

# **THE PRESENT AND FUTURE OF THE LAW OF DIVERSITY: ANTIDISCRIMINATION IN EMPLOYMENT AND EUROPEAN LAW**

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## **INTRODUCTION**

The purpose of this Essay is to assess the various components of European antidiscrimination law vis-à-vis social and employment policies in an evolutionary perspective. The sources created by the European Union Treaty and the later modifications that took place up to the Treaty of Amsterdam and the proposed Treaty on the European Constitution are analyzed as are the directives on equality matters, which are distinguished between first and second generations. The first generation dates from the 1970s to the 1990s and pertains to the man–woman sex equality concept; the second generation dates back to the year 2000 and pertains to the extension of the discrimination ban and is aimed at an increased number of protected categories. The regulatory setup is intertwined with the role of jurisprudence, primarily that of the European Court of Justice (ECJ), which was instrumental in formulating concepts and principals of community law. According to the ECJ jurisprudence, the legal provisions have been modified to reflect a more extensive substantive principle of equality. The implementation of the latter may offer a more adequate response to the need to safeguard the differences that identify the various protected groups from discrimination bans.

In analyzing the characteristics of the new antidiscrimination law, originating from the most recent directives, this Essay will show the conceptual novelties and also the technical solutions adopted to support the effective judicial framework that safeguards the principles of equality imposed on the members of the European Union (EU). There are nonetheless obvious contradictions that could undermine the full implementation of these principles.

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I. THE CONSULTING ROLE OF THE EUROPEAN COURT OF JUSTICE IN THE  
PREPARATION OF ANTIDISCRIMINATION LAWS, ITS INFLUENCE ON THE  
INTERPRETATION OF THE EUROPEAN TREATY OF AMSTERDAM, AND THE  
SO-CALLED SECOND-GENERATION DIRECTIVES

The role of the ECJ in developing community law on antidiscrimination issues is considered essential due to the evolution of community law from an original right safeguarding the free movement of European workers and the exchange of goods, toward a more comprehensive safeguard of fundamental rights and sustainable development, both of which were included in the European Treaty of Amsterdam,<sup>1</sup> and later in the European Constitution Treaty as part of the Charter of Fundamental Rights of the European Union, signed in Nice in 2000.<sup>2</sup>

The ECJ focused primarily on questions concerning community law that pertained to equal rights between men and women and the free movement of European workers. With respect to equality between men and women, the ECJ first addressed the right to equal pay<sup>3</sup> and equal treatment in employment, vocational training, promotion,<sup>4</sup> and working conditions.<sup>5</sup> The ECJ also addressed other relevant directives concerning maternity,<sup>6</sup> social security,<sup>6</sup> and most recently parental leave,<sup>7</sup> part-time work,<sup>8</sup> prevention of less favorable treatment than comparable full-time work, fixed-term work,<sup>9</sup> and prevention of less favorable treatment than comparable unfixed-term work.

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1. Treaty of Amsterdam Amending the Treaty of European Union, The Treaties Establishing the European Communities and Certain Related Acts, art. 1, Oct. 2, 1997, 1997 O.J. (C 340) 1, 7 [hereinafter Treaty of Amsterdam]. Article 2 enables the Council to “take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.” *Id.* art. 2, sub. 7. Article 2 is the legal basis of the second-generation directives.

2. Charter of Fundamental Rights of the European Union, 2000 O.J. (C 364) 1, 13.

3. The Equal Pay Directive 75/117/EEC introduced the “‘principle of equal pay’ . . . for work to which equal value is attributed.” Council Directive 75/117, art. 1, 1975 O.J. (L 45) 19, 19–20 (EC). This principle is derived from article 2(1) of the International Labour Organisation (ILO), Equal Remuneration Convention, 1951, No. 100. Convention (No. 100) Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, 165 U.N.T.S. 303, ILO, 34th Sess. (June 29, 1951), [hereinafter Equal Remuneration Convention].

4. Council Directive 75/117, 1975 O.J. (L 45) 19 (EC) (citing Council Resolution of Jan. 21, 1974, 1974 O.J. (C 13) 1, 1–4 (EC)).

5. Council Directive 92/85, art. 1, 1992 O.J. (L 348) 1, 2 (EC).

6. Council Directive 79/7, art. 1, 1979 O.J. (L 6) 24, 24 (EC).

7. Council Directive 96/34, art. 1, 1996 O.J. (L 145) 4, 5 (EU).

8. Council Directive 97/81, art. 1, 1998 O.J. (L 14) 9, 10 (EU).

9. Council Directive 99/70, art. 1, 1999 O.J. (L 175) 43, 44 (EU).

To promote the free movement of European workers, the ECJ declared unequal treatment based on nationality in work, pay, and other conditions unlawful.<sup>10</sup> The framework of European law also includes article 6 of the Treaty Establishing the European Community (EC Treaty).<sup>11</sup> In accordance with article 6, the EU is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, which are principles that are common to all member states as they result from their common constitutional traditions.<sup>12</sup>

The ECJ has so far ruled on the issues of discrimination, burden of proof, and sanctions. In doing so, it has gotten closer to common law doctrines while at the same time elaborating on the rulings of the constitutional courts of the member states concerning the principle of equality stated by national constitutional law, even though its own position has occasionally diverged from the courts' view. Thus, the ECJ has played a semi-federal role, as several commentators have noted.<sup>13</sup>

Six milestones have been reached thus far. The first milestone is the concept of "indirect discrimination" in addition to "direct discrimination," both in regards to equal rights between men and women and also the free movement of workers.<sup>14</sup> This concept refers to unintentional discrimination based on the "disparate impact" of neutral requirements or conditions of employment that are detrimental to a considerably larger proportion of women than men.<sup>15</sup> This approach, influenced by U.S. law, allows the tribunal to use its general knowledge and to take account of social facts such as that more women than men are likely to be single parents and responsible for a child. Indirect discrimination is based on sex or gender

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10. Treaty Establishing the European Community, art. 39, Nov. 10, 1997, 1997 O.J. (C 340) 173, 193 [hereinafter EC Treaty].

11. *Id.* art. 6.

12. *Id.*

13. Giuseppe Federico Mancini, *Attivismo e autocontrollo nella giurisprudenza della Corte di giustizia*, 30 RIVISTA DI DIRITTO EUROPEO 229 (1990); MASSIMO ROCCELLA, *LA CORTE DI GIUSTIZIA E IL DIRITTO DEL LAVORO* (G. Giappichelli ed., 1997); see Marzia Barbera, *Not the Same? The Judicial Role in the New Community Anti-Discrimination Law Context*, 31 INDUS. L.J. 82, 82 (2002) (discussing the influence of ECJ case law on the proposed amendment to Council Directive 76/207/EEC).

14. The indirect discrimination was stated first by Council Directive 76/207/EEC, which prohibited the discrimination by reference in particular to marital or family status as regard to access to employment, vocational training, promotion, and working conditions. Council Directive 76/207, arts. 1–2, 1976 O.J. (L 39) 40, 40 (EC). The concept was enlarged by the ECJ jurisprudence.

