

A Constitution for Antidiscrimination: Exploring the Vanguard Moment of Community Law

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Abstract: *It is a commonplace that ‘non-discrimination’ is a fundamental principle of Community Law. If the principle is taken to express a broader commitment to equality, however, there appears to be something quite unusual about it. When compared with the standards set by modern constitutional law, the commitment to equality is, at least with respect to Member State action, less extensive; in the context of indirect gender discrimination, however, the principle acquires remarkable scope. Although this ‘vanguard moment’ of Community Law is tacitly acknowledged in the practice of the ECJ, it is, at the same time, subdued; the resources of the principle might be tapped, however, by moving toward a constitution for antidiscrimination. The article explores both the philosophical presuppositions and the institutional context of what could become a constitutionalisation of antidiscrimination at the level of Community Law.*

I On Generality

There is something disturbing about the belief that, at least in the format of a non-discrimination principle, equality is a general principle of Community Law.¹ It is the elusiveness of the supposed generality that gives the subject matter a slightly paradoxical ring. On the one hand, there can be no doubt that strong principles of non-discrimination are binding on the Community and the Member States within the scope of the application of the Treaty; on the other, doubts remain about how far the commitment to non-discrimination extends. Whereas it is clear that Community law protects against discrimination on the ground of nationality (Articles 6 [now 12], 48 [now 39], 52 [now 43], 59–60 [now 49–50]), sex (Articles 118, 119 [now 137, 141]) and in other instances which are specified by the Treaty,² it remains to be seen whether—outside of the realm of the Community law proper, such as the Community’s own

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¹ See, for instance, P. Craig & G. de Búrca, *EC Law. Text, Cases, and Materials* (2d. ed. Oxford UP 1998), at 364, 368.

² One may think of the non-discrimination between producers and consumers in the field of agriculture (Art. 40(3) [now 34(2)]) and the prohibition to impose taxes that discriminate between domestic products and products imported from other Member States (Art. 95 [now 90]).

employment law³—Community law will also protect against discrimination on any other ground, even if only in the form of a deferential rational basis test.⁴

The practice of the Court, to be sure, has given rise to high hopes, what with dicta to the effect that, for example, the principle of equal pay is an embodiment of ‘the general principle of non-discrimination [. . .] in specific form.’⁵ These high hopes were subsequently dissipated in the *Grant* case, in which the Court explicitly refused to extend the protection against discrimination on the ground of sex, narrowly understood, to unequal treatment on the ground of sexual orientation.⁶ According to Barnard, the Court’s practice thus far amounts to restricting the application of the general principle of non-discrimination to Community acts proper by not making it enforceable, in its general form, against acts of Member States and private parties in Courts.⁷ This may not be the final word. In the eyes of at least some observers, ‘it seems increasingly as though a wider principle of equality and non-discrimination is being recognised as part of the general principles of Community law’.⁸

Doubts as to the generality of the equality principle vis-à-vis Member States’ acts have not only not been resolved but, indeed, have been aggravated by the Amsterdam Treaty. The list of prohibited grounds has been extended by the insertion of Article 6a (now 13), which confers the power on the Council—acting unanimously on a proposal from the Commission and after consulting the European Parliament—to take ‘appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, age or sexual orientation.’ Even though the sweep of this expanded list of prohibited grounds might suggest that the grounds mentioned are examples of a

³ See, for example, Case 75, 117/82, *Razzouk and Beydoun v. Commission* [1984] ECR 1509, paras.16–17.

⁴ For reconstructions of this type of review, see Michelman, ‘Politics and Values or What’s Really Wrong with Rationality Review,’ (1979) 13 *Creighton Law Review* 487–511; Bennett, ‘“Mere” Rationality in Constitutional Law: Judicial Review and Democratic Theory,’ (1979) 67 *California Law Review* 1049–1103; Sunstein, ‘Naked Preferences and the Constitution,’ (1984) 84 *Columbia Law Review* 1689–1732; for a pointed critique, see R. Nagel, ‘Legislative Purpose, Rationality, and equal protection,’ (1972) 82 *Yale Law Journal*, 123–154.

⁵ See Case C-132/92 *Roberts v. Birds Eye Walls* [1993] ECR I-5579. In *P v. S* the Court declared that Directive 76/207 on the equal treatment of men and women in employment was an expression of the principle of equality in a special field and that this principle is to be counted among the fundamental principles of Community Law. See Case C 13/94, *P v. S and Cornwall County Council* [1996] ECR I-2143. On other occasions, the Court has stated that equal treatment of men and women is a fundamental principle of Community law. See Case C-149/77, *Defrenne v. Sabena (III)* [1978] ECR 1356.

⁶ See Case C-249/96, *Grant v. South-West Trains Ltd* para. 43–47. It should be noted that in *P v. S*, *loc cit* n 5, para. 21, the Court was at pains to underscore that the adverse treatment of an employee who has had her sex changed was tantamount to discrimination on the ground of sex and did, therefore, fall comfortably within the ambit of Article 119 (now 141). Clearly, there is a sound reason for this position, as explained by the Court in *Grant*, for, otherwise, the respect for fundamental rights could have the effect of (or may become the pretence for) expanding Treaty provisions beyond the scope of the Community’s jurisdiction. After all, the Court’s reluctance to review measures taken by Member States on broader equal protection grounds does not preclude such review at Member State level. I cannot explore the question here of whether the stance adopted by the Court might not perhaps conflict with the type of review established by Case C-260/89, *Elliniki Radiophonia Tileorassi AE v. Dimotiki Etairia Pliroforissis and Sotirios Kouvelas* [1991] ECR I-2925.

⁷ See Barnard, ‘The Principle of Equality in the Community Context: *P. Grant, Kalanke and Marschall: Four Uneasy Bedfellows?*,’ (1998) 57 *Cambridge Law Journal*, 352–373 at 354–355, 372.

⁸ P. Craig & G. de Búrca, *op cit* n 1, 366. Note also recent legislative advances in this areas, e.g., Directive 91/81/EC on Part-Time Work, with regard to the framework agreement on part-time work concluded by UNICE, CEEP and the ETUC (OJ L14/9, clause 4).

broader and general non-discrimination principle, nothing in this provision can be read as indicating a direct or horizontal effect or as amounting to a change in the basic conception. Thus far, the Community's approach to equal protection against acts by the Member States is that of *non-discrimination with an exhaustive list of prohibited grounds*.⁹ Broadening its scope is a matter that has been left to future Treaty revision. In other words, in relation to the law of the Member States, the Community's commitment to equality is spelled out in a *set of explicit negative comparative rights*.¹⁰ The rights are *comparative* in that they demand that if someone is made worse off than another, the mere fact of differential treatment¹¹ gives rise to a *prima facie* claim on the part of the worse off to have the inequality abandoned.¹² The substantive range of these rights is restricted, however, owing to their negative focus. They require only that distributive decisions not be based on certain criteria. Finally, as has been set out in and confirmed by Article 6a (now 13), the relevant rights are also explicit. They protect against discrimination only for reasons explicitly mentioned in primary Community law.

II Higher Floors Only

It seems, therefore, as if the Community's commitment to equality differed remarkably from the way in which equal protection is commonly conceived of in modern constitutional law. In the context of the latter, it is, first and foremost, taken to be a general principle whose application is not restricted to an exhaustive list of unreasonable criteria of distinction. It protects against any arbitrariness, regardless of its source or context.¹³ Not infrequently, the standards applied by the courts follow a two- or multi-tiered pattern. Such patterns emerge from distinguishing a general

⁹ See Barnard, *loc cit* n 7, 360.

¹⁰ On the following, see Simons, 'Equality as a Comparative Right,' (1985) 65 *Boston University Law Review* 387–481 at 421–424.

¹¹ Two different cases have been made against equality as a comparative right. First, it has been contended that such a right is chimerical. Accordingly, all rights to equal treatment are derivative of a right that is granted to everyone. As is well known, Peter Westen has tried to defend this position. See Westen, 'The Empty Idea of Equality,' (1982) 95 *Harvard Law Review*, 537–597. For a convincing refutation of his claim, see Simons, *loc cit* n 10, 393–406. Second, some philosophers have argued that even if a prescriptive and comparative claim to equal treatment is conceivable, its enforcement would be undesirable from a normative point of view. See J. Raz, *The Morality of Freedom* (Clarendon Press 1986), 225–227, 241; Peters, 'Equality Revisited,' (1997) 110 *Harvard Law Review*, 1211–1264 at 1222, 1226, 1250, 1252. For a critique, see Greenawalt, "'Prescriptive Equality': Two Steps Forward,' (1997) 110 *Harvard Law Review*, 1265–1290.

¹² Owing to their comparative quality, equality rights do not in, or of, themselves demand either extending or withholding of a benefit to all. As to the consequence of 'levelling up' or 'levelling down', they are, as Lübke-Wolff explains, 'modally indifferent.' See G. Lübke-Wolff, *Die Grundrechte als Eingriffsabwehrrechte. Struktur und Reichweite der Eingriffsdogmatik im Bereich staatlicher Leistungen* (Nomos 1988), 244–245; Simons, *loc cit* n 10, 392, 398, 408, 429–430. However, in the context of sex discrimination law, the ECJ has frequently favoured the 'levelling up' approach. See for example, Case 43/75, *Defrenne v. Sabena (II)* [1976] ECR 455, para. 15.

¹³ For a German-American perspective, see Currie, 'Lochner Abroad: Substantive Due Process and equal protection in the Federal Republic of Germany,' (1989) *Supreme Court Review*, 333–372, at 369; for a more extensive narrative of constitutional borrowing, see A. Somek, 'The Deadweight of Formulae, Or: What Might Have Been the Second Germanization of American equal protection Review,' (1998) 1 *University of Pennsylvania Journal of Constitutional Law* (on the web: <http://www.law.upenn.edu/conlaw/issues/voll/num2/somek.htm>)

review of the rational basis of government action from more searching types of judicial inquiry into the objectives and the instrumental 'fit' of unequal treatment. The latter are applied when government action is, in particular, suspect of having expressed an invidious attitude toward certain groups. By and large, such an approach is typical of the path taken by the U.S. Supreme Court,¹⁴ the Supreme Court of Canada,¹⁵ and the German Federal Constitutional Court.¹⁶

Nevertheless, the judicial exposition of Community law can be recast against this background, too. For this purpose, one has merely to recognise that in Community law only the higher floors, but not the first floor, of modern equal protection is reflected in the jurisprudence of the Court. While the lower tier of general equal-protection is absent, the application of explicit and negative equality rights is most often strict. The standards applied by the Court appear to belong to a type of review that would elsewhere unquestionably be identified as an upper tier of equal protection scrutiny. The road taken by the ECJ, to be sure, has its own methodological virtues, for, in many instances, a forbidden content test takes the place which is commonly occupied by suspect content or purpose tests.¹⁷ The differential treatment of men and women is not taken to be highly 'suspect' of discrimination on forbidden grounds;¹⁸ rather, it is considered to be *per se* impermissible,¹⁹ unless it is in line with explicit (or implicit)²⁰ exemptions from the scope of antidiscrimination rights. Such exemptions are, for the most part, narrowly construed by the Court. This approach, for that matter, would at least explain the well-known ruling in *Kalanke* with respect to Article

¹⁴ For the Court's more recent perspective on the case law, see *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989). For a useful overview, see Galotto, 'Strict Scrutiny for Gender, Via *Croson*,' (1993) 93 *Columbia Law Review* 508–545.

¹⁵ The Canadian Charter of Rights and Freedoms contains a general equality clause that is followed by a non-exhaustive list of grounds on which discrimination is prohibited. For the Court's review of the approach taken with respect to the second, see most recently *Vriend v. Alberta* [1998] 1 S.C.R. 493 para. 71.

