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Alexander Somek, Neoliberal Justice
The Problem of Anti-Discrimination Law

[translated by Martin Voelker]

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I. Definition

'Anti-discrimination law' is usually defined as an area of law that prohibits discrimination in a determined field of the private-autonomous shaping of law or of interpersonal interaction.[1] For instance, it is due to anti-discrimination law that an employer is not allowed to discriminate against women with regard to promotions. The sanctions that are provided by anti-discrimination law are either based on private law (compensation claims, nullity of redundancies) or on public law (fines).

Last but not least, it is down to European Community law, and to the case law and the legislation under Article 141 (former 119) EC in particular, that the anti-discrimination law in its current shape became part

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[1] Cf. merely Christopher McCrudden, Introduction, in: same author (ed.), Anti-Discrimination Law, Aldershot 1991, xi-xxxi.

of the European legal culture.[2] The anti-discrimination law in the United States of America is based on a more long-standing tradition. It plays a significant role in the context of American labour law, since it compensates in some ways for the lack of rules in the field of social protection.[3]

Anti-discrimination law is based on a *fundamental differentiation*. It consists of the fact that certain subjects in specific contexts are subject to relatively stricter equality requirements than other subjects. The differentiation is made in so far as the attitude of the addressees in such contexts provides a fundamental indicator with regard to the social distribution of goods and burdens. The resulting emphasis on a social position can only refer to those subjects who have a significant influence [46] on the distribution (such as employers). Beyond, this emphasis can also be combined with a reference to the goods that are ready for distribution (for example you may think of the renting of living space).

Hence, there is an important distributive dimension of anti-discrimination law. It is a question of equality as an individual right to be free from discrimination, when it comes to social cooperation and the distribution of important goods.

II. Inclusive and exclusive reasons

The right to equality is based on a statement that refers to two types of reasons.[4] While the first type allows for the justification of an unequal treatment, the second type excludes any justification. Hence, there are *inclusive* reasons on the one hand and *exclusive* reasons on the other hand. Inclusive reasons have their origins in the structure of rational behaviour. They state that an unequal treatment is justified if it benefits the realisation of a legitimate (non-discriminatory) objective. Exclusive reasons exclude justifications for unequal treatment if the imposition of a disadvantage has a humiliating effect. In this comparative context, a humiliation always occurs if the person concerned suffers a disadvantage that cannot be

[2] Cf. Evelyn Ellis, EC Sex Equality Law, Oxford 1998.

[3] Cf. also McCrudden, Introduction, l.c.

[4] Cf. also Alexander Somek, Equality and Constitutional Indeterminacy. An Interpretative Perspective on the European Economic Constitution, in: European Law Journal, 7 (2001), 171-195, here: 178.

attributed to the person's sphere of responsibility.[5] Therefore the protection against discrimination requires the determination of the zone that cannot be attributed to a person's sphere of responsibility in relation to adjustment performances that rational people can expect from other individuals in order to be free to pursue their own purposes.

Inclusive and exclusive reasons are related to each other. The normative core of anti-discrimination law has its roots in this relationship.[6] The determination of this relationship defines the content of the protection against discrimination. To begin with, this content concerns the question to which degree the rational behaviour of *other people* must be borne. For example, one may tolerate people acting on the basis of stereotypes. Perhaps the reason is that they consider it worthwhile to live according to a stereotype, even if they do not manage to live up to it. It can also be rational to accept unequal treatment. This is exactly the idea of the Rawlsian difference principle. For those who have a lower economic capacity than other people, it can be rational to be disadvantaged in relative terms, if they are better placed with social inequality than without it.[7]

There is a noteworthy depth dimension to the definition of the relationship between rationality and discrimination, which constitutes a fundamental pillar of any protection against discrimination. The social determination of adaptability also gives rise to the question of the degree to which one accepts, or must accept, one's *own* rational [47] behaviour. It is a question of the appropriate level of self-disposal that one imposes on oneself and other people. From an anti-discriminatory point of view, the institutions can be *neutralised*, depending on how this level is determined. From a conceptual perspective, every fundamental social structure involves a *decision* on which type of discrimination is considered as acceptable or unacceptable.[8] This fact is linked to Plato's finding, still valid today, that constitutions differ from each other according to the type of person that

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[5] Cf. Alexander Somek, Rationalität und Diskriminierung. Zur Bindung der Gesetzgebung an das Gleichheitsrecht, Vienna 2001, 380, 386.

[6] Cf. ibit. 391-392.

[7] This situation does not change if you, like Cohen, interpret the concept of basic structure in an extensive way and include the 'ethos' of a society. Cf. G. A. Cohen, Where the Action Is: On the Site of Distributive Justice, in: Philosophy & Public Affairs, 26 (1997), 3-10, here: 28.