15. Case C-167/97, *R. v. Sec'y of State for Employment*, 1999 E.C.R. I-623, I-681–82, 2 C.M.L.R. 273, 275 (1999). "[A] 'considerably smaller proportion of women than men' is able to satisfy the two-year [employment] requirement . . . ." Catherine Barnard & Bob Hepple, *Indirect Discrimination: Interpreting Seymour-Smith*, 58 CAMBRIDGE L.J. 399, 407 (1999) (quoting *Sec'y of State for Employment*, 1999 E.C.R. at I-683 ("[A] considerably smaller percentage of women than men")).

differences and has been dealt with many times, especially with respect to the legal status of part-time female workers<sup>16</sup> and groups protected by the principle of free circulation.

The second milestone is the need to share the burden of proof among the parties. If there is evidence of discrimination (even if only based on statistical proof), it is up to the employer to demonstrate that there was no discrimination.<sup>17</sup> According to this principle, Council Directive 97/80/EC reverses the burden of proof in sex discrimination cases, anticipating the most recent Council Directive 2002/73/EC.<sup>18</sup>

The third milestone is the need to ensure the existence of adequate sanctions.<sup>19</sup>

The fourth milestone is the need to consider maternity-rights violations as acts of direct discrimination. For example, mothers cannot be fired when there are no state laws that sanction such conduct.<sup>20</sup> According to this principle, Council Directive 92/85/EEC protects pregnant women and new mothers.<sup>21</sup>

The fifth milestone is the need to forbid discrimination of any kind, whether it is by employers, in collective contracts, or in private companies' regulations.<sup>22</sup>

The sixth milestone is the need to legitimize positive actions for promoting equal opportunities between men and women, even though it may be implemented through quotas.

It is worth remembering that all of these issues have been dealt with by the laws that have been passed through the so-called second-generation directives, which implemented article 13 of the Treaty of Amsterdam. These directives cover direct and indirect discrimination, the partial discharge of the burden of proof on a complainant alleging discrimination, the recognition of the legitimacy of affirmative action, the provision of

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16. See, e.g., Case C-281/97, *Krüger v. Ebersberg*, 1999 E.C.R. I-5127, I-5149–50 (holding that exclusion of part-time workers from collective bargaining agreements constitutes indirect discrimination).

17. Case 109/88, *Union of Commercial and Clerical Employees, Denmark v. Danish Employers' Ass'n ex rel. Danfoss*, 1989 E.C.R. 3199, 3204.

18. Council Directive 97/80, art. 4, 1998 O.J. (L 14) 6, 8 (EU).

19. See Case C-271/91, *M. H. Marshall v. Southampton and South West Hampshire Area Health Auth.*, 1993 E.C.R. I-4367, I-4368 (noting that the Sex Discrimination Act of 1975 does not allow for any sanctions except those expressly stated in the Act (citing Sex Discrimination Act, 1975, c. 65, § 62(1) (Eng.)).

20. See Case C-177/88, *Dekker v. VJV-Centrum*, 1990 E.C.R. I-3941, I-3941–42 (finding that an employer cannot decide not to hire a female just because she is pregnant if she is otherwise qualified for the position (citing Council Directive 76/207, arts. 2(1), 3(1), 1976 O.J. (L 39) 40, 40–41 (EC))).

21. Council Directive 92/85, art. 1, 1992 O.J. (L 348) 1, 2 (EC).

22. See, e.g., Case C-33/89, *Kowalska v. Hamburg*, 1990 E.C.R. I-2591, I-2605 (forbidding discrimination in a collective agreement).

adequate judicial remedies, and other administrative procedures. Despite this, it is important to analyze what the ECJ left out before assessing the pros and cons of the new antidiscrimination law.

*A. The “Basic Model” of Antidiscrimination on Grounds of Sex and Its Main Challenges: Measures to Counter Direct and Indirect Discrimination*

There are problems in the definition of indirect discrimination, especially the justifications for the ban. One of the problems concerns justifications based on business necessity. Debate on this issue has mainly focused on concepts of economic freedom and the need for employers to decide what qualifications are relevant for the tasks to be fulfilled. The ECJ has adopted a rigorous attitude and has stated that the expected qualifications must be essential and necessary, a concept that has been accepted both for male–female sex equality and the other recent directives mentioned above.<sup>23</sup> However, the limits that can be imposed upon an employer’s business freedom have not been fully resolved. It is not yet clear who has the right to decide on job requirements, and whether it is legitimate to oblige the employer to evaluate alternatives that have a less discriminatory impact.

As an example, the Italian Constitutional Court, ruling on height requirements that were considered discriminatory against women, stated that the requirement was directly linked to the job and was thus justified.<sup>24</sup> However, the court found that the requirement should reflect the physical differences between men and women and therefore imposed two different height measurements.<sup>25</sup>

A second problem concerns the contrasting relationship between the equality principle and the observance of safeguards that arose to protect women. The differences of the treatment concerning the ban on nighttime work for women in the industrial sector, which is one of the first historical achievements of labor law, is one of the most relevant examples. The ban involved both community law and international law because of article 3 of ILO 89/1948 convention and was later modified according to the ECJ principles.<sup>26</sup> The ECJ considered the ban incompatible with the equality

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23. See, e.g., Case 237/85, *Rummier v. Dato-Druck GmbH*, 1986 E.C.R. 2101, 2109 (stating that criterion based on muscular demand or effort can be justified as long as the totality of the circumstances demonstrates that it is structured to preclude discrimination based on sex).

24. Corte cost., sez. riun., 15 apr. 1993, n.163, *Giurisprudenza Costituzionale* 1993, 1189.

25. *Id.*

26. Night Work (Women) Convention (Revised), art. 3, 81 U.N.T.S. 147, ILO, 31st Sess. (July 9, 1948) [hereinafter ILO Convention No. 89].

principle and detrimental to female employment opportunities.<sup>27</sup>

The revocation of the ban, historically present in France and Italy, gave rise to a heated debate because of the ECJ's hyper-egalitarian views.<sup>28</sup> Nonetheless, the ECJ has recommended implementing equal opportunity policies that aim to solve women's work problems. Women, in fact, often take care of domestic tasks in addition to having a regular job outside the house, which gives rise to the difference in the social roles of women—the so-called gender difference.

In any event, the law—both international and national—was modified to state that there exists a right to nighttime work for women.<sup>29</sup> The ban remained in force no longer based on sex and was limited to pregnancy and for the first years of a child's life.<sup>30</sup> It was modified to include both parents who may alternatively take care of the child in the child's second and third year.<sup>31</sup>

*B. Equal Opportunity, Promotion, Affirmative Action, and "Quotas"*  
*Cases: The Amendments of Article 141(1) European Treaty and of Council Directive 76/207/EEC (by Council Directive 2002/73/EC)*

Affirmative action geared towards promoting equal opportunities, especially for women, began to develop in the European states in the 1980s under the European Council's influence.<sup>32</sup> But national law provisions were met with objections, especially when quotas were suggested. These were amply debated after the first ECJ ruling,<sup>33</sup> a leading case that influenced, to a certain extent, the ensuing trend.<sup>34</sup> The issues that have

27. Case C-345/89, *Criminal Proceedings Against Stoeckel*, 1991 E.C.R. I-4047, I-4067. The ruling was related to the penal sanction provided in case of violation of the ban according to the French law. *Id.* at I-4064–65.

28. Alain Supiot, *Principi di eguaglianza e limiti della razionalità giuridica*, 6 LAVORO E DIRITTO 211, 219 (1992).

29. See Council Directive 93/104, art. 8, 1993 O.J. (L 307) 18, 20–21 (EU) (stipulating certain standards employers must meet when employing any night worker with no specific mention of gender in the directive); Council Directive 2000/34, 2000 O.J. (L 195) 41 (EU) (making minor changes to the previous directive).