¹⁶ For Art. 3(3) of the Basic Law containing explicit antidiscrimination provisions, see BVerfGE 85, 191, 206 (night-work). For a distinction between the general arbitrariness standard and instances of heightened scrutiny within the ambit of the general equal protection provision of Art. 3(1) of the Basic Law, see BVerfGE 55, 72, 88; 88, 87, 96.

¹⁷ See generally, Fallon, 'Implementing the Constitution' (1997) 111 *Harvard Law Review* 54–152 at 76, 83, 102–103.

¹⁸ The suspicion can be dispelled only if the relevant government interest is compelling and if the rule in question is narrowly tailored to pursuing that interest.

¹⁹ Of course, the question may arise of whether merely the explicit use of sex distinctions or also the imposition of disadvantage without such use is impermissible. For the discussion in the Federal Republic of Germany, see M. Sachs, *Grenzen des Diskriminierungsverbotes. Eine Untersuchung zur Reichweite des Unterscheidungsverbots nach Art. 2 Abs. 2 und 3 Grundgesetz* (Beck 1987); *idem*, 'Besondere Gleichheitsgarantien,' in J. Isen see & P. Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, vol. 5 (C. F. Müller 1992), 1017–1083, at 1030, 1044; U. Sacksofski, *Das Grundrecht auf Gleichberechtigung. Eine rechtsdogmatische Untersuchung zu Artikel 3 Absatz 2 des Grundgesetzes* (Nomos 1991), at 155–147. This question aside, an antidiscrimination right may be taken to be 'absolute', that is, ruling out the unequal treatment on any conceivable ground. This position is defended for Art. 3(3) Basic Law by Sacksofski, *ibid.*, at 306–310. For the alternative perspective, see S. Huster, *Rechte und Ziele. Zur Dogmatik des allgemeinen Gleichheitssatzes* (Duncker & Humblot 1993), 331–332.

²⁰ The operation with implicit exemptions seems to be characteristic of the wide scope that is afforded to objective justifications in cases of indirect discrimination. See for example, Case C-170/84, *Bilka-Kaufhaus GmbH v. Karin Weber von Hartz* [1986] ECR 1607, para. 36; Case C-379/87, *Groener v. Minister for Education* [1989] ECR 3967, para. 19. As we shall see, however, the test applied by the Court then slides into the suspect-content type of test.

2(4) of Directive 76/207, which permits Member State action to redress the inequality between women and men. According to the Court, a Bremen law had exceeded the range of this derogation by giving women an absolute and unconditional priority for appointment or promotion where there were equally qualified candidates of either sex.²¹ Regarding the differential treatment of men and women as strictly forbidden, rather than as being merely ‘suspect’ of discrimination, can also be observed in the Court’s reluctance to accept sex inequalities even though they may be supported by sound reasons of social policy, as in, for example, the case of different retirement ages for men and women in occupational pension schemes.²² Such a strict construction of exceptions to antidiscrimination rules seems to be a widespread practice. For example, once different retirement ages in state pension schemes have been abolished, the exception granted by Article 7(1) of Directive 79/7 is no longer available to maintaining a difference pertaining to the calculation of retirement pensions.²³ However, strict construction is also subject to relaxation in cases where discrimination is less evident. In the context of free movement of services (Article 59 [now 49] of the EC Treaty), the Court apparently relies on a filtering device to sort out possible grounds for exceptions. The filter echoes the more common focus on ‘suspectness’.²⁴ Whereas deliberate (and deliberately disguised) discrimination can only be justified on the grounds mentioned in Article 56 (now 49) of the EC Treaty, unintentional discrimination can be justified for more open-ended ‘objective’ reasons. In the context of deliberate discrimination against the free movement of workers, however, the scope afforded to ‘objective reasons’ seems to be broader than the explicit exceptions granted by Article 48 (now 39).²⁵

III Unprincipled Doctrine

Other instances of heightened judicial scrutiny can be found in cases in which the Court held that the burden of proof ought to be reversed where a non-transparent pay policy is suspect of discrimination on the ground of sex.²⁶ But details need not concern us here. What matters is that the only manifest difference with respect to the international concurrence of national (constitutional) courts is that the lower tier of general equal-protection review is absent in Community law. Minute deviations and differences in the constructive approach aside, the jurisprudence seems to be very much alike.

I think that this observation would be defensible on its own terms. There is a reason, however, to suspect that such an observation is, in fact, far less revealing than it might appear to be. Strict equal protection scrutiny is neither special nor particularly appealing. To be sure, beginning with Chief Justice Stone’s fragmentary

²¹ See Case C-450/93, *Kalanke v. Freie Hansestadt Bremen* [1995] ECR I-3051, para. 22. Case law would be less fun, of course, if there were no exceptions to this sort of treatment of exceptions—as, for example, in cases in which the Court applies a proportionality test. See, e.g., Case C-222/84 *Johnston v. Chief Constable of the RCU* [1986] ECR 1651

²² See Case C-262/88, *Barber v. Guardian Royal Exchange Assurance Group* [1990] ECR I-1889.

²³ See Case C-154, *Van Cant v. Rijksdienst voor Pensioen* [1993] ECR I-3811.

²⁴ For German constitutional jurisprudence, for example, cf. Heun, ‘Art. 3,’ in H. Dreier (ed), *Grundgesetz. Kommentar*, vol. 1 (Mohr & Siebeck 1991), 228–293, at 290.

²⁵ See P. Craig & G. de Búrca, *op cit* n 1, 367, 670.

²⁶ See Case C-109/88, *Handels- og Kontorfunktionærernes Forbund i Danmark v. Dansk Arbejdsgiverforening, acting on behalf of Danfoss* [1989] ECR 3199, paras. 13–14.

exposition in the *Carolene Products* footnote,²⁷ there is a venerable tradition of *theoretical* accounts explaining its virtues and delimiting its proper location.²⁸ Yet, when it comes to understanding *judicial practice*, it is fairly obvious that equal protection scrutiny is strict for the types of case in which its application is suggested by the constitutional text,²⁹ or in which the judges' convictions about what kind of government action is deeply wrong overlap despite diverging political opinions or moral beliefs.³⁰ The upper tier is a refraction of contingent judicial agreement.³¹ It represents what judges can agree upon in the face of other cases that they might wish to attribute to pervasive reasonable disagreement.³² As has been noted, for this reason, the equality principle is, for the most part, subject to 'underenforcement'.³³ Strict scrutiny is the exception to this rule. The instances in which it becomes relevant, however, are fortuitously selected, a reflection of the confluence of judicial intuitions.³⁴ Accordingly, the notorious lists of 'suspect classifications' are, by their very nature, unprincipled. As Unger succinctly remarks for American constitutional law, 'to defend the thesis that racial and sexual advantages count most because they are, in fact, more severe than other forms of social division and hierarchy would involve the established doctrine in controversies that it could not easily win.'³⁵ What is it, after all, about sex discrimination that would make it inherently worse than discrimination on the ground of sexual orientation?³⁶

IV Generality Reconsidered

Owing to the unprincipled nature of equal protection scrutiny, judicial expositions reside at a level that is substantively less engaging than the horizon explored by political philosophy. Judicial practice has little to say about the meaning of equality or about what makes discrimination wrong. On the contrary, it seems as if judicial doctrine were well advised to stay clear of the relevant philosophical expositions, for it would otherwise witness the erosion of institutionist judicial compromise.

Of course, there is a difference in focus. Over the last two decades, egalitarian political philosophy has become a booming field.³⁷ A brief look at the central aspects of this resurgence of egalitarianism reveals that legal doctrine and philosophy have, thus far at any rate, been devoted to different things. Whereas the latter is concerned

²⁷ See *United States v. Carolene Products Co.*, 304 U.S. 144, 152–153 Fn. 4 (1938).

²⁸ Most notably, J. Ely, *Democracy and Distrust. A Theory of Judicial Review* (Harvard UP 1981).

²⁹ This is not necessarily the case. The Austrian Constitutional Court chose not to take that path in spite of the constitutional text. See for example, VfSlg. 12.568/1990 and the historical account by Sachs, 'Der Geltungsverlust des Article 7 Abs. 1 Satz 2 B-VG,' (1985) 35 *Österreichische Zeitschrift für öffentliches Recht und Völkerrecht* 305–324.

³⁰ See Fallon, *loc cit* n 17, 145–148.

³¹ For an explanation, see M. Trebilcock, *The Limits of Freedom of Contract* (Harvard UP 1993), 204–205.

³² For a defence of this practice, see C. Sunstein, *Legal Reasoning and Political Conflict* (Oxford UP 1996), 46–48.

³³ See Sager, 'Fair Measure. The Legal Status of Underenforced Constitutional Norms,' (1978) 91 *Harvard Law Review* 1212–1264 at 1215–1220; Fallon, *loc cit* n 17, 64–65, 69, 150.

³⁴ For an account of moral intuitionism, see J. Rawls, *A Theory of Justice* (Harvard UP 1971), at 34–40.

³⁵ R. Unger, *The Critical Legal Studies Movement* (Harvard UP 1986) at 57.

³⁶ See *Romer v. Evans*, 517 U.S. 620 (1996).

³⁷ For an elementary exposition and a more advanced introduction, see respectively, W. Kymlicka, *Contemporary Political Philosophy. An Introduction* (Oxford UP 1990) and J. Roemer, *Theories of Distributive Justice* (Harvard UP 1996), 237–310.

with, for example, the proper 'currency' of egalitarian justice³⁸ or the principles governing the basic structure of society, doctrine clings to the task of distinguishing and reformulating detailed rules of non-discrimination. It may well be the case that mutual disciplinary indifference has also given free rein to the well-known scholastic penchant of analytic philosophy.³⁹ And it may also be the case that scholasticism exercises a deterring effect on those who are unfamiliar with the more academic way of determining where the 'real' problem presumably lies. Even philosophers, at times, wonder whether pursuing elaborate and minute discussions of counterfactual situations will have even the slightest implications for political practice.⁴⁰

In what follows, I would like to suggest how both philosophical scholasticism and legal isolationism can be overcome by adopting—in the legal context—a different perspective on 'generality'. Thus far, generality has been understood as referring to the *extension* of non-discrimination, that is, the limits set for the bases of unequal treatment that trigger a more or less searching judicial review of government action. This has, however, very little to do with viewing the subject matter philosophically. Philosophy is more concerned with *intension*,⁴¹ that is, what a violation of equality *means* to the person affected. As I shall try to show below (VIII), intension is addressed to the depth of our commitment to equality. From this perspective, judicial practice appears to be either *general* or *normatively truncated* with respect to what is required to be faithful to its *meaning*.

Extension and intension are not mutually exclusive. Since the latter has, as its function, the determination of the former, both address, at bottom, the same thing. Inferences, however, are to be drawn from intension to extension, rather than the other way round.

IV Egalitarian Reconstruction

I have already tried to point out that approaching Community law from an extensional angle invariably has to fall short of explaining the significance of the equality principle (III). In fact, it has the tendency of underestimating what makes Community law special in this regard.

From the outset, it should be clear that, for at least two reasons, this principle plays a fundamental role in Community law.

First, the fundamental liberties were originally conceived of as equality rights proper.⁴² I do not wish to dwell here on the question of whether, after the gradual expansion of the *Cassis de Dijon* revolution⁴³ into other spheres, fundamental liberties

³⁸ See Cohen, 'On the Currency of Egalitarian Justice,' (1989) 99 *Ethics* 906–944.

³⁹ See, for example, the excellent study by L. Temkin, *Inequality* (Oxford UP 1993).

