

Mainstreaming Equality: Dis/Entangling Grounds of Discrimination*

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*Half of the people can be part right all of the time,
Some of the people can be all right part of the time.
But all the people can't be all right all the time.
I think Abraham Lincoln said that.
"I'll let you be in my dreams if I can be in yours,"
I said that.*

– Bob Dylan, Talkin' World War Three Blues¹

I. INTRODUCTION: THE PROLIFERATION OF EUROPEAN UNION ANTIDISCRIMINATION LAW

Since its inception, the European Union's (EU) legal and political strategies concerning the equality² of its citizens have focused primarily on sex and EU (formerly European Community–EC) nationality.³ Equality policies are part of the EU's social policy, which is often portrayed as being inconsistent or at least in tension with its economic aims. "Equality" here has a rather limited meaning: it is the equality of competitors in a marketplace who must not be discriminated against while striving for success. Indeed, EC law has systematically blinded out the aspect of social security as the main guarantee against the vicissitudes of life and against the commodifying grip of the market.⁴ Already in this sense, the equality ambitions of the EC have always been incomplete. Moreover, the focus on sex and nationality was so exclusive that Catherine Hoskyns saw it apt to call a virulent social problem like racism a "policy vacuum" of the EU—in the middle of the nineties.⁵

¹ BOB DYLAN, *THE FREE WHEELIN' BOB DYLAN* (Columbia Records 1963).

² According to Mark Bell, the dichotomy also enters the European social policy itself. See MARK BELL, *ANTI-DISCRIMINATION LAW AND THE EUROPEAN UNION* 6-27 (2002) [hereinafter BELL, *ANTI-DISCRIMINATION LAW*] (identifying and contrasting the models of market integration and social citizenship).

³ For an overview of the respective developments see *id.* at 32-53.

⁴ Accordingly, in the words of Alexander Somek, "until today there yawns a social gap." ALEXANDER SOMEK, *Dogmatischer Pragmatismus. Die Normativitätskrise der Europäischen Union*, in *DEMOKRATIE UND SOZIALER RECHTSSTAAT IN EUROPA. FESTSCHRIFT FÜR THEO ÖHLINGER* 44 (Stefan Hammer et al. eds., 2004) [hereinafter SOMEK, *Normativitätskrise*].

⁵ CATHERINE HOSKYNs, *INTEGRATING GENDER: WOMEN, LAW AND POLITICS IN THE EUROPEAN UNION* 176 (1996) [hereinafter HOSKYNs, *INTEGRATING GENDER*]. Hoskyns pinpoints the extent to which "nationality (often defined in a narrow sense) is given priority in EU policy and research." *Id.* at 167. This privileging takes place "despite the priority supposedly given at the EC level to economic factors" when, "in the case of third country migrants, it is their lack of citizenship rather than their economic status which is considered decisive." *Id.* at 173.

The last decade, however, has witnessed a remarkable proliferation of (prohibited) grounds of discrimination on different levels of EU law.⁶ Article 13 of the EC Treaty lists eight such grounds,⁷ empowering the Council to take appropriate action to combat discrimination based thereon. Accordingly, Article 13 does not outlaw discrimination on those grounds but is a norm that constitutes a basis for EC action. The Charter of Fundamental Rights of the European Union declares even more grounds of discrimination illegitimate.⁸ The Charter has been incorporated into the European Constitution,⁹ which was signed in Rome on October 29, 2004. The recent Racial Equality Directive,¹⁰ the Framework Directive,¹¹ and the Equal Treatment Directive on discrimination between women and men in employment,¹² which was

⁶ See generally CHRISTOPHER MCCRUDDEN, THE NEW CONCEPT OF EQUALITY 9 (ERA Forum 2003 No. 3, 2003), available at http://www.era.int/www/gen/f_15802_file.pdf (last visited Jan. 19, 2005).

⁷ Those grounds are sex, racial or ethnic origin, religion or belief, disability, age, and sexual orientation. TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Nov. 10, 1997, O.J. (C 340) 3 (1997) [hereinafter EC TREATY]. Article 13 was originally promulgated as Article 6a of the Treaty of Amsterdam, which was signed on October 2, 1997, and came into force on May 1, 1999. TREATY OF AMSTERDAM AMENDING THE TREATY ON EUROPEAN UNION, THE TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES AND CERTAIN RELATED ACTS, Oct. 2, 1997, O.J. (C 340) 1 (1997).

⁸ Charter of Fundamental Rights of the European Union, Dec. 7, 2000, 2000 O.J. (C 364) 1 (2000). After stating the principle of Equality before the law in Article 20, the Charter quotes thirteen grounds of discrimination that are outlawed by Article 21(1): sex, race, color, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age, or sexual orientation. *Id.* art. 21(1). Article 21(2) adds the ground of nationality. *Id.* art. 21(2).

⁹ See CONSTITUTION OF THE EUROPEAN UNION, Part II: The Charter of Fundamental Rights of the Union, Dec. 16, 2004, 2004 O.J. (C 130) 1, available at http://europa.eu.int/constitution/index_en.htm (last visited Jan. 19, 2005).

¹⁰ Council Directive 2000/43/EC, 2000 O.J. (L 180) 22 (implementing the principle of equal treatment between persons irrespective of racial or ethnic origin) [hereinafter Racial Equality Directive]. A major catalyst for its development was the establishment of a right-wing government in Austria in February 2000. This occurred when the "Freedom Party," which had stirred racist and anti-immigrant sentiments during its election campaign, entered into a coalition with the Christian Democratic People's Party. In reaction to this development, which was strongly opposed by the "EU 14," the development process of the Racial Equality Directive was unusually smooth and fast. See BELL, ANTI-DISCRIMINATION LAW, *supra* note 2, at 74.

¹¹ Council Directive 2000/78/EC for Establishing a General Framework for Equal Treatment in Employment and Occupation, 2000 O.J. (L 303) 16 [hereinafter Framework Directive].

¹² Council Directive 76/207/EEC on the Implementation of the Principle of Equal Treatment for Men and Women as Regards Access to Employment, Vocational Training and Promotion, and Working Conditions, 1976 O.J. (L 39) 40, derogation in 194N, incorporated by 1994 O.J. (L 1) 484 [hereinafter Equal Treatment Directive].

amended in 2002,¹³ now provide rather diverse levels of protection for people with the features covered by the respective grounds.

The proliferation of forbidden grounds of discrimination in the context of a growing body of antidiscrimination law providing legal remedies and establishing institutions urges the questions of how those grounds relate to each other, of the ways they intersect or stand in symbiotic relation, and of the ways they converge or collide. This range of questions has long occupied feminist, antiracist, and queer legal thinking in the United States. In Europe, a preoccupation with gender equality in the legal arena has so far left these issues largely unexplored.¹⁴ A sophisticated theoretical stance, however, is urgently needed considering the complexity of the issues the EU and its Member States' national legal institutions are going to face.

As to the concrete aims its antidiscrimination strategy pursues, the Commission of the European Union has set a rather optimistic tone, as it always does.¹⁵ The Green Paper on Equality and Non-Discrimination in an enlarged European Union¹⁶ declares that

[t]he adoption of Article 13 [EC Treaty] reflected the growing recognition of the need to develop a *coherent and integrated approach* towards the fight against discrimination. This approach seeks to make the most of joint efforts to combat discrimination and to benefit from transfers of experience and good practice across the various grounds. It provides a more effective basis for addressing situations of multiple discriminations. It allows for common legal and policy approaches covering the different grounds, including common definitions of discrimination. While recognizing the specific challenges faced by different groups, this integrated approach is based on the premise that equal treatment and respect for diversity are in the interests of society as a whole.¹⁷

¹³ Directive 2002/73/EC of the European Parliament and of the Council Amending Council Directive 76/207/EEC on the Implementation of the Principle of Equal Treatment For Men and Women as Regards Access to Employment, Vocational Training and Promotion, and Working Conditions, 2002 O.J. (L 269) 15-20.

¹⁴ For a notable exception, see Schiek Dagmar, *A New Framework on Equal Treatment of Persons in EC Law? Directives 2000/43/EC, 2000/78/EC and 2002/??/EC Changing Directive 76/207/EEC in Context*, 8 EUR. L. J. 290 (2002).

¹⁵ Somek, *Normativitätskrise*, *supra* note 4, at 58.

¹⁶ Green Paper on Equality and Non-Discrimination in an Enlarged European Union, COM(04) 379 final [hereinafter Green Paper on Equality].

¹⁷ *Id.* at 5-6 (emphasis in original).