30. Night Work Convention, 1990, art. 7, ILO, 77th Sess. (June 26, 1990) [hereinafter ILO Convention No. 171]; Council Directive 92/85, art. 7, 1992 O.J. (L 348) 1, 3–4 (EC).

31. Council Directive 96/34, annex, cl. 2, 1996 O.J. (L 145) 4 (EU).

32. Council Recommendation 84/635, 1984 O.J. (L 331) 34, 34–35 (EC); see Marzia Barbera, *Eguaglianza di opportunità e azioni positive nel diritto comunitario e nelle legislazioni dei Paesi membri della Cee*, RIVISTA ITALIANA DI DIRITTO DEL LAVORO, 1986, vol. 5, pt. 1, at 857; Eliane Vogel-Polsky, *Les programmes d'action positive en faveur des femmes*, 124 REVUE INTERNATIONALE DU TRAVAIL 267 (1985).

33. See Case C-450/93 *Kalanke v. Bremen*, 1995 E.C.R. I-3051, I-3078 (holding that articles 2(1) and 2(4) preclude national rules that make sex the determinative factor in job placement).

34. See, e.g., Case C-476/99, *Lommers v. Minister van Landbouw, Natuurbeheer en Visserij*,

originated from it are similar to those facing the U.S. legal system.<sup>35</sup> These issues include: (1) the legitimacy of quotas as a derogation of the principle of formal equality and in favor of equality of treatment, something that would, in effect, create “reverse discrimination”; (2) the fairness of assuming the under-representation of the gender or the group to endorse the application of the quotas; (3) the difference between equating opportunities in the starting points and compelling equality of outcome, which would legitimate only the former; and (4) the importance of predefined percentages.

The ECJ jurisprudence has evolved over time. Its first ruling was related to the provision of the German legal system that gives women priority in jobs and promotions within the public sector if women are less than fifty percent of the employees and if both candidates—male and female—have the same qualifications.<sup>36</sup> The ECJ’s arguably unfavorable interpretation of the German system of equal opportunities on the formal equality principle resulted in a procedural interpretation and a declaration by the court that actions aimed at equal starting points are acceptable but not those designed to achieve equality of outcomes even for those of equal

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2002 E.C.R. I-2891, I-2928, I-2934, I-2938–39 (mentioning *Kalanke* when striking down an employer’s rule that only provided subsidized childcare to women); Case C-407/98, *Abrahamsson v. Fogelqvist*, 2000 E.C.R. I-5539, I-5571, I-5580–81, I-5583, available at <http://digbig.com/4rdck> (declaring that a rule that favors women who have sufficient qualifications over men for certain university positions is invalid in accordance with precedent); Case C-158/97, *Badeck*, 2000 E.C.R. I-1875, I-1930, available at <http://digbig.com/4rdcj> (allowing for a national rule that mentions that at least half of the members of certain administrative and supervisory bodies should be women); Case C-409/95, *Marschall v. Land Nordrhein Westfalen*, 1997 E.C.R. I-6363, I-6393 (finding that a national rule that gives preference to females for promotion purposes where there are fewer females than males in the relevant post is valid).

35. See *Johnson v. Transp. Agency, Santa Clara County, Cal.*, 480 U.S. 616, 635 (1987) (discussing the under-representation of women in the work force and the use of goals rather than quotas to correct this imbalance). See generally AFFIRMATIVE ACTION: SOCIAL JUSTICE OR REVERSE DISCRIMINATION?, (Francis J. Beckwith & Todd E. Jones eds., 1997) (distinguishing between the philosophy and public policy of affirmative action); ANTONIO D’ALOIA, EGUAGLIANZA SOSTANZIALE E DIRITTO DISEGUALE: CONTRIBUTO ALLO STUDIO DELLE AZIONI POSITIVE NELLA PROSPETTIVA COSTITUZIONALE (Università degli studi di Parma, Nuova Serie No. 33, 2002); GISELLA DE SIMONE, DAI PRINCIPI ALLE REGOLE (G. Giappichelli ed., 2001); DANIELA IZZI, EGUAGLIANZA E DIFFERENZE NEI RAPPORTI DI LAVORO: IL DIRITTO ANTIDISCRIMINATORIO TRA GENERE E FATTORI DI RISCHIO EMERGENTI (Università di Torino, Memorie del Dipartimento di scienze giuridiche, Series V, No. 25, 2005); Maria Vittoria Ballestrero, *Azioni positive e quote nel giudizio di due autorevoli Corti*, in LE PARI OPPORTUNITÀ NELLA RAPPRESENTANZA POLITICA E NELL’ACCESSO AL LAVORO 37 (Stefania Scarponi ed., 1997) [hereinafter LE PARI OPPORTUNITÀ]; Stefania Scarponi, *Pari opportunità e frauenquoten davanti alla Corte di giustizia*, 35 RIVISTA DI DIRITTO EUROPEO 717 (1995).

36. *Kalanke*, 1995 E.C.R. at I-3072–73 (citing Landesgleichstellungsgesetz [Bremen Law on Equal Treatment for Men and Women in the Public Service], Nov. 20, 1990, Gesetzblatt der Freien Hansestadt Bremen [Brem.GBl.] S.433, art. 1, § 2, para. 4); Miguel Rodríguez-Piñero, *Discriminación, igualdad de trato y acción positiva*, RELACIONES LABORALES, 1995 No. 2, at 81.

merit.<sup>37</sup> There has been a lot of criticism on this ruling not only concerning its interpretation of the equality principle but also about the role of the European Court and European states in social policies in general.<sup>38</sup>

Such statements are no longer found in the *Marschall* ruling. This ruling affirmed the principle of balance between formal and substantive equality and considered a legal system that is based on prioritizing access to the workplace and career progression for women. The ECJ's argument was founded, on the one hand, on equality of professional qualification and, on the other hand, a flexibility clause that allows male candidates to be assessed at the same time.<sup>39</sup> Special reasons, such as financial family commitments and long-term unemployment, may be valid grounds to disregard women's priority status.<sup>40</sup> So the objection against quotas founded on the merit argument was overruled.

An even more advanced ruling by the court in *Badeck* allowed the application of quotas such as a "minimum quota system" in favor of women.<sup>41</sup> According to the ECJ, European Community law does not preclude this type of quotas, based on special problems experienced by the group that is the beneficiary of the action, because "despite formal legal equality, 'in particular in employment, [women] do not have equal access to qualified . . . positions.'" <sup>42</sup> The positive action would result in an improved social position, and "[s]uch measures are therefore among the measures

37. *Kalanke*, 1995 E.C.R. at I-3077-78.

38. See Louis Charpentier, *La sentenza Kalanke ed il discorso dualista della parità* [*The Kalanke Case and the Dual Nature of Parity*], 69 *GIORNALE DI DIRITTO DEL LAVORO E DI RELAZIONI INDUSTRIALI* 155, 155 (1996) (criticizing the *Kalanke* case and comparing it to the rule of parity); Ninon Colneric, *Frauenquoten auf dem Prüfstand des EG-Rechts*, in *JURISTINNEN AN DEN HOCHSCHULEN: FRAUENRECHT IN LEHRE UND FORSCHUNG* 47, 47 (Ursula Rust ed., 1997); David A. Strauss, *The Illusory Distinction Between Equality of Opportunity and Equality of Result*, in *REDEFINING EQUALITY* 51, 55 (Neal Devins & Davison M. Douglas eds., 1998) (mentioning how government should do what it can to ameliorate barriers to certain groups of people).

