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Introduction

1. Reconciling Competitiveness with Solidarity

For at least two reasons, the international success¹ and the growing intellectual penetration of modern anti-discrimination law² merit sustained attention. The first reason affects the tendency of a historically fairly recent field of law to expand, gradually but steadily, its scope of application.³ The second betrays a desire for coherence, which is amply reflected in an increasingly interdisciplinary body of academic analysis.

Both reasons in juxtaposition make it inevitable to take anti-discrimination law seriously as a type of *social legislation*.⁴ Social legislation redistributes resources and opportunities against a baseline established by private transactions, thereby decreasing the dependence of people on market dealings.⁵ In Europe, at any rate, the rise of this new type is closely associated with a new goal of employment relations, which is deemed to be desirable from the perspective of both economics and social justice.⁶

¹ See, for example, Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome, on 4 November 2000. It underscores that an anti-discrimination principle is part of the common European human rights standard with regards to acts of public authority. See <http://conventions.coe.int/Treaty/en/Treaties/Html/177.htm> accessed 22 December 2010. For an introduction to the respective international developments, see C. McCrudden and H. Koutroufos, 'Human Rights and European Equality Law' 2006/8 *University of Oxford Faculty of Law Legal Studies Research Paper*, 4–8; C. McCrudden, 'Introduction', in C. McCrudden, *Anti-discrimination Law*, 2nd edn (Aldershot: Ashgate, 2004), xi–xxxii, at xii–xiii; S. Perchal, 'Equality of Treatment, Non-discrimination and Social Policy: Achievements in Three Themes' (2004) 41 *Common Market Law Review* 533–551 at 547–551.

² There can be little doubt that anti-discrimination law has become the darling subject of 'progressive' legal scholars and steadfast libertarians alike. There is a burgeoning literature which is developing as a result. For a highly useful overview, see C. McCrudden, 'Introduction', n. 1, xi–xxxii.

³ See M. Bell, *Anti-discrimination Law and the European Union* (Oxford: Oxford University Press, 2002), 136–143.

⁴ See G. de Búrca, 'EU Race Discrimination Law: A Hybrid Model?', in G. de Búrca and J. Scott (eds), *Law and New Governance in the EU and the US* (Oxford: Hart Publishing, 2006), 97–120 at 99, who observes that both the so-called Framework Directive and the Race Directive 'were seen by some as the first step towards a new kind of European social law'. According to Ellis, the aspirations underpinning new EU anti-discrimination legislation 'are justice and an improved quality of life for literally millions of people within the European Union'; see E. Ellis, *EU Anti-discrimination Law* (Oxford: Oxford University Press, 2005), at 1.

⁵ For a more elaborate account of social legislation, see below pp. 30 n. 54, 88.

⁶ It is a well-known fact that the inclusion of Article 157 FEU Treaty (ex 141 EC Treaty) into the agreement was motivated by the economic objective to prevent comparative disadvantage on the part

First, efforts are made to increase access to labour markets for former outsiders or those who are usually likely to be left out ('inclusion').⁷ Second, employment relationships are supposed to become less rigidly focused on the standard full-employment situation, in particular as regards rules governing collective representation, dismissals, working time and associated benefits ('flexibilization').⁸

Both developments are associated with an alteration of Europe's basic social orientation.⁹ Prior to the promotion of inclusion and flexibilization, European social legislation and industrial relations used to have their point in protection and redistribution. Benefits tended to accrue to insiders at the expense of outsiders.¹⁰ It was protective in that a basic task of employment law, for example, was to assist people in keeping their jobs. Owing to trade union pressure, enterprises had to perform a redistributive function as to the scale of wages paid out to different tiers of the workforce. Slackers and less productive members were held in employment and subsidized by the contributions by others. By contrast, the new vision appeals to universal self-reliance, initiative, competitiveness, entrepreneurial stamina, and personal responsibility.¹¹ Consequently, the role of the state as the purveyor of common concern is shifting from sheltering people—mostly, the male

of businesses that have to comply with anti-discrimination objectives. It has been assumed by the ECJ, early in its jurisprudence, that Article 157 FEU Treaty (ex 141 EC Treaty) serves a twofold purpose that is both economic and social. See Case 43/75, *Defrenne v. Sabena* (II) [1976] ECR 455. More recently, the Court explained that the economic aim is secondary to the social aim. The Court stated that Article 157 FEU Treaty (ex 141 EC Treaty) 'constituted the expression of a social right'. See Joined Cases C-270/97 & C-271/97, *Deutsche Post AG v. Elisabeth Sievers & Brundhilde Schrage* [2000], ECR I-929 at para. 57.

⁷ On 'inclusion' as the rationale underpinning anti-discrimination law, see H. Collins, 'Discrimination, Equality and Social Inclusion' (2003) 66 *Modern Law Review* 16–43.

⁸ What such 'flexibilization' means is captured by Barnard. From the vantage point of the demand side it means numerical (e.g., fixed-term contracts), working time (e.g., switches from full- to part-time work), and functional (e.g., shifts of tasks) flexibility. Seen from the supply side this implicates the increase in temporary employment and permanent re-skilling. See C. Barnard, 'Flexibility and Social Policy', in G. de Búrca and J. Scott (eds), *Constitutional Change in the EU: From Uniformity to Flexibility?* (Oxford: Hart Publishing, 2000), 197–216 at 198. See also S. Deakin and H. Reed, 'The Contested Meaning of Labour Market Flexibility', in J. Shaw (ed.), *Social Law and Policy in an Evolving European Union* (Oxford: Hart Publishing, 2000), 71–102. Ashiagbor points out correctly that in the context of labour market regulation the term 'flexibility' by default comes to mean 'deregulation'. See D. Ashiagbor, *The European Employment Strategy: Labour Market Regulation and New Governance* (Oxford: Oxford University Press, 2005), at 69. For a discussion of different forms of flexibility, see *ibid.*, at 154–164.

⁹ On the following, see the perceptive diagnosis by W. Streeck, 'Competitive Solidarity—Rethinking the "European Social Model"', <http://www.mpifg.de/pu/workpap/wp99-8/wp99-8.html> accessed 23 December 2010.

¹⁰ This has changed. The wage structure has become increasingly in-egalitarian in European countries. See G. Esping-Andersen, *Social Foundations of Postindustrial Economies* (Oxford: Oxford University Press, 1999), 24–25.

¹¹ On a philosophical plane, this shift is most visibly reflected in the relation between J. Rawls' *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971), on the one hand, and B. Ackerman's and A. Alstott's *The Stakeholder Society* (New Haven, CT: Yale University Press, 1999), on the other. Comparing these two works, one cannot but agree with Hegel that philosophy is the spirit of the age articulated in thoughts. Proponents of governmentality studies, to be sure, address this transition as the emergence of a neoliberal form of governmentality. See, for example, T. Lemke, 'The Birth of Bio-politics': Michel Foucault's Lectures at The Collège de France on Neoliberal Governmentality' (2001) 30 *Economy and Society* 190–207. For a very promising analysis,

breadwinner—against the peril of unemployment to coaching everybody into performing successfully in an increasingly rougher business environment. Social policy loses its protective edge. It becomes more investment-oriented, that is, calibrated to the production of human resources that are adapted to function under ever-changing and highly competitive conditions.¹²

This is consonant with one of the chief overall policy goals of the European Union to attain economic growth and prosperity on the basis of a unique combination of competitiveness and solidarity.¹³ As the Commission states in the White Paper on Social Policy:¹⁴

Competitiveness and solidarity have both to be taken into account in building a successful Europe for the future.