The EU applauds itself for having “one of the most advanced legal frameworks to be found anywhere in the world” and stresses that innovations in national law must be implemented in all Member States, requiring changes to national law in some and “the introduction of an entirely new, rights-based approach to antidiscrimination legislation and policy” in others.¹⁸

While it is certainly laudable that the EU has put considerable effort in to developing a legal antidiscrimination framework, its shortcomings must not be overlooked. This article will take a close and critical look at the assertion that the EU aims at the development of a coherent and integrated approach. It will also consider the EU’s optimism that a transfer of experience and good practice, rather than conflict between (and among) the majority and discriminated-against groups, is going to take place when it comes to assessing discrimination in theory and in practice. Looking at this assertion and optimism requires an analysis of the three directives—showing where they converge and where they establish different levels of protection. This article will address the issues of whether these differences can be justified with regard to the “specific challenges” the respective groups are confronted with or whether the directives establish a rather arbitrary hierarchy of grounds based on resentments and stereotypes. Following this analysis, which I will enrich with examples from Austrian legal discourse, I want to turn to the deeper theoretical issues, which are explored in intersectionality theories. These theoretical concepts reflect the complexities of multidimensional discrimination that may become obstacles to cooperation between and coalition building by discriminated-against groups and try to explore the role that inter- and intra-group conflict plays in the debate. With these analyses in mind, I will return to concrete questions of EU law.

II. THE EUROPEAN ANTIDISCRIMINATION FRAMEWORK: DIVERSITY AND HIERARCHY

The following considerations aim to highlight a few commonalities and differences of the EU’s provisions against discrimination. I will start on the treaty level and then proceed to compare the directives by focusing on their aims, scope, exceptions, and the role of positive action. The objective of this part is to analyze if and to what extent the EU’s antidiscrimination framework has established hierarchies of protection by treating

¹⁸ *Id.* at 6. For the respective changes and innovations, see EUROPEAN COMM’N DIRECTORATE GEN. FOR EMPLOYMENT & SOC. AFFAIRS, ANNUAL REPORT ON EQUALITY AND NON-DISCRIMINATION: PART I (2004). Also, for a thorough analysis of the legal developments (and possible shortcomings) in the new Member States and in candidate countries, see EUROPEAN COMM’N DIRECTORATE GEN. FOR EMPLOYMENT & SOC. AFFAIRS, EQUALITY, DIVERSITY, AND ENLARGEMENT, REPORT ON MEASURES TO COMBAT DISCRIMINATION IN ACCEDING AND CANDIDATE COUNTRIES (2003).

discrimination on some grounds with more insistence than discrimination on other grounds.

A. Treaty Level

I begin my exploration on the level of “constitutional law,” in this case that of the EC Treaty.¹⁹ Apart from proscribing the grounds of discrimination I have already enumerated in the introduction, a remarkable specificity can be found: the principle of “gender mainstreaming.” According to this principle, enshrined in Articles 2 and 3(2) of the EC Treaty,²⁰ gender equality is not just an issue for sectional policies on the riverbanks of the political mainstream, but also a general issue that has to inform every policy and every legal measure undertaken in the EU. Basically, gender mainstreaming stands for the idea that gender issues have to be positioned at the center of political attention, no matter which sphere is tackled.²¹ Accordingly, the relations between the sexes have to be taken into account in every field of policy. Put in the phrasing of the European Commission, gender mainstreaming means “not restricting efforts to promote equality to the implementation of specific measures, but mobilizing all general policies and measures specifically for the purpose of achieving equality.”²² So the aim of this principle is to “mainstream” the gender perspective, to move from piecemeal approaches to the overall level and, most of all, to shift the responsibility for gender equality away from “gender equality agents” to those responsible in high politics in each and every field of EU competence.

The efficiency of the gender mainstreaming strategy may well be questioned.²³ New policies nowadays are often undertaken in the spirit of neo-liberal minimalism, a desire to deregulate in favor of the free play of market forces. Aiming at equality, however, means to control those forces

¹⁹ The EC TREATY is analogous to an actual constitution for Europe. However, the Constitution of the European Union was signed on October 29, 2004 and is not yet in force.

²⁰ On the question of the *extent* to which Gender Mainstreaming is enshrined in the constitutional law of the EU, see Jo Shaw, *The European Union and Gender Mainstreaming: Constitutionally Embedded or Comprehensively Marginalised?*, 10 FEMINIST LEGAL STUD. 213-26 (2002).

²¹ For a short but very instructive introduction, see Fiona Beveridge & Jo Shaw, *Introduction: Gender Mainstreaming in European Public Policy*, 10 FEMINIST LEGAL STUD. 209-12 (2002).

²² Incorporating Equal Opportunities for Women and Men into All Community Policies and Activities: Communication from the Commission, COM(96)67 final.

²³ Fiona Beveridge & Sue Nott, *Mainstreaming: A Case of Optimism and Cynicism*, 10 FEMINIST LEGAL STUD. 299-311 (2002); MIEKE VERLOO, ANOTHER VELVET REVOLUTION? GENDER MAINSTREAMING AND THE POLITICS OF IMPLEMENTATION (IWM, Working Paper No. 5/2001, 2001).

with effective legal means. Accordingly, we face a dilemma or even a clash of political (and legal) paradigms here—the desire of deregulation on the side of the political mainstream versus the need to regulate on the “other” side.²⁴ Accordingly, as a worst case, covering up a new law with the label “gender mainstreamed” may serve as a rhetorical device in order to legitimate processes that do not further gender equality at all. Mainstreaming has to be regarded skeptically in the context of a neo-liberal approach to politics that aims at dismantling “hard” legal standards.²⁵ However, gender mainstreaming must not be underestimated. It may lead to desired results by guiding politicians. Further, such a principle of mainstreaming does not exist for the “other” grounds. Obviously, on the highest level of the law, “gender” has more “weight” and might thus be regarded as a privileged field of equality.²⁶

B. The Directives

The following comparison of the three antidiscrimination Directives is not intended to be inclusive and exhausting. Its aim is to pinpoint some of the most striking differences in their levels of protection.

1. Purpose

The purpose of the Directives is to “put into effect” the “principle of equality,”²⁷ respectively that of “equal treatment for men and women”²⁸ and

²⁴ See the mixed evaluation of the new—officially “gender mainstreamed”—Austrian university law in Elisabeth Holzleithner, “Gender Mainstreaming” an den Universitäten—*Fortschritt, Rückschritt oder Stillstand?*, in ERNA APPELT, KARRIERENSCHERE: GESCHLECHTERVERHÄLTNISSE IM ÖSTERREICHISCHEN WISSENSCHAFTSBETRIEB 27-46 (2004). The political process has been characterized by exactly the tension between the aims of deregulation and retaining a high standard of equality law.

²⁵ The EU is aware of this problem and insists that gender mainstreaming has to be part of a “dual approach” that contains positive action as well. See EUROPEAN UNION, GENDER MAINSTREAMING, at http://www.europa.eu.int/comm/employment_social/equ_opp/gms_en.html (last visited Jan. 19, 2005).

²⁶ If the way this weight is institutionalized is justified by the *specifics* of sex discrimination may be called an open question, its urgency is diminished by the fact that the European constitution includes a provision concerning the mainstreaming of the “other grounds”: “In defining and implementing the policies and activities referred to in this Part, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.” CONSTITUTION OF THE EU, Article III-118. This, however, is still much “less” than aiming at “full equality.”

²⁷ Racial Equality Directive, *supra* note 10, art. 1; Framework Directive, *supra* note 11, art. 1.

²⁸ The terms “man” and “woman” also include transsexuals in their newly ascribed sexes after sex change surgeries. Case C-13/94, P v. S and Cornwall County Council, 2 C.M.L.R. 247 (1994).

“equality between men and women.”²⁹ The Equal Treatment Directive rhetorically expands the purpose to mean “full equality in practice.”³⁰ Yet again, it seems to establish a more ambitious goal than the other Directives. According (only) to new Article 1a of the Equal Treatment Directive, “Member States shall actively take into account the objective of equality between men and women” in all their political, administrative, and legislative activities within the scope of the Equal Treatment Directive. This can be regarded as an implementation of the principle of mainstreaming within the scope of the Equal Treatment Directive.

2. Concept of Discrimination

The EU has decided to use one common definition of equal treatment and discrimination, direct and indirect, in all three Directives. This is fortunate and will certainly be conducive to the promised coherence of antidiscrimination law in practice. Uniformly, *direct* discrimination is defined as the treatment of a person that is less favorable than the treatment of another person “is, has been or would be” in a comparable situation. Clearly, the comparator need not “exist”; establishment of the probability of “his” or “her” better treatment will be enough. Everything will then depend on the construction of the comparator, the person who is, was, or would be treated more favorably. An infamous, and in its faintheartedness utterly instructive example is the construction of the comparator by the European Court of Justice (ECJ) in *Lisa Grant v. South West Trains Ltd.*³¹ Lisa Grant suffered worse treatment than her job-predecessor since she was refused concessionary on her company’s trains for her long-term companion, a woman. The ECJ held that the relevant comparator in this case is not a male colleague who has a *female* partner but a male colleague who has a *male* partner. This precedent is very unfortunate. It holds that the comparison must be between two different, yet in their discrimination similarly situated, members of a certain group. Such a construction of the comparator overlooks, as Nicholas Bamforth rightly observes, the most “important conceptual aspect of anti-discrimination law”: that its very *raison d’être* consists in promoting “the liberty, or the autonomy, or the equality of individuals or groups who would otherwise be socially disfavoured.”³² Comparing the disadvantaged and rendering disadvantage as the measure for disadvantage

²⁹ Equal Treatment Directive, *supra* note 12, art. 1(1)(a).

