁴ were to be framed in terms of indirect discrimination, possible justifications might not be so readily rejected – and she takes us on a tour with the *Webb* case through UK courts prior to the ECJ's statements. Another reason – and the stronger one – is the reminder of 'biologically' related pregnancy discrimination that the indirect-discrimination solution leaves us facing, as well as the problems as to where to draw the line. The importance of protection for pregnant women, and thus the desirability of not confusing pregnancy discrimination with discrimination against parenthood, was also stressed by Erika Szyszczak in the discussions. In addition, Clare McGlynn draws our attention to the potential reduction in the rights of pregnant women that the indirect approach might bring, eliminating stereotypical assumptions but leaving both women *and* men without protection – giving us the example of *Lewen*.¹⁵

After an intrinsic discussion of the pros and cons of using a comparator in pregnancy cases McGlynn goes on to deal with the item of pregnancy and fixed-term contracts, leaving us in suspense awaiting the ECJ's judgments in the cases of *Brandt-Nielsen*¹⁶ and *Melgar*.¹⁷ The outcome of these cases is closely related to the earlier discussion on pregnancy discrimination as either direct or indirect discrimination, and also to the question of whether direct discrimination could ever be justified.

The possibility that direct discrimination could indeed be justified is of special importance to the scope and legitimacy of positive action, an issue at the heart of my own article *On Equal Treatment, Positive Action and the Significance of a Person's Sex*, commented on by Erika Szyszczak.

The purpose of my article is to contribute to the normative analysis of equal treatment, the scope of positive action and legitimate considerations of sex in the light of Community law as reflected in ECJ case law. It contains a comprehensive presentation of the Court's reasoning in the core cases on positive action *Kalanke*,¹⁸ *Marschall*,¹⁹ *Badeck*²⁰ and *Abrahamsson*.²¹ In *Badeck* the ECJ summarises positive action as being compatible

¹⁴ Case C-32/93 *Webb v EMO Air Cargo* [1994] ECR I-3567.

¹⁵ Case C-333/97 *Lewen v Denda* [1999] ECR I-7243.

¹⁶ Case C-109/00 *Tele Danmark v HK, acting on behalf of Brandt-Nielsen*

¹⁷ Case C-438/99 *Jimenez Melgar v Municipality of Los Barrios Social Court*.

¹⁸ Case C-450/93 *Kalanke v Freie Hansestadt Bremen* [1996] ECR I-3051.

¹⁹ Case C-498/95 *Hellmut Marschall v Land Nordrhein-Westfalen* [1997] ECR I-6363.

²⁰ Case C-158/97 *Georg Badeck et al. V Hessischer Ministerpräsident und Landesanwalt beim Staatsgerichtshof des Landes Hessen* [2000] ECR I-1875.

²¹ Case C-407/98 *Abrahamsson and others v Elisabet Fogelqvist* (Judgment 6.7.2000).

with Community law if it does not automatically and unconditionally give priority to women when women and men are equally qualified and the candidatures are the subject of an objective assessment which takes account of the specific personal situation of all candidates (paragraph 23 of the *Badeck* judgment). Additionally, in *Badeck* and *Abrahamsson*, the Court has accepted positive-action measures which imply that the underlying selection formula is modified by transparent criteria amenable to review ‘which, although formulated in terms which are neutral as regards sex and thus capable of benefiting men too, in general favour women’ – *i.e.* within the concept of indirect discrimination. Basically articulated as a conflict between the principle of equal treatment in Article 2.1 and the ‘exception’ for positive action in Article 2.4 of the Equal Treatment Directive 76/207/EEC, on closer scrutiny the contradiction we seem to witness in the first three cases can be said to be only apparent. It is the same normative pattern – equal treatment meaning equal opportunities or competition on equal terms for the individual – which is upheld by means of regulations at different levels. The normative picture is quite different when an individual of the under-represented sex is – as was the case in *Abrahamsson* – to be given priority even when less qualified. In such cases other normative patterns and interests come to the fore than when equal treatment, in the sense of equal opportunities, is concerned. Being of the opinion that Community law as comprehended by the ECJ in the cases concerned is not the ultimately adequate expression of the values and interests at stake, I argue in favour of extending the normative basis of positive action within the framework of general proportionality assessments, occasionally allowing for the justification of direct discrimination as well. To illustrate the normative arguments that come into play, I have chosen to proceed from some concepts from representation theory, *i.e.* the argument of fair representation, the conflict-of-interest argument and the resource argument. These concepts are related both to the judgments of the ECJ that were just described and to the theory of law as normative patterns in a normative field underlying the Norma programme of research (see further below, Sec 5). The picture of the normative field of anti-discrimination law that comes to the fore is ‘a tug-of-war between conservative patterns of belonging and flexible employer prerogatives in what might be described as a minefield’.

Not without ‘trepidation’, as she puts it, *Erika Szyszczak* has accepted the invitation – and also the necessity – to step into this minefield of positive action. The Aristotelian (formal) equal treatment principle and the hitherto cautious application as regards the scope of positive action in Community law are simply not enough, neither when it comes to eradicating sex discrimination in society nor with regard to creating equal opportunities there. *Erika Szyszczak*, against the background of the EU’s new equal opportunities programme and the wording of Article 141.4 EC, suggests a new approach, seeing positive action not as a derogation from the equal treatment principle but as a legitimate legal tool on its own. She finds support for this view in the new directives

2000/43/EC and 2000/78/EC, too, as well as in the action programme to combat discrimination (especially in the preambles).