Anti-discrimination law appears to play an essential role in this context.¹⁵ It is difficult to imagine a principle that would be better suited to reconciling solidarity and competitiveness than the principle of equality of opportunity.¹⁶ It is intuitively plausible to assume, hence, that such a reconciliation obtains where equality of opportunity has levelled the playing field.

Anti-discrimination law espouses a certain interpretation of this reconciliatory principle.¹⁷ It protects people who happen to bear certain characteristics—most of

see M. L. Flear, 'Neoliberalism, the Open Method of Coordination, and the Undemocratic Governance of Health' (2007, manuscript on file with the author).

¹² See Streeck, n. 9. See B. Jessop, *The Future of the Capitalist State* (Cambridge: Polity Press, 2002) for a reconstruction of the shift from a 'Keynesian Welfare State' to a 'Schumpeterian Competition State'. This tendency is amply reflected in the EU employment strategy, which is laid down in Article 148 FEU Treaty (ex 128 EC Treaty), and pursued in the context of the so-called Luxembourg strategy. For a useful overview, see Deakin and Reed, n. 8.

¹³ This lay at the heart of the so-called Lisbon strategy. See Presidency Conclusions, 24 March 2000, para. 24:

People are Europe's main asset and should be the focal point of the Union's policies. Investing in people and developing an active and dynamic welfare state will be crucial both to Europe's place in the knowledge economy and for ensuring that the emergence of this new economy does not compound the existing social problems of unemployment, social exclusion and poverty. (http://www.europarl.europa.eu/summits/lis1_en.htm#c)

¹⁴ European Commission, *European Social Policy—A Way Forward for the Union: A White Paper*, COM(94) 333 final, 27 July 1994, para. 3. Arguably, this double objective can be traced back to Defrenne, n. 6. For this context, see C. Barnard, 'Social Policy Revisited in the Light of the Constitutional Debate', in C. Barnard (ed.), *The Fundamentals of EU Law Revisited: Assessing the Impact of the Constitutional Debate* (Oxford: Oxford University Press, 2007), 109–151 at 112–113.

¹⁵ The growing importance of the Union's anti-discrimination policy is concomitant to the Lisbon strategy, which promises to boost the competitiveness of the European economy (http://europa.eu/scadplus/glossary/lisbon_strategy_en.htm accessed 23 December 2010). See McCrudden and Kountourous, n. 1 at 18.

¹⁶ See S. Fredman, *Discrimination Law* (Oxford: Clarendon Press, 2002), at 14–15. For an account, see J. Roemer, *Equality of Opportunity* (Cambridge, MA: Harvard University Press, 1998). For a skeptical perspective, see J. H. Schaar, 'Equality of Opportunity—and Beyond' (1967), repr. in L. P. Pojman and R. Westmoreland (eds), *Equality: Selected Readings* (New York/Oxford: Oxford University Press, 1997), 137–147.

¹⁷ For an interpretation of European anti-discrimination law in light of the principle of equality of opportunity, see C. Barnard, *EC Employment Law*, 3rd edn, (Oxford: Oxford University Press, 2007), at 338.

which are socially salient, for example, sex, race, religion, ethnicity—from disadvantage that involves conduct by private actors or the state in the context of the provision of goods and opportunities. Characteristically, the protection is limited to certain critical goods,¹⁸ the precise extension of which (for example, ‘pay’) is subject to a great deal of litigation and casuistry. Most often, the goods in question are crucial for a person’s full participation in society, such as, for example, a dwelling, a job, or some career whose progress is measurable in terms of pay raises and promotions. Only in exceptional cases, the protection from discrimination extends beyond the context of housing and employment.¹⁹

As a principal matter, anti-discrimination law does not alter the competitive nature of the social access to goods where it is already subject to competition. Nonetheless, it exhibits special moral concern for those who are likely to become, in a market context, the victims of bigotry and stereotypes. With regard to potential social outsiders, it is not at all implausible to stretch the panoply of discrimination beyond unequal treatment and also to include into its scope matters such as harassment or the creation of a hostile work environment.

2. Practical and Intellectual Success

As regards the scope of protection from discrimination, narrowly understood, it is well known that European anti-discrimination law was initially restricted to prohibiting, in the employment context, pay discrimination on the grounds of sex and subsequently expanded into a more general equal treatment obligation.²⁰ Directive

¹⁸ See J. Gardner, ‘On the Grounds of Her Sex(uality)’ (1998) 18 *Oxford Journal of Legal Studies* 167–187 at 167. Needless to say that my loose reference to this type of goods could be specified in terms of ‘social primary goods’, ‘transcendental interests’, or ‘conditional goods’. See, for that matter, Rawls, *A Theory of Justice*, 92; O. Höffe, ‘Transzendentaler Tausch: Eine Legitimationsfigur der Menschenrechte?’, in S. Geseopath and G. Lohmann (eds), *Philosophie der Menschenrechte* (Frankfurt: Suhrkamp, 1998), 29–48, at 32–33.

¹⁹ See Article 3(1) of the Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L 180.

²⁰ Article 157 FEU Treaty (ex 141 EC Treaty) aside, sex discrimination has been ruled out since 1975/76 pursuant to Article 1 of Council Directive 75/117 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women, OJ L45, 19–20 [1975] and Article 2 of Council Directive 76/207/EEC of 9 February 1976 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, OJ L39, 40–42 [1976]. The Directives supplement the protection afforded by Article 157 FEU Treaty (ex 141 EC Treaty). See Ellis, n. 4 at 18. The Court, however, stated, that Article 157 FEU Treaty (ex 141 EC Treaty) is limited to questions of equal pay and does not extend to equal treatment cases. See, for example, Case C-281/97, *Andrea Krüger v. Kreiskrankenhaus Ebersberg* [1999] ECR I-5127 at para. 18. Legislation is necessary in order to give effect to protection from discrimination. Directive 78/7/EEC on the progressive implementation of equal treatment with regard to statutory social security schemes, OJ L6, 24, concluded the original set. For a brief account of the subsequent legislative history, which had been given momentum through a series of ‘action programs’, see Barnard, n. 17 at 300–301. Seven of the existing sex equality Directives have been consolidated into one legal instrument, namely, Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, OJ L204, 23–36.

2000/78/EC²¹ marked a major turning point, for it extended protection from discrimination to the grounds of religion or belief, disability, age and sexual orientation (Article 1). The so-called Race Directive²² pushed the scope of application beyond the context of employment, occupation and vocational training, however, exclusively for cases of discrimination on the grounds of racial or ethnic origin. Article 1(7) of Directive 2002/73/EC²³ made it mandatory for Member States to establish ‘equality bodies’ that are commissioned with monitoring compliance and supporting victims of discrimination. Recently, the protection from discrimination on the grounds of sex was extended to include trade in goods and services.²⁴ Finally, the Fundamental Rights Charter, which is, at least as regards most Member States, part of primary law pursuant to the new Article 6 EU Treaty, extends in its Article 11(1) protection from discrimination even to colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property and birth.