³⁰ *Id.* art. 2.

³¹ Case C-249/96, *Grant v. South West Trains Ltd.*, 1 C.L.M.R. 993 (1998).

³² Nicholas Bamforth, *Sexual Orientation Discrimination After Grant v. South-West Trains*, 63 MOD. L. REV. 702 (2000).

is a way of subverting the very point of antidiscrimination law. This is but one of the obvious traps of establishing *direct* discrimination—or not.

Hitherto, *indirect* discrimination was a construct defined by the Courts, and the ECJ has produced a somewhat complex, if not to say contradictory, case law concerning the standards of its detection.³³ Scrutiny differed from field to field with private employers being the most strictly scrutinized, followed by public policies in the working spheres, and the least strict standard in the field of social policy. Now the Directive's definition of indirect discrimination³⁴ is consistent with ECJ case law on indirect discrimination on the basis of nationality. Whereas statistical evidence was previously necessary in order to prove a significant disparate impact of an apparently neutral legal or policy measure, henceforth no proof is necessary "that a 'considerably smaller percentage' of one sex is affected."³⁵ Such unfavorable treatment will not constitute discrimination if it can be justified objectively by a "legitimate aim," if "the means of achieving that aim are appropriate and necessary."³⁶ No objective justification is possible for direct discrimination.³⁷ Either different treatment is justified, which means it is not discriminatory, or it constitutes discrimination, and discrimination bears no justification.

As a new legal development, all three Directives also outlaw *harassment*, an unwanted conduct related to the respective ground of discrimination.³⁸ The Equal Treatment Directive also contains a prohibition on *sexual harassment*, an unwanted conduct of a sexual nature.³⁹ It will be interesting

³³ For an instructive overview, see EVELYN ELLIS, EC SEX EQUALITY LAW 109-34 (2d ed. 1998).

³⁴ Indirect discrimination happens when an apparently neutral provision, criterion, or practice would put persons with one property such as sex, race, ethnicity, etc., at a particular disadvantage compared with other persons, unless that provision, criterion, or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.

³⁵ Annick Masselot, *The New Equal Treatment Directive: Plus Ça Change . . . : Comment on Directive 2002/73/EC of 23 September 2002 Amending Council Directive 76/207/EEC on the Implementation of the Principle of Equal Treatment for Men and Women as Regards Access to Employment, Vocational Training and Promotion, and Working Conditions*, 12 FEMINIST LEGAL STUD. 93, 97 (2004).

³⁶ Racial Equality Directive, *supra* note 10, art. 2(2)b; Framework Directive, *supra* note 11, art. 2(2)b; Equal Treatment Directive, *supra* note 12, art. 2(2).

³⁷ On tendencies to justify even direct discrimination, see ELLIS, *supra* note 33, at 134-36.

³⁸ Racial Equality Directive, *supra* note 10, art. 2(3); Framework Directive, *supra* note 11, art. 2(3); Equal Treatment Directive, *supra* note 12, art. 2(3).

³⁹ Sexual harassment is defined as any form of unwanted verbal, non-verbal, or physical conduct of a sexual nature with the purpose or effect of violating the dignity of a person, in particular

to see how institutions are going to combine findings of racial and sexual harassment, especially if different bodies are responsible for sexist and racist discrimination. In all directives, *instructing* anyone to discriminate on the basis of the prohibited grounds is also considered discrimination.⁴⁰

Article 2(5) of the Framework Directive contains a provision that renders it justifiable to qualify what constitutes discrimination on the grounds of religion or belief, disability, age, or sexual orientation in that the

Directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others.⁴¹

This reservation primarily, though not uniformly, refers to conduct on the basis of religious convictions. An issue like that of proscribing the wearing of an Islamic veil at school and in public office will have to be considered in the light of this reservation⁴² as well as many other questions concerning the position of religion and belief in a democratic society.⁴³

3. Scope

Turning to the scope of the Directives, the image of gender privilege crumbles. The Equal Treatment Directive and Framework Directive are both confined to the sphere of work, generally speaking, all dimensions of access to employment, working conditions, vocational training, and promotion in the private as well as public sectors and in public bodies.⁴⁴ In contrast, the Racial Equality Directive covers the areas of social protection and advantages, education, and equal access to and supply of goods and services, including the

when creating an intimidating, hostile, degrading, humiliating, or offensive environment. Equal Treatment Directive, *supra* note 12, art. 2(2).

⁴⁰ *Id.* art. 2(4); Racial Equality Directive, *supra* note 10, art. 2(4); Framework Directive, *supra* note 11, art. 2(4).

⁴¹ Framework Directive, *supra* note 11, art. 2(5).

⁴² So far, the courts have treated this question with more lenience concerning the power of the state to be restrictive in that wearing the veil has been considered as a sign of diminished loyalty to state institutions. See the decision of the European Court of Human Rights, *Leyla Sahin v. Turkey*, App. No. 44774/98 (2004), available at <http://www.echr.coe.int/eng/> (last visited Mar. 2, 2005).

⁴³ Brian Barry analyzes quite a few of them from the perspective of a liberal egalitarian. See, BRIAN BARRY, *CULTURE AND EQUALITY: AN EGALITARIAN CRITIQUE OF MULTICULTURALISM* (2001). For a pronounced multiculturalist standpoint, see BHIKHU PAREKH, *RETHINKING MULTICULTURALISM: CULTURAL DIVERSITY AND POLITICAL THEORY* (2000).

⁴⁴ Framework Directive, *supra* note 11, art. 1; Equal Treatment Directive, *supra* note 12, art. 3.

important field of housing.⁴⁵ The Commission introduced a proposal for an Amendment to the Equal Treatment Directive prohibiting gender discrimination in the area of goods and services in 2003.⁴⁶ Insurance companies were rather reluctant to accept this plan arguing it would be very expensive to put men and women, among others, on an equal footing in the field of health insurance. In October 2004, the Council of the EU reached a compromise that was adopted on December 3, 2004,⁴⁷ followed by the enactment of the new Directive on December 13, 2004.⁴⁸ According to this new Directive, less favorable treatment of women for reasons of pregnancy or maternity will have to be considered as direct discrimination.⁴⁹ However, differences of treatment between the sexes may still be accepted if they are “justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.”⁵⁰ “[P]roportionate differences in individuals’ premiums and benefits” may be permitted by the Member States, provided that sex is a “determining factor in the assessment of risk” and this claim is backed by “relevant and accurate actuarial and statistical data” which has to be “published and regularly updated.”⁵¹ In effect, the protection of gender will be on nearly the same level as that of race and ethnicity, whereas people suffering from discrimination on the “other” grounds will again be left worse off.

Both Article 3(2) of the Framework Directive and Article 3(2) of the Racial Equality Directive contain one limitation that has been vigorously criticized by many commentators: the Directives do “not cover differences of

⁴⁵ Racial Equality Directive, *supra* note 10, art. 3(1)(e)-(h).

⁴⁶ COMM’N OF THE EUROPEAN COMMUNITIES, PROPOSAL FOR A COUNCIL DIRECTIVE IMPLEMENTING THE PRINCIPLE OF EQUAL TREATMENT BETWEEN WOMEN AND MEN IN THE ACCESS TO AND SUPPLY OF GOODS AND SERVICES (2003), at http://europa.eu.int/comm/employment_social/news/2003/nov/equality_en.html (last visited Jan. 19, 2005).

⁴⁷ Press Release, European Union, Council Adopts the Directive Implementing the Principle of Equal Treatment Between Women and Men in the Access to and Supply of Goods and Services (Jan. 3, 2005), at http://europa.eu.int/comm/employment_social/news/2005/jan/equal_treatment_directive_en.html (last visited Jan. 19, 2005).

⁴⁸ Council Directive 2004/113/EC, 2004 O.J. (L373) 37 (implementing the principle of equal treatment between men and women in the access to and supply of good and services) [hereinafter Goods and Services Directive]

⁴⁹ Goods and Services Directive, art. 4(1)a.

⁵⁰ Goods and Services Directive, art. 4(5).

⁵¹ Goods and Services Directive, art. 5(2).

treatment based on [third country] nationality.”⁵² Furthermore, they are “without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons in the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned.” So both directives, even though they “should also apply to nationals of third countries,”⁵³ basically and explicitly only cover the situation of EU citizens in many important fields. Nearly a decade ago, Catherine Hoskyns remarked dryly that she considered it “significant that despite the priority supposedly given at the EC level to economic factors, in the case of third country migrants, it is their lack of citizenship rather than their economic status which is considered decisive.”⁵⁴

An analogous problem may come up in cases of same-sex marriages and relationships.⁵⁵ The Framework Directive is without prejudice to the national marriage and family laws of its Member States,⁵⁶ some of which make it possible for partners of the same sex to have their relationship legally recognized. Austria is among those countries that only minimally accommodate such relationships. Recently, the Austrian Constitutional Court had to deal with the question of whether a man’s male spouse, where the man is an EU citizen while his spouse is not, has the right to stay in Austria *as a spouse*. The Constitutional Court held that Austria did not violate a fundamental right by refusing to recognize the marriage of the two men.⁵⁷ Antidiscrimination in this area obviously has no real “bite,” but bite was not intended.