Erika Szyszczak hesitates, however, when faced with my suggestion that direct discrimination might also be allowed occasionally. After ‘testing’ the proportionality assessment within the concept of indirect discrimination as applied in the *Bilka-Kaufhaus* case,²² she comes to the conclusion that some sort of regulation with clear objectives and criteria set out for the permissible use of positive action is to be preferred before judicial discretion.

I myself am quite happy with Erika Szyszczak’s argument that we should see ‘positive action as one of the legitimate principles of equality which have emerged through democratic choice at different levels in the EU and which deserves equal protection alongside the notion of formal equality’. Recognising such a ‘plurality’ of equally legitimate and democratic equal-treatment concepts is – as will be further articulated below – the only way forward, in my view. And – as we learn from the European Court of Human Rights – competing and equally legitimate fundamental rights call for exactly the kind of general proportionality assessments that I have in mind. I advocate a proportionality assessment which is not like the one that prevails within the concept of indirect discrimination (objectively justified and unrelated to sex) but of a more general type, involving a balancing-off of conflicting rights. Such an approach is perfectly compatible with the wording of Article 2.4 in the draft proposal amending the Equal Treatment Directive put forward by the Commission,²³ built on a reporting of best practices which may in the long run form a base for more detailed regulations with regard to positive action.

In short, this part of the anthology deals with the importance of freeing ourselves from the liberal strait-jacket which the traditional legislation against discrimination on the grounds of sex has imposed on us, a strait-jacket that is constructed on the basis of the stipulation that sex is of no significance in the area concerned. Stipulated equality/sameness tends to conceal – or make invisible, as we learned from Jenny Julén’s article – real differences between the sexes and also ‘flaws’ in the underlying norms regulating working life. Real integration/equality requires the reformulation of reference norms. The displacement from complementarity towards equality in respect of the sexes that Anna Christensen described in her article must not imply that we deny every difference between the sexes on every occasion.

²² Case 170/84 *Bilka-Kaufhaus GmbH v Karin Weber von Hartz* [1986] ECR 1607.

²³ COM(2000) 334 final.

4 EQUAL TREATMENT AND THE FUTURE OF LABOUR LAW

The adequacy of the underlying norms of working life is the centrepiece of the third and last block of this anthology.

Along with some other significant trends, the broad normative implications for labour law in general of anti-discrimination legislation are dealt with by *Mia Rönnmar* in her article *The Right to Direct and Allocate Work – From Employer Prerogatives to Objective Grounds*. She investigates how legal developments in the area of non-discrimination may ultimately be expected to give rise to a more general requirement for objective grounds in the area of the direction and allocation of work. Rönnmar also describes how the development of what is generally called the Knowledge Society, increasing individualisation of work and the strengthening of fundamental social rights in working life, tends to generate requirements in the same direction. Then she relates this development to the ongoing flexibilisation of working life and the future of labour law. At the same time as increased diversification of working conditions – the outcome of flexibilisation – can be said to create a greater need for protection against discrimination, the connection between the flexibilisation of working life and the development of a general requirement for objective grounds is complex. Increased demands for objective justification dismantle employer prerogatives and thus the right to direct and allocate work as an instrument of functional flexibility. Simultaneously, common criteria for what is to be regarded as objectively justified imply a juridification of labour law (decisions formerly met within employer prerogatives may now be challenged in courts); they also give rise to precisely the kinds of ‘rigid’ regulations and structures that the flexibilisation of working life was a reaction to in the first place. Furthermore, while it is true that increasing individualisation can be seen as an expression of a strengthened position – ‘empowerment’ – for the individual employee, such developments risk undermining the strength and influence of unions and the ‘collective voice’ and might work to the ‘disempowerment’ of large groups of employees. Mia Rönnmar also sees difficulties with the ‘Swedish model’ and traditionally strong employer prerogatives which represents an obstacle to the described movement towards juridification and individual rights.

Mia Rönnmar hence puts anti-discrimination regulation into a broader context, examining its implications for the contents of future labour law. In her basically affirming comments on Mia Rönnmar’s article, *Ruth Nielsen* – who wrote her doctoral thesis on the implications for labour law in the Nordic countries of a general objectivity norm implicit in EC law²⁴ – highlights another trend which she feels should have been included,

²⁴ Nielsen, Ruth, *Arbejdsgiverens ledelseret i EF-retlig belysning, Studier i EF-rettens integration i dansk arbejdsret*, Jurist- och Økonomforbundets forlag, Copenhagen 1992.

questioning the tendency towards an individualisation of labour law. The ‘missing’ trend is the one towards workers’ privacy. Ruth Nielsen exemplifies this with Article 8 of the European Convention on Human Rights, the ILO Code of practice on the protection of workers’ personal data and the Council Directives 95/46/EC and 90/270/EEC. As regards individualisation, Ruth Nielsen draws our attention to the ongoing process of dismantling the dichotomy between employment and service contracts – also a subject addressed by Samuel Engblom; see further below – and the increased role of collective agreements in EC law. In her view, ‘the trend is that the individual and collective dimensions are becoming complementary and mutually supportive’ as mandatory or semi-mandatory regulation is gaining ground.