[8] Quite similar in this regard: Ronald Dworkin, Sovereign Virtue. The Theory and Practice of Equality, Cambridge/Mass. 2000, 282.

they deem applicable to them.[9] The traditional welfare state can also be analysed against the background of a neutralisation performance. After all, the receipt of benefits generally implies the willingness to work. Those who are not willing to work are not considered as being discriminated against.

Two languages can express the task of the protection against discrimination in terms of the determination of the relationship between rationality and discrimination. These languages attribute, in different ways, a normative content to the right to equality. The first language consists of the distributive language of the theory of social justice.[10] It belongs to the field of political philosophy and deals with the distribution of social goods. [11] The second language has its origins in the deontological perspective of legal thinking.[12] Its purpose lies in the observation of human behaviour and the assessment of the responsibility for the consequences that are linked to the latter.

In the introduction I mentioned that the fundamental differentiation of anti-discrimination law is based on a distinction that indicates an intrinsic distributive dimension. Therefore, I will start with the distributive language.

III. The distributive language

The theory of social justice deals with equality in relation to the basic structure of society. It is dedicated to fundamental institutions that organise the social collaboration and the design of the rights and duties relating thereto. Equality is significant with regard to the *relative position*

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[9] Cf. Platon, Politeia, 544d-e, dt.: O. Gigon, München 1974, 398.

[10] This refers to a type of Rawlsian theory that perceives society as a system of cooperation. According to this theory, the problem of social justice is linked to a fair distribution of the returns and costs of social cooperation.

[11] Cf. with regard to political philosophy as the attempt to draw the attention in politics to the philosophical thought: Leo Strauss, On Classical Political Philosophy, in: The Rebirth of Classical Political Rationalism. An Introduction to the Thought of Leo Strauss, ed. T. Pangle, Chicago 1989, 49-63.

[12] Cf. preferably: Leo Katz, Ill-Gotten Gains. Evasion, Blackmail, Fraud, and Kindred Puzzles of the Law, Chicago 1996.

that a person holds within this structure.[13] In this context, it is irrelevant whether a person has obtained this position due to discriminatory actions or not. Yet, it is essential that the positions in relation to each other [48] must not be designed in a way that allows for the systematic imposition of disadvantages on people who are not accountable for these drawbacks.[14]

Systematic disadvantages occur for different reasons. They can be based on social prejudices that are systematically reproduced[15], or they are the result of fundamental rules that form the basis of social cooperation. These reasons are generally insignificant for the assessment of the distributive question. However, they can be of importance if it is a question of dealing with the adequate determination of the position of disadvantaged groups. Apart from that, a distributive approach raises the question whether individuals can be expected to make a personal effort to avoid the acceptance of a relatively disadvantaged position within an existing basic structure. If this is not the case, such a position must not exist.

Since the distributive perspective essentially focuses on the reasonableness of one's own efforts, certain expectations correspond to the rules of the basic structure. Following Rawls, they can be referred to as *social division of responsibility*.[16] The social division of responsibility determines the conditions under which people have to bear social disadvantages without the community being obliged to compensate for the latter. Therefore, a person with great mathematic capabilities that allow him/her to take a well-paid position in the social division of labour, but who prefers to make a living as a busker, has no right to complain about his/her comparatively low income. This applies at least as long as it is more advantageous for everybody in the framework of social collaboration that mathematicians have a more considerable income than buskers.

IV. The deontological language

The deontological language focuses on the assessment of behaviour. From a deontological point of view, it is the specific purpose of rules to prohibit certain behaviour regardless of the significance or the negligibility of the

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[13] Cf. John Rawls, Eine Theorie der Gerechtigkeit, Frankfurt/M. 1975.

[14] Cf. in this regard the well-known work by Ronald Dworkin, l.c., 297.

[15] Cf. the analysis: Cass Sunstein, Free Markets and Social Justice, New York 1997, 151-166.

[16] Cf. John Rawls, Political Liberalism, New York 1993, 189.

consequences.[17] You must not kill. You are not allowed to kill, because this entails severe consequences for the person killed. You are not allowed to kill, because it is *wrong* to kill a person. It is wrong, since nobody has the right to decide on the life of another person.

The addressee of a prohibition must not impose a certain course of conduct if that conduct indicates a lack of respect for the victim. The claim that a prohibited behaviour was imposed can only be put forward under the condition that the addressee wanted the prohibited behaviour to take place or accepted its effects. Otherwise the scorned signal effect would stay out. Thus the identification of *reasons* for the behaviour is essential for the deontological approach.