Current political developments²⁵ and theoretical discussions alike betray an increasing awareness that what once began with a focus on employment discrimination and a small set of immutable characteristics may have already borne out principles that might encompass other, not even immutable grounds, of discrimination²⁶ and be relevant to spheres of private conduct outside the contexts of employment or housing.²⁷ To be sure, extension along the scope of personal characteristics need not necessarily be followed by expansions along the context of application. Conceivably, protection from discrimination could be legitimately

²¹ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 16–22 [2000]. I should mention that in 1997, a social partner agreement on discrimination against part-time workers was subsequently adopted in the form of a Directive. See Directive 97/81 OJ L 14/9 [1988].

²² See n. 19.

²³ Directive 2002/73/EC of the European Parliament and of the European Council of 23 September 2002 amending Council Directive 76/207/EC 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, OJ L 269/15 [2002].

²⁴ See Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ L 373/37 [2004]. Even more recently, a European Institute for Gender Equality was established. See Regulation 1922/2006 of the European Parliament and of the Council of 20 December 2006 in establishing a European Institute for Gender Equality, OJ L 403 [2006].

²⁵ For example, Article 1/1 of the 12th Protocol to the European Convention also sweeps broadly:

The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

²⁶ A case in point is the unequal treatment on the basis of body size or unappealing looks. See E. Kristen, ‘Addressing the Problem of Weight Discrimination in Employment’ (2002) 90 *California Law Review* 57–109; R. Post, ‘Prejudicial Appearances: The Logic of American Anti-discrimination Law’ (2000) 88 *California Law Review* 1–40.

²⁷ See, for example, A. Masselot, ‘The State of Gender Equality Law in the European Union’ (2007) 13 *European Law Journal* 152–168; on the potential use of Article 19 FEU Treaty (ex 13 EC Treaty, moved) as legal base in the area of health care services, see Bell, n. 3 at 141–142. On ‘untitled’ discrimination, that is, discrimination outside the sphere protected by Title VII of the Civil Rights Act, see, notably, I. Ayres, *Pervasive Prejudice? Unconventional Evidence of Race and Gender Discrimination* (Chicago, IL: University of Chicago Press, 2001).

limited to the distribution of certain critical goods.²⁸ Nevertheless, there seems to inhere in anti-discrimination law a generalizing momentum that might bring in the future within its scope of application even the aesthetically inept²⁹ or those adhering to widely detested habits.

As regards the quest for doctrinal coherence, recent work by scholars—even by those working in an Anglo-American context, where scholarship has traditionally been most indulgent of enduring fragmentation—is increasingly driven by a bid for systematicization.³⁰ As a result, it has become not merely difficult to maintain the traditional boundary between differential treatment and disparate impact³¹ but also to draw a line between anti-discrimination and disability law³² or anti-discrimination and affirmative action.³³ In the United States, at any rate, the drive towards systematicization is held back by a compromising judiciary which appears to recoil from drawing out the implications of innovative principles;³⁴ but once jurisdictional niceties and established distinctions of levels of scrutiny come to be increasingly experienced as unwelcome residues of old ways of thinking, the prevalence of this perception itself indicates that more is at stake than matching legislative provisions with constitutional powers. It seems to indicate that current judicial practice is blocking the path towards the realization of an emerging ideal of social legislation.

3. Europe's Social Question

The career of European anti-discrimination law and policy is nonetheless somewhat paradoxical. The European Union appears to have taken the lead in a field in which the integration process is otherwise deemed to have been least successful. Anti-discrimination law, arguably, is part of social policy;³⁵ the latter has been, undeniably, the sick man of the Union's internal policy.³⁶

²⁸ See above n. 18.

²⁹ See Post, n. 26.

³⁰ For a noteworthy European example, see Bell, n. 3.

³¹ Most prominently, L. Hamilton Krieger, 'The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity' (1995) 47 *Stanford Law Review* 1161–1248.

³² See, notably, C. Jolls, 'Anti-discrimination and Accommodation' (2001) 115 *Harvard Law Review* 642–699; P. S. Karlan and G. Rutherglen, 'Disabilities, Discrimination, and Reasonable Accommodation' (1996) 46 *Duke Law Journal* 1–41.

³³ See, for example, C. R. Sunstein, *Free Markets and Social Justice* (New York: Oxford University Press, 1997); L. Hamilton Krieger, 'Civil Rights Perestroika: Intergroup Relations after Affirmative Action' (1988) 86 *California Law Review* 1251–1333.

³⁴ See, for example, for the context of American disability law, S. R. Bagenstos, 'The Future of Disability Law' (2004) 114 *Yale Law Journal* 1–82 at 35–40; more generally, J. Rubenfeld, 'The Anti-discrimination Agenda' (2002) 111 *Yale Law Journal* 1141–1178.

³⁵ From a formalist perspective, one might want to object that Article 19 FEU Treaty (ex 13 EC Treaty, moved) has given anti-discrimination law a more fundamental place in Union law. I shall ignore this objection for the purpose of this introduction.

³⁶ See M. Poiars Maduro, 'Europe's Social Self: "The Sickness Unto Death"', in J. Shaw (ed.), *Social Law and Policy in an Evolving European Union* (Oxford: Hart Publishing, 2000), 325–350;

The analysis contained in the first two chapters of this book seeks to explore this paradox against the broader context of current Union anti-discrimination policy.³⁷ It departs by recalling to mind the significance which ‘the social question’ has always had for European integration. In fact, since its inception, the integration process was accompanied by a ‘not merely’ mantra, according to which Europe has always been supposed to be more than a ‘mere’ market society.³⁸ Ever since their founding, the Community and Union were followed by a train of proposals and various attempts to render it more social.

The *first chapter* sketches the regulatory constraints that the law of the common market has created for the pursuit of social policy by the Member States. The impact of Union law, to be sure, has not been without ambivalence. While there is express willingness on the part of the ECJ to respect national autonomy under certain conditions, it has become exceedingly difficult for Member States to make out, in advance, whether the Court is willing to see these very conditions obtain from one case to the next.³⁹ Those framing national social policy have reason to be cautious when a collision with Union law is to be expected. Similarly, even though Member States have often been given leave to uphold their social policies,⁴⁰ these are increasingly maintained with the awareness that the attitude of the Union is more one of toleration than of support. I will complement the picture by pointing out how over the years the perception of national social policy has come to be *assimilated* to the mindset of the common market.

This situation is exacerbated by the well-known fact that the recreation of a welfare state on the European level appears not to present a viable option.⁴¹ First, the jurisdictional space available to the Union is quite limited—too limited, at any rate, for such a task. Second, even if the Union had legal power to recreate a transnational equivalent to a national welfare state, the emergence of such a regime would be extremely unlikely owing to a net loss of social policy-making capacity

W. Streeck, ‘Vom Binnenmarkt zum Bundesstaat? Überlegungen zur politischen Ökonomie der europäischen Sozialpolitik’, in S. Leibfried and P. Pierson (eds) *Standort Europa: Europäische Sozialpolitik* (Frankfurt: Suhrkamp, 1998), 369–421.