⁴⁰ Ironically, this is true of the work of Dworkin. See, in particular, Dworkin, 'What Is Equality? Part II: 'Equality of Resources,' (1981) 10 *Philosophy and Public Affairs*, 283–345. For criticisms, cf. Kymlicka, *op cit* n 37, ch. 3; Kersting, 'Methodologische Probleme einer Theorie der sozialen Gerechtigkeit,' in P. Koller & K. Puhl (eds), *Aktuelle Fragen politischer Philosophie: Gerechtigkeit in Gesellschaft und Weltordnung* (Hölder-Pichler-Tempsky 1997), 32–52.

⁴¹ It goes without saying that in talking about 'extension' and 'intension', I draw an analogy to what has, since Frege, become an elementary (and contested) distinction in modern philosophy of language. See W. V. O. Quine, *Pursuit of Truth* (Harvard UP 1990), at 54, 68.

⁴² See Jarass, 'Elemente einer Dogmatik der Grundfreiheiten,' (1995) 30 *Europarecht* 202–226.

⁴³ See Case C-120/78, *Rewe-Zentrale AG v. Bundesmonopol für Brandtwein* [1979] ECR 649.

can still be seen in that light.⁴⁴ Still, it is remarkable that the history of Community law can be read as an invitation to consider the move from equality rights to full-fledged liberties as if a concern for equality had given birth to the protection of certain freedoms.

Second, in spite of the commitment of the ECJ to the protection of fundamental rights⁴⁵ and its reaffirmation in Article F(2) of the Maastricht Treaty, the conspicuous absence of a Bill of Rights has its virtue. Community law does not deflect attention from the seminal function performed by equal protection in unfolding a system of rights. This function is often clouded in a context in which the equality principle figures merely as one among many other fundamental rights. Community law, therefore, seems to lend itself to a mode of approaching modern constitutional law that I call the *egalitarian reconstruction of constitutional law*. It rests on assigning to equality a *priority* in the exposition of a system of fundamental rights, namely, through an explanation of the *meaning* of equality rights.

In order to avoid misunderstanding, I should add that egalitarian reconstruction is the name of a project. It does not represent—not yet, at any rate—an edifice of propositions expressing some grand theory of modern constitutional law. Moreover, egalitarian reconstruction is not restricted to doctrine. On the contrary, it shall become clear in this article that its full import can only be drawn out in transformative political practice.⁴⁶

In the following, I would like to explain what I take to be the meaning of equality by distinguishing between three types of discrimination. Against this background, it can be seen why Community law is an interesting subject from the perspective of egalitarian reconstruction.

V Three Types of Discrimination

I assume that the egalitarian reconstruction of constitutional law ought to depart from a formulation of the equality principle that is tantamount to an anti-discrimination principle, broadly understood. The principle protects against *partiality*.⁴⁷

Following Thomas Nagel, I assume that impartiality is violated if the person's perspective is not taken into account in the process of the universalisation of rules.⁴⁸ Against this general background, three types of discrimination can be distinguished.

(1) *Humiliation*: A person is humiliated if what matters from her own point of view is disregarded on the ground of a characteristic that is irrelevant from her own point of view and from the point of view of any other reasonable person.

⁴⁴ Thus far, I can only offer a provisional account of the issue. See Somek, 'Reverse Discrimination Revisited. Coping with an Incongruity between Community Law and Member State Legislation,' (1998) No. 9 *Vienna Working Papers in Legal Theory, Political Philosophy, and Applied Ethics* (<http://www.univie.ac.at/juridicum/forschung/wp09.pdf>), 19–26.

⁴⁵ See Case C-4/73 *Nold v. Commission* [1974] ECR 491, para. 13.

⁴⁶ If what is left of the meaning of 'left' is the unflinching commitment to equality, then egalitarian reconstruction may be legitimately considered to be a left-wing project. See R. Bobbio, *Left and Right* (Polity 1996), 48; A. Giddens, *The Third Way. The Renewal of Social Democracy* (Polity 1998), at 40. For a scornful comment on the left's preoccupation with egalitarianism from a left-wing perspective, see R. Unger, *Democracy Realized. The Progressive Alternative* (Verso 1998), at 163–164.

⁴⁷ Sunstein's so-called 'anticaste principle' expresses a similar idea. See C. Sunstein, *The Partial Constitution* (Harvard UP 1993), 338–346; *idem*, *Free Markets and Social Justice* (Oxford UP 1997), at 163.

⁴⁸ See T. Nagel, *Equality and Partiality* (Oxford UP 1991), 15–20.

The standard case of humiliation is discrimination on the ground of ascriptive traits, such as race. Such characteristics are the social tokens for the fact that a person may be treated as a non-person.⁴⁹ Equality protects against this severe form of depersonalisation. For example, with regard to the question of what ought to be required for obtaining a driver's licence, some personal qualities may come to mind, such as driving skills, knowledge of driving rules, maturity, *etc.*. Hence, someone who is denied a driver's licence on the ground of his or her sex is the victim of humiliation, since sex matters neither from his or her point of view nor from the point of view of any other reasonable person, that is, a person paying attention to the rational relationship between driving and the personal qualifications required for that purpose.

(2) *Stereotypisation*: A person is a victim of stereotypes if she is treated as if she were merely an exemplification of a certain type of person (which she, in fact, is not).

The standard case is unequal treatment on the ground of prejudice or 'overbroad' generalisations. If males are denied a driver's licence on the ground that they statistically cause more car accidents than women, this amounts to an (unnecessarily) overbroad generalisation with respect to individual drivers.

(3) *Overdetermination*: A person is overdetermined if she is the addressee of a rule that cannot be universalised except by presuming adaptive behaviour that cannot reasonably be expected from that person.

As we shall see, an interesting case of overdetermination is 'indirect discrimination'. However, there are other examples, too. If denying employment to consumers of narcotic drugs includes a refusal to employ methadone users, then the latter are overdetermined, for it is unreasonable to expect that they forego medical treatment for the sake of having a job.⁵⁰

VI Different Observation Schemes

I think the difference between the three types of discrimination becomes intuitively clear once we imagine a potential victim's response. Humiliation expresses an attitude of existential rejection.⁵¹ The victim responds: 'I am a human being, too'. Stereotypisation is blindness to what persons are as individuals. The victim claims: 'I am not like that.' Overdetermination threatens to mould individuals into a particular shape. The response is: 'I do not want to be like that'.

Put in simple terms, overdetermination means 'asking too much'. It affects the question of behaviour that may be *legitimately* expected of people if they wish to avoid social disadvantage. In contrast to stereotypisation, the wrong is not rooted in the divergence between what persons are and what persons are taken to be for the purpose of formulating legal rules. The wrong stems from imposing a normative expectation on others.

From the outset, it should be clear that, seen from an extensional perspective, the three types of discrimination are not mutually exclusive. One and the same case may be approached from different angles. They do not provide hard and fast rules either.

⁴⁹ See A. Margalit, *The Decent Society* (Harvard UP 1996), 118–119, 121.

⁵⁰ See, on that matter, *New York City Transit Authority v. Beazer*, 440 U.S. 568 (1979).

⁵¹ See Margalit, *op cit* n 49, 122.

They are normative observation schemes,⁵² or, employing a more venerable expression, different ‘topoi’ (types of argument)⁵³ that help us to make a case against discrimination. For example, unequal treatment involving the legislative use of a gender classification can simply be read as an instance of stereotypisation. At the same time, however, it can also be understood as an instance of overdetermination. Take, for the sake of example, a regulation banning women from working during the night.⁵⁴ Such a prohibition can be challenged on the grounds that it is based on wrong beliefs about the physical and psychological vulnerabilities of women. We would claim, then, that it amounts to stereotypisation. The night-work prohibition, however, can be challenged from a different angle, too. Evidently, it restricts women’s access to the labour market. Women are expected to look for day-time jobs. Such jobs may be scarce and, hence, more difficult to find. It follows that, by comparison with men, women would be at a disadvantage. They would have the same opportunities for employment only if they were more qualified or were for some other reason more likely to find employment than men. But this should not be expected from women, neither cognitively nor normatively. Seen through the lens of overdetermination, therefore, the night-work prohibition appears to strike an *improper balance* between the health risk that may be involved in this kind of work and the financial benefits that can be obtained from it.

VII The Depth of Egalitarian Commitments

Even though the three types of arguments are not mutually exclusive, they are not free-floating schemes, either. There is a dialectical and, indeed, circular relationship between and among them. This becomes clear when we consider that the outright neglect of a person’s interest—*i.e.*, humiliation—is likely to be defended by an appeal to what that person is. This strategy is most often manifest in the justification offered for the differential treatment of foreigners. They are denied special privileges of citizenship on the ground of their status, hence, on the ground of who they are. Generally, in the defence of an unequal differential treatment, social stigma or the ascription of lower status can be looked upon and defended from the perspective of a generalisation. Accordingly, what, at first glance, might be taken to express an invidious attitude can be given the more innocent appearance of being a mere proxy for general propositions.⁵⁵ However, wherever the defence of a treatment that is suspect of humiliation resorts to a generalisation of personal characteristics, it could also rest on stereotypes. Consider, again, the differential treatment of foreigners. It may well be the case that the proposition according to which migrant workers are ‘by their very nature’ less loyal to the country of residence than citizens is simply wrong. A stereotype would then have been unmasked. But the argument against discrimination

⁵² See P. Fuchs, *Die Umschrift* (Suhrkamp 1995), 24–29.

⁵³ See Aristotle, *Organon* V 108a–108b.

⁵⁴ To be sure, with exceptions for the protection of pregnant women, night-work prohibitions are impermissible within the scope of Community law. See, Case C-345/89, *Criminal Proceedings against Stoeckel* [1991] ECR I-4047; Case C-197/96, *Commission v. France* [1997] ECR I-1489; Art. 7 Directive 92/95.

⁵⁵ On proxy-discrimination in which a classification provides a means to reach a set of persons with traits that are different from the traits referred to in the classification itself, see Hellman, ‘Two Types of Discrimination: The Familiar and the Forgotten,’ (1998) 86 *California Law Review* 315–361 at 316.

must not stop here. Generalisations about the qualities, capabilities and attitudes of persons may also be called into question by asking whether they are defensible from a *broader* moral point of view. For example, do we not demand an improper loss of political autonomy from permanently resident aliens by continuing to deny them the right to vote in national elections? Is it not more reasonable to expect that they, too, feel concern about and allegiance to the polity where they pursue their vital interests? If this were the case, they would clearly be overdetermined, for we would grant them an opportunity to improve their economic lot only at the loss of political freedom.⁵⁶ We expect them to waive one or the other, whereas citizens may enjoy both. In this context, overdetermination has to do with (comparative) *obstacles* with respect to combining different pursuits or enjoying different goods. The victim can have the one only by sacrificing the other. But overdetermination also pertains to the level of exertion and effort that is demanded from different people. It is a triviality, therefore, that the evil that is to be remedied under the name of 'equality of opportunity' is overdetermination. The protection against overdetermination may, however, also call for preserving such obstacles and rendering their existence, at least, free of costs to the person adversely affected.

Asking too much of persons eventually amounts to a neglect of what matters to persons. It is a more detailed specification of the wrong that is already present in cases of humiliation. Not surprisingly, in raising the issue of discrimination, we eventually wish to establish that discrimination, whatever else it might be, is, at bottom, humiliating. Thus understood, the three types of discrimination are guidelines helping us to *unfold* the meaning of discriminatory acts.