As Ruth Nielsen states, it seems to follow from the case law of the European Court of Human Rights that queries about sexual orientation in connection with recruitment is a violation of Article 8 in the European Convention on Human Rights, irrespective of whether there is reason to suspect discrimination. Such a state of affairs is, of course, extremely interesting in relation to the issues dealt with by Jenny Julén in her article on pregnancy and recruitment. It also seems to have implications for discrimination law in a broader perspective. Protection under the ban on (direct) discrimination related to sex, sexual orientation, disability etc. presupposes knowledge of the ‘victim’s’ adherence to a protected group on part of the allocator of resources. Ignorance in this respect equals justification of a *prima-facie* case of discrimination. Thus, a ban on the query as such apparently serves to limitate the scope of non-discrimination legislation. It also seems to cause difficulties as regards the monitoring of discriminating structures/non-discrimination rights. In this respect, one might say that a ban on seeking information as regards adherence to a certain (protected) group strongly supports ‘stipulated sameness’ and thus furthers the Aristotelian formal-equality concept. Simultaneously, such a ban may be said to deny substantive (in-)equality, as it denies the knowledge of (stipulated ir-)relevant adherence to a group suffering from differential treatment.

As was already indicated, the ongoing trend in the direction of what Ruth Nielsen called ‘the dismantling of the dichotomy between employment contracts and service contracts’ is the subject of the next article, *Equal Treatment of Employees and Self-Employed Workers* by Samuel Engblom. One may also say that this article deals with the boundaries of labour law. The term ‘worker’ is here defined as anyone who personally performs remunerated work, and the underlying assumption of Samuel Engblom’s article is that self-employed workers selling labour-only services to professional employers share many characteristics with employees and that changes in the organisation of work and the organisation of firms have increased these similarities. Are there still valid arguments in favour of having different regulations for work performed by an employee and for jobs undertaken by a self-employed worker? Here, says Samuel Engblom, it is mandatory to pay attention to the inherent characteristic of self-employment: its double

nature. On the one hand, self-employed workers are human beings who personally perform remunerated work and more or less strongly resemble employees; on the other hand these workers are commercial enterprises. Fundamental to commercial law are the principles of freedom of contract and the presumption that all parties are equal. Samuel Engblom analyses the possibility of equal treatment of ‘workers’ against what he regards as being the different roles of labour law: i) as protection of human rights, ii) as promotion of social justice, and iii) as an instrument of economic policy. Engblom’s conclusion is that equal treatment of ‘workers’ is not possible owing to the double nature of the self-employed and the fact that the regulations of the market for labour and the market for goods and services rest on different principles. A balance between the two regimes has to be struck, in the course of which procedure three factors have to be weighed in: i) the nature of the relationship between the worker and the employer, ii) the roles played by the labour-law regulation at hand; and iii) the effect that the regulation will have on the self-employed worker in her capacity as a commercial enterprise. Instead of simply classifying self-employed workers as either workers or firms, subjected to either labour law or commercial law, legislators and courts should look for the correct mix of regulations. Or – to put it in the terms of the Norma model – it is not realistic to make a choice between labour law and commercial law. The different normative patterns at work here will all continue to attract legal solutions and will have to be balanced from time to time.

In his comments, *Simon Deakin* dwells on the nature and origins of the binary divide between employees and the self-employed. He also looks at the implications of the fragmentation of the enterprise for the application of labour law. Thus, he views the question firstly as concerning the classification of employment relationships and secondly in relation to the nature of the enterprise. Deakin questions the historic authenticity of the ‘binary divide’, maintaining that the ‘traditional’ division into employees and self-employed no longer makes sense in its functional terms of either ‘control’ or ‘economic reality’. ‘[T]he fundamental idea behind the binary divide – the trade off of control for economic security for the employed, with independence of action and some fiscal support for the self-employed – has broken down for a large group of workers’.

The other side of the coin where these developments are concerned is the legal nature of the employer, a matter which is increasingly emerging as an issue in its own right. According to Deakin, a ‘fragmentation’ of the enterprise stems from the growing practice of supplying labour services to an end-user through intermediaries, such as personal service companies or employment agencies, or, as Engblom puts it: ‘What in an earlier stage of development would have been intra-firm relationships described in bureaucratic terms and subject to labour law, have become inter-firm relationships expressed in contractual terms and subject to commercial law.’ What is required is a new understanding of how particular rights and liabilities are to be allocated when the traditional functions

of the employer are divided among a number of different entities. In this context, Deakin suggests three criteria for identifying the 'employer': co-ordination, risk and equity. In the traditional labour-law conception of the employer, these functions were united. With regard to agency work and supply of labour through intermediaries, the co-ordination and risk functions are now split: the co-ordination function belongs with in the end-user of labour, while the residual risk function is left with the agency or with the individual worker.