³⁷ The other part of an explanation would have to dig deeper into the history and point to the fairly notorious fact that Article 157 FEU Treaty (ex 141 (then 119) EC Treaty) had been introduced on the initiative of France that did not want to suffer a competitive disadvantage in the face of widespread pay discrimination in other member states.

³⁸ See Barnard, n. 14 at 111.

³⁹ For an overview, see V. Hatzopoulos, ‘Health Law and Policy: The Impact of the EU’, in G. de Búrca (ed.), *EU Law and the Welfare State: In Search of Solidarity* (Oxford: Oxford University Press, 2005), 111–168. This raises a more fundamental question about the ECJ’s jurisprudence. In my opinion, it bespeaks a deep crisis of normativity. See my ‘Dogmatischer Pragmatismus: Über die Normativitätskrise der Europäischen Union’, in S. Hammer, A. Somek, M. Stelzer, and B. Weichselbaum (eds), *Der soziale Rechtsstaat in Europa* (Festschrift *Theo Öhlinger*) (Vienna: WUV-Universitätsverlag, 2004), 41–67.

⁴⁰ The ECJ usually proclaims in its rulings that it is the preserve of the Member States to regulate certain matters of social policy, at any rate, as long as they stay within the limits set by free movement provisions. See, for example, Case C-158/96, *Raymond Kohll v. Union des caisses de maladie* [1998] ECR I-1931, para. 17.

⁴¹ See S. Leibfried and H. Obinger, ‘Nationale Sozialstaaten in der Europäischen Union: Zukünfte eines “sozialen Europas”’, in *TransState Reprints* (Bremen: University of Bremen, 2008).

suffered by the Member States when they are acting together. Not only individually and at the national level, but also collectively and at the supranational level do the Member States lack the capacity to achieve what they could have achieved, principally, prior to European integration. It turns out, indeed, that the public policy instruments that can be used by the Member States for the purpose of economic and social stabilization necessitate a move towards the flexibilization— or rather, ‘flexicuritization’⁴²—of employment relationships.

The *first chapter* concludes with observations concerning a shift in the jurisprudence of the ECJ towards what can be described as, borrowing American constitutional parlance, transnational substantive economic due process. It gives rise to increasing regulatory disarmament on the part of those Member States that have an ‘organized’ economy (i.e., a high degree of government involvement and stakeholder participation)⁴³ and raises serious concerns about potentially self-subversive tendencies of economic liberalization in Europe.

Moreover, this development finally brings to the surface what the social question truly amounts to in a *transnational* context. It is not *simply* about relieving the lot of the poor or guaranteeing, in whichever form, freedom from need;⁴⁴ rather, it is about whether national welfare systems that allow for a high degree of human independence from the market mechanism can be sustained as they are forced, within a transnational federation, to interact with systems that are unlike their own. Roughly speaking, it is about how social market economies with a more coordinated form of capitalism⁴⁵ can be sustained when they coexist with liberal market economies within one system that is structurally biased in favour of the latter.⁴⁶

Already at this point, it will emerge that European anti-discrimination law does not reply to how the social question presents itself *specifically* in a transnational context. Anti-discrimination law and policy are addressed to a transnational problem only in a weak sense, in that they help countries that have made a commitment

⁴² ‘Flexicurity’ is the new darling token of European employment reform. It suggests a combination of little or no job security with state support for the unemployed and strong efforts to restore employability through retraining. See Council Conclusions on Flexicurity in times of crisis, 2947th Employment, Social Policy, Health and Consumer Affairs Council meeting Luxembourg, 8 June 2009.

⁴³ On the distinction between organized and liberal market economies, see P. A. Hall and D. Soskice, ‘An Introduction to Varieties of Capitalism’, in P. A. Hall and D. Soskice (eds), *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (Oxford: Oxford University Press, 2001), 1–68.

⁴⁴ See H. Arendt, *On Revolution* (London: Pelican Books, 1977), at 59–60.

⁴⁵ Coordinated (or ‘organized’) capitalist systems have the state more heavily involved in creating the public infrastructure and in fostering technological innovation and professional training. The state participates in economic planning and in brokering deals between social partners. A social market economy, typically, not only provides social assistance for those who can prove to be in need but social security for all with regard to pension incomes, health care, and unemployment benefits. Ideally, it also attempts to provide services for families, children, the elderly, and disabled persons. See M. Höpner and A. Schäfer, ‘Eine neue Phase der europäischen Integration: Legitimitätsdefizite europäischer Liberalisierungspolitik’, in M. Höpner and A. Schäfer (eds), *Die Politische Ökonomie der europäischen Integration* (Frankfurt: Campus Verlag, 2008), 130–156 at 131.

⁴⁶ For a most recent analysis, see F. W. Scharpf, ‘The Double Asymmetry of European Integration, Or: Why the EU Cannot Be a Social Market Economy’ (2009) 09/12 MPIfG Working Paper 25–28.

to protection from discrimination not to suffer a disadvantage vis-à-vis others. However, protection from discrimination on grounds of sex or sexual orientation is not a problem that is *intrinsic* to a transnational context. By contrast, institutional differences between organized and liberal forms of capitalism (or liberal and social market economies) have the potential to unsettle a transnational system.

What is more, anti-discrimination law and policy are undoubtedly normatively very appealing. Who should be in favour of race discrimination? In this normative appeal, however, resides a danger, too. The success of the European anti-discrimination project is likely to detract from what truly is the social question in a transnational setting. Should it turn out—as the remainder of the essay will argue, indeed—that anti-discrimination law is normatively deficient, its moral appeal is even liable to disguise the Union’s lack of ability to address social concerns.

4. The Turn to Employment

In the *second chapter*, I turn to anti-discrimination law and policy. It actually represents that field of Union social policy which has been steadily successful since its inception. It even survived the current reorientation of social policy towards the use of more ‘soft’ as opposed to ‘hard’ legal means. The new, ‘soft’ social policy is associated with the rise of employment policy (Title IX, Articles 145–150 FEU Treaty (ex Title VIII, Articles 125–130 EC Treaty)) immediately before and in the wake of the conclusion of the Amsterdam Treaty. The resulting redefinition of European social policy in terms of securing the employability of human resources and the move from ‘hard’ harmonizing legislation to ‘softer’ tools of governance (reports, plans, benchmarking) are part of one and the same process.⁴⁷ They follow through on the shift of orientation that I mentioned above.

This shift is profound. The task of social policy is no longer perceived to lie in alleviating market dependence.⁴⁸ Social policy is now directed at making dependence more sustainable through enhancing the inclusive fitness of individuals. The idea is that, unless people have sufficient means to support themselves, nobody should be able to claim an exemption from the universal need to make one’s life and livelihood dependent on the interplay of supply and demand. There is no reason, for example, to protect employed insiders at the expense of more qualified outsiders. If the former are sheltered from competition due to the persistence of sexist or racist employment practices, they are likely to become the target, rather than the beneficiaries, of social policy. Consequently, the inclusive fitness of Europeans is supposed to be increased by removing obstacles to the participation in the labour market that originate from factors such as racial prejudice or the traditional domestic allocation of labour, on the one hand, or the lack of skills and insufficient

⁴⁷ See D. Ashiagbor, ‘EMU and the Shift in the European Labour Law Agenda: From “Social Policy” to “Employment Policy”’ (2001) 7 *European Law Journal* 311–330 at 329.