The Framework Directive contains one more limitation of scope concerning the armed forces. Member States may stipulate that the provisions concerning age and disability shall not apply to the military. This exception is remarkable for what it does not contain: namely an exception for sexual orientation. In contrast to the United States with its policy of “don’t

⁵² Racial Equality Directive, *supra* note 10, art. 3(2); Framework Directive, *supra* note 11, art. 3(2).

⁵³ Framework Directive, *supra* note 11, pmb. ¶ 12.

⁵⁴ See HOSKYNS, INTEGRATING GENDER, *supra* note 5, at 173.

⁵⁵ See generally *id.* at 97-103. Bell states that the “weak nexus to the market helps understand the slow progress experienced in this policy area.” *Id.* at 97. One might add that it is the reductionist understanding of the relationship between the public and the private, of intimate life and the market, that has to be taken into account here.

⁵⁶ Framework Directive, *supra* note 11, pmb. ¶ 12.

⁵⁷ VfSlg 1512/03-6 (2004).

ask, don't tell, don't pursue,"⁵⁸ and in contrast to Great Britain's longstanding reservations,⁵⁹ homosexual orientation shall be no barrier to membership in the armed forces.

4. Exceptions for "(Genuine and Determining) Occupational (Necessities and) Requirements"

All three Directives contain a reservation that justifies different treatment when occupational activities, their nature or the context in which they are carried out, demand a certain sex, race, ethnic origin, ability, sexual orientation, age, religion, or belief, if "such a characteristic constitutes a genuine and determining occupation requirement, provided that the objective is legitimate and the requirement is proportionate."⁶⁰ Strangely enough, the headings of Racial Equality Directive and Framework Directive are different (the Equal Treatment Directive contains no heading). Whereas the heading of the Racial Equality Directive speaks of "genuine and determining occupational necessities and requirement[s],"⁶¹ that of the Framework Directive announces only "occupational requirements."⁶² This should make no legal difference, but it is striking nonetheless.

Such a general reservation should certainly be interpreted narrowly yet in ways that leave open the possibility of anti-subordination measures for members of disadvantaged groups, such as hiring only women for battered-women's shelters, for example. Furthermore, interesting questions may occur if the narrow wording of this provision is taken seriously. What if a woman argued that the male sex is not a "genuine and determining occupation requirement" for the post of a Catholic priest and such a case came, which is not very probable as things stand today, before the ECJ? What kind of considerations would the court have to carry out? Maybe the challenge posed

⁵⁸ See, e.g., U.S. DEPT OF DEF., ENCLOSURE 2 OF DEPARTMENT OF DEFENSE DIRECTIVE 1304.26, available at <http://www.dont.stanford.edu> (last visited Jan. 19, 2005).

⁵⁹ For a thorough examination of the policy and its dire consequences, see Smith & Grady v. United Kingdom, 29 Eur. Ct. H.R. 493 (1999).

⁶⁰ Racial Equality Directive, *supra* note 10, art. 4; Framework Directive, *supra* note 11, art. 4(1); Equal Treatment Directive, *supra* note 12, art. 2(6). Such reservations justify what may be called "bona fide occupational qualifications," which in the US Title VII context are a possible exception for sex-specific policies but not for race-specific policies. These reservations have been harshly criticized by several commentators. See, e.g., Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1027 (1986) (stating that "[t]he statutory model of equal protection is riddled with exceptions that perpetuate women's subordination, the most egregious of which is that sex-specific employment discrimination claims under Title VII can be defended with arguments of 'bona fide occupational qualification'").

⁶¹ Racial Equality Directive, *supra* note 10, pmb. ¶ 18.

⁶² Framework Directive, *supra* note 11, pmb. ¶ 23.

by the directives for the ways issues are conventionally seen goes even further than we think today.

Significantly, the Equal Treatment Directive and the Framework Directive—but not the Racial Equality Directive—contain a range of other justifications for different treatment. Turning to the Equal Treatment Directive first, it starts out with a general reservation for provisions that aim at the “protection of women, particularly as regards pregnancy and maternity.”⁶³ Generally, I find it unfortunate here to talk of the “protection of women” as if men needed none, especially in light of a legal history that has for much too long regarded “man” as “woman’s protector and defender.”⁶⁴ Turning to the content of the exception, it is obvious that not only pregnancy and maternity, but also other characteristics of women may justify their protection. “Maternity” itself is a term that can be interpreted from very narrow to rather broad. The case law of the EJC has time and again opted for the broad version, thereby also strongly privileging maternity over paternity.⁶⁵ This has in some cases led to a deterioration of women’s situation by giving Member States the discretion to provide only for maternal but not for paternal leave, the most problematic cases in this sphere being *Commission v. Italy*⁶⁶ and *Hofmann v. Barmer Ersatzkasse*⁶⁷ where the ideological framework was laid in a way that invoked a traditionalist “ideology of motherhood.”⁶⁸ Only since the middle of the nineties have the EU Member States been required to provide for at least three months of parental leave as an individual right of both male and female workers.⁶⁹

The Framework Directive contains an elaborate provision concerning “occupational activities within churches and other public or private

⁶³ Equal Treatment Directive, *supra* note 12, art. 2(3).

⁶⁴ *Bradwell v. Illinois*, 83 U.S. 130, 141 (1873) (featuring this famous, if not infamous, quotation).

⁶⁵ ELLIS, *supra* note 33, at 242 (observing how a shift in language from maternity to motherhood can serve to rhetorically prepare a preference for maternal parenting in the case law of the EJC, notably in Case 184/83, *Hofmann v. Barmer Ersatzkasse*, 1984 E.C.R. 3047, 3075).

⁶⁶ Case 163/82, *Commission v. Italy* 1983 E.C.R. 3273.

⁶⁷ *Hofmann v. Barmer Ersatzkasse*, *supra* note 65..

⁶⁸ Clare McGlynn, *Ideologies of Motherhood in European Community Sex Equality Law*, 6 EUR. L. J. 29 (2000).

⁶⁹ Council Directive 96/34/EC on the Framework Agreement on Parental Leave Concluded by UNICE, CEEP and the ETUC, 1996 O.J. (L 145), *amended* by 1998 O.J. (L 10) 24, clause 2(1). . Where men can take parental leave, their inclination to do it is regularly low. *See* Report from the Commission on the Implementation of Council Directive 96/34/EC of 3 June 1996 on the Framework Agreement on Parental Leave Concluded by UNICE, CEEP and the ETUC, COM(03)358 final at 9.

organizations the ethos of which is based on religion or belief.”⁷⁰ Here people’s religion or belief may constitute an occupational requirement. The exact formulation is of special interest here: “This difference of treatment *shall* be implemented taking account of Member States’ constitutional provisions and principles, as well as the general principles of Community law, and *should* not justify discrimination on another ground.”⁷¹ It seems to me that “should” leaves more room for discrimination on another ground than “shall” would. The next passage bears witness to the complexity of the issue that this part of the provision deals with:

Provided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other public or private organizations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organization’s ethos.⁷²

Mark Bell rightly calls “[t]he intersection of rights to religious freedom and equal treatment . . . one of the most difficult areas of the [Framework] Directive to negotiate.”⁷³ The compromise enshrined in the delicate formulations found in the Directive is “complex and cumbersome.” It contains three dimensions. First and foremost, even though sexual orientation may be taken into account, the Directive obviously does not permit the overt and direct exclusion of lesbians and gay men from access to employment in religious organizations.⁷⁴ Second, religion and belief may, where national law or practice permits, only be taken into account if and insofar as the ethos of the organization needs to be maintained. Context, especially the vicinity to core doctrines of the respective faith, will play a decisive role here. Finally, and turning to existing employees, what will it mean that a religious institution may “require individuals working for them to act in good faith and with loyalty to the organization’s ethos”?⁷⁵ For example, can somebody who *is* not only homosexual but also *acts* according to this “status” also act in good faith and with loyalty to the Catholic Church? Or can he or she be required to

⁷⁰ Framework Directive, *supra* note 11, art. 4(2).

⁷¹ *Id.* (emphasis added).

⁷² *Id.*

⁷³ BELL, ANTI-DISCRIMINATION LAW, *supra* note 2, at 118.

⁷⁴ *Id.* at 117.

