

**The London School of Economics and Political Science**

**EQUALITY OR THE RIGHT TO WORK?  
EXPLANATION AND JUSTIFICATION OF  
ANTI-DISCRIMINATION RIGHTS IN  
EMPLOYMENT**

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**A THESIS SUBMITTED TO THE DEPARTMENT OF LAW OF THE LONDON  
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## **Declaration**

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# Abstract

This thesis explores the relationship between anti-discrimination rights in employment and equality, on the one hand, and the right to work, on the other hand, in an attempt to achieve a full understanding of this relationship, in terms of three different dimensions: the analytic, the moral and the socio-legal. Firstly, the thesis aims to examine analytically the relationship between anti-discrimination rights in employment and the two values. Secondly, the thesis considers whether such a relationship is morally desirable. Thirdly, it looks at how the current relationship between anti-discrimination rights in employment and equality was established.

The thesis adopts three different kinds of methodology, corresponding to each of the three aspects of the relationship mentioned above: conceptual analysis, moral evaluation and socio-legal studies. In a methodological sense, the thesis will explore the conceptual and socio-legal explanation and the justification of anti-discrimination rights with reference to the two values.

This thesis firstly concludes that the right to work approach to anti-discrimination in employment, as an alternative to the equality approach, would explain anti-discrimination rights in employment more clearly and consistently. Secondly, it shows that, with reservations in relation to some parts of the prohibition of indirect discrimination, the right to work approach would transform the prohibition of direct and indirect discrimination in a more justifiable way than the equality approach, as the former would solve the justifiability issues caused by the latter. Nonetheless, the socio-legal study of the anti-discrimination laws of the US and UK demonstrates that equality was established as their underlying value in a particular socio-legal context, where economic liberty was dominant in the regulation of the workplace and the social movements were separated from the trade unions, mainly reflecting male or white workers and neglecting the voices of those who were vulnerable to the then prevalent forms of discrimination.

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## List of Abbreviations

ADA Americans with Disabilities Act  
ADEA Age Discrimination in Employment Act  
BFOQ Bona Fide Occupational Qualification  
CA Court of Appeal  
CR Congressional Record  
CRA Civil Rights Act  
CRM Civil Right Movement  
DBP Directive on Burden of Proof (97/80/EC)  
DDA Disability Discrimination Act  
DES Department for Education and Skills  
EA Employment Act  
ECHR the European Convention on Human Rights  
ECJ the European Court of Justice  
EEOC Equal Employment Opportunity Commission  
EEAR Employment Equality (Age) Regulations 2006 (SI 2006 No.1031)  
EESDR Employment Equality (Sex Discrimination) Regulations 2005 (SI 2005 No. 2467)  
EOA Economic Opportunity Act  
EPrA Employment Protection Act  
EPA Equal Pay Act of the UK  
EqPA Equal Pay Act of the US  
ERA Employment Rights Act  
ESC European Social Charter  
ET Employment Tribunal  
ETD Equal Treatment Directive (76/207/EEC)  
FA Factories Act  
FLSA Fair Labor Standards Act  
GEO Government Equalities Office  
GFD General Framework Directive (2000/78/EC)  
GOQs Genuine Occupational Qualifications  
HC House of Commons  
HL House of Lords

HR House of Representatives  
ICSECR the International Covenant of Social Economic and Cultural Rights  
IRA Industrial Relations Act  
LC Leadership Conference  
MPLR Maternity and Parental Leave etc. Regulations 1999 (SI 1999 No. 3312)  
NAACP National Association of the Advancement of Colored People  
NALC Negro American Labor Council  
NCCL National Council of Civil Liberty  
NCW National Council of Women  
NLRA National Labor Relations Act  
NLRB National Labor Relations Board  
NMW National Minimum Wage  
NMWA National Minimum Wage Act  
PWR Part-time Workers (Prevention of Less Favourable Treatment) Regulations (SI 2000 No. 1551)  
PWD Pregnant Workers Directive (92/85/EC)  
DREO Directive on Racial or Ethnic Origin (2004/43/EC)  
RRA Race Relations Act  
TBA Trade Boards Act  
TUC Trade Union Congress  
WAC Women's Advisory Committee  
WC Women's Conference  
WCA Wage Councils Act  
WFA Work and Families Act  
WLM Women's Liberation Movement  
WM Women's Movement  
WTR Working Time Regulations 1998 (SI 1998 No. 1833)  
WWC Working Women's Charter

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# **Chapter 1 Introduction**

## **1.1. Research Questions**

This thesis examines anti-discrimination rights in a broad sense. The anti-discrimination rights to be discussed in the thesis include the prohibition of both direct and indirect discrimination. These anti-discrimination rights protect broad classes of people from direct and indirect adverse discrimination on the grounds of various personal traits, such as race and gender. However, some anti-discrimination rights protect only specific groups or classes as in the case of the prohibition of pregnancy discrimination and the prohibition of disability discrimination. The anti-discrimination rights for such groups, alongside other positive rights or duties for their benefit, such as the right to maternity leave and the duty of reasonable adjustments, constitute specific protection for these groups only. Owing to their particular qualities, these narrowly focused anti-discrimination rights need to be categorised separately from the first two anti-discrimination rights. In addition, there are some positive action provisions for women and ethnic minorities. It has been controversial whether such positive action programmes should be conceived of as anti-discrimination measures. It is also often the case that they are implemented not as a right, in a legal sense, but as a voluntary measure or a policy when they are legally allowed. Nonetheless, the discussion of positive action programmes is often combined with other types of anti-discrimination rights. Broadly viewed, thus, anti-discrimination rights in this thesis will mean these four types of anti-discrimination rights: (1) general protection against direct discrimination (2) general protection against indirect discrimination (3) specific protection for particular groups, and (4) positive action programmes.

Current anti-discrimination rights regulate a variety of areas. Some anti-discrimination rights, such as the Equal Protection Clause of the 14th Amendment to the US Constitution, are provided for in a constitution. They mostly prohibit a state from discriminating against particular groups of people on the grounds of their particular personal traits. Beyond such state activities and policies, current anti-discrimination rights regulate important social areas, such as employment, education and the provision of goods, facilities and services to the public. Of the important

social areas, employment is the only area which all the anti-discrimination laws regulate commonly in the UK. The prohibition of discrimination on the grounds of age, sexual orientation and religion only applies to employment.<sup>1</sup> Despite the coverage of several social areas, in addition, employment discrimination claims, most of which, unlike those concerning other areas, are first dealt with by Employment Tribunals (ETs), account for nearly all the legal discrimination claims in the UK.<sup>2</sup> This thesis will deal with anti-discrimination rights in employment alone.

There is a legal discourse<sup>3</sup> that looks at discrimination in employment from the perspective of equality. Under this discourse, if an employer discriminates against a black woman, i.e. refuses to hire, dismisses or otherwise places her at a disadvantage because of her sex or race, the employer's conduct is understood as constituting discrimination, as it encroaches upon equality between male and female workers or between white and black workers. This discourse is dominant in current anti-discrimination laws, as well as the scholarship dealing with anti-discrimination law. Most anti-discrimination laws in the EU declare that they are designed to safeguard the principle of equal treatment.<sup>4</sup> Moreover, equal treatment is treated as *de facto* equivalent to non-discrimination in countries such as the UK, where equal treatment is not explicitly mentioned within the wording of their anti-discrimination laws. This is evidenced in the fact that the whole section on discrimination laws is placed under the heading of 'equality of treatment' in a British textbook on labour law.<sup>5</sup> Furthermore, other forms of equality are used to explain and justify anti-discrimination rights. Equal opportunity, for example, was regarded as a general aim of the SDA 1975 of the UK<sup>6</sup> and is declared to be an essential value in regulating discrimination in employment in the EU.<sup>7</sup>

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<sup>1</sup> See Employment Equality (Age) Regulations (EEAR) 2006; Employment Equality (Sex Discrimination) Regulations (EESDR) 2003; Employment Equality (Religion or Belief) Regulations 2003.

<sup>2</sup> Whereas the average annual number of race and sex discrimination cases in county courts was 24 and 5 respectively between 1977 and 1989 (the last year for which the statistics for such cases were compiled), the annual number of all the claims accepted by ETs was 83,569 from 1 April 2006 to 31 March 2007 (See Hepple, Coussey and Choudhury, 2000, para. 4.13-4.14; ET, 2007).

<sup>3</sup> In this introduction, the term 'discourse' is used to mean that 'socially produced groups of ideas or ways of thinking that can be tracked in individual texts or groups of texts, but that also demand to be located within wider historical and social structures or relations' (Sawyer, 2002, 442).

<sup>4</sup> See Equal Treatment Directive (ETD), a1; Directive on Racial or Ethnic Origin (DREO); General Framework Directive (GFD), a1.

<sup>5</sup> Deakin and Morris, 2005, Chapter 6.

<sup>6</sup> Home Office, 1974.

<sup>7</sup> See GFD, recital (9).

The established relationship between equality and anti-discrimination law is neither natural nor self-evident. This relationship could be challenged in two different respects. To begin with, not all anti-discrimination rights seem to be based on equality. For instance, pregnancy discrimination has been a conundrum in anti-discrimination laws because there is no male comparator corresponding to a pregnant woman. Such a comparator was required for the woman to prove that she was being treated less favourably than men under the SDA 1975.<sup>8</sup> Moreover, equality-based anti-discrimination rights in employment may give rise to morally controversial results. Under these rights, for instance, employers may be allowed either to treat their employees equally badly or to discriminate on the grounds of other personal traits, on the grounds of which discrimination is not currently prohibited.

Moreover, the established relationship could be further challenged by the fact that the anti-discrimination dimension in employment can also be grasped from another perspective. Work is important because it is a principal institution in which people make their living, realise their potential and contribute to society. From the perspective of the value that emphasizes this importance of work for people, which will be referred to as the right to work, discrimination in employment is morally bad because it may arbitrarily deprive people of opportunities to achieve these important interests. Thus, the right to work requires that, for instance, to refuse to hire a black person on the grounds of race should be prohibited in order to protect these important interests in relation to work. Therefore the idea of the right to work could serve as a basis for protecting people from discrimination in relation to work.<sup>9</sup>

Furthermore, the right to work as understood above could construct different anti-discrimination rights in employment in terms of their meaning and scope. In relation to the meaning of discrimination, to begin with, we can see that, for instance, pregnancy discrimination could be constructed differently. Under the right to work, pregnancy discrimination is bad because it frustrates pregnant women's attempts to make their living or realise their potential. As far as pregnancy discrimination is concerned, thus, it is simply 'on the grounds of being pregnant' that employers are not allowed to discriminate against a woman. There is no need to prove unequal

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<sup>8</sup> The SDA 1975, as amended by the EESDR, does not require this sort of comparison (See SDA 1975, s3A).

<sup>9</sup> In a similar vein, for instance, the importance of education might serve as a basis of protection against discrimination in relation to education. However, anti-discrimination in domains other than employment is beyond the scope of this thesis.

treatment between the woman and men by means of comparison. Secondly, the scope of the discrimination to be prohibited could be different. Not all kinds of discrimination are prohibited under current anti-discrimination rights. Refusal to hire someone on the grounds, for instance, that the person has red hair is not prohibited. If anti-discrimination is designed to encourage equality between, for instance, men and women or among people of different races, the non-regulation of discrimination on the grounds of hair colour can be explained by this sort of equality. By contrast, dismissal on the grounds of hair colour may be prohibited under unfair dismissal law. The purpose of this law is to protect people from the harm caused by the deprivation of employment. Given the purpose of the law, it seems natural that all kinds of discriminatory dismissal, including dismissal on the grounds of having red hair, should be prohibited under unfair dismissal law. Therefore, we can see that the value which anti-discrimination in employment is designed to achieve through its implementation determines the meaning and scope of legally prohibited discrimination. In this regard, the right to work, emphasizing the importance of work for people, could not only serve as a basis for the prohibition of discrimination but also 'structure' anti-discrimination rights in employment in its own way.

From the discussion above, we are able to recognise that the relationship between anti-discrimination rights in employment and the values that underlie them may be assessed according to three dimensions of equivalence. First, we can ask whether equality really underlies anti-discrimination rights, that is, whether current anti-discrimination rights are really rights to equality. Drawing attention to this aspect, some may argue that some, if not all, anti-discrimination rights in employment are based not on equality but on the right to work. They may further argue that the discourse of equality in relation to the prohibition of pregnancy discrimination in employment is not substantive but rhetorical, even though it is explicitly mentioned in the relevant anti-discrimination law. Facing this sort of argument, we can decide which value underlies anti-discrimination rights in employment by finding the value that best fits their features. Moreover, even when it turns out that some anti-discrimination rights in employment are really based on equality, we may still wonder what kinds of anti-discrimination rights the right to work would create, as it is able to make a difference to the scope and meaning of the discrimination to be prohibited. This question will be answered by deducing the features of anti-discrimination rights in employment from the characteristics of the right to work.

Hence, the first aspect of the relationship between anti-discrimination rights in employment and the two values (equality and the right to work) is analytical in the sense that their relationship to each of the anti-discrimination rights in employment can be explored by analysing what kinds of anti-discrimination rights in employment the two values require in the light of the meaning and scope of the discrimination to be prohibited.

Secondly, we can assess the relationship between anti-discrimination rights in employment and these two values in terms of their moral desirability. As the meaning and scope of the discrimination to be prohibited are decided by its underlying value, we can morally evaluate the differences depending on the value. If some of the features of anti-discrimination rights based on equality face moral challenges, we may suspect that anti-discrimination rights based on equality are not morally desirable. For instance, we may doubt the moral desirability of the situation in which employers may be allowed to treat their employees equally badly under the equal treatment rule. Along the same lines, this aspect of the relationship between anti-discrimination rights in employment and the right to work can be assessed when the latter underlies, or would underlie, anti-discrimination rights in employment. By finally comparing different features of anti-discrimination rights depending on their underlying values in its moral aspect, we can find which value would structure anti-discrimination rights in employment more desirably. In this way, the second aspect involves not the analytical but the moral aspect of the relationship between anti-discrimination rights in employment and the two values.

Lastly, we can ask why it is that, of the two approaches having different implications for the meaning and scope of discrimination, the equality approach was chosen to underlie anti-discrimination rights in employment. If it turns out that the right to work approach is able to provide a basis for anti-discrimination rights in a more justifiable way, the question will be more precisely specified: what was the reason why anti-discrimination rights were based on equality, despite the fact that there was a better alternative? The reason for the dominance of the equality approach to anti-discrimination rights in employment can be found by looking at the socio-legal contexts in which particular anti-discrimination laws took shape. This is because it is the relevant socio-legal contexts, such as the political and historical contexts, that lead to a particular approach being adopted by the law instead of other possible ones.

Overall, this thesis explores the relationship between anti-discrimination rights in employment and equality, on the one hand, and the right to work, on the other hand, in terms of the three different dimensions discussed above: the analytic, the moral and the socio-legal. Firstly, the thesis aims analytically to examine the relationship between anti-discrimination rights in employment and the two different values. Can equality, as is commonly believed, really underlie current anti-discrimination rights? If so, how would anti-discrimination rights in employment be different if they were based on the right to work? If not, can the right to work explain anti-discrimination rights in employment? Secondly, the thesis considers whether the relationship between anti-discrimination rights in employment and each of the two values is morally desirable. If anti-discrimination rights in employment based on equality give rise to moral desirability issues, could those based on the right to work overcome them? Would anti-discrimination rights based on the right to work give rise to other moral desirability issues? Thirdly, it looks at how the current relationship between anti-discrimination rights in employment and equality was established. What kinds of social, political or historical factors have influenced the making of anti-discrimination rights in employment based on equality? By separately exploring the three different aspects of the relationship, this thesis attempts to achieve a full understanding of the relationship between anti-discrimination in employment and the two values.

## 1.2. Methodology

The thesis adopts three different kinds of methodology, corresponding to each of the three aspects of the relationship between anti-discrimination rights in employment and the two values: conceptual analysis, moral evaluation and socio-legal studies. To begin with, in exploring the different features of anti-discrimination rights, depending on which value they are based on, conceptual analysis will be used.<sup>10</sup> Conceptual analysis is ‘the analysis of concepts.’<sup>11</sup> As Coleman points out, the purpose of conceptual analysis is ‘to retrieve, determine, or capture the content of

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<sup>10</sup> This thesis assumes that conceptual analysis can be made, independently of moral and socio-legal analysis. See, eg, Hart, 1958 and Hart, 1994. On the one hand, however, a school of scholars (eg, Dworkin, 1986; Dworkin, 2004) deny the separability of conceptual analysis from moral analysis. On the other hand, another school of scholars (eg, Leiter 2003; Lacey, 2006) deny the separability of conceptual analysis from socio-legal analysis.

<sup>11</sup> Himma, 2007, 4.



a concept in the hopes that by doing so, we will learn something interesting, important, or essential about the nature of the thing the concept denotes.’<sup>12</sup>

In this thesis, conceptual analysis will firstly reveal the meanings of equality and the right to work. In moral or political discourse, both values may have different meanings among different people depending on their moral or political perspectives. In an attempt to clarify what may be agreed and what may not be agreed among those who view them differently, the thesis will introduce the distinction between various conceptions and the concept of a value. As will be explained in the relevant chapter, the concept of a value is what is agreed as being its ‘most basic elements’ among different people, despite the differences in their conceptions of it.<sup>13</sup> Based on this distinction, on the one hand, we will have a clear understanding of the several conceptions of equality which are used to underlie current anti-discrimination rights in employment, by focusing on its concept as their basic elements. In relation to the right to work, on the other hand, few conceptions of which are available to consider the relationship between them and anti-discrimination rights in employment, we will construct a new conception of this right by looking at the two subcategories as its basic elements, namely, ‘a right’ and ‘work’. Once we are able to see the conceptions of the two different values clearly, we will explore their relationship with anti-discrimination rights in employment. This is possible because equality and the right to work construct the complexity and structure of anti-discrimination rights in employment in their own conceptual ways.<sup>14</sup> If a particular conception of equality underlies current anti-discrimination rights in employment, the latter represents the former’s essential properties without which we cannot say that the latter are equality rights. In a similar vein, the right to work could lead to different anti-discrimination rights, reflecting its conceptual characteristics. Thus the conceptual analysis of the relationship between anti-discrimination rights in employment and each of the two values will enable us to discover not only which value each of the current anti-discrimination rights in employment is based on but also what differences the alternative value would make to anti-discrimination rights in employment.

The second methodology that is adopted in the thesis in order to determine whether some features of anti-discrimination rights in employment depending on their

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<sup>12</sup> Coleman, 2001, 179.

<sup>13</sup> For the distinction between the concept and its conceptions, see Koller, 2006, 182-184.

<sup>14</sup> For an account of how a value structures an area of law, see Zipursky, 2000.

underlying values are morally desirable is moral evaluation. Whether or not a right of a particular scope and meaning is morally desirable is a subjective matter, relying on people's different perspectives. Thus, looking at this sort of matter may not be as persuasive as it aims to be. Bearing in mind the high risk of a subjective bias against a particular value, first of all, moral evaluation will be based on a logically consistent application of a particular value to anti-discrimination rights in employment. In this sense, the results of the conceptual analysis of the relationship between anti-discrimination rights and each of the two values will feed into the discussion of moral evaluation. Moreover, possible moral objections to the view suggested in the thesis as to the moral desirability of the relationship will be examined by looking at whether they are logically consistent and grounded on factual evidence. Nonetheless, the reliance on logical consistency and factual evidence constitutes only a small part of how moral evaluation is made. The main method of morally evaluating different features of anti-discrimination rights in employment depending on their underlying values is to weigh their consequences for those at work in general, namely, those that anti-discrimination rights in employment are designed to protect.<sup>15</sup> It may turn out that whereas some features of anti-discrimination rights in employment based on a particular value give rise to disadvantages for some of them, if not all, those based on the other value do not. If the former value brings about such bad consequences, we can say that the combination of anti-discrimination rights in employment with the value is not as morally desirable as that of the combination of them with the other value. Nonetheless, the disadvantageous nature of such features may be morally tolerated given the external benefits that they may bring about. These external benefits include values or considerations other than equality and the right to work, such as the historical or social necessity of particular anti-discrimination rights in employment and business freedom and productivity. Thus moral evaluation will be made by comparing and evaluating all the consequences brought about by particular features of anti-discrimination rights in employment.

Lastly, the thesis will adopt socio-legal studies in an attempt to explore the socio-legal contexts of the established relationship between anti-discrimination laws and

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<sup>15</sup> In this sense, moral assessment in this thesis is based on consequentialism. In moral and philosophical discourse, however, there is a vast debate on the basis for moral judgement about a particular action: consequentialism is often denied by other moral theories, such as deontological ones. For an account of all these theories, see Scheffler, 1988.

equality. The combination of equality and anti-discrimination rights in employment is a product created in a specific social, political and historical context. Thus, the dominance of the equality discourse in regulating discrimination in employment is one kind of 'social phenomenon', which, as Cotterrell points out, must be 'reinterpreted systemically and empirically' within its relevant context.<sup>16</sup> Among a variety of socio-legal contexts, special attention is drawn to the political process of the formation of anti-discrimination laws and the value structure in the workplace. Firstly, a particular legal discourse is normally established by the politically influential actors concerned, as law 'is given discursive coherence and unity because its intellectual insecurity, its permanent cognitive openness, is stabilized by *political fiat*'.<sup>17</sup> Thus the political process must have been decisive in shaping anti-discrimination rights in employment based on equality. Secondly, the thesis presumes that the pre-established relationship among the workplace rights must have had an impact on the formation of anti-discrimination rights in employment based on equality. This is because all workers' rights are designed to counteract the rights of employers, such as freedom of contract and the right to property. Accordingly, in determining the scope and meaning of the discrimination to be prohibited, the value chosen may have been influenced by the strength of such employers' rights which varies between different legal systems and cultures. In short, this study aims to carry out a combined socio-legal study to illustrate the intertwined impact of these contexts on the formation of anti-discrimination rights in employment based on equality.

The socio-legal study will be carried out by looking at the making of the Civil Rights Act (CRA) of 1964 in the US and the SDA 1975 in the UK respectively, both of which were the first systemic and comprehensive laws in each of the two countries. The reason why the socio-legal study focuses on the anti-discrimination laws of the US and the UK in seeking the reasons for their dominant reliance on equality is because in these countries anti-discrimination laws have always been at the forefront of employment regulation. Furthermore, legal ideas with respect to such laws were introduced earlier in these countries than they were in other countries, as is shown by the fact, for instance, that the prohibition of indirect discrimination

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<sup>16</sup> Cotterrell, 1998, 181.

<sup>17</sup> Ibid., 183.

evolved through the case law of the US and was first introduced into Europe by the SDA 1975 of the UK.

Although conceptual analysis and socio-legal studies are distinguished, both have in common that they describe anti-discrimination rights with reference to equality and the right to work. This approach of giving an account of something as a descriptive matter will be termed ‘explaining’ it. Using the term in this sense, while the former puts its explanatory focus on the conceptual aspect of the relationship between anti-discrimination rights in employment and the two values, the latter puts its explanatory focus on the causal aspect of its historical formation. In this regard, on the one hand, the thesis will both conceptually and socio-legally ‘explain’ anti-discrimination rights in employment with reference to the two values. On the other hand, the thesis is concerned with morally evaluating features of anti-discrimination rights with reference to the two values in order to decide whether they are desirable. To morally evaluate something in order to judge its moral desirability will be termed ‘justifying’ it in this thesis. Using the term in this sense, the thesis will explore the justification of anti-discrimination rights in employment with reference to the two values. In a methodological sense, thus, the thesis will explore the explanation and the justification of anti-discrimination rights with reference to the two values with a view to reaching a full understanding of the relationship between them and the two values.

### **1.3. Outline**

Part One, which covers Chapters 2 and 3, deals with the concept of equality and its relationship to anti-discrimination rights in an attempt to explain and justify them with reference to equality. Chapter 2 firstly considers the concept of equality and the moral justifiability issues arising from it, whereby the relationship between equality and anti-discrimination rights in employment will be examined. It grasps the concept of equality as the common basic framework among various conceptions of equality, such as equal treatment, equal opportunity and equality of result. It shows that the concept of equality is made up of two basic elements, namely, ‘comparison’ and ‘equalization’. Then, it explores some justifiability issues concerning equality, such as levelling down, that inevitably result from the concept of equality.

Then, Chapter 3 examines whether anti-discrimination rights can be explained and, if so, whether they can be justified by reference to equality. To this end, each of the

four types of anti-discrimination rights will be examined with reference to various conceptions of equality. On the one hand, the chapter demonstrates that the prohibitions of both direct and indirect discrimination are based on the concept of equality. However, it will be argued, some features of these anti-discrimination rights based on equality are not morally desirable as the concept of equality fully operates in anti-discrimination rights in employment. On the other hand, the chapter shows that specific protection for women and people with disabilities and positive action programmes for a particular group cannot be explained with reference to the various conceptions of equality, as they do not explain why only particular groups are protected or benefited.

Part Two, which consists of Chapters 4, 5 and 6, deals with the right to work and its relationship with anti-discrimination rights in employment in an attempt to explain and justify them with reference to the right to work. Chapter 4 develops a conception of the right to work by combining a theory of rights with the importance of work for people. Drawing on the interest theory of rights, firstly, it shows that the right to work has to protect the two common interests of working people. Of the common interests in relation to work, subsistence and self-realisation, which are referred to as *the work values*, are morally important enough to deserve protection. Putting this theory of rights and the moral importance of work for people together, it will reach a conception of the right to work, which will be defined as legally protected interests reflecting *the work values*. The chapter finally demonstrates that the right to work gives rise to its own justifiability issues, such as constraints on employers' freedom and business productivity, as it encroaches upon freedom of contract.

In an attempt to explore the relationship of the right to work to each of the four types of anti-discrimination rights in employment, Chapter 5 firstly deals with the first two anti-discrimination rights, namely, the prohibition of both direct and indirect discrimination. It explores how the right to work would make various differences in the regulation of both direct and indirect discrimination, the prohibition of which is explained with reference to equality, as will be shown in Chapter 3. The focus of this chapter is on whether anti-discrimination rights with reference to the right to work could avoid the justifiability issues which inescapably arise with reference to equality. In addition, it further considers whether anti-discrimination rights with reference to the right to work would be justifiable in terms of employers' freedom and business productivity.

Chapter 6 looks at anti-discrimination rights in employment for a particular group of workers alone: specific protection for women and protection for people with disabilities and positive action programmes for women and ethnic minorities. It tries to explain with reference to the right to work these anti-discrimination rights which are not explicable with reference to equality, as will be shown in Chapter 3. Explanation with reference to the right to work will be made in comparison with what is called the group subordination perspective, which, without relying on equality, tries to explain anti-discrimination rights for a particular group alone in terms of group subordination. As a result, the chapter argues that the right to work approach provides a better explanation for specific protection for women and people with disabilities than the group subordination perspective. Also it shows that hard positive action programmes, being distinguished from soft positive action ones, are not explained with reference to the right to work either, as they encroach on the prohibition of direct discrimination based on *the work values*.

Part Three, consisting of Chapters 7 and 8, provides a historical review of the formation of anti-discrimination laws in the US and the UK. On the one hand, they draw attention to the fact that anti-discrimination rights were established in opposition to employers' rights in the workplace. In the UK and the US, employers' rights, such as freedom of contract and the right to property, are more strongly guaranteed, and, as a result, the regulation of employment contracts, which leads to the guaranteeing of workers' rights, is comparatively thin.<sup>18</sup> The chapters describe this established tradition in relation to the workplace rights, in particular, 'the sweeping value of economic liberty' in the US and 'the dominance of freedom of contract combined with voluntarism' in the UK. Then they demonstrate that, given the dominance of employers' rights in the workplace, the equality approach was adopted in these countries as the underlying value of anti-discrimination rights in employment as it was less in conflict with employers' rights than the right to work approach.

On the other hand, these chapters show what kinds of political contexts gave rise to the equality-based anti-discrimination laws in the two countries. Social movements, such as the Civil Rights Movement (CRM) in the US and the Women's Movement (WM) in the UK, were among the main drivers leading to the introduction of the

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<sup>18</sup> Summers, 2001, 11.

anti-discrimination laws. In addition, anti-discrimination rights on the grounds of a particular trait basically involved the trade unions as the organised representative of the workers, as they were mainly concerned with employment. By exploring the social movement politics surrounding the introduction of anti-discrimination laws, these two chapters show that the actual separation of the social movements from the labour movements contributed to the formation of anti-discrimination rights in employment based on equality, as the former relied on equality to pursue their doctrinal consistency in relation to the then prevalent discrimination on the grounds of race or sex and the vast majority of trade unions mainly represented advantaged workers only, namely, white workers in the US and male workers in the UK. Overall, Part Three shows that the introduction of the equality approach to discrimination rights in employment in the two countries is only explicable by referring to their particular legal traditions as to the regulation of the workplace and the politics of the social movements.

# **Part One**



## Chapter 2 The Concept of Equality and Issues of its Justifiability

### 2.1. Introduction

We do not have to reflect every kind of equality that is used in current moral and legal discourse in order to know what the moral value of equality means. This is because, for instance, some kinds of equality may be being misused. Given that it is powerful and persuasive to invoke equality in most Western countries,<sup>1</sup> the value of equality may be more likely to be misused than other moral values. Indeed, as Raz points out, there are rhetorical equality claims in Western thought which rely on the rhetorical power of the value of equality, but which are not actually designed to promote equality.<sup>2</sup> Therefore, while we are required to reflect a variety of views on equality in the conceptual analysis of equality, we need to have a criterion to rule out those in which the idea of equality is being misused. In conceptual analysis, that the meaning of something important is distinguishable from other meanings is a basic pre-condition for it to have an independent meaning.<sup>3</sup> Equality also needs to be distinguished from other similar values in order for it to be independently meaningful. For this reason, this chapter will exclude from the realm of equality some meanings of equality which are not independent from other moral values, even though they are being used in current moral or legal discourse.

Even when we exclude such misuses of the idea of equality, there remains a large variety of types of equality discourse. In order to reveal what equality means, we need to analyse all of the meanings in an attempt to find out their sameness and differences. In this regard, the difference between what a value commonly means and its different types is recognised as the distinction between the concept and different conceptions of the value by several scholars.<sup>4</sup> For instance, Dworkin generalises the distinction between the concept and its conceptions. He does so by using the analogy of the relationship between courtesy and respect in the interpretation of courtesy.<sup>5</sup> He

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<sup>1</sup> See Westen, 1990, Part Four.

<sup>2</sup> Raz, 1986, 227-229.

<sup>3</sup> Koller, 2006, 184.

<sup>4</sup> See, eg, Rawls, 1971, 5-6; Dworkin, 1986, 70-72, 92-93.

<sup>5</sup> Dworkin, 1986, 70.

explains that whereas everyone can agree that courtesy is a matter of respect, they disagree on 'the correct interpretation of the idea of respect'. Dworkin maintains that seeing courtesy as a matter of respect is about the very concept of courtesy and that conceptions of courtesy are competing interpretations of the idea of respect in relation to courtesy. Applying the distinction between the concept and various conceptions, he argues that the common concept of law is a kind of a plateau, on which arguments about what law is develop.<sup>6</sup>

The distinction between the concept and various conceptions can be applied to the value of equality. There are a variety of types of equality in legal, moral and philosophical discourse. Despite their diversity, one can call each of them one kind of equality. The reason for this is that they have something in common. In this chapter, equality as the basic common element shared by a variety of ideas of equality is defined as the concept of equality. Despite the fact that it is called one kind of equality, each kind of equality is different in its substance. Furthermore, the justifiability of each kind of equality is contested in the moral and legal discourse on equality. Different and contested ideas of equality are defined as conceptions of equality in this chapter.

Following the distinction between the concept and various conceptions, it can be said that anti-discrimination rights in employment are believed to be based on several conceptions of equality, such as equal treatment, equal opportunity, equality of results or equal concern and respect. In order to examine in the next chapter whether or not they are actually based on equality, we need to know what these conceptions of equality mean. Hence this chapter firstly attempts to correctly characterise the common aspect of equality in various features of these conceptions of equality, namely, the concept of equality and its relationship with the various conceptions of equality. The understanding of the general features of equality will help us more easily to grasp the elements which enable anti-discrimination rights to be rights to equality despite the differences in their underlying conceptions. However, we will not look separately at each of the conceptions of equality that are used to underlie anti-discrimination rights. Since, as will be shown later, most conceptions of equality differ only in the aspect in terms of which they are designed to equalise a certain state of affairs among people, to focus on the concept of equality and its relationship

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<sup>6</sup> Ibid., 93.

with various conceptions will be sufficient to clarify the conceptions of equality that underlie anti-discrimination rights in employment. For the sake of clarification, instead, we will attempt to distinguish the concept of equality from non-genuine conceptions of equality which are not based on this concept, despite their explicit use of the term equality. Lastly, in order to consider in the next chapter whether equality-based anti-discrimination rights are morally justifiable, this chapter will explore what kinds of justifiability issues are commonly faced by the concept of equality irrespective of the differences between the conceptions. The justifiability issues will include both those all conceptions of equality face without exception and those which the conceptions of equality that are used to underlie anti-discrimination rights commonly encounter.

## **2.2. The Conceptual Elements of Equality**

Terms related to equality, such as 'equal' and 'equally', are used in daily life to describe a certain state of affairs. For instance, it is often said that two persons, A and B, are equal in their height or weight. In addition, 'equal' is often used in mathematics to express a certain mathematical state. However, equality in legal and moral discourse is different from the simple factual description of a state of affairs. It does not simply describe a certain state of affairs. It requires that things 'should' be in the certain state. In this sense, the nature of equality in legal and moral discourse is prescriptive rather than descriptive.<sup>7</sup>

Reflecting this prescriptive nature of equality in moral and legal discourse, we can derive a general equality statement in terms of which every kind of equality can be rephrased without its meaning being changed: 'A and B must be equal in terms of X'. Here X represents what is morally suitable to be distributed, such as benefits, burdens, treatment and power.<sup>8</sup> Although A and B may be different in many respects, A and B must not be different in terms of X. To achieve equality according to this statement, firstly, A and B must be compared in respect of X. In this comparison, it does not matter how much X A and B actually have so long as they have the same amount of X. This is because, however little X A and B may have, as long as they are

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<sup>7</sup> Westen, 1990, chapters 1 and 3.

<sup>8</sup> X as an aspect is sometimes different from what is actually distributed. For instance, to satisfy the statement that 'A and B must be equal in terms of treatment', something specific, such as money and benefits, may be actually distributed. Despite this possible difference, for convenience of discussion, it is assumed in this chapter that X means both the aspect and what is actually distributed.

not different in the amount of X, the equality statement is satisfied. Thus, even a situation in which, as a result of comparison, it turns out that neither of them has any X does not generate the concern with equality which the statement requires. What matters in the equality statement is a difference between A and B in terms of X. Secondly, if A and B are different in terms of X, A and B must be equalised in the amount of X that they have. As a result of equalisation, A and B may end up having a full unit of X, half a unit of X or no unit of X. Again the equality statement is only concerned with the sameness of A and B in relation to X. Therefore, we can see that the general equality statement in moral and legal discourse contains 'comparison' and 'equalisation' as its constitutive elements.

Although the expressions are different, there seems to be little disagreement between proponents and opponents of equality that a statement which consists of comparison and equalisation is an equality statement. On the one hand, Simons, one of the proponents of equality, suggests an example where equality is meaningful. In the example, a father declares to his three children that if he takes any of the children to the movies, he will take them all.<sup>9</sup> Hence, under their father's promise, all the children should be compared in terms of their going to the movies. If it turns out, after a comparison, that one of the children has been to the movies, the father's promise requires equalisation, namely, that the other two children should also go to the movies. Hence, in this example, we can transform the father's promise into an equality statement, namely, that all the children should be equal in terms of going to the movies. On the other hand, Raz, who rejects the idea that equality is independently valuable, formulates a more general egalitarian principle: 'All Fs who do not have G have a right to G if some Fs have G'.<sup>10</sup> In this formulation of equality, whether or not some Fs must have G or not depends on whether or not the other Fs have G. Based on comparison among Fs, all Fs are equalised in terms of whether or not they have G. Thus, Raz's principle is also an equality statement: all Fs must be equal in terms of G.

From the fact that a general equality statement consists of comparison and equalisation, it does not necessarily follow that the two elements are indispensable for the statement to be an equality statement. To be indispensable, it is required that

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<sup>9</sup> Simons, 1985, 384-401; Greenawalt, 1997, 1265.

<sup>10</sup> Raz, 1986, 225. For a similar formulation, see Peters, 1997, 1223.

the absence of either of the elements in the statement makes the statement indistinguishable from other kinds of statement.

Indeed, both of the two elements are essential to constitute equality. In order to see whether this is true, let us begin with the comparison element. Suppose that there is a general rule that all persons belonging to Group C, including A and B above, must receive a full unit of X. In a case where A has half a unit of X and B has a full unit of X, under this general rule, A is entitled to the other half unit of X. The decision to give a full unit of X to A does not depend on whether B has a full unit of X or not. Hence, A can still claim a full unit of X even though B has actually no X or half a unit of X. Thus it can be found that the general rule lacks one of the conceptual elements, namely, comparison.

Even if we admit that there is no comparison in the application of the general rule above, one might still wonder why comparison is needed to constitute the concept of equality. We can ordinarily say that people belonging to a particular group, to which the general rule is applied, must be equal. Accordingly, the general rule above could be expressed as follows: all persons in Group C must be equal in terms of X. Thus, it might be argued that what the concept of equality requires is equalisation alone, whether or not equalisation is actually based on comparison.

However, the general equality statement that 'A and B must be equal in terms of X' alone is not able to explain why both of them have a full unit of X rather than, for instance, half a unit of X in the general rule. In order to explain the reason, it is necessary to say that there is the general rule above, namely, all members belonging to Group C are entitled to a full unit of X. Although we can say that A and B must be equal in terms of X, presupposing the general rule but not mentioning it explicitly, hence, it is true that this equal statement has no independent force without the general rule. It simply points out that the general rule must be applied to both A and B. In this sense, equalisation alone is not a sufficient condition for the general equality statement.

Unlike equalisation as the application of a general rule, the equalisation which the general equality statement requires can be made in various ways. Leaving aside variables of X, such as half a unit of X, however, it can be said that equalisation in the general equality statement is realised mainly in two ways. Equality, for instance, requires that treatment, benefits, burdens, power, etc., should be given to all people, whether they are men or women, black people or white people, or else they should be

given to none of them. Moreover, in Simons' example of the three children above, the father may take all of them to the movies, or none of them. In Raz's general egalitarian principle, furthermore, only when a person has G, do the others have a right to G. If no Fs have G, no other F is entitled to G. Overall, which of the two distributive routes is chosen in realising equality depends on whether or not one of those belonging to a particular group as a comparator has been given G. In this respect, realising the general equality statement, unlike the implementation of a general rule, is conditional, contingent or relational.

Whether the equal state of affairs brought about as a result of the application of a general rule is independently meaningful has been doubted by both proponents and opponents of equality. For instance, when Westen argues that equality in legal discourse is empty on the grounds that equality is derivative from rights,<sup>11</sup> what he actually means by equality is equalisation according to a general rule, in this chapter's terms. Legal rights, such as the right to vote and the right not to be tortured, are one kind of general rule in the sense that all the people that such rights are designed to protect are entitled to them. Without knowing their legal rights, a statement of equality alone does not specify a concrete meaning, since it is not known how the equalisation required by the statement will take place. Once we know their legal rights, the statement of equality arising from these rights simply confirms them. Thus, Westen argues that equality generated by legal rights is not self-standing and as a result it is empty. Furthermore, Simons fully acknowledges that normative equality does not include 'a duty to implement a rule accurately', although he defends the moral value of equality. This is because 'rules requiring specified forms of treatment to members of a class are noncomparative in inspiration'.<sup>12</sup> Since comparison makes equality distinctive from the application of a general rule, equality is described as comparative justice in moral discourse in contrast with non-comparative justice.<sup>13</sup> What is more, equality is depicted as a comparative right in legal discourse.<sup>14</sup>

Nonetheless, comparison expresses only one element of the concept of equality. It should be noted that equalisation is the final state which equality reaches. Indeed,

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<sup>11</sup> Westen, 1982, 548.

<sup>12</sup> Simons, 2000, 723-730; Simons, 1985, 403-408.

<sup>13</sup> See Feinberg, 1974; Montague, 1980.

<sup>14</sup> Simons, 1985.

there is justice or a right, the fulfilment of which is determined only through comparison but which does not require equalisation. We cannot call this sort of justice or right a form of equality because it lacks the element of equalisation. For instance, there is proportional treatment in moral and legal discourse: A and B must be treated proportionally in terms of X according to the amount of Y that they have. For instance, suppose that B has twice as much Y as A and accordingly B must receive twice as much as X. Thus, this proportional treatment can lead to a situation in which A is given one unit of X and B two units of X, or another situation where A is given half a unit of X and B a full unit of X. The amount A receives depends on the amount B receives. In this sense, this statement requires comparison. However, equalisation does not take place because different amounts of X are distributed to A and B. In this sense, the equalisation element in equality distinguishes equality from proportional distribution.

Of course, the proportionality proposition can sometimes be rephrased: A and B must be equal in terms of X per unit of Y.<sup>15</sup> In the rephrased statement, one can say that A and B are equal in terms of X per unit of Y regardless, for instance, of whether A is given one unit of X and B two units of X, or A half a unit of X and B one unit of X. Thus, we could say that equalisation takes place in the rephrased statement. Indeed it can be argued that proportional distribution is interchangeable with equal distribution following the concept of equality.<sup>16</sup> To be precise, however, the aspect to be equalised in the rephrased statement is not X but X per unit of Y. If we stick to X, not X per unit of Y, as an aspect of comparison, proportional distribution in terms of X according to the amount of Y cannot be rephrased and accordingly equalisation does not take place. In this precise sense, therefore, equality in terms of X is still distinguished from proportional treatment in terms of X according to Y, even if the latter can be rephrased in terms of equality by phrasing it in terms of X per unit of Y.

In sum, both comparison and equalisation are indispensable in constituting the concept of equality. Both of them enable equality to be meaningful independently from, for instance, the application of a general rule or proportional distribution. The absence of either of these two elements makes an equality claim tantamount to the application of a general rule or proportional distribution. In terms of the concept,

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<sup>15</sup> Sen, 1996, 397.

<sup>16</sup> Simons, 1985, 444-445.

therefore, equality is a value requiring the equalisation of something important based on a comparison between people.

## **2.3. The Relationship between the Concept and Conceptions of Equality**

There is a large variety of conceptions of equality in moral and legal discourse. As far as anti-discrimination laws are concerned, equal treatment, equal opportunity, equality of results, equal respect and concern and so on are used to explain the corresponding anti-discrimination rights. What is more, in moral and philosophical discourse on equality, various conceptions have been proposed in relation to morally appropriate distribution; equality of resources,<sup>17</sup> equality of primary goods,<sup>18</sup> equality of opportunity, equality of welfare,<sup>19</sup> equal access to advantage,<sup>20</sup> and equality of capability.<sup>21</sup> In this section, we will consider how these conceptions of equality can be explained in relation to the concept of equality.

We have already found that the sameness in conceptions of equality stems from the two conceptual elements that commonly operate in each of the conceptions of equality. How do the differences among the various conceptions of equality arise? In the general equality statement in the previous section, X represents the aspect to be equalised among people.<sup>22</sup> We did not specify X in order to derive the two conceptual elements from the statement. Now we can see the various conceptions of equality above, as X, such as treatment, opportunity, primary goods and welfare, are now specified. These conceptions of equality mainly vary in their substance depending on which aspect they claim should be equalised among people. Thus, on the one hand, each conception of equality is a specific idea of equality in which the aspect to be equalised among people is explicitly expressed. From the point of view of the concept of equality, on the other hand, only the applied aspects of the two conceptual elements vary.

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<sup>17</sup> Dworkin, 2000, Chapter 2.

<sup>18</sup> Rawls, 1971.

<sup>19</sup> Arneson, 1989.

<sup>20</sup> Cohen, 1989.

<sup>21</sup> Sen, 1979.

<sup>22</sup> In the literature, an aspect in which people should be equal is called an (evaluative) space, metric, respect or dimension(See Sen, 1992, 13).



Therefore, we can see that a conception of equality consists of the two parts having different functions, namely, the two conceptual elements and the aspect to be equalised among people. While the former enables the conception of equality to maintain a homogenous quality as equality, the latter distinguishes between various conceptions of equality. As X within the general equality statement, being the aspect to be equalised among people, generates the differences among the various conceptions of equality, one conception of equality is able to compete against the others within the scope of the concept of equality on the basis that it grasps a more precise or more justifiable aspect of equal distribution.

Relying on the relationship between the conceptions and the concept of equality, as stated above, we can explain why some conceptions of equality with the same two conceptual elements may collide with each other. For instance, equal treatment sometimes conflicts with equality of results in the sense that the latter may require different treatment in order to equalise the results. Those conceptions collide with each other because it is not the two conceptual elements but the actual aspects to be equalised among people that collide. The collision between equal treatment and equality of results is due to a partial contradiction between treatment and results. Even though some conceptions of equality are in conflict, they are still kinds of equality, as the two conceptual elements of equality operate in them.