The idea of 'equity' refers to the identification of the enterprise with a space within which the principle of equal treatment must be observed. Here, both Deakin and Engblom draw our attention to the fact that where rights to non-discrimination are concerned, employees and self-employed people occasionally already enjoy legal rights to equal treatment.²⁵ This, and the special problem introduced by Deakin of overriding the boundaries of the employer, is also reflected in the requirements that the end-user observe equal treatment in the case of agency labour. Thus, it is the organisational unity of the enterprise which makes it legitimate under UK anti-discriminations Acts for agency or 'contract' workers to be accorded equal-treatment rights with the permanent workers alongside whom they work, even though these workers have no contract with the user. A collective agreement to that end was recently signed on the Swedish labour market, too, in the temporary-agency business. As Simon Deakin puts it: '[T]echniques are available to legislators if they wish to address the implications of the fragmentation of enterprise. ... [As a matter] of particular interest for present purposes, they may make it possible for the equal treatment principle to apply across the employee/self-employed divide, and, in some exceptional cases, beyond the limits of the enterprise itself'. Such a general development could in future be expected to add significantly to the scope and efficiency of existing bans on pay-discrimination, until now restricted to comparisons within the same employer's business. Another opening in this direction is offered by the directives on part-time and fixed-term work, respectively.²⁶

The adequacy of the underlying norms of working life and the special concerns of anti-discrimination legislation viewed from the perspective of disabled people forms the subject of *Andreas Inghammar's* article *Discrimination of People with Disabilities. Normative Aspects of Disability and Work in a Swedish, English and EC context*. The article thus relates to the underlying norms of labour law in general, as well as to the reform potential of concepts such as indirect discrimination, requirements on work adjustment and positive action when it comes to integrating the disabled on the open labour market. The article discusses how the Disability Discrimination Act (DDA 1996)

²⁵ Compare, for instance, the Council's Directive 2000/43/EC and 2000/78/EC, respectively.

²⁶ Clause 3.2 in the Framework Agreements, respectively.

in the UK and the Swedish Act (1999:132) on discrimination in working life of persons with disabilities (FUDA), as well as the new Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (the framework directive), are constructed and how they have chosen to address some of the problems that people with disabilities might face in the context of discrimination on the labour market. As the ban on discrimination requires equal treatment (only) of the equally situated in these cases as well, Inghammar comes to the conclusion that anti-discrimination legislation in relation to the disabled has a somewhat 'elitist' impact, and that its potential when it comes to solving the problem of integrating the (quite disparate) groups of disabled people on the labour market is hence considerably restricted. This is so despite the requirement for 'reasonable adjustments' on the employer's part and the rules on the burden of proof (with regard to the framework directive, these rules were copied from the directive 97/80/EC on the burden of proof). As for indirect discrimination – present in the FUDA as well as in the framework directive – Inghammar draws our attention to the fact that this concept is not present in the DDA 1996.

In his comments, *Alan Neal* does not deny that the absence of the concept of indirect discrimination in the DDA 1996 stressed by Inghammar may be labelled a significant difference, not least as regards the implementation of the framework directive; but he doubts whether this necessarily results in a 'less effective' regulatory regime. On the contrary, Neal suggests, the United Kingdom model might actually be better at bringing about the 're-integrative' objectives underlying the relevant legislation. It is the duty to make (reasonable) adjustments – present in all three regimes under review – that makes a substantial difference as compared to other fields of non-discrimination law. This duty implies – according to Neal – that the issue of potential discrimination to the disadvantage of disabled persons has to be addressed throughout the whole management process. It is also accompanied by those positive implications that Evelyn Ellis missed with regard to the concept of indirect discrimination – regulations that require positive action and are not restricted to the imposition of legal penalties. 'It is hard to see how a future failure to re-visit procedures for recruitment selection, redundancy selection, capability, discipline/dismissal, or a wide range of other interfaces between established "general" individual employment rights and obligations raised in relation to potential disability discrimination by both the 1995 Act and the associated Codes of Practice can now be defended by a respondent employer or employing organisation', says Neal. He thus takes a more optimistic view of the potential introduced by normative regulation of working life in the context of disability than Inghammar does. By prescribing adaptation, this legislation goes some way further than the mere penalisation and sanctioning of identifiable 'unlawful' acts. In the debate, Evelyn Ellis followed up Neal's line of argument, stating that the inclusion of the concept of indirect discrimination with reference to the disabled risks 'eroding' the concept, since justification is likely to

be frequently accepted!

What Alan Neal is doing here is to indicate the potential of positive duties – or fourth-generation rights, to quote Sandra Fredman, or active measures, to quote the Swedish legislator²⁷ – as a way forward to really promote the integration of marginalised/protected groups into the active workforce, thereby encouraging substantive equality.

5 THE NORMATIVE FIELD OF DISCRIMINATION LAW

Some of the terms and functions that are central to the theory of ‘Normative Patterns in a Normative Field’ underlying the whole Norma research programme have already occasionally been mentioned in this introduction. The concept *basic normative pattern* is a key concept to the theory; and a deepened understanding of basic normative patterns, their manifestations, historical development and interrelations, is at the heart of the Norma programme. The theory has been presented in various forms on other occasions,²⁸ and here I will only provide a brief general introduction before describing what would be the normative field of discrimination law.

The theory is based on the contention that different basic normative patterns can be distinguished in the multitude of legal norms. The basic normative patterns are held to reflect normative practices functional to society and human relationships. They thus reflect – and codify – social normative conceptions and practices aimed at making long-lasting human relationships and sustainable societies possible, and they are closely related to societal conditions. As social life is quite complex, these normative patterns do not make up the ‘hierarchical legal system’ we frequently imagine. Instead, these patterns are brought into play in a *normative field* determined by the different basic patterns, which also act as *normative poles*. As changes in underlying societal conditions account for many of the movements in the normative field and the new legal institutions which have arisen over time, one may at the same time picture the field as a *functional field*.²⁹ However, the basic normative patterns all represent enduring legitimate normative

²⁷ Fredman 2000 and the Swedish Equal Opportunities Act.