It should be plain, then, that in the rejection of overdetermination our egalitarian intuitions attain their greatest depth. Consider the example of a person who is denied a professional position on the ground of his or her religious conviction (for example, a Moslem). This appears to be humiliating. The applicant's interests are not taken into account owing merely to his or her religious beliefs. The treatment is clearly arbitrary. If, however, we wish to understand why religious discrimination is *deeply* wrong, the case has to be considered from the perspective of overdetermination. What if the applicant had known that he would have had better chances for success had he chosen to change membership to a church or denomination beforehand? I am not talking about fictional examples, here. At the turn of the century, Austrian Jews sensed that an official conversion to Roman Catholicism would definitely promote their prospects and, sadly enough, they were right about this. Yet, requiring from a person a change of religious belief for the purpose of avoiding social disadvantage is clearly an instance of overdetermination. Religious convictions are not a component in a person's preference schedule and, therefore, not open to adjustments under the constraints set by scarcity and limited opportunity. As Madison and Jefferson knew,⁵⁷ religious convictions command our respect precisely because they are not governed by will and,

⁵⁶ A similar idea has been developed in American constitutional law under the name of 'unconstitutional conditions' in a non-comparative context. Accordingly, obtaining a state benefit may not be made conditional on the explicit or implicit waiver of basic liberties. See Sullivan, 'Unconstitutional Conditions,' (1989) 102 *Harvard Law Review* 1415–1506; R. Epstein, *Bargaining With the State* (Princeton UP 1993), 6–12, 285–294.

⁵⁷ Michael Sandel has recently reminded us of this. See M. Sandel, *Democracy's Discontent. America in Search of a Public Philosophy* (Harvard UP 1996), 65–71.

therefore, are not subject to choice from a believer's point of view. Freedom of conscience is inalienable. It can be seen, then, that the mere focus on the arbitrariness involved in denying a person a (secular) position on the ground of religion cannot explain what makes religious discrimination such an appalling act. One has to look at the matter from the perspective of overdetermination.

VIII The Vanguard Moment of Community Law

Modern constitutional law has, without difficulty, integrated humiliation and stereotyping into its equal protection jurisprudence. In fact, stereotyping is the core of its most trivial test, namely the rational basis test.⁵⁸ Hardly any attention, however, is paid to the problem of overdetermination, at least within the sphere of equal protection proper.⁵⁹ This is confirmed by the fact that standards of equal protection are more stringent than the ordinary rationality or arbitrariness test if a rule is deemed suspect of humiliation or stereotyping for having imposed a disadvantage on the basis of personal characteristics that are, *by their very nature*, beyond the agent's control. Equal protection is most stringent when it affects discrimination on the grounds of race, gender, or mental and physical disability. It is less stringent, however, if it is assumed by courts that persons are in a position to avoid suffering a disadvantage.⁶⁰ My tentative conclusion, therefore, is that with respect to the problem of overdetermination the jurisprudence of the courts reflects a more or less 'stoic' attitude. Courts assume that, apart from invidious discrimination, the law does not demand too much from the norm-addressees if they are required to adjust their behaviour to circumstances in order to obtain a benefit or avoid a burden.⁶¹ At any rate, this does not affect their human dignity.

Given that legislation and preliminary rulings exert a higher-law effect vis-à-vis national legislation (*i.e.*, direct effect and supremacy), Community law may also safely be treated as constitutional law, at least in this context.⁶² It seems, however, as if this brand of constitutional law were the exception to the rule of stoicism. This exceptional quality of Community law goes back to the attention that has been paid to instances of indirect discrimination. They are dealt with not only in the context of fundamental liberties,⁶³ but also in the context of the direct application of Article 119 (now 141) of the EC Treaty and its implementation through directives (*e.g.*, Article 4(1) of Directive 79/7). The basic idea is that women are discriminated against by regulations that are gender-neutral at their face value where those regulations have a disproportionate negative impact on women and where this impact cannot be defended on neutral

⁵⁸ Accordingly, unequal treatment ought to have a conceivable rational relationship to a permissible goal pursued by the legislature. If the classification is over- or underinclusive as to its purpose, the persons adversely affected are victims of stereotyping. For references, see n 4 *supra*.

⁵⁹ One explanation for the failure of law to take overdetermination into account is its deontological mindset. According to Leo Katz's diagnosis, the law focuses, for the most part, on good or bad intentions, and compliance with the 'paths' laid out for the creation of entitlements rather than on good or bad effects or the social purpose of transactions. See L. Katz, *Ill-Gotten Gains. Evasion, Blackmail, Fraud, and Kindred Puzzles of the Law* (Chicago UP 1996), 56–57, 69, 192.

⁶⁰ For a reconstruction, see R. Unger, *What Should Legal Analysis Become?* (Verso 1996), at 84.

⁶¹ For an expression of this mentality, see Trebilcock, *op cit* n 31, 208–209.

⁶² See Weiler, 'The Transformation of Europe,' (1991) 100 *Yale Law Journal* 2405–2483 at 2413–2414.

⁶³ See, for Art. 48 (now 39), for example, Case C-152/73, *Sotigiu v. Deutsche Bundespost* [1974] ECR 153; Case C-379/87, *Groener v. Minister for Education*, 1989 ECR 3967.

(‘objective’) grounds.⁶⁴ In contrast to Community law, the category of indirect discrimination has not gained prominence in the *constitutional* law of the Member States.⁶⁵

To be sure, the concept of indirect gender discrimination has been applied very cautiously by the ECJ and pertains, owing to Community law’s traditional focus on economic activities, only to employment relationships—that is, equal pay and equal treatment (Article 2 of Directive 76/207)—on the one hand, and social security laws on the other (Article 4(1) of Directive 79/7).⁶⁶ In the practice of the ECJ, the concept has given rise to several complexities, and the vanguard moment of Community law has been more or less *contained* within them.

The basic idea is that a rule imposing a disadvantage on a certain group of workers, such as part-time workers, does not violate Article 119 (now 141) of the EC Treaty unless the fact that it affects a greater number of women than men is deliberately and directly based on considerations of sex.⁶⁷ Still, where a rule appears intrinsically⁶⁸ to have a disparate impact on women without indications of deliberate discrimination, it, too, can be defended only if it is ‘attributable to factors which are objectively justified and are in no way related to any discrimination based on sex’.⁶⁹ The substantive question is left to the national courts to decide.

In *Bilka*, the Court introduced a strict rationality test with the well-known elements of appropriateness and necessity.⁷⁰ In addition, it was made clear that ‘the real need’ on the part of the employer or the ‘necessary social policy aim’ of legislation⁷¹ bares the major burden of justification. The element of proportionality proper, namely

⁶⁴ See Peters, ‘The Many Meanings of Equality and Positive Action in Favour of Women under European Community Law – A Conceptual Analysis,’ (1996) 2 *European Law Journal*, 177–196 at 187. See, also the definition in Art. 2 of Directive 97/80/EC: ‘For purposes of the principle of equal treatment referred to in paragraph 1, indirect discrimination shall exist where an apparently neutral provision, criterion or practice disadvantages a substantially higher proportion of the members of one sex unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex.’ This definition has incorporated the rationality test that was first established in *Bilka*. See n 70 *infra*.

⁶⁵ For an assessment of the practice of the German Federal Constitutional Court, see K.-J. Bieback, *Die mittelbare Diskriminierung wegen des Geschlechts. Ihre Grundlagen im Recht der EU und ihre Auswirkungen auf das Sozialrecht der Mitgliedstaaten* (Nomos 1997), 48.

⁶⁶ One may also have to grant that the very notion of ‘indirect discrimination’ is paradoxical. It presumes discriminatory intent where by definition such an intent can only be manifest through its absence. This speaks to the fact that the law is still approaching the matter from its deontological perspective. It seems as if the *evasion* of direct gender-neutrality through the enactment of regulations with disparate impact were the central problem. See, for example, Case C-96/80, *Jenkins v. Kingsgate (Clothing Productions) Ltd.* 1981 ECR 911, para. 13 where the Court indicates that an unequal pay policy is indirectly discriminatory if *in light of actual difficulties* encountered by women in arranging to work a certain number of hours, the policy in question ‘cannot be explained by factors other than discrimination based on sex’ (my italics).

⁶⁷ See *ibid.*, para. 10.

⁶⁸ This aspect, however, plays a more prominent role in the assessment of indirect discrimination of migrant workers, for an assessment of the latter cannot be left to a disparate impact analysis given that reasons for not moving from one country to the other are fairly diverse. See Case C-237/94, *O’Flynn v. Adjudication Officer* [1996] ECR I-2617.

⁶⁹ See Case C-96/80, *Jenkins v. Kingsgate (Clothing Productions) Ltd.* [1981] ECR 911, para. 11.

⁷⁰ See Case C-170/84, *Bilka-Kaufhaus GmbH v. Karin Weber von Hartz* [1986] ECR 1607, para. 36. In the context of European law, a strict rationality test is sometimes mistaken for a proportionality test. See P. Craig & G. de Búrca, *op cit* n 1, at 816. However, as the authors correctly explain, the test closely resembles the ‘rule of reason’ test applied in the context of the free movement of goods and services.

⁷¹ See Case C-171/88, *Rinner-Kühn v. Spezialgebäudevereinigung GmbH* [1989] ECR 2743

balancing, is conspicuous in its absence in the *Bilka* test. It would call for an assessment of whether a certain policy that may in no way rest on a negative bias towards women is nevertheless indefensible in the light of the burden that is imposed on them. In marked contrast, the ECJ sees the issue differently. The strict rational relationship requirement is combined with a purpose test.⁷² Consequently, the purpose of the policy in question must not be suspect of sex discrimination. The responsible authority may demonstrate that the unequal treatment in question is not excessive if no disadvantages are inflicted on women beyond those necessary to achieve the purpose. If such a demonstration is successful, the disparate impact on women is justified.

It goes without saying that, in a legal context, the operation with ‘purposes’ and ‘aims’ may proceed from a deontological perspective.⁷³ The presence or absence of discriminatory intent, then, matters a great deal.⁷⁴ As is well known, the broader the range of permissible purposes, the more difficult it is to identify discriminatory intent.⁷⁵ A supplementary pay policy, for example, whose professed aim is to reward mobility, training or length of service, may, in fact, put women with household and family duties at a disadvantage;⁷⁶ the focus on intention, however, may serve to preclude any effective challenge. This points to the major difficulty of the ECJ’s indirect discrimination jurisprudence. It lies in the scope and generality attributed to purposes that are taken to establish a sufficient objective justification. In fact, the purposes of a pay differential, supposedly reflecting an equilibrium in the labour market, are likely to be accepted as objective justifications despite the fact that they reinforce discrimination which is endemic in market behaviour⁷⁷—such as yielding to third-party preferences, resorting to economically rational stereotyping and adverse selection owing to lack of opportunity.⁷⁸ It seems, therefore, as if indirect gender discrimination were losing its cutting edge because of the Court’s readiness to accept social policy aims that purportedly respond to the needs of the market.⁷⁹

IX Preserving the Vanguard Moment: The Feminist Model Case

In my opinion, the vanguard moment of Community law can be preserved only if its meaning is recast in the terms provided by the egalitarian reconstruction of consti-

⁷² For this type of test, see Fallon, *loc cit* n 17, 90–105.

⁷³ See, Katz, *op cit* n 59; T. Nagel, *The View from Nowhere* (Oxford UP 1986), 179.

⁷⁴ See also Reich, ‘A European Constitution for Citizens: Reflections on the Rethinking of Union and Community Law,’ (1997) 3 *European Law Journal* 131–164 at 148.

⁷⁵ For the American experience, see Simon, ‘Racially Prejudiced Government Actions: A Motivation Theory of the Constitutional Ban Against Racial Discrimination,’ (1987) 15 *San Diego Law Review* 15, 1041–1130; Strauss, ‘Discriminatory Intent and the Taming of *Brown*,’ (1989) 56 *University of Chicago Law Review* 935–1015

⁷⁶ See Case C-109/88, *Danfoss* [1989] ECR 3199.

⁷⁷ See Case C-127/92, *Enderby v. Frenchay Health Authority and the Secretary of State for Health* [1993] ECR 5535, paras. 16–17. The problem is well-known to American anti-discrimination law. For an illuminating discussion of *EEOC v. Sears, Roebuck & Co.*, 628 F. Supp 1264 (N.D. Ill. 1986), see Williams, ‘Deconstructing Gender,’ (1989) 87 *Michigan Law Review* 797, reprinted in K. Bartlett & R. Kennedy (eds), *Feminist Legal Theory. Readings in Law and Gender* (Westview 1991) 95–123 at 102–106.