On the other hand, a conception of equality could have an ambiguous meaning. Where this is the case, again, it is not the concept of equality that is ambiguous. It is the aspect that is to be equalised in the conception of equality that can be interpreted in several ways. For instance, the idea of opportunity in equal opportunity means 'somewhere between a guarantee and a mere possibility of attaining something'.<sup>23</sup> Because of this broad meaning of opportunity, whereas equal opportunity could sometimes mean simply the removal of hindrances, such as prejudices against a particular group, it might also require special preferences for the group, which comes closer to a guarantee. Simply stating the idea of equal opportunity cannot fix the exact sense of the word, which varies between a guarantee and a mere possibility of attaining something, as the meaning of opportunity varies according to the context.<sup>24</sup>

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<sup>23</sup> Westen, 1985, 839.

<sup>24</sup> Ibid 838.

In sum, whereas all the differences among the variety of conceptions of equality result from the different aspects which are to be equalised among people, their similarity as conceptions of equality comes from the two conceptual elements in conceptions of equality. Without the operation of the two conceptual elements in those various conceptions of equality, we cannot call them kinds of 'equality'. Borrowing Hart's terms, comparison and equalisation are 'a uniform or constant feature' of equality in conceptions of equality, despite their diversity.<sup>25</sup>

## 2.4. Non-genuine Conceptions of Equality

As has already been mentioned, there is literally a huge variety of equality claims made in legal, moral, philosophical and political discourse. Regardless of whether those equality claims are morally justifiable, we can test whether they are really claims of equality. If some equality claims lack either or both of the two conceptual elements of equality, then they are not genuine equality claims. Although they explicitly use the term 'equality', their use of equality is rhetorical rather than substantive. This section will show how we can test whether an equality claim is genuine, taking some claimed conceptions of equality as examples.

Here is a typical non-equality based moral suggestion: distribution should be made according to basic needs. Distribution according to basic needs is transformed into distribution according to urgency of basic needs when the goods to be distributed are not sufficient to satisfy all people's basic needs. This distribution does not necessarily require an equal amount of distribution. This is because people's basic economic or physical needs may be different. The amount that they receive as a result of the distribution is likely to be different. Hence, this distributive rule does not require equalisation. Distribution according to basic needs might sometimes turn out to be the same as equal distribution among people. As Raz points out, however, this takes place only when each member's needs happen to be more or less the same.<sup>26</sup> Some might argue that, as this distributive rule is applied, we can say that all people's basic needs are equally satisfied. Nevertheless, the word 'equally' simply emphasises that the distribution rule is completely realised without any exception. It

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<sup>25</sup> Hart, 1994, 159.

<sup>26</sup> Raz, 1986, 239.

does not add any substantive meaning to the original rule. In this sense, Sen's argument that 'equal satisfaction of needs is a requirement of equality'<sup>27</sup> is mistaken.

Some might suspect that this distribution is the same as proportional distribution based upon comparison. This might be so because we can say that something is distributed proportionally to people's needs. Despite the similarity of these statements, however, the two kinds of distribution are completely different. People's basic needs are absolute, not relative. Such needs do not depend on comparison, namely, whether or not other people's needs are satisfied. Whereas proportional distribution based on comparison is only concerned with the relative proportion of distribution, distribution according to basic needs is only satisfied when the absolute amount that is required to meet each member's needs is distributed. Overall, since it lacks both comparison and equalisation, we cannot say that distribution according to basic needs follows the concept of equality.

Nonetheless, some proponents of equality argue that equality demands distribution according to basic needs. For instance, Dworkin maintains that, in a family with two children, where one of them is dying from a disease that is merely making the other uncomfortable, we must give the remaining dose of a drug to the seriously ill child in order to treat them with equal respect and concern.<sup>28</sup> In a similar vein, Nagel argues that giving absolute priority to the economically or physically worse off is an egalitarian policy.<sup>29</sup> To take an example of a family with two children, Nagel explains that equality requires the family to move to a city where the second child, who suffers from a painful handicap, can receive special treatment and schooling rather than moving to a suburb where the first child, who has a special interest in sports and nature, can benefit.<sup>30</sup>

However, this kind of equality argument made by means of the examples above is not actually based upon the concept of equality. First of all, this is because helping the seriously ill and the handicapped child in the two examples above does not necessarily require comparison. Both families' decisions to help a child in urgent need can be made without any comparison. Suppose that each family in Dworkin's and Nagel's examples has only one child. Even if the only child in Dworkin's

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<sup>27</sup> Sen, 1992, 15.

<sup>28</sup> Dworkin, 1977, 227.

<sup>29</sup> Nagel, 1979, 123.

<sup>30</sup> Ibid., 123-124.

example is seriously ill, the remaining dose of the drug will still be given to the child. Moreover, if the only child in Nagel's example suffers from a painful handicap, the family will definitely decide to move to a city where the child can receive a better medical treatment. In both of these cases, 'no comparison' does not decrease the importance of helping their only child. Thus we can say that the families' decision to help their only child is made not as a result of any comparison with another child but according to the child's urgent needs. Dworkin's and Nagel's conceptions of equality are not able to explain these cases.

Secondly, the comparison with another child found in the original cases is not to equalise something between the two children but to decide which child's needs are more urgent. Let us focus on Dworkin's equal concern and respect, as Nagel is not clear about which aspect is to be equalised in his conception of equality. We can hardly say that, after the family in Dworkin's example has given the remaining dose of the drug to the seriously ill child, the respect and concern given to their children is equalised. Rather we can say that special respect and concern is given to the seriously ill child because of its more urgent need. If equal respect and concern in Dworkin's case really aims to equalise respect and concern, this could be achieved by disrespecting both of the children. It seems evident that equal concern and respect in this case is not intended to equalise concern and respect in this way. Overall, their conceptions of equality do not genuinely follow the concept of equality as far as the examples above involving children are concerned.

There is another non-genuine conception of equality which attempts to explain distribution according to basic needs in the name of equality: equality of basic capability. Sen suggests that his capability approach to equality is more proper in the domain of distribution than other conceptions of equality, such as equality of welfare and equality of resources.<sup>31</sup> Capability may be broad enough to cover a variety of human beings' activities and each person's capability may be compared and equalised in the same way as resources and welfare can be. Thus, as far as capability is concerned, equality of capability may be understood as a genuine conception of equality.

However, what we need to consider, in relation to this section, is Sen's equality of 'basic capability' but not of 'capability'. Equality of basic capability is specially

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<sup>31</sup> See Sen, 1992, chapter 3.

focused on achieving a proper understanding of poverty. He placed needs in relation to poverty, understood as 'basic capability failure', in the context of equality, when he initially suggested this new aspect of capability:

It is arguable that what is missing in all this framework is some notion of 'basic capabilities': a person being able to do certain basic things. The ability to move about is the relevant one here, but one can consider others, e.g., the ability to meet one's nutritional requirements, the wherewithal to be clothed and sheltered, and the power to participate in the social life of the community. This notion of urgency related to this is not fully captured by either utility or primary goods, or any combination of the two. ... I believe what it is at issue is the interpretation of needs in the form of basic capabilities. This interpretation of needs and interests is often implicit in the demand for equality. This type of equality I shall call 'basic capability equality'.<sup>32</sup>

On the surface of it, distribution according to equality of basic capability seems to differ from distribution according to basic needs. We cannot say that people, as a result of the latter distribution, are equal in terms of the amount of what is distributed. However, we might say that basic capability is equalised among people after the former distribution has been made. Thus the former distribution might meet one of the two conceptual elements of equality, namely, equalisation, whereas the latter does not. Nonetheless, equality of basic capability lacks the element of comparison which the concept of equality also requires. Suppose that everyone is entitled to the satisfaction of their need for basic capability. Although this general rule could make everyone equal in terms of basic capability, distribution according to the rule does not require comparison, as was shown in Section 2.2. Under this rule, the equalisation of basic capability is simply the result of the application of this general rule without any exception. In this regard, as Cohen points out, equality of basic capability as a matter of fact means the 'universal' satisfaction of the need for basic capability.<sup>33</sup> Therefore, as long as equality of basic capability does not deny that people must have their need for basic capability met, equality of basic capability is not a genuine conception of equality.

In short, whether a particular conception of equality is genuine can be determined by examining whether it contains these two conceptual elements. On a closer look, some conceptions of equality which claim that they explain distribution according to basic needs actually turn out to lack either or both of these conceptual elements. We

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<sup>32</sup> Sen, 1979, 218.

<sup>33</sup> Cohen, 1994, footnote 4.

have confirmed that the claimed conceptions of equality seek to satisfy basic and urgent needs even where no comparator is available or various forms of equalisation are possible. To this extent, these conceptions of equality are not genuine ones.

## **2.5. The Levelling Down Issue**

The argument in the previous section that some conceptions of equality are not genuine on the grounds that they are not based on the concept of equality does not mean that the alleged conceptions of equality are morally wrong. It simply means that those alleged conceptions of equality are not, in fact, conceptions of equality at all. For a similar reason, the fact that some conceptions of equality turn out to be based on the concept of equality does not mean that these conceptions of equality are morally right. The issue of the moral justifiability of equality is another matter which is different from whether or not some moral claims are claims about equality.

As was mentioned in Section 2.3, most conceptions of equality compete against one another as to which one is morally desirable. In particular, the competition mainly takes place in relation to the aspect which is to be equalised. That is, it centres on which aspect each conception of equality proposes is most morally important and relevant. Based on this observation, Sen emphasises that justice is about ‘equality of what’.<sup>34</sup> However, it should be noted that this chapter looks at the justifiability issues which equality commonly faces despite its various conceptions. Whether or not a particular aspect in a conception of equality is morally important does not concern these issues, as it is specific to this conception of equality alone. The justifiability issues which will be addressed in this chapter stem from the conceptual elements that are common to every conception of equality. For instance, people may agree that a particular aspect which a conception of equality proposes is morally important. Nonetheless, they may disagree that this aspect should be equalised. Thus, as issues of the justifiability of equality are involved with its conceptual elements, what matters first is not the question ‘equality of what?’ but ‘whether equality?’.<sup>35</sup> This section will look at the levelling down issue which typically reveals the latter sort of dilemma of the moral justifiability of equality.

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<sup>34</sup> Sen, 1996, 16.

<sup>35</sup> Kane, 1996, 405.

As the concept of equality comprises both comparison and equalisation, the element that distinguishes it from other moral values is that the morality of a state of affairs is always judged on the basis of a comparator. What the moral value of equality attempts to correct is a difference between a person and his or her comparator. As was shown in the previous sections, the value is not concerned with what a person would want absolutely, even if he or she was the only person in the world. The value is recognised and realised relatively, namely, only in relation to the state of affairs of other comparators.

Let us suppose that there are inequalities among people that occur ‘through no fault or choice of theirs’ and accordingly that some are better off whereas others are worse off. Thus, the moral value of equality requires these inequalities to be corrected. Equality between the better off and the worse off can be achieved by levelling down the benefits of the better off to the amount of benefits that the worse off have as well as by levelling up the benefits of the worse off to that of the benefits the better off have. In a similar vein, moreover, if there is not enough of something valuable for it to be distributed, the principle of equality might lead us to waste it. As Raz illustrates,<sup>36</sup> if three persons have an equal right to a house, but there is only one house available, the house will be wasted as long as it cannot be distributed equally among the three of them. The fact that equality as a moral value is satisfied even when people’s welfare is not improved at all is morally troubling. This sort of issue which equality faces is commonly termed ‘the levelling down objection’ by opponents of equality.<sup>37</sup> They regard ‘levelling down’ as evidence that equality as a moral value is not always justifiable.

In the face of the levelling down objection, some may still argue that equality itself is good, whether its outcome involves levelling down or levelling up. Their argument is based on the assumption that the existence of unequal states of affairs among people through no fault or choice of theirs is morally bad.<sup>38</sup> Hence, ‘levelling down’ does not matter according to this view. Equal states of affairs will be fairer even if the amount of benefits given to the better off and the worse off are less than the amount that the worse off have when inequality exists.<sup>39</sup> Although this view directly

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<sup>36</sup> See Raz, 1986, 227.

<sup>37</sup> Parfit, 1997, 211.

<sup>38</sup> McKerlie, 1996, 274, and Parfit, 1997, 206.

<sup>39</sup> McKerlie, 1996, 295.

attempts to defend levelling down as one feature of the moral value of equality, if it is taken to extremes, this view can result in equality being completely separated from people's needs for wealth or benefits. Thus, this view is not convincing to those who believe that morality consists in improving people's welfare and their quality of life to a certain extent. In fact, there are few proponents of equality who fully defend levelling down as such.<sup>40</sup>

Facing the levelling down objection, most proponents of equality attempt to adjust the idea of equality in order to avoid this kind of logical but extreme defence of equality. Firstly, some proponents of equality argue that equality can avoid the levelling down issue by focusing on inequality of the worse off rather than the better off.<sup>41</sup> For them, equality should be realised only by way of levelling up, namely, by benefiting the worse off. Then we could ask why equality should matter only to the worse off despite the fact that it could be realised by levelling down. The idea of equality alone, conceived of as consisting of the two conceptual elements, is not able to answer this question. Nonetheless, if it is insisted that equality is meaningful only when it benefits the worse off, this view is not a conception of equality any more, although it is claimed as a conception of equality. It is the priority view in which 'benefiting people matters more the worse off these people are'.<sup>42</sup> In response to the question, if it is argued that levelling down is not allowed, for instance, in order to improve overall utility, this argument is actually relying on utilitarianism rather than egalitarianism.<sup>43</sup> If it is argued that levelling down must not take place on the grounds of people's 'well being' or 'benevolence', the argument is actually based on the principles related to these virtues.<sup>44</sup> Overall, it is impossible to support the arguments in favour of preventing levelling down only by reference to the value of equality. A moral principle other than that of equality which prevents levelling down is needed in order to prefer 'levelling up' to 'levelling down', otherwise the priority

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<sup>40</sup> Although Temkin believes that there is something bad 'in an important respect, even if there is no one for whom it is bad', he argues at the same time that proponents of equality should be pluralists about morality to prevent levelling down (See Temkin, 2003a, 781-782; Temkin, 2000, 155).

<sup>41</sup> See Honderich, 1989, 47.

<sup>42</sup> Parfit, 1997, 213.

<sup>43</sup> Raz, 1986, 227.

<sup>44</sup> Honderich, 1989, 57.



view above, being distinguished from equality, should be conceived of as a separate moral value.<sup>45</sup>

So far we have assumed that the inequalities between people which we have discussed, which the moral value of equality attempts to correct, are all ones that result 'through no fault or choice of theirs'. Based on this assumption, it has been argued that the moral value of equality requires all these inequalities to be corrected. However, not all the inequalities that occur among people 'through no fault or choice of theirs', some people may argue, necessarily have to be corrected. Of these inequalities, there are some that do not result from human wrongdoing. For instance, there may be inequalities between two societies which have no connection with each other at all. These inequalities may not have to be amended, as no human wrongdoing is involved with them. Inequality matters when it involves 'assessing agents or actions'.<sup>46</sup> On this view, when inequality arises without any wrongdoing of agents, it does not matter morally. In other words, this view contends, there is no injustice, to the extent that inequality does not involve any wrongdoing of agents.<sup>47</sup> This view of equality does not necessarily require levelling down of benefits or resources. This is because when inequality in resources occurs regardless of 'the agency of any individual or institution',<sup>48</sup> proponents of this view do not think that it is wrong. By narrowing down the scope of cases in which inequalities should be corrected, the view makes the issue of levelling down less likely to arise.

It should be noted, however, that this view of equality does not completely solve the levelling down issue. In equality of treatment, in which unequal treatment may be involved with human wrongdoing, the levelling down issue could arise. Let us suppose that a father has given dessert to only one of his three children because he loves that child most. This inequality, which has been produced by the father's wrongdoing in the distribution of desserts, can be corrected by giving desserts to the other siblings as well as to that child, as could be generally expected. However, there is an alternative way of realising equality. The father might not give a dessert to the

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<sup>45</sup> Holtug, 2007. Other scholars doubt that the priority view is an independent moral value (See Temkin, 2003b; Crisp, 2003).

<sup>46</sup> Temkin, 1993, 11. While this sort of equality is called the deontological version of equality, equality conceived of as correcting all the inequalities that occur among people through no fault or choice of theirs is called the teleological version of equality. For the distinction of these two versions of equality, see Parfit, 1997.

<sup>47</sup> Parfit, 1997, 212.

<sup>48</sup> McKerlie, 1996, 280.

favoured child any more, instead of giving desserts to all his children. Thus, we will need a value other than equality in order to argue that to give a dessert to none of them is wrong or unjust. Therefore, the levelling down issue remains unresolved in the view in which inequalities do not have to be corrected if they do not involve human wrongdoing.<sup>49</sup>

It can be argued that abstract conceptions of equality can avoid levelling down. For instance, Dworkin proposes a principle of abstract equality in which a government has a duty to treat its citizens with equal concern and respect. According to the levelling down objection, this conception of equality faces the criticism that the principle of equal concern and respect would be realised in a totalitarian state in which everyone is equally disrespected, for instance, in such a way that everyone is tortured. Recognising the levelling down objection to his conception of equality, Dworkin argues that his principle of equality is conceptually incompatible with such a totalitarian state:

The idea of equality is meant to suggest content for the ideas of respect and autonomy: those in power are meant to treat others as they treat themselves, not in the sense of supplying for them only the same goods and opportunities they take themselves, so that a masochistic tyrant could justly torture everyone along with himself, but in the more fundamental sense of attempting, so far as it is possible, to see the situation of each person defined through the ambitions and values of that person, just as he must see his own situation defined through his own ambitions and values in order to have that grasp of himself as an entity that is necessary to self-consciousness and therefore to self-identity.<sup>50</sup>

Dworkin's defence against the levelling down objection is based on the assumption that human beings are entities who secure their own self-consciousness and self-identity and that accordingly torturing someone encroaches on his or her nature as such an entity. If this assumption is fully implemented, everyone accordingly receives equal concern and respect from the government. However, that everyone must be treated as such an entity is another moral principle. The idea of equal concern and respect does not necessarily contain this moral principle. The latter cannot be derived from the former. Thus equal concern and respect as an abstract version of equality can avoid levelling down only by relying on a moral principle other than equality.

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<sup>49</sup> See Lippert-Rasmussen, 2007, 118-123.

<sup>50</sup> Dworkin, 1977, 356-357.

However, it might be contended that the idea of equal concern and respect actually means the independent moral principle described above. Indeed, Williams maintains that the idea of equality means that all people should be respected as human beings who possess self-consciousness.<sup>51</sup> If the principle of equal concern and respect is tantamount to this general moral principle,<sup>52</sup> it is not based on comparison, as shown in Section 2.2. Thus, as Raz points out, the word 'equal' in the term 'equal concern and respect' does not add any substantive meaning to the independent moral principle because 'being human is in itself a sufficient ground for respect'.<sup>53</sup> Thus, equal concern and respect understood as this principle is not a form of equality anymore and thus can be called a non-genuine conception of equality.

In sum, equality faces the levelling down issue because of its conceptual elements. Levelling down is hardly defensible in terms of its moral justifiability. Narrowing down the scope of the inequalities to be corrected by the principle of equality does not avoid the levelling down objection completely. We need values other than equality to prevent levelling down. Since every conception of equality faces the levelling down issue, this is typical of 'whether equality?'.

## 2.6. Equality of Whom?

So far we have assumed that those to whom equality applies are individuals. This is not necessarily the case. Equality may apply between groups in which people are categorised on the basis of a particular criterion. Whether equality should apply individually or on a group basis is another justifiability issue of equality. Unlike the levelling down issue, not all conceptions of equality face this issue. Whereas the former addresses whether equality itself is morally justifiable, the latter concerns which sort of equality is morally more justifiable within the boundary of equality. Nonetheless, this issue needs to be explored in this chapter. This is because the conceptions of equality that are used to underpin anti-discrimination rights in employment, such as equal treatment, equal opportunity and equality of results, are

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<sup>51</sup> Williams, 1962.

<sup>52</sup> It is not certain whether or not Dworkin originally meant the general moral principle described above by the term equal concern and respect. In the main text of *Taking Rights Seriously*, he explains that treating someone as an equal is for that person 'to be treated with the same respect and concern as anyone else' (See Dworkin, 1977, 227).

<sup>53</sup> Raz, 1986, 228.

concerned with particular personal traits, along the same lines as such conceptions of equality are applied on a group basis. Hence this section will consider the 'equality of whom' issue, which the conceptions of equality underlying anti-discrimination rights commonly encounter.

In the phrase 'equality of X', X often means what is distributed as an object of equality. Based on this use of X, we can often describe certain conceptions of equality, such as equality of wealth or equality of power. However, the X in 'equality of X' can sometimes mean a trait, whose difference among people should not make a difference in the distribution of something valuable. When we say equality of race or equality of sex, equality means this sort of equality. Here the beneficiaries of equality of this sort are not all people. They are confined to people recognised by a particular trait specified as X in equality of X. When we distribute power equally, equality of sex is not concerned with inequalities in power unless there are inequalities in power between men and women. In this regard, equality of 'X as a distinguishing personality trait' plays the role of confining the application of equality of 'X as an object' to particular groups formed through 'X as a distinguishing personality trait'.

Despite its narrower scope of application, equality of 'X as a distinguishing personality trait' is based on the concept of equality. For instance, equality in power between women and men does require, firstly, a comparison to be made in terms of the amount of power that the two groups have, although any difference in power based on distinctions other than sex is not recognised by such equality. Once there is a difference in power between women and men, equality in power between women and men requires the difference to be equalised, say, by taking some power from the group that has more power than the other group and redistributing it to the other group. Therefore we can see that equality of 'X as a distinguishing personality trait' is a kind of equality which is based on the concept of equality, although its distribution does not completely realise equality of 'X as an object'.

As equality of X can mean two different sorts of equality, we need to have both an object and beneficiaries of equality in order to fix what precisely it means. Nonetheless, we describe equality only in terms of either its object or its beneficiaries. The reason why this is quite often done is that, when we specify equality only in terms of either its object or beneficiaries, we presume that the other aspect of equality is implicitly known. For instance, when we talk about equality of wealth, we quite often mean that this sort of equality should be individually

implemented for everyone. However, this is not always the case. Equality of wealth confined by equality of race is not concerned with inequalities in wealth among people unless there are inequalities in wealth between different races. Moreover, what should be distributed in equality of race or equality of sex is quite often opportunities for something valuable, such as education or employment. However, this is not always clear. What is to be distributed in equality of race could be education or employment itself but not opportunities for education or employment. If this is the case, then education or employment should be equally distributed along racial lines among people, for instance, by setting a quota for a particular racial group according to its demographic proportion in society.

The fact that equality of 'X as a distinguishing personality trait' places a limit on equality of 'X as an object' gives rise to another justifiability issue.<sup>54</sup> From the perspective of those who think that something valuable should be equally distributed on an individual basis, equality of 'X as a distinguishing personality trait' does not fulfil the mission of equality. Let us see how this takes place through Table 1.<sup>55</sup> In Table 1, we suppose that there is a society that consists of four white and four black people. The numbers in Table 1 represent the amount of wealth that each individual has in this society. I and II demonstrate two different situations regarding the distribution of wealth. It is assumed, in order to focus on distribution only, that the overall amount of wealth is the same in I and II. As the table shows, there is a difference in wealth between white and black people in I: the average amount of wealth of the white people is 10 whereas that of the black people is 8. However, there is no difference in wealth between white and black people in II: the average amount of wealth of the two groups is the same as both groups have 9 on average. Thus the transformation from I to II achieves equality of race in this society. Even when equality of wealth is realised only along racial lines, however, there will still exist inequalities between people. In II, inequality within each group increases: the gap between the worse off (w1, w2, B1 and B2) and the better off (w3, w4, B3 and B4) has widened. The question then arises why racial inequality in wealth alone matters while inequality in wealth based on distinctions other than race becomes worse.

<sup>54</sup> See Thomson, 1973, 357; Elster, 1992; 195-204; Sher, 2002, 193-196; Rae, 1981, 29-38, 76-81.

<sup>55</sup> The basic idea of this figure is borrowed from similar figures or other demonstrations in Elster, 1992, 195; Sher, 2002, 194-195; Rae, 1981, 36.

<Table 1>

I				II			
W1	8	B1	6	W1	6	B1	6
W2	8	B2	6	W2	6	B2	6
W3	12	B3	10	W3	12	B3	12
W4	12	B4	10	W4	12	B4	12
AW	10	AB	8	AW	9	AB	9

Although there may be a variety of ways in which proponents of equality of 'X as a distinguishing personality trait' can defend it, we can see that they face a common dilemma. First of all, if proponents of equality of this sort admit that something valuable is individually important for everyone, there seems to be no reason why it should not be equally distributed on an individual basis. Here it should be noted that particular inequalities, for instance, among racial groups can also be corrected by the realisation of equality on an individual basis. In this sense, focusing on particular traits, such as sex or race, with reference to equality hardly seems justifiable. Thus, the concession of the importance of something valuable for every individual may lead us to deny the independent significance of equality of 'X as a distinguishing personality trait'. Secondly, in an attempt to justify equality of 'X as a distinguishing personality trait' independently, they may argue that there is an historical and social exclusion from something valuable based on particular distinctions: the role of women has been confined to home and to child care and they have been subordinated to men; black people were once slaves and in addition they have been segregated in some countries. For these reasons, it may be argued, equality of 'X as a distinguishing personality trait' is independently meaningful. If inequalities matter only for these reasons, however, this will mean that current inequalities in relation to something valuable as such do not matter. Thus, the argument that draws attention to the history and the reality of groups with a particular trait brings about a troublesome situation in which something that is valuable as an object of equality is not important as such but it is only important for particular groups differentiated by the trait.

There may be a third view in which equality of 'X as a distinguishing personality trait' can be defended. On this view, we do not have to choose between equality on an individual basis and equality of 'X as a distinguishing personality trait'. For instance, Young admits that equality should eventually be realised on an individual

basis for everyone but not between groups.<sup>56</sup> Nonetheless, she argues that looking at inequalities between groups is needed because it is able to reveal the 'structural' privilege of a particular group and the 'structural' disadvantage of other groups.<sup>57</sup> Further, these inequalities between groups, she argues, do not have to be directly equalised through measures targeting the disadvantaged groups, such as positive action programmes for them.<sup>58</sup>

However, this explanation of equality of 'X as a distinguishing personality trait' weakens its significance as an independent moral value. As it does not necessarily require equalisation, Young's equality of 'X as a distinguishing personality trait' is not a conception of equality fully operated based on the two conceptual elements. Under equality on an individual basis, moreover, comparison between a particular group and other groups may be needed and emphasised in order to find a particular serious inequality regarding the group without introducing any independent equality of 'X as a distinguishing personality trait'. Hence, the necessity of comparison to disclose the structural inequalities of a particular group alone without further equalising them does not lead us to the conclusion that equality of 'X as a distinguishing personality trait' is independent from equality on an individual basis. Therefore, although Young may rightly argue for the necessity of comparison between a particular group and other groups, she does not prove the independence of equality of 'X as a distinguishing personality trait' from equality of individual basis.

In sum, equality of 'X as a distinguishing personality trait' is an independent kind of equality in the sense that the two conceptual elements of equality are present. It is realised not individually but on the basis of the groups formed along the lines of X. Thus it is indifferent to individual inequalities within the groups. For this reason, the moral worth of equality of 'X as a distinguishing personality trait' may be doubted. This sort of justifiability issue of equality is common among the conceptions of equality that are used to underpin anti-discrimination rights in employment.

## 2.7. Conclusion

So far we have shown that both comparison and equalisation are indispensable in constituting the concept of equality. Both of them enable equality to be meaningful

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<sup>56</sup> Young, 2001, 17.

<sup>57</sup> Ibid., 17.

<sup>58</sup> Ibid., 18.

independently from, for instance, the application of a general rule or proportional distribution. The absence of either of these two elements makes an equality claim tantamount to that of the application of a general rule or proportional distribution. In various conceptions of equality, their similarity as forms of equality results from the two conceptual elements, while the aspects to be equalised among people make all the differences among them. Thus, whether a particular conception of equality is genuine can be assessed by examining whether it contains the two conceptual elements. Some conceptions of equality which claim that they can explain distribution according to basic needs actually turn out to be non-genuine ones from which either or both of these conceptual elements are absent.

We have also found that there are two justifiability issues in relation to the conceptions of equality regarding anti-discrimination rights in employment. Generally speaking, first of all, there is the 'levelling down' issue which every conception of equality faces. Equality in relation to a particular good is realised either by giving the good to all people or to none of them. It is unavoidable that all conceptions of equality face this issue as the two conceptual elements of equality are present in them. As equality realised through levelling down does not contribute to improving people's wellbeing, it is vulnerable to moral criticism. Some scholars claim that equality is able to avoid this consequence of distribution. However, it turns out that they are actually relying on a moral principle other than equality. Secondly, and more specifically, the conceptions of equality that are employed in anti-discrimination rights in employment face another justifiability issue as they are addressed to particular personal traits. Equality of 'X as a distinguishing personality trait' is realised not individually but on the basis of the groups formed along the lines of X. Thus it is indifferent to individual inequalities within the groups. For this reason, the moral worth of equality of 'X as a distinguishing personality trait' may be challenged.



## **Chapter 3 Anti-discrimination Rights in Employment and Equality**

### **3.1. Introduction**

This chapter considers the relationship between anti-discrimination rights in employment and equality. As was mentioned in the introduction of the thesis, this relationship can be divided into two different dimensions. One is a descriptive dimension, namely, whether equality really underlies current anti-discrimination rights in employment. The other one is whether equality-based anti-discrimination rights are morally desirable. Using the terms ‘explain’ and ‘justify’ as they were defined in the Introduction, the two dimensions are about whether equality explains anti-discrimination rights in employment and whether equality justifies all their features as being based on equality, respectively.

There may be two different meanings of the explanation of anti-discrimination rights with reference to equality. Firstly, equality underlies anti-discrimination rights when various features of certain anti-discrimination rights fit the concept of equality. Hence, in order to discover whether or not equality underlies anti-discrimination rights, it is essential to examine whether or not the operating features of each anti-discrimination right meet the two conceptual elements of equality, namely, comparison and equalization. Secondly, even if anti-discrimination rights in employment do not contain the conceptual elements of equality, anti-discrimination rights may be instrumentally useful for the purpose of realising equality. If anti-discrimination rights in employment are necessary to realise equality in this regard, we can say that equality underlies these rights. In this chapter, thus, we will consider both of the two meanings of the explanation of anti-discrimination rights in employment with reference to equality.

The discussion as to the justifiability of anti-discrimination rights in employment with reference to equality can proceed only after it has been confirmed that anti-discrimination rights are explained by reference to equality. This is because, if anti-discrimination rights are not explained by reference to equality, these rights are not equality rights at all, and accordingly the discussion of the moral justifiability of anti-

discrimination rights as equality rights cannot take place. Hence, one may conceive of three kinds of possible relationship between anti-discrimination rights and equality. Firstly, anti-discrimination rights may be explained and justified by reference to equality. Secondly, even though anti-discrimination rights may be explicable by reference to equality, the rights may not be morally justified by reference to equality alone. Lastly, anti-discrimination rights may not be explained by reference to equality at all.

Based on the discussion of the concept and the justifiability of equality in the previous chapter, this chapter explores whether anti-discrimination rights can be explained and, if so, whether they can be justified by reference to equality. To this end, instead of looking at each and every anti-discrimination law, this chapter deals with the four types of anti-discrimination rights in employment that were categorised in the Introduction of the thesis: the prohibition of direct discrimination, the prohibition of indirect discrimination, specific protection for women and people with disabilities and positive action for women and minorities. Each category of the anti-discrimination rights is alleged to be explained and justified by different conceptions of equality, such as equal treatment, equal opportunity, and equality of results. Therefore, the relationship between equality and each of the four types of anti-discrimination rights will be examined respectively.

## **3.2. The Prohibition of Direct Discrimination**

### **3.2.1. Explanation**

#### **3.2.1.1. Comparison and Equalisation**

Under sex discrimination law, unlawful discrimination takes place when employers treat an applicant for a job in their company or a person employed by them less favourably on the grounds of sex than a person of the other sex.<sup>1</sup> This sort of discrimination is called direct sex discrimination, which is distinguished from indirect sex discrimination, as will be shown in the following section. The prohibition of direct sex discrimination is regarded as realizing equal treatment under sex discrimination law.<sup>2</sup> The same relationship as the one between the prohibition of

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<sup>1</sup> See SDA 1975, s1; Amended ETD, a2(2).

<sup>2</sup> See, eg, Amended ETD, a2(1).

direct sex discrimination and equal treatment can be observed in anti-discrimination laws relating to other traits, such as race, religion and sexual orientation.<sup>3</sup>

Indeed the prohibition of direct discrimination on the grounds of a personal trait can be explained with reference to equal treatment. To begin with, it is certain that, in explaining the prohibition of direct discrimination with reference to equal treatment, what is to be distributed is treatment regarding employment. If what is to be distributed were employment itself, but not treatment regarding employment, jobs would be equally given either to everyone or, for instance, to both sexes, regardless of whether or not people have the ability to do the jobs. The prohibition of direct discrimination does not require employment itself to be equally distributed. It simply prevents the access to, and the maintenance of, employment from being dependent on people's personal traits.

Then let us see whether the prohibition of direct discrimination on the grounds of a personal trait can be constructed, relying on the two conceptual elements of equality. Firstly, it requires a comparison of treatment between the groups formed along the lines of the particular trait, for instance, between male and female workers or between black and white workers. Once it is found by comparison that there is any difference in treatment on the grounds of the personal trait, it then equalizes treatment by eliminating the difference. Although employers do not promise that everyone is entitled to some specific benefits, if they give these benefits to white or male employees, they must also give the same benefits to black or female employees unless there is a reason other than sex or race to give them to the former employees only. Of course, the employers may choose not to give the benefits to either of them. What is not permissible under the direct discrimination provisions is, however, a situation where they give some benefits to particular groups, such as male or white employees, but they do not give them to the other groups, such as women or black people, on the grounds of their sex or race, and *vice versa*. As this example shows, the prohibition of direct discrimination on the grounds of a personal trait equalizes the treatment of different persons by giving benefits to all of them (levelling up) or to none of them (levelling down), unless it is found that there is a reason other than the personal trait to give it to only some of them. Hence, it meets the requirement of the concept of equality, namely, 'equalization' based on 'comparison', in terms of

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<sup>3</sup> See, eg, GFD, a2; DREO, a2(1).

treatment regarding employment. Therefore, the prohibition of direct discrimination on the grounds of a personal trait is explained with reference to equal treatment between the groups formed along the lines of a personal trait regarding treatment in employment.<sup>4</sup>

In fact, direct discrimination cases show that levelling down takes place in the operation of the direct discrimination provisions. To begin with, in *Palmer*,<sup>5</sup> where, when a federal court in the US ruled that segregation between black and white people in swimming pools was unequal, a city closed white-only public swimming pools instead of opening them to black people, the Supreme Court held that the city's decision did not violate the principle of equality. Moreover, in the EU, raising the pension age for women so that it is the same as that for men does not violate equal treatment, according to the European Court of Justice (ECJ).<sup>6</sup> In the UK Courts, furthermore, the issue of levelling down has been shown in the reasoning of judgements in direct discrimination cases. For example, the House of Lords (HL) ruled in *Zafar*<sup>7</sup> that unreasonable treatment does not in itself amount to sex or race discrimination because if an employer is unreasonable, 'he might well have treated another employee in just the same unsatisfactory way as he treated the complainant'. This reasoning also applies to discrimination by way of victimization<sup>8</sup> and was applied to harassment on the grounds of sexual orientation.<sup>9</sup> In short, these cases demonstrate that the prohibition of direct discrimination allows levelling down, just as the moral value of equality does.

In the US context, however, Peters, one of the opponents of equality, doubts the interpretation of the direct discrimination provision by reference to equal treatment. He criticises the equal treatment interpretation of the prohibition of direct discrimination for two reasons. In the first place, he maintains that the focus of the

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<sup>4</sup> See Simons, 2002, 709. However, this does not mean that *vice versa*. As Homes points out, the difference in treatment due to a pure mistake is corrected not by the prohibition of direct discrimination but by the equal treatment rule (See Homes, 2005, 186-187).

<sup>5</sup> See the opinion of Justice Black in *Palmer v. Thompson*, 403 US 217 (1971). However, this case is involved with the Equal Protection Clause in the Fourteenth Amendment of the US Constitution.

<sup>6</sup> *Smith v. Avdel*, Case 408/92 [1994] ECR I-4435.

<sup>7</sup> *Zafar v. Glasgow City Council*, [1998] IRLR 36.

<sup>8</sup> *The Chief Constable of West Yorkshire Police v. Khan* [2001] IRLR 830.

<sup>9</sup> See *Pearce v. Governing Body of Mayfield School*, [2003] IRLR 512. Currently, this comparative approach to harassment does not apply as discrimination laws in the UK have been amended to implement the relevant EU Directives in which the meaning of harassment is not based on comparison (See RRA (Amendment) Regulations 2003, s5; Employment Equality (Sexual Orientation) Regulations 2003, s5; EESDR 2005, s5.). For a discussion of the harassment provisions, see Barmes, 2007.

prohibition of direct discrimination is not on 'the difference in treatments that result from' such discrimination but on 'the application of harmful irrelevant criteria to produce that difference'.<sup>10</sup> He illustrates this point by taking an example of the '*single person reductio*'.<sup>11</sup> This is a situation where, for instance, a black person is denied a job because of race and no other non-black person is given that job. In this instance, if unlawful discrimination is defined as unequal treatment based on comparison, the black person is not able to claim the right not to be discriminated against on the grounds of race, as there can be no comparison between the black applicant and other non-black applicants. In this case, although there is no comparator to the black person, if the black person should be protected from discrimination under anti-discrimination law, the prohibition of direct discrimination cannot rely on the comparison required by the equal treatment interpretation. Therefore, the black person's anti-discrimination right against race-based treatment is 'absolute, not contingent',<sup>12</sup> in the sense that it is not dependent on comparison whether discrimination takes place or not.<sup>13</sup>

Secondly, Peters points out that the equal treatment interpretation of the prohibition of direct discrimination may bring about levelling-down, which he thinks is morally unacceptable. As one example, he takes the swimming pool case mentioned above. In this case, treating black and white people equally badly by closing the swimming pool is not regarded as breaching equal treatment, the requirement of which can be met by both equally good and by equally bad treatment. Consequently, as long as the prohibition of direct discrimination is interpreted with reference to equal treatment, one could not prevent the swimming pool from being closed on the grounds of racial hatred. On the contrary, if anti-discrimination rights are understood as prohibiting the use of irrelevant criteria, he argues, closing the swimming pools would still be another form of race-based treatment and, as a result, it would fall under the prohibition of direct discrimination.<sup>14</sup>

However, Peters' argument contains some logical errors in relation to the levelling down issue. It is certain that the equal treatment interpretation of the prohibition of direct discrimination allows levelling down. Also, there is some merit in his

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<sup>10</sup> Peters, 1997, 1256.

<sup>11</sup> Peters, 2000, 1110.

<sup>12</sup> Ibid.

<sup>13</sup> For a similar view in the UK context, see Holmes, 2005, 186.

<sup>14</sup> Peters, 1997, 1113.

argument that permitting levelling down is morally unacceptable. However, one cannot say that anti-discrimination rights are not 'equality rights' on the grounds that the rights bring about morally unacceptable results. This is because logically the latter, namely the question of the moral justifiability of the prohibition of direct discrimination as an equality right, cannot be used as a ground to support the former, namely whether the prohibition of direct discrimination meets the concept of equality or not. As is distinguished by the two different terms, 'to justify' and 'to explain' that are used in this chapter, each of the two arguments falls into two different dimensions of discussion. Therefore, his examples, which show the moral difficulties of the equal treatment interpretation of the prohibition of direct discrimination, cannot support his main contention that the prohibition of direct discrimination is not an equality right at all.

Whether or not equal treatment explains the prohibition of direct discrimination should be determined according to whether equal treatment fits the operating features of the prohibition of direct discrimination. As was shown above, in the operation of the prohibition of direct discrimination, both comparison and equalization are observed in relation to the treatment of workers and levelling down is permissible as one of the two forms of equalization. Contrary to Peters' argument, therefore, the levelling down cases in anti-discrimination laws, such as the swimming pool case, show that equal treatment does apply to the prohibition of direct discrimination.

Nonetheless, it is hard to deny that actual comparison cannot be made in the *single person reductio*, in order to prove that discrimination takes place. In this sense, equal treatment has a difficulty in explaining the *single person reductio*. However, it is also true that the issue of the *single person reductio* has been sorted out in the UK, following the concept of equality. Anti-discrimination legislation of the UK solves this issue by allowing hypothetical comparison claims. In other words, when it is inferred that an employer would have treated, for instance, men or white people differently from women or black people in the same situation, it is admitted that the employer has discriminated against women or black people, even though there is no actual comparator to the women or black people. For instance, the SDA 1975 provides that discrimination is established if an employer treats a woman less

favourably on the grounds of her sex than he *would* treat a man.<sup>15</sup> This wording of the anti-discrimination law has led the courts to admit hypothetical claims. In *Vento*,<sup>16</sup> for example, the EAT upheld the Tribunal's decision that 'the applicant was less favourably treated than a hypothetical male officer would have been in the same circumstances' although there was no actual male comparator in the same position. Although hypothetical comparison claims are not real and accordingly no actual comparison can be made, it is certain that discrimination in the *single person reductio* has been constructed, relying on the comparison required by the equal treatment interpretation of the prohibition of direct discrimination. Despite the difficulty in the *single person reductio*, therefore, the prohibition of direct discrimination can be explained by reference to equal treatment, as far as the UK discrimination law is concerned.<sup>17</sup>

### 3.2.1.2. The Proscribed Grounds of Discrimination

Following the analysis of equality of 'X as a distinguishing personality trait' in Chapter 2, let us see how equal treatment explains the prohibition of direct discrimination on the grounds of several personal traits, such as sex, race, religion, age and sexual orientation. Equality of 'X as a distinguishing personality trait' is realised not individually but on the basis of the group which is formed along the lines of X. The prohibition of direct discrimination does not individually apply to those to whom treatment regarding employment should be distributed. If it did apply on an individual basis, the prohibition of direct discrimination would not be confined to particular proscribed grounds, such as sex or race. When discrimination on the grounds of people's hair colour takes place, for instance, equal treatment on an individual basis would require that discrimination on the grounds of hair colour should be prohibited. This is because treatment regarding employment would not be equally distributed to those who are discriminated against on the grounds of their hair colour. On the contrary, the application of the current prohibition of direct

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<sup>15</sup> SDA 1975, s1(1) (a). However, hypothetical comparison is not allowed in the Equal Pay Act (EPA) 1970. For an account of this Act's discord with the SDA 1975, see Fredman, 2008.

<sup>16</sup> *Chief Constable of West Yorkshire v Vento*, [2001] IRLR 124.

<sup>17</sup> Now the *single person reductio* can also be resolved under the Amended ETD in which direct discrimination is defined similarly to that of UK sex discrimination law (See Amended ETD, a2(2)).

discrimination is confined to several grounds, such as sex, race, age, religion etc. Although, historically speaking, the proscribed grounds of discrimination have been extended, they are still too limited to cover all possible kinds of discrimination.

Therefore, equality of 'X as a distinguishing personality trait' fits well with the current features of the prohibition of direct discrimination. The meaning of X in the phrase 'equality of X' is just one forbidden grounds of discrimination. For instance, equality of race in treatment regarding employment means that there must be no distinction based on race in the distribution of treatment regarding employment. As the prohibition of direct discrimination in employment on the grounds of race requires employers not to discriminate on the grounds of race, it can be explained with reference to equality of race in treatment regarding employment. In this way, the prohibition of direct discrimination in employment on the grounds of X is explained by reference to a particular kind of equality, namely, equality of 'X as a distinguishing personality trait'. Here it should be noted that the prohibition of direct discrimination in employment on particular grounds, as such, represents an independent sort of equality. Thus, the prohibition of direct discrimination on some limited grounds is a congregation of different sorts of independent equality of 'X as a distinguishing personality trait', such as racial or sexual equality.

Can the prohibition of direct discrimination on the grounds of X, as explained with reference to equality of 'X as a distinguishing personality trait', be unlimited in such a way that new Xs can be continuously added to the current list of Xs? It seems that we could specify all the Xs that are conceivable as a forbidden ground of discrimination at a given time. For instance, we could add new traits of people, such as their appearance, weight, whether they smoke and whether they wear glasses, to the current list of Xs. However, this would not exhaust the proscribed grounds of discrimination. They would still be limited because people's traits can be indefinitely specified: whether they are left-handed or right-handed, their hair colour, accent etc. In response to this point, some might argue that X should mean all the personal traits that people have. However, not every personal trait can be a forbidden ground of discrimination in employment. For instance, people's ability is a personal trait, but we cannot argue that distinctions based on people's ability should be forbidden. Traits, on the basis of which equality is realised, cannot but be selective. Therefore, the limited proscribed grounds of discrimination are a logical feature of the



prohibition of direct discrimination explained with reference to equality of 'X as a distinguishing personality trait'.