39. *Marschall*, 1997 E.C.R. at I-6393.

40. See *id.* (stating that the laws have provisions that mention there may be reasons that tilt the balance in their favor).

41. Case C-158/97, *Badeck*, 2000 E.C.R. I-1875, I-1923-24. The court found that the national rule of the land of Hesse, Germany, prescribes "that the binding targets of the women's advancement plan for temporary posts in the academic service and for academic assistants must provide for a minimum percentage of women which is at least equal to the percentage of women among graduates, holders of higher degrees and students in each discipline." *Id.* at I-1923; Hessisches Gesetz über die Gleichberechtigung von Frauen und Männern und zum Abbau von Diskriminierungen von Frauen in der öffentlichen Verwaltung [HGIG] [Law of the Land of Hesse on Equal Rights for Women and Men and the Removal of Discrimination Against Women in the Public Administration], Dec. 21, 1993, GBVBI. I at 729, § 5. Other provisions of the same national law "allocates at least half the training places to women, unless despite appropriate measures for drawing the attention of women to the training places available there are not enough applications from women." *Badeck*, 2000 E.C.R. at I-1927-28; HGIG, § 7.

42. *Badeck*, 2000 E.C.R. at I-1926 (alterations in original).



authorised by Article 2(4) of the Directive, which are intended to improve the ability of women to compete on the labour market and to pursue a career on an equal footing with men.”<sup>43</sup> The legitimacy of positive actions, such as those voluntarily accepted by employers and unions in order to redress the under-represented sex, those that give priority to women for jobs and promotions, and those that set aside half of the available training placements, were affirmed.<sup>44</sup> The rulings stress that the purpose of quotas is to avoid the so-called glass ceiling, and confirm that the prerequisite of equality, or equivalence, in professional skills cannot be disregarded.<sup>45</sup> On the contrary, the ECJ has refused the legitimacy of a system of classification that gives importance to the peculiar women’s skills in family management. It is important to remember that preferential treatments are temporary measures, subject to the so-called sunset clauses, when the under-representation has been redressed, according to article 4 of the Convention on the Elimination of All Forms of Discrimination Against Women.<sup>46</sup>

Some issues, though, have not yet been addressed. For example, the levels of under-representation have yet to be agreed upon (whether it should be fixed at fifty percent, or even higher—as in Italy, where the law refers to two-thirds of the available positions in public administration, or in political candidatures). It is also necessary to understand whether under-representation may be a symptom of inequality due to stereotypes or discrimination in the past. Further, an interesting dilemma is whether the application of quotas is in contrast to the request to remove all forms of discrimination, or whether it is an effective tool to fight the social causes that created the under-representation problem in the first place.<sup>47</sup> The final objective, though, must be the promotion of gender equality in every field, as in the Northern European countries. Another issue is whether the application of quotas should be considered compulsory whenever the existence of past discrimination can be proven. Their use would be a form of legal redress, as in some national laws. These issues demonstrate that

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43. *Id.* at I-1927.

44. *Id.* at I-1928–30.

45. *Id.* at I-1924; Louis Charpentier, *The European Court of Justice and the Rhetoric of Affirmative Action*, 4 EUR. L.J. 167, 193 (1998); Dagmar Schiek, *A New Framework on Equal Treatment of Persons in EC Law?*, 8 EUR. L.J. 290, 298 (2002).

46. Convention on the Elimination of all Forms of Discrimination Against Women, art. 4, opened for signature Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981).

47. Bhikhu Parekh, *A Case for Positive Discrimination*, in DISCRIMINATION: THE LIMITS OF LAW 261, 269 (Bob Hepple & Erika M. Szyszczak eds., 1992) (“[U]nder certain circumstances positive discrimination may also involve preferential treatment and even the system of quotas in such areas as education, employment and political representation.”).

European law has not yet fully solved all the outstanding issues.

Nevertheless, an interesting development can be found in the new wording of article 141 of the Treaty. Under this article, member states can maintain or adopt preferential treatment to the under-represented sex with a view toward ensuring full equality in practice between men and women in working life.<sup>48</sup> Moreover, member states can also adopt preferential treatment in order to make it easier to pursue a vocational activity or to prevent or compensate for disadvantages in their professional careers.<sup>49</sup>

The provision considers preferential treatment legitimate, but adopts a gender-neutral stance rather than a *de facto* stance in favor of women.<sup>50</sup> This solution has been praised by many as the result of a well-balanced assessment of the equality problem. Others, on the other hand, have perceived it as a weakening of the effort to create female equality in the labor market. It is worth remembering that female employment is substantially lower than male employment all over Europe.<sup>51</sup>

In an attempt to make affirmative action more effective, the Council Directive 2002/73/EC (which modifies the previous Council Directive 76/207/EEC on sex equality) obliges member states to actively promote the goal of equality between the sexes.<sup>52</sup>

Articles 2 and 3(2) of the Treaty of Amsterdam list sex equality among the European Union's fundamental policies, and article 137 allows for community action in the field of equality between men and women with regard to labor market opportunities and treatment at work.<sup>53</sup> The provision stands for the development of European employment strategy with the aim fixed by the Lisbon Accord of 2000 to meet the rate of sixty percent of women in employment by 2010 and annual adoption of guidelines, which member states are asked to take into account in their national policies.<sup>54</sup> The employment guidelines are based on four pillars: employability; entrepreneurship; adaptability; and equal opportunities, according to the European model of promoting both flexibility and social security.

Moreover, the second-generation directives take affirmative action into consideration to confirm their legitimacy, although they do not make them compulsory. The Race Directive allows "adoption of measures intended to

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48. Treaty of Amsterdam, *supra* note 1, art. 141.

49. *Id.*

50. *Id.*

51. NICKY LE FEUVRE, WOMEN, WORK AND EMPLOYMENT IN EUROPE § 2.2.1, <http://digbig.com/4rfgc> (last visited Feb. 5, 2007).

52. Council Directive 2002/73, 2002 O.J. (L 269) 15, 17 (EU).

53. Treaty of Amsterdam, *supra* note 1, arts. 2, 3(2), 137.

54. European Council, Lisbon Accord § 30, Mar. 23–24, 2000, *available at* <http://digbig.com/4rfgr>.

prevent or compensate for disadvantages suffered by a group of persons of a particular racial or ethnic origin.”<sup>55</sup> The framework directive on employment has the same provision relating to groups or persons of a particular “religion or belief, disability, age or sexual orientation.”<sup>56</sup> Quotas are not specifically mentioned either, but the mentioned concept can be considered broad enough to include them.