²⁸ See, for instance, Christensen, Anna, Protection of the Established Position: A Basic Normative Pattern, *Scandinavian Studies in Law* 2000, pp. 285–324, Christensen, Anna, Normative Patterns and the Normative Field: A Post-Liberal View on Law, In: T. Wilhelmsson and S. Hurri (eds.), *From Dissonance to Sence: Welfare State Expectations, Privatisation and Private Law*, Ashgate, England 1998, and *Norma 1996:1*, Normative Development within the Social Dimension, Lund 1996.

²⁹ Compare the approach to discrimination law represented in Anna Christensen’s article in this anthology.

conceptions in society, and it is the task of legislators and courts to balance these conceptions within the framework of law.

This model of law can be said to be particularly suitable for describing the dynamics of the normative process in the perspective of European integration. The theory provides a common frame of reference where legal solutions in the different Member States can be described according to their position in relation to the different basic patterns in the normative field. The technique of teleological interpretation used by the ECJ, based on the functionality of national regulation implementing Community law in relation to Community aspirations, is also highly compatible with this theoretical framework.

The theory's model of law is one that lends itself to general application. However, within the Norma programme it has been applied to the legal areas covered by the programme. We have frequently described the normative structure of legal areas pertaining to the social dimension as a normative field with three dominating basic patterns or poles of attraction: Protection of the Established Position, Just Distribution and the Market-Functional Pattern. Behind the Market-Functional Pattern several patterns can be distinguished, all with the common denominator of articulating the scope of action related to the 'free market'.

The normative pattern for the Protection of Established Position originates in the very base of property rights way back in history, possession. Behind this pole we detect stability in the sense of conservatism – the opposite to change and flexibility. Attached to the pole of Protection of Established Position in the discrimination context I would situate what may be called the Pattern of Belonging. The Pattern of Belonging – including the profound notion of willingness, but also the obligation, to admit to the group/share with (but only with) people who are already in some way associated with the group, by virtue of which the Pattern of Belonging also to some extent covers the pattern of Just Distribution³⁰ – is in conflict with the individual's right to equal treatment. It is of fundamental importance to note that it is the group behind the pole Protection of the Established Position that has to a considerable extent been in the position to create the rules of the game – the reference norms.³¹

³⁰ Compare the remark by Simon Deakin in the final discussion at the conference, to the end that the differentiating structures of prior societies often come with compensating solidarity mechanisms, and that the equal-treatment approach may call for new such mechanisms to develop (such as a positive duty to make adaptations). Compare also Anna Christensen's article on the historical complementarity of groups like men and women, now stipulated to be equal.

³¹ The prohibitions on direct discrimination are said to be characterised by their dependence on the background norms in the area of intervention. Compare especially Anna Christensen's article in this anthology.

The Pattern of Equal Treatment aims at providing equal opportunities in equal cases, that is competition on equal terms. Such a normative pattern may be said to constitute part of the Market-Functional Pattern.

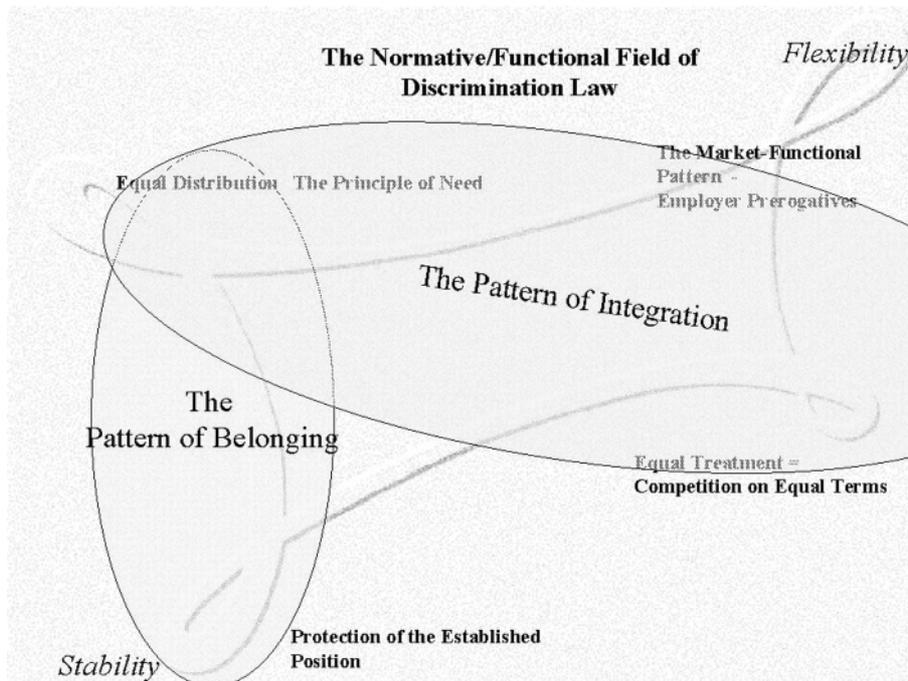
Other patterns concerning distribution come closer to the pole of Just Distribution. Such a pattern is Equal Distribution, which is very clearly a distributive pattern characterised by solidarity rather than market values. The Principle of Need may be said to constitute another normative pattern for Just Distribution. Both patterns attract regulation in another direction than the pattern of Equal Treatment seen as equal opportunities. In a discrimination-law context, this is where we find quota solutions and the like.³²

The Market-Functional-Pattern Pole contains the normative patterns which have developed in the free market. The freedom of contracts is a central part of this aggregated pattern. The right to property is also a part of this pattern, but in the Market-Functional Pattern it is the proprietor's exchange and disposal rights to his property on a market which matter. From the functional point of view, these are patterns conducive to change and flexibility.