### **3.2.2. Justifiability**

#### **3.2.2.1 The Levelling Down Issue**

It has been shown that the prohibition of direct discrimination based on equal treatment may give rise to levelling down. However, levelling down itself is often regarded as morally unacceptable, as was discussed in the previous chapter. Hence a question arises as to whether the prohibition of direct discrimination in employment can find any justification from equal treatment with respect to levelling down

Simons, a proponent of equality, tries to defend levelling down. He argues that to allow levelling down in the prohibition of direct discrimination is not always problematic, because it prevents racial strife, which unequal treatment could give rise to.<sup>18</sup> In a racially segregated society, according to him, the consequential harm of unequal treatment outweighs the adverse nature of equally bad treatment as one form of levelling down. Hence, in a society of that kind, levelling down may be morally acceptable, even if it causes bad treatment to both white and black people.<sup>19</sup>

However, this justification for levelling down in race discrimination can work in a society where racial inequality is embedded, but does not necessarily apply to every society. This is because the degree of racial inequality varies among different societies. Therefore, it can be put into question whether Simon's justification could apply to other societies, for instance, those in which racial inequality is not as serious as that in the US, but in which direct discrimination on the grounds of race is forbidden. Moreover, the defence of levelling down, using Simons' race-based rationale, can hardly apply to the prohibition of direct discrimination on other grounds, such as religion, belief or age, which are also forbidden in the US. One can hardly contend that direct discrimination on these grounds affects people with traits other than race as much as race discrimination stigmatizes black people in the US.

Moreover, Simons' argument cannot explain why under certain anti-discrimination laws in the US, levelling down is unlawful. Some legislation in the US explicitly provides for the prohibition of levelling down: 'it shall be unlawful for an employer

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<sup>18</sup> Simons, 2002, 765.

<sup>19</sup> Ibid., 765.

... to reduce the wage rate of any employee in order to comply with this chapter'<sup>20</sup>; 'an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the [non-discrimination] provisions of this subsection, reduce the wage rate of any employee.'<sup>21</sup>

Nonetheless, Simons tries to justify the clauses preventing levelling down by reference to equality. He argues that the reason for giving people these sorts of rights to prevent levelling down, which he terms 'impure equality rights',<sup>22</sup> is that the victims of discrimination suffer a special kind of harm, in the form of stigma, insult and disrespect.<sup>23</sup> However, this justification actually does not rely on the idea of equality. According to him, the attempt to avoid the special harm which the victims of discrimination might suffer due to levelling down prevents equal treatment from working completely. Hence, it is not equal treatment but the aim of preventing special harm that justifies the clauses preventing levelling down. What is more, the justification does not account for the fact that the provisions given above preventing 'levelling down' can also protect the wages of, for instance, male workers from being reduced. One cannot say that men would suffer the same special kind of harm as women would, if men's wages were levelled down. Rather, those provisions preventing levelling down are based on values other than equality, such as the protection of workers' wages for the sake of their standard of living.

Proponents of equality might argue that other employment laws may provide protection from levelling down. According to them, anti-discrimination laws would not be the only ones that regulate employment in order to protect workers. Hence it should be the task of other employment laws to prevent levelling down. However, this argument would admit that levelling down, such as equally bad treatment, is morally unacceptable and that other values such as 'employment protection' should serve as a supplementary basis for anti-discrimination rights based on equal treatment. Thus, the argument would disclose that the equal treatment rule is not morally self-standing in protecting workers from discrimination.

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<sup>20</sup> Age Discrimination in Employment Act (ADEA) of 1967 (29 USC §621 (1994)).

<sup>21</sup> Equal Pay Act (EqPA) of 1963.

<sup>22</sup> Simons, 2002, 717.

<sup>23</sup> Ibid., 719.

### 3.2.2.2. The 'Equality of Whom?' Issue

As the current prohibition of direct discrimination is explained by reference to equality of 'X as a distinguishing personality trait', it faces the same justifiability issue as the latter does, i.e. 'equality of whom?', as we have shown in the previous chapter. First of all, the selectiveness of the proscribed grounds of discrimination necessarily causes the interpretational difficulty of whether or not a particular trait at issue is included in such proscribed grounds. If the trait is interpreted so that it cannot be included in the grounds, the prohibition of direct discrimination does not apply regardless of whether or not some treatment that is alleged to be made on the grounds of the trait is discriminatory. Thus, whether or not the trait belongs to such grounds functions as a threshold for protection against discrimination which is legally required if we are to claim that discrimination takes place. For instance, if people's sexual orientation is not regarded as being part of their sex, discrimination on the grounds of which is currently forbidden, then discrimination on the grounds of sexual orientation is allowed to take place, as the ECJ held in *Grant*<sup>24</sup> before the prohibition of discrimination on the grounds of sexual orientation was explicitly introduced under the GFD. Moreover, pregnancy discrimination is permitted, if the trait of pregnancy is not a matter of sex, on the basis that not all women are pregnant, as the US Supreme Court held in *Gilbert*<sup>25</sup> before the CRA of 1964 was amended by the Pregnancy Discrimination Act of 1978.

It is undeniable that actual discrimination on the grounds of sexual orientation and pregnancy in the cases considered above does take place. Because of this discrimination, those who are discriminated against do not get benefits in employment which other workers do, do not obtain a job, or are dismissed. However, actual discrimination on such grounds is not *de jure* discrimination to be protected from because of the selectiveness of the proscribed grounds of discrimination with reference to equality of 'X as a distinguishing personality trait'. Of course, this difficulty of the current prohibition of direct discrimination in relation to sexual orientation and pregnancy could be, and partly has been, resolved by adding new traits to the list of the proscribed grounds of discrimination. Nonetheless, adding new traits to the list of such proscribed grounds is a legislative process which requires the

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<sup>24</sup> *Grant v. South-West Trains*, Case 249/96 [1998] ECR I-0621.

<sup>25</sup> *General Elec. Co. v. Gilbert*, 429 US 125 (1976).

approval of the legislature. Given the harmful effects of such discrimination, this form of correction is too slow, as is shown by the legislative history of both the law on sexual orientation discrimination in the EU and the law on pregnancy discrimination in the US. Moreover, what is important in relation to the equality approach to discrimination in employment is that the addition of a particular new trait to the list of proscribed grounds of discrimination is not able to solve completely the interpretational difficulty caused by the equality approach. To the extent that the proscribed grounds of discrimination are selective with reference to equality of 'X as a distinguishing personality trait', this difficulty will always arise. For instance, the addition of a particular trait to the list of such proscribed grounds will give rise to a similar sort of interpretational difficulty in relation to the newly added trait.

Furthermore, the selectiveness of the proscribed grounds of discrimination with reference to equality of 'X as a distinguishing personality trait' raises the justifiability issue in relation to non-regulation of discrimination on other grounds. Let us suppose that a man is refused a job on the basis that he is overweight, even though his being overweight does not affect his ability to do the job. He is not able to claim that he is discriminated against, as discrimination on the grounds of being overweight is not prohibited under the current prohibition of direct discrimination. Then the question arises whether it is justifiable not to protect the man discriminated against on the grounds of being overweight.

In the US context, some argue that discrimination is prohibited only when it gives rise to very special harms.<sup>26</sup> For instance, discrimination against black people in the US indeed entails social stigma towards them. Black people who are discriminated against because of their race are stigmatized as being 'less than full citizens'. It is certain that they have historically suffered because they were slaves and were subsequently segregated on the grounds of their race. They may still suffer because of the continuing effects of past discrimination. Thus, the necessity of protecting black people from stigmatising discrimination provides the reason why discrimination against black people should be tackled strongly. For instance, whether or not it takes place could be specially monitored by checking the proportion of black people in the workforce. Nevertheless, this does not give any reason for ruling out protection from other kinds of discrimination. For instance, discrimination on the

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<sup>26</sup> See Bagenstos, 2003, 842.

grounds of being overweight does those discriminated against a lot of harm. This harm may not be as stigmatizing as the harm that black people suffer because of discrimination. Nevertheless, we cannot say that the harm that discrimination on the grounds of being overweight causes is slight. Those who are discriminated against because they are overweight are denied, or lose, a job just as black people are, or do, because of their race. Regardless of the traits on the grounds of which they are discriminated against, those who are refused, or lose, a job because of discrimination find it very hard to manage their financial difficulties and find themselves frustrated, since they are not able to realise their abilities and to contribute to society. Thus, in terms of their actual effects on people's lives, we can say that both kinds of discrimination are unfair and morally undesirable. Thus, the justification of protection from discrimination on limited grounds with reference to its special harm is not convincing.

Others contend, in the US context, that isolated instances of discrimination can inflict only limited harm on their victims. They admit that, for instance, an applicant for a job might be discriminated against on the basis that she has a particular hair colour. Nonetheless, they argue that this sort of discrimination is very rare in reality. Thus, even if it does take place, she can get a job easily from other employers who are not biased against an applicant with that hair colour. It does not cause much harm to those who are discriminated against. It only imposes a heavier job search cost on those who are discriminated against than when they would have experienced if they had not been discriminated against. Therefore, they suggest that legal regulation on discrimination should be focused on socially pervasive forms of discrimination.<sup>27</sup>

However, the distinction between isolated instances of discrimination and socially pervasive forms of discrimination has the effect of excluding protection from discrimination which is not rare but which is also not socially pervasive. Although we cannot say that discrimination on the grounds of being HIV positive is not as widespread as race discrimination was in the US, it quite often takes place. In addition, discrimination on the grounds of being a smoker and being overweight is the most common of a variety of forms of what is called lifestyle discrimination in the US.<sup>28</sup> What is more, there is a survey showing that the wages of people with

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<sup>27</sup> Arneson, 2006, 784; Hasnas, 2002, 503; Alexander, 1992, 198, 203; Kelman, 2001, 863-864.

<sup>28</sup> National Workrights Institute, 2005.

below-average looks are lower than those of average-looking workers and that there is a premium in wages for good-looking people.<sup>29</sup> Given the substantial frequency of these forms of newly emerging discrimination, we cannot say that they take place as rarely as discrimination on the grounds of hair colour. Such discrimination is frequent although it is not as prevalent as race discrimination. Thus, the newly emerging forms of discrimination are likely to do those who are discriminated against much more harm than simply incurring a job search cost. According to a justification of the selectiveness of the proscribed grounds of discrimination which relies on the prevalence of discrimination on these grounds, nonetheless, discrimination which is not rare but which is not as prevalent as, for instance, race or sex discrimination does not have to be prohibited until it is found to be prevalent in a society.

Some proponents of the selectiveness of the proscribed grounds of discrimination may concede that the current standard of social pervasiveness in selecting the proscribed grounds of discrimination is very high and, accordingly, it needs to be lowered so as to include the newly emerging forms of discrimination. Yet they may still insist that really rare instances of discrimination do not have to be prohibited. Such discrimination can hardly matter to those who are discriminated against because they can easily find a job which will provide the same benefits as the job that they have been refused does. This may sometimes be the case. However, this is not always so. Some people may want a job in a particular company only. The company may provide unique advantages to its employees. For instance, it may provide employees with special benefits, such as much more flexible working time for family life, or a unique quality of job which can hardly be found in other companies of the same sort. Thus, given the individual differences of the effects of discrimination on those who are discriminated against, this sort of justification for ruling out protection from rare instances of discrimination can be examined only by comparing the harmful effects of such discrimination on the individual working life of those discriminated against with the values or benefits which its non-regulation is designed to protect. This comparison will be made in Chapter 5 after we have looked at what kinds of values or interests are involved in people's working life in Chapter

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<sup>29</sup> Hamermesh and Biddle, 1994.

4. Overall, subject to the later comparison, the limitedness of the proscribed grounds of the current prohibition of direct discrimination is not morally desirable.

### 3.3. The Prohibition of Indirect Discrimination

#### 3.3.1. Explanation

Under the Amended ETD of the EU, indirect discrimination takes place where ‘an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is appropriate and necessary and can be ‘justified’<sup>30</sup> by objective factors unrelated to sex’.<sup>31</sup> In other words, to establish indirect sex discrimination, a workplace rule must be proved to have a disparate impact on persons of a particular sex. This is the reason why indirect discrimination was originally termed ‘disparate impact discrimination’ in the US. However, such a rule with a disparate impact can be justified on grounds other than sex, such as economic, technical or administrative reasons for the rule, which must be necessary and proportional. Most indirect discrimination provisions in relation to race, sexual orientation, religion, etc. in the EU have a similar structure to that of the sex discrimination law in the EU.<sup>32</sup>

The indirect discrimination provisions examine seemingly neutral rules, which are not in breach of the prohibition of direct discrimination. When employers want to hire people as their employees, for instance, they require applicants to have graduated at least from high schools.<sup>33</sup> On the face of it, this application requirement is neutral, not race-based. However, when most black people do not meet this requirement, whereas most white people do, the requirement, *de facto*, discriminates against black people, unless it is ‘justified’ by reasons unrelated to race. For this

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<sup>30</sup> In this thesis, the term ‘justify’ and other similar terms, such as ‘justifiable’ and ‘justifiability’, in relation to the indirect discrimination provisions will always be used with single inverted commas to distinguish them from the use of the term justify and other similar terms as defined in the introduction of the thesis.

<sup>31</sup> Amended ETD, a2(2).

<sup>32</sup> See DREO, a2(2)(b); GFD a2(2)(b)(i). However, the Directive on Burden of Proof (BPD) provides for the prohibition of indirect discrimination by means of a different wording: ‘... disadvantages a substantially higher proportion of the members of one sex ...’ (a2(2)).

<sup>33</sup> *Griggs v. Duke Power Co.*, 401 US 424 (1971).

reason, the provisions go beyond the prohibition of direct discrimination based on equal treatment.<sup>34</sup>

Drawing attention to this advanced nature of the prohibition of indirect discrimination, proponents of equality argue that the indirect discrimination provisions are based on equality of results rather than equal treatment.<sup>35</sup> However, we can easily see that the prohibition of indirect discrimination does not fit equality of results because it does not enable the offer of a job to a particular group to equalise differences in the number of job holders between this group and other groups. Nonetheless, it may be argued that the prohibition of indirect discrimination instrumentally contributes to the purpose of equality of results. Indeed, in the example given above, the employer could willingly hire more black people because he fears that he will be sued on the basis that the recruiting rule has a disparate impact on black workers. In fact, the prohibition of indirect discrimination has led employers to adopt positive action programmes affirmatively employing ethnic minorities in the US, because the programmes could make it harder for employees to prove the disparate impact of workplace rules on disadvantaged groups.<sup>36</sup> In this respect, it is certain that the provisions are more result-oriented than the prohibition of direct discrimination which is simply designed to prohibit employers' biased attitude towards people with particular personal traits. Leaving aside the question of why equality of results is realised in such a way that results are levelled up, nonetheless, we can ask why we do not create positive action programmes, such as offering jobs to disadvantaged groups, rather than implementing indirect discrimination provisions in order to achieve equality of results. This is because positive action programmes are a direct and effective means of achieving equality of results. In this regard, the link between equality of results and the prohibition of indirect discrimination as its instrumental means is rather weak. Therefore, equality of results is inappropriate to explain the prohibition of indirect prohibition, in terms of both the latter's operating features and the instrumentality of the latter for the former.

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<sup>34</sup> However, unlike equal treatment in this chapter, the principle of equal treatment in the EU is broadly defined to include the prohibition of indirect discrimination. See, eg, GFD, a2.

<sup>35</sup> Barnard and Hepple, 2000, 564.

<sup>36</sup> Rutherglen, 1995, 136-139.



To be precise, the indirect discrimination provisions realize the equality of impact of workplace rules on groups of workers categorized according to their particular personal traits, such as sex or race.<sup>37</sup> Firstly, as any rule can have a different degree of impact on different groups, equality of impact requires us to compare the different degree of impact of a particular rule on a particular group. If particular groups of workers, such as female or black workers, suffer the disparate impact of a certain rule, the rule falls under the prohibition of indirect discrimination if it is not 'justified' otherwise. Secondly, equality of impact requires us to equalize the different impact on different groups, e.g. female and male, or black and white workers, caused by the rule. One way of equalizing the different impact is to change or modify the rule in order to remove its disparate impact. For instance, when giving an occupational pension only to full-time workers turns out to be indirectly discriminatory against women workers,<sup>38</sup> most of whom work part-time, an employer may choose to give an occupational pension to part-time workers as well as to full-time workers. On the other hand, there is an alternative way of equalizing the disparate impact. The employer could choose to remove the disparate impact by giving the occupational pension neither to full-time nor to part-time workers. Therefore, the indirect discrimination provisions can be explained by equality of impact of workplace rules on particular groups as 'equalization' based on 'comparison' is observed in the features of the provisions.

Moreover, the fact that only groups formed along the lines of particular personal traits are protected from indirect discrimination can be explained with reference to equality of impact of 'X as a distinguishing personality trait.' The prohibition of indirect sex discrimination requires that a workplace rule does not put, for instance, women or men, but not all the workers of any distinction, at a particular disadvantage. Thus, the prohibition of indirect sex discrimination can be explained with reference to the equality of impact of a workplace rule on men and women. What is more, the prohibition of indirect discrimination on several grounds is a combination of each individual kind of the equality of impact of a workplace rule on a group formed along the lines of a personal trait.

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<sup>37</sup> Simons, 2002, 714.

<sup>38</sup> *Bilka-Kaufhaus v. Weber*, Case 170/84 [1986] ECR 1607.

However, equalisation of impact in the prohibition of indirect discrimination is not as complete as that of equal treatment in the prohibition of direct discrimination. Under the BPD, for instance, there is no violation of the indirect discrimination provisions if the proportion of persons in one sex suffering from detrimental effects is not ‘substantially higher’<sup>39</sup> than that of other groups. Moreover, even in instances where workplace rules can be proved to have a disparate impact on a particular group, the equalization of this impact is not required, if the rules are ‘justified’ by reasons that are unrelated to particular personal traits, such as a business or administrative need for the rule. Thus, the equalization of impact in the prohibition of indirect discrimination permits more exceptions than that of equal treatment in the prohibition of direct discrimination.

Because of its ‘justification’ clause, the prohibition of indirect discrimination is claimed to address not equality but the appropriateness of a rule.<sup>40</sup> When deciding whether a rule with a disparate impact is ‘justified’ or not, it is argued, what needs to be substantively examined is whether the rule at issue is appropriate or not in terms of its business necessity. From this point of view, it could be said, a variety of workplace rules, such as specific job requirements,<sup>41</sup> a pension scheme for part-time workers,<sup>42</sup> and overtime payment,<sup>43</sup> have been examined in the light of their appropriateness under the indirect discrimination provisions of both the US and the EU.

However, this argument does not show why certain workplace rules are not examined even though they may be inappropriate. Under the prohibition of indirect discrimination, as has been shown above, it needs to be examined whether a workplace rule can be ‘justified’ by reasons other than, for example, sex or race, which must be necessary and proportional, only after the rule has been proved to have a disparate impact on a particular group. For this reason, the appropriateness of a rule with no, or considerably smaller, disproportional effects can hardly be brought under scrutiny, even though it may be inappropriate. Therefore, the explanation of

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<sup>39</sup> See BPD, a2(2). However, it remains to be seen how the phrase ‘put persons of one sex at a particular disadvantage compared with persons of the other sex’ (a2(2) in the Amended ETD) will be interpreted in the courts.

<sup>40</sup> Westen, 1990, 110.

<sup>41</sup> See, eg, *Griggs v. Duke Power Co.*, 401 US 424 (1971).

<sup>42</sup> See *Bilka-Kaufhaus v. Weber*, Case 170/84 [1986] ECR 1607.

<sup>43</sup> *Lenggerich v. Helmig*, Case 399/92, [1994] ECR I-5727.

the indirect discrimination provisions with reference to the appropriateness of a workplace rule is not successful.

### **3.3.2. Justifiability**

As was shown in the previous subsection, levelling down may take place in the prohibition of indirect discrimination based on equality of impact. Once a workplace rule with a disparate impact on, for instance, women is laid down and is not 'justified' by reasons unrelated to sex, however, changing or adjusting rather than cancelling the rule is likely to be the best way of removing the disparate impact. For instance, in the example of occupational pensions which was given in the previous subsection to demonstrate equality of impact, the employer could have chosen to give the pension to neither full-time nor part-time workers so as to avoid the disparate impact caused by giving the pension only to full-time workers. However, after the employer gives pensions to full-time workers, to cancel the occupational pensions for the full-time workers would be in breach of the employment contract(s) signed between the employer and each of the full-time workers. Having said this, even if the cancellation of the occupational pensions given to full-time workers did not constitute a contractual duty, it would give rise to strong resistance from full-time workers. In this regard, once workplace rules are laid down, it is not easy for an employer to undertake the levelling down action. As far as established workplace rules are concerned, therefore, the levelling down issue does not seem to constitute a major concern for the justifiability of the indirect discrimination provisions.

Moreover, the fact that protection against indirect discrimination applies only to groups formed along the lines of particular personal traits does not give rise to a major concern about its justifiability either. Even if the protection against indirect discrimination applies to all the groups formed along the lines of particular traits, it is unlikely that individuals will actually be protected from the bad impact of workplace rules on them. This is because the majority of detrimental workplace rules tend to have an adverse impact on several groups of workers and accordingly they do not have a disparate impact on particular groups alone. Thus, the 'equality of whom?' issue is not likely to matter in the prohibition of indirect discrimination, even though it may arise theoretically.

### **3.3.2.1. Indirect Discrimination and Positive Measures for Disadvantaged Groups**

Nonetheless, the prohibition of indirect discrimination faces other challenges in relation to its moral justifiability. First of all, the difficulty of justifying the prohibition of indirect discrimination is clearly shown in the relationship between positive measures in favour of disadvantaged groups, such as women and black people, and the prohibition of indirect discrimination. As was shown in the previous subsection, advantaged groups, such as men and white people, as well as disadvantaged ones can seek protection from indirect discrimination if workplace rules have a disparate impact on them. Therefore, positive measures in favour of a disadvantaged group, which do not amount to positive action causing the reverse discrimination issue, could constitute indirect discrimination against members of an advantaged group. For instance, if an employer or a government decides to give a special allowance to part-time workers in order to encourage women's employment, this decision would surely benefit more women than men, because more female workers tend to work part-time than male workers. Following the indirect sex discrimination provision of the EU sex discrimination law, in this case, one can say that the decision puts male workers at a particular disadvantage compared with female workers. Thus, the decision would fall within the indirect sex discrimination provisions.

With respect to the argument given above, then, one can ask whether the special allowance for part-time workers, as such, can seek 'justification' on grounds other than sex. As was shown in the previous subsection, under the EU sex discrimination law, a rule with disparate impact can be 'justified' for reasons unrelated to sex.<sup>44</sup> However, the special allowance for part-time workers aims to encourage women's employment and accordingly it is directly concerned with women as a specific sex.<sup>45</sup> Hence, this positive measure is not likely to be 'justifiable' under EU sex discrimination law.<sup>46</sup> Unless the government/company finds another reason for wanting to hire part-time workers (to cut down on costs, to avoid turnover due to

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<sup>44</sup> Amended ETD, a2(2).

<sup>45</sup> If the intention to encourage women's employment is explicitly known, the policy may amount to direct sex discrimination (See McCrudden, 1986a, 230).

<sup>46</sup> However, McCrudden claims that whether this sort of policy is in breach of the indirect discrimination provisions depends on 'the way in which it is operated in practice' (See Ibid., 230-232).

burnout, etc.), therefore, they will not go ahead with this positive measure due to the indirect sex discrimination provisions. Therefore, the indirect discrimination provisions based on equality of impact could deter employers or governments from adopting a variety of progressive measures in favour of disadvantaged groups.

This dilemma of the prohibition of indirect discrimination leads Loenen to suggest that the prohibition of indirect discrimination should be conceived of as protecting only disadvantaged groups of people.<sup>47</sup> This is because, the scholar argues, positive measures in favour of disadvantaged groups are necessary or important to protect disadvantaged groups and should not be impeded by the prohibition of indirect discrimination.<sup>48</sup> However, the scholar's account reveals that the value underlying this argument is not equality but a special concern for disadvantaged groups. In this sense, the interpretation of the prohibition of indirect discrimination for disadvantaged groups only needs to rely on a value other than equality.

Nevertheless, the argument that those positive measures are needed to protect disadvantaged groups suggests one important point in relation to the justifiability of the prohibition of indirect discrimination with reference to equality. That is, the positive measures may be morally desirable on the basis that they aim to benefit disadvantaged groups, although they may have a disparate impact against advantaged groups. Therefore, it should be noted that rules with a disparate impact and rules which are morally undesirable can be two different things.

The relationship between these two different groups of rules is shown in Figure 1. In the figure below, A represents the rules with a disparate impact. Hence the area outside A represents rules with no disparate impact. On the other hand, B represents rules which are morally undesirable. As one can see, rules with a disparate impact can be morally undesirable (A&B in Figure 1). On some occasions, however, disparate impact can be found in morally desirable rules (A-B in Figure 1). For instance, positive measures in favour of disadvantaged groups can have a disparate impact against advantaged groups, although they are morally desirable. Therefore, rules with disparate impact and undesirable rules can be different from each other.

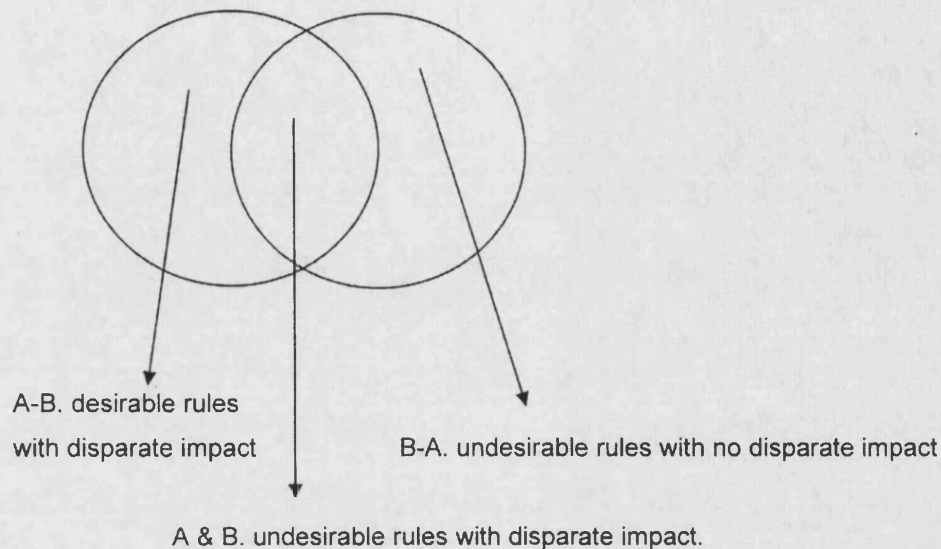
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<sup>47</sup> Loenen, 1999, 206.

<sup>48</sup> Ibid., 206.

<Figure 1>

A. Rules with disparate impact, B. Undesirable rules



### 3.3.2.2. Indirect Discrimination and Equally Disadvantaged Members of Advantaged Groups

Secondly, a difficulty in justifying the prohibition of indirect discrimination may arise when some persons suffer from the undesirability of rules even though the rules have no disparate impact against a group to which they belong (See B-A in Figure 1). For example, in *Griggs*,<sup>49</sup> the US Supreme Court held that hiring requirements for job applications, such as high school education or a standard intelligence test, were indirectly discriminatory because they had an adverse effect on black people. These requirements were not ‘justified’ by reasons unrelated to race, because they were irrelevant to, and thus not necessary for, successful job performance. From the perspective of the desirability of workplace rules, the requirements themselves are not morally desirable because they prevent certain workers, who have the ability to do that job but who cannot meet the requirements, from gaining employment. Nonetheless, in this case, it would have been impossible for white applicants who did not graduate from high school (a minority in the group of white people) to bring their claim to the court, relying on the prohibition of indirect discrimination. This is

<sup>49</sup> *Griggs v. Duke Power Co.*, 401 US 424 (1971).

because the minority would not be able to prove the disparate impact of the rule against their group, namely, white people, as most white people satisfied the job requirement. Hence, whereas the job requirements can be considered as indirectly discriminatory against black people (as in the A & B area of Figure 1), they cannot be proved to have a disparate impact on white applicants without high school education who account for this minority in the group of all white people, in spite of the fact that they are still undesirable for the minority of white people (as in the B-A area of Figure 1). By the same token, in the European context, male part-time workers, who suffer from an undesirable rule, such as giving pensions only to full-time workers, are not able to bring their claims to the court, relying on the prohibition of indirect discrimination, whereas female part-time workers have done so. This is because, under sex discrimination law, male workers, including male part-time workers, are not regarded as particularly disadvantaged compared to the other sex, i.e. women, because the majority of male workers work not part-time but full-time. In short, the prohibition of indirect discrimination under particular circumstances cannot provide protection for equally disadvantaged members of the advantaged groups, who, *de facto*, suffer from undesirable workplace rules.

### **3.4. Specific Protection for Particular Groups**

#### **3.4.1. Pregnancy and Maternity Protection**

In current UK and EU law, there are several rights for women in relation to pregnancy and maternity. First of all, discrimination on the grounds of pregnancy is prohibited as unlawful sex discrimination under sex discrimination law. Secondly, there are positive rights for women in employment law, such as the right not to be dismissed on the grounds of pregnancy and maternity and the right to paid maternity leave, which are designed to protect women's health and safety in relation to pregnancy and maternity.<sup>50</sup> In this subsection, we will examine whether these two kinds of rights, which will be referred to as pregnancy and maternity protection as a whole, can be explained with reference to equal treatment.

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<sup>50</sup> Pregnant Workers Directive (PWD); Employment Rights Act (ERA) 1996; Maternity and Parental Leave etc Regulations (MPLR) 1999.

To begin with, let us see whether the prohibition of pregnancy discrimination in sex discrimination law can be explained with reference to equal treatment between men and women. As the prohibition of pregnancy discrimination was not explicitly provided for in the EU and the UK anti-discrimination laws before the ETD was amended in 2002,<sup>51</sup> it was dealt with under the direct sex discrimination provisions. Hence, it might be expected that equal treatment of sex as the basis for direct sex discrimination can be used to explain pregnancy protection. For pregnancy discrimination to qualify as direct sex discrimination, it needs to satisfy two requirements under the UK sex discrimination law, as was established in *Zafar*.<sup>52</sup> The first is whether the treatment is 'less favourable' to a particular sex than to the other sex; the second is whether the treatment is given 'on the grounds of sex'. Although the two points are intertwined, analyzing them separately will be helpful in order to understand the dilemma of pregnancy and maternity discrimination, within the context of the direct sex discrimination provisions.

The first requirement involves comparison between men and women. However, how could pregnancy be compared with a particular condition in men? One cannot find an accurate male comparator to a pregnant woman because no man can be pregnant. Nevertheless, comparison with men in a similar condition had to be made under the prohibition of direct sex discrimination based on equal treatment, with a view to determining whether a pregnant woman was treated less favourably. For this reason, the UK courts previously compared pregnant women with ill men,<sup>53</sup> in the sense that the physical condition of the pregnant women was similar to that of ill men. This interpretation could mean that the dismissal of a pregnant woman is not sex discrimination if ill men are dismissed on the grounds of their illness in the workplace. Thus pregnant women's protection depended on whether or not ill men were protected. As these rulings might imply that women's pregnancy is abnormal and unhealthy, moreover, they were severely criticised for being very offensive to women.<sup>54</sup>

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<sup>51</sup> Discrimination on the grounds of pregnancy and maternity is explicitly prohibited. See Amended ETD, a2(7); SDA 1975, s3A, as amended by the EESDR.

<sup>52</sup> See Lord Browne-Wilkinson's judgement in *Zafar*.

<sup>53</sup> *Hayes v. Malleable Men's Working Club and Institute*, [1985] ICR 703; *Webb v. EMO*, [1992] 2 All ER 43.

<sup>54</sup> Fredman, 1997b, 186-187.



The second requirement leads us to examine whether or not treatment ‘on the grounds of pregnancy’ amounts to treatment ‘on the grounds of sex’. To this end, it can be argued that pregnancy discrimination is sex discrimination because it is unique to women. On the other hand, it could be contended that treatment on the grounds of pregnancy is not necessarily treatment on the grounds of sex since non-pregnant persons are not always men. The US Supreme Court upheld this latter argument.<sup>55</sup> In order to counteract the Court’s rulings on pregnancy discrimination, the US Congress had to amend Title VII of the CRA of 1964 by extending the meaning of sex to include pregnancy.<sup>56</sup> Unlike the US Supreme Court, the ECJ ruled in *Dekker* that detrimental treatment on the grounds of pregnancy was in breach of the equal treatment principle between men and women.<sup>57</sup> The Court held that pregnancy was inseparable from women and accordingly ‘on the grounds of pregnancy’ amounted to ‘on the ground of sex’ in the former ETD.

However, it should be noted that the US Supreme Court and the ECJ did not have to consider the first requirement of direct sex discrimination. This was because the direct sex discrimination provisions in the US and the EU, unlike the corresponding provisions in the UK, did not explicitly require comparison by their wording.<sup>58</sup> In *Webb*,<sup>59</sup> where the Court of Appeal (CA) compared a pregnant woman with a man who was absent from work because of his medical condition,<sup>60</sup> the ECJ again ruled that detrimental treatment of a pregnant woman was in breach of the direct sex discrimination provisions, based on the second requirement of direct sex discrimination. In this case, unlike *Dekker*, the ECJ made it clear that there was no need for a comparator as regards pregnancy discrimination. Nevertheless, under the UK sex discrimination law, which defines sex discrimination as less favourable treatment on the grounds of sex, one still had to find a comparator to establish discrimination even after ‘on the grounds of pregnancy’ is regarded as the same as ‘on the grounds of sex’. Notwithstanding this, the ECJ did not make it clear why

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<sup>55</sup> *Geduldig v. Aiello*, 417 US 484 (1974); *General Elec. Co. v. Gilbert*, 429 US 125 (1976).

<sup>56</sup> Pregnancy Discrimination Act, 42 USC §2000e(k) (1994).

<sup>57</sup> Case 177/88, [1990] ECR I-3941.

<sup>58</sup> See CRA of 1964, s703(‘unlawful to hire or to discharge ... because of any individual’s sex’) and ETD, a2(1)(‘no discrimination on the grounds of sex’). However, the new definition of direct discrimination relying on the comparison element of equality is inserted in EU sex discrimination law (See Amended ETD, a2(2)).

<sup>59</sup> Case 32/93, [1994] ECR I-03567.

<sup>60</sup> *Webb v. EMO*, [1992] 2 All ER 43.

pregnancy discrimination did not need comparison, even though the corresponding UK law explicitly required comparison with a male comparator.

Therefore, the Court's decisions in *Dekker and Webb* raise the question: how could the argument that pregnancy is incomparable be harmonized with the requirement for comparison provided by the direct sex discrimination provisions based on equal treatment, i.e. comparison between a pregnant woman and her male comparator? One possible answer would be an interpretation that held that the ECJ cases as regards pregnancy were actually based on comparison, which was not explicitly presented and hence was invisible.

In fact, this attempt could be made by applying the 'but-for test'<sup>61</sup> to pregnancy discrimination. In *Webb*, it could be interpreted that a female candidate would not have been denied a contract of employment, i.e., she would have not been treated less favourably, 'but for' her sex, because the actual reason for the denial was that she was pregnant, which is unique to women. Nonetheless, this extensive application of the 'but-for' test still leaves the issue of comparison unsolved in the context of the anti-discrimination laws in the UK. The attempted 'but-for' test simply shows the inseparable links between pregnancy and being female.

As an alternative, a new 'but-for' test could be suggested as follows: a pregnant woman would not have been denied the same treatment as the non-pregnant persons but for her pregnancy.<sup>62</sup> In this way, this 'but-for' test could serve to make the invisible comparison revealed in *Webb*. Hence it could be said that comparison is still needed to establish pregnancy discrimination. Notwithstanding the success of the making of the comparison, however, the comparison in the new 'but-for' test is made not between men and women, but between a pregnant woman and non-pregnant persons. Therefore, the new test goes beyond current sex discrimination law.

Thus, it seems that the prohibition of pregnancy discrimination will have to be separated from sex discrimination in order to apply the new but-for test. In this regard, it is suggested that a new independent law, such as a Pregnancy Discrimination Act, is needed to protect pregnancy.<sup>63</sup> Although, under this Act, a pregnant women discriminated against on the grounds of being pregnant would be able to make a comparison between herself and non-pregnant persons, this would not

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<sup>61</sup> *James v. Eastleigh Borough Council*, [1990] ICR 544.

<sup>62</sup> Wintemute, 1998, 25; Honeyball, 2000, 51.

<sup>63</sup> Honeyball, 2000.

mean that the Act is based on equal treatment between pregnant women and the non-pregnant.

First of all, a comparison made between a pregnant woman and the non-pregnant persons in this Act would not be decisive in determining whether or not discrimination with respect to pregnancy takes place, whereas a comparison in the prohibition of direct discrimination based on equal treatment would be. This is because, for instance, even in a situation where a pregnant woman who is discriminated against is the only employee, she would be required to prove 'less favourable treatment' to establish discrimination if the Act was based on equal treatment. However, this argument is not enough to claim that the Act is not based on equal treatment. We have already argued in sub-section 3.2.1.1. that hypothetical comparison can be made in a situation like the one mentioned above. Thus the difficulty of finding a comparator in the situation could be solved by following the logic of equal treatment.

Second, the more decisive reason why a separate Act would not be based on equal treatment can be found in the fact that the Act would protect pregnant women only. The independent Act would prohibit discrimination on the grounds of pregnancy and would not protect non-pregnant persons. In other words, under the Act, non-pregnant persons could not be allowed to claim their anti-discrimination rights on the basis that some treatment is preferential to pregnant women. If they could, other employment rights for women, such as the right to paid maternity leave and the right not to be dismissed on the grounds of pregnancy and maternity, could be challenged under this Act on the grounds that they are discriminatory against non-pregnant persons. For this reason, in effect, a state law in the US in which women are entitled to reinstatement after taking maternity leave, whereas people taking leave because of illness are not was challenged on the grounds that people taking leave because of illness did not have the same rights.<sup>64</sup> Of course, men cannot claim under the current direct sex discrimination provisions either that the right to paid maternity leave discriminates against them on the grounds of sex. However, it should be noted that they cannot claim it only because special measures for the protection of women as regards pregnancy and maternity are allowed as an exception to the prohibition of direct sex discrimination based on equal treatment under EU sex discrimination

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<sup>64</sup> *California Federal Savings v. Guerra*, 479 US 272 (1987).

law.<sup>65</sup> Therefore, even a separate pregnancy discrimination act could not be based on equal treatment between pregnant women and the non-pregnant.<sup>66</sup>

### **3.4.2. Protection for People with Disabilities**

Protection for people with disabilities mainly comprises the prohibition of direct disability discrimination and the duty of reasonable adjustments.<sup>67</sup> Of these two rights, it may be argued that the former is based on comparison as less favourable treatment of people with disabilities than the non-disabled on the grounds of disability is prohibited under the right. However, this comparison is not the one that is required by equal treatment. Just as the non-pregnant would not be able to claim that they are discriminated against under the independent Pregnancy Discrimination Act considered above, the non-disabled cannot do so either. The prohibition of direct disability discrimination is designed to protect people with disabilities only. Thus, like the prohibition of discrimination on the grounds of pregnancy and maternity, the prohibition of direct disability discrimination cannot be explained with reference to equal treatment.

What is most innovative in protection for people with disabilities is probably the duty of reasonable adjustments. According to the duty of reasonable adjustments in the Americans with Disabilities Act (ADA) of the US,<sup>68</sup> discrimination takes place when employers do not ‘make reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity’.

This duty of reasonable adjustments is distinct from other anti-discrimination rights. To begin with, this duty is different from the prohibition of direct discrimination. The former requires employers to positively adjust their criteria, requirements and practices to the particular needs of a person with disabilities, whereas the latter requires employers not to discriminate against workers on the grounds of their

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<sup>65</sup> Amended ETD, a2(7).

<sup>66</sup> Some proponents of equality admit that pregnancy discrimination cannot be explained by equal treatment (See Simons, 2002, 768; Fredman, 1997b, 184).

<sup>67</sup> ADA of 1990; Disability Discrimination Act (DDA) 1995; GFD.

<sup>68</sup> ADA of 1990, s102(b)(5). Also, see similar provisions in DDA 1995 (s3A(6), s4A(1)).

several traits.<sup>69</sup> Sometimes adjusting to the special needs requires preferential treatment of the disabled versus the non-disabled. For instance, in *Archibald*,<sup>70</sup> where a road sweeper in the UK was unable to do her job because she could not walk, due to a complication during minor surgery, the duty of reasonable adjustments was interpreted as requiring her employer to transfer her to a higher grade job in order for her to do sedentary work. From a direct discrimination point of view, however, this preferential treatment could not be permitted if it brought about less favourable treatment of other employees.

Moreover, the duty of reasonable adjustments can be differentiated from indirect discrimination in EU anti-discrimination law, although it is stipulated in the GFD that the latter takes place when employers fail to implement the former.<sup>71</sup> The duty of reasonable adjustments explicitly requires employers to take positive measures to accommodate the needs of people with disabilities, whereas the prohibition of indirect discrimination, as commonly understood, can do so implicitly only when the employers cannot justify the current criteria, practices, or requirements in question, on grounds other than, for example, sex or race, although these workplace rules have a disparate impact on particular groups of workers.

Rather, the duty of reasonable adjustments is closer to hard positive action, which will be dealt with in the next section. In effect, in *Archibald*, if another candidate for the sedentary work could not have been offered the job because the employer had the duty to make adjustments, even though the other candidate was better qualified than the disabled worker, the duty would have given rise to unequal treatment. However, the employer in the case mentioned above was obliged to treat the sweeper more favourably than others, only when there was no sedentary job in the same or lower grade. In this case, the more favourable treatment for the sweeper was the last resort to 'cater for the special needs of disabled people'. Unlike *Archibald*, most adjustments to be made by employers include altering their working hours, assigning them to a different place and acquiring or modifying equipment, and they do not necessarily directly involve less favourable treatment of the non-disabled.<sup>72</sup> The duty of reasonable adjustments, thus, differs from the duty under which some positive

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<sup>69</sup> GFD, a5.

<sup>70</sup> *Archibald v Fife Council*, [2004] IRLR 651.

<sup>71</sup> GFD, a2(2)(b)(ii).

<sup>72</sup> For a variety of examples of adjustments, see the original DDA 1995, s6(2).

action programmes require employers to give preference to disadvantaged groups. In short, the duty of reasonable adjustments is ‘fundamentally different’ from traditionally recognised anti-discrimination rights.<sup>73</sup>

The duty of reasonable adjustments may even be distinguished from positive protection for women with pregnancy and maternity, such as the right to paid maternity leave. While the latter dictates to employers how they are to accommodate pregnant women, the extent to which the former must be made cannot be specifically decided in advance. Despite this difference, however, the positive nature of the duty of reasonable adjustments is similar to that of pregnancy and maternity protection. Both of them legally require employers to positively accommodate the specific needs of particular workers but they do not necessarily require employers to discriminate against other groups of workers in favour of such workers.

Given the similarities between the duty of reasonable adjustments and positive protection for women during pregnancy and maternity, we can see that the whole issue of protection for people with disabilities cannot be explained with reference to equal treatment for the same reason that pregnancy and maternity protection cannot be explained in this way. The whole issue of protection for people with disabilities is designed to protect people with disabilities only. Accordingly, people with no disabilities cannot claim that they are discriminated against on the basis that an employer accommodates a worker with disabilities under the duty of reasonable adjustments.

### **3.4.3. Specific Protection and Equal Opportunity**

It is often argued that the specific protections for pregnant women and people with disabilities are based on the idea of equal opportunity. For instance, it is said that the protection for people with disabilities aims to remove barriers to obtaining and maintaining employment, with a view to realising ‘equal opportunity’ in employment. Because of these barriers, it can be argued, opportunities for disabled people to gain or enjoy employment are far less than those of other people. The same argument can be applied to the protection of pregnant women in employment. One can say that, without specific protection for women’s pregnancy and maternity, women are not able to gain the opportunity to succeed in their careers as much as

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<sup>73</sup> Karlan and Rutherglen, 1996, 2. See also Waddington, 2000, 178.

men as 'employment and occupation are key elements in guaranteeing equal opportunity'<sup>74</sup> for pregnant women. As in this way the specific protections for women and people with disabilities are instrumentally necessary to the purpose of equal opportunity, equal opportunity may provide an account of the fact that such protections are designed to protect particular groups only. In this regard, equal opportunity seems to overcome the difficulty of explaining the specific protections with reference to equal treatment.

Nevertheless, the explanation of specific protection by reference to this sort of equal opportunity produces no substantive meaning of equality. Let us assume that men and the non-disabled have as much difficulty in accessing employment as women and the disabled because, say, of a serious economic depression. In this situation, men and women, or the disabled and the non-disabled, would be regarded as equal in terms of opportunity. Hence, if protection for pregnant women and the disabled were based on equal opportunity, it would not impose an obligation to remove those special barriers for women and the disabled. However, under the current anti-discrimination laws, discrimination against pregnant women and the disabled is prohibited irrespective of the extent to which other groups of people have opportunities. In other words, employment opportunities for pregnant women and disabled people in specific protection for both of them cannot be realised by depriving men or the non-disabled of their opportunities for employment. In this regard, as Janet Richards points out,<sup>75</sup> this use of the term 'opportunity' is different from, say, opportunity in a running competition, where removing all the runners' shoes would be acceptable in terms of fair competition. What equal opportunity for disability and pregnancy discrimination is concerned with is removing unique barriers to opportunities for employment for particular groups but not 'equalising' the opportunities between these particular groups and the other groups. This view of the nature of opportunity in the specific protections shows that they are not necessarily derived from equal opportunity as their underlying purpose.