For the articulation of the right to equality, this implicates that a discriminatory act is prohibited regardless of the significance or negligibility of its consequences. Yet, it also means that the discrimination only has to be accounted for if the addressee of the ban on discrimination has the undisputed [49] suspicion that he/she has attributed a lower value to one person than to another person. The focus lies on the unequal treatment in the shape of a humiliating act. The execution of a discriminating act requires the actor to consider the discrimination to be a *reason* to act.[18]

The *responsibility for distributional consequences* becomes relevant in a way that differs from the distributive perspective. The question is whether discrimination is executed as an act of unequal treatment. The deontological perspective focuses on the responsibility for the effect that the behaviour has *on others.* If the distributive perspective refers back to responsibility, it deals with the effects of the behaviour on the actor's social position.[19]

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[17] Cf. Thomas Nagel, The View from Nowhere, Oxford 1986, 176.

[18] With regard to the attribution of reasons of behaviour cf. Thomas Nagel, The Possibility of Altruism, Princeton 1970, 47-48, 120, 129.

[19] In this context, it is obvious that the less someone can be held liable for her/his actions, the more free he/she is. For a related distinction between two types of responsibility that is, however, based on the temporal dimensions of behaviour, cf. E. Goodin, Social Welfare as a Collective Social Responsibility, in: D. Schmitz/R. E. Goodin, Social Welfare and Individual Responsibility, Cambridge 1998, 97-196, here: 150.

V. The unity of anti-discrimination law

The above-mentioned reflections served as a preparation to precisely grasp the unity of anti-discrimination law. It is the result of the intrinsic attempt of anti-discrimination law to translate the distributive perspective of the theory of justice into the deontological language of law. This *translation function* is ambiguous. The translation is successful with regard to 'direct discrimination'. Yet, it fails in the opposite case of 'indirect' discrimination. This raises a problem.

Anti-discrimination law cannot be based on a single pillar. The protection against direct discrimination must be complemented by the protection against indirect discrimination. Otherwise, it could be easily undermined. However, indirect discrimination lacks the distributive rule that is characteristic for translation. Therefore, the use of anti-discrimination law can be assimilated to the social division of responsibilities in a market economy. With regard to anti-discrimination law, this means that its use necessarily fuels the suspicion of being a neo-liberal and hence blunt instrument of welfare policy.

The following explanations of this contribution are dedicated to this problem. The following section can be considered as a guideline. The explanations must not be understood as premises of the further analyses. They rather sum up the results of the latter.

VI. Translation – Incompleteness – assimilation

It is due to the translation function of anti-discrimination law that, from a normative point of view, the distributive function of the protection against discrimination must constitute a liability. Undoubtedly, this represents a paradox. In order to fulfil its distributive task, an act, for which no one can be held responsible from a deontological perspective, has to be considered as individual wrongdoing in the framework of [50] anti-discrimination law. The reason is obvious. The theory of justice addresses „society as a collective body"[20]. It does *not* directly address certain social function holders within an established, basic structure. The translation into the deontological idiom must remove this uncertainty. Anti-discrimination law uses its addressees as *distribution agents* by creating liability and

[20] Cf. John Rawls, Eine Theorie der Gerechtigkeit, l.c., 189.

responsibility rules to justify the worse treatment of certain people.[21] Those people who could be negatively affected by the behaviour of these agents, but do not have the social power to avoid this behaviour, are their *clients*. The significance of 'direct discrimination' lies in nothing other than this translation function.

Discrimination bans encourage people who act rationally to circumvent them. As a countermeasure, the protection against direct discrimination must be complemented by the protection against indirect discrimination. Yet, this complementarity only emphasises the *incompleteness* of the translation of distribution and liability issues. The translation of distribution and liability questions could only be carried out in full, if the extent of the responsibility of the distribution agents was clear. In this context, anti-discrimination law lacks a principle that exceeds the ban on direct discrimination. The importance of 'indirect discrimination' lies in its intrinsic puzzle. At this decisive point, which is of crucial importance for its success, anti-discrimination law lacks a distributive rule.

This reveals the conservatism of this field of law. It is an instrument of market correction. This requires that anti-discrimination law does not question the market as distribution mode. It is hence not by coincidence that, in the context of the assessment of cases of indirect discrimination, due to the lack of clear distributive rules, that form of social division of responsibility takes possession of anti-discrimination law, which is not unusual for market transactions. It reduces the claim of the theory of justice, that is systematically anti-discriminating, to the observation of the *behaviour* of certain distribution *agents,* which are considered as rational actors in a market economy. Therefore, the exclusive reasons (i.e. the reasons for anti-discrimination) can be adapted to this context. This renders the field of inclusive reasons expandable in principle. This can especially be observed in a social world like ours, in which adaptability is considered and experienced as virtue.[22]

The following analysis of the basic principles of European anti-discrimination law in relation to labour law will confirm these observations.