The new law has made people wonder whether positive actions are to be considered compulsory in the constitutional system, which includes the substantive equality principle. For example, article 3 of the Italian Constitution requires the state to remove all obstacles that prevent citizens from full participation in the economic, social, and political life of the country.<sup>57</sup> The new article 51 of the constitution, as modified in 2001, requires the state to promote women’s equal opportunities, both in politics and in public administration.<sup>58</sup> These provisions cannot be described as mere derogations from the principle of equal treatment in the formal sense, and can be expected to promote substantive equality by the use of quotas. In Italian law, the provision related to recruitment and promotions in the public administration sector states that if women make up less than two-thirds of the civil servants employed in the post concerned, then they are entitled to be given priority.<sup>59</sup> The public administration has to give a justification if it selects a man and not a woman of the same qualification to fill the vacancy.<sup>60</sup>

By contrast, European and national policies have accepted the approach of gender mainstreaming. Influenced by the Fourth World Conference on Women in Beijing in 1995, gender mainstreaming attempts to combat gender poverty and promote gender equality.<sup>61</sup> The new approach involves gender equity within such relevant areas of public policy and places greater emphasis on the general relationship between gender and development. From this perspective it involves addressing the entire problem of gender inequality by looking at new roles of men and giving priority to positive discrimination measures, which represent a step forward.<sup>62</sup>

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55. Council Directive 2000/43, 2000 O.J. (L 180) 22, 23 (EU).

56. Council Directive 2000/78, 2000 O.J. (L 303) 16, 16 (EU).

57. COSTITUZIONE [COST.] [Constitution] art. 3 (Italy).

58. *Id.* art. 51.

59. Decreto Legislativo of 23 may 2000, art. 7(5), Racc. Uff. n.196.

60. *Id.*

61. *Communication from the Commission to the Council and the European Parliament*, at 7, COM (2001) 295 final (June 21, 2001).

62. *See id.* at 2 (discussing how gender mainstreaming involves the “integration of gender issues in policy and planning”). The Programme of Action was implemented over a five-year period (2001–2006) as part of the global political framework for this area adopted by the European Community on integrating gender issues in development cooperation. *Id.* at 3.

National legislation has encouraged affirmative action on a voluntary basis, offering financial incentives in order to promote access to labor markets for women and to help promote women within companies (according to European programs like EQUAL).<sup>63</sup> European and national legislation has also promoted family-friendly policies that go beyond those based on maternity- or parental-leave statutory systems, typical of the European model. By encouraging flexible working hours, part-time work, child care, and other efforts to reconcile family and working life, European legislatures are boosting employment among women and men who have left work.

Another significant method of promoting equal opportunities is to offer financial incentives to encourage women to be employers themselves. However, the 2004 European Commission reported on the progress made in mainstreaming gender issues in various strategic areas and stressed that lack of speed threatens to jeopardize the achievement of the Lisbon objectives.<sup>64</sup> The Commission has called on the member states to redouble their efforts to promote equality between men and women by reducing inequalities in the labor market (employment and pay), stressing a balance between work and home life, and promoting balanced participation of men and women in decision making.<sup>65</sup> Last but not least, there have been increased efforts to combat both violence against women and human trafficking of women.<sup>66</sup>

A further way to pursue equal opportunity and antidiscrimination is through the strategy of Corporate Social Responsibility (CSR). Recently, some European companies have adopted the strategy of CSR, according to the Green Book of the European Commission of 2001 and the following communication of 2002.<sup>67</sup> One of the most important objectives of the CSR is the achievement of equal opportunities. Some of these have to do with women and others with disabled people. Often these objectives involve specific requirements that have to be met by companies.

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63. EQUAL, How Does EQUAL work?, <http://digbig.com/4rfgx> (last visited Feb. 5, 2007).

64. *Report from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions Report on Equality Between Women and Men*, at 3, 7, COM (2004) 115 final (Feb. 19, 2004).

65. *Id.* at 7–10.

66. *Id.* at 11–12.

67. CORPORATE SOCIAL RESPONSIBILITY: A BUSINESS CONTRIBUTION TO SUSTAINABLE DEVELOPMENT 6 (2002), available at <http://digbig.com/4rfhf>; EUROPEAN COMM'N, DIRECTORATE-GENERAL FOR EMPLOYMENT AND SOCIAL AFFAIRS, PROMOTING A EUROPEAN FRAMEWORK FOR CORPORATE SOCIAL RESPONSIBILITY 4-5 (2001), available at <http://digbig.com/4rfhh>.

## II. THE NEW ANTIDISCRIMINATION LAW PROVIDED FOR BY THE RACE DIRECTIVE AND THE EMPLOYMENT FRAMEWORK DIRECTIVE

Article 13 of the Treaty of Amsterdam authorizes the EU to take steps to combat discrimination based on sex, race or ethnic origin, religious or personal beliefs, disability, age, or sexual orientation.<sup>68</sup> A separate source of antidiscrimination law has thus been created, although broadly connected to the evolution of the EU's social policy. The EC Treaty includes, among its objectives, the harmonization of member states' employment policies.<sup>69</sup> A new employment chapter was incorporated in the EC Treaty as a means of developing a coordinated European strategy for employment to create a skilled, trained, and flexible workforce.<sup>70</sup>

Employment guidelines stress the need to foster a labor market that facilitates social integration through a coherent set of policies as a key element in guaranteeing equal opportunities for all. The guidelines also foster full participation of citizens in their economic, cultural, and social lives, and facilitates the realization of each citizen's potential. Discrimination based on religion or personal beliefs, disability, age, or sexual orientation undermines the objectives of the EU Treaty.

The increased number of immigrants has recently prompted the need to combat illegal entries, which could generate racist reactions, and has been the basis for the Race Directive. The 2000 antidiscrimination rules contained in Council Directives 2000/43/EC and 2000/78/EC, are considered some of the most significant in European-social-policy evolution.<sup>71</sup> They are inspired also by the European Convention of Human Rights (ECHR), which states in Article 14: "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."<sup>72</sup>

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68. Treaty of Amsterdam, *supra* note 1, art. 13(1); Catherine Barnard, *Article 13: Through the Looking Glass of Union Citizenship*, in LEGAL ISSUES OF THE AMSTERDAM TREATY 375, 393 n.114 (David O'Keeffe & Patrick Twomey eds., 1999).

69. EC Treaty, *supra* note 10, art. 136.

70. *Id.* tit. XI, ch. 1.

71. Council Directive 2000/78, 2000 O.J. (L 303) 16, 18–22 (EU); Council Directive 2000/43, 2000 O.J. (L 180) 22, 24–26 (EU); MASSIMO ROCCELLA & TIZIANO TREU, DIRITTO DEL LAVORO DELLA COMUNITÀ EUROPEA 239–240 (3d ed. 2002); Gregor Thüsing, *Following the U.S. Example: European Employment Discrimination Law and the Impact of Council Directives 2000/43/EC and 2000/78/EC*, 19 INT'L J. COMP. LAB. L. & INDUS. REL. 187, 188–89 (2003); Lisa Waddington & Mark Bell, *More Equal Than Others: Distinguishing European Union Equality Directives*, 38 COMMON MKT. L. REV. 587, 588 (2001). See generally IZZI, *supra* note 35.

72. Convention for the Protection of Human Rights and Fundamental Freedoms art. 14, *opened*

To ensure the effectiveness of the antidiscrimination law, both directives have rules regarding positive actions. In the Race Directive, the need for specific action to ensure the development of democratic and tolerant societies is stressed.<sup>73</sup> This is true not only in the fields of employment and self-employment, but also in the areas of education, social protection (including social security and health care), social advantages, and access to goods and services.<sup>74</sup>

Moreover, member states are obliged to designate a body or bodies to promote equal treatment irrespective of racial or ethnic origins; the bodies are a part of national agencies and are charged with defending human rights and safeguarding individual rights.<sup>75</sup>

According to paragraph 20 of the preamble to Council Directive 2000/78/EC, “[a]ppropriate measures should be provided, i.e. effective and practical measures to adapt the workplace to the disability, for example adapting premises and equipment, patterns of working time, the distribution of tasks or the provision of training or integration resources.”<sup>76</sup> Some provisions in the matter of remedies and enforcement offer legal instruments safeguarding the effectiveness of the prohibitions.<sup>77</sup> These include the obligation for the partial reversal of the burden of proof and the legitimization of any judicial or administrative procedure that is awarded not only to individuals but also to private associations.<sup>78</sup> These associations

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for signature Nov. 4, 1950, Europ. T.S. No. 5, at 10.