Some may argue that equal opportunity itself is designed to benefit disadvantaged groups only. According to them, equal opportunity is realised only in the way that disadvantaged groups are protected. Thus the specific protections for women and

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<sup>74</sup> GFD, recital (9).

<sup>75</sup> Richards, 1997, 265-268.

people with disabilities, they may argue, are a necessary means of realising equal opportunity. However, this understanding of equal opportunity does not follow from the concept of equality. Regardless of whether this view is morally justifiable, we cannot call this view an equality view. As was mentioned in the previous chapter, it is a kind of priority view in which 'benefiting people matters more the worse off these people are'.<sup>76</sup> Overall, given the operating features of the specific protection for pregnant women and disabled people, equal opportunity does not substantively function to sustain the specific protections for women and people with disabilities.

Lastly, the explanation of the specific protections for people with disabilities and women with reference to equal opportunity may give rise to confusion in the explanation of anti-discrimination rights as a whole. As was shown in Section 3.2, equal treatment explains the prohibition of direct discrimination. Thus we can now see that both equal treatment and equal opportunity are needed in order to explain anti-discrimination rights. On the one hand, if equal treatment is used to explain the direct discrimination provisions, it is realised in the sense that sex is not regarded as being relevant in employment. This equal treatment rule addresses employers' prejudice or bias against disabilities or pregnancy as a barrier to realising it. Hence the realization of equal treatment requires employers to be impartial in terms of sex or disability. On the other hand, when equal opportunity is used to explain specific protection for women and people with disabilities, equal opportunity addresses the special needs of particular groups as a barrier to their employment. Equal opportunity requires employers to show special concern for those needs. Employers, if necessary, are required to violate the equal treatment rule used to explain the prohibition of direct discrimination, as was shown in the previous subsection. Thus, equal treatment and equal opportunity have different implications in content and may occasionally be exclusive of each other. Even if it is argued that the prohibition of direct discrimination itself is designed to realise equal opportunity, this does not resolve the confusion. If one argues that the two kinds of barriers, which the prohibition of direct discrimination and the duty of reasonable adjustments or maternity protection are designed to tackle, should be removed to realise equal opportunity, one is actually

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<sup>76</sup> Parfit, 1997, 213.



supporting, at the same time, two different, and sometimes conflicting, kinds of equal opportunity.<sup>77</sup>

## **3.5. Positive Action**

### **3.5.1. Positive Action as an Exception to Equality?**

In a broad sense, positive action is defined as ‘positive steps taken to increase the representation of women and minorities in areas of employment, education and business from which they have been historically excluded.’<sup>78</sup> In the US, education -- in particular, admission to universities -- has been one of the main domains in which positive action programmes have been adopted. Despite the significance of education in the discussion of positive action, the kind of positive action to be dealt with in this section is mainly confined to an employment context.

Positive action in employment can be sought in various ways.<sup>79</sup> An employer may voluntarily reform procedures and criteria for recruitment, promotion and training, which have been contributing to the under-representation of a particular group of workers. Moreover, an employer may try to encourage those from the under-represented groups to apply for a job, for instance, by providing special advertisements targeting them alone. In order to take these positive measures more systemically, an employer may set a long-term goal or timetable. Positive action of this sort will be called soft positive action in an attempt to distinguish it from hard positive action, which will be explained shortly.

Further, it is quite often the case that some kinds of discrimination are prevalent and persistent despite the existence of the prohibition of direct discrimination. Thus the prohibition of direct discrimination needs to be effective in order to achieve its regulatory purpose. To this end, it requires some supplementary measures to be legally adopted. Thus, beyond the voluntary proactive actions considered above, employers are sometimes legally required to adopt soft positive action policies. For instance, employers are obliged to prepare pay equity plans to achieve equal pay for work of equal value between men and women in Ontario, Canada.<sup>80</sup> Currently, the

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<sup>77</sup> Richards, 1997, 271.

<sup>78</sup> Fullwinder, 2005.

<sup>79</sup> For various kinds of positive action programmes, see McCrudden, 1986a.

<sup>80</sup> Pay Equity Act of Ontario Canada, s3.

public authorities have a duty to affirmatively eradicate race, disability and sex discrimination in the UK.<sup>81</sup> In the US, government contractors are required to take positive action to ensure that all applicants and employees are treated without regard to race, colour, religion, sex or national origin.<sup>82</sup> This requirement which is imposed on government contractors is not a legal duty, but it may actually be effective as, if they fail to comply with it, government contracts can be terminated or suspended. Under this sort of legalised soft positive action, employers must affirmatively correct practices which are discriminatory against particular groups, whether explicitly or implicitly, and proactively help those who are under-represented to be employed or promoted.

Beyond the soft positive action programmes mentioned above, there may be what is called hard positive action programmes for a particular group of workers. When an employer finds that a particular group of workers is underrepresented in particular jobs because of their lack of skills and qualifications, the employer may provide the vocational training that is necessary for them to be recruited and promoted; people who do not belong to the group are not allowed to take such vocational training. Moreover, he may set a quota for women and minority groups in particular jobs. To meet the quota, he may recruit a member of the groups, even though she is less qualified than other applicants for the jobs. Other applicants for the jobs may not be able to be employed or promoted, even though they are the best qualified. In a more moderate way, he may employ a member of the groups only when both she and other applicants are equally qualified.<sup>83</sup> By nature, therefore, hard positive action is in breach of the direct discrimination provisions based on equal treatment.

Let us first see whether soft positive action programmes can be explained with reference to equality. As the prohibition of direct discrimination can be explained with reference to equality, in particular, equal treatment, any measures beyond the prohibition of direct discrimination need to appeal to different types of equality in

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<sup>81</sup> See Race Relations Act (RRA) 1976, s71, as amended by the Race Relations (Amendment) Act 2000, DDA 1995, s49a, as amended by DDA 2005; SDA 1975, s76(a), as amended by the Equality Act 2006. The UK government is preparing an Equality Bill in which public bodies have a new single duty not only to replace the current three separate equality duties but also to cover gender reassignment, age, sexual orientation and religion or belief (See Government Equalities Office (GEO), 2008, Chapter 1).

<sup>82</sup> Federal Executive Order 12246, s202.

<sup>83</sup> This sort of hard positive action will be explicitly allowed under a New Equality Act, which is expected to be introduced in the 2008-2009 parliamentary session (See GEO, 2008, Chapter 4).

order to include them within the scope of equality. For this reason, a new type of equality, such as substantive equality, seemingly different from equal treatment, is used to derive the necessity of soft positive action measures beyond the prohibition of discrimination.<sup>84</sup> In relation to soft positive action programmes, substantive equality relies for its explanation on equality of opportunity as substantively conceived of or on equality of results.<sup>85</sup> Insofar as substantive equality is concerned with these conceptions of equality, the discussion of specific protection for particular groups in the previous section is sufficient to show why they cannot sustain soft positive action programmes. This is because the specific protections for women and people with disabilities are a kind of legalised soft positive action programme for these groups. The duty of reasonable adjustments for people with disabilities is typical of this kind of legalised soft positive action. As was shown in the previous section, equal opportunity following the concept of equality can hardly explain why it is realised only in the way that disadvantaged groups are protected or benefited. This is also the case with equality of results.

Then let us focus on whether hard positive action programmes can be explained with reference to equality. The question in relation to hard positive action programmes is whether and, if so, to what extent, hard positive action programmes can be allowed as an exception to the prohibition of direct discrimination. Several anti-discrimination cases and provisions show that positive action programmes are exceptionally permitted under the current anti-discrimination laws. For instance, the US Supreme Court held in *Weber*<sup>86</sup> that a job training programme, according to which a company gave job training opportunities to black people with less seniority than white people, with a view to taking a governmental contract, did not violate Title VII of the CRA of 1964. Moreover, in the UK, in principle, preferential treatment for disadvantaged groups is not allowed in the light of its interpretation of anti-discrimination laws, but preferential treatment, relating to arrangements for training, is exceptionally permitted in the SDA 1975 and the RRA 1976.<sup>87</sup> Furthermore, it was provided under the EU sex discrimination law that in 'measures to promote equal opportunities' it can be allowed as an exception to the prohibition

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<sup>84</sup> Fredman, 2005.

<sup>85</sup> *Ibid.*, 167.

<sup>86</sup> *United Steelworkers of America v. Weber*, 443 US 193 (1979).

<sup>87</sup> SDA 1975 s47; RRA 1976, s37-38.

of direct sex discrimination.<sup>88</sup> With regard to the interpretation of this clause, the ECJ held that positive action is allowed on condition that its preferential treatment is not automatic or absolute.<sup>89</sup> From these examples, it can be observed that the hard positive action programmes have been allowed under anti-discrimination laws as an exception to the prohibition of direct discrimination based on equal treatment.

However, proponents of equality do not accept hard positive action programmes as constituting an exception to equality. For them, they are measures that achieve equality in a more far-reaching way than equal treatment. In this sense, hard positive action is based on a deeper idea of equality, namely, substantive equality. Therefore, the positive action programmes are not an exception to equality, but an 'equality' measure. Although this notion of substantive equality is complicated in relation to hard positive action, it can be broken down into two different kinds of arguments. The first is that new conceptions of equality, such as equality of results or equal opportunity, explain hard positive action.<sup>90</sup> The second is that these new conceptions of equality are realized only in favour of disadvantaged groups of people.<sup>91</sup>

### **3.5.2. Hard Positive Action and Substantive Equality as New Conceptions of Equality**

Firstly, let us see how equality of results explains hard positive action programmes. On the one hand, compared with the positive action programmes, the prohibition of direct discrimination based on equal treatment does not necessarily lead to the guaranteeing of special benefits, jobs or promotions. It simply prohibits employers' biased attitudes against particular groups of people in deciding who should receive benefits or positions. Hence, the unequal distribution of benefits, jobs and promotions between advantaged and disadvantaged groups quite often cannot be addressed through the prohibition of direct discrimination. In terms of results, thus, the prohibition of direct discrimination based on equal treatment does not guarantee particular benefits, jobs or promotions. However, the hard positive action programmes aim to directly secure, as results, benefits, jobs or promotions for disadvantaged groups, for instance, by reserving them for these groups only.

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<sup>88</sup> See ETD, a2(1), a2(4).

<sup>89</sup> See *Kalanke*, Case 450/93 [1995] ECR I-3051; *Marschall*, Case 409/95 [1997] ECR I-6363; *Badeck*, Case 158/97 [2000] ECR I-1875; *Abrahamson*, Case 407/98 [2000] ECR I-5539.

<sup>90</sup> Barnard and Hepple, 2000; Bell, 2003a, 94-95.

<sup>91</sup> Schiek, 2002a, 301-302; Fredman, 2000, 174-176; Bell, 2004, 247.

On the other hand, compared with hard positive action programmes, the prohibition of indirect discrimination may affect whom jobs or promotions should be given to. As was discussed in Section 3.3, however, the prohibition of indirect discrimination indirectly affects the results by means of analysing the impact of a particular standard but not by directly offering jobs or promotions. Hence, the hard positive action programmes are more result-oriented than the prohibition of indirect discrimination. Therefore, the programmes achieve greater equality of results between advantaged and disadvantaged groups than the prohibition of direct and indirect discrimination.<sup>92</sup>

Moreover, proponents of equality argue that equal opportunity can explain the positive action programmes. The prohibition of direct discrimination based on equal treatment opens the possibility of attaining places or benefits by removing some barriers of biased attitudes against disadvantaged groups. However, the removal of such visible obstacles or barriers does not necessarily mean the absence of the invisible effects of social disadvantages. Given these invisible effects, equal opportunity requires certain jobs or kinds of job training to be given to disadvantaged groups.<sup>93</sup> These jobs or kinds of job training are a sort of opportunity for disadvantaged groups of people to achieve broader aims such as realizing their potential or improving their socio-economic situation. In this sense, 'the more far-reaching equal opportunity' requires us 'to equalize the starting points' by undertaking the hard positive action programmes.<sup>94</sup>

Based on this reasoning, proponents of substantive equality explain that the legislation and case law mentioned above took place because anti-discrimination laws used to be narrowly tailored to the realization of equal treatment as formal equality.<sup>95</sup> However, anti-discrimination laws in the EU, they contend, have recently developed in the direction of substantive equality.<sup>96</sup> For instance, they argue, the Amended ETD provides for positive action programmes in the context of 'full equality'.<sup>97</sup> The 'full equality' in the Amended ETD seems to be meant to go beyond the previous phrase 'equal opportunities',<sup>98</sup> which was often interpreted as meaning

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<sup>92</sup> Hepple, 2001.

<sup>93</sup> Barnard and Hepple, 2000, 566.

<sup>94</sup> Fredman, 2002, 130.

<sup>95</sup> Barnard and Hepple, 2000, 562-564.

<sup>96</sup> Ibid., 567.

<sup>97</sup> Amended ETD a2(8). See also EC Treaty, a141(4).

<sup>98</sup> ETD, a2(4).

simply the removal of barriers, such as the biased attitudes of employers towards minorities, by means of the anti-discrimination provisions. In this regard, the new idea of equality involving 'the more far-reaching equal opportunity' or equality of results, according to which hard positive action is no longer regarded as an exception to equality, appears to be provided for in anti-discrimination laws in the EU.

Nonetheless, the explanation of hard positive action by the new conceptions of equality again raises the question: why is levelling up but not levelling down preferred within those conceptions of equality? As was confirmed in the previous chapter, to the extent that such conceptions of equality are based on comparison and equalisation as their conceptual elements, they can be realised by levelling down as well as by levelling up. Thus, proponents of substantive equality need to explain why offering jobs or promotions to disadvantaged groups of workers, rather than depriving advantaged groups of workers of them, is required, although both decisions are ways of realising the conceptions of equality.

One possible answer to the question would be that special concern for disadvantaged groups of people is morally desirable. If so, however, the value underlying the positive action programmes is not equality but the 'special concern for disadvantaged groups'. For instance, Dworkin emphasizes that 'the difference between a general racial classification that causes further disadvantage to those who have suffered from prejudice, and a classification framed to help them, is morally significant'.<sup>99</sup> The reason why the difference is morally significant is that there are continuing effects of discrimination against race, in particular, in relation to the black people in the US.<sup>100</sup> Judging from this reasoning, he seems to argue that since inequalities between black and white people have existed over a long period, hard positive action should be taken with a view to compensating disadvantaged groups for the suffering from past inequalities. Leaving aside whether this reasoning is morally defensible or not,<sup>101</sup> special concern for the disadvantaged people's compensation is a separate value from equality. In his explanation of the race conscious programmes in the US, therefore, the argument of substantive equality for

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<sup>99</sup> Dworkin, 1985, 314.

<sup>100</sup> Ibid., 293-303; Fredman, 2000, 174.

<sup>101</sup> This chapter argued that this sort of reasoning is not morally defensible in relation to the current prohibition of direct discrimination (See subsection 3.2.2.2).

hard positive action relies on a new value other than equality, i.e. 'special concern for disadvantaged groups'.

Notwithstanding this, there is another argument in favour of hard positive action plans. Even if it is admitted that hard positive action is based on values such as the special need for compensation, according to Dworkin, the plans do not violate the equal protection clause or the anti-discrimination clause in Title VII of the CRA of 1964. The reason for this argument is that these clauses are designed to achieve not 'equal treatment' but 'equal concern and respect'. According to him, the anti-discrimination principle in the equal protection clause designed to realise equal respect and concern, should be interpreted as meaning that 'no one in our society should suffer because he is a member of a group thought less worthy of respect, as a group, than other groups'.<sup>102</sup> Following this sort of anti-discrimination principle, the race-conscious programmes are not in breach of the anti-discrimination principle. This is because they are designed not to cause racial contempt but 'to improve [the] overall position of any minority'.<sup>103</sup> Leaving aside the issue whether the clause can be interpreted in this way or not, he manages to keep the race-conscious programmes out of the anti-discrimination principle based on equal respect and concern.

However, this defence of the hard positive action plans raises the levelling down issue again. As was shown in the previous chapter, equal respect could be achieved by showing equally offensive disrespect rather than equally favourable respect. If it is argued that equal concern and respect does not face the problem of levelling down, then it is not a conception of equality. Unless, as Raz shows,<sup>104</sup> equal concern and respect is interpreted rhetorically rather than strictly, thus losing its substantive meaning, however, it is inevitable that levelling down, namely, equally offensive disrespect, is allowed in equal respect and concern. Therefore, Dworkin faces a new difficulty in defending levelling down caused by equal concern and respect, even though he can avoid the criticism that hard positive action violates equality.

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<sup>102</sup> Dworkin, 1985, 302.

<sup>103</sup> Dworkin, 2000, 425.

<sup>104</sup> See Raz, 1988, 228.

### 3.5.3. Hard Positive Action and Substantive Equality as an Asymmetric Operation of Equality

Nonetheless, proponents of equality disagree with the claim that the hard positive action programmes which are designed to be especially concerned with disadvantaged groups are not based on equality. Further, they continue to ground anti-discrimination laws on the new conceptions of equality, such as equality of results or equal opportunity, alongside equal treatment. However, viewing these programmes as realising substantive equality rather than as an exception to equality strengthens the tension between these programmes and the prohibition of direct discrimination.<sup>105</sup> For instance, because the hard positive action programmes are based on one conception of equality, they need to be taken as far as possible. The more broadly the programmes are allowed, however, the more narrowly equal treatment applies as one underlying value. In this way, taking substantive equality to extremes runs the risk of expelling equal treatment from anti-discrimination laws. Notwithstanding this, equal treatment remains at the core of anti-discrimination laws. Even proponents of equality do not argue that equal treatment should be removed completely from anti-discrimination law in order to realise substantive equality. Thus, the old and the new conceptions of equality have to coexist even though they are mutually exclusive.

To sort this problem out, proponents of substantive equality suggest that these conceptions, such as equality of results and equal opportunity, are asymmetric, whereas formal equality, such as equal treatment, is symmetric.<sup>106</sup> The former are asymmetric in the sense that they are needed only for disadvantaged groups, not for both disadvantaged and advantaged groups. However, following this logic, one finds that, unless equal treatment is asymmetric, it is impossible for the new conceptions of equality to be asymmetric. For instance, the hard positive action programmes for disadvantaged groups not only require new conceptions of equality but also entail less favourable treatment to advantaged groups of people. Hence, equal treatment, as well as the new conceptions of equality, has to operate only for disadvantaged groups of people according to the logic of substantive equality. Therefore, all conceptions of

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<sup>105</sup> Collins, 2003a, 17-21.

<sup>106</sup> Schiek, 2002a, 301-302; Fredman, 2000, 174-176.



equality are asymmetric for pro-equality scholars, as far as hard positive action is concerned.

Of course, employment protection for disadvantaged groups may be more important than that for advantaged groups. Without it, they would suffer severe economic hardship, whereas advantaged groups would not. For this reason, special concern for them could be prioritized over the interests of advantaged groups. However, when the pro-equality scholars express this sort of prioritized concern in terms of equality, they actually change the concept of equality. They regard only levelling up as belonging to equality out of the two ways of realising equality, i.e. levelling down and levelling up. Given this logic of substantive equality, one can find that in an effort to include the hard positive action programmes within the scope of equality, substantive equality ends up denying the concept of equality itself. In this respect, substantive equality, which was as suggested as an asymmetric operation of equality, is not equality anymore. It is a priority view, as was shown in the previous chapter.

### **3.6. Conclusion**

Does equality explain anti-discrimination rights? Partially, yes. We have confirmed that the prohibitions of both direct and indirect discrimination are based on equality. More specifically, the current prohibition of direct discrimination on the grounds of a particular trait can be explained with reference to equal treatment of the trait and, accordingly, the current prohibition of direct discrimination on the grounds of several traits is a congregation of equal treatment of each of the traits. Also, the prohibition of indirect discrimination can be explained with reference to equality of impact on the groups formed along the lines of the traits. The argument held by opponents of equality that the two anti-discrimination rights are not explicable by reference to equality is contrary to the results derived from a close inspection of the relevant provisions and case law.

On the other hand, it has been argued that specific protection for women and people with disabilities cannot be explained by reference to equality. Moreover, we have also confirmed that positive action for women and minorities is an exception to equality. These two anti-discrimination rights operate in an asymmetric way, being designed to protect only specific groups. By nature, the asymmetric operation of the rights contradicts the concept of equality, which is based on comparison and equalization. For this reason, for instance, substantive equality which claims to

explain positive action is not equality any more. Therefore, the conceptions of equality that are used to explain the two kinds of anti-discrimination rights are rhetorical rather than substantive in terms of their explanatory force in relation to anti-discrimination rights.

Are, then, the anti-discrimination rights as equality rights, namely, the prohibition of direct discrimination and the prohibition of indirect discrimination, justifiable? Partially, no. One cannot say that the two anti-discrimination rights are wholly justifiable. This is because, on some occasions, the two rights produce morally undesirable results. In the first place, equal treatment does not prevent levelling down, such as equally bad treatment, from occurring as a result of its operation. As was shown by the case law, the direct discrimination provisions do allow equally bad treatment because they are operated with reference to equal treatment. In order to prevent 'levelling down' from occurring in the prohibition of direct discrimination based on equal treatment, we need values other than equality. Moreover, the current prohibition of direct discrimination on the grounds of several traits rules out protection from discrimination on other grounds. Even though people are often discriminated against because of their personal traits, they are not protected from discrimination if such traits do not belong to the list of proscribed grounds of discrimination. Furthermore, under the prohibition of indirect discrimination, rules with disparate impact and morally undesirable rules are two different things. As a result of this difference, the prohibition of indirect discrimination may, under certain circumstances, deter the adoption of positive measures with disparate impact in favour of disadvantaged groups. What is more, the prohibition of indirect discrimination excludes equally disadvantaged members of advantaged groups from its protection. In short, both the direct and indirect discrimination provisions based on equality may give rise to morally undesirable results under certain circumstances.

## **Part Two**

## **Chapter 4 A Conception of the Right to Work and its Justifiability Issues**

### **4.1. Introduction**

In Part One of the thesis, it was argued that some anti-discrimination rights in employment are difficult to explain and justify by reference to equality. In pursuit of an alternative explanation and justification for anti-discrimination rights in employment, Part Two, which covers Chapter 4, 5 and 6, deals with the right to work and its relationship to anti-discrimination rights. As the first chapter of Part Two, this chapter considers the right to work and its justifiability issues, on the basis of which the next chapter will examine whether or not anti-discrimination rights in employment can be explained and, if so, justified.

Two main conceptions of the right to work have been in use over time. One conception of the right to work means the freedom of work. Although what exactly that means depends on how we define the 'free' state, in this traditional sense,<sup>1</sup> it hardly has any implications for anti-discrimination. This is because the freedom of work, as it has been traditionally understood, is difficult to distinguish from freedom of contract under the common law, in which discrimination in employment is allowed to take place, as will be explained in Section 4.5. The other conception of the right to work means the right to a job. Leaving aside the question of its practicability under the current economic system, this conception is not suitable for the purpose of this chapter, which attempts to find a conception of the right to work which could underlie anti-discrimination in the whole area of employment. It is narrowly focused on whether or not people are entitled to a job and accordingly it excludes other domains of employment.

Therefore, this chapter will construct a new conception of the right to work. If it is to be distinguished from the traditional conceptions of the right to work, firstly, the new conception needs to be meaningful in its own right and broader in its scope. Moreover, the new conception will be compared with equality in the light of their

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<sup>1</sup> See, eg, Jacobs, 2000; Drzewicki, 2001.

relationship to anti-discrimination in employment. Thus, it needs to be so abstract in its meaning that it is able to show its connection to anti-discrimination in employment in value-related terms. As was pointed out in the introduction of the thesis, this chapter methodologically assumes that this new conception of the right to work can be constructed from its subcategories, as its basic elements, namely, 'a right' and 'work', just as a conception of equality is constructed from its two conceptual elements (comparison and equalisation).

In an attempt to construct this new conception of the right to work, this chapter will start with the question of what a right is, since a conception of the right to work as a right needs to meet the requirements for being a right. It should be noted that although a right may conceptually include a moral as well as a legal aspect, this chapter will focus on the idea of a legal right. Based on a consideration of the nature of a right, the following section will determine which moral aspects of work make it the object of a right. This discussion is designed to discern the value of work for people. If the nature of a right and the moral importance of work for people are combined, then a conception of the right to work can be defined in Section 4.4. This section will be followed by Section 4.5 in which a comparison with the traditional conceptions of the right to work will be made with a view to clarifying the new conception of the right to work. The exploration of the justifiability of this new conception of the right to work, which will be made in Section 4.6, aims to establish common features of the justifiability issues which an attempt to establish the right to work in this way will encounter. It should be noted that this section is not intended to argue in favour of, or against, the introduction of the right to work. It will simply reveal general features of the issues which will be discussed in detail in relation to the justification of anti-discrimination rights in employment with reference to the idea of the right to work in the next two chapters.

## **4.2. The Nature of a Right**

Since the right to work is supposed to be a right, its conceptions are subject to the general nature of a right. Thus, a consideration of the nature of a right will suggest what sort of attributes need to be drawn from work in order to define the right to work. That is, it will help us to understand which of a variety of aspects of work should be focused on for the conceptual construction of the idea of the right to work.

In addition, the way that a right generally operates in relation to its jural relations should apply to the right to work. Hence, the new conception of the right to work also needs to be defined so as to meet its nature concerning the jural operation of a right. For these reasons, the conceptual structure of a right will be explored in this section.

#### **4.2.1. Interest or will?**

If someone holds a right, what does this mean? There have been two main theories in jurisprudence about what a right is; the will theory and the interest theory. Each of the theories has its own philosophical and historical background,<sup>2</sup> and the legal arguments in relation to the debates between the two theories cover almost the whole area of law. Given this backdrop, it may be necessary to develop in detail all the arguments in these debates in order to support one of the two theories. Nonetheless, since this chapter is primarily aimed at defining a particular right, it will briefly deal with the reason why a particular theory has been chosen to construct a new conception of the right to work.

The will theory takes the view that, if X holds a right, X is able to exercise control over a duty created by this right.<sup>3</sup> If X decides to exercise this right, someone else's duty which is imposed by this right must be implemented. Alternatively, X is able to waive this right and free the duty bearer from this duty. The will theorists identify a right with having this sort of control or power over the related duty. Thus, the will theorists argue that if, even when he is entitled to a benefit, X does not have this sort of control over his entitlement, then X is not holding a right. For instance, suppose that X is entitled to receive some money from Y but X is not allowed to exempt Y from the duty to give this money to X. Then, according to the will theorists, X's entitlement to receive the money from Y is not a right because he has no control over his entitlement.

The interest theory argues that X has a right where X's interest is protected.<sup>4</sup> There is no right which does not protect a certain interest. Suppose that, although X can enforce Y to do something, X has no benefit from doing so. In this case, according to

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<sup>2</sup> See Kramer, Simmonds, and Steiner, 1998; Waldron, 1984.

<sup>3</sup> Simmonds, 1998, 215. For Hart's account of will (choice) theory, see Hart, 1982, 162-193.

<sup>4</sup> See, eg, Raz, 1986, 166, 180-183. For Bentham's version of interest (benefit) theory as the earliest one, see Hart, 1982, 171-179.

the interest theorists, X does not have a right because X has no interest that needs to be protected. However, it is true that not all the interests of an individual become a right. The interest theorists hold that the protection of an interest is a necessary, but not a sufficient, condition for it to become a right.<sup>5</sup> An interest, they argue, must be worthy of protection if it is to become a right.<sup>6</sup>

Of the two theories, the will theory is abandoned in this chapter. The primary reason for this is that, unlike the interest theory, the theory is hardly able to explain most of the employment rights that actually exist under the current legal system. Under the National Minimum Wage Act (NMWA) 1998, for instance, workers are not able to contract out of the NMW protection. That is, they are not allowed to alienate their right to the NMW, in order to make a contract of employment providing for a certain wage below the NMW. A contract of employment of this sort is void under the Act.<sup>7</sup> On top of this, under the Working Time Regulations (WTR), employment rights concerning the length of night work, daily rest, weekly rest periods and the entitlement to annual leave are not waivable by workers.<sup>8</sup> According to the will theory, all these unwaivable employment rights laying down the minimum working conditions are not rights because the holders of these rights have no control over their rights. As far as employment rights are concerned, therefore, the will theory is not appropriate as a theory of the nature of a right.

Simmonds, one of the will theorists, contends that unwaivable employment rights are rights, the holders of which in effect have control over them.<sup>9</sup> Although workers do not have the power to alienate their right, he argues, when, for instance, it comes to their right to the NMW, they still have a certain option, namely, whether or not they will sue their employer for paying them less than the NMW. However, his argument is not consistent with the actual provisions of the Act. Regardless of whether or not individual workers want to sue their employer for a violation of the Act, an officer in charge of the enforcement of the NMW can present a complaint to an ET or commence other civil proceedings on behalf of a worker, if the employer does not comply with an enforcement notice requiring him to pay the NMW.<sup>10</sup> Thus,

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<sup>5</sup> Kramer, 2000, 473.

<sup>6</sup> See Kramer, 1998; Raz, 1984.

<sup>7</sup> See NMWA 1998, s17(1).

<sup>8</sup> See Working Time Regulations (WTR) 1998, s35.

<sup>9</sup> Simmonds, 1998, 229.

<sup>10</sup> NMWA 1998, s20(1).

the enforcement of the right to the NMW, even at the stage of deciding whether or not employers who are in breach of the Act will be sued, does not depend on workers' discretion as to whether or not they want to sue their employer.

Following the interest theory of the nature of a right, it is assumed in this chapter that a right exists to protect people's interests. If people have a right, it means that their interests are protected. Thus, the interest theory suggests that we should look at people's interests in relation to work in order to define the right to work. Moreover, since the right to work is designed to benefit not a particular person but all people who are involved with work, these interests should be common to all these people. Therefore, the nature of a right according to the interest theory suggests that work should be explored in terms of the common interests of people who are involved with work.

#### **4.2.2. Correlativity between Rights and Duties**

It seems evident that rights are necessarily involved with duties. However, the precise relationship between rights and duties is disputed among legal philosophers. Some argue that rights are correlative to duties. Others argue that a right is a justifying reason for a duty or duties to be imposed. In this subsection, we will briefly look at the correlativity theory of the relation between rights and duties and criticisms of it, and we will support the theory.

According to Hohfeld, when we talk about rights, we tend to refer to various different types of jural relations as are shown in Table 2.<sup>11</sup> To isolate the different types of jural relations involved in the common use of rights, he classified four types of what we commonly call rights. First of all, the most common case is one in which X is legally protected 'against someone else's interference or withholding of assistance or remuneration, in relation to a certain state of affairs or action'.<sup>12</sup> This sort of jural relation is a claim-right, which Hohfeld sees as a right in the strictest sense.<sup>13</sup> The second type of jural relation is that X's interests can be protected, for instance, by being free from any duty not to undertake a certain action. Hohfeld calls this type of jural relation a privilege, which current legal philosophers prefer to call

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<sup>11</sup> See Hohfeld, 11-31 in Campbell and Thomas, 2001. For detailed commentaries of Hohfeld's jural conceptions, see Kramer, 1998, 7-60; Simmonds, 1998, 148-158; Simmonds, 2002, 275-291.

<sup>12</sup> Kramer, 1998, 9.

<sup>13</sup> See Hohfeld, 13.



liberty, on the basis that liberty consists of the absence of duty. Thirdly, X is sometimes able to change her own, or others', entitlements by expanding or reducing or modifying them. For instance, someone is able to write a will to bequeath his wealth to his relatives. This kind of jural relation is named power. Lastly, X's interests can be protected by not being exposed to the exercise of power. Hohfeld classifies this sort of a right as a kind of immunity.

**<Table 2>**

Jural Opposites	claim-right	privilege (liberty)	power	immunity
	no-right	duty	disability	liability

Jural Correlatives	claim-right	privilege (liberty)	power	immunity
	duty	no-right	liability	disability

Each of these four jural relations that have been explained above entails its jural correlative as is shown in Table 2. X's claim-right not to have his actions interfered with by someone else means that someone else has a duty not to interfere with X's actions. X's privilege or liberty to be free to take certain actions, which is the opposite of X's duty not to take certain actions, implies that other people have 'no right' to prevent X from performing the actions. Likewise, X's power to change Y's entitlements requires that Y has a liability to be exposed to his entitlements being changed by X. X's immunity from having his entitlements changed by Y, which is the opposite of X's liability to being exposed to having his entitlements changed by Y, means that Y is unable to change X's entitlements. Thus, X's immunity entails Y's disability. In this way, a claim-right as the jural opposite of 'no right' is correlative to a duty; privilege or liberty, which is the jural opposite of duty, is correlative to 'no right'. Similarly, power as the jural opposite of disability is correlative to liability; immunity, which is the jural opposite of liability, is correlative to disability.

The relationship between the first four jural relations and their correlatives is purely conceptual. As Kramer points out, it is not empirical or substantive in the sense that

it is not exposed to 'moral objections or empirical refutation'.<sup>14</sup> Each of the first four jural relations by conception entails its correlative and *vice versa*. Thus, for instance, without denying a claim-right conceptually, we cannot deny a duty as its correlative.

Nonetheless, some proponents of the interest theory object to the correlativity view of jural relations. This is because, they argue, someone's right is a justifying reason for imposing several duties on others, and accordingly rights are logically prior to duties.<sup>15</sup> Hohfeld's correlativity theory of the relation between rights and duties, it is argued, obscures this point, if we mean by saying that a person has a right that someone else already has a duty. Moreover, by understanding a right as a reason for imposing duties, they contend that a right as a justifying force may give rise to several duties, if they are all necessary to protect the right.<sup>16</sup> They argue that the correlativity view is not able to explain this dynamic nature of a right by claiming that a right is correlated to a duty.

It can be acknowledged that we say in an ordinary sense that a right is a reason for imposing a duty on others. We often justify imposing a duty by emphasising a right. However, it should be noted that when we say that X's right is a justifying reason for imposing a duty on others, we use the term 'right' in a way that already includes the importance of X's interest within it. The reason why this use of the term 'right' is possible is that a right is commonly expressed in terms of the interest that it protects. When we mention a particular right, we often also mention the interest that it protects. For instance, the right not to be tortured expresses the interest that this right protects, namely, that of not being tortured. Precisely speaking, nonetheless, it is not the right itself but the importance of X's interest that is protected by the right that leads to a duty being imposed. Thus, when the legislature makes a law that protects X's interest, on the one hand, they may think that there is sufficient reason to impose a duty to protect X's interest, i.e., X's interest is morally or politically important enough to be protected. In other words, the moral or political importance of X's interest requires the legislature to enact a law imposing a duty on others. In exactly the same way, on the other hand, the importance of X's interest is also a reason for establishing a right. Just as it is a reason for imposing the duty not to torture, we can say, the importance of not being tortured is a reason for establishing the right not to

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<sup>14</sup> Kramer, 1998, 22.

<sup>15</sup> MacCormick, 1982, 161.

<sup>16</sup> See Raz, 1984b, 199-200.

be tortured. Therefore, the fact that we can say that a right is a reason for imposing a duty does not show that a right is not correlative to a duty. Much less does it prove that a right is not logically prior to the corresponding duty. Once the legislature establishes X's right in order to protect his interest, it simultaneously imposes a duty on someone else.

It may still be argued, however, that the fact that a right is a justifying reason for imposing not one but several duties proves that one right is not always correlated to one duty. As Kramer points out, however, this view confuses rights and duties at different degrees of specificity.<sup>17</sup> An abstract right can have several sub-rights. Each of these sub-rights of an abstract right has a sub-duty as its correlative. When it is said that a right gives rise to several duties, this actually means that an abstract right gives rise to several sub-duties. What are correlated to sub-duties are not abstract rights, but several sub-rights of the abstract right. Thus, the correlativity theory between rights and duties still applies between sub-rights and sub-duties.

The correlativity theory has some implications for a new conception of the right to work. Among other things, a new conception of the right to work should entail a corresponding duty that is correlated with the right to work. Thus, a new conception of the right to work that cannot be explained by its corresponding duty will be mistaken, because it does not fit the correlativity doctrine. Furthermore, the corresponding duty of the duty-bearer which is correlated with the right to work is helpful in capturing the justifiability issues of the right to work. A conception of a certain right necessarily leads to an emphasis on X's interest that the right is protecting, as it is expressed in combination with the interest that it is protecting. However, its duty bearers often object to the establishment of a certain right because of the burden to which the duty gives rise, arguing that, given the burden it imposes on them, the right is not justifiable. Although the establishment of a certain right requires the imposition of a certain duty as its correlative, a duty expressed in terms of the burden on its bearer is more likely to justify their objection than a right that is expressed as a protected interest of its holder. In this way, the theory of correlativity between rights and duties helps to make it easier to consider from the duty holder's point of view whether or not the establishment of the right to work is justifiable.

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<sup>17</sup> Kramer, 1998, 43-44.

### **4.3. Work: Interests and Values**

Relying on the interest theory, it can be said that the right to work is a person's legally protected interest(s) in relation to work. However, this version of the right to work does not reveal what the interests are that are to be protected in relation to work. In order to define the right to work, we need to establish people's common interests in relation to work. Moreover, we have confirmed that not all interests are necessarily to be protected. To be protected by a right, an interest must be worthy of protection. The question therefore is when people who have an interest in relation to work are entitled to a right. Although whether or not a particular interest is worthy of protection is ultimately judged by the legislature which enacts a law granting people a right, we can say that in order for an interest to deserve protection, it must be at least morally valuable. Although not all interests that are conceived of as morally valuable are necessarily protected, some interests that are regarded as unimportant are hardly likely to be protected. Thus, morally important interests are the most likely candidates to be protected by a right. Thus, this section will explore not only what people's common interests are in relation to work but also how valuable these are.

#### **4.3.1. Interests, Values and Work Values**

Before exploring the interests that are worthy of protection in relation to work, we need to clarify the meanings of the terms used in this chapter. First of all, we need to clarify what we mean by work. Sociologically, work is defined as 'the effort or activity of an individual performed for the purpose of providing goods or services of value to others'.<sup>18</sup> Work defined in this way includes unpaid activities, such as voluntary work. Nonetheless, paid work constitutes the main part of work under the current economic system. In this chapter, despite its possible broader meaning, the discussion of work is confined to people's paid effort or activity, in order to avoid complicated issues in relation to unpaid work, for which the chapter does not have space.<sup>19</sup> Moreover, defined in this way, work can be differentiated from other similar terms. When we find satisfaction in our work, we call it a 'calling' or a 'vocation'.<sup>20</sup> 'Labour', on the other hand, is a word that is sometimes used to imply unsatisfying

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<sup>18</sup> Hall, 1986, 13.

<sup>19</sup> For accounts of the relationship between paid work and unpaid work, in particular, domestic labour and reproductive contribution, mainly by women, see Conaghan, 2005; Klare, 2002.

<sup>20</sup> Pence, 1978, 307.

work or work which needs physical strength to be done. In comparison with these similar terms, 'work' means all paid activities regardless of whether they are regarded as a calling or vocation, or as labour.

Second, we need to clarify the differences between interests, values and work values. People's interests vary depending on their preferences and likings. They do not have to be morally important. Values are interests that are morally important. Given the differences between interests and values, we can see that all interests are not values. Even though a person wants something strongly, it is not a value but only an interest if it is not morally important. In addition, even though something is regarded as morally important by some members of a society, it is not a value but simply an interest if it is, objectively speaking, not morally important. This view of a value is different from the psychological view of a value in which anything that is conceived of as morally important by some individuals is a value.<sup>21</sup> Of these values, work values are referred to as the ones that are achievable mainly through the specific domain of work. If a value is pursued mainly through a domain of life other than work, then it is not a work value. Even when a value is equally involved with several domains, including work, it cannot be a work value.

There are a variety of interests that people have in relation to work. People prefer and, if possible, choose a particular type of work in the light of their own interests. They want to pursue a working life goal that is fit for their interests. In psychological studies,<sup>22</sup> people's common interests in relation to work are traditionally categorised into three types. The first one is material interests, namely, that people make their living through work; the second one is social or relational values, whereby it is meant that people take part in social life by engaging in socially organised work; the third type is self-actualisation interests, which means that they show their potential and their abilities through work. Moreover, it has recently been argued that 'power and prestige' should be categorised as another type of interest pertaining to work.<sup>23</sup>

These three or four work-related interests discussed in psychological studies are not all work values. This is because either some of these types of interests are not closely linked to work or their moral importance is doubted even though they are

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<sup>21</sup> For psychological definitions of values, see, eg, Super and Sverko, 1995, 5; Schwartz, 1992, 2. Since psychological values are interests from the perspective adopted in this chapter, they are called interests in this chapter.

<sup>22</sup> Borg, 1990.

<sup>23</sup> Ros, Schwartz and Surkis, 1999, 55.

psychologically categorised as one type of interest. First of all, the second type of interest can be pursued without work. People build a variety of social relationships through several areas of life, such as local community, religion and leisure. The importance of building social relationship in one area of life is more or less equivalent to that in other areas. Work is simply one of the areas in which social relationships are built. Thus, although maintaining social relations is indispensable to people's life, it is not principally, let alone exclusively, associated with work. Moreover, 'prestige and power' is not a work value for two reasons. One reason is that it can be doubted whether the interest in power and prestige is morally valuable for its own sake. Some people may have a strong interest in power and prestige. However, we cannot easily say that we should seek power and prestige for their own sake in our life, even though the pursuit of something valuable may entail power and prestige. The other reason is that the interest in power and prestige is not necessarily involved with work. It cannot be denied that some work gives power and prestige. However, it is also true that we more often pursue power and prestige in other domains of life, such as politics. Thus, we can hardly say that the interest in power and prestige is achievable mainly through work.

Nonetheless, some may not agree that the building of social relations of power and prestige should be ruled out as possible candidates for work values. They may argue that the right to work is closely associated with such interests. Their choice of such interests as work values might be one option in constructing a new conception of the right to work. In this regard, the conception of the right to work which will be constructed in this chapter and other possible conceptions of the right to work may compete as to which of them represent more morally desirable aspects of work, just as a variety of conceptions of equality compete with each other.

#### **4.3.2. The Work Values**

Of the four types of work-related interests, the first and the third type respectively will be considered in this subsection. The focus of the consideration of these two work-related interests will be on whether or not they are work values. As we mentioned above, to become work values, they need both to be morally valuable and to be achievable principally through work.

#### 4.3.2.1. Subsistence

Subsistence is one of the most basic conditions of human existence. People need basic resources, such as food, clothing, health care and housing, without which they would not survive. The precise extent to which people need these resources is contestable. The need for basic resources could be met up to a relatively decent standard of life or to a minimum one making only physical survival possible. Despite the difficulty in fixing the extent of meeting subsistence, it is undeniable that our existence entirely depends on meeting our subsistence needs. The importance of subsistence is comparable only to that of physical security. For this reason, it is one of the most important moral concerns whether or not a person's subsistence is satisfied.<sup>24</sup>

It goes without saying that work is a principal vehicle of subsistence. Under the current economic system, it is an institutionalised economic practice that people get paid for their work. The incomes they receive from their work enable them to buy resources to satisfy their needs. Of course, work may not be the main means of subsistence for all people. A minority of people whose wealth is enough to satisfy their subsistence can survive without having to work. Apart from the exceptionally rich, however, most people have to work for their subsistence. For this reason, earning one's living is commonly regarded as tantamount to gaining some income through work, as is shown by the fact that people's work is expressed as their 'livelihood' in ordinary English usage.

The importance of work as a principal means of subsistence is reflected in people's attitudes towards their work. People do appear to think that maintaining their economic life is the most important aspect of their working life. For instance, an international psychological survey conducted by the Meaning of Working (MOW) International Research Team in the early 1980s over eight countries (Belgium, Britain, Germany, Israel, Japan, the Netherlands, the United States and Yugoslavia) reported that the largest portion of people (35%) think that, of the eight categories given in the survey, family support or income is the most important reason for

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<sup>24</sup> Shue, 1980, 20.

‘working’.<sup>25</sup> Moreover, the same survey found that people think that good pay is the second most important of the eleven working conditions.<sup>26</sup>

It might be argued that some social welfare benefits enable people to live without work. Under the current UK welfare system, for instance, the unemployed are granted a flat-rate unemployment benefit, if they have paid enough National Insurance contributions during employment.<sup>27</sup> Even if the unemployed are not eligible for the contribution-based unemployment benefit, they are sometimes entitled to other kinds of unemployment benefit on the condition that their income and savings are below a certain level.