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[21] Cf. John Gardner, Liberals and Unlawful Discrimination, in: Oxford Journal of Legal Studies, 9 (1989), 1-21.

[22] Cf. Alexander Somek, l.c., 407.

VII. Direct and indirect discrimination

European Community law has two scopes of application with regard to the protection against discrimination in labour law. The gender-based equal treatment is stipulated in [51] Art. 141 of the EC Treaty and specified by directives. The further reaching realisation of equal treatment in employment and work is based on Art. 13 of the EC Treaty and is regulated in the European Framework Directive for equal treatment in employment and occupation (2000/78/EC Council of 27.11.2000). Beyond the field of work and employment, Council Directive 2000/43/EC of 29.06.2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (cf. lit. e-h of Art. 3, leg. cit.) includes the protection against discrimination in areas such as social benefits or education.

By referring to the case law of the European Court of Justice (ECJ), both new directives distinguish in Art.2 between direct and indirect discrimination. Both types of discrimination are inadmissible due to the so-called *principle of equal treatment*, that is content-wise restricted to the regulation of these discrimination bans. A *direct* discrimination occurs, where one person on the grounds of reasons that are explicitly excluded by the principle of equal treatment (race, ethnic origin, religion, belief, disability, age, sexual orientation) 'is treated less favorably than another is, has been or would be treated in a comparable situation'. In contrast, an *indirect* discrimination occurs, where an apparently neutral provision, criterion or practice would put persons, who feature a taboo characteristic, at a particular disadvantage compared with other persons. With regard to indirect discrimination, as a result of its definition amongst other things, it is emphasized that the suspicion of discrimination is not substantiated if that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

It is striking that the legally significant distinction between direct and indirect discrimination takes place at a very early stage on the definition level. While the definition of direct discrimination gives the impression of being subject to a strict rule (according to Art.4 of the quoted directive, exemptions can be provided by law with regard to occupational requirements), the definition of indirect discrimination is subject to a necessity test.

VIII. The enigma linked to direct discrimination

Hence the difference between direct and indirect discrimination seems to be clarified. As long as it is not a question of an occupational requirement that is stipulated by law, direct discrimination is prohibited. A direct discrimination occurs where, due to a characteristic or feature that is referred to in Art. 1 of the respective directive, one person – even if only on a hypothetical basis – is treated less favourably than another person that is in a comparable situation, but does not have this characteristic or feature. Therefore, it should be possible to imagine a simple case that demonstrates how an employer behaves, when he or she discriminates against a person on the grounds of race, ethnical origin, religion, belief, disability, age or sexual orientation.

The following description represents such a case. The operator of a bar advertises a job and states in the advertisement that he does not want to employ 'gays'. There is barely a more direct and awkward way of discrimination. It is obvious that the bar operator does not want to employ people on the ground of their homosexuality. This is a paradigmatic case of direct discrimination.

[52] However, at a second glance, it can emerge that the barkeeper behaves in a completely rational way and that his actions are not based on an aversion to homosexual men. Let us assume that the barkeeper is worried about his business. His regular customers are paunchy men that enjoy telling dirty jokes. They would certainly not welcome being served by a 'fagot' or would enjoy humiliating a homosexual waiter. In the first case, the older, more experienced men would go to another bar; in the second case, the atmosphere would be unbearable. The reason for the barkeeper's discriminating behaviour lies therefore not in the sexual orientation of potential employees. He acts solely on business grounds. He takes the customers' preferences into consideration. If this attitude were a taboo, the market economy would not exist. The barkeeper cannot be held liable for the fact that these preferences are the way they are. Therefore, the discrimination on the grounds of sexual orientation only *indirectly* represents the reason for his behaviour. The barkeeper considers the sexual orientation of an employee, since it is with regard to the customers' preferences a factor that has to be taken into account when planning the operating result. Against this background, would it not be more appropriate to speak of an indirect discrimination, although the barkeeper advertises that 'gays' are not welcome as employees?

IX. Indirect indirect discrimination

According to the legal definition, indirect discrimination always (and only) occurs, where the use of apparently neutral criteria results in the fact that a person with a certain feature or a certain characteristic is on a real or hypothetical basis treated less favourably than another person. Yet, the explicit exclusion of male homosexuals from an occupation is not based on the use of a neutral, but scorned criterion. Therefore, we cannot speak of indirect discrimination.