⁷⁸ See Trebilcock, *op cit* n 31, 188, 199; C. Sunstein, *Free Markets and Social Justice*, *op cit* n 47, 153–158.

⁷⁹ See Cases C-317/93, *Inge Nolte v. Landesversicherungsanstalt Hannover* [1995] ECR I-4625 and C-444/93, *Megner and Scheffel v. Innungskrankenkasse Vorderpfalz, now Innungskrankenkasse Rheinhessen-Pfalz* [1995] ECR I-4741.

tutional law. The notion of indirect gender discrimination can be given a *different reading*, namely as a *failure to protect women against overdetermination* in the context of the male-dominated structure of work.⁸⁰ Thus understood, it is linked to the identification of discrimination against female ways of being a member of society (and this goes along with, among other things, giving birth to, and taking care of, children). Women are not to be allowed to suffer a disadvantage, for example, in payment schedules or social insurance schemes simply because they are more likely to be employed part-time than men.⁸¹ Full-time work would be available to them if they were economically in a position to delegate child-rearing to the same extent as men are, or if they were ready to give up their conviction that child-rearing should be delegated only to the least extent necessary.⁸² Thus understood, indirect gender discrimination would admit of the *legal relevance of overdetermination*. And the latter results, first, from the insufficient political and economic capacities of women to participate in the male dominated structure of work on an equal footing, secondly, from 'privatising child-rearing costs onto mothers'⁸³ and, thirdly, from an indifference to the beliefs held by women about what makes life in society a good life (and this may include child-rearing).

The idea that indirect gender discrimination can be reconstructed as giving legal relevance to overdetermination may find support in feminist legal theory. According to prominent feminist legal scholars, the guarantee of gender equality calls not just for the recognition of difference, but for the abolition of disadvantage resulting from difference.⁸⁴ Hence, difference is only equalised if the unequal consequences of sex differences are eliminated. The basic principle—as expressed, for example, by Littleton⁸⁵—demands that difference be made costless for those who are marked as different. If the adoption of a project or a lifestyle which is regarded as typically 'female' (such as working as a kindergarten, or pre-school, teacher) entails having comparatively lower social prestige, less income and fewer opportunities than others, then a person committing her- or himself to such a project would be free from discrimination only if any improvement in his or her position would amount to satisfying an expensive taste or supporting a base pursuit. If such a person were, indeed—contemporary evidence notwithstanding—free from discrimination in the labour market, it would not be unreasonable to shift the burden of personal improvement onto her or him. It goes without saying that in our society there is a great deal of discrimination against 'female' types of work (for example, everything related to 'caring' activities). This entails the social devaluation and financial depreciation of

⁸⁰ See generally, J. Sohrab, *Sexing the Benefit. Women, Social Security and Financial Independence in EC Sex Equality Law* (Dartmouth 1996).

⁸¹ For an explanation of the rationale underlying the protection against indirect discrimination from this perspective, see P. Craig & G. de Burca, *op cit* n 1, 813–814.

⁸² See Williams, 'Gender Wars: Selfless Women in the Republic of Choice' (1991) 66 *New York University Law Review* 1559–1634 at 1607–1608.

⁸³ *Ibid.*, at 1606.

⁸⁴ Rhode, 'The Politics of Paradigms: Gender Difference and Gender Disadvantage' in G. Bock & S. James (eds), *Beyond Equality and Difference* (Routledge 1992), 149–163 at 154–155; Taub & Williams, 'Will Equality Require More Than Assimilation, Accommodation, or Separation from the Existing Social Structure?', (1985) 37 *Rutgers Law Review* 825, reprinted in P. Smith (ed), *Feminist Jurisprudence* (Oxford UP 1993), 48–64. See also, Littleton, 'Reconstructing Sexual Equality,' (1987) 75 *California Law Review* 1279, reprinted in C. Bartlett & R. Kennedy, *op cit* n 77, 35–56.

⁸⁵ *Op cit* n 84, at 37.

life projects whose equal worth is to be recognised from a moral point of view.⁸⁶ Thus, the protection against overdetermination is also, but not exclusively, related to the *rejection of accommodation*. Viewed in this light, it matches precisely with the kind of freedom associated with *equal* respect, namely not the freedom to choose between options as they are offered by the market, but the freedom to express one's deepest commitments and to refuse to submit them to existing social pressure.

X Social Division of Responsibility

This brings me back to the point that I made in Section IV: exploring the meaning of the equality principle invites a juxtaposition of legal discourse and modern political philosophy. I have already mentioned that overdetermination involves an assessment of what a person may legitimately be expected to do if the person wishes to avoid social disadvantage. From the perspective of egalitarian liberalism,⁸⁷ the problem of overdetermination affects what has been called the social division of responsibility.⁸⁸ The latter determines the extent to which persons have no reason for complaint given their responsibility for their own preferences and choices against the baseline of the share of useful goods they may legitimately expect to receive in a system of fair co-operation.⁸⁹ Situations for which persons are, thus understood, 'responsible' are, by definition, immune from critical scrutiny. Persons can only blame themselves.

Of course, at this point, legal thought has to encounter the 'great principles' of egalitarian political philosophy, such as Rawls' difference principle or Dworkin's counterfactual measure for the 'equality of resources'.⁹⁰ It seems as if such principles determine the extent to which people may legitimately expect the support of society for their well-being or the control of their own destiny. Clearly, the social division of responsibility materialises in the social division of individual power to pursue life projects and also pertains to the conditions under which people acquire 'the firm conviction that [their] determinate conception of the good is worth carrying out'.⁹¹ In Rawlsian theory, social primary goods are the means to express the mutual recognition

⁸⁶ See *Ibid.*, at 51.

⁸⁷ Its proponents argue that equality is the most fundamental normative commitment of liberalism. Above all, liberty is taken to be the *equalisandum* of equality. To approach liberty in this manner is resolutely 'egalitarian'. Egalitarian liberals contend that among all conceivable cardinal goods (such as, in particular, welfare) only liberty (*qua* equality of resources) remains as a defensible candidate for an equal distribution. See Dworkin, *op cit* n 40. Egalitarian liberalism, therefore, grows out of a rejection of a welfarist-consequentialist egalitarianism; nevertheless, at bottom, its perspective is egalitarian. It comes as no surprise, then, that important variants of this type of liberalism can accommodate, what Richard Arneson calls, the 'generic egalitarian intuition': 'other things being equal, if a good is being distributed, it is intrinsically (non-instrumentally) better that the good should go to a worse-off rather than to a better-off person, even if supplying the good to the already better-off person would produce more utility overall than would supplying the good to the worse-off person'. Arneson, 'Against 'Complex' Equality,' in D. Miller & M. Walzer (eds), *Pluralism, Justice, and Equality* (Oxford UP 1995), 226–252 at 251.

⁸⁸ See J. Rawls, *Political Liberalism* (Columbia UP 1993), 33–34, 185, 189; J. Roemer, 'A Pragmatic Theory of Responsibility for the Egalitarian Planner,' in *idem*, *Egalitarian Perspectives. Essays in Philosophical Economics* (Cambridge UP 1994), 179–197; *idem*, *A Future for Socialism* (Harvard UP 1994), 12–13.

⁸⁹ As Giddens, *op cit* n 46, at 34–35 explains, with the demise of social democracy's commitment to a collectivism, which almost by implication meant state provision, the social division of responsibility becomes one of the most pressing political issue of our age.

⁹⁰ See Rawls, *op cit* n 34, 302–303; Dworkin, *op cit* n 40.

⁹¹ Rawls, *op cit* n 88, 318.

of citizens' needs, particularly since their adoption claims to be neutral among different determinate conceptions of the good. Hence, one might suppose that a measure of social primary goods, which is defensible from an egalitarian point of view, provides the yardstick for the social division of responsibility. Things are not, however, as easy as they might appear to be. The very *selection* of social primary goods presupposes strong intuitions about the *legitimate* range of individual powers, in particular, the power to stick to life-projects even under adverse circumstances. In somewhat obscure remarks, Rawls indirectly admits this fact by noting that, in selecting social primary goods as all-purpose means (for the pursuit of the good), 'we must look to social requirements and the normal circumstances of human life in a democratic society' and presuppose 'various general facts about human wants and abilities, their characteristic phases and requirements of nurture, relations of social interdependence, and much else'.⁹² I am sceptical, therefore, that the claim that society is neutral among different conceptions of the good can be upheld when it comes to spelling out the social division of responsibility. What appears to matter, instead, are 'strong evaluations'⁹³ of what is worth pursuing in life and of the moral and social powers that persons may legitimately be expected to possess.

XI Choice and Trade-Off

In addition to the problem involved in identifying a range of goods, the concept of a social division of responsibility between the individual and society raises at least two elementary questions.

First, holding individuals responsible for what they have chosen to do or to make of themselves presupposes that the situation of choice is such that it makes sense to confer responsibility on the party for choosing what he or she has chosen.⁹⁴ In my opinion, it is evident that the notion of choice loses its liberal charm if the situation of choice—in comparison with others choosing—amounts to having to make a decision between competing disadvantages. Again, feminist theory is useful to elucidate what is at issue here. The 'choices' made by women reflect the social constraints stemming from a sexist organisation of work and a private life which is predominated by the interests and economic power of men. A societal pattern that distinguishes between the ideal-worker father and the marginalised care-giving mother is still in force.⁹⁵ Against this background, the unequal allocation of care-giving responsibilities means that employed women shoulder a disproportionate burden once wage and domestic labour are combined.⁹⁶ This burden is aggravated through practices of sex discrimination or sexual harassment at the workplace. Even if women prove to be able to overcome professional prejudice and eventually become 'gentlemen' themselves, such achievements may come at a high emotional cost. According to Joan Williams, 'the typical corporate woman is married and childless: roughly, sixty-five percent of managerial women have no children by the age of forty.

⁹² *Ibid.*, 307.

⁹³ See C. Taylor, 'What is Human Agency?' in *idem*, *Human Agency and Language. Philosophical Papers* vol 1 (Cambridge UP 1985), 15–44 at 23.

⁹⁴ For a sober exploration of this question, see Scanlon, 'The Significance of Choice,' in S. Darwall (ed), *Equal Freedom. Selected Tanner Lectures on Human Values* (Michigan UP 1995), 39–104.

⁹⁵ See Williams, *loc cit* n 82, 1600.

⁹⁶ *Ibid.*, 1599.

[...] Sociological studies show that women with firm career-commitments often sacrifice child-rearing with ambivalent feelings of loss and sadness'.⁹⁷

Egalitarian liberalism holds that society has no responsibility to alleviate a person's situation if that situation is attributable to individual choices.⁹⁸ But women make their choices in a situation of overdetermination. What everyone is expected to be able to do is particularly burdensome to them. Feminist theory helps to clarify what is at issue here, in particular, with respect to the victim's own rationalisation of 'choices'. For example, 'when women speak of their 'choice' to scale back work commitments in deference to their children's needs, they help recreate and legitimise the system of marginalised caregivers by enshrining as ideal-workers adults without primary responsibility for children.'⁹⁹

But the idea of a social division of responsibility raises a second question, too, and an adequate response to this question amounts to a fundamental criticism of the idea that awarding the respect that is due to autonomous persons means respecting their 'choices'. Given the contents of our most valuable pursuits and commitments, it is highly doubtful whether 'choosing' them is the right way of explaining why they matter to us.¹⁰⁰ Rather, it appears as if we *discover* them and are *chosen by them* in the course of existential experimentation.¹⁰¹ This attitude toward the good is, to some extent, articulated by what may be called 'cultural liberalism'.¹⁰² This type of liberalism pays attention to the fact that what is most important in our life is what we have firm reason to do in the context of culturally situated practices.¹⁰³ The relevant projects are not readily available to the trade-offs envisaged by rational choice among alternatives in the context of wealth-maximisation.¹⁰⁴ Rather, the existence of intrinsically valuable pursuits points to the existence of normative limits of what may be legitimately compromised in life.¹⁰⁵

XII Feminism Defeminised

The feminist case for the rejection of accommodation is particularly strong. Nobody can deny that female ways of being human are valuable in themselves (or, at least,

⁹⁷ *Ibid.*, 1597–1598.