⁷⁵ Framework Directive, *supra* note 11, art. 4(2).

keep his or her sexual orientation a secret?⁷⁶ Again, this article does not go into further detail here, but while these issues are hardly new, the careful and cautious formulation of the Directive adds a certain virulence to consideration of them. Its formulation seeks to avoid any privileging of religion or belief over other grounds. The future will show if and how the interests of churches and other organizations based on belief will be balanced with the interests of those who depart from their ethos in any way but nevertheless want to work in such organizations. Inter-group conflict is rather logical here and has been carried out vigorously during the negotiations for the Framework Directive.⁷⁷

“Reasonable accommodation for disabled persons”⁷⁸ and the “[j]ustification of differences of treatment on grounds of age”⁷⁹ are two more elaborated exceptions to be found in the Framework Directive. While these exceptions may raise similar issues, this article will not explore them in any further detail.

5. The Position of “Positive Action”

A highly contested field is that of “positive action,” sometimes referred to as “reverse discrimination,” though this notion is certainly too narrow considering the broad range of measures that can be implemented under the heading. In this area, gender is again on top of the hierarchy. Member States are allowed to “maintain or adopt measures within the meaning of Article 141(4) of the Treaty with a view to ensuring full equality in practice between men and women.”⁸⁰ Such measures may provide for “*specific advantages*” for the under-represented sex, aimed at making it easier “to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.”⁸¹ The wording of the positive action provisions of the other two directives is a bit more guarded and less inclusive. Member States are not required to refrain “from maintaining or adopting *specific measures* to prevent or compensate for disadvantages”⁸² that are linked with any of the grounds referred to in the Directives. The Racial Equality Directive and the

⁷⁶ BELL, ANTI-DISCRIMINATION LAW, *supra* note 2, at 118.

⁷⁷ *See id.* at 117.

⁷⁸ Framework Directive, *supra* note 11, art. 5.

⁷⁹ *Id.* art. 6.

⁸⁰ Equal Treatment Directive, *supra* note 12, art. 1(8).

⁸¹ *Id.* art. 141(4).

⁸² Racial Equality Directive, *supra* note 10, art. 5; Framework Directive, *supra* note 11, art. 7 (emphasis added).

Framework Directive do not specifically cite the pursuance of a vocational activity, and being guaranteed a “specific advantage” may in some cases contain more than a package of “specific measures.” I suspect that the demarcation line will be drawn when it comes to quota regulations. Quotas may, according to established case law of the ECJ, be implemented in favor of the under-represented sex under certain conditions, among them the provision of a “saving clause” for equally qualified and socially disadvantaged men.⁸³ I doubt that quota regulations would be regarded as legitimate when it comes to the “other” grounds.⁸⁴ The article will return to this question below.

6. Conclusion

I have tried to show that, so far, the coherent antidiscrimination framework the EU allegedly aims at does not yet exist. On the contrary, a hierarchy of grounds can be detected with gender and race/ethnic origin alternately on top. Surely enough, the EU stresses that the Directives provide only minimum requirements in order to put into effect the principle of equality. Accordingly, the Member States have the chance to implement the very coherent and integrated equality law framework the EU has promised. This goal remains unrealized, though. Austria’s feeble attempt at implementation on the federal law level is a good example.⁸⁵ The Federal Equality Law basically replicates the hierarchies of the EU Directives. Intersectionality’s place is established in one provision concerning procedure. The commission responsible for cases of sex discrimination must always hear cases where the equal treatment of men and women in the working sphere is at issue, even if discrimination on another ground may also be involved.⁸⁶ Rules for other kinds of intersections are blatantly missing from the law.

The following section shall add theoretical depth and practical insight to the hierarchies and problems I have detected in the interplay of the three Directives. I want to contextualize EU antidiscrimination law with regard to the intersection and symbiosis of systems of discrimination, drawing from the

⁸³ The paradigm-setting decision by the ECJ is Case C-409/95, *Marschall v. Land Nordrhein-Westfalen*, 1997 E.C.R. I-6363.

⁸⁴ An indication in favor of this interpretation is the special provision concerning Northern Ireland in the Framework Directive. See Framework Directive, *supra* note 11, art. 15.

⁸⁵ Austria is one of five countries that the Commission is taking to the European Court of Justice for failing to implement EU anti-discrimination law. Press Release, European Comm’n, Commission takes Member States to the European Court of Justice for Failing to Implement E.U. Anti-discrimination Laws (Dec. 20, 2004).

⁸⁶ § 1(3) Bundesgesetz über die Gleichbehandlungskommission und die Gleichbehandlungsanwaltschaft, BGBl I 66/2004.

respective theories that have been developed in feminist, anti-racist, and queer legal thinking during the past fifteen years.

III. THE PERVASIVENESS OF HIERARCHY/CONFLICT IN EQUALITY LAW AND POLITICS

To be the victim of discrimination is painful. It hurts even more when law and its institutions ignore one's discrimination, or if it is considered worthy of less attention than the discrimination against "others." Being the target of classificatory animosity, without a chance of redress, may lead to frustration and/or resentment, and to withdrawal and/or action ranging from political lobbying to violent revolt. That members of other groups seem to be adequately recognized may add fuel to the fire of inter-group conflict.⁸⁷ Such inter-group conflict is always already there since people burdened by discrimination on one ground or another share many of the resentments and animosities of the "mainstream." A white woman, singly burdened as she may be, is not by default free from racism or animosity towards people with disabilities or members of religions she believes have questionable rites. Not only the usual white middle-class, heterosexual, neo-conservative suspects, but also some "ethnic communities speak out against gay marriage."⁸⁸ Finally, turning to a debate that has recently occupied the EU, the designated and ultimately ousted EU Commissioner for Justice, Rocco Buttiglione, had to withdraw because of strong resistance by the European Parliament. During the hearings he had expressed some of his "private" views concerning women and marriage, including the belief that it was the aim of marriage to "allow women to have children and to have protection of a male," the idea that single mothers are "not very good," and the belief that homosexuals are "sinners."⁸⁹ He later tried to frame the fact that the European Parliament rejected him⁹⁰ as an instance of religious

⁸⁷ On the other hand, discriminated-against groups whose legal position is relatively better may in return be unable to accept that the legal framework accommodates other groups in ways they believe only they deserve—a tendency that is shamelessly exploited by way of "divide-and-conquer-strategies" of the "right." See Nancy Ehrenreich, *Subordination and Symbiosis: Mechanisms of Mutual Support between Subordinating Systems*, 71 UMKC L. REV. 251, 258-62 (2004) [hereinafter Ehrenreich, *Subordination and Symbiosis*].

⁸⁸ Elena Shore, *Ethnic Communities Speak Out Against Gay Marriage*, PAC. NEWS SERV., June 8, 2004, at <http://www.alternet.org/story/18901> (last visited Jan. 19, 2005).

⁸⁹ *EU Team Withdrawn*, INT'L HERALD TRIB., Oct. 28, 2004, available at <http://www.iht.com/articles/2004/10/27/business/union.html> (last visited Jan. 19, 2005).

⁹⁰ This is not technically spoken. The European Parliament made clear it would reject the whole Commission, which is why EU Commission President José Manuel Barroso withdrew the proposal including Rocco Buttiglione. See *id.*

discrimination.⁹¹ Indeed, even though being a commissioner is not just any job, one may still ask what would happen if the principles of the Framework Directive were applied here. However, this article leaves the consideration of this question to the reader's imagination.

The Directives, with their hierarchies, stir the covetousness of the groups treated the worst. These groups cannot perceive why their experiences with discrimination should count less than those of the other groups. Thus, a coherent approach, as the EU claims it aims for, seems to be the obvious choice. However, considering the few examples presented in the preceding paragraph, one may wonder if such a coherent and integrative approach is really in the *actual* interest of all discriminated-against groups or their spokespeople. Who, after all, detects, establishes, and ascertains these interests? Who wants equality law with bite for whom, including antidiscrimination, positive action, and the mainstreaming of the respective grounds? Does antidiscrimination law for some necessarily produce synergies for the status of others? Can the interests of "those oppressed" be harmonized? Questions like these lie at the center of theories of intersectionality and their descendents, such as "New Complexity Theories,"⁹² theories of symbiosis,⁹³ or multidimensionality.⁹⁴ Starting with the original insights of Kimberlé Crenshaw's concept of intersectionality, this article will explore several dimensions of inter- and intra-group conflict that can be tackled with the methods and insights developed in this theoretical context.

A. Intersectionality

Kimberlé Crenshaw introduced the notion and concept of intersectionality to legal discourse in an attempt to show how conventional perspectives on discrimination tend to focus on only one aspect of oppressed identities such as gender, race, or sexual orientation. She demonstrated how a single focus on women's discrimination could lead to blindness concerning the issues confronted by women at the intersection of another power vector such as race. Crenshaw's theory of intersectionality is a response to the tendency she detected "to treat race and gender as mutually exclusive

⁹¹ David Hannan, *Accidental Hero*, SPECTATOR, Nov. 13, 2004, at 21-22 (recounting Rocco Buttiglione's conversation with Daniel Hannan about homosexuality, homophobia, and "the morbid totalitarianism of the Left").

⁹² Darren Lenard Hutchinson, *New Complexity Theories: From Theoretical Innovation to Doctrinal Reform*, 71 UMKC L. REV. 431 (2002).