However, the barkeeper could still claim that his hiring criterion serves as a mere replacement for 'neutral criteria'. The neutral criteria are the business result and the work atmosphere. What looks like an indirect discrimination, must therefore be considered a indirect indirect discrimination. The link to the scorned characteristic is a way to realise an indirect – since it is focused on the business result – discrimination. Yet, indirect indirect discrimination is not prohibited.

This claim reveals the key problem, for indeed direct discrimination can be represented as indirect indirect discrimination in the framework of the determination of the relation between rationality and discrimination (see above II.). This is possible, but does not mean that the direct discrimination is identical to the implicit indirect negation. From a rational point of view, any direct discrimination can *principally* be considered as indirect indirect discrimination. This is because the feature (such as race or gender), to which the discrimination is linked, serves as an *extensional predicate*.[23] Its use ensures that recipients of the [53] distinction cannot elude the discriminating behaviour. The unequal treatment achieves its (generally permitted) aim.

It is important to respect the restriction that was mentioned above. The conversion of a direct discrimination into an indirect indirect discrimination requires that the set behaviour is considered as rational behaviour. A direct discrimination only occurs suddenly, if it is irrational. It occurs, if a carrier of certain characteristics or features is readily treated less favourable. The discrimination is based on groundless rejection. While irrational discrimination may be socially widespread, it is of no interest from a procedural perspective. If someone must defend himself against the accusation of discrimination, rationalisations represent the background music of any discrimination.[24]

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[23] Cf. Alexander Somek, l.c., 395-397.

[24] For a case study, cf. Elisabeth Holzleithner, Gleichbehandlung an den Universitäten, in: Christine

X. Two reasons for the protection against direct discrimination

Yet, the significance of the protection against discrimination is obvious in both cases. First of all, the perpetrators of irrational discriminations can be subject to the pressure to justify their behaviour. Secondly, the use of extensional predicates is precarious, because the victims cannot avoid the discriminatory behaviour (or only by dissimulation or social ducking). The respective characteristics feature their immutable nature. You do not choose your sexual orientation. You discover it (sooner or later). However, from a rational point of view, these features (or characteristics) are not a reason to disparage their carriers. If irrationality does not prevail, then people with dark skin are not discriminated against, because they are 'black'. For example, people avoid contact due to the assumption that small children are afraid of people with dark skin. This is a discriminatory reason. In the example, it is based on a stereotype. The use of a stereotype allows discriminatory behaviour to form an exemption that represents itself with a claim of rationality. The protection against discrimination addresses this claim amongst others and examines whether it exists rightly.

From a rational point of view, a direct discrimination only takes up a scorned feature, because it is *more* suitable than another, 'apparently' neutral criterion to pursue a purpose that is not intrinsically discriminatory. Direct discrimination represents 'proxy discrimination'.[25] It refers to a feature in order to indicate a different characteristic, which is significant for the distinction. To the extent that direct discrimination proves to be more accurate than indirect discrimination, it is more rational by comparison.

With regard to its representative function (e.g. 'sexual orientation' standing for 'bad for business') the feature used is even neutral. It is only 'apparently' not neutral.

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XI. Direct discrimination as reflexive category

In the guise of rational discrimination, direct discrimination is categorically deprived from the protection against discrimination. When

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Goldberg/Sieglinde K. Rosenberger (ed.), Karriere Frauen Konkurrenz, Innsbruck 2002, 191-204.

[25] Cf. preferably Deborah Heilman, Two Types of Discrimination: The Familiar and the Forgotten, in: California Law Review, 86 (1998), 315-361, especially 334-335.

considered against the background of the distinction between rationality and discrimination, it disperses. Therefore, direct discrimination as a category can only be considered as the answer to the problem that is caused by indirect indirect discrimination. There is nothing direct about it.

This reflection may reveal an essential purpose of anti-discrimination law. Employers can *even then* be held liable for the discrimination of black people or homosexuals, if their behaviour represents an indirect indirect discrimination. This is evident in those cases where prejudices of consumers and clients are indirectly affirmed by rational behaviour. The foreseeable attitude of the barkeeper's guests is characterised by homophobia. There are no objective grounds for this. The same applies to small children, who are afraid of people with dark skin.

The anti-discrimination law has no choice but to start with ingrained expectations and groundless prejudices of third parties. If those were constantly affirmed by the behaviour of distribution agents, then homosexuals and black people would never be able to assert themselves and to be respected within society. A single interruption in a significant place can dissolve the systemic web of discriminations. The objective of anti-discrimination law can be achieved by compelling people, who are strongly prejudiced, to associate with those, who were the victims of their preconceptions to this day. The objective is to guarantee everybody's equal participation in a social cooperation.