Several of the contributions to this anthology have described the crucial function of discrimination law as that of breaking up old structures of belonging which are for some reason considered inadequate today. We speak of the widening of normative circles,³³ of inclusion and integration. In the present context I have chosen the concept Pattern of Integration, which in my view covers not only the Market-Functional Pattern but also Just Distribution. Here it is all about change – the change of attitudes and practices to destroy old patterns of belonging. Once the patterns of belonging are changed, and those who are to be protected have entered the group of established positions, the era of non-discrimination regulation has had its day. Since basic normative patterns as such are pretty stable over time, and the structures and attitudes of belonging are shaped and reshaped on a daily basis, as are the ambitions of integration, this situation is not likely to occur for a long time – if ever.

³² See further Ann Numhauser-Henning's article in this anthology.

³³ Compare especially Mattias Malmstedt's article in this anthology but also, for instance, Andreas Inghammar's on the integration of the disabled in the labour market. The integrative aspect of discrimination law also contains the case of 'complementarity', dealt with as regards the roles of men and women in a historic context by Anna Christensen in her article. In earlier times, the groups that are now to be treated equally were complementary. However, once we have set ourselves the ambition 'equal treatment', we are dealing with the integration of a group into normative circles where the group did not formerly 'belong' in these cases as well.



6 EQUAL TREATMENT – A NORMATIVE CHALLENGE

The ECJ's case law on non-discrimination, which is built on Article 6 (now Article 12 EC) and Article 119 (now Article 141 EC) in the Treaty of Rome, may be said to form a normative core in Community law. Lately, the principles of non-discrimination and equal treatment have gained further ground, both in Community law and in national legislations.

The principles of non-discrimination and equal treatment are thus fundamental to the two Framework Agreements hitherto conceived at the European level through the Social Dialogue in the area of atypical work, now the Council Directive 1997/80/EC on part-time work and Council Directive 1999/70/EC on fixed-term work respectively. This is a new setting which implies special challenges to discrimination law as traditionally conceived. Here, in contrast to more traditional fields of discrimination law, we are

dealing with protected groups defined precisely by the working conditions that the ban on discrimination is supposed to render equal. It is hardly possible to stipulate that there is no relevant difference between permanent and fixed-term workers without doing away with the core of traditional employment protection or labour law, and the difference also shows in that the rule on equal treatment in those directives explicitly accepts the justification of direct discrimination.³⁴ Moreover, the regulation on how to establish a 'similar case' is different from former non-discrimination law, permitting a broader scope of comparison.³⁵ Finally, the interrelation between those two new directives and indirect sex discrimination as hitherto conceived by the ECJ is more than complex.³⁶

Furthermore, after the Amsterdam Treaty of 1997 the principles of non-discrimination and equal treatment have strengthened their treaty base through Articles 2, 3.2 and 141 EC and, even more so, through Article 13 EC, widening the scope of EC non-discrimination law considerably.³⁷ The new writings imply a stronger Community commitment to the achievement of social inclusion for hitherto marginalised or differently treated groups, expressing a real desire to promote substantive equality. On the basis of Article 13 we have now seen two new directives, Directive 2000/43 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin³⁸ and Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation.³⁹ Especially the last one faces us with the possibility of a future 'Single

³⁴ The possibility and legitimacy of the justification of direct discrimination in sex discrimination law is central to my own article but can also be said to be at the heart of the contributions of Jenny Julén and Clare McGlynn.

³⁵ See Clause 3.2 in the Framework Agreements, respectively. Simon Deakin touches on the issue in his comment on Samuel Engblom's article, but it is also central to an understanding of Karin Lundström's article.

³⁶ Apart from the ECJ's abundant case law on indirect discrimination and part-time employment in general, I would like to make a special mention of the cases C-189/91 *Petra Kirshammer-Hack v Nurhan Sidal* [1991] ECR I-6185, C-167/97 *Regina v Secretary of State for Employment, ex parte Nicole Seymour-Smith and Laura Perez* [1999] ECR I-623, C-78/98 *Shirley Preston et al v Wolverhampton Healthcare NHS Trust et al and Dorothy Fletcher et al v Midland Bank plc* (judgment 16.5.2000) and C-322/98 *Bärbel Kachelmann v Bankhaus Hermann Lampe KG* (judgment 26.9.2000), reflecting the complex relation between equal treatment and the scope and content of employment-protection regulation in general.

³⁷ The special difficulties which new protected groups might entail are dealt with in the articles by Anna Christensen as regards age and Andreas Inghammar and Alan Neal as regards the disabled, respectively.

³⁸ OJ 2000 L 180/22.

³⁹ OJ 2000 L 303/16.