⁹³ Ehrenreich, *Subordination and Symbiosis*, *supra* note 87.

⁹⁴ See Darren Lenard Hutchinson, *Dissecting Axes of Subordination: The Need for a Structural Analysis*, 11 AM. U. J. GENDER SOC. POL'Y & L. 13 (2003).

categories of experience and analysis.”⁹⁵ In several cases this has led to the dismissal of black women’s discrimination complaints since they were neither classified as complaints of “all women” nor of “all blacks.”⁹⁶ The term “intersection” is explained with reference to the following:

[T]raffic in an intersection, coming and going in all four directions. Discrimination, like traffic through an intersection, may flow in one direction, and it may flow in another. If an accident happens in an intersection, it can be caused by cars traveling from any number of directions and, sometimes, from all of them. Similarly, if a Black woman is harmed because she is in the intersection, her injury could result from sex discrimination and race discrimination.⁹⁷

Applying this analogy to the case law Crenshaw analyzed, she observed a tendency to hold *no* “driver” responsible. An analogous argument can be found in early cases dealing with pregnancy, when disadvantaging pregnant women was not regarded as discrimination against women since not all women were pregnant. As one court described it, “[t]here is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not.”⁹⁸ Moreover, Crenshaw demonstrated how the conventional single-axis antidiscrimination doctrine brought black women into the dilemma of threatening the unity either of “women” or of “blacks,” depending on the strategy they pursued.

The political consequences of such a dilemma are dire. The question arises as to how to get out of it. Certainly single axis theories have to be cracked open. They must not exclude those women, who they claim are their constituency, by shoving their experience as “black” or “colored” to the side, positing them only as “women.” That way, a false unity is alleged that can then in turn be seen as threatened by fragmentation when one group claims it is not adequately included. Joan Williams rightly and dryly comments that “[t]he problem is not that antiessentialism eroded coalitions that used to

⁹⁵ Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, in *FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER* 57, 57 (Katharine T. Bartlett & Roseanne Kennedy eds., 1991).

⁹⁶ *Id.* at 58-62.

⁹⁷ *Id.* at 63.

⁹⁸ *Geduldig v. Aiello*, 417 U.S. 484, 496-97 (1974). Joan Williams has analyzed how women are set against each other via the dichotomy between selfishness in the “working mother” as well as in the abortion debate. See Joan Williams, *Gender Wars: Selfless Women in the Republic of Choice*, 66 N.Y.U. L. REV. 1559 (1991).

exist, but that certain coalitions white feminists thought existed never did.”⁹⁹ Accordingly, taking seriously the interwoven nature of grounds of discrimination means that categories of discrimination cannot be regarded as “closed,” meaning that those who claim they are “different” are seen as the threatening outsider—others who endanger a unity which can only be *imagined* at the price of blinding them out. Intersectionality theory has warned how single-issue politics start out from norm figures that are reproduced hand in hand with their privileges that stem from ignoring those outside of the norm. Single-issue politics are becoming “exclusive.” They tend to articulate first and foremost the interests of the “privileged” members within the disadvantaged group, namely those who are only “singly-burdened.”

B. Inclusion, Solidarity, and Coalition Building

Taking up a thought by Katharine T. Bartlett, I would suggest that in this light the question of feminist and any other progressive legal theory has to be reconstructed as the quest for those who are excluded.¹⁰⁰ It thereby becomes a question of social inclusion¹⁰¹ that must be distinguished from forced assimilation to mainstream norms. Such norms shape not only the way people are supposed to live, but also, more specifically, the way issues are construed, questions are posed, and answers are suggested in law and legal theory. Social inclusion knows no privileged place that comes first and from which it progresses. This is something law has to take seriously and every “single-issue movement” must take to heart. Francisco Valdes makes the point like this:

Neither sex, race nor sexual orientation can “come first” in the configuration of human identities, politics and communities

When I am asked, and I am, which “comes first” for me, color or sexuality, I respond, as a good law professor should, “it depends.” It depends on the facts and the politics of the situation. Thus, when I am in a people-of-color situation, I find myself operating, and being received as, primarily a gay man. And when I am in a sexual minority situation, I find myself operating, and being received as, primarily a person of color. In these varying settings, my mission remains constant:

⁹⁹ Joan Williams, *Implementing Antiessentialism: How Gender Wars Turn Into Race and Class Conflict*, 15 HARV. BLACKLETTER L.J. 41, 78 (1999).

¹⁰⁰ Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 831, 847 (1990).

¹⁰¹ Cf. Hugh Collins, *Social Inclusion: A Better Approach to Equality Issues?*, 14 TRANSNAT'L L. & CONTEMP. PROBS. Xxx (2005).

to interject the “other,” and to remind those who are present of those who are not.¹⁰²

In this context, it seems apt to focus on the issue of solidarity within and among different disadvantaged groups. What does all this mean for the “unity” of such movements and their capacity for coalition building? Seeing how little people have in common when it comes to “identity,” in a way every social movement is an “impossible” coalition, since those who take part in the movement are separated in so many ways. Judith Butler has, with reference to the work of Slavoj Žižek, pointed out that every “promise of identity as a rallying point within political discourse” is “phantasmatic” and that disappointment is inevitable.¹⁰³ Identity and political unity alternately compel and disappoint, and disappointment is unavoidable because every unity depends on its constitutive “outside” that may be repressed for some time, but that will come back to haunt that same unity and identity and ultimately lead to its collapse.¹⁰⁴ This may explain why many social movements are so short-lived.¹⁰⁵ If they are to be successful, they have to focus and demand of everybody who is a part to backtrack for the sake of the “overall aim.” Once a movement has established and let go of its initial radical steam, it will be criticized, perhaps rightly so, for its shortcomings and myopic tendencies, often along the lines of generation, for young rebels believe the old and established leaders have become saturated and rely on their own relative privileges. Some of this critique is fair, some is not, and certainly the movements and their outsiders need each other to remain vital and reach at least some progressive political aims. The centrifugal tendencies, which are always there, will eventually make them split in ever smaller units until, in times of uniting disparaged power, those units will merge (often during acute crisis) and then, when the time comes, collapse again.

C. Sources of Group Conflict

Recently, Nancy Ehrenreich has taken a well-conceived, critical look at several sources and explanations of conflict among groups, expressing her

¹⁰² Francisco Valdes, *Sex and Race in Queer Legal Culture: Ruminations on Identities & Inter-Connectivities*, 5 S. CAL. REV. L. & WOMEN'S STUD. 25, 40-41 (1995).

¹⁰³ JUDITH BUTLER, BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF “SEX” 188 (1993).

¹⁰⁴ Such collapse may come about when for some the moment has arrived when they feel they have to “break coalition in order to preserve their own integrity and purpose.” Mari J. Matsuda, *Beside My Sister, Facing the Enemy: Legal Theory Out of Coalition*, 43 STAN. L. REV. 1183, 1184 (1991).

¹⁰⁵ And it may explain why organizing or building a coalition for a certain *event* is so much more satisfactory than long-term political organizing: success is easier, though not simple, to achieve and when the event is over, everybody goes home with new energy and spirits.

hope the study will show that such conflicts are “unnecessary” in the sense that they may be transcended by coalitions and policies that focus, to put it bluntly, on the “real enemy.”¹⁰⁶ She suggests that many battles fought by disadvantaged groups have as their source a *divide-and-conquer-strategy* pursued by the neo-liberal and religious right that ultimately diverts progressives from targeting the interlocking system of multiple discriminations.¹⁰⁷ In Ehrenreich’s view, this system works like a “house of cards”¹⁰⁸—different kinds of discrimination interlock and enforce each other, they are symbiotic and mutually supportive. Each kind of discrimination exploits and malevolently exaggerates differences of sex, race, or sexual orientation. Coalitions of disadvantaged groups will only succeed, at least temporarily, if a necessary alertness concerning difference does not turn into its destructive counterpart or extreme.¹⁰⁹

Getting into more detail concerning not only the obstacles to successful coalition-building, but also the obstacles to adequate and ultimately productive group- and identity-based analysis, Ehrenreich names and analyzes four major problems that are continually discussed in intersectionality theory: the *zero sum problem*, the *battle of oppression problem*, the *infinite regress problem*, and the *relativism problem*, which ultimately asks if the “real enemy” exists at all.¹¹⁰ The *zero sum problem* seems to suggest that there is no gain without a loss—consequently it seems impossible to advance the interests of all disadvantaged groups. Legal reform in this light seems to function as a zero sum game where progress for one group works at the expense of another. To name just one example, gaining the right to marry a same sex partner, a victory for some gays, lesbians, and transsexuals, might be said to strengthen the very same regime of family

¹⁰⁶ Ehrenreich, *Subordination and Symbiosis*, *supra* note 84, at 271.

¹⁰⁷ Of course, not all members of disadvantaged groups are politically progressive. This is one major problem of progressive theory.