In light of the determination of the relation between rationality and discrimination (see above II.), this means that the protection against discrimination is *prioritised* with regard to the respect of rational behaviour. The term 'direct discrimination' describes this priority. Without it, the right of equality would be *meaningless*.[26] Its importance depends on the precondition that certain reasons for rational behaviour are excluded due to their discriminatory content.

XII. The distributive dimension and the content of the principle of equality

The above-mentioned translation is successful. The category of direct discrimination highlights the distributive dimension of anti-discrimination law in its deontological guise. In the framework directive (in paragraph 9 of the preamble), this dimension is clearly expressed. Employment and occupation are described as key elements 'in guaranteeing equal opportunities for all and contribute strongly to the full participation of

[26] Cf. Alexander Somek, l.c., 317, 356, 359, 391-392.

citizens in economic, cultural and social life and to realising their potential'. The inclusion of the addressees of the protection against discrimination, that appears to be implicit, can be seamlessly reconciled [55] with the social division of responsibilities, as it is perceived by the theory of justice. There is no reason why people should accept a social disadvantage due to existing racist or homophobic prejudices. The same applies if the less favourable treatment is merely based on a rational consideration of such prejudices. From a distributive perspective, the protection against direct discrimination cannot be criticized. The rational consideration of prejudices is illicit. This is the content of the right to equality that the directives describe as the 'principle of equal treatment' (Art. 1, leg. cit.).[27]

As regards content, the principle of equal treatment as a prohibition of direct discrimination for the distribution agents means nothing other than the fact that they are collectively obliged to make an appropriate contribution in the fight against systematic discrimination. The obligation applies to all of them, since it concerns everybody personally. Since it does not become obsolete as a consequence of the consumers' preferences, the distribution agents carry a financial and pedagogical burden in relation to the latter. The distribution agents must take responsibility as the consumers' teachers. The *attitudes* of the members of society are supposed to change by accepting the clients of anti-discrimination law as employees. On the grounds of changed attitudes, the social position of these clients is supposed to improve in the long term. In a society, in which social goods are attributed due to voluntary transactions, this seems to be the only way to arrive at a situation of equal participation for everyone.[28]

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[27] The principle of equality focuses on the fact that the distribution agents' attitude must not obstruct the equal access of clients of the protection against discrimination to social positions. There is a good reason for this. There is barely a more appropriate field to interrupt the circuit of the social confirmation of prejudices than the field of employment. Employment and the participation in social life, that goes along with it, belong to the goods that everyone wants to have, irrespective of what else people may want apart from this. Equal opportunities in terms of access are important. It is not an acceptable alternative to deport people of a different colour and homosexuals to islands, where they can lead a comfortable life.

[28] A change of the distribution of resources can lead to a change of attitudes. It is well known that wealth can replace education or personal style as source of social recognition. In newspapers, there is abundant information about gross people. Law can tie in with social mechanisms of

XIII. Incompleteness

With regard to its form, the decentralised value assessment on markets is the same as under social discrimination. Anti-discrimination law tries to avoid the occurrence of the latter. If, due to his complexion, A is perceived as better looking than B by the public, the designer will rather hire A than B as a model, merely because the consuming public prefers A to B. The public does not have to justify its preference. The market economy requires everybody to be adaptable *except for* consumers where their preferences are concerned. However, they have to accept to be manipulated by the suppliers. But they do not really care, since they are poised to perceive their desires as given.

[56] Besides, adaptability represents the cast-iron law of survival in the market economy. The anti-discrimination law only excludes those who often have striking, but immutable, features and who are therefore not able to adapt.[29] They are not flexible. Bans on discrimination compensate for this situation. Inflexibility is neutralised. Beyond, in a market economy, the social division of responsibility is shaped in a way which allows employers to choose any kind of rational behaviour that is appropriate to avoid a conflict with the protection against direct discrimination. Their responsibility as distribution agents does not exclude them from rationally adapting to the determination of the relation between rationality and discrimination, which the ban on direct discrimination imposes on them.

In order to be able to distinguish between an impeccable rational adaptation and circumvention, the use of anti-discrimination law requires considering the discrimination as an act. The justification of the act must be taken into consideration. In this context, one should resort to *conceivable reasons* for the behaviour. Hence, the distribution agents must focus on avoiding any kind of behaviour that *could be* perceived as the expression of a discriminatory stance.

Yet, the translation function of anti-discrimination law does not allow for a consideration of the *attitude of the distribution agents.* If their attitude were decisive, this would lead to a deontological reduction of this legal field. [30] The translation would be obsolete. Therefore, the

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this kind and stimulate a change of attitude through the distribution of resources.

[29] Cf. to this problem: Kenji Yoshino, The Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of, 'Don't Ask, Don't Tell', in: Yale Law Journal, 108 (1998), 485-571.