However, unemployment benefits are designed to induce, and often pressurise, the unemployed to find work. As the fact that both contribution-based and income-based unemployment benefits are called Job Seekers’ Allowances in the UK implies, the basic requirement for the benefits is that the unemployed have to be actively looking for a job. Moreover, the amount of the benefit that the unemployed receive is not enough to maintain the living standards of those in employment. In particular, low, flat-rate unemployment benefits, which are offered in some countries, regardless of the level of wage that they earned in their previous jobs, may cause them to suffer serious economic hardship. Furthermore, even those receiving relatively high-rate unemployment benefits in other countries suffer economic hardship. For instance, financial hardship is still the main social problem in relation to unemployment in countries, such as Norway and Sweden, where the unemployed are entitled to a relatively high level of unemployment benefits,<sup>28</sup> although it is less so than in countries, such as the UK, which offer relatively low flat-rate unemployment benefits.<sup>29</sup> In addition, several psychological surveys show that economic hardship is the most influential factor affecting mental well-being among the unemployed.<sup>30</sup> Thus, the financial hardship suffered during unemployment by the unemployed is ‘an integrated part of the unemployment benefit system’ in all the welfare states, functioning as a pressure ‘to seek and obtain paid work’.<sup>31</sup> Overall, social welfare

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<sup>25</sup> See MOW International Research Team, 1987, 111-115.

<sup>26</sup> Ibid., 121-126.

<sup>27</sup> See the website of JobCentrePlus (at <http://www.jobcentreplus.gov.uk>).

<sup>28</sup> Halvorsen, 1997, 258.

<sup>29</sup> See Nordenmark, Strandh and Layte, 2006.

<sup>30</sup> See, Halvorsen, 1997; Strandh, 2000.

<sup>31</sup> See Halvorsen, 1997, 265.



systems maintain, or sometimes strengthen, the characteristic of work as a means of subsistence.

#### **4.3.2.2. Self-realisation**

The definition of self-realisation rests on how we see the self that is realised through self-realisation. We can see a variety of traits in the self which are visualised through self-realisation. We can describe these traits as abilities and powers, if we see the latter in a broad sense. Thus, the self is conceived of as possessing a potential that can be expressed as abilities and powers. If the self is viewed in this way, then the realising of the self means that the abilities and powers of an individual are actualised. In other words, the individual's abilities and powers are brought to light through his (or her) own efforts. However, the realisation of an individual's abilities and powers does not simply mean that they are actualised. They need to be assessed through external examination. Unless the abilities and the powers that are actualised are objectively judged through external examination, we do not know whether or not they have been realised. Hence, the self-realising activities of an individual require their products to be externalised in the society to which the individual belongs. Therefore, as Elster points out, self-realisation is defined as 'the actualization and externalization of the powers and the abilities of the individual'.<sup>32</sup>

Self-realisation is not a unilateral process moving from the self to the outer world. It is a mutually influencing process between the self and the outer world. On the one hand, self-realisation is a process in which people achieve something in the outer world through their abilities and powers. In this sense, self-realisation is closely related to self-achievement or self-fulfilment. At the same time, and on the other hand, self-realisation is a process of developing or adjusting the self in order to have sufficient abilities and powers to deal with the objects in the outer world that are involved with self-realisation. Accordingly, self-realisation presupposes self-development or self-enhancement as part of its meaning.

Before exploring the relationship between work and self-realisation, we need to consider whether self-realisation is valuable at all. Certainly we do not think that self-realisation is the most important value. Arguably, other values, such as autonomy and self-esteem, which will be dealt with in subsection 4.3.2.3., are more

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<sup>32</sup> Elster, 1986, 101.

important than, or at least as important as, self-realisation. However, we can see that there are reasons why a self-realising life as opposed to a non-self-realising one should be encouraged. First of all, the former life gives much more benefit to society than the latter one. As mentioned above, the abilities and powers actualised need to be socially assessed through objectified examination. Through this externalisation, the abilities and powers that people develop and realise in their life become socially beneficial. Given the fact that society is maintained and developed through people's useful activities, self-realisation should be encouraged as a mechanism for producing socially useful activities.

However, self-realisation might be objected to on the grounds that people's attitudes towards their lives vary. Some people might not wish to pursue a self-realising life. Others might think that, although they themselves want to develop their abilities and powers in their life, not all people should have to realise their abilities and powers. Given the variety of people's views on self-realisation, we certainly cannot say that all people pursue, or would prefer, self-realising lives. Nonetheless, the vast majority of people by nature take pleasure in their abilities being realised. As Rawls points out in what he called the Aristotelian Principle, human beings tend to enjoy the exercise of their capacities in their life and this enjoyment is in proportion to the extent of the capacity and its complexity.<sup>33</sup> This is shown by psychological surveys about people's preferences among socially important values. For instance, an international psychological survey jointly carried out in ten countries (Australia, Belgium, Canada, Croatia, Italy, Japan, Poland, Portugal, South Africa and the US) shows that people think that self-realisation is the most important aspect of their life.<sup>34</sup> In this survey, personal development, ability utilisation and achievement, all pertaining to self-realisation, are ranked in first, second and third place respectively, with other values such as social relations, autonomy, life-style, altruism, economics, aesthetics and creativity being left behind.<sup>35</sup> Thus, we can see that how we develop our abilities by, for instance, learning certain skills and how these developed abilities are exercised is an important part of our life plans, without which the scope of a meaningful life is significantly narrowed. In this regard, self-realisation is very important even without invoking the social contribution that it makes.

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<sup>33</sup> Rawls, 1971, 426.

<sup>34</sup> See Sverko and Super, 1995, 351.

<sup>35</sup> See Appendix A, 4 in Super and Sverko, 1995.

Having confirmed the significance of self-realisation as a value, we now explore the relationship between work and self-realisation. First of all, let us see how people find their working life in terms of its non-economic aspects. Do people really think that they are obtaining something other than their livelihood through their working life? There have in fact been numerous surveys which reveal that people value their work because of its non-economic benefits as well as its economic ones. In surveys carried out repeatedly from 1950 to 1990, respondents were asked the same question, whether they would 'continue working if they won the lottery or inherited a sum of money large enough to enable them to live comfortably for the rest of their lives without having to work'.<sup>36</sup> The vast majority of the respondents in these surveys answered that they would continue regardless of the economic need.<sup>37</sup> For instance, the MOW survey mentioned in the previous subsection, which remains among the most comprehensive in terms of the number of respondents and countries covered, found that 86.1% of all the respondents said that they would continue working.<sup>38</sup>

Moreover, of the several non-economic benefits already mentioned above, psychological surveys suggest, people really think that self-realisation is especially important. For instance, the MOW survey mentioned above demonstrates that an interesting job is the second most important reason for working, with income-production being the first.<sup>39</sup> In this survey, interesting work ranks above other reasons for doing work such as its 'time-occupying', 'interpersonal contact', 'societal-service' and 'status and prestige-producing' aspects. Of course, not all interesting work is self-realising. However, it seems unlikely that an uninteresting job gives people the feeling of self-realisation. From the MOW survey, we can see that self-realisation, apart from subsistence, is people's main interest in relation to work.

The reason why people desire self-realisation mainly through their work is probably that work is central to life. 'Central' does not simply mean that people spend most of their adult life working. It also means that work is one of the most important domains of life. The MOW survey shows that people understand work to be the second most important, next to family, of the five areas of life, namely, family, leisure,

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<sup>36</sup> Harpaz and Fu, 2002, 640.

<sup>37</sup> Ibid 640.

<sup>38</sup> MOW International Research Team, 1987, 90.

<sup>39</sup> Ibid., 112.

community, work and religion.<sup>40</sup> Other psychological surveys that have been carried out over the last two decades, following the MOW survey, reveal that work's centrality has not changed over time.<sup>41</sup> The centrality of work to people's lives implies that, if people want to realise their abilities and powers, work is the most likely candidate to be chosen for their self-realisation.

Because of the centrality of work to most people's life, work strongly affects the personality which is determinant of their self-realisation. On the one hand, if the conditions in which current work is done are bad, it has a negative effect on personality. For example, a sociological survey indicates that doing less complex work for a long time affects people's intellectual flexibility negatively.<sup>42</sup> This survey also shows that the extent of occupational self-direction, defined as the use of initiative, thought and independent judgement in work, affects people's personality strongly.<sup>43</sup> That is, as people do simple, closely supervised and routinised work, their ideational flexibility and self-confidence are decreased.<sup>44</sup> The negative effect of non-self-realising work on personality indirectly proves that work is the principal area in which people pursue their self-realisation if they wish to do so.

On the other hand, self-realising work develops personality. This positive relationship between personality and self-realising work has been emphasised philosophically. Generally speaking, not only do human beings who do self-realising work change nature by their powers and abilities but also they themselves are developed and enhanced. For instance, Pope John Paul II explains this nature of work for human beings as follows:

[Work] is a good thing for man. It is not only good in the sense that it is useful or something to enjoy; it is also good as being something worthy, that is to say, something that corresponds to man's dignity, that expresses this dignity and increases it. Through work man not only transforms nature, adapting it to his own needs, but he also achieves fulfilment as a human being and indeed, in a sense, becomes more a human being.<sup>45</sup>

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<sup>40</sup> Ibid 83. The Work Importance Survey carried out, later than the MOW survey, over the 1980s shows a similar pattern (See Sverko and Super, 1995, 352-353 and Appendix B).

<sup>41</sup> See Lundberg and Peterson, 1994; Harding and Hikspoors, 1995; Harpaz and Fu, 2002; Ardichvili, 2005.

<sup>42</sup> See Kohn and Schooler, 1983, chapter 5.

<sup>43</sup> See *ibid.*, chapter 6.

<sup>44</sup> See Kohn and Schooler, 1983.

<sup>45</sup> Pope John Paul II, 1981.

The centrality of work for self-realisation needs to be clarified in order to avoid possible misunderstandings. First of all, the fact that work is the principal area of self-realisation does not mean that people cannot pursue self-realising activities in other areas of life. People do pursue self-realisation through non-work activities such as religion and politics rather than, or as well as, work. Their abilities and powers might enable them to pursue self-realisation in multiple areas of life, or in areas other than work, while spending a significant amount of their life on working only to meet economic needs. Thus, despite the centrality of work for self-realisation, domains of life other than work can be self-realising for some people. Moreover, the fact that work is the principal area of self-realisation does not lead to the contention that other areas of life are less important than work. Each area of people's life has its own importance and accordingly is not replaceable by other areas of life. Self-realisation is simply one of the important values which may underlie several realms of life.

In sum, both subsistence and self-realisation are sufficiently morally important to be considered values: the former is involved with people's physical existence; the latter with their development and contribution to society. In addition, work is a principal means through which subsistence and self-realisation are pursued. Without work, the two values would be very difficult to achieve. The moral importance of the two values and their indispensable link with work make both of them work values. Thus, both subsistence and self-realisation will be hereafter referred to as *the work values*.

#### **4.3.2.3. Relationship between *the Work Values* and Other Values**

It has been argued here that subsistence and self-realisation are *the work values*. However, we do not know the extent of the significance that is attached to *the work values*, compared with other values. Thus it is necessary to explore the relationship between *the work values* and other relatively well-recognised values. In particular, since self-realisation may be rather unfamiliar, it will be necessary to assess its significance in relation to other values. In this subsection, the role, if any, that these work values play in enhancing well-recognised values, such as self-respect, autonomy and social inclusion will be examined.

##### **4.3.2.3.1. Self-respect**

Self-respect is people's belief in their own worth.<sup>46</sup> To live a life, people need to have a feeling that their life is worth living. Self-respect is the basic mental state of affairs on which the pursuit, maintenance, and development of life is grounded. Without the secure conviction of the worth of the self, people hardly find their life meaningful. Although self-respect is their subjective feeling of their worth, it is mainly influenced by a variety of social conditions. This is because the activities upon which self-respect is built are done not in isolation but as part of people's social life. Drawing on the significance of self-respect and on society's influence on it, Rawls points out that self-respect is such an indispensable value that a just society cannot be maintained without it.<sup>47</sup> In this sense, he views self-respect as the most important primary good.<sup>48</sup> Thus, his two principles of justice, namely, equal liberties and the difference principle, are supposed to serve to enhance self-respect.<sup>49</sup>

The relationship between self-realisation and self-respect is positive. The positive relationship between the two values can be proved by the fact that the enhancement of self-respect is influenced by the extent that people achieve *the work values* through work. Firstly, we can hardly imagine that people will have self-respect when they are unable to achieve subsistence through work. It is quite often the case that people feel shame when they cannot earn their own living. To a certain degree, social welfare benefits given to the unemployed relieve them of the feeling of shame. Nonetheless, the welfare benefits do not remove this sort of shame completely. As was shown in the subsection, 4.3.2.1, society places much more significance on subsistence through work than on subsistence itself. Thus, the thought that people should work for their subsistence undermines the self-respect of people who are living on welfare benefits. Only meeting their subsistence through work can get rid of such shame completely. In this sense, self-respect is enhanced by subsistence through work.

Secondly, it does matter in the enhancement of self-respect whether or not people do self-realising work. For instance, let us consider those whose work as a whole represents drudgery in their life. In this case, wages from this kind of work may be sufficient for them to earn their living. Thus, this work does not give rise to the same

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<sup>46</sup> Rawls, 1971, 178, 440. It should be noted that we will use self-respect and self-esteem interchangeably, as Rawls does.

<sup>47</sup> Rawls, 1971, 178.

<sup>48</sup> Ibid., 440.

<sup>49</sup> Ibid., 179.

degree of low self-esteem as being unable to manage their own subsistence. Nevertheless, drudgery may bring about a new kind of low self-esteem. Those who do such work are likely to find their work boring. They will not think that they are showing their abilities and potential fully through their work. Moreover, it is the case that their work is not valued by others due to its boredom. Given these circumstances, the thought that, despite the boredom, they will have to engage in drudgery for their whole life can lead to depression. Hence, those who do such work are much less likely to have self-respect. On the other hand, doing self-realising work influences self-esteem positively. People doing self-realising work are likely to think that not only do they contribute to society, but also that they are realising their abilities and potential. Given the centrality of work to life, certainly those who do self-realising work are confident of their worth in society.

Rawls himself implicitly shows that the relationship between self-realisation and self-respect is positive. When he argues that self-respect is the most important primary social good, he actually stresses the importance of self-respect relying on self-realisation. As was mentioned in the previous subsection, his Aristotelian Principle actually means that people naturally enjoy self-realisation. Having defined the Aristotelian Principle, he explains that the circumstances in which the Aristotelian Principle is met support self-respect:

I assume then that someone's plan of life will lack a certain attraction for him if it fails to call upon his natural capacities in an interesting fashion. When activities fail to satisfy the Aristotelian Principle, they are likely to seem dull and flat, to give us no feeling of competence or a sense that they are worth doing. A person tends to be more confident of his value when his abilities are both fully realized and organized in ways of suitable complexity and refinement.<sup>50</sup>

#### **4.3.2.3.2. Personal Autonomy**

Since what autonomy means varies among its proponents, let us focus on, as a well-known example, the conception of personal autonomy proposed by Raz. He recognises it as 'an essential ingredient of individual well-being'.<sup>51</sup> His conception of personal autonomy does not simply mean the absence of a coerced life. He defines it more positively: an autonomous person 'controls, to some degree, their own destiny,

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<sup>50</sup> Rawls, 1971, 440.

<sup>51</sup> Ibid., 369.

fashioning it through successive decisions through their lives'.<sup>52</sup> Thus, the positive meaning of personal autonomy requires three conditions in which it can be achieved; appropriate mental abilities, an adequate range of options and independence.<sup>53</sup>

Each of *the work values* outlined above can be interpreted as being involved with personal autonomy. Firstly, subsistence is a precondition in the sense that, without its satisfaction, people are hardly able to pursue an autonomous life. Specifically, subsistence affects two of the conditions of autonomy, namely, appropriate mental abilities and an adequate range of options. For instance, malnutrition and poor health caused by insufficient subsistence may adversely affect the development of the abilities necessary to pursue an autonomous life. Moreover, people struggling to maintain subsistence through work tend to find themselves facing a very narrow range of options. If, for instance, a person has to keep working much longer hours than other persons do, in order to earn enough money to sustain subsistence, his life options are much narrower than those who are working fewer hours. To promote personal autonomy, thus, the pursuit of subsistence through work needs not only to be possible but also to be carried out in a way that is at least not negative for personal autonomy.

Secondly, let us look at the relationship between autonomy and self-realisation through work. To begin with, self-realising work can contribute to the enhancement of an autonomous life. For instance, highly supervised work is not self-realising because we cannot say that those doing it are showing their abilities in terms of how to work. In this regard, we can say that people's own discretion and judgement about how to work should be encouraged in order to allow people to pursue self-realisation through work. If people follow their own judgement and discretion about how to work, this means that autonomy is increased in their working life. In this way, borrowing Raz's terms, self-realising work permits people to control, to some degree, how they work, fashioning it through successive decisions through their working lives. Some might argue that this sort of autonomy confined to work is only part of the whole autonomous life. However, we have already confirmed that work is central to life. Given this significance of work, the promotion of an autonomous

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<sup>52</sup> Raz, 1985, 370.

<sup>53</sup> Ibid., 372.



working life through self-realising work would be a very important part of an autonomous life as a whole.

Nonetheless, personal autonomy may not necessarily be concerned with self-realisation through work. Some people may decide not to pursue self-realisation through work. They may even do so in pursuit of an autonomous life. Irrespective of their intention, being forced to live a self-realising working life violates personal autonomy even if it leads to successful self-realisation. An achievement that is brought about by forced self-realisation may not be morally valuable because it is not a product of personal autonomy. In this regard, as Raz points out, it is desirable that a person is able to decide whether to live a life of self-realisation or to reject it.<sup>54</sup> Notwithstanding this, self-realisation through work contributes to the enhancement of autonomy in another respect. To live an autonomous life, several possible ways of life should be available as life options. Self-realisation through work should be among the options that people can choose. We can certainly say that life options with the possibility of self-realisation through work would make people more autonomous than life options with little or no possibility of self-realisation through work. Given that work is central to life, moreover, the importance of the former options is further increased in enabling people to pursue personal autonomy.

#### **4.3.2.3.3. Social Inclusion**

The value of social inclusion focuses on the social integration of disadvantaged members into a community. This value is different from the values mentioned above in that the value of what is being assessed is determined not by its direct contribution to people's well-being but by its importance to social integration. From the perspective of social inclusion, work is valuable, not because it is beneficial to people's well-being, but because it enhances social integration. Indeed, Collins, a proponent of social inclusion argues that work is a very important institution through which the value of social inclusion is mainly achieved:

Social inclusion requires regulation of social institutions. Money is not an acceptable substitute for the non-material goods that form a core of 'well-being'. In the case of work, for instance, having a job differs from receiving the same amount of money in welfare benefits. A job provides the opportunity to

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<sup>54</sup> Ibid., 375.

acquire knowledge and skills, to participate in the workplace community, to achieve meaningful goals, to acquire status, or identity in the community, and to form friendships. The policy of social inclusion wishes to distribute these non-material goods to all members of society. Work is not regarded as a means to an end of material wealth, but an end in itself, because it is a vital ingredient of 'well-being'. And the achievement of 'well-being' for all groups is an essential element in constructing a civil and safe community.<sup>55</sup>

Of the reasons why work is important to social inclusion, 'to participate in a workplace community' or 'to form friendships' is not sufficiently important to put a special emphasis on work from the perspective of *the work values*. As was mentioned already in the subsection, 4.3.1, the workplace is not the only or principal domain of life through which people can participate in the community. People can form social relationships without work. Leaving aside this relational function of work for this reason, thus, the significance of work to achieving social inclusion lies in the fact that it gives people 'the opportunity to obtain knowledge and skills', 'to achieve goals through work' and 'to secure status and identity in the community'. The attainment of knowledge, skills and goals are all closely related to the pursuit of self-realisation. It is natural for people to obtain knowledge and skills in order to show their abilities and their potential for self-realisation. Moreover, the status and identity secured through work cannot be separated from self-realisation. They are based on achievements made as a result of the pursuit of self-realisation. Thus we can see that all the important opportunities that work provides are mainly concerned with self-realisation. In this sense, the importance of work for social inclusion is implicitly based on the argument that work is one of the main means of self-realisation. Therefore, we can confirm that self-realisation as one of *the work values* strengthens the importance of work for social inclusion.

Overall, *the work values* achieved through 'proper' work promote self-esteem, personal autonomy and social inclusion. Subsistence through work is the basis of self-esteem and personal autonomy. Self-realisation through work also enhances self-esteem and personal autonomy. Social inclusion places significance on work, implicitly based on self-realisation through work. Therefore, the constructive relationship of *the work values* to the well-recognised moral values confirms the moral importance of the former values.

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<sup>55</sup> Collins, 2003b, 25.

## 4.4. A Conception of the Right to Work

### 4.4.1. Defining the Right to Work

Now we are finally in a position to define a conception of the right to work. Following the interest theory, we have already confirmed that the right to work is people's protected interest(s) in relation to work. Given that subsistence and self-realisation as the principal interests in relation to work are sufficiently morally important to deserve to be designated as *the work values*, the right to work needs to be defined in such a way that we can specify these values as the interests that the right to work is designed to protect. However, it should be noted that these work values as common interests in relation to work cannot be the same as the right to work itself. In other words, the values of 'subsistence' or 'self-realisation' through work cannot constitute the right to work itself. The fact that subsistence is one of *the work values* presumes that people seek to meet their subsistence by engaging in certain activities, relying on their own efforts. Moreover, self-realisation through work assumes that people pursue self-realisation, based on their own judgements and choices. *The work values* are something that is pursued through work, in a way that is reliant on individuals' own efforts and choices, but not provided by others. Hence, we should define the right to work as protected interest(s) which are not the same as, but are involved with, *the work values*.

Although people pursue *the work values* by means of their own efforts and choices, they can still have interests in relation to these work values. These interests are involved with removing some obstacles which prevent or deter them from pursuing their subsistence and self-realisation through work. These interests in removing obstacles exist to serve *the work values* as the main interests in relation to work. In this sense, people's interests in removing such obstacles are sub-interests which help people to pursue *the work values*. These sub-interests are related to *the work values* as superior interests. In order to express this relationship between the right to work as protected sub-interests and *the work values* as the superior interests, therefore, a conception of the right to work is defined as follows: a person's legally protected interest(s) reflecting *the work values*. Defined in this way, the right to work is made up of two conceptual elements, namely; (i) being legally protected (ii) reflecting *the work values*.

#### 4.4.2. How does the Current Right to Work Reflect *the Work Values*?

There are a variety of work-related rights that are legally enforceable. As defined above, the conception of the right to work requires that these rights must directly or indirectly reflect *the work values* in order to be classified as the right to work. Most of the work-related rights of workers satisfy this requirement. First of all, *the work values* suggest that work should be available for people. In this regard, access to and maintenance of work are prerequisites in order for *the work values* to be pursued. Thus, for instance, the right not to be unfairly dismissed is established to protect the maintenance of work from employers' arbitrary dismissal in most countries. Moreover, a current right which is even more directly involved with *the work values* is the right to the statutory minimum wage. This right is established to guarantee workers a minimum level of subsistence. Thus, we can easily see that this right belongs to the right to work.

Furthermore, most rights pertaining to working conditions reflect *the work values* indirectly. Working conditions positively or negatively influence workers in pursuit of *the work values*. Decent working conditions not only lessen the hardship that work normally entails but also help maintain the mental and physical strength needed to do meaningful work. Conversely, for instance, working long hours is detrimental to workers' health and safety and accordingly can frustrate workers' efforts to pursue their own working life goals reflecting *the work values*. This is the reason why, by prescribing maximum working hours, legislation helps workers to pursue their working life goals. In this way, most rights setting minimum working conditions help people to pursue their working life goals. Of course, the sub-interests in decent working conditions are not as directly connected with *the work values* as the sub-interests in the minimum wage or maintenance of employment. Nonetheless, it is certain that *the work values* require that working conditions should not deter or prevent people from pursuing them.

On the face of it, few employment rights are directly involved with elements of self-realisation whereas the right to the minimum wage, for instance, is designed to directly protect those of subsistence. Nevertheless, some employment rights can be interpreted as reflecting certain elements of self-realisation. One of the rights that reflect such elements is the right to flexible working, such as the right to request

flexible working in the UK<sup>56</sup>, or the right to request a change from full-time to part-time work in Germany.<sup>57</sup> Of course, it is the case that the right to flexible working is designed to help working parents to earn their living. For instance, the right helps single parents, who otherwise might be forced to resign and suffer economic difficulties, to manage their working life by adjusting or reducing their working time. However, this right does not simply help the pursuit of subsistence through work. Let us suppose that there are working parents, each of whom alone can earn enough money to make their living. Without both of them adjusting their working time, or one of them changing to part-time work, however, they are hardly able to bring up their young child. They cannot leave all of the child care to others because their child needs their direct care to a certain degree. In this case, the reason why the right to flexible working is beneficial for the working parents with young children is not that it helps working parents to keep their job to meet subsistence needs. The reason is that work is valuable for them independently of its economic benefit. Accordingly, it is not desirable that either of the working parents should give up work completely to care for their child. In the present case, thus, it can probably be said that the right to flexible working assists working parents to obtain self-realisation through work. The element of self-realisation in establishing the right to flexible working is shown by the UK government's comment in its consultation document when it proposed to extend the right to request flexible working to apply more broadly. According to the government, the right to flexible working is designed 'to ensure a framework is in place which supports families in the choices they make and ensure that mothers and fathers can fulfil their potential and achieve goals at home and at work'.<sup>58</sup>

Interpreted in this way, the right to work includes almost all the workers' rights which are individually guaranteed in relation to their work. In this sense, the right to work is so broad in its scope that it can be likened to other social rights, such as the right to health or the right to education, covering all rights concerned with health or education. However, the broadly defined right is different from ambiguously defined rights, such as work-related rights or rights in work. 'Work-related rights' or 'rights in work' cannot demonstrate the fact that these rights are aimed at protecting *the work values*. Despite its broadness, the new conception of the right to work actually

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<sup>56</sup> ERA 1996 s80f, as amended by Work and Family Act (WFA) 2006, s12.

<sup>57</sup> See Burri, Opitz, and Veldman, 2003.

<sup>58</sup> DTI, 2005.

displays the fact that it is established to serve *the work values*. In this sense, it is a broad value-related framework which can structure and underpin work-related rights in the process of their legislative development.

#### **4.4.3. Correlative to the Right to Work: Constraints on Freedom of Contract**

The meaning of freedom of contract and the validity of contracts entered into were explained by a judge in the late nineteenth century as follows: ‘Men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of Justice.’<sup>59</sup> However, without deciding what ‘freely’ or ‘voluntarily’ means, we still do not know whether or not a contract entered into is valid under freedom of contract. Under English law, whether a contract is entered into voluntarily or not is determined by whether duress or undue influence is exerted when it is formed.<sup>60</sup> Thus, it is a principle in English law that all contracts entered into without duress or undue influence are legally protected. This subsection will suggest that freedom of contract as understood in this way has a special relationship with the new conception of the right to work.

It has already been argued in subsection 4.2.2. that a right is conceptually correlated to a duty. The correlativity doctrine between rights and duties leads us to ask how the new conception of the right to work can be stated in terms of its correlated duty. The duty bearers in respect of the right to work will be mainly, if not exclusively, the state and employers. Firstly, if workers are entitled to job training from the state, this right to job training held against the state is tantamount to the state’s duty to provide job training. In the sense that it is held against the state, this right is not different from other social rights, such as the right to health or the right to education whose duty bearer is often the state. Unlike the right to health or the right to education, however, most employment rights that are currently being enforced are against employers. Following the correlativity theory, these rights held against employers can be expressed in terms of employers’ duties. For instance, workers’ right not to be unfairly dismissed is tantamount to their employers’ duty not to dismiss them

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<sup>59</sup> *Printing and Numerical Registering Co. v. Sampson* (1875) LR 18 Eq 462, per Jessel MR at 465.

<sup>60</sup> Collins, 2003c, 138.

unfairly. Moreover, workers' right to the NMW is synonymous with employers' duty to give workers wages that are not less than the NMW.

As employment rights are expressed in terms of employers' duties, we can see clearly that these rights restrict employers' particular rights in relation to employment. Before the duty not to dismiss workers arbitrarily was established, employers were free to terminate employment contracts at will. In addition, employers were free to make an employment contract offering any wage to workers, however low it was, before the introduction of the minimum wage law. Now employers are not able to enjoy this right, as a worker has a contractual right to the difference between his actual wages and the NMW under the NMWA 1998.<sup>61</sup> These rights of employers in relation to termination of employment contract or wages had been derived from freedom of contract. Thus we can see that the right to work held against employers limits employers' freedom of contract, to which they otherwise would be entitled.

We can show this relationship between the right to work held against employers and employers' freedom of contract in light of Hohfeld's theory on rights. Using his terms, if Y has a claim-right to require X not to take an action, this means that X has a duty not to take the action because a claim right is correlative to a duty. Moreover, X's privilege or liberty to take certain actions means that X has no duty not to take these actions, because X's liberty is the jural opposite of X's duty in Hohfeld's sense. Thus, Y's claim-right to require X not to do certain actions always limits X's liberty to take the actions. Likewise, employers' liberty to enter into a contract freely, which is called employers' freedom of contract, means that they do not have any duty not to enter into a contract of a particular sort. If workers have a claim-right to require employers not to enter into an employment contract that involves particular working conditions, this means that employers have a duty not to enter into a contract of this kind. Hence, workers' claim-right against employers in relation to a particular working condition always limits employers' liberty to enter freely into a contract of any kind. In this way, the right to work held against employers puts constraints on the freedom of contract which employers were previously entitled to enjoy. In this sense, the right to work held against employers exists as constraints on employers' freedom of contract.

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<sup>61</sup> NMWA 1998, s17(1).

## **4.5. A Comparison of the New Conception with Other Conceptions of the Right to Work**

There are other conceptions of the right to work which have been in use over time. This section assesses two traditional conceptions of the right to work from the perspective of its new conception. This assessment is aimed at clarifying the right to work defined in this chapter and emphasises the conceptual advantages of using the new conception.

### **4.5.1. The Right to Work as the Freedom of Work**

The right to work has often been used to mean the freedom of work. For instance, Marshall recognised the right to work as ‘the right to follow the occupation of one’s choice in the place of one’s choice, subject only to legitimate demands for preliminary technical training’.<sup>62</sup> Limitations which prevent or deter people’s free choice in relation to occupation vary from direct physical coercion to employers’ biased attitudes towards particular workers. Thus, the scope of the right to work depends on what is meant by free choice of occupation.

First of all, the right to work as the freedom of work may simply mean the absence of physical compulsion in the choice of occupation. As is shown by Article 8 of the International Covenant of Civil and Political Rights and the ILO Convention on Forced Labour, people are entitled to be free to work in the sense that none is forced to work. It is their discretion whether they decide to work or not. Thus a person can remain unemployed without seeking a job. Moreover, people are free to apply for any job they want, subject to the qualifications required by the job. No one is allowed to force people to choose a particular job. Once people enter into employment, furthermore, they are not forced to work. Of course, not giving their labour under the direction and control of their employer contrary to their employment contract may lead to them being dismissed, or sometimes to be liable to pay damages for violating their contractual duty. Nonetheless, their contractual duty to work for their employer may not be enforced by means of physical compulsion.

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<sup>62</sup> Marshall, 1992, 10.



However, the freedom of work as the denial of forced labour hardly has a substantive meaning independent from freedom of contract. Under freedom of contract, people are free to enter into an employment contract. In other words, this contract cannot be coerced either. Any coerced contract including an employment contract is not legally binding under common law because it is not based on mutual consent. Hence, free choice of occupation as the absence of physical coercion can be secured with reference to freedom of contract alone and accordingly there is little scope for the freedom of work independent of freedom of contract. Some might argue that there is indeed a scope for the freedom of work as independent from freedom of contract, on the basis that, as is shown by the ILO Convention on Forced Labour,<sup>63</sup> the freedom of work forbids people in prison from being forced to work for the political, educational or economic purposes of the state. On the face of it, freedom of contract does not seem to apply to forced labour in prisons. However, if freedom of contract were constitutionally guaranteed, forced labour imposed on prisoners by a state would be regulated with reference to freedom of contract alone. Laws or state actions forcing people to work for special purposes would be unconstitutional, violating freedom of contract. Thus, with the constitutional provision on freedom of contract, the law prohibiting forced labour for unjustified purposes in prisons would not be necessary in terms of its *de facto* legal effect.

Of course, it might be argued that there are cases where this freedom of work collides with freedom of contract. For instance, a contract freely and voluntarily entered into, in which a person is obliged to serve as someone's slave, can be in breach of the freedom of work, even though it is in accordance with freedom of contract. However, this sort of contract can be interpreted as void under freedom of contract. This is because freedom of contract has an intrinsic constraint, namely, that contractual parties must not be allowed to deny freedom of contract itself. From this point of view, hence, the seeming conflict between the freedom of work and freedom of contract can be solved within the latter's scope. In this sense, there exists little scope for the freedom of work independent from freedom of contract in the regulation of what is called a slave contract.

As well as this sort of physical compulsion, Marshall provides examples of limitations on the free choice of occupation, such as a statute confining occupations

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<sup>63</sup> Abolition of Forced Labour Convention (No. 105), a1.

to certain social classes and local regulations confining employment to local residents.<sup>64</sup> The strength of compulsion of the statute or the local regulations is no less than a physical compulsion. This is because not complying with a law gives rise to forced punishment, including physical coercion. Thus, the statutes and bylaws limiting people's economic activities can be construed as forms of coercion in breach of freedom of contract. Hence, realisation of freedom of contract in employment requires workers to be free from coercion enforced by this sort of legislation. This was the reason why, when the wage assessment provisions of the Statute of Apprentices, authorising judges to set the wages with a view to preventing low wages, were repealed in 1813, the repeal was supported in a Select Committee with reference to the freedom of work as synonymous with freedom of contract. The Select Committee wrote: 'No interference of the legislature with the freedom of trade, or with the perfect liberty of every individual to dispose of his time and of his labour in the way and on the terms which he may judge most conducive to his own interest, can take place without violating general principles of the first importance to the prosperity and happiness of the community'.<sup>65</sup> Therefore, the right to work as the freedom of work is still nothing but an expression of freedom of contract in relation to occupation.

'Free choice' in the freedom of work may be interpreted as meaning the absence of unreasonable limitation of employment opportunities as well as the absence of physical coercion or its equivalents in the choice of occupation. The freedom of work as understood in this way does put a constraint on freedom of contract. Moreover, the constraint on freedom of contract by this freedom of work, unlike the slave contract discussed above, can hardly be regarded as intrinsic to freedom of contract. Hence, the freedom of work as the absence of unreasonable limitations in the choice of occupation exists for its own sake but not as the application of freedom of contract to occupation. Did the independent freedom of work exist as a legal right under English common law? There have been few cases in which judges take the freedom of work as the absence of unreasonable limitation of employment opportunities.<sup>66</sup> Under the

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<sup>64</sup> Marshall, 1992, 11.

<sup>65</sup> Select Committee's Report of 1811, cited in Webbs, 1920, 60.

<sup>66</sup> Exceptionally see Lord Shaw in *Morris v. Saxelby* [1916] 1 AC 688; Lord Denning in *Edwards v. Society of Graphical and Allied Trades* [1971] Ch 354.

governance of freedom of contract in common law, there has been little room for this sort of freedom of work.

#### **4.5.2. The Right to Work as the Right to Employment**

In international law, the right to work is involved with making jobs available. For instance, the right to work means ‘the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts’ in the International Covenant of Social, Economic and Cultural Rights (ICSECR).<sup>67</sup> ‘Recognising’ this right to work, a state is obliged to follow certain policies concerning vocational training and unemployment, with a view to achieving stable economic growth and full employment.<sup>68</sup> Moreover, the European Social Charter (ESC) has a similar approach to the right to work.<sup>69</sup>

The right to work in the ICSECR reflects *the work values*, in particular, subsistence, as is shown by the use of the phrase ‘to gain his living’. This satisfies one of the two conceptual elements of the right to work. Nonetheless, the right to work in the ICSECR does not belong to the right to work as defined in this chapter as it is by nature legally unenforceable. Firstly, this is shown by the fact that it does not specify any right, based on which individuals can bring the state to court on the grounds that they are not able to find a job. The state simply recognises, but is not obliged to establish, the right to work. Secondly, the duty imposed upon the state does not oblige it to implement a specific policy, for instance, to reduce the unemployment rate to a specific level, however high this may be. Although the state has to adopt economic and employment policies concerned with realising the right to work and this is often described as a duty, more precisely speaking, it is not a legally binding duty, but a policy recommendation. For this reason, the ILO Convention more specifically providing for the same sort of duty being imposed on the state as that in the ICSECR is entitled ‘Employment Policy Convention’ but not the right to work.<sup>70</sup> For the same reason, a proponent of this sort of right to work explains it as being not ‘one that the courts should enforce’ but ‘a presumption guiding our policies’.<sup>71</sup>

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<sup>67</sup> ICSECR, a6(1).

<sup>68</sup> ICSECR, a6(2).

<sup>69</sup> See ESC of 1965, Part II, a1.

<sup>70</sup> Employment Policy Convention (No. 122).

<sup>71</sup> Shklar, 1991, 99.

Beyond macroeconomic policies aimed at promoting economic growth and raising employment rates, it has been argued that the unemployed should be provided with state-created jobs by means of, for instance, public works programmes.<sup>72</sup> When an unemployed person has a right held against a state to make jobs available, and public work programmes are made available as a state's legal duty corresponding to the unemployed person's right, this sort of the right to work is different from the right to work in the ICESCR. This right to work is not a policy recommendation but is legally enforceable. Moreover, the reason why the proponents of the right to work argue that jobs should be provided to the unemployed is mainly concerned with subsistence. For instance, Harvey contends that it is necessary to prevent unemployment by guaranteeing the right to work because 'unemployment is a primary cause of both absolute and relative poverty'.<sup>73</sup> Therefore, the right to employment, indeed giving a job to the unemployed, can be classified as implementing the right to work.

Nonetheless, the right to work as the right to employment does not represent the whole of the right to work, which means all employment rights reflecting *the work values*. The right to work as the right to employment only covers the availability of employment, mainly reflecting subsistence as one of *the work values*. Thus, if a right guarantees minimum or fair working conditions which are not directly involved with the availability of employment but are designed to help people pursue *the work values*, it is beyond the scope of the right to work understood as the right to employment. Therefore, the right to employment is simply one aspect of the right to work, even if it is indeed actualised. The right to employment is not representative of the right to work as a whole.

Notwithstanding its narrow focus, as the right to employment is used to mean the right to work, it becomes difficult to provide accurate terms to represent other kinds of the right to work. As a result, firstly, they tend to be defined very specifically. For instance, general employment rights in relation to working conditions, such as wages and working time, are defined as 'the right of everyone to the enjoyment of just and favourable conditions of work' in the ICESCR.<sup>74</sup> In the ESC, moreover, these general employment rights are divided into three kinds of rights, namely, 'the right to just

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<sup>72</sup> See Rustin, 1983; Arneson, 1990; Quigley, 1998; Harvey, 2002; Tcherneva and Wray, 2005.

<sup>73</sup> Harvey, 2002, 398.

<sup>74</sup> ICESCR, a7.

conditions of work', 'the right to safe and healthy working conditions' and 'the right to a fair remuneration'.<sup>75</sup> Alternatively, work-related rights other than the right to employment are expressed as rights in work. Thus, from the perspective of the right to work as the right to employment, all work-related rights are divided into two categories of rights, namely, the right to work and rights in work.<sup>76</sup> In this way, although the right to employment and other employment rights differ only in their applied areas as the same right to work, the latter is not included in the categorisation of the right to work.

#### 4.6. The Justifiability Issues of the Right to Work

It seems evident that current employment rights that are classified as the right to work do not reflect *the work values* fully. Under current employment rights, we cannot say that all workers manage to satisfy their subsistence through work. Even fewer employment rights are directly involved with regulating the content of work to make it fit for self-realisation through work. In this sense, the extent to which the currently justiciable right to work reflects *the work values* seems rather minimal. Moreover, the extent to which *the work values* are reflected in the right to work may vary among countries. For instance, we can say that *the work values* are more fully protected in some countries in which the right not to be unfairly dismissed is established than in other countries where employment can be terminated at will. The reason why the current right to work does not reflect *the work values* fully is mainly concerned with its justifiability. When an employment right is established in a country, other moral and political considerations are taken into account together with *the work values*. The judgement is often taken that *the work values* are not as important as other competing values or considerations. Or it is held that an employment right reflecting *the work values* should be compromisingly minimal because other competing interests should also be protected. This section explores what the common justifiability issues of the right to work are, with a view to understanding the general features of the issues.

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<sup>75</sup> ECR, a2, a3 and a4 respectively.

<sup>76</sup> See the title of Drzewicki, 2001.

#### 4.6.1. Constraints on freedom

Freedom can be defined as the absence of coercion. Because of its nature, this is widely termed negative freedom. From the point of view of this notion of freedom, when an employer arbitrarily refuses to hire or dismisses a worker, he does not affect, much less encroach upon, the worker's freedom at all. This is because the employer does not exercise any coercion forcing him to remain or become unemployed. He simply removes one opportunity of employment and the worker is still free to find a job elsewhere. Based on this notion of freedom, Hayek contends:

The individual provider of employment cannot normally exercise coercion, any more than can the supplier of a particular commodity or service. So long as he can remove only one opportunity among many to earn a living, so long as he can do no more than cease to pay certain people who cannot hope to earn as much elsewhere as they had done under him, he cannot coerce, though he may cause pain.<sup>77</sup>

We have already confirmed that the right to work held against employers is by conception a constraint on freedom of contract. Some opponents of the right to work may contend that it is because of its conceptual nature as a constraint on freedom of contract that the right to work is not justifiable. They argue that the right to work against employers encroaches upon freedom as understood as the absence of coercion, by limiting freedom of contract that is essential to realising freedom alongside property rights. For instance, Hayek argues that the permissibility of a contract should not be dependent on 'the approval of its particular content by an agency of the government' because freedom of contract is aimed at achieving freedom.<sup>78</sup>

Negative freedom supported by the opponents of the right to work is contrasted with positive freedom in which people are understood to be free when they are able to obtain something valuable. The substance of positive freedom varies depending on what we see as valuable. Self-realisation is a kind of positive freedom because we can say that we are free when we are actually able to obtain self-realisation. As Raz points out, autonomy could also be understood as one sort of positive freedom to the extent that it requires people to obtain 'both the possession of certain mental and

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<sup>77</sup> Hayek, 1960, 136.

<sup>78</sup> Ibid., 230.

physical abilities and the availability of an adequate range of options' for its fulfilment.<sup>79</sup>

From the point of view of positive freedom, negative freedom cannot be an independent value. It is meaningful only when it contributes to positive freedom.<sup>80</sup> As has been shown in subsection 4.5.1, for instance, the freedom of work understood as the absence of coercion to work has little substantive meaning on its own. It is substantive only when it helps people to obtain access to employment. Thus, negative freedom is subordinate to positive freedoms, such as autonomy and self-realisation. Following this relationship between negative and positive freedom, the right to work as a constraint on freedom of contract is not contrary to freedom to the extent that the latter freedom is regarded as positive. From the perspective of positive freedom, the limiting of negative freedom of a particular sort by the right to work is justified on the grounds that it supports or encourages positive freedom.

#### **4.6.2. Inefficiency and Uncompetitiveness**

Some opponents of the right to work might concede that the right to work may be justified in terms of some moral aspects, such as the improvement of positive freedom. Nonetheless, they may still object to the right to work on grounds other than its moral aspects. They contend that the right to work may be inefficient in fulfilling its purposes and may be uncompetitive for the economy. These arguments are not purely moral in the ordinary sense. However, this alleged inefficiency and adverse effect on the economy are often considered very important factors when the establishment of a particular kind of the right to work is discussed. Further, the consideration of these factors often outweighs the moral importance of the right to work. In this regard, inefficiency and uncompetitiveness respectively are justifiability issues of the right to work.

To begin with, let us consider the objection that the right to work is inefficient for its purposes. An employment right limits freedom of contract of employers in a particular area of employment with which the right is concerned. However, employers still have their discretion to manage their business as to other areas of employment. Thus, if the employment right is enacted, employers will tend to avoid

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<sup>79</sup> Raz, 1985, 408.

<sup>80</sup> See *ibid.*, 375; Plant, 1992, 121.

their duty by using their unlimited rights in other areas. For instance, if the right to the minimum wage is enforced, employers may alleviate their increased costs by dismissing some of their employees or not hiring any more. If this is the case, workers who become unemployed, or remain unemployed, as a result of employers' cost-cutting efforts suffer economic hardship, although all employed workers benefit from the right to the minimum wage. In this sense, Hayek's criticism that wages raised by the action of trade unions 'can benefit only a particular group at the expense of others'<sup>81</sup> would apply to the statutory minimum wage. Hence, on the whole, the right to the minimum wage will not achieve its goal of sustaining the subsistence of workers, including the unemployed, to a certain minimum level. Moreover, employers will show the same attitude when they face other kinds of the right to work, such as the right to paid maternity leave. If possible, for instance, they may not hire female workers to avoid the cost of paid maternity leave. Therefore, some kinds, if not most kinds, of the right to work do not achieve their goals due to employers' tendency to reduce the additional costs incurred by them.

However, some proponents of the right to work may argue that the right to work is not necessarily inefficient. For instance, it is reported that the implementation of the NMWA 1998 has not had an adverse effect on employment.<sup>82</sup> It might not have been necessary that employers avoid the right to the NMW. They might have absorbed the increased cost by making their businesses more cost-effective or they might have decided to reduce their profits instead of cutting their costs. For this reason, the experience of the NMWA 1998 may indicate that the efficiency of one kind of the right to work depends on the concrete context in which it is enforced. Hence, proponents of the right to work argue, the argument that the right is generally inefficient is contentious.