⁹⁸ For the most advanced statement of this position, see J. Roemer, *Equality of Opportunity* (Harvard UP 1998).

⁹⁹ Williams, *loc cit* n 82, at 1562. In fact, feminists claim that the overdetermining structure is based on latent stereotypes about what women are and what women want.

¹⁰⁰ See, *supra* Section VIII on the example of freedom of conscience.

¹⁰¹ This has been most impressively explored by Menke, 'Liberalismus im Konflikt. Zwischen Gerechtigkeit und Freiheit,' in M. Brumlik & H. Brunkhorst (eds), *Gemeinschaft und Gerechtigkeit* (Fischer 1993), 218–243.

¹⁰² The latter is exemplified in the work of J. Raz, *op cit* n 11 and W. Kymlicka, *Liberalism, Community, and Culture* (Clarendon Press 1989). Cultural liberalism underscores the existence and preservation of the social conditions that enable agents to pursue life projects that appear to be *valuable* to them in the context of received understandings and practices. Cultural liberalism charges its egalitarian counterpart with an inability to account for this enabling function of cultural contexts.

¹⁰³ See both Raz, *op cit* n 11, 309–311 and Kymlicka, *op cit* n 102, 165–168.

¹⁰⁴ For a thorough elaboration of that point, see E. Anderson, *Value in Ethics and Economics* (Harvard UP 1995).

¹⁰⁵ See therefore, the concern with incommensurability, the refusal to compare different options and the attempt to identify exemptions from trade-offs in Raz, *op cit* n 11, 325, 346 and Kymlicka, *op cit* n 102, 193. For an overview of the present discussion in philosophy, see R. Chang, 'Introduction,' in *eadem* (ed), *Incommensurability, Incomparability, and Practical Reason* (Harvard UP 1997), 1–34.

beneficial to society). There cannot be, for example, a principled objection to awarding appropriate payment to those working in the household. In addition, I think that the strength of the feminist case owes to a perspicuous ambiguity. Even though feminists are very outspoken about the *cultural* sources of gender differences, feminists can easily claim support since such differences always have an obscure relationship to biological functions. Gender is entangled with sex.¹⁰⁶ It is not by accident that *within* a culture, the *culturally* constructed meaning of being a woman makes its appearance in a *naturalised* format. In the feminist context, therefore, the charge of overdetermination has connotations with *humiliation*. Gender does not have to be a source of disadvantage for, otherwise, what matters to women would be disregarded precisely because they are what they cannot avoid being, that is, women. The resulting strength of the feminist case is reflected in the comparatively weak standing of those whose situation is not related to what appears to be a humiliating instance of discrimination. But does this mean that they are not victims of overdetermination?

Consider the following examples: children with learning disabilities can scarcely be raised to the level of those who are most likely to make it to universities. Are they not, with respect to their access to welfare and social privilege, indirectly discriminated against on the grounds of *mental or psychological impairment*? Similarly, children from destitute and disintegrated families may only, in exceptional cases, be able to overcome their educational handicap and find their way to institutions, such as good schools or universities, for which society finally provides the inventory of 'equality of opportunity' (stipends, grants, student loans, etc.). Is it not plausible to conclude that they suffer indirect discrimination owing to *family background*? Moreover, children whose parents cannot afford to send them to private schools have a worse start in life than 'skippies' from wealthy families. It appears as if this were the model case for indirect discrimination on the basis of *parental wealth*. The focus need not, however, be restricted to the younger generation. Owing to the structure of the economy, workers whose plants are shut down face the prospect of long-term unemployment. In the present situation, one may well believe that this is an instance of indirect discrimination on the basis of *prior demand in the labour market*. Employees in their fifties are laid off and replaced by younger personnel, because the latter work for less money and are more obedient than people who tend to confront their bosses with their life-long experience. This seems to be tantamount to indirect discrimination on the basis of *age*.

What these factors have in common with a 'gendered' role is that they are rooted in something that is *beyond a person's control*. In addition, they are a source of a *systemic disadvantage*.¹⁰⁷ Whoever bears the marks of, or is affected by, one of these factors is very likely to be subordinated by multiple indices of well-being (income, education, political power, employment, susceptibility to violence and crime, etc.).¹⁰⁸ They differ

¹⁰⁶ See Z. Eisenstein, *The Female Body and the Law* (California UP 1988), 2–3: 'Just as biology is never devoid of its cultural definition and interpretation, so sex itself, as a biological entity, is partly defined in and through culture. And just as biological constitution is never irrelevant to the definition of individual identity, so gender is never completely distanced from biology. Biology is, in part, gendered—which is, in part, culture; and gender is, in part, biological—which is also, in part, cultural. [...] Gender is a mix of both woman's unique biological potential and its cultural reduction to her determined function.'

¹⁰⁷ On the concept, see H. Shue, *Basic Rights. Subsistence, Affluence, and U.S. Foreign Policy* (2d. ed. Princeton UP 1996), at 47.

¹⁰⁸ See C. Sunstein, *Free Markets and Social Justice*, *op cit* n 47, at 163.

from gender, however, in one important respect. They *merely* indicate deprivation. In their case, social disadvantage is not the unjust ‘price’ to be paid for the realisation of something that is also a source of self-esteem. In spite of this perspicuous difference, however, the analogy to the situation of women is nevertheless remarkable when one considers that the good of the victims of deprivation equally lies in maintaining the life of ordinary people. They make no special or exceptional claims. According to Littleton,¹⁰⁹ women are willing to pay an increasingly heavy price to maintain some socially female mode of being. They waive careers and stay at home. Similarly, those struggling to find a job in the future may spend a considerable part of their income and leisure on job-training and the development of skills, whereas those at the top of the professional hierarchy do not have to.

But is it not reasonable, on the other hand, to expect those whose jobs are in jeopardy to avoid unemployment through better training? I cannot answer this question here. I can only point to its intriguing quality from a philosophical point of view. In the perspective of *egalitarian liberalism*,¹¹⁰ the question concerns the social division of responsibility. For *cultural liberalism*,¹¹¹ it concerns the respect that is owed to other aspects of life that are not related to the job (love, adventure, poetry, family, aimless pastime, *etc.*). And it seems as if feminist legal theory (or, at least, a certain aspect of it) provides a key to exploring the problems underlying both perspectives. What matters, then, is to what extent the feminist rejection of accommodation can be *generalised* and whether there is reason to believe that we can transcend the level of *intuitive judgement* when it comes to identifying actual instances of overdetermination.

XII Opening Pandora’s Box

It should be clear that generalising the protection against overdetermination would cut deeply into existing institutions. It may require far-reaching corrections of social contexts that would reach well beyond the restitution of entitlements or the payment of compensation. The right to be free from discrimination would be transformed, to borrow Roberto Unger’s term, into a ‘destabilisation right’, for it would tie ‘the collective interest in ensuring that all institutions and practices can be criticised and revised to the individual interest in avoiding oppression’.¹¹² I am sceptical, too, that a philosophical theory could ever come up with a full scheme of the social division of responsibility, at least where it affects the respect that is due to culturally situated goods and pursuits. Rather, I assume that determining the latter without overdetermining persons presupposes a struggle over the construction of social meanings (such as the dichotomy between ‘self-less motherhood’ and the economically rational behaviour of breadwinners). To be sure, comparative arguments, such as arguments for equal treatment, play an important role here. Yet, the arguments that appear to be strong enough to rebut the presumption in favour of equal treatment are most likely to arise from *strong evaluations*. Even the assessment of burdens—in particular, in the context of trade-offs—is infused with an implicit recognition of cultural values. Thus, the struggle over the terms of social responsibility has the proper location in

¹⁰⁹ See *op cit* n 84, at 51.

¹¹⁰ See *supra* n 87.

¹¹¹ See *supra* n 102.

¹¹² R. Unger, *False Necessity: Anti-Necessitarian Social Theory in the Service of Radical Democracy* (Cambridge UP 1987), at 530.

politics—politics, not understood as a deficient mode of philosophy, but rather conceived of as a domain over which philosophy has no avail, since it is the sphere in which we create and recreate the social images of ourselves as co-operating members of society. Philosophy, to be sure, can help us to elucidate and clarify what is at stake here.

The legal protection against indirect discrimination may not cause any severe disruptions in the structure of economic and legal arrangements as long as its application is narrowly conceived and restricted to a certain sphere (such as employment and social security) and a certain group (women).¹¹³ On a limited scale, it can be contained. Extending it to an unlimited number of groups and universalising its relevance would, however, imply that almost any regulation or legal relationship could be subjected to equal protection scrutiny from almost any perspective.¹¹⁴ The constitutional protection against overdetermination can be extended only if its range of application—what I have referred to as its extension (IV)—is, at the same time, restricted. The tasks of extensional generalisation and containment cannot be handed over to a court of law. The question of whether, for example, senior citizens or members of the social underclass are eligible for full protection against discrimination, and in what respects, is clearly a matter of social and economic policy. A political agency ought to be in charge here. The ordinary political process, however, is, by its very nature, not sufficiently principled to direct its operation in the spirit of an application of the anti-discrimination principle, broadly understood.

There seems, then, to be a dilemma.¹¹⁵ If the full anti-discrimination principle is to be constitutionalised, it clearly requires rules exercising the higher law effect of modern constitutional law. At the same time, however, it should be clear that the scope of its full application is determined on the ground of far-reaching *political* choices—higher law-making processes, as it were. In other words, if we were to give effect to the full meaning of the equality principle, we would require *a constitution for anti-discrimination*. And in this context, it seems as if, surprisingly enough, the vanguard moment of the Community's equal protection law may even be reinforced by an interesting intellectual side-effect of European integration.

XIII Reaping the Benefit of Conceptual Disintegration

Any search for alternative institutional models has to begin with a sober reflection of what is already there. In the following, I should like to point out why the widespread belief that national polities have one consolidated constitution is misleading. Rather, we should commence with the premise of constitutional dualism. I shall briefly refer to the context of discovery that gives rise to this claim.

¹¹³ In order to avoid misunderstanding, I should add that affording women full and comprehensive protection against cultural and economic marginalisation would amount to a social revolution of its own, given the entanglement of gender with various instances of social disadvantage.

¹¹⁴ Consider claims such as the following: The right of the employer to terminate contracts is overinclusive with respect to employees who are over fifty, for it allows the former to discriminate against the latter. The right of parents to raise their children is overinclusive with respect to those children whose life is doomed owing to poor family upbringing. If government does not encourage investment in less affluent regions, people who live there suffer discrimination, for they are forced to move to some other place in order to make a living.

¹¹⁵ Unger refers to this dilemma as 'the missing agent problem'. See Unger, *op cit* n 60, 31–32.