¹⁰⁸ Ehrenreich, *Subordination and Symbiosis*, *supra* note 84, at 279. Ehrenreich claims that this metaphor is more informative than that of the “intersection.” She states:

Unlike intersectionality’s separate vehicles operating independently and coming from opposite directions, the sets of cards exist in relation to each other and are mutually reinforcing; they hold each other up. They also overlap; the set of “clubs” contains members that also belong to the set of “threes,” etc. Second, most cards are on top of some cards and underneath some, and leaning on still others.

Id.

¹⁰⁹ See Valdes, *supra* note 99, at 63.

¹¹⁰ Ehrenreich, *Subordination and Symbiosis*, *supra* note 84, at 267.

values that oppresses women, lesbians, gays, and transsexuals.¹¹¹ However, the failure to gain this right to marry is just as oppressive.

The *battle of oppressions* is waged over the question of whose oppression comes first and has to take priority on the to-do list of the disadvantaged.¹¹² The way this question is answered (if groups believe it has to be tackled with) may have important material effects: financial resources are scarce (“fighting for the crumbs”) and so are affirmative action slots. This situation can (also) lead to what Ehrenreich calls *compensatory subordination*, a phenomenon that is aggravated by the problem of *infinite regress*—a splitting of groups into ever smaller subgroups that tends to lead to the exclusion of subgroups the more distant they are from mainstream values.¹¹³ Ehrenreich defines compensatory discrimination as “the tendency of individuals who are subordinated along one axis to compensate for that subordination by exerting the power they hold along another axis.”¹¹⁴

Certainly this problem exists; however, discrimination by the discriminated against will not always be based on the psychological phenomenon of compensation but may simply be a function of the stereotypes and resentments (racism, sexism, and heterosexism, for example) that are so

¹¹¹ For a response to Nancy Ehrenreich with reference to this example, see Samuel A. Marcossan, *Multiplicities of Subordination: The Challenge of Real Inter-Group Conflicts of Interest*, 71 UMKC L. REV. 459 (2002).

¹¹² Catharine A. MacKinnon is famous for trying to distil an “essence of gendered experience” from a multitude of positionalities in the force fields of race, sexual orientation, and class, for example. Calling MacKinnon’s respective efforts “heroic,” Nancy Ehrenreich obviously still believes that this undertaking is a futile exercise, even though she does not directly state such a belief. Ehrenreich, *Subordination and Symbiosis*, *supra* note 87, at 309. MacKinnon herself sharply criticizes “postmodernism” for a few false accusations:

We do not say that gender is all there is. We have never said it explains everything. We have said that gender is big and pervasive, never not there, that it has a shape and regularities and laws of motion to it, and that it explains a lot—much otherwise missed, unexplained. It is a feature of most everything, pervasively denied. . . . Postmodernism natters on about how feminism privileges gender, but seldom says what that means either. If to privilege gender means that feminism arranges gender on top of some hierarchy of oppressions, the allegation is false, at least as to me. I don’t do hierarchy. If these critics mean that feminists think gender matters a lot and often read situations in terms of dynamics of gender hierarchy, and refuse to shut up about gender as a form of domination, they are right. They should say why, in each instance, we are wrong to do so, why its place in our analysis is unearned. Male supremacy “privileges” gender; we criticize it.

Catharine A. MacKinnon, *Points Against Postmodernism*, 75 CHI.-KENT L. REV. 687, 695, 696-97 (2000). MacKinnon’s poignant formulations show that intersectionality theorists probably have more in common with those they criticize than they may think or declare.

¹¹³ Ehrenreich, *Subordination and Symbiosis*, *supra* note 84, at 270.

¹¹⁴ Ehrenreich, *Subordination and Symbiosis*, *supra* note 87, at 276.

pervasive in society and do not spare the disadvantaged. Under these auspices of crosswise and mutual subordination, the danger may be that in such a situation of relativism somehow the “real enemy” gets lost. If everybody subordinates everyone or at least everybody subordinates or supports the subordination of somebody, a theory of subordination that pinpoints *the* (or even *a*) source of oppression will not be possible. This sounds like a rather self-destructive development if discrimination becomes an amorphous concept, which makes it impossible to focus on the specifics of some features. However, this need not be the case. A complex theory of oppression will be one of interlocking force fields with no primary, prior, or privileged site and source of power, but rather one with a framework of analysis that helps to explain what happens in a certain *context*, and why those things occur.

As a consequence of this divisive power network, Ehrenreich detects a weakening of possible progressive efforts by the way disadvantaged groups are affected. Their exclusion of subgroups, a heightened intra-group vulnerability, and the obfuscation of one’s own oppression by the celebration of one’s own relative privilege reinforce the interlocking system of subordination.¹¹⁵ Faced with this unfortunate situation, Ehrenreich insists in her reassessment of conflict among and within groups that many of the alleged problems are in fact “false concerns.”¹¹⁶ They are based on a false and dangerous “politics of distinctness.”¹¹⁷ Such politics conceptualizes individual and group identity as a unified whole that has to remain pure, its borders kept safe from intrusion. According to Ehrenreich, it is rather absurd how ever smaller groups and subgroups of the oppressed compete for the crumbs of the cake that serves to feed the privileged, insisting on their ever more specialized identity without seeing the “possibility of identities of interest and coalitional collaboration.”¹¹⁸ But is there a way out of these dynamics?

D. Attempts at Reconciliation

Francisco Valdes develops his concept of “interconnectivity” as a “personal awakening to the tight interweaving of systems and structures of subordination”¹¹⁹ in order to show how such coalition building might be possible. Interconnectivity signifies an ethos of “openness, interactivity,

¹¹⁵ *Id.* at 258.

¹¹⁶ *Id.* at 316.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 320.

¹¹⁹ Valdes, *supra* note 99, at 49.

flexibility, and adaptability,”¹²⁰ a practice that exists as well as a capacity for productive interaction in society and politics. Beseechingly, he appeals to interconnectivity’s “potential for reconciliation”¹²¹ that should help to overcome “the racism of white lesbians, bisexuals and gay men, joined with the androsexism of gay men, whether white or of color, and coupled with the separatism of lesbians, whether white or of color” that “combine to cloud our vision and undermine our power.”¹²² One way to deal with this situation, which constitutes our post/modern condition, is to, as Mari Matsuda suggests, always ask the other question: “When I see something that looks racist, I ask, ‘Where is the patriarchy in this?’ When I see something that looks sexist, I ask, ‘Where is the heterosexism in this?’ When I see something that looks homophobic, I ask, ‘Where are the class interests in this?’”¹²³ This is one important way of making intersectionality work.¹²⁴

One can raise serious doubts as to how realistic such complex theoretical attempts at harmony are. The question then becomes whether the *reality* of conflict is in fact the greatest obstacle to harmony. Even if on a meta-level it can be shown that ultimately the interests of “women” and “ethnic minorities”—two overlapping categories—can be harmonized, there will still be controversy over the amount of patriarchalism in ethnic groups as compared to that of the larger society and if “women” are better or worse off under one or the other legal, cultural, or social regime. Sometimes harmony on a meta-level may well be a rhetorical sleight of hand, such as when a quest for gender-equality is read into *the* theory of multiculturalism (as if it existed)¹²⁵ in order to show that there is no conflict between the two totally unrealistic constructs of “feminism” and “multiculturalism.”¹²⁶

Yet, my point here is not to destroy any welcome optimistic accounts of coalition building with their potential for political and legal progress. Instead,

¹²⁰ *Id.* at 47-48.

¹²¹ *Id.* at 63.

¹²² *Id.* at 45. I find it a bit irritating how Valdes seems to put lesbians’ “separatism” and gay men’s androcentrism on an equal footing here, since this separatism hardly produces systemic effects. However, this is not the place to dig into the question in detail.

¹²³ Matsuda, *supra* note 104, at 1189.

¹²⁴ How to institutionalize “the other question” seems to be the major challenge here.

¹²⁵ “Multiculturalism does not exist.” Stanley Fish, *Boutique Multiculturalism*, in MULTICULTURALISM AND AMERICAN DEMOCRACY 69 (Arthur M. Melzer et al. eds., 1998).

¹²⁶ On the debate among feminists, see Leti Volpp, *Moving Beyond the Feminism v. Multiculturalism Debate*, in DOING JUSTICE TO DIVERSITY (Dilek Cinar ed., forthcoming 2005); Elisabeth Holzleithner, *Still a Dilemma: Feminism and Multiculturalism*, in DOING JUSTICE TO DIVERSITY, *supra*.

now that the complex sources of conflict between and among groups discriminated against, and the possible ways of surmounting them, have been sketched, I want to return to the issues I started with and have another short look at EU antidiscrimination law.

IV. THE FUTURE OF EU EQUALITY LAW: HARMONY, CONFLICT, OR WHAT?

This final section will look at some specific points in EU equality law where conflict seems preprogrammed and decisions in single cases will not easily be reached. Returning to the remarks above concerning the scope of antidiscrimination law, antidiscrimination is about the distribution of goods. Those who have a say in their distribution are to be “chained.” They have to tie their actions to good reasons. Such good reasons stand out due to the absence of discrimination, that is, of treating somebody worse than an appropriate comparator just because he or she has a certain feature such as sex, race, age, or a disability. With regard to this real or projected non-discriminated, mainstream other, a person who is equally qualified to receive a certain good must be treated equally. What exactly does this mean in a context when only one post or at least a scarce amount of goods is to be distributed?