Secondly, it is argued that the right to work makes business uncompetitive. Firstly, this is because the right to work increases business costs. For example, the enforcement of statutory weekly maximum working hours alongside the statutory minimum wage would represent a significant economic burden on employers. If under working time legislation, maximum working hours were not allowed to be extended by consent between employers and workers, employers would have to

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<sup>81</sup> Hayek, 1960, 270.

<sup>82</sup> See Metcalf, 2002, 573-576.



employ more workers to produce the same output. Even if, under working time legislation, workers were allowed to work overtime beyond weekly maximum working hours, but were entitled to the normal hourly rate plus a premium payment, employers would have to pay additional wages for the time worked beyond the maximum working hours. Either way, it is true that this kind of right to work imposes greater economic costs on business. As cost per worker increases in this way, the prices of the products or services made using the more expensive workers will rise. As a result, the products or services become less competitive than those made in a country where working time legislation does not exist, or where this legislation allows workers to work longer maximum hours. Moreover, some kinds of the right to work might make business inflexible even if they do not directly impose costs on employers. For instance, if employers were obliged to consult workers' representatives when they want to make economic dismissals, employers would be slower to respond to the changes of economic situations than without the provision. In this way, strict employment protection for workers could reduce flexibility to deal with economic difficulties. Thus, even some kinds of the right to work which do not directly impose costs on employers could also make businesses less competitive. In particular, this competitiveness argument tends to be strengthened as a national economy is more heavily influenced by the global economy as a result of globalisation.

Opposing the argument against the right to work above, it is argued that a carefully established employment right could make business more competitive. Under an unregulated system of employment relations, employers tend to try to be cost-effective by cutting wages and deteriorating other working conditions. When an employer who wants his product to be competitive cuts his workers' wages, for instance, other employers engaged in the same industry will follow suit. Thus employers tend not to be competitive in ways other than lowering wages. However, under a regime of employment rights, below which terms and conditions of employment are not allowed to be set, employers find it impossible to be cost-effective by lowering working conditions and turn their attention to other competitive aspects such as improvements in technology. Therefore, from the long-term perspective, business will be more competitive with the right to work. Moreover, as an economy becomes more knowledge-based, workers' positive cooperation becomes more important to produce high quality products or services. Those who are

dissatisfied with their working conditions are not willing to do their best to improve the quality of the products or services produced by them. On the contrary, some employment rights can contribute to winning workers' cooperation by making workers more satisfied with their work. Therefore, it is argued, a knowledge-based economy requires proper employment rights to be given in order to be competitive. Given the nature of competition, it is further argued, the competitiveness argument also needs to be assessed with the help of empirical data on the relation between employment standards and productivity.

## 4.7. Conclusion

By understanding the nature of a right as protecting right holders' interests, the interest theory suggests that it is essential to find the common interests that are not attainable without work, in order to define the right to work. In addition, the interests found in relation to work should be morally valuable enough to justify legal protection. Of the various interests in relation to work, subsistence and self-realisation meet these two conditions. Firstly, both of them are mainly achievable through work. The social welfare benefits that are designed to meet some part of subsistence maintain, or sometimes strengthen, rather than change, the characteristic of work as a principal means of subsistence. Moreover, several psychological surveys show that what makes work meaningful beyond the subsistence function is self-realisation. Work is the main place in which people pursue self-realisation in their life. Secondly, subsistence and self-realisation are morally important for their own sake. In particular, self-realisation is morally valuable since it is a natural desire of people and it is beneficial for society. Both of them also contribute to the enhancement of moral values, such as self-respect, personal autonomy and social inclusion. In particular, self-respect and social inclusion implicitly presume work as a principal means of self-realisation. As subsistence and self-realisation meet the two conditions, therefore, they are designated as *the work values*.

Having identified *the work values* that the right to work is supposed to protect, the right to work is defined as follows: people have legally protected interest(s) reflecting *the work values*. Defined in this way, the scope of this new conception of the right to work covers almost all the currently justiciable employment rights. They are all directly or indirectly involved with *the work values*. Moreover, as the correlativity doctrine between a right and its corresponding duty applies to the new

conception of the right to work, the right to work held against employers is tantamount to a constraint on employers' freedom of contract.

The comparison of the new conception of the right to work with the traditional conceptions of the right to work has not only clarified the former, but has also shown its conceptual advantages. First, the right to work as the freedom of work has no independence from the principle of freedom of contract, since all kinds of coercion violating the freedom of work can be regulated by freedom of contract. Unlike the right to work as the freedom of work, the right to work as defined in this chapter is substantive for its own sake. Second, the right to work as the right to employment covers only one of the various domains of employment. As the right to employment represents the right to work, nonetheless, other kinds of right to work are categorised as work-related rights or rights in work, thus losing the link with *the work values* in their categorisation. Unlike the right to work as the right to employment, the new conception of the right to work places equal emphasis on all work-related rights by expressing them as the same kind of right reflecting *the work values*. Therefore, the new conception of the right to work is suitable for examining anti-discrimination rights in employment.

The new conception of the right to work has its own justifiability issues. First of all, the right to work faces the criticism that it limits freedom. In particular, this criticism is acute as the right to work held against employers conceptually exists as a constraint on freedom of contract. However, there is a counter-criticism that this objection against the right to work is based on the negative meaning of freedom, which, the counter criticism argues, is only meaningful when it contributes to positive freedom. A second objection to the right to work is that the right to work is inefficient and uncompetitive. As competition is intense among companies at the international, as well as at the domestic, level, this criticism has gained in strength.

## **Chapter 5 The Prohibition of Direct and Indirect Discrimination and the Right to Work**

### **5.1. Introduction**

In this and the following chapter, we will look at the relationship between anti-discrimination rights in employment and the right to work as defined in the previous chapter. The aim of examining this relationship is to see whether the right to work can provide an alternative to equality as a way of approaching anti-discrimination rights in employment. It will not be argued that the current anti-discrimination rights in employment can be explained by reference to the right to work. Instead what will be considered here is what differences would be made if we grounded anti-discrimination rights in employment on the right to work. If the right to work is to function as an alternative, it should resolve the shortcomings of equality in the explanation and justification of anti-discrimination rights in employment, which were shown in Chapter 3.

In an attempt to consider an alternative relationship between anti-discrimination rights in employment and the right to work, we will first deal with the prohibition of direct and indirect discrimination in this chapter. In relation to these anti-discrimination rights, although equality fits well with the operating features, it gives rise to the justifiability issues, such as the limitedness of the proscribed grounds of discrimination and the levelling down issue. Thus, we will look at whether and, if so, how the explanation of the prohibition of direct and indirect discrimination with reference to the right to work would be different mainly in relation to the meaning of discrimination and such justifiability issues. Further we will consider whether such anti-discrimination rights based on the right to work would be justifiable in terms of business freedom and competitiveness.

Before starting to deal with the research questions mentioned above, we need to clarify the meaning of the explanation of anti-discrimination rights in employment with reference to the right to work. There is a difference in categorisation between the right to work and equality: the former is a right and the latter is regarded as a moral principle. It seems reasonable to suppose that the nature of the explanation and

justification of anti-discrimination rights with reference to the right to work as a right should be different from their explanation and justification with reference to equality as a value. Despite the seeming difference between a right and a moral value, there will be few actual differences in the nature of the explanation and justification between the right to work and equality. In order to explain anti-discrimination rights with reference to the right to work, the right to work needs to fit well with the operating features of anti-discrimination rights. As anti-discrimination rights are rights, what remains in the process of examining the fitness of the right to work with regard to anti-discrimination rights is whether or not the values underlying the latter rights are the same as the values underlying the right to work, namely, subsistence and self-realisation. Therefore, the explanation of anti-discrimination rights with reference to the right to work will in effect put the focus on the relationship between anti-discrimination rights and *the work values* underlying the right to work.

## **5.2. Anti-discrimination in Employment and *the Work Values***

In order to examine the relationship between each of the current anti-discrimination rights in employment and the right to work, there should be a generally positive and constructive relationship between anti-discrimination in employment in general and *the work values*. Thus, we firstly need to show whether or not anti-discrimination in employment enhances these values. However, as has already been shown in the previous chapter, other employment rights also have a positive and constructive relationship with *the work values*. Thus, secondly, anti-discrimination in employment, which enhances these values, needs to be distinguished from other employment rights which also enhance them. In this section, therefore, we will consider whether, and how distinguishably, anti-discrimination in employment has a relationship with *the work values*.

### **5.2.1. The significance of protection from discrimination for *the work values***

As was shown in Chapter 3, the realisation of equality among people is entirely dependent upon comparison between people. In this sense, equality is a comparative value. Unlike equality, *the work values* are non-comparative ones. The realisation of

*the work values* does not depend on comparison between people. As was demonstrated in the previous chapter, *the work values*, as people's common interests, should be promoted or enhanced for everyone. Barriers and obstacles to people's pursuit of *the work values* should be removed for everyone.

The difference between satisfying equality as a comparative value and *the work values* as non-comparative ones leads to a differentiation of the significance of anti-discrimination in employment for the two values. Under the equality principle, discrimination matters to people because it is a form of unequal treatment or else because it gives rise to unequal opportunity. Anti-discrimination conceived as realising equal treatment or equal opportunity is satisfied when people are treated equally or are given equal opportunity. Under *the work values*, discrimination matters because of its negative effect on people's working life. It is harmful to people's pursuit of *the work values*. For working people, for instance, discrimination on the grounds of sex or race in employment means 'deprivation of their opportunities to realise *the work values*' or 'other detrimental treatment deterring the realisation of these values'. Anti-discrimination in employment is satisfied when *the work values* are protected from such deprivation and detrimental treatment.

How does discrimination affect *the work values* negatively? First of all, discrimination against a particular person puts her subsistence at risk. In terms of subsistence, discrimination may be less serious in a society whose social security system is well established. Even in this society, however, discrimination is still harmful to people's subsistence because the level of social security benefits is supposed to be lower than the wages those discriminated against would otherwise earn. Moreover, there is special harm that discrimination gives rise to in relation to subsistence. Discrimination against a particular person deprives her of the feeling that she manages to secure her subsistence by being rewarded for her work. Therefore, anti-discrimination in employment is important in the sense that it contributes to people's pursuit of subsistence through work.

Moreover, discrimination is uniquely harmful in terms of people's pursuit of self-realisation. Let us suppose that an employer holds the view that women's main role in society should be housekeeping and child-rearing; he does not regard women as autonomous subjects pursuing their self-realisation in employment. His refusal of a job to women resulting from this view is harmful to women who happen to be victims of such treatment. It is probable that those who are discriminated against

have long prepared for the job in order to show and realise their ability; they may have attended further or higher education and acquired the knowledge and qualifications necessary for the job; they may also have been specially trained in preparation for the job; during their preparation, they may have put a lot of effort into making themselves ready for the job. Making all the preparatory activities for the job pointless, discrimination in employment deprives women of opportunities for realising their potential and, as a result, of contributing to society. Given the nature of self-realisation through work, its frustration because of discrimination can hardly be compensated for. There is no alternative to it. It is impossible to satisfy those who want to achieve self-realisation through work, for instance, by granting them social security benefits. Unlike self-realisation, however, subsistence for those discriminated against may be met by means of social security benefits, although these are insufficient to meet the full level of subsistence and receiving them may put those discriminated against in danger of being stigmatised as social dependents. Hence, self-realisation explains more clearly why anti-discrimination measures should be taken in employment.

Frustration of self-realisation and subsistence due to discrimination in employment negatively affects people's self-respect, autonomy and social inclusion, all of which have a close relationship with *the work values*, as was shown in the previous chapter. Firstly, deprivation of opportunities to achieve *the work values* due to discrimination leads those deprived to suffer low self-esteem. For instance, the women discussed above who are not able to pursue self-realisation because of the mistaken views of an employer may undergo a loss of self-respect. They may be depressed by the thought that without a directly contributory role in society, they must simply help other family members to achieve self-realisation in employment and they are not financially independent. Moreover, women whose activities are mainly confined to the area of family life are not likely to have their own particularised life plan. Their life plan is mainly dependent on their family. Thus discrimination puts women's autonomous lives in danger. Furthermore, deprivation of employment opportunities due to discrimination leads those deprived to be socially excluded. They do not feel that they belong properly to society. In addition, accumulated and widespread social exclusion due to discrimination in employment leads those discriminated against to become socially segregated, as discrimination against blacks did in the US. The negative effect of discrimination in employment on self-respect, autonomy and social

inclusion results from the fact that discrimination prevents people from pursuing *the work values* which can be achieved principally by gaining access to employment.

### **5.2.2. Anti-discrimination in employment and other kinds of employment protection**

From the perspective of equality, anti-discrimination in employment has little to do with other kinds of employment protection, since each of them is based on different values. However, we can see the positive and constructive relationship of anti-discrimination with *the work values*. From the perspective of *the work values*, thus, both anti-discrimination in employment and other kinds of employment protection are designed to protect such work values. In other words, using rights terminology, both anti-discrimination rights in employment and other employment rights constitute the right to work, reflecting such work values. As both of them are the same right to work, they need to be distinguished in order to clarify the position of anti-discrimination in employment in protecting *the work values*.

Differences between anti-discrimination rights in employment and other employment protection rights can be found by comparing the former and two of the latter in turn. Firstly, whilst certain employment rights guarantee minimum working conditions, anti-discrimination rights in employment do not. For instance, workers are entitled to at least a certain amount of wages under the right to minimum wages<sup>1</sup> or not to work beyond a maximum number of weekly working hours.<sup>2</sup> These employment rights are designed to protect people from the degradation of *the work values* by securing certain working conditions. On the other hand, the prohibition of discrimination in employment does not guarantee any specific working conditions to workers. In the prohibition of discrimination in employment, workers are not able to claim a certain level of wages or working hours. Anti-discrimination in employment requires only that their working conditions should not depend on, or should be free from the arbitrary or unreasonable prejudices of others, in particular employers, against workers' particular traits.

Secondly, whereas certain employment rights require employers to treat their workers reasonably, fairly or justifiably, anti-discrimination in employment requires

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<sup>1</sup> NMWA 1998.

<sup>2</sup> WTR 1998.



them not to treat workers on the basis of particular traits, such as sex or race. In the right not to be unfairly dismissed, for example, employers are not allowed to dismiss workers without any reason or to dismiss them on the ground that they have made very minor mistakes in doing their job. In comparison, however, just as the prohibition of discrimination does not guarantee any specific wages or working hours, it does not prevent workers from receiving such unfair or harsh dismissal. It only prevents discriminatory dismissal on the ground of particular traits.

Despite the difference between guaranteeing certain specific working conditions, such as minimum wages or maximum working hours, and preventing people from being harshly dismissed without any reason, we can say that both paying workers a wage below the minimum wage and dismissing workers without any reason are harsh for workers. Both of these rights share the aim that they protect people from this sort of harsh treatment. In this way, under other kinds of employment protection rights, all people are generally entitled to a minimum level of treatment, preventing the degradation of *the work values*, regardless of whether this involves dismissal or certain specific working conditions. Thus these kinds of employment protection provide protection against the general degradation of *the work values*. However, anti-discrimination in employment does not guarantee a minimum level of treatment at all. It has nothing to do with the absolute level of treatment, below which treatment is really harsh and undesirable. However harsh dismissal without reason and paying wages below the minimum wage may be, anti-discrimination in employment is not able to guarantee protection from such treatment. It prevents such harsh treatment only when the treatment is given on the grounds of people's personal traits. Thus, anti-discrimination in employment is aimed at protecting people's work values from being selectively degraded because of their particular traits. Therefore, what distinguishes anti-discrimination in employment from other kinds of employment protection is that it protects people against selective, but not against general, degradation of their work values.

While exploring the differences between anti-discrimination in employment and other forms of employment protection guaranteeing certain specific working conditions, we can certainly see that neither of them is sufficient for the protection of *the work values*. On the one hand, anti-discrimination rights as a form of the right to work are a necessary, but not sufficient, condition for protecting people from the degradation of their work values. For instance, anti-discrimination in employment in

the area of wages does not provide any remedy for those who are paid very low wages unless they are paid very low wages because, for instance, of their sex or race. In addition, the prohibition of discrimination in the area of dismissal does not give any protection for those who are dismissed for no reason. On the other hand, employment protection rights guaranteeing workers certain specific working conditions are not sufficient for the protection of their work values either. For instance, even though employers are obliged to pay workers the minimum wage, they may still pay certain workers less than other workers on the grounds of their particular traits so long as they pay them more than the minimum wage. Therefore, anti-discrimination and employment protection guaranteeing certain specific working conditions should supplement each other to provide full protection against the degradation of people's work values.

Exceptionally, however, the right not to be unfairly dismissed does not necessarily have to be supplemented by the prohibition of discrimination. This is because there is a further element in the right not to be unfairly dismissed which distinguishes it from the prohibition of discrimination. The word 'unfair' in the right not to be unfairly dismissed can include 'discriminatory' in its meaning. In other words, the scope of the right not to be unfairly discriminated against can cover both discriminatory and other unfair dismissal. Hence this right can prevent not only harsh dismissal without any reason but also discriminatory dismissal, such as dismissal on the grounds of sex or race, as long as we regard the latter as unfair. As far as dismissal is concerned, anti-discrimination in employment is included in the right not to be unfairly dismissed. Therefore, the right not to be unfairly dismissed prevents both selective and general degradation of *the work values*, whereas the prohibition of discrimination prevents the former only.

Overall, from the perspective of *the work values*, discrimination matters because of its negative effect on people's pursuit of *the work values*. In particular discrimination is especially harmful in preventing people from achieving self-realisation through work, as those discriminated against cannot be assisted in it by other measures such as social security benefits. Thus, anti-discrimination in employment protects people from being arbitrarily blocked in their pursuit of *the work values*. Although it protects these work values, anti-discrimination in employment is different from other kinds of employment protection in that it only protects people against selective degradation of their work values.

## 5.3. The Prohibition of Direct Discrimination

### 5.3.1. Explanation

#### 5.3.1.1. Comparison and the *Single Person Reductio*

As was mentioned in Chapter 3, anti-discrimination law in the UK keeps the element of comparison in equality in the meaning of discrimination by requiring particular treatment to be ‘less favourable treatment on the grounds of a particular trait’ in order for the treatment to constitute discrimination. This definition of discrimination seems to require both ‘less favourable treatment’ based on comparison and ‘on the grounds of a particular trait’. The element of comparison in the meaning of discrimination is reinforced by the provision in anti-discrimination law by which a comparison for the purpose of examining whether or not less favourable treatment takes place must be made in relevant circumstances which ‘are the same, or not materially different’.<sup>3</sup> Moreover, the prohibition of direct discrimination based on equality gives rise to what is called the *single person reductio* as was mentioned in Chapter 3. In this situation, nonetheless, UK anti-discrimination law maintains the element of comparison in the meaning of discrimination by using a hypothetical comparison. Even where there is no actual comparator, discrimination takes place where it is judged that a person would be less favourably treated on the grounds of the trait than a hypothetical comparator. The introduction of a hypothetical comparison is an indispensable supplementary device as discrimination is defined on the basis of the concept of equality.

How would the meaning of discrimination be constructed using the idea of *the work values*? Unlike equality, *the work values* underlying the right to work are not based on comparison. The prohibition of direct discrimination as the right to work does not require the meaning of discrimination to be defined with reference to any comparison. Thus, the element of comparison in the meaning of discrimination and the introduction of a hypothetical comparison would be unnecessary with reference to the right to work. Discrimination against a person occurs when unfavourable treatment of a person is made on the grounds of that person’s traits. Thus, to

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<sup>3</sup> SDA 1975, s5(3).

constitute discrimination, the treatment of a person would have to be both 'unfavourable' and 'on the grounds of her particular traits' if we use the idea of *the work values*

Therefore, this meaning of discrimination would solve the *single person reductio* without setting up the device of a hypothetical comparator. To judge whether or not discrimination takes place on the grounds of a particular trait, we need to know that the unfavourable treatment at issue is because of the trait. This causal relationship between 'unfavourable treatment' and 'the trait' can be inferred from circumstantial evidence. In a situation where a person is discriminated against on the grounds of a particular trait, where she is the only worker in a company, we can thus judge if this unfavourable treatment towards the only person in the company takes place because of her particular trait, by, for instance, considering whether the employer has expressed a negative view of that particular trait and how he treated previous workers, if any.

Now we can see that the process of hypothetical comparison in the current prohibition of direct discrimination based on equality is actually the same as that of inferring discrimination in the prohibition of direct discrimination based on *the work values*. All hypothetical less favourable treatment is actually unfavourable treatment in the sense of discrimination without the element of comparison. Moreover, actual less favourable treatment on the grounds of a particular trait is always unfavourable treatment on the grounds of that trait. A person who is actually less favourably treated than others because of the trait is unfavourably treated because she deserves the same treatment as others regardless of her trait. Therefore, both actual less favourable treatment and hypothetical less favourable treatment on the grounds of the trait could always be changed into unfavourable treatment on the grounds of the trait. For this reason, discrimination in the CRA of 1964, in which the meaning of discrimination happens not to be defined to strictly follow the concept of equality, simply means the disadvantaging of individuals 'because of such individuals' race, color, religion, sex, or national origin'.<sup>4</sup>

There then arises the question what, if any, the actual role of comparison is in the construction of discrimination which could be made without it. Where there exists discrimination against a person on the grounds of her sex, for instance, a difference

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<sup>4</sup> 42 USCA § 2000e-2, s703.

in treatment by comparison with other persons (or a presumed difference in treatment by comparison with a hypothetical comparator) will arise. Here the treatment of the person is less favourable (or would be less favourable) than that of other persons (or that of a hypothetical comparator). In the construction of discrimination, this less favourable treatment (or hypothetical less favourable treatment) of her is only meaningful because it takes place (or would take place) because of her sex. If the less favourable treatment (or hypothetical less favourable treatment) against her is (or would be) given because of reasons other than those of her sex, this is not less favourable treatment (or hypothetical less favourable treatment) on the grounds of her sex and accordingly it is not discrimination at all. Thus, we can find that whether or not this less favourable treatment (or hypothetical less favourable treatment) takes place (or would take place) cannot be decided without fixing whether the treatment is given because of her sex.

A discrimination case illustrates this point clearly. In *Shamoon*,<sup>5</sup> a female chief inspector in the police force claimed that she was discriminated against on the grounds of sex, because she was prevented from performing one of her job responsibilities, namely, appraisals of constables, whereas male employees of the same rank were not. In her claim, a comparison was made between her and her male colleagues of the same rank in order to show that she was being less favourably treated. This comparison was made possible on the condition that all the relevant circumstances pertaining to her and her male colleagues were not materially different except for her sex. On the other hand, her superior claimed that the appraisal of constables was being taken from her because some of the constables made a complaint to him about her performance of the appraisal of them. He contended that if he received a similar complaint about the male colleagues' performance, he would take the same action. In his opinion, the relevant circumstances of her and her male colleagues were materially different because the constables did not make any complaints about the performance of the male colleagues. Comparison cannot be made between her and her male colleagues as they are not appropriate comparators. This argument does not mean that comparison is impossible in this case. This argument being accepted, the HL held that comparison must be made between her and a hypothetical male comparator, about whose appraisal a complaint would be

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<sup>5</sup> *Shamoon v. Chief Constable of the Royal Ulster Constabulary*, [2003] UKHL 11.

made. Thus, we can see that in both claims, who is a comparator (or a hypothetical comparator) is different, depending on what is the alleged reason for the treatment of the female employee. Two Law Lords explicitly mentioned this point in this case.<sup>6</sup> In addition, when other Law Lords decided which circumstances were the relevant ones that 'are the same, or not materially different' in order to decide who should be an actual (or hypothetical) comparator, they actually considered why the treatment at issue was made in the case.<sup>7</sup> In their reasoning, thus, the reason why the treatment at issue has been made dictates which circumstances are relevant in deciding who should be an actual (or hypothetical) comparator.

Therefore, in relation to alleged discriminatory treatment, who should be compared with cannot be known without the information as to why the treatment was made. It is entirely dependent on the 'on the grounds' element in the meaning of discrimination. What is important here, however, is that once we decide why the treatment was made, we do not have to make any further comparison. We already know whether the alleged discriminatory treatment is discrimination once we decide why the treatment was made. The element of comparison in the meaning of discrimination in UK anti-discrimination law does not play any substantive role in the construction of discrimination. Although it is certain that discrimination can be constructed with reference to comparison, thus, the element of comparison itself, which inevitably gives rise to the requirement of hypothetical comparison, is intellectually redundant in the construction of discrimination. There is a dilemma here in UK discrimination law: although comparison is redundant in the meaning of discrimination, the attempt to construct the meaning of discrimination with reference to equality seems always to require it to be built on the element of comparison. This is shown by the statement in the Discrimination Law Review that the UK government is planning to maintain the meaning of discrimination constructed on the basis of comparison, despite its difficulty in finding a comparator: 'We believe it is better to keep the essentially comparative nature of British discrimination law, which reflects the fact that discrimination law is by its nature generally about equal treatment rather than fair treatment.'<sup>8</sup> In contrast, the meaning of discrimination

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<sup>6</sup> See Lord Nicholas (para. 8-9) and Lord Hope (para. 44) in *Shamoon*.

<sup>7</sup> See Lord Hutton (para. 79-83), Lord Scott (para. 110-120); Lord Rodger (para. 125, 144-145) in *Shamoon*.

<sup>8</sup> Department of Education and Skills (DES) et al., 2007, 34.

based on *the work values* requires that we find a real reason for unfavourable treatment and, if not, we infer a probable reason for the treatment from the circumstances concerned. This way of constructing discrimination would be intellectually clearer and less confusing.

The removal of comparison in the construction of discrimination has another merit. As was mentioned in Chapter 3, discrimination based on unique characteristics, such as pregnancy and disability, which are found only in specific groups of workers, is hardly explicable with reference to equality, in particular, equal treatment. The main reason for this is that it is impossible to construct such discrimination on the basis of comparison, as there is no comparator (or hypothetical comparator) corresponding to those discriminated against on such grounds. Accordingly, the current prohibition of direct discrimination on the grounds of, for instance, sex or race, which is based on the concept of equality, is hardly consistent with that on the grounds of pregnancy and disability. In the meaning of discrimination based on *the work values*, however, we decide whether or not the discrimination on the grounds of unique traits takes place by examining only whether or not the adverse treatment is on the grounds of the unique traits without further confirming whether or not it is a form of less favourable treatment. Here we find that ‘no requirement’ of a comparator (or hypothetical comparator) in the construction of discrimination with reference to *the work values* fits well with the nature of discrimination on the grounds of unique traits. Therefore, the prohibition of pregnancy and disability discrimination could easily be incorporated into the general prohibition of direct discrimination with reference to *the work values*.

#### **5.3.1.2. The Scope of Proscribed Grounds of Discrimination**

As has been shown in the previous section, discrimination in employment matters as it is harmful to those pursuing *the work values*. Any kind of discrimination, regardless of its grounds, is harmful to people’s pursuit of these values. The effect of such discrimination on people’s pursuit of these values is the same for those discriminated against regardless of the grounds on which they are discriminated against. Thus, the idea of *the work values* suggests that opportunities to realise these values should be given to everyone irrespective of their personal traits. This sort of reasoning can be found in the European Convention on Human Rights (ECHR). It provides that ‘the enjoyment of the rights and freedoms set forth in this Convention

shall be secured without discrimination *on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.*<sup>9</sup> The importance of human rights for all people dictates that human rights should be guaranteed regardless of any distinction among people. Likewise, the importance of *the work values* would dictate that opportunities for employment should be protected from any discrimination.

Precisely speaking, however, although the importance of *the work values* makes all kinds of discrimination unacceptable, it does not mean that all forms of distinction among people should be prohibited. For instance, employers make distinctions between people in terms of their ability. Such distinctions are essential and indispensable for business. Of those applying for a job, they choose the person best qualified to do the job. Given this nature of employment opportunities, employers are allowed to use this sort of distinction in relation to business. Therefore, anti-discrimination based on *the work values* prohibits discrimination on the grounds of all traits that are irrelevant to business necessity. Hence, under the prohibition of direct discrimination with reference to the right to work, employers would be obliged not to use any personal trait, which is 'arbitrary' or 'irrelevant' to business necessity. Nonetheless, we can still see that the grounds on which discrimination is prohibited cannot be exhaustive: they are not selective; they include all personal traits, regardless of how unique or trivial they are, as long as they are irrelevant to business necessity. Unlike the explanation of the prohibition of direct discrimination in employment with reference to equality, therefore, it would not be possible to explain with reference to the right to work the fact that discrimination is prohibited only on limited grounds.

The inexhaustive extension of proscribed grounds of discrimination would solve the justifiability issues resulting from the selectiveness of the proscribed grounds of discrimination in the current prohibition of direct discrimination. First of all, it would not give rise to the difficulties caused by the equality approach, namely, whether or not a trait at issue belongs to proscribed traits of discrimination.<sup>10</sup> Under the right to work approach, those discriminated against because of a particular trait would not have to prove that this trait belongs to proscribed traits of discrimination. It would

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<sup>9</sup> ECHR, a14.

<sup>10</sup> See subsection 3.2.2.2 in this thesis.



not matter whether homosexuality is a form of sex<sup>11</sup> or whether some impairment such as HIV is a form of disability.<sup>12</sup> Regardless of whether their trait is similar to or the same as other traits, we would only need to prove that disparate treatment is given because of the trait and that the trait is irrelevant to business necessity. Moreover, the inexhaustive extension of proscribed grounds of discrimination is more responsive to newly emerging forms of discrimination.<sup>13</sup> As society changes, people tend to have new prejudices or biases against those with a particular trait. For instance, discrimination on the grounds of being HIV-positive has been increasing. Also, we can see that discrimination on the ground of people's appearance, such as being ugly or being overweight, is growing in contemporary society. Whereas under the prohibition of discrimination on limited grounds, each of these new grounds of discrimination would need the approval of the legislature in order to become a proscribed ground of discrimination, the inexhaustive extension of proscribed grounds of discrimination would protect against discrimination on these new grounds without further legislative action.

Some may wonder if the inexhaustive extension of proscribed grounds of discrimination might lead to the justification of direct discrimination. For instance, where an airline refuses to hire male stewards, on the grounds that airline passengers prefer to be served by female stewardesses,<sup>14</sup> distinction on the ground of sex in hiring flight attendants may be relevant to business necessity. If the employer hires male stewards, the airline may lose customers, as they still prefer to be served by female stewardesses. Whereas current anti-discrimination law prohibits discrimination on the grounds of sex resulting from customers' preferences<sup>15</sup> or extra cost which could be inflicted in order not to distinguish on the grounds of sex,<sup>16</sup> anti-discrimination law based on *the work values* appears to allow this sort of distinction within its scope as long as it is relevant to business necessity.

Among other things, however, we should not forget that current anti-discrimination law *de facto* considers business necessity as a justification for direct discrimination. Under current anti-discrimination law, for instance, distinction on the grounds of sex

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<sup>11</sup> *Grant v. South-West Trains*, Case 249/96 [1998] ECR I-0621.

<sup>12</sup> *Bragdon v. Abbott*, 524 US 624 (1998).

<sup>13</sup> See subsection 3.2.2.2. in this thesis.

<sup>14</sup> *Diaz v. Pan American World Airways*, 442 F.2d 385 (1971).

<sup>15</sup> See also *Fernandez v. Wynn Oil Company*, 653 F.2d 1273 (1981).

<sup>16</sup> *International Union and Agricultural Implement Workers v. Johnson Controls*, 499 US 187 (1991).

or race is allowed where they are needed as Genuine Occupational Qualifications (GOQs) for a job. Of course business necessity in relation to sex or race discrimination is so strict that the scope of exceptions to the prohibition of direct discrimination is very narrow. Nonetheless, we cannot deny that current discrimination law allows considerations of business necessity to be made. Some anti-discrimination law allows exceptions to the prohibition of direct discrimination to be made more broadly. For instance, under the age discrimination law of the UK, distinction on the grounds of age is permitted not only as GOQs<sup>17</sup> but also, for instance, where an employer sets a retirement age at 65 or over the age of 65.<sup>18</sup> Thus we can see that business necessity is a factor of consideration when we decide whether or not distinction based on a particular trait is allowed under current anti-discrimination law. What is distinctive in the current prohibition of direct discrimination on particular grounds, such as sex or race, is not the absence of justification for direct discrimination but its very narrow scope, in which only illustrated specified distinctions based on such grounds are exceptionally allowed.

Thus, to be precise, the question with regard to business necessity is whether the prohibition of direct discrimination based on *the work values*, defined as the prohibition of distinction based on traits irrelevant to business necessity, leads to the loosening of the strictness of the current justification for direct discrimination. If business necessity is conceived as 'the rationale for making a profit', as it commonly is, certainly the meaning of discrimination will be loosened and this will, for instance, allow only women to be recruited as flight attendants. In terms of business necessity, as understood above, to make a distinction of sex in recruiting flight attendants is relevant to such business necessity because aircraft passengers prefer to be served by female flight attendants. However, this sort of business necessity must be socially amended to protect against the selective degradation of *the work values*. Even though it may be more profitable for airline companies to accommodate customers' biased preferences, it would be very harmful to both women and men. Employing only female flight attendants would reinforce traditional prejudices about women's role even in the workplace. In addition, men who want to be flight attendants would be blocked from opportunities to apply for the job.

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<sup>17</sup> EEAR 2006, s8.

<sup>18</sup> Ibid., s30.

Therefore, *the work values* would require that business necessity in the meaning of discrimination should be defined as one that is not being pursued for reasons of business efficiency and productivity as such but which is socially adjusted in order to protect people's work values. As a matter of legal technicality, this socially adjusted business necessity could be made explicit in anti-discrimination law by clauses providing that business necessity must be objectively justified in general, or that the necessity for GOQs alone must be regarded as a business necessity in the prohibition of direct discrimination on the grounds of sex or race. In this way, the prohibition of direct discrimination with reference to the right to work would maintain the strictness of justification for direct discrimination, while its proscribed grounds of discrimination would be inexhaustively extended.

#### **5.3.1.3. The Levelling Down Issue**

Equally bad treatment can be practised by an employer in two different ways, depending on when he intends to give all workers equally bad treatment. Before he treats workers in relation to working conditions, firstly, he may decide to treat all employees unreasonably and arbitrarily; the reason why he treats them badly is not specifically fixed. Thus, he does not discriminate against them on particular grounds, such as sex and race, and accordingly he can continue to treat his employees badly even if a new discrimination law comes into force. Secondly, let us suppose that the employer has been treating workers badly on the grounds of their particular traits. Now the employer's treatment turns out to be discriminatory under the new discrimination law and he is under an obligation to correct this discrimination. If this is the case, then he can correct the discrimination by treating equally badly other workers who until now have been treated otherwise. As was shown in Chapter 3, both sorts of equally bad treatment can be explained with reference to equality, but they are hardly justifiable.

As was mentioned in Chapter 3, some legislation in the US provides for the prohibition of levelling down of the second sort.<sup>19</sup> Although it is morally justifiable, under the equality approach, this sort of provision is inevitably an exception to equality, as it prevents the full operation of the concept of equality. Under the right to work approach, however, this sort of provision would be essential in order to protect

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<sup>19</sup> See ADEA of 1967, s623(a)(3)); EqPA of 1963, s206(d)(4).

and enhance people's work values. Correcting discrimination by means of equally bad treatment is still harmful to those who have been discriminated against. Their work values are still being degraded even though they are now equal to those who have not been discriminated against. Thus, the right to work approach suggests that discrimination should be corrected in a particular way, namely in the way that the working conditions of those who have been discriminated against are levelled up to those of the workers who have not been discriminated against. Therefore, such provisions in US anti-discrimination law would be an essential, but not an exceptional, measure in protecting workers from discrimination according to the right to work approach. In this way, of the two sorts of equally bad treatment, the second one would not take place in the prohibition of direct discrimination under the right to work approach.

In the first case of equally bad treatment, discrimination itself does not take place at all, as there is no selective degradation of *the work values*. Equally bad treatment of this sort cannot be regulated through anti-discrimination law. Some measures other than anti-discrimination in employment are needed to prevent this sort of equally bad treatment. Anti-discrimination in employment alone would not prevent equally bad treatment of the first sort from taking place. In this regard, the prohibition of direct discrimination based on *the work values* is the same as that based on equality. Nevertheless, there is a difference between the two approaches. Equality does not address the necessity of taking measures other than anti-discrimination, as it includes equally bad treatment in its meaning. Under the right to work approach, however, we should bear in mind that anti-discrimination in employment does not completely protect people from degradation of their work values, as has been shown in the previous section. It only prohibits the selective degradation of their work values. The right to work approach requires that such values not be downgraded but that they be enhanced. Thus, as equally bad treatment amounts to a general degradation of the work values, this approach would require the prohibition of direct discrimination to be supplemented by other employment rights protecting people against the general degradation of their work values. In this way, the right to work approach would morally address the necessity of preventing the first case of equally bad treatment.

### 5.3.2. Justifiability

The explanation of the prohibition of direct discrimination with reference to the right to work given above would not bring about a new justifiability issue. It would simply solve the troubling justifiability issues which the prohibition of direct discrimination with reference to equality inevitably faces and make the prohibition of direct discrimination clearer. However, the justifiability issue as to the scope of the proscribed grounds of discrimination was not completely discussed in Chapter 3 because we were not yet able to envision the values the degradation of which direct discrimination imposes on those who are discriminated against. Now that we have found in the previous section that discrimination is harmful to people's work values, we will focus on whether the inexhaustive extension of the proscribed grounds of discrimination is justifiable in this section in furtherance of the justifiability discussion in Chapter 3.

The inexhaustive extension of the proscribed grounds of discrimination means that discrimination on the grounds of a particular trait, however rarely it actually takes place, would be prohibited. This regulation of rare instances of discrimination might be objected to on several grounds. First of all, it might be contended that such regulation can give rise to uncompetitive businesses. This contention may be based on the expectation that, by requiring employers not to make any distinction based on traits that are irrelevant to business necessity, such regulation of discrimination will increase business costs and put more administrative burdens on employers. However, it is not likely to cause special business costs because it requires employers not to be prejudiced against any person with a particular trait. In this regard, it is different from, for instance, the right to a statutory minimum wage, according to which employers bear the burden of taking on extra costs by paying more than the minimum wage. In addition, unlike the right not to be unfairly dismissed,<sup>20</sup> it does not require employers to comply with certain procedures in relation to their decisions. Administrative burdens, if any, are likely to be less demanding than in the case of the right not to be unfairly dismissed. Moreover, and more importantly, the inexhaustive extension of the proscribed discriminatory grounds may make businesses more productive. For instance, biases or prejudices against people with particular traits may reduce the possibility of recruiting and maintaining able

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<sup>20</sup> See, eg, Employment Act (EA) 2002, s98A

workers. By pressurising employers into focusing on workers' ability rather than irrelevant traits, the prohibition of discrimination on the grounds of all irrelevant traits might make businesses more competitive. Thus, the objection relying on the business competitiveness issue seems very weak.

Secondly, and more traditionally, the inexhaustive extension of proscribed discriminatory grounds is opposed on the basis that it places excessive constraints on employers' freedom. For instance, it is argued that employers should be free to choose any applicants according to their preferences unless they do so because of hatred or contempt for them.<sup>21</sup> This freedom is likened to the personal freedom to choose, for instance, friends and spouses. People are free to choose them on emotional grounds even though they may be influenced by their prejudices against people with a particular trait. We can hardly say that people must be legally prohibited from being discriminated against on the grounds of a particular trait in building their personal relationships. Similarly people should be free to hire applicants relying on their personal preferences in order to lead a life in a particular way. Given the importance of freedom, its limitation should be minimised. Otherwise it would put the freedom to formulate and carry out a particular life plan at risk. The regulation of rare instances of discrimination would involve this very danger.

It seems that we have sufficient reasons not to prohibit discrimination in the domain of personal relationships. It seems undesirable to have regulation of discrimination in such areas, even though it can be argued that it is morally wrong to discriminate against people with a particular trait in those areas. However, work is not personal, unlike family life. It does not necessarily require those engaging in it to build emotional relationships, which is essential in personal relationships. Generally speaking, even some close relationships built at work are not as close as those of family life. Work is principally a social domain in which those engaging in it pursue their work values. In this respect, work cannot be likened to personal relationships such as those of family life. Therefore, it is not right to infer a reason for allowing discrimination in the workplace from the analogy with personal relationships.

However, it may be true that some employers really believe that those with a particular trait are bad enough to be refused a job regardless of their ability. Also

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<sup>21</sup> Hasnas, 2002, 496.

they may truly think that to prohibit the employers from discriminating against them, despite their strong preferences, will prevent them from making their own particular life plan at work. In addition, they may not be easily persuaded that their preferences are unreasonable and that their life plan will not be ruined in the impersonal relationship of work by working with people with a particular trait that they really dislike.

If this is really the case, we should compare the values protected by the prohibition of discrimination with the employers' freedom that is protected by the non-regulation of isolated instances of discrimination in order to decide which values should be prioritised. Those who are discriminated against because of the employers' unreasonable prejudice against a particular trait may find another job with little difficulty. In this regard, the regulation of rare instances of discrimination may not be beneficial to people's pursuit of *the work values*. However, this is not necessarily so. First of all, jobs in a company from which some individuals are blocked because of such discrimination may be especially important for them. It may be that the jobs which the company provides for its workers have some unique quality, which cannot be enjoyed in other similar companies. Or it may be that the company guarantees flexible working hours, thus enabling its employees to easily balance between work and family life. According to a survey, indeed, how a company supports parents' work and family life balance is one of the important factors in deciding which company working parents choose to work for or in deciding whether or not they will remain in their current company after giving birth to a baby.<sup>22</sup> Hence, those discriminated against may lose something valuable in the pursuit of *the work values* if rare instances of discrimination are not regulated. In comparison, the employers who hate those with a particular trait lose their freedom to act on unreasonable beliefs in the regulation of rare instances of discrimination. Thus such employers' freedom does not deserve protection. Moreover, even if those who are discriminated against by such employers can find a job of the same quality elsewhere, it is still doubtful whether such employers' freedom deserves protection. Those who are discriminated against may have to travel or they may have to prepare several job interviews. This job search burden, including the financial cost, will be heavier if the jobs to be searched for require high skills and qualifications. Because of this burden

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<sup>22</sup> See the *Guardian*, G2 Special, 'The best companies to work for if you're a parent', 30 July 2007.

of job-searching, it may be that it is not worth protecting employers' freedom to discriminate against people with this trait at work. Therefore, protection against discrimination by unreasonable and persistent employers, however rare it is, may be morally more desirable than protection for such employers' freedom.

## **5.4. The Prohibition of Indirect Discrimination**

### **5.4.1. The Disproportionate Impact or Adverseness of a Workplace Rule?**

The prohibition of indirect discrimination involves provisions, criteria and practices in the workplace. Why do such workplace rules matter under the prohibition of indirect discrimination? According to the prohibition of indirect discrimination, those rules do matter because of their disproportionate impact on particular groups. A significant difference of such impact between groups is regarded as discriminatory unless the rules are 'justified'. As was shown in Chapter 3, thus, however serious the impact of a particular workplace rule is for all workers, including the particular groups, this rule does not matter for the prohibition of indirect discrimination unless this impact is disproportionate between the compared groups.

Under the right to work, why do workplace rules matter? As has been shown in the previous chapter, the right to work reflects people's work values. Given the nature of *the work values*, that they are generally pursued and that their degradation should be prevented for all people who are pursuing them, all workers should be protected against adverse workplace rules. Thus the right to work places a focus on the adverse impact of workplace rules on workers pursuing their work values. Of course, more members of a particular group may suffer from the adverseness of workplace rules than those of other groups. From the perspective of the right to work, nonetheless, this fact cannot be a reason why other groups of workers, fewer members of whom suffer from adverse rules than this particular group, are not protected from them. Some workers from other groups, however small their number may be, suffer the same adverseness of workplace rules as those of the particular group. Therefore, the disparate impact, which is the respect in which a workplace rule is problematised under the prohibition of indirect discrimination, is not a main concern of the right to work approach.

The difference in the way of seeing the impact of workplace rules on workers between the two approaches can be illustrated in an indirect sex discrimination case.



What the prohibition of indirect discrimination involves in *Allonby*<sup>23</sup> is a workplace rule that a college can dismiss employees for economic reasons. Due to recent legislative changes in relation to part-time lecturers, because of which they are entitled to equal or equivalent benefits to those of full-time lecturers, the college decided not to renew the one-year contracts of its part-time lecturers who had been employed for 6 years on a succession of one-year contracts, and to employ the same part-time lecturers through a company carrying on the business of supplying teachers. The part-time lecturers had to do exactly the same work through the agency company but under less favourable conditions. In this case, it was not disputed by the parties and accepted by the court that the college's decision not to renew their one-year contracts amounted to dismissal.