⁴⁸ See G. Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Princeton, NJ: Princeton University Press, 1990), at 37.

motivation, on the other. The new employment policy is conducted—evocative of the most recent, and also most curious, rendering of the Third Way⁴⁹—with a new entrepreneurial spirit that turns away from ‘social spending’ and moves towards ‘social investment’.⁵⁰ Not surprisingly, this strategy of creating sustainable market-dependence is backed up with the subordination of social policy to economic policy—or even an increasing degree of absorption.⁵¹ As social policy becomes redefined with an eye to employment objectives, it is about to play an increasingly ancillary role vis-à-vis the pursuit of economic goals.

I think it is fair to say that, owing to this strong emphasis on the supply side, the reorientation is surrounded by neoliberal air. In order to appear legitimate, however, subsuming social under economic objectives needs to be presented as though it were based upon an even-handed reconciliation of social and economic concerns.⁵² The claim to have thus discovered the key to an all-encompassing (‘Catholic’) concordance between potentially conflicting economic and social objectives is a visible trait of European neoliberalism.

5. The Turn to Management

In the *second chapter*, I also try to show how anti-discrimination law has become interconnected with the European Employment Strategy, which is in turn enveloped in the Union’s overarching economic agenda, namely, the formerly so-called Lisbon strategy.⁵³ As a result, anti-discrimination law is part of a process⁵⁴ where the protection of the interests of employees becomes secondary to securing their

⁴⁹ See A. Giddens, *The Third Way: The Renewal of Social Democracy* (Cambridge: Polity Press, 1998); see Ashiagbor, n. 8 at 281–282.

⁵⁰ On this spirit, see C. de la Porte, ‘Is the Open Method of Coordination Appropriate for Organising Activities at European Level in Sensitive Policy Areas?’ (2002) 8 *European Law Journal* 38–58 at 48.

⁵¹ See, generally, Streeck, n. 9. The subordination is actually spelled out in Article 146(2) FEU Treaty (ex 126(2) EC Treaty), where the Member States are exhorted to conduct their employment policies in ‘a way consistent with the broad guidelines of the economic policies of the Member States and of the Community adopted pursuant to Article 99(2)’. That is, the economic policy guidelines laid down by the Council define the most general framework for the pursuit of social policy objectives in this field. Practically, this is played out in the ‘mainstreaming’ of social policy issues into the meetings of the Economic and Financial Affairs Council (ECOFIN) and the de facto incorporation of the employment strategy into the aims of the Lisbon process. See European Commission, *White Paper on Growth, Competitiveness, and Employment: The Challenges and Ways Forward into the 21st Century*, COM(93) 700 final (1993), and E. Szyszczak, ‘The New Paradigm for Social Policy: A Virtuous Circle?’ (2001) 38 *Common Market Law Review* 1125–1170 at 1133, 1135, 1140, 1151; K. Jacobsson, ‘Soft Regulation and the Subtle Transformation of States: The Case of EU Employment Policy’ (2004) 14 *Journal of European Social Policy* 355–370 at 358.

⁵² See Szyszczak, n. 51 at 1152–1153.

⁵³ Even though the Lisbon Process has officially expired in 2010, it has substantially been carried over into the ‘Europe 2020’ agenda. See European Commission, ‘Europe 2020: A Strategy for Smart, Sustainable and Inclusive Growth’, COM(2010) 2020.

⁵⁴ On the link between the European Employment Strategy and gender mainstreaming, see Barnard, n. 17 at 304–305.

interest in employment and employability for the sake of economic stabilization.⁵⁵ As the rights associated with the status of employees, which until recently have been deemed to be associated with economic citizenship, tend to recede into the background,⁵⁶ policy discourses increasingly encourage social actors to submit ‘creative’ proposals to a common problem-solving project, the epitome of which are ‘integrated guidelines’.⁵⁷

Effective equality management depends on good communication. The turn to management, thus, necessarily involves the use of discourse. As is well known to proponents of critical discourse analysis, discourse creation is not an innocuous affair. Coupled with asymmetries of social power, the imagery introduced by classifications can serve as a medium for ruling others.⁵⁸ Hence, leading through talking is not an idle task. Not only are Member State governments put in the awkward position of having to redescribe their social systems in the newspeak created by the Council and Commission, the use of discourse allows these institutions to present the reconciliation of competing objectives at a *symbolic* level. Optimistic guidelines and cheerfully formulated action plans can pretend that the convergence on harmonious objectives is unlikely to encounter any fundamental resistance, for example, on the ground of a profound conflict between the life interests of ordinary people and the acceleration of production and consumption under contemporary capitalism. In fact, what can be done at that symbolic level is to stage activity by changing the description of strategies and goals.⁵⁹ The symbolic celebration of social progress is all the easier where, as is the case for transnational cooperation, the political process is blissfully insulated against collisions with potentially unruly forces.

6. Manageable Social Policy

The shift from the adoption of social legislation—the latter option is seldom available to the Union for a variety of reasons—to more open methods of voluntary coordination is congruent with experiencing the *situation* of social policy-making in

⁵⁵ For a statement to this effect, see the ‘Economists for an Alternative Economic Policy in Europe’, quoted in Ashiagbor, n. 8 at 171.

⁵⁶ The claim may appear to be overstated in light of the social rights contained in the Charter of Fundamental Rights. Nevertheless, the import of these rights is a question that requires more detailed analysis and cannot be, hence, subject of premature celebration. I shall return to this matter in the second chapter.

⁵⁷ So-called ‘integrated guidelines’ are used by the European Council in order to coordinate the economic and the employment policies of the Member States. See, for example, Council Decision 2005/600/EC of 12 July 2005.

⁵⁸ For an introduction, see R. Wodak, ‘Critical Discourse Analysis’, in C. Seale, G. Gobo, J. F. Gubrium, and D. Silverman (eds), *Qualitative Research Practice* (London: Sage, 2004), 197–213 at 198.

⁵⁹ On the replacement of the four original pillars of the European Employment Strategy with three overarching objectives, see K. Armstrong and C. Kilpatrick, ‘Law, Governance, or New Governance? The Changing Open Method of Coordination’ (2007) 13 *Columbia Journal of European Law* 649–677 at 666.

a certain way. Arguably, the facilitation of voluntary self-improvement appears to be an attractive option when the situation is marked by a number of features.

First, policy-making is imagined to be a process of common problem-solving. It is expected to work best when a high number of 'stakeholders' provide input and experts recommend options for implementation. Negatively put, this means that the situation of policy-making is not perceived to be fraught with irreconcilable conflicts between and among ideological persuasions. In a situation of conflict, by contrast, it might be best to let one party prevail over others while leaving losers the opportunity to make good in the future. Contests between or among political parties with different visions of the political economy fit the latter description. This type of situation is *not* susceptible to description in terms of common problem-solving.