Non-Discrimination/Equal Treatment Act’ – a challenge not only to discrimination law, but also to the realisation of social equality as such, as will be elaborated below. The Nice Summit in December 2000 and the adoption of the EU Charter on Fundamental Rights⁴⁰ further add to the challenges ahead for discrimination law. In the following concluding remarks, I will dwell on some of those challenges a little, drawing on the totality of the contributions as well as on the general discussions that ensued. However, this introduction merely reflects a limited number of the issues raised in the discussions during the conference and by legal developments as such.

The point of departure of traditional discrimination law is, as was indicated by many of the contributors to this anthology, the Aristotelian principle that ‘like shall be treated alike’; and the common feature of hitherto ‘piece-meal’ prohibitions against discrimination is that they all concentrate on what is to be regarded as alike (similar cases) – not on the treatment as such.⁴¹ ‘A Single Anti-discrimination Act’ can be regarded as the natural outcome of a steadily expanded scope for the non-discrimination/equal treatment principle to include different groups of society. Such ‘A Single Act’ may be said to imply a generalised Aristotelian principle,⁴² stating that we are all alike and thus to be treated equally. Such a basic right to equal treatment is best understood as a fundamental human right for the individual, based on the idea that ‘all human beings are born free and equal in dignity and rights’.⁴³ The desired development can thus be expected to be given additional support by the legal developments in the wake of the new EU Charter on Fundamental Rights.⁴⁴

⁴⁰ OJ 2000 C 364/1.

⁴¹ See especially Anna Christensen’s article on reference norms.

⁴² As does any law in the liberal tradition. Thus, according to Anna Christensen any ‘legal order’ has its area of application – its normative circle of subjects to which it applies – and is, within this area of application, built on the notion that ‘like shall be treated alike’. In this sense we are dealing with a general principle of equality, not geared to any particular groups, but rather entailing the general instruction to act in the norm-based objective manner that is associated with all forms of exercising authority/laying down normative regulation. The discrimination-law dimension here is how we define the group that is within – *i.e.* protected by – the application area of the rules at issue.

⁴³ Article 1 of the UN’s Universal Declaration of Human Rights 1948. Here, however, we should note the distinction made by Evelyn Ellis at the conference on fundamental human rights to non-discrimination as linked to inherent characteristics of the individual. The right to equal treatment for part-timers and fixed-term workers would thus not be considered as a human right!

⁴⁴ Observe, however, the remark made by Ruth Nielsen in her contribution with regard to a ban even on the queries about certain characteristics within the personal sphere, which seems to serve to limit the scope of non-discrimination legislation even further.

One problem with such a development is, in my opinion, the notorious disadvantages inherent in the Aristotelian principle of equal treatment owing to its fundamentally *formal* character. Another problem is the change of focus which such a Single Act could be expected to imply. Once the question of whom the rule applies to is no longer significant – *everyone* has a right to equal treatment – the treatment as such comes to the fore. Then again, at the same time as a generalised right to equal treatment threatens to make ‘invisible’ the existing problems of differential treatment that constitute the *raison d’être* of traditional piece-meal bans on discrimination,⁴⁵ and can thus be expected to work to the detriment of substantive equality, this new focus on the treatment as such may open new doors to positive duties and fourth-generation positive rights.

First, then, as regards formal versus substantive equality and the well-known troubles with the Aristotelian principle: formal equal treatment has shown to be a rather inefficient tool when it comes to addressing the existing inequalities in a dedicated manner. It often fails to meet the normative – and instrumental – interests behind non-discrimination rules, *i.e.* to integrate hitherto marginalised or differently treated groups in society. This is especially true with regard to the legitimate scope of positive action and the reluctance to see positive action as anything other than a narrowly interpreted exception from the general rule on equal treatment reflected in the ECJ’s case law.⁴⁶ An even more fundamental factor is that formal equal treatment rests heavily on stipulated sameness, concealing real differences and making the need for other (changed/new) reference norms invisible. With a general development implying the hegemony of the formal equal treatment concept – or the Aristotelian principle – we run the risk of making non-discrimination prohibitions even less effective. If the Aristotelian principle, more or less present since the time of the French revolution, had done the trick, we would never have seen those special pieces on non-discrimination legislation that have been

⁴⁵ The starting-point of a typical piece-meal ban on discrimination is that it can be established that a certain group is not included in the area of application of a certain normative structure (does not belong), or – though formally belonging – is treated differently and worse than what follows from the relevant reference norms. As was already touched upon, discrimination law typically implies a situation where the purpose of legal intervention is to change the pattern of (formal or actual) belonging – the normative circle of application of a certain set of (reference) norms. On the other hand, with Evelyn Ellis and her enlogg on ‘political correctness’ with reference to these issues (see Ellis, Evelyn, In Praise of Political Correctness, In: Ann Numhauser-Henning (ed.), *Normativa perspektiv. Festskrift till Anna Christensen*, Juristförlaget i Lund, Lund 2000), a strong notion of the equal value – and thus the right to equal treatment – of every person may merely induce political correctness and diminish the express denial of the existence of discrimination and derogatory remarks in respect of certain groups of people.

⁴⁶ See further my own article in this anthology.

introduced throughout the years.