In the case described above, the prohibition of indirect discrimination pays attention to the disparate impact of the college's rule on dismissal on women. Of the 341 part-time lecturers, 110 were men and 231 were women. We can probably say that the rule of the college on dismissal had had a disparate impact on women. Thus, under the prohibition of indirect discrimination, the rule is discriminatory unless it is objectively 'justified'. In the application of the prohibition of indirect discrimination, the impact of the rule does matter because of the discrepancy of the impact between men and women. Some might argue that, broadly speaking, the discrepancy includes the adverse impact of the rule itself. However, this does not fit well with the disproportionate impact analysis of the prohibition of indirect discrimination. If, of the 341 part-time lecturers, 170 were men and 171 were women, it is not likely that such a rule would be considered to be disproportionate in its impact. Where, of the 341 part-time lecturers, 10 are men and 331 are women, it is more likely than in the original situation that the rule would be regarded as having a disproportionate impact on women. In contrast, the right to work approach would draw attention to the fact that the dismissal of the part-time lecturers, accompanied by their being self-employed through the agency company, badly affected them: their income fell and they lost their sick pay and career structure, which went with direct employment. This sort of change was very harmful to them, as their pursuit of subsistence and self-realisation was blocked by the dismissal. The fact that more women than men

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<sup>23</sup> *Allonby v. Accrington & Rossendale College*, [2001] EWCA Civ 529.

bore the brunt of the dismissal is not as important as the fact that all the part-time lecturers suffered the same adverse impact.

Once a workplace rule turns out to have a disproportionate impact on a particular group, the prohibition of indirect discrimination examines whether or not the rule is 'justifiable' in terms of business necessity. Employers tend to argue that the scope of business necessity for a workplace rule should be broad. On the contrary, a particular group of workers who suffer the adverseness of a workplace rule disproportionately compared to other groups of workers tend to contend that the scope of business necessity should be interpreted more narrowly. The more strictly we interpret business necessity, the more likely it is that a rule with a disparate impact will be 'unjustifiable' and will accordingly be regarded as discriminatory. Thus, we can see that the 'justifiability' of a rule depends on how we interpret business necessity.

Then how does the equality approach have an effect on whether a workplace rule with a disparate impact is 'justifiable'? Under the equality approach, firstly, it might be argued that the degree of the disparate impact of a workplace rule should influence the determination of whether or not it is 'justifiable'. On this view, the more disproportionately a workplace rule affects a particular group of workers, it might be argued, the narrower will be the scope of 'justifiable' business necessity for it. If business necessity is seen strictly according to the extent of the disparate impact, for instance, the portion of women among the part-time lecturers should be important in *Allonby*. The more female part-time lecturers there are, the stricter the business necessity test should be. Thus, in a case where, of the 341 part-time lecturers, 300 are female, the business necessity for the dismissal should be stricter than in the current case where 231 are female. However, this view is not consistent with the interpretation of the indirect discrimination provisions, nor is it supported by any case law. Under such provisions, the proportion of a particular group to whom a rule applies is only meaningful where it is used to assess whether the rule has a disparate impact on that group. Thus, the fact that a rule has a more disparate impact than other rules does not lead us to interpret the business necessity of the rule more strictly than that of other rules. Hence, once the dismissal proved to have a disparate impact, the CA in *Allonby* did not pay attention to the quantitative extent of the disparate impact in order to examine whether or not the dismissal was 'justifiable'.

However, although business necessity is not examined case-by-case, considering the extent of the disparate impact, equality might be reflected in the business

necessity test in the sense that it requires all the rules with a disparate impact to be examined strictly. For instance, Gardner argues that the business necessity test should be strict, thus excluding from its scope the relatively unimportant needs of an employer, such as 'marginal profitability', in order to provide more opportunities to disadvantaged groups of workers.<sup>24</sup> On this view, the 'justifiability' of a rule can be qualitatively weighed against the disadvantage to which the rule gives rise 'against a particular group'. In other words, employers' business activities are restricted because they are harmful to particular groups of workers. Indeed, the CA suggested in *Allonby* that what is required in the 'justifiability' test of the dismissal is 'a critical evaluation of whether the college's reasons demonstrated a real need, consideration of the seriousness of the disparate impact of the dismissal on women including the applicant; and an evaluation of whether the former were sufficient to outweigh the latter.'<sup>25</sup> Thus, the seriousness of the disparate impact of the dismissal should be evaluated by looking into the disadvantage that the dismissal gives rise to for women, rather than by looking at the relative proportion of women part-time lecturers compared with men part-time lecturers.

Nonetheless, this qualitative construction of the 'justifiability' test of a workplace rule with a disparate impact puts the meaningfulness of equality at risk. This is because, if it is the disadvantage to which the rule itself gives rise that is focused on in this way, then the relatedness of the disadvantage to a particular group is no longer relevant. This can be shown by the fact that we can say, without mentioning 'against a particular group', that the 'justifiability' of a rule can be qualitatively weighed against the disadvantage to which the rule itself gives rise. In *Allonby*, for instance, the dismissal means that the female part-time lecturers faced wage reductions, deprivation of their sick pay and the severance of their career development. It can be said that this sort of disadvantage is serious enough to outweigh the business necessity for the dismissal. However, what matters here is that this sort of disadvantage is not more serious among the female part-time lecturers in particular.

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<sup>24</sup> Gardner, 1992, 166.

<sup>25</sup> Sedley LJ's remarks (para. 29) (emphasis by the author). However, it is doubtful whether this sort of approach is consistent with the ruling of the ECJ in indirect sex discrimination cases. In *Bilka*, the ECJ held that workplace rules with a disparate impact must be for the real needs of employers and be appropriate to these needs in order for them to be 'justifiable'. Thus, according to the ECJ, the separate test in which the seriousness of the disparate impact of workplace rules is considered is not needed (See Connelly, 2001).

The male part-time lecturers suffered exactly the same disadvantage. To the extent that the disadvantage is not unique to female part-time lecturers, the relatedness of the dismissal to women does not play a role in strictly examining the business necessity in relation to the dismissal. What can lead the courts, as the CA did in *Allonby*, to interpret business necessity narrowly is not the disadvantage of 'a particular group' in relation to a workplace rule but the disadvantage itself. Thus equality focusing on the disadvantages of 'a particular group' in relation to a workplace rule does not substantively lead to a narrow interpretation of business necessity. Overall, therefore, it is equivocal under the prohibition of indirect discrimination what it is that leads us to interpret business necessity strictly.

In comparison, the right to work approach examines whether or not the rule is 'justifiable', once a workplace rule turns out to have an adverse impact on workers. Because, as was mentioned above, the right to work approach does not draw attention to the disparate impact of a workplace rule, the proportion of a particular group of workers suffering the adverseness of a workplace rule does not have to function as a 'counter-justifiability' force against which the 'justifiability' of a workplace rule is measured. Moreover, the adverseness of a workplace rule does not have to be closely connected to a particular group. The extent to which a rule is adverse towards workers is measured by its encroachment on their work values. The more seriously a rule affects their work values, the more the counter-force against business necessity is strengthened. In *Allonby*, for instance, the right to work approach would directly draw attention to the adverseness of the dismissal. The disadvantage that the dismissal gives rise to is very harmful to people's pursuit of subsistence and self-realisation, as it gives rise to wage reductions, deprivation of their sick pay and the severance of their career development. Thus, the seriousness of the dismissal is directly measured by its adverseness towards workers, including female part-time lecturers. This seriousness of the dismissal is a counteracting force which can work against employers' claimed business necessity. Therefore, the adverseness of a workplace rule, measured by its negative effect on *the work values*, is directly used to work against the scope of business necessity, whereas under the equality approach equality hardly retains its meaningfulness when the seriousness of the impact of a rule is qualitatively measured.

Indeed, a provision, a criterion, a practice in relation to dismissal can actually be examined by means of unfair dismissal law in the UK. Under this law, workplace

rules must not serve to dismiss workers unfairly. In *Allonby*, female part-time lecturers as well as male ones are entitled not to be unfairly dismissed, regardless of whether the dismissal disproportionately affects a particular group. One of the reasons why, despite this advantage of unfair dismissal law, female part-time workers rely on the prohibition of indirect discrimination is that 'the unfairness' of dismissal is not strict for dismissed workers. In *Allonby*, an ET held that the female part-time workers were unfairly dismissed because the college did not observe the procedures required by their employment contract in case of dismissal. According to the tribunal, however, their dismissal was not substantively unfair. Thus, the tribunal decided that the female part-time workers should receive no compensation for the procedural unfairness of the dismissal. In this case, there was no longer any dispute about the unfairness of the dismissal in the EAT<sup>26</sup> and the CA. From the perspective of the right to work approach, although unfair dismissal law is better than the prohibition of indirect discrimination in the sense that all groups of workers are protected under the former law, regardless of the disparate impact that they have in relation to dismissal, the test of fairness in unfair dismissal law should also be stricter in order to protect workers from the adverseness of dismissal.

A similar situation arises between the prohibition of indirect discrimination and protection for part-time workers. Whereas, under the Part-time Workers (Prevention of Less Favourable Treatment) Regulations (PWR), both male and female part-time workers are protected, female part-time workers alone are entitled to the prohibition of indirect discrimination, as they are the majority of the part-time workforce. Moreover, under the PWR, female part-time workers do not have to show the existence of disparate impact, which is essential for indirect discrimination to be proved. Thus, we can say that the PWR is consistent with the right to work approach. Nonetheless, the scope of 'justification' for the discrimination against part-time workers in the PWR is broader than that of a workplace rule with a disparate impact in the prohibition of direct discrimination. When it comes to part-time work, therefore, the right to work approach would require not only direct protection for part-time workers but also the strengthening of this protection.

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<sup>26</sup> EAT/1300/97, EAT/108098/, EAT/1081/98, 2000.

There is another area in which both indirect sex discrimination and the direct regulation of a workplace rule applies. In *Edwards*,<sup>27</sup> a female train operator claimed that she was indirectly discriminated against by a new shift system in which she had to work early mornings. She, who was a single parent with a young child, was unable to meet the new shift system because she had to attend to her child. An ET held that the new shift system was not 'justifiable' because it was shown that a special shift scheme might have made it possible for single parents to work only social hours, 'without significant detriment to the objectives of London Underground to achieve savings'.<sup>28</sup> It was not disputed whether the new shift system was 'justifiable' in the CA. The focus of the dispute in the CA was whether the new shift system had a disparate impact on women drivers. Whereas, of 2023 male train operators, none was unable to meet the shift system, she, of 21 female train drivers, was the only one who was unable to comply with it. Although the CA made a decision that the shift system had a disproportionate impact on women drivers, two of the judges expressed explicitly the difficulty of the decision in this case, i.e., that 100 % of male drivers and 95.2% of female drivers were able to comply with the shift system.<sup>29</sup> Despite the difficulty in deciding whether the new system had a disparate impact on female drivers, because of the small margin of 4.8%, the disparate impact analysis was crucial in the prohibition of indirect discrimination based on equality. From the perspective of the right to work, however, there would have been no reason why this disparate impact analysis would have to be the most difficult hurdle in this case. It could have been easily proved that accommodating the female train driver in order for her to manage both work and child caring was necessary for her pursuit of subsistence and self-realisation. Thus, what remained was only whether the new shift system was 'justifiable', despite its adverseness towards a particular worker. In this regard, the right to work approach would draw attention to the right to flexible working. Parents with children aged under 6, are entitled to the right to request flexible working, such as reducing working time and working flexi-time in the UK.<sup>30</sup> This right is given regardless of whether the parents applying for flexible working

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<sup>27</sup> *London Underground v. Edwards*, [1998] IRLR 364.

<sup>28</sup> [1995] ICR 574.

<sup>29</sup> See the judgments of Swinton Thomas LJ and Simon Brown LJ in *Edwards*. Particularly, Simon Brown LJ said: 'I confess to having found the point a very difficult one and to have changed my mind more than once during the course of the appeal.'

<sup>30</sup> ERA 1997, s80f, as amended by WFA 2006, s12.

are male or female. What is important here is that the right is not dependant on its disparate impact, which is provisional and changeable over time. Of course, an employer is not obliged to allow flexible working to all his employees who want it. He is entitled to refuse the request for flexible working for business reasons, such as 'the burden of additional costs' and 'the detrimental effect on his ability to meet customer demand'.<sup>31</sup> Business reasons in this right are not as strict as the 'justifiability' of workplace rules with a disparate impact. Again, the right to work approach would require that, with a view to assisting people in pursuing *the work values* more comfortably, the right to flexible working should be strengthened by making sure that the business reasons for refusing the flexible working request are narrowly and strictly interpreted.

In this way, the application of the right to work approach to the adverseness of workplace rules in all areas of employment would make the prohibition of indirect discrimination obsolete, solving the latter's justifiability issues. Although the differences between the direct regulation of a workplace rule and the prohibition of indirect discrimination would be those in relation to a workplace rule, the former would not remain within the scope of anti-discrimination law any longer, whereas the latter would sustain, albeit indirectly, its anti-discrimination element. In this regard, the direct regulation of a workplace rule required by the right to work approach would mean that the regulation of a workplace rule through the prohibition of indirect discrimination would be completely transformed, leaving no trace of anti-discrimination law.

#### **5.4.2. Justifiability of the Direct Regulation of a Workplace Rule**

As it goes beyond the scope of current anti-discrimination law, the direct regulation of a workplace rule may face two main justifiability issues. One is involved with the likelihood that the direct regulation of a workplace rule will need to compromise with business interests. The other is mainly concerned with the extent to which the direct regulation of a workplace rule encroaches upon business freedom and productivity. In this subsection, we will look at these two aspects in turn to see whether the direct regulation of a workplace rule is justifiable.

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<sup>31</sup> ERA 1997, s80g.

As has already been mentioned in the previous subsection, business necessity in the laws on unfair dismissal, part-time work and the balance between work and family life is not as strict as it is in the prohibition of indirect discrimination. Moreover, such laws have higher thresholds for their protection than the prohibition of indirect discrimination. For instance, workers cannot rely on unfair dismissal law unless they have been working for an employer for not less than one year<sup>32</sup> whereas there is no qualifying period of employment in the prohibition of indirect discrimination. Moreover, many of those laws do not apply to a worker who is not under contract of service and accordingly is not an employee in a legal sense.<sup>33</sup> However, the prohibition of indirect discrimination does apply even to workers who are not employees.<sup>34</sup> Based on these observations, some might argue that the right to work approach to a workplace rule is inherently weaker in protecting workers' interests than the prohibition of indirect discrimination.

However, the reason why the current direct regulation of a workplace rule is more constrained than the prohibition of indirect discrimination is probably that the former is based on the consideration that such regulation without constraints on its application would more significantly encroach on business freedom and competitiveness than the latter. Under the prohibition of indirect discrimination, employers are obliged to take business measures, the aim of which corresponds to a real need of the business and which are appropriate and necessary to that aim only when the current rules have a disproportionate adverse impact on particular groups of workers.<sup>35</sup> However, under the alternative approach, employers would be obliged to pursue such business measures whenever the current rules have an adverse impact on any workers. Thus, the scope of employers' duty to take business measures 'justifiably' in the right to work approach is broader than that of the same duty in the other approach. Hence employers' freedom is much more limited in the direct regulation of workplace rules than in the prohibition of indirect discrimination. Because of this nature of the direct regulation, considerations of business freedom and productivity intervene, thus weakening it through some constraints on its application. We can see here that considerations of business freedom and

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<sup>32</sup> ERA 1996, s108(1).

<sup>33</sup> ERA 1996, s 95(1), s230(1).

<sup>34</sup> See SDA 1975, s82(1).

<sup>35</sup> *Bilka-Kaufhaus v. Weber*, Case 170/84 [1986] IRLR 317.



productivity, which makes the current direct regulation weaker, are external rather than internal to the right to work approach. As has already been shown in the previous subsection, on the contrary, *the work values* are a morally justificatory force for strengthening the direct regulation of a workplace rule. Therefore, the contention that the right to a workplace rule is inherently weaker is mistaken.

In relation to the qualifying thresholds of the current direct regulation of a workplace rule, there might be another argument for preferring the equality approach through the prohibition of indirect discrimination. The argument is that the right to work approach does not give workers disadvantaged because of the thresholds for employment rights a means of challenging them, whereas the equality approach does. Indeed, several qualifying thresholds for employment rights have been challenged in terms of their legitimacy, as is shown in several legal cases under EU anti-discrimination law.<sup>36</sup> However, if there had been a provision in the EU law that everyone is entitled to the enjoyment of just and favourable conditions of work, such as are provided for in the ICSECR,<sup>37</sup> such kinds of qualifying thresholds could have been challenged by all disadvantaged workers by means of the provision. Thus, what leads to thresholds for employment protection being challenged is not the moral strength of the prohibition of indirect discrimination but its constitutional rank overruling domestic law.

Now let us consider the second justifiability issue, that the direct regulation of a workplace rule significantly limits employers' freedom and negatively affects business productivity. We have already confirmed above that the direct regulation of a workplace rule may indeed encroach on business freedom and productivity. This criticism is not new. All the current direct regulations have been subjected to this criticism by their opponents. What is new in the right to work approach to a workplace rule is its scope of application. If all workplace criteria, practices and provisions were under scrutiny in terms of their justifiability by their direct regulation, as they are under the current prohibition of indirect discrimination (but only when they have a disparate impact on particular groups), that would be really comprehensive. Every area of employment, such as recruitment, promotion,

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<sup>36</sup> *R v. Secretary of State for Employment, ex parte EOC*, [1994] IRLR 176; *R v. Secretary of State for Employment, ex parte Seymour-Smith*, Case 167/97 [1999] ECR I-623; *Kirshammer-Hack v. Sidal*, Case 189/91 [1993] ECR I-6185.

<sup>37</sup> ICSECR, a7.

displacement, dismissal and working conditions, would be regulated to the extent that it adversely affects workers. In addition, it would include the prohibition of direct discrimination within its scope, just as the right not to be unfairly dismissed could include the prohibition of direct discrimination in relation to dismissal as was shown in the section 5.2. Thus, this comprehensive implementation of the right to work approach to a workplace rule would make any separate regulation of the prohibition of discrimination unnecessary. Because of this comprehensive scope, the direct regulation on workplace rules replacing the prohibition of indirect discrimination may face the criticism that it would impose severe constraints on employers' freedom and would lead to uncompetitive businesses.

The right to work approach to a workplace rule can hardly be defended against the criticism outlined above by relying on the arguments made in justifying the inexhaustive extension of proscribed grounds of discrimination. The main point in defending the latter is that it would be beneficial to business because the prohibition of discrimination on the grounds of all irrelevant traits pressurises employers into choosing the best qualified person. This point would not be valid any more in the right to work approach to all workplace rules. It would sometimes happen that, under the direct regulation of workplace rules, employers would not be allowed to take some business measures, even if they were very necessary and beneficial, when they have would have a serious negative effect on workers.

Some may argue that business measures regarded as necessary despite their adverseness to workers would not be productive for business from the long-term perspective. This is because their adverseness would make it very hard to win workers' positive cooperation, which is important in order to produce high quality products or services. However, even though there is a point that a workplace rule having an adverse impact on workers does not necessarily lead to productive business, this does not prove that the comprehensive application of the right to work approach to every area of employment helps business to be productive. Rather, if it is commonly admitted that business freedom and competitiveness is a basic condition for sustainable business, the comprehensive direct regulation of a workplace rule is not likely to be regarded as desirable.

However, to doubt the application of the right to work approach to all areas of employment does not necessarily lead us to accept that the approach itself is not justifiable. We do not have any reason to think that the direct regulation of a

workplace rule, rather than the prohibition of direct discrimination, is always unjustifiable. For instance, direct regulation on dismissal was established although it was criticised for its negative effect on business. This shows that it was decided that, as far as dismissal is concerned, protection from the degradation of *the work values* is more important than its alleged negative effect on business, or that its negative effect is not as harmful to business as its opponents have contended. As has already been shown, moreover, the prohibition of indirect discrimination regulates workplace rules on part-time and work-life balance, as they disproportionately affect women. At the same time, nonetheless, direct regulations on such rules are established on the basis that to protect workers against their adverse effects on part-time and work-life balance outweighs the alleged negative impact on business. Thus, in the domains of employment in which the direct regulation of a workplace rule is made, it will be more desirable that this regulation, as a proper means of overcoming the justifiability problems of the prohibition of indirect discrimination, should be strengthened. Along the same lines, it will be also more desirable that any newly emerging obstacles to people's pursuit of their work values should be tackled with reference to the right to work rather than the prohibition of indirect discrimination.

## 5.5. Conclusion

So far, we have explored the relationship between the prohibition of direct and indirect discrimination in employment and the right to work in comparison with the relationship between the same rights and equality. This exploration is based on the observation that anti-discrimination in employment serves as a protection against the selective degradation of *the work values*. Although anti-discrimination in employment does not prevent the general degradation of *the work values* and accordingly should be supplemented by protection against their general degradation, it plays a role in protecting them. In this regard, anti-discrimination rights enhancing *the work values* actually constitute a right to work.

Firstly, we found that the right to work approach could explain the prohibition of direct discrimination, removing the redundant element of comparison in the current meaning of discrimination and resolving the justifiability issues caused by the current prohibition of direct discrimination based on equality. There would be no reason for the meaning of discrimination in the right to work approach to be built on comparison. In addition, the removal of comparison from the meaning of

discrimination would make it clearer and more consistent with the prohibition of direct discrimination on the grounds of a unique trait, such as pregnancy. Moreover, the two justifiability issues to which the prohibition of direct discrimination based on equality gives rise would not arise under the right to work approach to discrimination. As all kinds of discrimination are harmful to people's pursuit of *the work values*, they would all be prohibited. As the prohibition of direct discrimination based on *the work values* is only designed to protect people against the selective degradation of *the work values*, furthermore, it would also be required that it should be supplemented by provisions or rights preventing their general degradation, thus resolving the levelling down issue. After seeking an explanation of the prohibition of direct discrimination with reference to the right to work, we discussed in the second subsection the justifiability issue to which the inexhaustive extension of the proscribed grounds of discrimination would give rise. The point is that the consideration of business freedom and productivity would not undermine the justifiability of the inexhaustive extension of the proscribed grounds of discrimination.

In relation to the prohibition of indirect discrimination, the findings in the chapter are more complicated. It was firstly shown that direct protection from the adverseness of workplace rules rather than protection through the disparate impact analysis of these rules would be consistent with the right to work approach. Direct regulation would solve the justifiability issues of the prohibition of indirect discrimination by both protecting all workers from the adverseness of workplace rules, regardless of whether they belong to a particular group, and by not requiring a particular group of workers to prove the disparate impact of the workplace rules on them. Nonetheless, the direct regulation of a workplace rule creates new justifiability issues. The criticism of the right to work approach to a workplace rule based on the weakness of the current direct regulation of workplace rules misses the point. The weakness in comparison with indirect discrimination is not inherent in the right to work approach because it occurs because of external considerations of business freedom and productivity. However, the criticism that the direct regulation of a workplace rule in every domain of employment will undermine business freedom and competitiveness may have a point. Nonetheless, the direct regulation of workplace rules in particular important areas is still desirable and needs to be

strengthened in order to overcome the shortcomings of the prohibition of indirect discrimination.

## **Chapter 6 Anti-discrimination Rights for Particular Groups in Employment and the Right to Work**

### **6.1. Introduction**

In this chapter, we will deal with rights which can be included in anti-discrimination rights in a broad sense: anti-discrimination rights for particular groups only. These rights can be divided into two kinds of anti-discrimination rights; specific protections for women and people with disabilities and positive action for women and minorities. As was shown in Chapter 3, anti-discrimination rights in employment for such groups, unlike the current prohibition of direct and indirect discrimination, cannot be explained with reference to equality, as they do not fit well with the concept of equality. Hence, we will look at whether these anti-discrimination rights can be explained and, if so, justified with reference to the right to work as opposed to equality.

It should be noted that this chapter will consider what is called the group status perspective,<sup>1</sup> in which anti-discrimination rights for particular groups are seen as measures aimed at improving the inferior social status of a group, although it will mainly explore the question of how to look at the relationship between anti-discrimination rights for particular groups and the right to work. We did not exhaust all the values expressed in the name of equality when we looked at the relationship between such anti-discrimination rights and equality in Chapter 3. All we found in Chapter 3 was that such rights do not fit well with several conceptions of equality. In other words, the nature of the rights by which particular groups only are protected in employment cannot be analysed in terms of the concept of equality comprising 'comparison' and 'equalisation'. Although this perspective is often expressed in terms of equality, we argued in Chapter 3 that it is not one that follows the concept of equality. Nonetheless, the group status perspective still seems to substantively explain or justify anti-discrimination rights for particular groups if we leave aside whether or not it is an equality perspective. Thus, despite the conclusion of Chapter

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<sup>1</sup> For a general account of this perspective in comparison with individual justice model, see McCrudden, 2003, 22-28.

3, the group status perspective as a substantive claim of equality remains intact. In this regard, the group status and the right to work perspectives may still compete as to which of them is more suitable for the explanation of anti-discrimination rights for particular groups only. Therefore, the explanation of anti-discrimination rights for particular groups only with reference to the right to work in this chapter will be made in comparison with the group status perspective, as well as the equality perspective, in an attempt to look at whether the right to work approach is an alternative to both of these two different but often conflated perspectives.

## **6.2. Specific Protection for a Particular Group**

### **6.2.1 Explanation**

#### **6.2.1.1. Pregnancy and Maternity Protection**

In current UK and EU law, as has already been explained in Chapter 3, there are several rights in relation to pregnancy and maternity which can be categorised as pregnancy and maternity protection. First of all, discrimination on the grounds of pregnancy is prohibited under sex discrimination law. Secondly, there are other rights in employment law, such as rights regarding pregnant women's health and safety and rights protecting women's maternity.<sup>2</sup> Of these rights, we will place the focus of the discussion on, as examples of explanation, three rights, namely, the prohibition of discrimination on the grounds of pregnancy, the prohibition of dismissal on the grounds of pregnancy and maternity<sup>3</sup> and the right to paid maternity leave.<sup>4</sup>

It is undeniable that pregnancy and maternity are unique to women. It is biologically impossible for men to become pregnant or to become mothers. This physical uniqueness of women does not directly lead to any specific protection for women. Everyone may have their own physical uniqueness which does not necessarily require any specific protection for them. What differentiates women's pregnancy and maternity from other kinds of physical or biological uniqueness in

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<sup>2</sup> PWD, ERA 1996; MPLR 1999.

<sup>3</sup> PWD, a10.

<sup>4</sup> Ibid., a8, a11(2).

relation to specific protection is that non-protection of women's pregnancy and maternity would make it very hard for them to pursue their work values. Women find it very difficult to obtain and sustain a job if they are not properly protected for their pregnancy and being a mother.

For this reason, first of all, discrimination on the grounds of pregnancy is prohibited. For instance, an employer is not allowed to dismiss a pregnant woman simply because he dislikes pregnant women. Moreover, he is prohibited from discriminating against the pregnant woman on the basis that she will be incapable of working for a certain period. Employers may argue that even though they are not prejudiced against pregnant workers, maintaining such workers is costly and accordingly harmful to their business. In other words, they may contend that the distinction of pregnancy is relevant to business necessity and, accordingly, that it does not constitute direct discrimination as defined with reference to the right to work in the previous chapter. Under the right to work approach, nonetheless, discrimination on the grounds of pregnancy with a view to saving costs would be prohibited by socially adjusting business necessity so as not to include this kind of business efficiency.

Of course, under the prohibition of direct discrimination based on *the work values*, pregnancy discrimination could be prevented. In this regard, specific protection against discrimination on the grounds of pregnancy alone would not have to be separately regulated. However, the prohibition of discrimination on the grounds of pregnancy is not sufficient to remove barriers to women obtaining and maintaining employment opportunities. Let us suppose that an employer adopts a policy according to which all those who are incapable of work can be dismissed irrespective of their reasons.<sup>5</sup> The employer may argue that the policy is not particularly aimed at removing pregnant women. According to this policy, the employer does – and will – dismiss all those who are temporarily unable to work regardless of their reasons. In this sense, dismissal on the grounds that pregnant women are not able to work for a certain period of time may not be interpreted as pregnancy discrimination. Thus, the prohibition of discrimination on the grounds of pregnancy may not be able to protect pregnant women from dismissal under this policy. If this is the case, then women are

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<sup>5</sup> This situation will not arise under unfair dismissal law if dismissal on the grounds of being temporarily incapable of work is regarded as unfair. However, where there is no such law, as in the US, it does happen, as is shown in *California Federal Savings v. Guerra*, 479 US 272 (1987).



specially disadvantaged because they are pregnant. They can be dismissed not only when they are incapable of working because of illness but also when they are pregnant. Thus, pregnant women suffer more because of their unique traits than those who are unable to work for other reasons. In addition to discrimination on the grounds of pregnancy, therefore, *the work values* require the dismissal on the grounds of pregnancy and maternity to be prohibited.

Moreover, women can still suffer because of their unique traits even though they are protected from dismissal and discrimination on the grounds of pregnancy and maternity. For instance, if they are not paid while they are on maternity leave, they are not likely to manage their subsistence very well. Even if they can rely for subsistence on their partners while they are on maternity leave, this may be psychologically harmful to women because it leaves them economically dependent as a consequence of their natural unique traits. Thus, this barrier to employment caused by unpaid or poorly paid maternity leave would be substantial enough to block women's pursuit of their work values. In this regard, the right to paid maternity leave is a specific protection for women, without which they would find it hard to pursue their work values.

Some might take the view that specific protection for women is not consistent with the rationale for the right to work on the basis that it is not a general but a special protection for women only. Of course it is correct to say that, as has been shown in the previous chapter, the prohibition of direct discrimination and the direct regulation of a workplace rule based on *the work values* shows that this protection is not confined to particular groups of workers. In this sense, the right to work is a general protection covering all those people who suffer from discrimination and the adverse impact of a workplace rule, regardless of which group they belong to. Nevertheless, this rule of general protection, albeit differently, applies to specific protection for women in relation to pregnancy and maternity. What distinguishes pregnancy and maternity protection from the prohibition of direct discrimination and the direct regulation of a workplace rule is that those who need it are exclusively women. If people suffer in the pursuit of their work values because of their unique traits, they only need protection against the degradation of their work values resulting from their unique traits. Thus, protection for those who suffer because of their unique traits is a sort of general protection, not a special protection, in the sense that it satisfies all of those who need it.

In a similar vein, some may argue that, for instance, accommodating women's pregnancy and maternity by guaranteeing specific positive protection for them is a form of preferential treatment for women which is in breach of the prohibition of direct discrimination. Accommodating women in relation to pregnancy and maternity through specific protection is not relevant to business necessity, the argument runs, although it uses a particular trait to give those with the trait a particular benefit. However, productivity and competitiveness for business should not be pursued in a way that puts those in unique need in danger of losing their work values. In this regard, business necessity as commonly understood, as pursuing productivity and efficiency, is socially adjusted in order to protect *the work values* of women with unique needs by accommodating them. Under the prohibition of direct discrimination based on *the work values*, positive protection for women regarding pregnancy and maternity would thus amount to such socially adjusted business necessity. Hence, such positive protection for women is not in breach of the prohibition of direct discrimination as based on *the work values*.

The fitness of this explanation of the specific protection for women with reference to the right to work can be illustrated by comparison with the attempt to explain specific protection with reference to equality. In Chapter 3, we found that specific protection for women cannot be explained with reference to equality. The attempt to explain the prohibition of pregnancy discrimination with reference to equal treatment between men and women faces the difficulty that a male comparator, with whom a pregnant woman could be compared, can hardly be found. As it does not require a male comparator to compare with in the construction of discrimination, however, the right to work approach incorporates the prohibition of pregnancy discrimination in its general prohibition of direct discrimination. Moreover, the prohibition of dismissal on the grounds of pregnancy and maternity and the right to paid maternity leave can hardly be explained with reference to equal opportunity, as they do not allow levelling down to take place in their operation. In comparison, explanation with reference to the right to work fits well with this nature of these two specific rights for women.

However, the need for specific protection for women can be approached from the perspective of women's subordination as a group.<sup>6</sup> The reality of women in the workplace is indicative of women's subordination. They are more likely to be engaged in unstable and low-paid jobs than men. This sort of economic marginality and occupational segregation leads women to become socially subordinated second-class citizens. One of the essential reasons for women's subordinated status is that their unique or special needs in relation to pregnancy and maternity are not met in the workplace. Unsupportive pregnancy policies in the workplace may require them to interrupt their careers in order to give birth to a baby. After they have given birth to, and looked after, a baby, they may find it difficult to find a decent job. Even if they do not give up their career, the temporary interruption of their career by maternity leave may cause them to lag behind those whose careers have not been interrupted. Recognising the link between the inadequacy of pregnancy and maternity protection and women's subordination, a feminist scholar argues that 'one of the crucial issues to be addressed in order to eliminate the economic and social subordination of women is how to make the workplace more accommodating to pregnancy and parenting needs'.<sup>7</sup>

Thus, the explanation of pregnancy and maternity protection with reference to the right to work needs to be clarified in order to be distinguished from its explanation with reference to the perspective of women's subordination. The women's subordination perspective seems to be similar to the right to work perspective in that women's needs in relation to pregnancy and maternity should be satisfied in both of the perspectives. In addition, women's subordinate status as a group in the former perspective may be understood as showing the social seriousness of the situation that the failure of women to manage their subsistence independently and to achieve self-realisation has cumulatively given rise to.

Despite its closeness to the right to work approach, however, the focus on 'group subordination' as a result of the failure of the pursuit of *the work values* rather than the failure itself may lead to differences in the explanation of pregnancy and maternity protection between the two perspectives. According to the women's subordination perspective, the social seriousness of women's failure in the pursuit of

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<sup>6</sup> See, eg, Crain, 1994; Fudge, 1996; Fredman, 1997b, Chapter 5.

<sup>7</sup> Finley, 1986, 1120-21.

their work values is really essential to the recognition of women as a socially and economically subordinated group. Thus, this argument may allow us to infer that we do not have to be concerned about workers' failure in the pursuit of their work values if it is not serious enough to degrade them to the level of a socially and economically subordinated group. From the perspective of the right to work, unlike the social subordination perspective, pregnancy and maternity protection are needed regardless of whether or not non-protection for pregnancy and maternity contributes to women's subordination as a social group. This difference in the explanation of specific protection for women results from the fact that subsistence and self-realisation are mainly focused on the interests of women as individuals, while the women's subordination perspective is centred on women as a social group.

Therefore, the women's subordination perspective is indifferent to the needs of other workers in relation to the family. For instance, this perspective as such does not hint at the significance of accommodating the needs of a single father with a baby. Just as women do, single fathers find it very hard to manage both work and care for children. A single father may have to give up his job in order to look after his child just as women often do. From the women's subordination perspective, it seems certain that non-accommodation of fatherhood does not lead to men being degraded into a socially and economically subordinated group. Thus, we cannot refer to the women's subordination perspective to explain the importance of accommodating fatherhood. If we want to acknowledge the need for accommodating single fathers in relation to their family life, we should display the significance of a balance between work and family for all people. Of course, the women's subordination perspective may presume its significance. Nonetheless, the women's subordination perspective, by putting the focus on women's subordination as a group, makes invisible the values underlying workers' activities in relation to work and family.

From the perspective of the right to work, women's needs in relation to pregnancy and maternity and the need of single fathers to look after their children are different in that the former is unique to women whereas the latter is not unique to men. Thus, women's needs are accommodated by means of specific protection for them whereas the needs of single fathers are likely to be met by means of protection for parents in general. Despite the difference between the kinds of protection, both are closely connected to family life. Balancing between work and family life is needed for all people to pursue their work values. For the same reason that pregnancy and

maternity should be accommodated in the workplace, the right to work approach suggests, single fathers should pursue their work values without being frustrated by the non-accommodation of their need for child care. Thus, both the needs of women and single fathers should be accommodated in order for them to pursue their subsistence and self-realisation without any sacrifice of their family life.

#### **6.2.1.2. Specific Protection for People with Disabilities**

Disability is defined by the US ADA of 1990 as 'a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities'.<sup>8</sup> Similarly, in the UK DDA 1995 disability is defined as 'a physical or mental impairment that substantially limits one or more of the major life activities'.<sup>9</sup> In the definitions of disability, such life activities include basic human activities such as 'caring for oneself, performing manual tasks, walking, and seeing, hearing, speaking, breathing, and learning'.<sup>10</sup> From these definitions of disability, we can see that a certain physical or mental impairment as such is not sufficient to constitute disability discrimination. Disability in such laws is defined by the seriousness of the impact of a certain physical or mental impairment on people's lives. Hence, what is unique about people with disabilities is that they experience substantial difficulty in managing their lives because of their impairment.

The working life of people with disabilities is also very negatively affected by their disabilities. They are quite often blocked from pursuing subsistence, much less self-realisation, thus making them dependent on social security benefits from the state or income support from their family. Firstly, prejudices or stereotyping against people with disabilities may prevent them from getting access to a job. Some people may wrongly think that people with disabilities are totally incapable of work, although they are actually capable of doing particular jobs. In this sense, the prohibition of direct discrimination on the grounds of disability may be helpful to a certain extent.

However, this is not at all sufficient to enable people with disabilities to pursue their work values. The difficulties in the pursuit of their work values for people with disabilities remain largely unsolved, even after such prejudices or stereotyping of people with disabilities are strongly tackled. They are still unlikely to get access to a

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<sup>8</sup> DDA 1995, s1.

<sup>9</sup> ADA 1990, s3(2).

<sup>10</sup> Equal Employment Opportunity Commission (EEOC), 1991, s2.

job because their disabilities make them unsuitable for the job. In addition, those who become disabled while they are working are likely to be dismissed because they are regarded as being unable to perform their current duties. For these reasons, people with disabilities are very vulnerable to the loss of their work values. The duty of reasonable adjustments pays attention to the reality that their physical or mental impairments themselves would remain a substantial barrier to their pursuit of *the work values* unless they are accommodated. The right to reasonable adjustments requires employers to make reasonable efforts to adjust working conditions in order for people with disabilities to be employed or maintain their jobs rather than refusing to hire or dismissing them.

Moreover, the serious difficulties that people with disabilities face in the pursuit of their work values suggest that employers sometimes extend the duty of reasonable adjustments to include within its scope special treatment which they do not allow to be given to non-disabled employees according to their policy. Let us suppose that an employee becomes disabled while doing a job, and accordingly is unable to do the current job which she has been doing. However, there are jobs in other departments of her company which she is capable of doing despite her disability. In this situation, whether or not she is transferred to another department is a matter of employment and unemployment, whereas other non-disabled employees can continue to do their current jobs if they are denied reassignment to other departments. Thus, the duty of reasonable adjustments may require her employer to transfer the disabled employee to enable her to continue work despite her disability even where to do so is contrary to the redeployment policy of the employer. For instance, the US Supreme Court held in *Barnett*<sup>11</sup> that the duty of reasonable adjustments in the ADA of 1990 can be interpreted as requiring an employer to transfer a disabled employee to a position which is normally given according to seniority rules provided that an exception from the seniority rules is reasonable. Along the same lines, moreover, the HL decided in *Archibald*<sup>12</sup> that under the duty of reasonable adjustments in the DDA 1995, employers are obliged to reassign an employee, who was doing road sweeping but was no longer able to walk, to an office position, even without a competitive interview, which is necessary to transfer an employee to posts of a higher grade

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<sup>11</sup> *US Airways v. Barnett*, 535 US 391 (2002).

<sup>12</sup> *Archibald v. Fife Council* [2004] IRLR 651.

according to their redeployment policy. Therefore, we can see that the seriousness of the difficulties of people with disabilities in pursuit of their work values sometimes means that an employer is obliged to give preferential treatment to people with disabilities.

The duty of reasonable adjustments is a form of specific protection that is designed to lessen these serious difficulties of people with disabilities in their pursuit of *the work values*. However, the duty of reasonable adjustments as a specific protection for people with disabilities can be distinguished from pregnancy and maternity protection for women, even though both of them are designed to accommodate the unique needs of particular groups. Whereas how they are to accommodate pregnant women is dictated to employers, for instance, by the right to paid maternity leave, the extent to which employers must accommodate the needs of people with disabilities in relation to their working life cannot be specifically decided in advance. People's disabilities vary in their nature and extent. In addition, how similar jobs are performed in the workplace may be different among companies. Considering both the job at issue and the particular disability, employers, rather than the state, must decide which forms of accommodation should be made. Moreover, the administrative or financial burdens that certain kinds of accommodation incur limit the extent to which accommodation should be made. If a certain kind of accommodation, even though it is necessary for people with disabilities to do a certain job, for instance, is unreasonably costly to employers, they are not obliged to make such an accommodation for people with disabilities. They are only required to make 'reasonable' adjustments for them. In this sense, consideration of business productivity is inherently reflected in the meaning of the duty of reasonable adjustments, whereas such consideration was made in the case of the right to paid maternity leave as to the length and level of pay before it was legally established.

However, the social subordination perspective, which has been used to explain pregnancy and maternity protection, as we mentioned in the previous subsection, gives a different explanation of specific protection for people with disabilities. Based on the social effect of the exclusion of people with disabilities, for instance, an American scholar maintains that disability discrimination law, including the duty of reasonable adjustments, is designed to 'remove the stigmatic injury that results from

exclusion' of people with disabilities.<sup>13</sup> His emphasis is placed on the social effect that the exclusion of people with disabilities gives rise to in relation to their status as citizens. Disability discrimination is socially serious and prevalent enough to make them socially subordinated and stigmatised as second-class citizens. Thus, disability discrimination law in employment is a measure that aims to eliminate the social subordination of people with disabilities by facilitating their integration into society through work. In particular, the duty of reasonable adjustments is aimed at tackling society-wide neglect of people with disabilities, whereas the prohibition of direct disability discrimination targets prejudices and stereotyping against them.<sup>14</sup> Hence it seems that the group subordination perspective can explain protection for people with disabilities as a specific right for them.

In a similar way to the way that the right to work approach is differentiated from the subordination perspective as to specific protection for women, nonetheless, a distinction can be made between the group subordination and the right to work perspectives in relation to specific protection for people with disabilities. As far as employment is concerned, the former approach is more focused on group-based social harm of people with disabilities inflicted by their exclusion from employment. In the former approach, the reason why the duty of reasonable adjustments is given to people with disabilities is that it helps them to integrate into one of the important areas of social life and accordingly eliminates the social subordination of people with disabilities through disability discrimination law. Even though the duty of reasonable adjustments is individually guaranteed to all people with disabilities, the eventual aim of this individual protection is to eliminate the social result that participation of people with disabilities in employment brings about in relation to their subordinated status as a social group. However, the right to work perspective basically draws attention to the severity of the difficulties that each person with disabilities individually faces in access to employment. In this approach, the reason why specific protection is guaranteed to people with disabilities is that they commonly face such difficulties which have serious effects on their pursuit of their work values. Therefore, the duty of reasonable adjustments is ultimately aimed at helping

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<sup>13</sup> Bagenstos, 2003, 843-844; Bagenstos, 2000, 418-444.

<sup>14</sup> Bagenstos, 2000, 433-434.



individuals with disabilities to achieve their work values. In this sense, the right to work perspective is individual-focused rather than group-based.

Given this distinction between the two approaches, we can see that the explanation of specific protection for people with disabilities with reference to the group subordination perspective can distance itself from the direct interests of each individual with disabilities which it is designed to protect. Although people with disabilities are often stigmatised by not being able to get access to jobs, the stigmatising effect results from the fact that they are not able to pursue their subsistence and self-realisation through work. Their frustration in their pursuit of subsistence and self-realisation leads them to suffer from low self-esteem. In addition, their failure to pursue subsistence and self-realisation through work causes them to become alienated from society. The accumulation of low self-esteem and social exclusion of people with disabilities could develop into social stigma. However, if work did not basically function as the main area of subsistence and self-realisation for people with disabilities, the deprivation of employment opportunities could not have a stigmatising effect on them. Thus the stigmatising effect to which non-accommodation of people with disabilities gives rise lies in the fact that they are deprived of opportunities to achieve subsistence and self-realisation. Nonetheless, the direct individual interests of people with disabilities are invisible in the explanation of the duty of reasonable adjustments with reference to the group subordination perspective. In addition, this explanation is inaccurate in that it does not show what individuals with disabilities desire to achieve with the aid of specific protection for them.

### 6.2.2 Justifiability

As has already been shown in the previous subsection, both specific protections for women and for people with disabilities are given regardless of how other groups of people are treated in employment. In a society like the US, where other groups of people have little protection from employers' harsh treatment, this nature of specific protection may lead some to doubt its justifiability. For instance, where women are entitled to reinstatement after taking maternity leave whereas people taking leave because of illness are not,<sup>15</sup> it may be argued that it is unfair that ill people have no

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<sup>15</sup> *California Federal Savings v. Guerra*, 479 US 272 (1987).

guarantee of reinstatement after taking leave because of their illness. If women are entitled to reinstatement even though they are incapable of working for a significant period of time, there seems to be no reason why ill people who are temporarily incapable of working should not be entitled to reinstatement after sickness leave. Thus, it seems fair either that those who are incapable of working for a certain period of time as well as women in pregnancy and maternity need should maintain their job after taking leave or that neither of them should be guaranteed to be able to return to their job after taking leave.