[30] With regard to the deontological reduction, cf. Alexander Somek, l.c., 456-458.

determination of the attitude, for which the distribution agent can be held liable, must be based on the definition of the relation between rationality and discrimination from a distributive perspective that is *independent* from his positions. A further glance at direct discrimination may provide us with a better insight on what this means.

Ladies orchestras (or girl groups) do not employ male musicians. This is probably a case of direct discrimination. The decision on whether a direct discrimination has occurred requires seeing the case for what it really is, i.e. an indirect indirect discrimination. The use of the definition of the relation between rationality and discrimination, on which the principle of equality is based, results in the fact that anti-discrimination law classifies the case *prima facie* as direct discrimination. In order to decide on the question whether the ladies of the ladies orchestra *really* discriminate against men by not employing them, the content of the principle of equality in this particular case has to be determined. In this context, the systematic consequence of the distribution agents' attitude in relation to the rational pursuit of a purpose must be taken into account. Reasons for behaviour do not play an essential role.

The exclusion of men from this employment represents a rational and necessary means to maintain the identity of the service company 'ladies orchestra' (or of a girl group). The pursuit of the target to achieve economic success with such a business would be discriminatory if it strengthened the *systematic* and social less favourable treatment of men. However, this is not to be expected. The operation of a ladies orchestra does not serve a discriminatory purpose. It does not promote the prejudice that men are worse musicians than women. This prejudice would be linked [57] to the consequence that, from a socio-economic perspective, male musicians would be worse off than female musicians. Against this background and since this consequence is not to be expected[31], anti-discrimination does not have to be prioritised with regard to the rational pursuit of a purpose. Even if the members of a girl group came together because they considered men to be repelling creatures and therefore attributed a lower value to men than to women from a deontological point of view, this would not be necessary.

On the one hand, this reflection shows that the definition of the relation between rationality and discrimination can only be determined by resorting

[31] Girl groups and boy groups must be distinguished from cases, in which gender-specific groups have the social and economic power to decisively determine the quality standard. Therefore, the above-mentioned reflections cannot be conferred to the Vienna Philharmonic Orchestra.

to the distributive dimension of anti-discrimination law; this entails the assessment of the question whether a business decision affects a person's systematic, less favourable treatment or is entangled in it. *On the other hand*, from the point of view of distribution agents, anti-discrimination law has a deontological horizon. In the case of indirect discrimination, the latter threatens to replace the lacking distributive dimension.

Indirect discriminations that are based on the use of 'apparently neutral features' ('part-time employees' instead of 'women') are considered to be admissible, if 'the provisions, criteria or practices are objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary (Art. 2 of both framework directives). This shows that indirect discrimination subjects the priority determination in relation to rationality and discrimination to a consideration in relation to rationality. In this way, the determination of the relation between the protection against discrimination and economic rationality is on the same level with the latter. It is potentially made available to economic interests. It lacks the distributive rule. It is reduced to one aspect within the weighing of benefits that represents the domain of moral intuitionism.[32] Yet, the lack of a distributive rule encourages bad intentions in particular. If the use of deontological language is not determined by a distributive rule, it prevails. Hence, the development of disproportional distribution effects is only classified as discrimination if there are indications that the distribution agent intended discrimination. If an intention cannot be found – and when will this be the case? -, discriminatory distribution effects can be dismissed as an attitude's unintended side effects. The deontological language dominates. Anti-discrimination law decomposes itself. Its application is turned upside down.

XIV. Assimilation

What would happen to the barkeeper, if he focused on exclusively employing 'married people'? At first glance, you may think that the clever man has merely changed his technique of discrimination [58]. He has opted for an indirect instead of a direct discrimination. In comparison to the scorned feature of 'sexual orientation', marriage is a neutral

[32] Cf. Alexander Somek, Eine egalitäre Alternative zur Güterabwägung, in: B. Schilcher et al. (ed.), Regeln, Prinzipien und Elemente im System des Rechts, Wien 2000, 193-220.

characteristic. This is at least what it looks like. It remains true, provided that you do not ask yourself the question what 'indirect' means.

From an intensional perspective, indirect discrimination occurs if the scorned feature is not directly mentioned, but replaced by a synonym. You say 'not married' instead of 'gay'. From an extensional perspective, indirect discrimination occurs, if it is not accurate. The selection of unmarried people also includes homosexual singles. The less accurate a classification is, the easier a suspicion of direct discrimination can be rebutted.