In the last few years, there has been a growing debate over what the European Communities and the European Union are,¹¹⁶ and over what, in light of what they are, they ought to become in the future.¹¹⁷ There is common consensus that the Union and the Communities are something special. They are historically unprecedented.¹¹⁸ The Western type of constitutional democracy provides a major baseline for the comparisons that nurture this consensus.¹¹⁹

Paradoxically, the attempt to come to grips with the Communities, by highlighting the differences from the Atlantic nation state, has had a remarkable feedback effect on our received political vocabulary. Old master concepts have begun to erode. As Majone has convincingly argued, understanding regulatory growth in Europe presupposes 'unzipping' the received and consolidated concept of the state.¹²⁰ Then, it can be seen that while the coercive, macro-economic, redistributive functions of the state are still maintained at Member State level, the European Community has already realised a different type of statehood, albeit only in the narrow sense of a 'regulatory state'¹²¹ that responds to a limited set of public 'bads'.¹²²

The process of conceptual disintegration gives rise to an intriguing dialectic. Turning de-consolidated concepts back to the baseline from which they were originally taken, it can be discovered that what used to be conceived of as a single entity, namely the nation state, is probably better understood as having always been a mere conglomerate of various public functions. Obviously, the benefit to be taken from this dialectic is that political imagination is rendered more flexible when it comes to conceiving feasible institutional alternatives.

I assume that the same dialectical process informs our insight into the internal complexity of the concept of the 'constitution'. In the following, I submit that a certain type of constitutional dualism has been the hallmark of the modern Western European welfare state. Then, I would like to go on to explain that a constitution for anti-discrimination offers a promising route for transcending national dualism by lifting one of its main components to a higher constitutional plane.

XIV Pillars Undergirding a Roof before 1992: Liberty and Inclusion

The notion of 'dualism' has recently been introduced into constitutional law by Bruce Ackerman. In his path-breaking study *We the People*, Ackerman distinguishes

¹¹⁶ See, for example, von Bogdandi & Nettesheim, 'Ex Pluribus Unum: Fusion of the European Communities into the European Union,' (1996) 2 *European Law Journal* 267–289; Joerges, 'European Economic Law, the Nation-State and the Maastricht Treaty,' in: R. Dehousse (ed.), *Europe after Maastricht. An Ever Closer Union?* (Law Books in Europe 1994), 29–62.

¹¹⁷ For a brief overview, see Oliver Gerstenberg, 'Law's Polyarchy: A Comment on Cohen and Sabel,' (1997) 3 *European Law Journal* 343–358 at 346–349.

¹¹⁸ For a buoyant comment on the wide-spread obsession with novelty, see S. Puntischer Riekmann, *Die kommissarische Neuordnung Europas* (Springer 1998), 41–44.

¹¹⁹ The other baseline is, of course, international organisation. See Weiler, *loc cit* n 62, at 2410.

¹²⁰ Cf. Majone, 'Redistributive und sozialregulative Politik,' in M. Jachtenfuchs & B. Kohler-Koch (eds), *Europäische Integration* (Leske & Buderich 1996), 225–247 at 229.

¹²¹ For a characterisation of its most basic feature, that is, the response to market failure, see C. Sunstein, *After the Rights Revolution. Reconceiving the Regulatory State* (Harvard UP 1990), 47–55; Majone, *loc cit* n 120, at 239–240.

¹²² See Majone, 'Understanding Regulatory Growth in the European Community,' in D. Hine & H. Kassim (eds), *Beyond the Market. The EU and National Social Policy* (Routledge 1998), 14–35 at 30–31.

between three types of democracy: monist, rights-based and dualist.¹²³ Whereas monist democracy assumes that the core institution of ordinary representative democracy, *i.e.*, the parliament, is also the proper agent of constitutional reform, rights-based constitutionalism establishes limits on parliamentary democracy from the perspective of a pre-political system of rights. By contrast, dualist democracy rests on the distinction between the ordinary process of politics and an extraordinary process of higher law-making. According to Ackerman, the United States is an instance of dualist democracy.

The type of dualism that I have in mind is different—if not entirely different—from Ackerman's conception.¹²⁴ Traditional legal analysis assumes that states have only one constitution. It is tantamount to the higher law, which is formally labelled 'constitutional law'. I agree with Ackerman that this view is owing to a misleading obsession with legal form. In my opinion, modern European welfare states have, at least, two constitutions. The content of these constitutions is expressed in different types of laws. If one were to flirt with European terminology, one might even speak here of two 'pillars' undergirding the nation's roof.¹²⁵

First, there is the *constitution of liberty*. The allusion to Hayek's classic book is intended,¹²⁶ for this constitution is the constitution of liberal democracy. Parliament is the corporate body representing the people. The independent judiciary is in charge of upholding the rule of law and protecting liberties, notably private property and freedom of contract, against infringements by the state. Private law is the normal basis for governing the legal relationships between citizens. Constitutional law has to protect the integrity of pre-politically given rights and the autonomy of commercial ('civil') society.¹²⁷

Second, with the rise of the modern welfare state a different type of constitution emerges. Its development can be understood as a response to the problems posed by the constitution of liberty. In fact, this response is a reply to overdetermination. The basic normative idea expressed by it is that it cannot reasonably be expected that people will participate in a market economy unless there are safeguards against the risks created by the attendant mode of inclusion.¹²⁸ Therefore, I would like to refer to this second constitution as the *constitution of inclusion*.

To be a participating member of a society integrated on the basis of market relationships is to be in constant peril of being excluded from society¹²⁹ owing to contingencies such as accidents, illnesses, falling demand in the labour market, *etc.*

¹²³ See B. Ackerman, *We the People*, vol. 1: *Foundations* (Harvard UP 1992), 6–16, 266–290.

¹²⁴ I should mention, too, that it differs from what Robert Post has introduced under the name of 'constitutional domains' with reference to 'management', 'democracy' and 'community' as types of human ordering that are constitutive of the manifold meanings of basic rights. See, R. Post, *Constitutional Domains. Democracy, Community, Management* (Harvard UP 1995), especially 3–10.

¹²⁵ Such analogies to the structure of European institutions are not as far-fetched as they might appear. For my idea is that these two constitutions use the same institutional structure, just as the European Communities and the different pillars of the Union do.

¹²⁶ See F.A. Hayek, *The Constitution of Liberty* (Chicago UP 1960).

¹²⁷ For an account of the constitution of liberty, thus understood, cf, D. Grimm, 'Die Grundrechte im Entstehungszusammenhang der bürgerlichen Gesellschaft,' in *idem*, *Die Zukunft der Verfassung* (Suhrkamp 1991), 67–100 at 92–96.

¹²⁸ It goes without saying that the account of the welfare state offered here is indebted to François Ewald, *L'Etat Providence*.

¹²⁹ See Luhmann, 'Inklusion und Exklusion,' in *idem*, *Soziologische Aufklärung*, vol. 6: *Die Soziologie und der Mensch* (Westdeutscher Verlag 1995), 237–264 at 249–250.

Even though it is uncertain whether the risks associated with being in society will ever materialise, it is, nevertheless, certain that if they materialise, one will lose the capacity to participate. The mode of inclusion into society involves a *constitutive risk of exclusion*.

The constitution of inclusion is designed to neutralise the negative side-effect of a mutually beneficial mode of being in society (*i.e.*, a market economy) by insuring against the risk of dropping out of society at any *conceivable* point of time. Its temporal perspective is not restricted to the moment of an individual's fall, however. It is also directed at more or less equitable entry conditions (*e.g.*, public education, subsidies for families, *etc.*) and the continuous access to the society (*e.g.*, subsidisation of job-training and businesses, macro-economic policies). The constitution of inclusion promises social security for all in the sense that all are participating members in many different functioning units of society.

The relationship between the constitution of liberty and the constitution of inclusion is one of complementarity—and this may be one of the reasons why dualism has remained latent over a long period of time. Historically, the constitution of inclusion presupposes the expansion of the liberal polity. The latter, however, would be unstable if it were not supported by the substance and institutional scheme of co-operation supplied by the former. To be sure, the increase in government bureaucracy that goes along with developing the constitution of inclusion requires some adjustments in the liberal mode of interpreting the constitution. Government has to be invested with sufficient powers of regulation. The only way to deal with the demands of inclusion from the perspective of the constitution of liberty consists of restricting the effective scope of economic rights, such as freedom of contract.¹³⁰ Curbing the reach of economic liberties is one of the paths liberal constitutionalism has taken in the process of letting the constitution of inclusion grow. In addition, the modes of co-operation between private and public interest groups is grafted upon the formal rules of representation established by the constitution of liberty. As to the legal form in which its substance is expressed, namely administrative law, the constitution of inclusion differs from the constitution of liberty. Since it cannot succeed with grave provisions (such as one stating that no one shall be deprived 'of life, liberty, or property, without due process of law'), it is articulated in complicated insurance schemes and the attendant financing plans or the provision of public goods.

As the constitution of liberty yields, legislation—with the support of interest groups—builds up a different constitutional regime. Its point is not to protect society against government intrusion but to continue with social inclusion despite the very terms of social reproduction. Surprisingly, the basic components of this constitution echo what went under this name prior to the transformation of constitutional law into a formally 'higher' stratum of norm-production. Very much like the rights in sixteenth and seventeenth-century England, social insurance provisions are considered to be the 'inheritance'¹³¹ of the citizens of modern welfare states. The law is taken to be binding on future generations,¹³² for, otherwise, its purpose would be frustrated (*e.g.*, pensions). Therefore, it is indeed perceived as if its bases were a social contract among members

¹³⁰ See Ackerman, *op cit* n 123, 130.

¹³¹ See J.C.D. Clark, *The Language of Liberty 1660–1932. Political Discourse and Social Dynamics in the Anglo-American World* (Cambridge UP 1994) at 94.

¹³² See S. Holmes, *Passion and Constraint. On the Theory of Liberal Democracy* (Chicago UP 1995), 152–161.

of different generations. This type of social contract, however, differs from the one envisaged by classic empiricist philosophers. Rather than an unanimous expression of the mutual respect for equal liberty, it is a compact binding people together in mutual solidarity, people who see social co-operation among generations and from one generation to the next as a positive-sum game. Accordingly, the order of inclusion is seen as expressing the fundamental terms of our social existence. The terms of inclusion are a constant focus of public debate and civil attention—far more than traditional basic liberties. Thus understood, the collective organisation of modern social security is of a ‘constitutional nature’ in the very trivial sense that in the eyes of the citizens its existence is deemed to be fundamental.

XV The National Predicament

For the most part, the constitution of inclusion is the product of government co-operating with interest groups and political parties represented in parliament. The ordinary democratic process is expected to monitor the integrity of various schemes of entitlements by making them more efficient and by readjusting them to match budgetary constraints. Owing to their institutional role, (constitutional) courts review the rationality of such adjustments, protect legitimate expectations and demand that minimal standards be sustained. In principle, however, courts cannot move ahead by providing more than the legislature is willing to provide.

As has been pointed out, the provision of social security (in the broad sense of inclusion) is rooted in national solidarity or an ethics of nationality.¹³³ The interests of compatriots are assigned a special weight. Collecting taxes and granting transfer payments appears to be legitimate in the eyes of the taxpayers as long as the beneficiaries are members of the same national polity. This is, as it were, the *political limit* of this constitution. With the formation of new types of membership in the course of increasing migration,¹³⁴ (for example, the inclusion of foreign workers into social insurance schemes), this limit is becoming more porous.

In addition, the constitution of inclusion has its *economic limits*. The *internal* limit is set by conceivable strains on the national debt. This is an old story and it has resumed pressing relevance in the context of the Monetary Union.¹³⁵ The *external* economical limit has received more attention in the last few years. As the international mobility and concentration of capital increases, welfare states encounter increasing difficulties in protecting national economies against divestment and the vagaries of free trade.¹³⁶ National politics cannot but advise their people to readjust their behaviour and expectations to changed circumstances. However, what economists refer to as the ‘reallocation of resources’ is a painful process. But while people grumble, national politics is of little avail. The constitution of inclusion is about to reach its external economic limit.

¹³³ See Y. Tamir, *Liberal Nationalism* (Princeton UP 1993), 147–148; D. Miller, *On Nationality* (Oxford UP 1995), 70–73; Rhodes, ‘Defending the Social Contract. The EU between Global Constraints and Domestic Imperatives,’ in D. Hine & H. Kassim, *op cit* n 122, 36–59 at 40.