73. Council Directive 2000/43, 2000 O.J. (L 180) at 22.

74. *Id.*

75. *Id.* art. 13, para. 1, at 25.

Member States shall ensure that the competences of these bodies include: without prejudice to the right of victims and of associations, organisations or other legal entities referred to in Article 7(2), providing independent assistance to victims of discrimination in pursuing their complaints about discrimination, conducting independent surveys concerning discrimination, publishing independent reports and making recommendations on any issue relating to such discrimination.

*Id.* art. 13, para. 2. In Italy the body is called Ufficio Nazionale Antidiscriminazioni Razziali (UNAR), the Italian Office Against Racial Discrimination. UNAR, <http://digbig.com/4rfhn> (last visited Feb. 5, 2007).

76. Council Directive, 2000/78, pmbl., para. 20, 2000 O.J. (L 303) at 17.

77. *Id.* arts. 9–11, 2000 O.J. (L 303) at 20.

78. *Id.* arts. 9–10, 2000 O.J. (L 303) at 20.

Member States shall take such measure as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.

*Id.* art. 10, 2000 O.J. (L 303) at 20. In criminal procedures and in procedures in which it is for the court or competent body to investigate the facts of the case, these concepts do not apply. *Id.*

include unions and specific public agencies whenever there is a case of collective discrimination where there is no identification of the individual victims or when the complainant is in need of support.<sup>79</sup>

However, Council Directive 2000/78/EC does not include particular instruments of coercion (such as injunctions) to ensure that real protection will be guaranteed. Instead, this directive allows for fines to compensate for the prejudice to one's rights, as is currently the case with respect to race and sex discrimination under some national laws.<sup>80</sup> It is hoped that by stating that "[p]ersons who have been subject to discrimination based on religion or belief, disability, age or sexual orientation should have adequate means of legal protection. . . . Member States should provide for effective, proportionate and dissuasive sanctions in case of breaches of the obligations under this Directive."<sup>81</sup>

The fields covered by the prohibition of discrimination include many terms and conditions of employment.<sup>82</sup> The directives also state that an instruction to discriminate shall be deemed to be discrimination under article 2, paragraph 1.<sup>83</sup> The directives further provide that member states shall introduce into their national systems such measures as are necessary to protect individuals from any consequences as a reaction to a complaint or to proceedings aimed at enforcing compliance with the principle of equal

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79. *See id.* art. 9, para. 2, 2000 O.J. (L 303) at 20 (stating that unions and associations may represent complainants).

80. *Id.* pmbl., para. 35, art. 17, 2000 O.J. (L 303) at 18, 21.

81. *Id.* pmbl., paras. 29, 35, art. 17, 2000 O.J. (L 303) at 18, 21; Council Directive 2000/43, pmbl., paras. 19, 26, art. 15, 2000 O.J. (L 180) 22, 23 (EU) ("Persons who have been subject to discrimination based on racial and ethnic origin should have adequate means of legal protection. . . . Member States should provide for effective, proportionate and dissuasive sanctions in case of breaches of the obligations under this Directive.").

82. According to both directives 2000/78 and 2000/43, the ban shall apply, in the public or private sector, in relation to:

- (a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;
- (b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;
- (c) employment and working conditions, including dismissals and pay;
- (d) membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations.

Council Directive 2000/78, art. 3, para. 1, 2000 O.J. (L 303) at 19; *see* Council Directive 2000/43, art. 3, para. 1, 2000 O.J. (L 180) at 24 (detailing an almost identical provision). Council Directive 2000/43/EC further provides: "(e) social protection, including social security and healthcare; (f) social advantages; (g) education; (h) access to and supply of goods and services which are available to the public, including housing." *Id.*

83. Council Directive 2000/78, art. 2, para. 4, 2000 O.J. (L 303) at 19; Council Directive 2000/43, art. 2, para. 4, 2000 O.J. (L 180) at 24.

treatment.<sup>84</sup>

*A. The Extension of the Antidiscrimination Law to Cover Race, Religion, Age, Sexual Orientation, Disability, Opinions, and Harassment: Definitions and Values of the Judicial System*

Both Council Directives 2000/78/EC and 2000/43/EC extend the antidiscrimination laws to new areas. Some of these areas had already been included in national constitutional and labor laws, while others were new—such as age, sexual orientation (excluding, for the latter, the ECJ orientation expressed in the rulings *P v. S* 1996),<sup>85</sup> harassment, and sexual harassment (considered only by Council Directive 2003/72/EC in the matter of equality between women and men) and in some legal systems (as in the United Kingdom) the ground of religion as well.<sup>86</sup>

The new European directives adopt the same notion of unlawful discrimination. The common law influence is clear in both Council Directives 2000/78/EC and 2000/43/EC with regard to three concepts.

First, direct discrimination means that a person has been treated less favorably than another has been or would have been treated because of a discriminatory element.<sup>87</sup>

Second, indirect discrimination is a specific disadvantage that apparently neutral rules, criteria, or customs may give to some people in respect of race, ethnic origin, ideology, religion, handicap, age, and sexual orientation unless such rules, criteria, or customs are justifiable by a legitimate reason, and the employed means are appropriate and necessary (excluding further exceptions for specific factors such as age and disability).<sup>88</sup>

Third, harassment means being subjected to undesirable actions that have been undertaken for one of the forbidden reasons and with the purpose or effect of “violating the dignity of a person” or with the intention or effect to create a climate of intimidation, hostility, or humiliation.<sup>89</sup> This

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84. Council Directive 2000/78, art. 11, 2000 O.J. (L 303) at 20; Council Directive 2000/43, art. 9, 2000 O.J. (L 180) at 25.

85. *P. v. S.*, 1996 E.C.R. I-2143, I-2165–66; Angus Campbell & Heather Lardy, *Discrimination against Transsexuals in Employment*, 21 EUR. L. REV. 412, 412–13 (1996) (citing *P. v. S.*, 1996 E.C.R. at I-2152–58).

86. Council Directive 2000/78, arts. 1–2, 2000 O.J. (L 303) at 18; Council Directive 2000/43, art. 2, 2000 O.J. (L 180) at 24.

87. Council Directive 2000/78, art. 2, para. 2, 2000 O.J. (L 303) at 18; Council Directive 2000/43, art. 2, para. 2, 2000 O.J. (L 180) at 24.

88. Council Directive 2000/78, art. 2, para. 2, 2000 O.J. (L 303) at 18; Council Directive 2000/43, art. 2, para. 2, 2000 O.J. (L 180) at 24.