From the point of view of rationality, extensional predicates play an important role if discrimination occurs (see above II.). Therefore, one should adhere to an extensional characterisation. Thus indirect discrimination always occurs, if, due to a very inclusive classification, a surprisingly high percentage of the scorned group is concerned and the relatives of the group members suffer a 'particular disadvantage'. Meanwhile, from a conceptual perspective, indirect discrimination does not come close to what should have been achieved by the identification of such a direct indirect discrimination. On the one hand, there is a striking asymmetry in relation to direct discrimination. Since the latter was translated, as demonstrated above, as a category, it *represents* the distribution key. The situation is different with regard to indirect discrimination. There is no rule that indicates the percentage of disadvantage, above which discrimination occurs. On the other hand, there may be an objective reason for the absence of a rule. From a distributive perspective, the 'disparate impact' of a measure or a practice does not naturally reveal the disadvantage of position that is relevant to the distribution. Whether seventy per cent of those that work in comparably low-paid jobs are women and not men is irrelevant, if the seventy per cent of women and the thirty per cent of men that also have low-paid jobs have a systematic disadvantage in common that is based on their respective social impotence. Undoubtedly, in such cases indirect discrimination could be complemented by a distributive rule.

You could consider women to be always discriminated against, if they take less than half of the positions. Yet, such an understanding of direct indirect discrimination cannot be reconciled with indirect discrimination, as understood by anti-discrimination law. Indirect discrimination includes a deontological brake. Employers are allowed to present 'objective reasons'. These reasons can help them to shirk their responsibilities as distribution agents. After all, the use of a very inclusive classification allows for the presentation of reasons for rational behaviour, on the grounds of which distribution agents are permitted to act *like all other*

market participants. The creation of a distribution rule within direct discrimination results in the rejection of certain cases. Indirect discrimination reintroduces these cases in permission form.

Thus, the use of anti-discrimination law is assimilated to the type of social division of responsibility that is typical for commerce in a market economy. It is coherent with the deontological language of law. The argument that distribution agents should not be asked to make undue sacrifices can be used to free their behaviour from the suspicion of being the *expression* of discriminatory attitude.

[59] Anti-discrimination law becomes flexible towards economic, practical constraints.[33] At this decisive point for anti-discrimination law, a distribution rule is missing. Instead, the deontological language prevails. Anti-discrimination law is neither equipped with a benchmark for the social division of responsibility nor with a pattern to determine the position. Therefore, it is susceptible to the practice of replacing distribution questions with liability questions in the context of the behaviour in a market economy.

Whether the use of anti-discrimination law *can* also provide an effective intervention in the logic of market-based discrimination in cases of indirect discrimination, depends thus on the attitudes of the institutions that apply the law. The guarantee of the protection against discrimination becomes a voluntary service of well-intentioned judges.[34] Strangely enough, this is coherent with a neoliberal welfare policy. Beside the promotion of flexibility and adaptability, the latter guarantees certain social minimum standards (in this case the protection against direct discrimination). With regard to the field that goes beyond minimum standards, this welfare

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[33] Cf. Nikola Lacey, From Individual to Group?, in: B. Hepple/E. Szyszczak (eds.), Discrimination: The Limits of Law?, London 1992, 99-124, here: 105: '[I]n deciding what constitutes less favorable treatment, sexist [...] stereotypes can creep in; in deciding what is justified, the view of anti-discrimination law as essentially concerned with dismantling restrictive practices and opening up a genuine market of equal opportunity predisposes tribunals to be sympathetic to economic arguments and discourages any clear appeal to the intrinsic value of a more egalitarian world.'

[34] For an optimistic perspective, cf. Karl-Jürgen Bieback, Die mittelbare Diskriminierung wegen des Geschlechts. Ihre Grundlage im Recht der EU und ihre Auswirkungen auf das Sozialrecht der Mitgliedsstaaten, Baden-Baden 1997.

policy made the voluntary guarantee of social protection its principle, although this is not required by law.[35]

XV. Final remarks

Anti-discrimination law is a legal field of which some expect an increase of social justice. I am afraid that this hope is unfounded. The use of anti-discrimination law is ultimately not subject to general distributive benchmarks. Indeed, the decision-making authorities are provided with great latitude for discretion. The rules lack something that they are expected to have: a standardisation.

Whether the revealed indeterminacy of law represents an issue that is not restricted to anti-discrimination law, can be left open.[36] In the future we should focus on the question whether a notorious instrument such as 'the ratio' or the old-fashioned technique of the guarantee of 'inflexible' social rights may be more harmless, since they are by far normatively richer than private protection against discrimination.

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[35] With regard to the latter, cf. Wolfgang Streeck, Neo-Voluntarism: A New Social Policy Regime?, in: European Law Journal, 1 (1995), 31-59.

[36] Cf. also Alexander Somek/Nikolaus Forgó, Nachpositivistisches Rechtsdenken. Inhalt und Form des positiven Rechts, Wien 1996.