Let us first have a look at the level of “good reasons” in the context of a community such as the EU that is strongly focused both on the functioning of an internal market and external market relations. Everybody has the right to be refused a good only for the right reasons. Somebody has the right to deny another a good if he or she does not *function* according to the rules that are to be applied. In a way, and apart from the human rights claim that nobody must be denied equal respect, antidiscrimination is directed against the loss of valuable resources, since for every *better* qualified person who is denied a job solely on grounds that amount to discrimination, another person who is *less* qualified will be hired. This is not good for a system that claims to be based on performance, achievement, and merit. Accordingly, carried to rhetorical extremes and ideologically speaking, antidiscrimination is a lubricant for the perfect functioning of the capitalistic machinery.¹²⁷ The antidiscrimination system does nothing to question the market ideology. It fails to dismantle its myths and to challenge the manner in which they are manipulatively used to the detriment of the many and the benefit of a few. But let us cling to that and ask what, if anything, antidiscrimination law can achieve.

Ideally, somebody with the power to distribute a job is *free to choose* only if the candidates are equally qualified and no distinction can be made. Being

¹²⁷ These extremes are sometimes articulated in a rather explicit way, especially in publications on the issue of gender mainstreaming.

unable to make a distinction according to quality has opened up the possibility to establish a certain kind of quota-system that obliges the job distributor to allocate a post to the best qualified female applicant if she is equally qualified as the best male candidate. Even a feeble rule such as this, which basically takes the place of throwing the dice, was considered unjustified by the European Court of Justice. In a curt decision, *Kalanke v. Freie Hansestadt Bremen*,¹²⁸ the ECJ held that the equality principle of the Equal Treatment Directive precluded national rules providing that “where men and women who are candidates for the same promotion are equally qualified, women are automatically to be given priority in sectors where they are under-represented.”¹²⁹ Such a rule constitutes, according to (by now established) case law, discrimination on grounds of sex. After a rather unexpected outcry by several Member States who were trying to take the principle of gender equality seriously, the ECJ in its next decision distinguished the *Kalanke* holding by declaring that such priority can indeed be given to *equally* qualified female candidates¹³⁰ “unless reasons specific to an individual male candidate tilt the balance in his favor.”¹³¹ Contrary to *Kalanke*, in *Marschall* the ECJ admitted that such quota regulations are not a frivolous invention of radical feminists gone wild but a totally rational reaction to discriminatory structures of job allocation. The ECJ, in a rightly well-known passage, described it like this:

As the Land and several governments have pointed out, it appears that even where male and female candidates are equally qualified, male candidates tend to be promoted in preference to female candidates particularly because of prejudices and stereotypes concerning the role and capacities of women in working life and the fear, for example, that women will interrupt their careers more frequently, that owing to household and family duties they will be less flexible

¹²⁸ Case C-450/93, *Kalanke v. Freie Hansestadt Bremen*, 1995 E.C.R. I-3051 (1996).

¹²⁹ *Id.* ¶ 16.

¹³⁰ One Member State has as yet tried to rid itself of this corset. In an attempt at augmenting the number of female professors at Swedish universities, the Swedish Regulation of Universities contained a provision that justified a certain species of positive discrimination with a view to promoting equality. With regard to certain posts, which had to be explicitly designated, “sufficient” qualification would do. That is, if a sufficiently qualified woman competed with a man who was better qualified, she would still get the post, provided that the difference in their qualifications was not “so great that such application would give rise to a breach of the requirement of objectivity in the making of appointments.” Regulation 1995:936, art. 3 (quoted in Case C-407/98, *Abrahamsson & Anderson v. Fogelqvist*, 2000 E.C.R. I-5539, ¶ 14). The ECJ considered this measure disproportionate and declared it precluded by the EC Treaty. *Abrahamsson*, *supra* ¶ 14.

¹³¹ Case C-409/95, *Marschall v. Land Nordrhein-Westfalen*, 1997 E.C.R. I-6363, ¶ 25.

in their working hours, or that they will be absent from work more frequently because of pregnancy, childbirth and breastfeeding For these reasons, the mere fact that a male candidate and a female candidate are equally qualified does not mean that they have the same chances.¹³²

Apart from this utterly clear statement, the decision contained one central enigma, namely the quality of the “reasons specific to an individual male candidate” that were apt to annul the female candidate’s quota-advantage that was to compensate for her structural disadvantage. What the decision did declare was that “an objective assessment which will take account of all criteria specific to the individual candidates” had to be the basis of the decision for one or the other candidate and that the criteria favoring the male candidate “must not be such as to discriminate against female candidates.”¹³³ The rest was left to the creativity of lawmakers and judges.

I suggest—and this is the point where I turn from the single axis of gender (in)equality to multiple discriminations—that the “saving clause” is the entrance point for the consideration of “other” grounds of discrimination. The hierarchy here is clear: a general preference for a woman can be annulled by showing that a man is in a worse situation than his female competitor. So let us imagine a case: a white heterosexual Christian woman, unmarried, with no children, competes with a man of Turkish descent who has been naturalized, who is Muslim, married, and has two children. We could further complicate the situation by rendering her a lesbian. Who is worse off? How detailed would the comparison of individual situations have to be? And where exactly would the discrimination of whom be localized? Maybe, considering this turn of events, we have now and finally arrived at the point where gender quotas, or any quotas for that matter, come to their limits.

A feminist may claim that having to consider other discriminations will render the rule even more harmless than it already is. It is harmless already—feeble—since equal qualifications can hardly ever be established anyway, because there is always some kind of difference to be found. The bit of bite quota regulations have in favor of women is further qualified when other grounds of discrimination come into play. Certainly, women who carry features that make them bearers of multiple oppressions are given priority by quota-rules: women of color, disabled women, and lesbians, for example. But women, as I have shown, may *lose out* in such competitions against men carrying disadvantaging features as well. This may be considered a good thing, for there are privileged women, after all, and men who are less privileged than the women with whom they actually compete. Everybody can

¹³² *Id.* ¶¶ 29-30.

¹³³ *Id.* ¶ 34.

think of excellent examples. Maybe no group, not even women as a group, despite the specifics of “their” discrimination, which generally has to do with the roles reproduction and care-taking typically play (and are projected to play) in their lives,¹³⁴ must be favored by way of gendered quota regulations. Still, feminists may cringe, even if only with a bad conscience, when they look at the latest statistics and may even feel frustrated that despite the proliferation of grounds of discrimination the “woman question” seems to lose ground—ideologically and in terms of resources.

V. CONCLUSION

Obviously, explosive dynamics of group conflict are built into the application of EU antidiscrimination law. When other disadvantaged groups make up ground, the balance shifts, the positioning changes and the cards, to invoke a variation of Nancy Ehrenreich’s metaphor of the house of cards, are shuffled anew. Groups that focus on “their” problems will at least temporarily have to blind out those of “others.” Consequently, their success may indeed turn out to be a problem—or feel like a problem—for members of “other” disadvantaged groups, overlapping as all the disadvantaged groups always are. But some features of identity seem to be more important than others, at least for some time, which is why people engage in single-issue movements when they believe they might be successful—or find some kind of intellectual or emotional home. Somehow the resulting conflicts between groups focusing on certain issues should not be destructive, which is where Valdes’s “interconnectivity” and Matsuda’s “other question” come in time and again. This will be especially virulent in the processes of implementing antidiscrimination law, when discriminated-against groups who do not have much in common (like religious groups and groups of gender “outsiders” such as homosexuals, bisexuals, and transsexuals) have to cooperate, and of applying antidiscrimination law, when the “comparator” has to be established. Accordingly, the weight of responsibility on the shoulders of antidiscrimination institutions is heavy and their task is complex. No doubt, the road to equality will remain thorny. The EU Directives are but a second step—several will have to follow until a truly coherent and integrative antidiscrimination law that is based on the specifics of the respective discriminations, and not on prejudice, will be in place.

Finally, in the midst of all the (legitimate) fuss about antidiscrimination, one should be reminded that this is but one strategy that can be used in the quest for equality. Concentrating on issues of antidiscrimination law covers up the shortcomings of an approach that tends to ignore questions of material

¹³⁴ Elisabeth Holzleithner, *Faces of Discrimination: The Case of Sex Equality*, in PROTECTION AGAINST DISCRIMINATION AND GENDER EQUALITY—HOW TO MEET BOTH REQUIREMENTS 4 (Janet Cormack ed., 2003).

equality, of equality on the other side of the market. Equality must not come to mean equality of disadvantage, but rather equality of dignity with access to a defensible amount of basic goods nobody should have to do without. It is the traditional system of social security that provides for material equality and not equality as antidiscrimination, which may amount to no more than equality of bad conditions. Europe, on its way to an ever-tighter Union, should not forget about that.