89. Council Directive 2000/78, art. 2, para. 3, 2000 O.J. (L 303) at 19; Council Directive



definition must, however, be integrated with what is already provided for by state law.<sup>90</sup>

Opinions differ as to whether direct discrimination is still based on the comparison of the disparate treatment given to two separate people. Introducing hypothetical comparisons between actions taken and actions not taken has, according to some, modified the structure of the discriminatory issue.<sup>91</sup> The protected value of this provision is the dignity of the individual. According to the EU Charter of Fundamental Rights, now in the European Constitutional Treaty article 1, human dignity is inviolable.<sup>92</sup> It must be respected and protected.<sup>93</sup> The example of harassment supports this interpretation. Most interpretations suggest that it is enough for the victim to prove the prejudicial action without the need to carry out any comparisons. However, this issue is still being debated. There is no doubt that current interpretations greatly help judicial action against discrimination.

The solution could be found in the burden-of-proof standard more than in the structural redefinition of the matter. The new definition of harassment may not be a form of discrimination but rather a separate unlawful act. In other words, whenever a protected subject challenges a discriminating act, the burden then rests on the employer to justify the unfavorable treatment. However, this requires a closer examination of the legal system that governs such situations. An important example can be found in U.K. law. The legal provisions regarding sex discrimination cases in the Sex Discrimination Act, which were added through amendment in 2001, state that:

Where, on the hearing of the complaint, the complainant proves facts from which the tribunal could . . . conclude in the absence of an adequate explanation that the respondent

(a) has committed an act of discrimination against the complainant which is unlawful under Part 2 [the employment field], or

(b) is by virtue of section 41 or section 42 . . . to be treated as having committed such an act of discrimination against the

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2000/43, art. 2, para. 3, 2000 O.J. (L 180) at 24.

90. Council Directive 2000/78, art. 2, para. 3, 2000 O.J. (L 303) at 19; Council Directive 2000/43, art. 2, para. 3, 2000 O.J. (L 180) at 24.

91. Marzia Barbera, *Eguaglianza e differenza nella nuova stagione del diritto antidiscriminatorio comunitario* [Equality and difference in the new season of EU antidiscrimination law], 25 *GIORNALE DI DIRITTO DEL LAVORO E DI RELAZIONI INDUSTRIALI* 399 (2003).

92. Treaty Establishing a Constitution for Europe, art. I-2, 2004 O.J. (C 310) 1, 11 (EU).

93. *Id.*

complainant, the tribunal shall uphold the complaint unless the respondent proves that he did not commit, or, as the case may be, is not to be treated as having committed that act.<sup>94</sup>

The U.K. tribunals have stated that it is necessary for the respondent to show that the treatment was in no way based upon sex. This requires a tribunal to assess not merely whether the respondent has offered an explanation for the facts from which such inference can be drawn, but further that it is adequate to discharge their burden of proof—on the balance of the probabilities—that sex played no part of the reason for the treatment in question.<sup>95</sup> The tribunals have acted in a similar way on the matter of discrimination on the ground of race according to the U.K. Race Relations Act (Amendment 2000)<sup>96</sup> and also in both the areas of sexual orientation and religion.

*B. The Definition of Direct and Indirect Discrimination and the Criteria for Justification: Open Issues*

There has been much debate on the subject of defending discrimination claims lodged by persons in protected groups. There are several provisions about justifications and exceptions in both the Race Directive and the Employment Framework Directive.

The concept of indirect discrimination is dealt with in article 2 of both directives.<sup>97</sup> It is further specified in subparagraph 2(b)(i) of the Employment Framework Directive that provisions, criteria, or accepted practices that are objectively justified toward the achievement of legitimate results and the appropriate means to reach them do not constitute discrimination.<sup>98</sup> This standard is consistent with the requirement that plaintiffs who feel they have been discriminated against have the burden of proving the damages they have suffered while the defendants have the burden of supplying justifications for their conduct. Moreover, there are specific exceptions to the prohibitions against discrimination in addition to the general justification already mentioned.

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94. Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations, 2001, S.I. 2001/2660, § 5 (U.K.) (second alteration in original).

95. *Barton v. Investec Henderson Crosthwaite Sec. Ltd.*, [2003] UKEAT 18\_03\_0304, 2003 I.C.R. 1205, para. 25, 2003 I.R.L.R. 332 (Employment Appeal Trib.) (Eng.).

96. Race Relations Act, 1976, c. 74 (Eng.); Race Relations Act 1976 (Amendment) Regulations, 2003, S.I. 2003/1626.

97. Council Directive 2000/78, art. 2, para. 2, 2000 O.J. (L 303) 16, 18 (EU); Council Directive 2000/43, art. 2, para. 2, 2000 O.J. (L 180) 22, 24 (EU).

98. Council Directive 2000/78, art. 2, para. 2(b)(i), 2000 O.J. (L 303) at 18.

In the case of people with disabilities, the employer is not guilty of indirect discrimination if national law obligates it to adopt reasonable accommodations for disabled persons to ensure access to employment, training, and career progression.<sup>99</sup>

This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned.<sup>100</sup>

Another example would be national rules that place age-based limits on employment. They are objectively and reasonably justified by a legitimate aim, including the promotion of access to the labor market and vocational training objectives, as long as the means of achieving them are appropriate and necessary.<sup>101</sup> Insofar as the general legal standard is concerned, its scope has been criticized because it leaves significant discretion to lawmakers and judges. This approach is similar to the scrutiny that is typical of U.S. jurisprudence. However, concerns regarding legitimate finality, together with social necessity, should inspire the adoption of rigorous criteria of evaluation such as those of the ECJ. The ECJ's evaluation has always been restrictive in the sex discrimination examples, where the finalities of social policies have never been justified if they were in conflict with the ban on discrimination.

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99. *Id.* art. 2, para. 2(b)(ii), 2000 O.J. (L 303) at 19.

100. *Id.* art. 5, 2000 O.J. (L 303) at 19.

101. *Id.* art. 6, para. 1, 2000 O.J. (L 303) at 19–20.

Such differences of treatment may include, among others:

- (a) the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection;
- (b) the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;
- (c) the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.

*Id.* art. 6, 2000 O.J. (L 303) at 20. The accommodation in the retirement or disability scheme is peculiar in that it allows different criteria based on actuarial calculations but prohibits them if it results in discrimination on the ground of sex. *Id.*

A second provision for accepted justifications pertains to the prerequisites for employment, such as Genuine Occupational Qualifications and Genuine Occupational Requirements in U.S. and U.K. laws.<sup>102</sup> It is accepted that differences in treatment based on personal characteristics, which are the object of the antidiscrimination guarantees, may be established, provided that they appear essential and instrumental for the nature of the activity or the context in which it is carried out. Moreover, the end must be legitimate and the requirement proportionate.<sup>103</sup>

The legal standard looks very strict. However, Council Directive 2000/78/EC makes clear its limitations. It states that “[t]his Directive does not require the recruitment . . . of an individual who is not competent, capable and available to perform the essential functions of the post concerned.”<sup>104</sup>

This approach is important because some considerations are made from the point of view of the negative impact on antidiscrimination laws in European legal systems. On the one hand, it has weakened the ban on direct discrimination, which in many national legal systems only allowed strict and limited justifying reasons stated by the law.<sup>105</sup> On the other hand, it is not completely clear whether it is also applicable to the ban on indirect discrimination when compared to the genuine and essential qualification for employment. In short, the adopted standard has blurred the boundaries between what constitutes discrimination and what does not.