In respect of the change of focus which a development towards a Single Act entails, the issues dealt with in the article by Mia Rönnmar come to the fore. In general labour law, as Mia Rönnmar shows, the non-discrimination approach can be said to interrelate with the important trend towards a more flexible working life in interesting but also complex ways. In Fordist Society social justice and equity were satisfied through collectively bargained working conditions which were to apply to huge groups of workers, as well as through compulsory protective labour laws. With more diverse and flexible working conditions, individual rights to non-discrimination and equal treatment come in handy. A right to equal treatment, however, calls for the precise definition of the underlying norms of working life that might (through increased juridification and standardisation) lead to a new ‘rigidification’ contrary to flexibility needs.

In the discussions Simon Deakin also pointed to some essential differences between equal-treatment regulation and traditional labour law, consisting in the relevant scope of application and the ways to approach the labour market. Significant differences are thus that equal-treatment law generally applies to job seekers and even the self-employed, and that it has a kind of ‘labour-market-measure appearance’, promoting employment.⁴⁷

Then again – as I suggested before – we have reason to ask ourselves whether we can be sure that developments will turn out to be so problematic after all. While a generalised right to equal treatment threaten to make the existing problems with differential treatment ‘invisible’ and thus threatens to counteract substantive equality, it just might be that this new focus on the treatment as such may open up new possibilities.

During discussions Evelyn Ellis called our attention to the fact that traditional anti-discrimination law had an unfortunate focus on the negative side of (un-)equal treatment. She did so in connection with the concept of indirect discrimination, considered in theory to contain ‘a tremendous potential’ to bridge the gap between formal and substantive equal treatment.⁴⁸ Thus, in the discussions Evelyn Ellis once again manifested her scepticism towards the concept of indirect discrimination. It may theoretically have the potential to overcome traditional and now inadequate structures on the labour market. This potential is, however, limited by the construction of bans on discrimination as punitive rules addressing a ‘responsible’ subject.

As regards the potential to achieve results – and thus substantive equality – solutions entailing positive duties may show us a more efficient way forward. Alan Neal stressed

⁴⁷ Here Deakin draws attention to the substantive side of equal treatment policies/regulation; see further below.

⁴⁸ See especially the article by Anna Christensen in this anthology, but also the article by Karin Lundström.

such a potential on the part of positive duties in connection with the rules on employers' obligations to undertake reasonable adjustments to accommodate the disabled. The imposition of positive duties to promote equality as the way to promote a true integration of marginalised/protected groups into the active workforce, thereby achieving substantive equality, was also addressed by Sandra Fredman under the concept of 'fourth generation anti-discrimination provisions' at a recent Brussels workshop.⁴⁹ Such positive duties may come in many shapes and sizes and are usually triggered by evidence of structural discrimination. Another characteristic is that they may be asymmetrical in their approach – that is, expressly address the disadvantaged group.

One example of positive duties is the technique employed by the Swedish legislator consisting in compulsory so-called 'Equality plans', which leaves most of the contents of such plans outside the scope of legislation but regulates (and stimulates) the process.⁵⁰ The effectiveness of such rules stems from the same notions as 'the open method of co-ordination' in Community employment policies/regulation. They also seem to meet the idea behind the wording of the new Article 2.4 on positive action in the draft proposal amending the Equal Treatment Directive put forward by the Commission.⁵¹ It is just possible that the monitoring of 'good examples' may initiate a 'positive spin' in equality practices which may further substantive equality and social inclusion far beyond what could ever be achieved by punitive-style legislation.⁵²

History seems to provide good reasons for us not to be too optimistic as regards future social-equality developments. There are, however, some trends which indicate more positive developments, or at least a positively argued preoccupation with these matters, within Community law. One is, in my opinion, the economic or market concerns now frequently articulated in European politics in relation to demographic developments, the ageing of the population and internationally low activity rates. Positive-action measures can also be furthered by the adoption and development of material socio-economic human rights as expressed in the EU Charter on Fundamental Rights 2000 and elsewhere.

⁴⁹ Fredman 2000.

⁵⁰ See the Swedish Equal Opportunities Act, recently complemented with more or less detailed rules on the monitoring of equal-pay policies within the workplace, SFS 2000:773.

⁵¹ COM(2000) 334 final.

⁵² As for this line of argument, see further Alan Neal's contribution in this anthology. In the general discussions, Michiyo Morozumi, Tokyo University, gave us an interesting Japanese example of 'positive duties' in the shape of the Maruko Alarm Company Case 1996. Here a duty was put on the employer to 'make a reasonable effort to balance between groups in a working place', compensating the lack of a rule on equal treatment of temporary workers as compared to regular workers.

The major concern of the European Union for the future is undoubtedly the issue of enlargement, that is the integration of a number of new member states. It should come as no surprise for the reader of this text that integration and the widening of normative circles are at the heart of discrimination law. Hence, it should prove exceptionally important to follow this process from the discrimination-law perspective, whether articulated in those terms or not. As we see from a number of policy documents, the question of social inclusion – not least into the labour market – whether of women and ‘new’ age groups, or of the citizens of new member states or the disabled, must be considered a major concern for the future. This is not only a matter of social or moral values, but also a matter of the economic efficiency. Furthered by the political and economic necessity to integrate new and larger groups into the European Union and the European labour market, non-discrimination regulation in the broad definition suggested by this anthology promises to create new ways of promoting equal treatment and social inclusion. However, such a development requires the Aristotelian concept of equality to be complemented by a plurality of different equality concepts.