Second, the situation is envisaged as a fertile ground for communicative action.⁶⁰ All agents coordinate their action plans by deliberating about common goals and reasonable means to achieve them. It is presumed that common action might be based on consent and practical convergence, not least because the pool of reasons available to the agents involved is homogenous enough to make the undistorted exchange of ideas possible.

Finally, it is assumed that the reasons in favour of voluntary compliance are at least as strong as self-interest. In fact, since compliance is equated with the readiness for voluntary improvement, the situation has to indicate that improvement is in the self-interest of the polity affected. This is the case for regulatory competition where the incentive for policy change ('improvement') originates from the motive to maintain an attractive business place.

7. Equality Management: the Macro and the Micro Level

That European anti-discrimination law is characterized by an increasing complementarity of 'hard' regulation and 'soft policy' coordination formulates no new insight, in particular not for those using the designator 'hybridity' to refer to this situation.⁶¹ But recognizing the complementarity does not really explain the reason why 'hard' legislation is insufficient to attain anti-discrimination's noble objectives and why the latter is ostensibly depended on supplementary equality management.

The explanation given in Chapters 4 to 6 of this book is that anti-discrimination law is *normatively deficient*. Put simply, it does not regulate enough. When things cannot be accomplished by playing by rules, the need arises to get things done by innovative action, which is expected to accomplish, in one way or another, what mere norms fail to deliver. This explains why the need for equality management arises in the first place.

⁶⁰ See J. Habermas, *Theory of Communicative Action*, trans. by T. McCarthy (Cambridge: Polity Press, 1984), vol. 1 at 82–101.

⁶¹ See T. Hervey, 'Thirty Years of EU Sex Equality Law: Looking Backwards, Looking Forwards' (2005) 12 *Maastricht Journal of European and Comparative Law* at 307–327 at 322.

Moreover, the binocular perspective applied in this book will reveal that the move to equality management can be observed at two levels. At the *macro level*, it affects the ‘complementary’ between legislation and the pursuit of ‘action programs’ or ‘mutual learning processes’, the instigation of which has been encouraged in the European Union. For the most part, these processes are about generating a pool of new ideals in the triadic relation of the European Commission, Member State governments, and civil society. However, the very same shift to management can be observed in the manner in which scholars—in the United States—imagine anti-discrimination strategies to be reinforced at the *micro level* of workplace organization. Both the micro and macro strategy switch from legislation to management and, as regards the subjects affected, from the legality of compliance to practical training and moral improvement. Both strategies involve a high degree of ‘pedagogicization’ and rest their hope on changing attitudes and social understandings. Remarkably, in their focus on attitudes and social understandings, the normative deficit of anti-discrimination law *persists*.

Despite a high degree of overlap, the difference between the strategies is obvious. Whereas the macro level tries to impact on practices from the outside—that is, in a manner similar to a regulation—the micro level tries to overcome the normative deficiency of anti-discrimination law from within its sphere of application, namely, the workplace. The binocular perspective of this book will reveal that the most recent European attempts to reinforce protection from discrimination resemble closely proposals made in the context of American anti-discrimination scholarship where the narrow confines of law are imagined to be supplanted by social learning processes. It is remarkable to observe that the attitude-transforming pedagogical structures that some US American scholars would like to see realized at the workplace level are supposed to be realized in Europe in the context of joint efforts of interested actors (‘stakeholders’) and national administrations.

Whereas the developments at the European macro-level will be explored in Chapter 2, I shall return to the micro level in Chapter 7. Without overburdening the discussion of European developments with reflections on US American scholarship, it is necessary to examine these developments for one very important reason. The micro level reveals the pathologies inherent in the move to equality management that remain largely latent at the European macro level.

8. The Systematic Analysis

The thesis that anti-discrimination law, understood as a type of social legislation, is normatively deficient, is part of an even larger claim, namely, that the ascendancy of anti-discrimination law is not by accident concomitant to neoliberalism. There are, however, at least two ways of defending this claim. The first is presented in Chapters 1 and 2. It amounts to an exploration of the broader public policy context of the relevant legislation. In this context, the macro level of equality management plays a prominent role. The second consists of reconstructing the social policy perspective that is *systematically* articulated within the categories and principles of

anti-discrimination law. From within the very terms with which anti-discrimination law tries to impact on personal relations, the association with neoliberalism is, indeed, all the more striking.

The task of such an internal reconstruction is left to the larger part of the essay. Whereas in the first two chapters the adjective ‘neoliberal’ is used merely to describe a historically momentous shift of orientation from status protection to employment market access, on the one hand, and from collective interest representation to investment in human capital, on the other, the *third chapter* tries to put this shift into a broader perspective. It is based on the recognition that neoliberalism is as a major historical force determinative of the spirit (*Geist*) of our age.⁶² Its ascendancy does not leave social policy unaffected.

Roughly speaking, the spirit of an age is manifest in the *default account* of reasons that we take to be authoritative for the purpose of defending claims. The default account stands for what we believe to be convincing because we expect it to sound convincing to everyone. It is by no means the only account that people resort to in a historical situation, but it is the one that is not expected to be burdened with the onus of proof.

By default, neoliberalism treats the market not merely as one sphere among others but rather as the universal law governing our social existence. This is not to say that the neoliberal view of the world does not recognize anything outside markets; it is, however, the distinguishing mark of our age that any social practice is by default rendered intelligible from within the mindset of rationally calculating individuals for whom the good of life is whatever it may amount to individually, mediated by acts of consumption.⁶³ It is not by accident that under the auspices of neoliberalism economics comes to take the centre stage of the social sciences.

The commitment to market rationality is not without moral constraints. In fact, it is part of the moral strength of neoliberalism to expect consumers to avail themselves of consumer goods by catering to the tastes and needs of others. While consumption is the message, market coordination is the medium. Hence, the moral principle that is *compatible* with neoliberalism has it that whoever wants to live well needs to adapt to market demand. Adaptability is the chief social virtue. It is equality of adaptability against which all allocations are subject to critical appraisal.

9. Triangulating the Neoliberal Left

The neoliberal left—in contradistinction to its more conservative laissez-faire counterpart—is committed to rectifying adverse distributive consequences that

⁶² The following remarks on the spirit of an age are influenced by T. Pinkard, *Hegel's Phenomenology: The Sociality of Reason* (Cambridge: Cambridge University Press, 1994).

⁶³ For the transformation of the meaning of love and romance along these lines, see E. Illouz, *Consuming the Romantic Utopia: Love and the Cultural Contradictions of Capitalism* (Berkeley, CA: University of California Press, 1997).

originate from the influence of factors that seriously hamper or even prevent adaptation. Any rectification requires a modicum of intervention into markets. It is remarkable to observe, though, how compatible the commitment to intervention is with the basic neoliberal contention that all human dealings are essentially market dealings.

First, the factors that are recognized to undermine adaptability are socially salient (often 'visible') enough in order to become a factor in encounters among strangers. The social imagery relevant for the neoliberal left envisages *individuals* engaged in trade and barter and not, for example, collisions between functionally differentiated subsystems of society⁶⁴ or the threat posed by such systems to the human psyche.⁶⁵ Hence, disadvantages are taken to arise as a result of individual acts, albeit it is recognized that disadvantages arise also as the aggregate effect of such acts.