¹³⁴ See, for example, Y. Soysal, *Limits of Citizenship. Migrants and Postnational Membership* (Chicago UP 1994), 123–135.

¹³⁵ See F. Snyder, *EMU Revisited. Are we Making a Constitution? What Constitution are we Making?* (EUI Working Paper Law 98/6, 1998), 45–51.

¹³⁶ From the burgeoning literature, see L. Thurow, *The Future of Capitalism. How Today’s Economic Forces Shape Tomorrow’s World* (W. Morrow & Co. 1996) 115–138.

XVI A Very Bold Claim and Something Less Than That

For the sake of argument, I propose that what makes the European Community intriguing from the perspective of constitutional dualism is the fact that it has—at least to a certain extent—'federalised' the relationship between the constitution of liberty and the constitution of inclusion. Whereas the economic component of the constitution of liberty has been elevated to the federal level, the managing of the constitution of inclusion has been left to the Member States.¹³⁷

To be sure, this is a very bold claim and to defend it would require a whole list of detailed clarifications and modifications, in particular with respect to such areas as, say, agricultural policy or the progress made in the field of consumer protection.¹³⁸ But I do not want to defend this claim here; I have something different in mind. My reason for making this very bold claim is that it sets the stage for the introduction of a further claim that is, at least in my conceit, less than bold. It may be even trivial. It goes like this: since the federalisation of the constitution of liberty has been conducted in the context of what grew out of a special type of free trade regime, it contains the seeds for a constitution of anti-discrimination.

As is well known, free trade regimes are the consequences of the classical economic logic of mutual comparative advantage, which is perfectly congruent with the constitution of liberty.¹³⁹ Free trade regimes merely connect private law systems with one another as they are guaranteed by different constitutions. What has to be overcome for this purpose and, beyond that, for the creation of an internal market, is discrimination against foreign goods, services, establishments, traders and workers. It comes as no surprise then, that the EC's original constitution of anti-discrimination, at least before *Cassis de Dijon*, draws out the egalitarian implications of the constitution of liberty. The EC, as is well known, went well beyond a free trade regime. The internal market is not just a concatenation of different constitutions of liberty. It juxtaposes the constitution of liberty with the 'competition between legal orders',¹⁴⁰ which is aimed at selecting the least restrictive set of trading and mobility rules in the application of the country of origin principle ('derogations' notwithstanding).¹⁴¹ The internal market is not just the institutional vehicle for the optimisation of economic efficiency, it is also the means for maximising the economic component of the constitution of liberty within the sphere of this market. It comes as no surprise that, from the perspective of the constitution of inclusion, the constitution of liberty appears to be out of bounds.¹⁴²

¹³⁷ See Mestmäcker, 'On the Legitimacy of European Law,' (1994) 58 *Rechtszeitschrift für ausländisches und internationales Privatrecht* 615–635 at 629–630; for a critical discussion, cf, Gerstenberg, *loc cit* n 117, 348–349. See also, Rhodes, *loc cit* n 133, 46.

¹³⁸ For a very sober and balanced account, see Joerges, 'Das Recht im Prozeß der europäischen Integration. Ein Plädoyer für die Beachtung des Rechts durch die Politikwissenschaft und ihre Beteiligung an rechtlichen Diskursen,' in: M. Jachtenfuchs & B. Kohler-Koch, *op cit* n 120, 73–108 at 69.

¹³⁹ For a historical account, see D. Irwin, *Against the Tide. An Intellectual History of Free Trade* (Princeton UP 1996), 93–96.

¹⁴⁰ See Reich, 'Competition between Legal Orders: A New Paradigm of EC Law?,' (1992) 12 *Common Market Law Review* 861–896

¹⁴¹ See Behrens, 'Die Konvergenz der wirtschaftlichen Freiheiten im europäischen Gemeinschaftsrecht,' (1992) 27 *Europarecht* 145–162 at 148–150.

¹⁴² See Streeck, 'From Market-Making to State-Building? Some Reflections on the Political Economy of European Social Policy,' in S. Leibfried & P. Pierson (eds) *Fragmented Social Policy. The European Union's Social Dimension in Comparative Perspective* (Brookings Institution 1995), 389–431.

However, owing to its origin in a free trade regime, the EC has a strong commitment to equality. Not surprisingly, from its inception, European social policy was aimed at protecting equal opportunity and the social insurance benefits of market participants.¹⁴³ Article 6a (now 13) of the EC Treaty promises a move beyond that, even if the focus is still on the all-too-familiar instances of humiliation (race, sex, ethnicity, religion, but also age and sexual orientation) and the competence of the Council is restricted to the powers conferred on the Community by the Treaty. However, given the profound and well-grounded scepticism with respect to a future transformation of the Community into a full-blown welfare state of its own,¹⁴⁴ my belief is that Europe could become the platform for constructing a constitution of anti-discrimination. Such a constitution would have to resolve the conflict between the different visions of equality inherent in the constitutions of liberty and inclusion. It could establish common standards of social policy by protecting groups that are particularly vulnerable, for example, to the effects of growing capital concentration and job fluctuation,¹⁴⁵ and would thus curb the operation of free market dealings. Thus, it could erect a barrier against instances in which discrimination appears to be *rational* from an economic point of view.¹⁴⁶

XVII The Range of Antidiscrimination: From Social Policy Regulation to Radical Democracy

At present, the constitution of inclusion is striking at its own limits. The creation of a European Welfare state appears not even to be desirable. Why should the European Community not be acting on behalf of a more fully developed egalitarian ideal? Almost all of the institutional prerequisites for the appropriate division of labour between the supranational and the national level are already there. On the basis of the Treaty, to which this or that amendment might be necessary, the Community could issue directives whose transposition would be monitored by the Court.

A whole range of options for bringing a constitution for anti-discrimination about can be imagined. I would like to point briefly to a more restricted and a more perfect variant.

By elevating the concern for equality—in the sphere of political economy—to the supranational level and by thus overcoming constitutional dualism, the creation of a *more restricted* constitution for anti-discrimination is neither a fantastic nor a revolutionary project. Since the protection against overdetermination is sensitive to contextual factors, legislation need not even assume the usual format of anti-discrimination laws. One could begin here and now, on a very limited scale, for example, by protecting the expectation of senior workers to receive their full life-time salary; or by responding to the social hazards involved in new types of work, such as part-time work, fixed-term contracts, temporary and seasonal work etc.;¹⁴⁷ or by forcing firms to co-operate with governments on the level of vocational retraining programmes; or by moving toward a new deal for work on the basis of maximum hour legislation. Countless instances can be imagined in which European policy entre-

¹⁴³ See Hine, 'Introduction,' in *idem* & H. Kassim, *op cit* n 122, 1–13 at 5.

¹⁴⁴ See Majone, *loc cit* n 120, 234–135; Rhodes, *loc cit* n 133, 46, 55–56.

¹⁴⁵ For a diagnosis, see A. Schubert, *Der Euro. Die Krise einer Chance* (Suhrkamp 1998) 81–82.

¹⁴⁶ See *supra* n 78.

¹⁴⁷ See on that issue, 'A Manifesto for Social Europe,' (1997) 3 *European Law Journal* 189–205 at 195.

preneurs¹⁴⁸ would be in a position to advance a constitution for anti-discrimination on a limited—although, not necessarily ineffective—scale.

It may well be the case, however, that the experience with such measures would show us that they cannot do more than scratch the surface of the existing social arrangements.¹⁴⁹ Despite all the efforts, people would remain locked into situations of social disadvantage. At this point, a *more perfect* variant of a constitution for anti-discrimination would have to dig deeper into those formative contexts of social life¹⁵⁰ that are the very source of economic deprivation and political disempowerment, such as the hierarchical segmentation of the labour force, the growing concentration of capital which is accompanied by a severe reduction in the number of jobs, the social and cultural hierarchy of the school system, systems of taxation devoid of distributive effects, the disproportional representation of citizens' needs given the prevalence of organised interests, *etc.*¹⁵¹ Modifying such structural features would require, first, more extensive programmes for, and more elaborate visions, of an egalitarian society, and, secondly, fairly sweeping regulatory powers. It is not a lack of vision that is blocking the road to social change. More or less specific visions virtually abound. They range, for example, from granting the greatest possible unconditional basic income,¹⁵² through ideas for a 'coupon economy',¹⁵³ to the decomposition of traditional property rights in the political economy of an empowered democracy.¹⁵⁴ At bottom, the problem is as trivial as it could possibly be, namely lack of political will.

The realisation of both variants of a constitution for anti-discrimination, that is, in its more restricted and its more perfect form, presupposes overcoming the Community's notorious 'democracy deficit'. It has been argued that as a normative concept such a deficit exists only in the light of what appears to be the desirable goal of the integration process.¹⁵⁵ This is undoubtedly true. It must not be overlooked that addressing the democracy deficit as if it were a natural quality (a 'structural feature') of the Community's constitution is the strategy of those wishing to pursue limited political goals with integration, such as overcoming regulatory failure and the technocratic depoliticisation of the political economy.¹⁵⁶ Again, the lack of political will accounts for the fact that no progress is being made, although, seen from an institutional perspective, to make a great deal of progress here would be very simple.

On the level of Community law, the lack of will translates—borrowing Ackerman's term—into the absence of a higher law-making moment.¹⁵⁷ In French constitutional parlance, the European Community and, by implication, the European Union, have no democratic *pouvoir constituant*. The ratification of Treaty revisions by the parliaments of single Member States does not confer the democratic legitimacy that

¹⁴⁸ See Majone, *loc cit* n 122, 24–26.

¹⁴⁹ For that reason, Unger considers substantive equal protection to be an 'aversive therapy for the ills of industrial democracy'. See *idem*, *op cit* n 60, 82.

¹⁵⁰ On the notion of formative contexts, see Unger, *op cit* n 122, 58–60.

¹⁵¹ See Unger, *op cit* n 60, 95–96.

¹⁵² See P. van Parijs, *Real Freedom for All. What (If Anything) can Justify Capitalism?* (Oxford UP 1995).

¹⁵³ See J. Roemer, *A Future for Socialism*, *op cit* n 88, 60–74.

¹⁵⁴ See the most recent restatement by Unger, *op cit* n 46, 273–275.

¹⁵⁵ See Majone, 'Europe's 'Democracy Deficit': The Question of Standards', (1998) 4 *European Law Journal* 5–28; Weiler, 'Europe: The Case Against the Case for Statehood', (1998) 4 *European Law Journal* 43–62 at 60.

¹⁵⁶ See Majone, *loc cit* n 122, 20–21; *idem*, *loc cit* n 155, 14–15.

¹⁵⁷ See Ackerman, *op cit* n 123, 216–221.

would be required for the more ambitious investments in antidiscrimination, that would follow, for example, from a common European referendum or from the resolves of a Convention Parliament that has been democratically elected for the purpose of debating and deciding important constitutional questions.

XVIII Conclusion

It is a mistake to suppose that democracy is radical only if it builds on widespread direct participation. Democracy is radical only if it goes to the root of existing social problems and confers on those who were left in a powerless position the power to resolve these problems.¹⁵⁸ Today, a Bill of Rights no longer arouses much interest, let alone popular excitement. There are too many of them, and some contain too many promises. If the Community decided to adopt its own Bill of Rights or to accede to the ECHR, this would hardly reverberate in the minds and hearts of ordinary people. On the other hand, a selection of groups and instances of antidiscrimination, broadly understood, most likely would do. Thus understood, the broader vision of a constitution of antidiscrimination could also provide the trajectory for what might then well be a radical democratic transformation of European integration.

¹⁵⁸ I. Shapiro, *Democracy's Place* (Cornell UP 1996), 50.