It is unclear whether the principles that have been formulated regarding gender discrimination can be extended to other areas such as the necessary correlation between prerequisites and tasks to be executed, the possibility to utilize prerequisites of less discriminatory impact, and the revision of the prerequisites so that they reflect particular differences. The exception in antidiscrimination law pertaining to churches and other faith-based

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102. *E.g.*, Sex Discrimination Act, 1975, c. 65, § 7 (U.K.).

103. *Id.* art. 4, para. 1, 2000 O.J. (L 303) at 19; *see also* Council Directive 2000/43, art. 4, 2000 O.J. (L 180) 22, 24 (EU) (detailing a similar provision).

104. Council Directive 2000/78, *pmb.*, para. 17, 2000 O.J. (L 303) at 17.

105. *See, e.g.*, Law of Dec. 9, 1977, No. 903, art. 1, *Gazz. Uff. n.* 343 (1977) (discussing where in matters concerning the equality between men and women, this law provides exceptions for direct discrimination against models, artists, and actors, but only if sex is a genuine and essential requirement). This provision remains in force, but there are no corresponding exceptions in other fields of antidiscrimination law. In the United Kingdom, the Race Relations Act (RRA) contained a narrow list of genuine occupational exceptions that included actors, models, personal-welfare counselors, and work in a place where food and drink is provided for which persons of a particular racial group are “required for reasons of authenticity.” Race Relations Act 1976, c. 74, § 5. The references to particular jobs have been abolished by The RRA Amendment with respect to race and ethnic origin (but not color or nationality), and now any job may be restricted to a racial group based on the relevant grounds—but only if there is a genuine occupational requirement and that requirement is applied appropriately. Race Relations Act 1976 (Amendment) Regulations, 2003, S.I. 2003/1626, reg. 7.

organizations, which carry out professional activities, is created by Council Directive 2000/78/EC.<sup>106</sup> The Directive allows exceptions to the ban if religious or personal beliefs are essential prerequisites, which are legitimate and justified by the nature of the activities that are carried out or the context within which they are carried out.<sup>107</sup> Here, the respect of constitutional principles and European Community law are imposed,<sup>108</sup> but if the latter provides for it, the recognized organizations are entitled to expect good faith and loyalty towards the ethics of the organization from their employees. This too has raised doubts, as it could reopen discussions on the scope of the application of the discrimination ban, supporting less restrictive interpretations than those that state—in the matter of fair dismissal or access to the employment—that such exception is valid only for those jobs strictly related to religion or belief. An example from the Italian legal system shows that, in a religious school, an employee's personal choice of a nonreligious marriage could have an impact on philosophy teachings, but not, say, physical education teaching. Thus, only the first case may fall within the exception of the discrimination ban. The Directive's reference to the organization context, instead of focusing on the activity carried out therein,<sup>109</sup> could be construed as a tool for the enlargement of the exceptions that allow discrimination in specific instances.

*C. Limits to the Application: Fields of Law and the Risk of Weakening the Safeguards in the Transposition by Internal Regulations*

We should also take into consideration the exceptions to the prohibitions of Council Directive 2000/78/EC pertaining to safety and social protection, public safety, crime prevention, safeguarding of public order, health protection, the state and the services that the state offers,<sup>110</sup> and the armed services with regard to the issues of age or handicap, if provided for by the European member states.<sup>111</sup>

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106. Council Directive 2000/78, art. 4, para. 2, 2000 O.J. (L 303) at 19.

107. *Id.*

108. *See, e.g.*, Council Directive 2000/78, pmb., para. 11, 2000 O.J. (L 303) at 17 (stating that discrimination based on religion or belief, disability, age, or sexual orientation may undermine the objectives of the EC Treaty). EU Declaration No. 11 on the status of churches and nonconfessional organizations, annexed to the Final Act of the Amsterdam Treaty, has explicitly recognized that it respects and does not prejudice the status under national law of churches and religious associations or communities in the member states and that it equally respects the status of philosophical and nonconfessional organization. Treaty of Amsterdam, *supra* note 1, annex, decl. 11.

109. Council Directive 2000/78, art. 4, para. 2, 2000 O.J. (L 303) at 19.

110. *Id.* art. 2, para. 5, 2000 O.J. (L 303) at 19.

111. *Id.* art. 3, para. 4, 2000 O.J. (L 303) at 19.

The prohibition against discrimination does not apply to salary differences based on nationality, nor is this prejudicial to third country citizens and stateless persons, nor to whatever treatment that derives from the legal status of third country citizens or stateless persons.<sup>112</sup> This has attracted criticism because of its broad scope and its exclusion of nationality among the discriminating factors. Additionally, the Council Directive runs counter to many important ECJ rulings on workers' free circulation and the protection of migrant workers.<sup>113</sup> In this respect, international law appears to be more progressive, following the International Convention on the Elimination of All Forms of Racial Discrimination.<sup>114</sup>

#### CONCLUSION

The implementation of the Council Directives reveals a tendency towards the revision of internal laws, even if there exists a safeguarding clause in the Directives that state that the implementation should not serve to justify any regression in relation to the situation that already prevails in each member state.<sup>115</sup> This occurred in Italy through legislative decrees number 215 (Race Directive) and number 216 (General Law on Employment) in 2003.<sup>116</sup> The regulations utilized an extensive interpretation of the EU Directives' contents, both for the exceptions to the fields of application and also the justifications. Insofar as the burden of proof is concerned, a solution has been adopted that does not improve what was already included in the civil code regarding legal presumptions. Finally, it should be mentioned that lately, in an attempt to increase job opportunities, employment policies have been revised in less favorable terms than those provided for by the law. This has brought into play the application of the discrimination ban in favor of some categories of people because of age, gender, or handicap. Thus, affirmative action appears to be the most convincing means of accommodating differences.

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112. See *id.* art. 3, para. 2 (mentioning that this Directive "does not cover differences of treatment based on nationality"); see also Council Directive 2000/43, art. 3, para. 2, 2000 O.J. (L 180) 22, 24 (EU) (containing a similar provision).

113. Donata Gottardi, *Dalle discriminazioni di genere alle discriminazioni doppie o sovrapposte: le transizioni*, 25 *GIORNALE DI DIRITTO DEL LAVORO E DI RELAZIONI INDUSTRIALI* 447, 453 (2003).

114. International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Dec. 21, 1965, 660 U.N.T.S. 195.

115. Council Directive 2000/78, art. 8, para. 2, 2000 O.J. (L 303) at 20; Council Directive 2000/43, art. 6, para. 2, 2000 O.J. (L 180) at 24.

116. Decreto Legislativo of 9 July 2003, Racc. Uff. n.216; Decreto Legislativo of 9 July 2003, Racc. Uff. n.215.

The function of affirmative action has always been considered in the double sense of removing obstacles to the full equality of citizens and deliberately redressing discrimination issues, even though it may be impossible to trace an actual discriminatory deed. If affirmative action is applied with all this in mind, it will be found to be a powerful means to speed up the social process towards equality and the respect of differences. The debate on affirmative action does not preclude the utilization of quota systems. These may be the result of voluntarily undertaken commitments, or, in some cases, may be imposed by the law or achieved through collective agreements. The most practical solution may be the provision of priority rights, helped by flexibility clauses. The future will show how effective such measures have been, and if they can be maintained in the light of the new problems currently facing employment in Europe. These new problems threaten to jeopardize the actual application of discrimination prohibitions, even though their utility in the implementation of the European accords is undeniable.