Second, the preferred method of rectification is not the replacement of the market with a different social mechanism but rather its moral purification. The ideal world envisaged by anti-discrimination law is a world inhabited by *better people*—and not, for example, a world where power differentials in the relation of capital and labour have been readjusted such as to approach evermore closely a sustainable equilibrium.

It should not go unnoticed that owing to both restrictions, the neoliberal left can only choose from among a limited set of options. First, disadvantages that are directly or indirectly linked with highly visible and immutable personal characteristics have to be the central focus of concern. It is difficult, however, to come up with a consistent list of immutable factors and to explain, for example, why discrimination on the grounds of religion or political persuasion ought not to be permitted by contrast to discrimination on the grounds of race. Why would it be unreasonable to expect flexible and adaptable employees to adhere to the political views of their bullying bosses? Moreover, anti-discrimination law promises success to those who have internalized the entrepreneurial subjectivity of self-promoting market participants. Anti-discrimination law itself discriminates systematically against those who *simply* fail or who do not conceive of life as a career or as a project for the success of which they find themselves burdened with a special responsibility. Invisible inadaptability that originates, for example, from a commitment to tradition or the fate of having a certain character does not enter the neoliberal picture. Second, market-correcting solutions are premised on the counterfactual example of a world where no actor would be tarnished with a bad attitude or unconscious bias. What for law and economics is the hypothetical world without transaction costs, which supplies the imagined background for the deduction of efficiency-optimizing rules, is for anti-discrimination law a market inhabited by morally unadulterated participants. Not even the problem of indirect discrimination

⁶⁴ See, for that matter, A. Fischer-Lescano and G. Teubner, 'Regime-collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25 *Michigan Journal of International Law* 999–1046.

⁶⁵ See G. Teubner, 'The Anonymous Matrix: Human Rights Violations by "Private" Transnational Actors' (2006) 69 *Modern Law Review* 327–346.

would arise for most women since an ideal counterfactual world has allocated childrearing responsibilities equally. What remains outside the purview of anti-discrimination law, then, are discretionary political measures that replace competition with sheltered practices of employment that offer opportunities to lead a decent life without the inhibitions originating from omnipresent exhortations to excel or the expectation to pursue a career.

10. The Normative Deficiency of Anti-discrimination Law

The *third chapter* offers a rough outline of the argument that is to follow in Chapters 4 to 7. In the *fourth chapter*, I defend a reading of anti-discrimination law that accords priority to the redistributive point of view. Ironically, this viewpoint also reveals its normative deficiency.

I argue that the law's most prominent category, direct discrimination, cannot be accounted for unless by appeal to its redistributive task. The law removes from individual conduct its ordinary ambivalence in that it prohibits reliance on certain grounds of distinction and entrusts distributive agents, notably employers, with the task of breaking the social cycle of systemic discrimination. Direct discrimination norms thereby constitute what counts as the agent's intent, normatively understood. With such normative intent, it is clarified that—disclaimers of agents about their 'real' pre-normative intentions notwithstanding—doing *x* counts as engaging in discrimination on the grounds of *y*.

The constitution of normative intent specifies the redistributive mandate inherent in protection from indirect discrimination for a special causal relation between an individual agent and individual effects. Since the focus comes to rest consequently on individual acts, intentions and choices, the redistributive mandate of anti-discrimination law is submitted to a deontological realization. This gives rise, necessarily, to a deontological misreading of anti-discrimination law. It appears to be, at its core, about identifying guilty minds and bad attitudes. Indeed, owing to its very constitution, anti-discrimination law becomes realized on the basis of a false understanding of its own foundation.

The *fifth chapter* draws out the implication inherent in the distributive view by explaining why the category of direct discrimination is in no manner different from indirect discrimination but rather a special case of it. Direct discrimination isolates one causal relation between market transactions and distributive outcomes. This causal relation can be given an extensional and an intensional interpretation. An extensional interpretation relies on a 'but for' analysis. What matters is whether the presence of a prohibited ground is causally involved in bringing about the difference of treatment. It therefore promises a finding of direct discrimination against various rationalizations of conduct ('Defendant did not mean to . . .'). Alas, this promise cannot be kept. The most appealing interpretation of direct discrimination is intensional, which means that it examines conceivable reasons for action and thereby opens the door to enquiries into pre-normative intent. This accounts for anti-discrimination law's inverted appearance. It is normatively twisted.

Underneath this twist lurks an antinomy, which is the essence of its normative deficiency. Indirect discrimination is more fundamental than direct discrimination. But direct discrimination is more important to the realization of anti-discrimination law, for it promises to fill the void left by the absence of distributive patterns.

However, the root of this deficiency is twofold. First, anti-discrimination law, even though distributive in its orientation, does not recognize any distributive patterns. Hence, no such patterns can direct the application of normative intent. Second, recourse to pre-normative intentions cannot provide clear guidance either, for the real intent of agents is necessarily elusive. Since, owing to the deontological misreading, anti-discrimination law nonetheless becomes thrown back to the level of pre-normative intentionality, its application is destined to become the hotbed of moral controversy. The *sixth chapter* tries to explain and to specify in which respect moralism is the consequence of its normative deficiency and a permanent feature of its practical application.

The normative deficit of anti-discrimination law also explains why the field is systematically vulnerable to be intellectually diluted into pure casuistry. By casuistry I do not mean that for legal rules and principles to become clear they ordinarily require a comparative reflection on how they are to be applied to cases. Casuistry in the sense of the term relevant here does not mitigate indeterminacy but rather exacerbates and conceals it. When principles themselves are not sufficiently clear or pull into different directions, clinging to precedents, no doubt, creates the comforting image of adhering to legal standards; however, resort to precedents offers no reprieve where principles are so muddled that the holding of a case is without further dispute only relevant to the facts that it purports to have ruled on. This experience of such pseudo-normativity is ordinarily made in the relation of two or more conflicting cases that seem to claim equal relevance to a case at hand. In such a situation, precedents do not in any manner prejudice results. Judicial reasoning has an easy time of engaging in distinguishing, thereby even further increasing, the complexity of the field.

It is to be feared, or even to be expected, that in a situation marked by pervasive casuistry, the purported reconciliation of economic and social objectives is likely to be tilted in favour of the former. Under the auspices of neoliberalism, the voice of economic rationality sounds more commonsensical than high-minded moral demands. The synthesis in the relation of competitiveness and solidarity may hence become dominated by the imperatives of flexibility, availability, self-promotion, or permanent requalification at the expense of the interests of life as it exists outside of work. In short, anti-discrimination law is not unlikely to be a blunt tool of social protection.

11. The Neoliberal Predicament and its Antidote

The *seventh chapter* pushes the matter further by studying how the normative deficiency grows into a true neoliberal predicament if attempts at reinforcing anti-discrimination law remain tied to the horizon of the pre-normative level. This predicament comes to the fore in efforts undertaken by scholars of the 'second

generation' of US American anti-discrimination law. They try to imagine what it would take to overcome this deficiency.

In Chapter 7, the analysis comes to a full circle. The study of the micro-level equivalent to European macro-level policy-learning strategies further elucidates the absence of normative guidance inherent in recourse to pre-normative dealings. Not surprisingly, attempts at making progress are concerned with changing attitudes and dispositions, without, however, having a clear conception of the direction in which policy is to be moved. 'Experimentation' and 'mutual learning processes' are the euphemistic referents used in this context. Their currency indicates the persistence of impasse.

Second-generation scholarship, instead of overcoming moralism, aggravates an already existing preoccupation with attitudes, intentions, and personal biases. Worse still, social problems are deemed to originate from a lack of moral self-observation on the part of individual agents and organizations. Resolving these questions is believed to require monitoring and cleansing of the mind of inappropriate, even if unconscious, content. It is disturbing to observe how scholars advocate the implementation of hyper-competitive production models to the transformation of the souls and minds of unreconstructed employers and employees. Second-generation anti-discrimination law comes perilously close to a mind-moulding exercise short of embracing terror.

The *eighth chapter* turns to so-called accommodation requirements and argues that these do not represent one more element in the deontological toolbox of anti-discrimination law. Rather, they represent the law's very own means of drawing out its innermost aspiration. In principle, the embrace of accommodation reverses the deontological inversion of anti-discrimination law. The result of the double negation is not a mere affirmation of the distributive dimension but rather its transcendence into a broader ambition.

The limited personal scope of accommodation requirements is difficult to defend. With the recognition of accommodation, the emphasis of the protection from discrimination shifts from conduct and distribution towards decommodification, that is, making human life generally more independent of the market nexus. However, creating the conditions of a relatively more decommodified life presupposes the full range of social policy strategies whose capabilities have been impaired in Europe while anti-discrimination law was rising to new heights. While the neoliberal predicament exposes the significance of anti-discrimination law, accommodation represents its limit.

Hence, one is bound to conclude that European anti-discrimination law is a self-contradictory project. Its ascendancy is concomitant to a displacement of that full-blown social policy which would be required for its own realization. Anti-discrimination law is social policy in the state of its disempowerment by competitiveness.

Lest I be misunderstood, I hasten to add that the following essay has not been designed as a diatribe against the noble cause of protecting people from discrimination. Rather, it is meant to explore its limit. Anti-discrimination law may be very useful in targeting animus and narrow stereotypes. But it cannot supply the core of a social model.

The book concludes with an appeal to the historical horizon from within which debates over the Third Way have been conducted in Europe. These debates will have to continue. Otherwise, it is to be feared that Europe will be robbed of its social core in the future.

12. Constructivism: a Note on Legal Analysis

Chapters 1 to 3 of this book are concerned with exploring the broader context of European anti-discrimination policy. Methodologically, they might pass as descriptive political science. By contrast, Chapters 4 to 8 present a type of legal analysis that neither considers itself limited by jurisdictional bounds nor aspires to reconstruct European equality law as it stands. Evidently, it is interested in fundamental categories and associated ways of thinking. It is thereby that it wishes to make sense of the significance of a certain field of law.

For the purpose of the following analysis, intermittent reference to the US American experience is particularly useful. The academic debate has already begun to explore various options of reinforcing anti-discrimination policy. Examining these proposals helps to determine its significance. Since capturing this significance is the point of the essay, I abstain from discussing the intricacies of, for example, allocating the burden of proof for cases of direct or indirect discrimination.

The analysis to be found in Chapters 4 to 8 espouses a conception of legal scholarship that I consider to be adequate to our intellectual situation. This situation is marked by both the demise of legal positivism and the widespread reluctance to embrace natural law theory. We are aware that law cannot be treated as a *stable* possession which is fixed ('laid down') in certain positing acts. What we claim to be law is the product of arguments. Equally, we sense that law is also not the manifestation of timeless reason. What we claim to be law is very much a product of our time.

A jurisprudential position that avoids embracing legal positivism and natural law theory without retreating to the intellectual high ground of postmodernism⁶⁶ can, with a certain measure of historical accuracy, be characterized as constructivist. The constructivism practiced in this essay is, indeed, related to its nineteenth-century German predecessor. While sharing certain of its traditional central concerns, it also rejects others. With traditional constructivism the position shares the belief that legal thought is devoted to making our normative ideas clear. The point of this endeavour is to have clear ideas help us comprehend the objective normative meaning of social situations. If it were not for legal thought, it would not be authoritatively known whether or not, for example, a certain pair of utterances is a binding contract or whether, closer to the point of our analysis, an act amounts to discrimination. Since it is part of the objective meaning of legally relevant situations to carry normative implications and since modern law, at any rate, is about empowering the human will, constructivist analysis seeks to determine the rights that emerge as a

⁶⁶ See, for example, D. Patterson, *Law and Truth* (New York: Oxford University Press, 1995).

result of legally significant situations. The task of elucidating their objective meaning involves the use of legal distinctions. They ought to be as clear as possible

This is what the constructivism practiced here has in common with its predecessor. What it does not endorse is the confidence of the latter that the system of legal concepts provides the legal analyst with the intellectual resources to find the one right answer to any and every legal problem, or worse still, the contention that the authoritative source for such answers in hard cases is the conceptual system itself. The new constructivism readily concedes that the substantive construction of a system of law may in certain or even in most cases not admit of one right answer. A construction may not even be able to establish the jurisdiction of the organ that is supposed to absorb a substantive indeterminacy. One may have to conclude that the law is objectively unclear.

When situations are legally unclear, the law cannot rule. Unclear legal situations become supplanted by the interference of other media of communication, such as money and power. But even where legal institutions are marked by indeterminacy, this indeterminacy is bounded and the product of the work of a set of concepts and distinctions. Bounded indeterminacy is constituted by the interaction of a set of normative ideals. It is this type of indeterminacy which is of particular interest to the analysis that follows.

What distinguishes the new constructivism from its nineteenth-century precursor is also the key role played by an insight, which was first formulated by Hans Kelsen.⁶⁷ It continues to play a central role in social system's theory. The legal system not only uses what it takes to be authoritative legal standards in order to elucidate the objective meaning of social situations; legal acts themselves are self-referentially constituted. Such acts validate themselves by claiming to be valid legal acts. Any contractual agreement which is taken seriously by the parties is self-validating in that the parties claim to be bound by it. But also the judgments handed down by courts are self-validating in the sense that they situate themselves within a context that points to the source of their authority. Of course, validation is a cooperative social process, in the course of which legal thought is generative of a constantly evolving structure of reasoning.

Not surprisingly, the self-interpretations of legal acts are error-prone and susceptible to self-obfuscation. They are so, in particular, when the law is in the hand of courts. Courts need to decide. Owing to the permanent embarrassment by carrying a burden of justification, courts are likely to ascribe to their reasoning more solid foundations than they actually can possess. This is unavoidable. Indeed, in their case, it is particularly obvious that the raising of legal claims involves self-validation in spite of insufficient reasons. As a result, the reality of legal systems, aside from over-determination by money and power, is marked by the production of ideology.

It is the task of legal scholarship to remove from the appearance of legal materials, piece by piece, the ideological distortions that originate from overconfident justifications.

⁶⁷ See H. Kelsen, *Introduction to the Problems of Legal Theory*, first pub. 1934, trans. by B. Litschewski Paulson and S. L. Paulson (Oxford: Clarendon Press, 1992).