Certainly it is not justifiable to dismiss them on the grounds that they are temporarily incapable of working. The unfairness of dismissing those taking sickness leave lies in the fact that their illness, which is not under their control, makes them lose their job. Women suffer the same unfairness after sickness leave. This is the reason why people, regardless of their sex, should be generally protected from dismissal on the grounds of temporary incapacity for work through, for instance, unfair dismissal law. However, the unfairness of the dismissal of those taking sickness leave does not lie in the fact that, unlike them, women are guaranteed a job after maternity leave because of their unique needs. The former is morally irrelevant to the latter. In other words, pregnancy and illness are not morally comparable because, as Fredman points out, pregnancy is a natural physical and biological condition and 'should not be stigmatized as "unhealthy"'.<sup>16</sup> Thus, it will not be morally desirable to deny specific protection for women which is designed to accommodate women's unique needs on the grounds that others are not entitled to reinstatement after sickness leave. For the same reason, moreover, arguing that those who take sickness leave should be protected from dismissal on the grounds that women are entitled to reinstatement after maternity leave is not morally convincing.

A similar counter-argument may be made against the duty of reasonable adjustments. In the US, where those who have less severe impairments than people with disabilities are not protected under the duty of reasonable adjustments, even though less costly accommodation might allow them to continue their job with such impairments, the question arises whether protection for people with disabilities under

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<sup>16</sup> Fredman, 1997, 186.

the duty of reasonable adjustments is justifiable. In *Duncan*,<sup>17</sup> for instance, a worker was required to lift heavy items as a custodian. After he had a back injury, he was not capable of lifting heavy items any longer. Although his company had jobs available which he was capable of doing with his back injury, his applications for the jobs were twice denied without specified reasons. Then he was dismissed on the grounds of work incapability resulting from his back injury. The court held that he was not entitled to reasonable adjustments because his back injury was not regarded as serious enough to substantially limit his major activities. In this case, his dismissal may be morally undesirable and unfair. The unfairness in his treatment results from the fact that he was not even considered as a candidate for the alternative jobs, which he could have performed well despite his back injury. Thus, the worker would, or should, have been protected from dismissal, for instance, under unfair dismissal law.<sup>18</sup> However, such unfairness does not result from the fact that those who have a serious back injury and are regarded as disabled are entitled to the vacant jobs. The severity of disabilities causes people with disabilities to be protected under the duty of reasonable adjustments as it substantially limits their major life activities. Their severe life-long conditions are not morally comparable with those of people who have less severe back injury. Thus, the fact that the custodian is not protected from unfair dismissal does not weaken the justifiability of the duty of reasonable adjustments for people with disabilities.

The argument that specific protections for women and people with disabilities are not in breach of the prohibition of direct discrimination is based on the fact that such specific protections are mainly involved with employers' financial costs and administrative burdens. They are not in breach of the prohibition of direct discrimination since they require business necessity to be socially adjusted in order for employers not to consider, at least to a certain extent, such financial and administrative burdens on business competitiveness in the areas with which the specific protections are concerned. However, this might not be the case where the duty of reasonable adjustments is involved with the direct interests of those who are

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<sup>17</sup> *Duncan v. Washington Metropolitan Area Transit Authority*, 240 F.3d 1110 (2001). For a similar case, see also *Williams v. Channel Master Satellite System*, 101 F.3d 346 (1996).

<sup>18</sup> *Felix v. New York City Transit Authority*, 324 F.3d. 102 (2003). There is no unfair dismissal law in most states of the US. As a result, in *Williams v. Channel Master Satellite System*, 910 F. Supp. 1124 (1995), Williams unsuccessfully claimed that her dismissal was wrongful termination in violation of public policy under common law (see *ibid.*, 1137-1138).

not protected under the protections. We have already seen cases in which the duty of reasonable adjustments may have led to the deprivation of opportunities for the non-disabled in relation to employment. In *Barnett*, for instance, if a disabled employee had been transferred to a position which is normally filled according to seniority rules, then non-disabled employees who were more senior than the disabled person would have been deprived of the opportunity to obtain the position. For the non-disabled employees, obtaining the position would have meant an expected increase of income, less demanding work, or the realisation of their ability. They would have lost all these personal interests based on *the work values*. In *Archibald*, moreover, a non-disabled employee who would not have been able to get an office job if the disabled road sweeper had taken the job would have experienced a loss of the same sort as the non-disabled senior employees in *Barnett*. In both of these cases, although employers are reasonably obliged to accommodate people with disabilities, despite the economic and administrative burden, disability used as a criterion for selecting the vacant posts may not be relevant to business necessity of the sort in which they seek the best qualified person for their business. Thus, it may be argued that under the prohibition of direct discrimination based on *the work values* the non-disabled persons in the cases considered above would have been discriminated against on the basis that they were not disabled.

However, it should be noted that the loss to the disabled will be far more serious when they are dismissed rather than transferred than that of the non-disabled when they are refused the request to be transferred or employed. Thus, the likelihood of the greater loss to the disabled in the pursuit of their work values can justify the relatively smaller loss to the non-disabled that is caused by the duty of reasonable adjustments. In *Barnett*, for instance, the more senior non-disabled employee who would have failed to be transferred because of the preference shown to the disabled person was still doing his or her current job, whereas the disabled person had no other option but to be dismissed because of his incapacity for doing his original job, as actually happened in this case. In addition, the disabled road sweeper in *Archibald* was not able to do manual work any longer as she was unable to walk. Her dismissal gave rise to far more loss than the disappearance of one opportunity of obtaining an office job would have brought about to non-disabled workers. Thus, this sort of preferential treatment of disabled over non-disabled persons is justified even though it may be in breach of the prohibition of direct discrimination.

Moreover, it should be noted that certain kinds of accommodation of people with disabilities involving preferential treatment over the non-disabled is allowed only where it does not incur great loss on the part of non-disabled people in their pursuit of *the work values*. Firstly, disabled persons need to be well qualified for the vacant posts, even though they may not be the best qualified. In *Archibald*, the disabled person was assessed as 'more than capable of carrying out work in an office environment' although she was not successful in winning competitive interviews for office posts.<sup>19</sup> Secondly, the duty of reasonable adjustments involving preferential treatment only applies to transfer of the current employees who became disabled during employment. The duty of reasonable adjustments does not require employers to give people with disabilities preferential treatment over the non-disabled when they decide whom to employ.

## 6.3. Positive Action

### 6.3.1. Explanation

As was mentioned in Chapter 3, positive action programmes are differentiated between soft and hard ones depending on whether they are in breach of the prohibition of direct discrimination. In this subsection, we will consider whether and how the right to work approach explains the two kinds of positive action programmes in turn.

To begin with, let us consider whether soft positive action programmes are explained with reference to the right to work. The prohibition of discrimination requires a legal process to be implemented. Individuals discriminated against are required to bring a case to a court to correct discrimination. This process of complaint is time-consuming and the result of the process applies only to those who actually complain of discrimination. Given these circumstances, employers' proactive voluntary measures will substantially contribute to protection from degradation of *the work values* by discrimination. Therefore, they should be encouraged to do so in order to enhance *the work values* in the right to work approach.

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<sup>19</sup> [2004] ICR 954, para. 53.

There exist some kinds of positive duty of employers for soft positive action, as was explained in Chapter 3. Under this positive duty, employers must affirmatively correct practices that are discriminatory against particular groups, whether explicitly or implicitly, and proactively help those who are under-represented to be employed or promoted. This positive duty of employers can also be explained with reference to the right to work. To prevent selective degradation of *the work values* resulting from persistent and prevalent discrimination, the prohibition of direct discrimination needs to be effective. For this reason, it is supplemented by a new positive duty of employers which obliges, rather than allows, them to take proactive measures.

Some may argue that there is no need to impose a new positive duty on employers because anti-discrimination in employment is a negative right in that it simply requires employers not to discriminate. However, this argument is based on a mistaken view of the nature of a negative right. Every right, including a negative right, may require a positive duty for its effective implementation. As Shue points out, for instance, the right to physical security, which, as a typical negative right, seems to require only a negative duty to be imposed, actually requires for its effective protection a wide range of positive duties to be taken by the agencies concerned, such as “police forces; criminal courts; penitentiaries; schools for training police, lawyers, and guards; taxes to support an enormous system for the prevention, detection, and punishment of violations of personal security”.<sup>20</sup> Without these positive duties, the right to physical security would not be actually effective. Like the right to physical security, anti-discrimination in employment, as the right to work, must involve a new positive duty where particular kinds of discrimination are persistent and prevalent and the simple negative duty of non-discrimination alone does not work well.

The correctness of this explanation of soft positive action with reference to the right to work is shown by comparison with its explanation with reference to equality. As the prohibition of direct discrimination is explained with reference to equality, in particular, equal treatment, any measures beyond the prohibition of direct discrimination need different types of equality in order to include them within the scope of equality. For this reason, a new type of equality, such as equal opportunity as substantive equality, seemingly different from equal treatment as the value

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<sup>20</sup> Shue, 1980, 37-38.

underlying the prohibition of direct discrimination, is used to derive the necessity of positive measures beyond the prohibition of discrimination.<sup>21</sup> However, equal opportunity following the concept of equality can hardly explain why it is realised only in the way that disadvantaged groups are protected or benefited.

In comparison, non-discrimination itself is not self-realisation or subsistence in the right to work approach. The prohibition of direct discrimination is simply one means of protecting people against the degradation of their work values. Thus, unlike the equality approach, the right to work approach does not require a new type of value, such as substantive equality, to explain employers' voluntary proactive measures beyond their positive duty. In other words, in the right to work approach, proactive measures beyond the negative duty of non-discrimination are not differentiated from the duty of non-discrimination in terms of their underlying value, as they are designed to encourage the subsistence and self-realisation of those who are often discriminated against. In this regard, the provisions which seemingly permit positive action programmes to be taken as an exception to equal treatment in EU anti-discrimination law<sup>22</sup> would not have to be explicitly provided for in the right to work approach, as far as soft positive action programmes are concerned. Even if they were, they would be meant to confirm and emphasise the necessity of these programmes under the right to work.

Beyond soft positive action programmes, there are hard positive action programmes. These hard positive action programmes are by their nature in breach of the prohibition of direct discrimination. Because of all these hard positive action programmes, firstly, those who belong to over-represented groups are not able to obtain vocational training, employment or promotion. They are unfavourably treated because of their traits. Secondly, the particular trait in favour of which hard positive action programmes are adopted is not relevant to business necessity. In any ordinary sense, a business does not need a person who is less qualified for a job. Business is most benefited when the best qualified person is chosen. The nature of hard positive action programmes in breach of the prohibition of direct discrimination can be expressed by relying on *the work values*. Under hard positive action programmes for a particular group of workers, other groups are blocked from pursuing their

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<sup>21</sup> Fredman, 2005.

<sup>22</sup> See EC Treaty a141(4); GFD, a7(1); DREO, a5.

subsistence and self-realisation in relation to a vocational training opportunity, employment and promotion. Such programmes are harmful to other groups' pursuit of their work values. Therefore, they cannot be explained with reference to the right to work.

Some may argue that some hard positive action programmes are not in breach of the prohibition of direct discrimination as they are relevant to business necessity. This argument is based on a situation, for instance, in which the customers of a company who belong to minorities would be more willing to purchase its products or services if they were served by workers from minorities. Thus a company which wants to boost its sales among minority customer groups may want to recruit from these minorities even though they are not the best qualified candidates. Moreover, the argument that some hard positive action programmes are not in breach of the prohibition of direct discrimination can be made in a more sophisticated way. The argument that has just been made presumes that the minority group members recruited through hard positive action programmes are not the best qualified. However, this presumption may not be true. The minority group members recruited through such programmes are, some proponents of positive action programmes argue, the most qualified because they can perform the jobs best given this particular situation.<sup>23</sup> Thus, with a view to increasing sales among minorities, the distinction of race made in job qualifications can be a GOQ in the UK context, the satisfaction of which makes such a distinction lawful under the prohibition of direct discrimination. If this is the case, it seems certain that hard positive action programmes can be relevant to business necessity.

Nonetheless, the attempt to explain hard positive action programmes by relying on business necessity is contrary to the current prohibition of direct discrimination in which discrimination because of customers' preferences based on racial or sexual bias is prohibited. In the US, as has already been mentioned in the previous chapter, recruiting women as flight attendants only on the grounds that airline passengers prefer women to men is in breach of the prohibition of direct discrimination.<sup>24</sup> According to the US court, passengers' preferences for women are not a matter of

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<sup>23</sup> There are numerous articles supporting this argument in the US and the UK. To name two in the UK, see McCrudden, 1998, 562-567; Nicolson, 2006, 118.

<sup>24</sup> See *Diaz v. Pan American World Airways*, 442 F.2d 385 (1971); *Wilson v. Southwest Airlines Company*, 517 F. Supp. 292 (1981).



business, even though accommodating them would be more profitable. Thus confining a flight attendant post to women only is not a Bona Fide Occupational Qualification (BFOQ) which is equivalent to a GOQ in the UK. Given this strict interpretation of the BFOQ, the argument for allowing hard positive action programmes with reference to business necessity, in particular, job qualification would necessarily mean that a distinction between the races or sexes in recruiting or promoting workers on the grounds of customers' preferences based on racial or sexual bias would be made lawful as well. Just as a black person can be chosen for a job to improve sales among black people, it would be allowed that a white person could be recruited for a job on the grounds that he would boost sales among white customers where they tended to prefer a white worker to a black person as a salesman. Thus, the explanation of hard positive action programmes relying on business necessity is not successful to the extent that business policies accommodating customers' sexual or racial biases are in breach of the prohibition of discrimination on the basis that it does not belong to business necessity socially adjusted for people's work values.

Some scholars try to distinguish between hard positive action programmes of the sort mentioned above and business policies accommodating customers' sexual or racial biases. For instance, Turner argues in the US context that the former is inclusionary and integrative but the latter is exclusionary and segregative.<sup>25</sup> However, this argument does not change the fact that accommodating particular customers' preference for a worker of a particular trait is in breach of the prohibition of direct discrimination irrespective of whether or not it is beneficial treatment for minorities. Turner's argument only shows why hard positive action programmes designed to accommodate minority customers' preferences may be morally justifiable. Leaving aside the justifiability issue of hard positive action programmes, which will be dealt with in the next subsection, thus, the argument is still not appropriate to decide how business necessity is objectively constructed in relation to the prohibition of direct discrimination.

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<sup>25</sup> Turner, 2004, 236.

### 6.3.2. Justification for Hard Positive Action

As hard positive action is not explained with reference to the right to work, it is unlikely to be justifiable for the sake of *the work values*. Nonetheless, hard positive action has been defended in numerous ways. Firstly, this subsection will consider how some of the justification defences for hard positive action relying on problems in the current system of distributing jobs among people can be understood in terms of the right to work approach. Secondly, it will explore whether hard positive action can be justifiable despite its encroachment on *the work values*.

In order to defend hard positive action programmes, some scholars have criticised the notion that the best qualified person should be chosen for a job. Their argument is that this is not as morally desirable or socially useful as its proponents contend. Thus, the argument runs, objections to hard positive action programmes based on this notion can be challenged. For instance, Fredman, a proponent of hard positive action programmes argues:

People do not deserve their talents, and those born with greater talents do not necessarily deserve greater rewards. Therefore, as Fallon argues, while it is arguably fairer than many other bases for distribution, such as nepotism or invidious discrimination, merit-based distribution is not morally required. Indeed, merit-based distribution is best justified not on moral but on utilitarian grounds, namely that society benefits from awarding educational opportunities or jobs to those who are most likely to perform best. Yet even the utilitarian argument is not conclusive. While some qualifications are often necessary for particular jobs or university places, a basic threshold of ability or qualification may well be sufficient, leaving no scope for the argument that the higher an individual's score, the better he or she will perform.<sup>26</sup>

This argument may have a point with regard to subsistence as a work value. As people deserve their talents and as a result have a job, as was shown in Chapter 4, they can secure their subsistence. Thus, if subsistence is entirely dependent on whether people have talents, it will surely be very harsh on those who do not have talents. This is because subsistence is a matter of survival for human beings. People's subsistence should be secured regardless of whether or not they have talents. In this regard, if those born with greater talents alone deserve subsistence, certainly that is not morally acceptable. In reality, however, people's talents are not likely to determine their subsistence completely. Those who fail to get a job which requires

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<sup>26</sup> Fredman, 1997a, 598-599.

them to have particular talents may find another job requiring other talents or fewer talents. Even in a situation where a person does not have a job, social security benefits play a role in managing subsistence. Nonetheless, it is certain that subsistence considered as a work value does not much strengthen the notion that the best qualified person should be chosen for a job.

However, this is not the case with self-realisation. Some people are born with natural talents. Relying on this fact, Fredman may presume that those born with natural talents have a better ability to do a particular job. This is not necessarily so. If it is so, competition would be morally meaningless, as those with natural talents would always win it. To achieve self-realisation through a particular job, people need to develop their natural talents into an ability to do the job. Basically, people can develop their ability to do a particular activity by exerting effort. Given the role of effort in developing natural talents into an ability to perform a particular job, as Sher points out, those who actually make an effort to develop their natural talents deserve to have the job more than those who do not make such an effort despite their natural talents.<sup>27</sup> Moreover, people with lesser natural talents can develop the same level of ability as those with better natural talents by putting in more effort. Thus, the fact that a person is chosen for a particular job because she is the best qualified candidate does not necessarily mean that she was born with the greatest talent. Thus, contrary to Fredman's contention, those who develop and achieve their ability to do a job by making an effort morally deserve the job. If they do not deserve the job, although they have become the best qualified candidate for it through their effort, then there would be little use in exerting effort to develop ability, which is essential for self-realisation to be achieved.

However, even when effort is needed to develop a particular ability for a job, if the character of those who make more effort is largely built on environmental factors such as 'fortunate family and social circumstances', as Rawls points out,<sup>28</sup> it is argued that those who become the best qualified by making such an effort may still not deserve the job. It is true that such environmental factors affect people's characters, depending on which people can make the effort to achieve self-

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<sup>27</sup> Sher, 1997, 73.

<sup>28</sup> Rawls, 1971, 104. However, Rawls establishes not only self-respect, as shown in the previous chapter, but also the principle of fair equality of opportunity, the absence of which leads to people being 'debarred from experiencing that realisation of self which comes from a skilled and devoted exercise of social duties' (Rawls, 1971, 84).

realisation. In this regard, to enhance people's self-realisation through work, society should endeavour to create an environment in which people's characters are not affected negatively in terms of making an effort to achieve their own self-realisation. However, people's characters do not totally determine whether or not they are able to make such an effort and, if so, the extent of the effort. As Sher points out, some people are less attentive to, and less concerned about, the need to achieve self-realisation through a particular job although they have such a character.<sup>29</sup> Thus, those who are more attentive to their self-realisation and as a result become the best qualified candidate for a job deserve it. In addition, he shows the possibility that those who lack the character to make an effort can put in more effort by being vigilant towards distractions or temptations which bar them from making an effort.<sup>30</sup> Thus, they will deserve to have a job if they become the best qualified candidate by putting in more effort of this sort.

Furthermore, even where some people obtain the ability and the qualifications for a job relatively easily because of their natural talents, to let them perform the job is more useful for society, because they are the best qualified for the job. For instance, it will be harmful to society to recruit a less skilled surgeon rather than the most skilled one for a post which requires the performing of medical operations on the grounds that the most skilled surgeon does not deserve the post because his high skill in performing medical operations results from his natural talents.

Of course, there are jobs for which several applicants have equal ability and qualifications. If this is the case, we cannot, or do not have to, find the best qualified person for the jobs in terms of social utility. Nevertheless, to choose a particular applicant out of those equally capable candidates on the grounds of a particular trait will deprive the other applicants of the chance of getting a job which they could otherwise equally be given, for instance, on a lottery basis. Thus, unless the irrelevant grounds for choosing a particular applicant are otherwise justified, to do so will be less fair than to choose one on a lottery basis. Overall, therefore, the best qualified person should deserve to be chosen for a job to achieve self-realisation through work.

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<sup>29</sup> Sher, 1997, 71.

<sup>30</sup> Ibid., 72.

Some proponents of hard positive action often point out problems of measures of ability; measures of ability are inaccurate; subjective judgement of people's ability is often prejudicially stereotyped; seemingly neutral measures have the effect of excluding historically disadvantaged groups.<sup>31</sup> Indeed, based on this argument, the ECJ has justified preference for women in what is called the tie-break situation in relation to promotion in *Marschall*.<sup>32</sup> The ECJ held that women are unlikely to have the same chances because of prejudices and stereotypes regarding women's roles, where female and male candidates are equally qualified for a particular post. Thus, the Court ruled that, in this situation, to promote a female candidate is permitted in order to 'counteract the prejudicial effects on female candidates of the attitudes and behaviour'.<sup>33</sup>

However, the inaccuracy and unfairness of measures of ability do not serve well as a defence of hard positive action programmes. Firstly, the very aim of the prohibition of direct discrimination is to tackle such prejudices and stereotypes. In addition, the prohibition of indirect discrimination, even though it does not directly require employers to review promotion criteria, could lead employers to correct, for instance, promotion criteria with discriminatory effect. Thus, if these anti-discrimination remedies are not sufficiently effective to make measures of ability accurate and undiscriminating, they should be strengthened in order to be fit for their purposes.

Secondly, if it turns out that it is hardly possible to solve this problem under the current framework of non-discrimination, we should change the current framework of non-discrimination. In an attempt to prohibit discrimination effectively, for instance, a new duty to review and correct the procedures and criteria for choosing the best qualified person may be imposed on employers. In particular, as Malleeson points out,<sup>34</sup> employers may be explicitly required to change them with reference to the potential candidate pool, including those traditionally excluded, as they tend to have been established with reference to the candidate pool of advantaged groups. Moreover, as Sturm and Guinier point out, the proportion of traditionally excluded groups in the workforce may be required to serve as a signal of the failure or success

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<sup>31</sup> Fredman, 1997a, 599; Selmi, 1995, 1251-1314.

<sup>32</sup> C-409/95 [1997] ECR I-6363. See also *Badeck*, C-158/97 [2000] ECR I-1875; *Abrahamsson*, C-407/98 [2000] ECR I-5539; *Lommers*, C-476/99 [2002] ECR I-2891

<sup>33</sup> Para. 31 in *Marschall*.

<sup>34</sup> Malleeson, 2006.

of the new positive duty of reviewing and correcting measures of ability.<sup>35</sup> That this is a correct and effective way of solving the inaccuracy and unfairness of measures of ability can be demonstrated by comparison with the effect of the introduction of hard positive action. As Sturm and Guiner point out, the introduction of hard positive action programmes will constitute an exception to the existing framework of selection, which is not only inaccurate but also functions discriminatorily, but it will not change the existing framework of selection itself.<sup>36</sup> Thus, even after the introduction of hard positive action programmes, the inaccurate and discriminatory framework of selection remains influential, thus frustrating some of the best qualified persons by its inaccuracy and excluding some groups of workers by its implicit or explicit discriminatory operation. Therefore, to require employers to review and correct their criteria for recruiting and promotion which, as was mentioned in the previous subsection, is categorised as soft positive action, will be stronger and more effective than to require employers to take hard positive action for a particular group of workers. Overall, the inaccuracy and unfairness of measures of ability do not necessarily lead us to adopt hard positive action programmes.

As hard positive action programmes by nature encroach on other groups' right to work, generally speaking, any justification for them cannot be based on *the work values*. However, this does not mean that hard positive action programmes are not justified by values other than *the work values*. Hard positive action programmes may be required by more important values than *the work values*. Nonetheless, the perspective of the right to work transforms the justification issue of hard positive action: it is no longer simply a matter of whether hard positive action is morally desirable; it is whether or not the values justifying it are significant enough to outweigh the likely loss of *the work values* caused by it.

Let us explain this point in more detail. The loss of *the work values* caused by hard positive action programmes matters firstly to its beneficiaries. When a member of a minority group is chosen for a job, even though she is not the best qualified candidate, how can she have self-respect? She is not likely to have self-respect. This is because the self-realisation and subsistence underlying self-respect presume that she should obtain a job by relying on her own ability and effort. In particular, given

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<sup>35</sup> See Sturm & Guiner, 1996.

<sup>36</sup> Ibid., 1014.

this nature of self-realisation through work, the person who is chosen for a job even though she is not the best qualified candidate is not likely to have the feeling of achievement, excellence or recognition which often accompanies the process of self-realisation while performing the job. Thus, the fact that she is not the most qualified candidate for the job may tend to undermine her appraisal of her self-realisation and subsistence. Moreover, even though she may have self-respect, how can we justify the loss of self-respect of the best qualified person who is denied a job because of hard positive action programmes? He may lose his self-respect because he is actually deprived of opportunities to realise his abilities. In addition, he may suffer from the fact that he is unfairly treated. From the perspective of the right to work, therefore, the concrete issue of the justifiability of hard positive action programmes is whether or not the values justifying hard positive action programmes outweigh the loss of *the work values* that they give rise to.

Indeed, in certain circumstances, the values justifying hard positive action may outweigh the loss of *the work values*. For instance, where past discrimination against a particular group was prevalent and as a result, to use the social integration argument for hard positive action,<sup>37</sup> the group is currently segregated from society, a person chosen for a job, even though she is not the best qualified candidate, will have self-respect because she has competed against the best qualified person in her unfavourable conditions, such as poverty and a lack of educational opportunities which have been caused by prevalent past discrimination. Thus she might be proud of having obtained the job. Given the fact that a particular group is segregated from society, moreover, this sort of self-respect may be more important than the best qualified person's loss of self-respect. In addition, people from other groups, including the best qualified person, may accept this assessment. The validity of this justification for hard positive action programmes can be evidenced in the fact that hard positive action programmes have been mainly found in societies, such as the US, South Africa, India and Northern Ireland, where past discrimination against a particular race, class or religion was so prevalent that it led to particular groups based on such distinctions being segregated for a long time.<sup>38</sup>

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<sup>37</sup> See Anderson, 2002, and Dupper, 2005.

<sup>38</sup> See, eg, Anderson, 2002 and Dupper, 2005.

There have been various justifications for hard positive action relying on several values. They are commonly broken down into three categories; compensatory justice, distributive justice and social utility.<sup>39</sup> Are such defences successful in justifying hard positive action despite the loss of *the work values* of some individuals that are caused by it? This subsection will not explore whether or not these defences are really successful. Given the nature of assessing and balancing the different values involved in hard positive action, it is hardly possible to conclude that a particular value is more significant than other values at an abstract level without considering them in a particular social context, for which we do not have space in this chapter.

Even though hard positive action may be justifiable, for instance, in a particular social context, the right to work approach suggests that hard positive action programmes should have an inherent limit to their scope. As has been mentioned above, people will have self-respect only when they obtain a job through their own effort to achieve self-realisation. Thus those who get a job by means of hard positive action programmes but cannot successfully perform the job will not feel self-respect and their uneasiness with the job will be strengthened by other people's probable view that they do not deserve their job. In order to make them feel self-respect based on self-realisation, therefore, the right to work approach based on *the work values* requires that those targeted by the programmes have threshold qualifications for the job which will enable them to perform it successfully.

Moreover, the right to work approach may also suggest which hard positive action programmes should be chosen from among various alternative ones. If, of two options of hard positive action programmes, one has a less adverse effect on other groups' work values than the other, this approach requires that the former should be chosen. Thus, hard positive action programmes in vocational training would be preferred to those involving employment. Of hard positive action programmes regarding employment, those in which a particular trait is regarded as a plus factor, other qualifications being equal, should be chosen for a job<sup>40</sup> rather than those in which a person is chosen even though she is less qualified than other candidates to meet a quota reserved for a particular group. Along the same lines, hard positive action programmes involving preferential hiring would be more desirable than those

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<sup>39</sup> McHarg and Nicolson, 2006.

<sup>40</sup> This sort of positive action will be explicitly allowed under a new Equality Act, which is expected to be introduced in the 2008-2009 parliamentary session (See GEO, 2008, Chapter 4).



involving dismissal. This is because the latter would have a more adverse effect on *the work values*, in particular, on subsistence. What the right to work approach suggests here with regard to hard positive action programmes is not new. It is what the proportionality test requires in balancing between two conflicting values or rights. Here the right to work approach suggests that the proportionality test should be carried out in order to ensure that hard positive action programmes are narrowly tailored in order to minimise the loss of other groups' work values.

## 6.4. Conclusion

Overall, firstly, we have found that the right to work approach explains and justifies both specific protections for women and for people with disabilities which are hardly explicable with reference to equality. Current specific protections for such groups, the implementation of which does not depend on comparison and does not allow levelling down to take place, constitute a specific form of the right to work which accommodates groups with unique needs. Unlike the right to work approach, the group status perspective, by focusing on the subordinated status of women and people with disabilities as social groups, makes invisible *the work values* as common interests which individuals desire to achieve in employment. Moreover, the fact that other groups of people are not entitled to seemingly similar protection does not weaken the justifiability of specific protections for groups with unique needs. It is not morally relevant to specific protections for such groups, as the latter are based on their unique needs in the pursuit of their work values.

Secondly, our findings on the relationship between positive action and the right to work are complicated. Differentiating between two sorts of positive action, namely, soft and hard positive action, the former is allowed and sometimes required by the right to work approach, which also explains the prohibition of direct discrimination. This is contrasted with the finding in Chapter 3 that a new kind of equality, i.e., substantive equality, as opposed to equal treatment explaining the current prohibition of direct discrimination, is used in order to allow and require soft positive action to be adopted. However, hard positive action is not explained by reference to the right to work as it encroaches on *the work values*. Nonetheless, this does not mean that hard positive action is never justifiable. Despite its encroachment on *the work values*, hard positive action may sometimes be justifiable. Even in these justifiable

circumstances, the right to work approach places an inherent limit on the scope of hard positive action and dictates which of the various options should be chosen.

In Chapters 5 and 6, we have found that the right to work approach to anti-discrimination in employment, as an alternative to the equality approach, would change the prohibition of direct and indirect discrimination in a more justifiable way and that it not only fits well with both specific protections for women's pregnancy and maternity and for people with disabilities but also gives a better explanation for soft positive action and a justification for hard positive action. We are in a position now to wonder why the equality approach, rather than the right to work approach, has become so firmly established, in spite of the shortcomings of its explanation and justification of anti-discrimination rights in employment. This question leads us to explore the socio-legal context in which this approach was applied in the formation of anti-discrimination law, which will be dealt with in the following chapters.

## **Part Three**

## Chapter 7 The Making of Title VII of the Civil Rights Act of 1964

### 7.1. Introduction

As was shown in the previous chapters, equality and the right to work involve different anti-discrimination rights in employment in light of their meaning, scope and relationship with other employment rights. Whereas in the equality approach to discrimination in employment, discrimination on the grounds of several traits alone is prohibited, in the right to work approach not only discrimination on the grounds of all irrelevant traits is prohibited, but the prohibition of discrimination is also supplemented by other employment protection rights in order to prevent the general degradation of *the work values*. If discrimination in employment is regulated by reference to the right to work, thus, employers' rights, such as freedom of contract and the right to property, are much more restricted than if it is so by reference to equality.

The different implications of these two approaches to employers' rights could suggest why the equality, rather than the right to work, approach was chosen to underlie anti-discrimination in employment. They will lead us to see the value structure in the governance of employment framing workplace rights, which shows the relationship and hierarchy between conflicting values, such as economic liberty and the right to work. This value structure varies among societies, depending on their tradition and culture. Hence it may influence which approach to discrimination in employment is adopted. For instance, the equality approach would be preferable as it is less in conflict with employers' rights in a society that places more emphasis on employers' freedom to conduct business. Therefore, choosing a particular approach to regulating discrimination in employment in a society can be understood from the context of the value structure governing employment in that society.

However, the value structure is not naturally given. Historically speaking, the way a society's legal tradition and culture strike a balance between employers' and workers' rights has been established through the social and political activities of socially organised interest groups. In particular, workers' employment rights and

values have been institutionalised through social movements involving not only massive demonstrations and strikes but also legal battles with regard to the interpretation of legally protected values and rights. There was no exception in the case of regulating discrimination in employment: social movements substantively contributed to the introduction of anti-discrimination employment law. Given the influential role of social movements, their internal and external conditions in choosing a value underlying their anti-discrimination demands in employment may have been important in the establishment of anti-discrimination law based on that value. They may have chosen an equality approach because they thought that it would be relatively easy to achieve. It may also have been that they, or at least some of them, requested the introduction of anti-discrimination rights based on the right to work but failed to achieve them because of their internal and external conditions. Therefore, the establishment of an anti-discrimination right based on a particular value can be understood in the context of what social movement sought in relation to the right's establishment.

From this point of view, this chapter explores why and how equality was chosen as the underlying value of Title VII of the US CRA of 1964 (hereafter Title VII). The contextual understanding above, first of all, suggests that it will be crucial to understand the value structure in relation to employment in the US when equality was chosen and established as the underlying value of Title VII. Secondly, this understanding leads us to explore the internal and external conditions of the social movement of the time: the CRM.

To this end, this chapter will first consider what the approaches to discrimination in employment had been in the US and whether they had changed since anti-discrimination law in employment was first proposed in the Congress in the early 1940s. Secondly, it will look at the extent to which there was a balance between workers' and employers' rights in the value structure of the US Constitution before the early 1960s. Thirdly, the chapter will explore the internal and external conditions of the CRM in order to explain its role in the establishment of equality under Title VII. Finally, this chapter will consider how the value of equality was established in Title VII during the actual legislative process in 1963-1964.

## 7.2. The Change in approaches to Discrimination in Employment

Attempts to introduce a federal anti-discrimination employment law predated the 1960s. The first attempt dated to 1942.<sup>1</sup> Almost every year from then to 1963, bills to prohibit discrimination in employment were proposed in either the House of Representatives or the Senate. Each time these proposed bills were defeated in the House or Senate Committee to which the bills were referred, or they died because of a Senate filibuster.<sup>2</sup>

One can find different values underlying anti-discrimination in employment by comparing the 1945 and 1963 bills. A 1945 anti-discrimination bill,<sup>3</sup> for instance, was strongly influenced by a value other than equality, such as the right to work. The right which was to be given to workers in this bill was framed as ‘the right to work without discrimination against them because of their race, creed, color, national origin, or ancestry’.<sup>4</sup> In the bill, moreover, this right was declared as ‘an immunity of all citizens of the United States, which shall not be abridged by any State or by an instrumentality or creature of the United States or of any State’.<sup>5</sup> According to the official report of the bill, the reason that people’s right to work without discrimination was declared to be ‘an immunity’ was that this right was related to ‘the right to freedom to work to safeguard their economic welfare’.<sup>6</sup>

Of course, the prohibition of discrimination in this bill did not attempt to prohibit discrimination on the grounds of all irrelevant traits, unlike that based on the right to work as defined in Chapter 5. Even if we did not prohibit all kinds of discrimination, however, we could still partly pursue the right to work approach to discrimination on the grounds of a personal trait. This is because this right to work approach, as was shown in Chapter 5, also requires the prohibition of prevalent and persistent discrimination on the grounds of a personal trait to be pursued alongside other employment rights to prevent the general degradation of work values. Indeed, the

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<sup>1</sup> HR. 7142 (75<sup>th</sup>, 1942).

<sup>2</sup> Vaas, 1966, 431. The term ‘filibuster’ is used when a single senator or group of senators delay or prevent a vote, relying on Senate rules in which senators can speak for an unlimited time unless opponents can secure two-thirds of all senators to impose cloture (For details, see Gold and Gupta, 2004).

<sup>3</sup> HR. 2232 (79<sup>th</sup>, 1945).

<sup>4</sup> Ibid., s2.

<sup>5</sup> Ibid., s4.

<sup>6</sup> House Report, 79-187, 1945.

right to work approach in the 1940s pursued this sort of the right to work, as will be shown in Section 7.4. This is the reason that ‘the right to work without discrimination’ was in accordance with a scholar’s view of the time that the right to work included both anti-discrimination and the right to live.<sup>7</sup>

Another idea of the right to work in relation to anti-discrimination in employment was found in a congressional debate of the early 1940s. It was argued that an anti-discrimination right was similar to a property right. According to one of the proponents of an anti-discrimination bill, the right to work including anti-discrimination in employment was at least a quasi property right and as a result, ‘the Congress fundamentally has the same right to adopt this legislation for the purpose of regulating this quasi property, at least the right to acquire and to hold a job’, just as it has the right in relation to traditional property rights.<sup>8</sup>

In comparison, this approach disappeared from the bills for anti-discrimination in employment legislation of the 1960s. These later bills explicitly relied on equality, specifically equal opportunity.<sup>9</sup> However, the value of equality was not mentioned in the final CRA of 1964. In addition, equality was not mentioned as its constitutional ground either in its House Report<sup>10</sup> or in the Senate Report.<sup>11</sup> Instead, the Senate Report made it clear that the Congress enacted it under the power given under the Commerce Clause in the Constitution.<sup>12</sup> This Clause does not suggest anything about a value to underlie anti-discrimination on the grounds of race; it simply gives the Congress the power to regulate interstate commerce.<sup>13</sup>

However, the absence of equality from the official Act or Reports did not mean that Title VII was not based on equality. Equality is established in the whole CRA of 1964 including Title VII, as will be shown in section 7.5. The only reason that the Congress was not able to declare that equality sustained the CRA of 1964 was

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<sup>7</sup> Summers, 1947, 73.

<sup>8</sup> LaFollette in 78 Congressional Record (CR) 3031-3032 (Appendix) (1944)

<sup>9</sup> See, eg, HR. 405 (88<sup>th</sup>, 1963), s2(a), S. 1937 (88<sup>th</sup>, 1963), s2

<sup>10</sup> House Report, No. 88-914, 1963

<sup>11</sup> Senate Report, No. 88-872, 1964.

<sup>12</sup> Ibid., 2366-2368. The Supreme Court upheld in *Heart of Atlanta v. United States*, 379 US 241 (1964) that the public accommodations provisions (Title II) of the CRA of 1964 were constitutionally valid under the Commerce Clause.

<sup>13</sup> US Constitution, a1, s1, c3.

because it feared that the Supreme Court would deny its equality-based constitutionality because of the state-action doctrine of the Equal Protection Clause.<sup>14</sup>

That the Act was based on equality was apparent to the executive and the legislature. There was a consensus on equality as the basis of the CRA of 1964. For instance, one of the leading proponents of the bill described anti-discrimination rights based on equality as the 'philosophy behind the Commerce Clause'.<sup>15</sup> Moreover, when the Act passed the Senate, the Republican Senator Dirksen, who played a key role in making the main amendments to the House bill, stated:

Today we come to grips finally with a bill that advances the enjoyment of living: but, more than that, it advances the equality of opportunity. I do not emphasize the word 'equality' standing by itself. It means equality of opportunity in the field of education. It means equality of opportunity in the field of employment. It means equality of opportunity in the field of participation in the affairs of government. That is it. Equality of opportunity, if we are going to talk about conscience, is the mass conscience of mankind that speaks in every generation, and it will continue to speak long after we are dead and gone.<sup>16</sup>

Clearly for him, equal opportunity was the underlying value of the CRA of 1964, Titles of which regulated various domains, such as voting, public accommodation, education, federally-assisted programmes and employment. President Lyndon Johnson's explanation of the Act's purpose echoed that of Senator Dirksen. On the day he signed the Act into law, Johnson said: 'It does say that there are those who are equal before God shall now also be equal in the polling booths, in the classrooms, in the factories, and in hotels, restaurants, movie theaters, and other places that provide service to the public'.<sup>17</sup> This demonstrates that all the Titles of the Act are designed to achieve equality throughout such various areas.

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<sup>14</sup> See, eg, Remarks of Attorney General R. Kennedy (1 July 1963) and Brief of Professor Pau. A. Freund in 88<sup>th</sup> Congress Senate Hearings on S. 1732 before the Committee on Commerce; Gunther and Sullivan, 1997, 201-203.

<sup>15</sup> Senator Clark, 110 CR 13079-13080 (1964).

<sup>16</sup> 110 CR 14510 (1964).

<sup>17</sup> Johnson, 1964.



## **7.3. The Value Imbalance between Economic Liberty and Counter-Values**

The value structure regarding employment in the US Constitution before the 1960s was a pre-condition on which the legislature or the CRM had to rely or against which it had to struggle. In exploring what made equality the underlying value of Title VII, in this section we will first look at the value structure regarding employment in the US Constitution before the 1960s and how it influenced the choice of equality as the underlying value of Title VII.

### **7.3.1. The Sweeping Value of Economic Liberty in Employment**

The principle of freedom of contract and property rights are understood as indispensable to economic liberty. As far as employment is concerned, employers hire, dismiss and generally treat their workers based on an employment contract. Moreover, property rights are a pre-condition in which freedom of contract operates. Thus, the argument goes, in order to promote economic liberty, these rights need to be guaranteed.

According to the Fifth and Fourteenth Amendments,<sup>18</sup> property and liberty may not be abridged without due process by states and the federal government. As liberty is interpreted to include economic liberty, freedom of contract is conceived of as part of this liberty. Thus, on the one hand, property and the freedom of contract based on economic liberty are fundamental rights in the Constitution. On the other hand, workers' rights and their underlying values are not explicitly mentioned in the Constitution. Unless these rights and values are implicit in the Constitution, there seem to be no direct and general values protecting workers.

Indeed, there was no balance between economic liberty and values protecting workers in employment in the early twentieth century. Economic liberty was the dominant value in the regulation of employment. Any laws prohibiting discrimination, protecting a minimum wage or allowing peaceful picketing were contrary to economic liberty and as a result were deemed unconstitutional. Few

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<sup>18</sup> See the Fifth Amendment ('No person shall ... be deprived of life, liberty or property without due process of law'); the Fourteenth Amendment, s1('No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law.').

values could be construed to protect workers in the Constitution. Workers were only protected where, for example, their safety and health were threatened.

Several Supreme Court cases demonstrate the dominance of economic liberty in the regulation of employment. To begin with, the dominance of economic liberty was seen clearly and explicitly in *Lochner*.<sup>19</sup> In this case, the Supreme Court held that a state law regulating working hours in bakeries was unconstitutional because it encroached upon 'the general right to make a contract in relation to one's business'. In *Adair*,<sup>20</sup> moreover, the Court struck down a federal law which made it a crime to discriminate against a worker because of union membership, for exactly the same reason as in *Lochner*. In the Court's view, laws protecting workers from discrimination on the grounds of union membership were based not upon constitutionally protected values but simply on the 'desirability of levelling inequalities of fortune by depriving one who has property of some part of what is characterized as his "financial independence"'.<sup>21</sup> Furthermore, the Court held in *Truax*<sup>22</sup> that a state law prohibiting a restraining order or injunction against workers' picketing and boycotting was unconstitutional because the property right was unequally restrained by the law.

Of course, economic liberty was not the only value in the regulation of workplaces. The Court held that this value did not apply to exceptional circumstances in which the safety, health, morals and general welfare of the public were at risk. Nonetheless, the Court held that economic liberty was the dominant principle and accordingly the scope of such counter-values must be narrowly construed. In *Adkins*, for instance, the Court reasoned that 'any form of law establishing minimum wages' was unconstitutional because it inherently restrained freedom of contract, whereas a law limiting maximum working hours in particular areas might be exceptionally allowed because it did not inherently do so.<sup>23</sup> Therefore, we can see that economic liberty was so dominant in the regulation of the workplace that workers were only protected from unsafe working conditions and unfair labour practices by employers in very narrowly construed and exceptional circumstances.

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<sup>19</sup> *Lochner v. New York*, 198 US 45 (1905).

<sup>20</sup> *Adair v. United States*, 208 US 161 (1908).

<sup>21</sup> *Coppage v. Kansas*, 236 US 1 (1915), 18.

<sup>22</sup> *Truax v. Corrigan*, 257 US 312 (1921).

<sup>23</sup> *Adkins v. Children's Hospital*, 261 US 525 (1923), 553-554.

### 7.3.2. Free Labour and the New Deal

The Thirteenth Amendment abolished slavery in the US.<sup>24</sup> However, a study of the Congressional debate over the Amendment shows that 'by abolishing slavery and involuntary servitude, its framers sought to advance both a floor of minimum rights for all working men and an unobstructed sky of opportunities for their advancement'.<sup>25</sup> According to this study, the Amendment was aimed not only at eradicating slavery but also protecting labour from subjugation by employers.<sup>26</sup>

In fact, during the first half of the twentieth century, trade unions attempted to find a constitutional counter-value against economic liberty on which workers' rights, specifically, the rights to organise, to strike and to picket, could be based by reinterpreting the Thirteenth Amendment. According to labour leaders, individual workers were helpless against a large corporate employer without collective rights to organise or to strike; they suffered 'involuntary servitude' which is forbidden by the Amendment along with slavery.<sup>27</sup> Labour leaders believed that 'free labour' stemming from the Amendment was a counter-value strong enough to be set against the dominant value in employment, economic liberty: collective labour rights could have a constitutional ground in the Amendment because the Amendment applies both to private and to governmental areas.

During the 1920s, the leading national labour organisation, the American Federation of Labor (AFL) pushed for the ideal of free labour to be endorsed in the Constitution. When it demanded a law to limit the use of injunctions against picketing, it argued that the law should be based on the Thirteenth Amendment. According to the AFL, 'Every human being has under the Thirteenth Amendment to the Constitution of the United States an inalienable right to the disposal of his labor free from interference, restraint or coercion'.<sup>28</sup>

Although the trade unions focused on collective rights because of their opposition to state intervention, in accordance with the value of voluntarism,<sup>29</sup> the endorsement of

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<sup>24</sup> See the Thirteenth Amendment, s1 ('Neither slavery nor involuntary servitude ... shall exist within the United States, or any place subject to their jurisdiction').

<sup>25</sup> Vandervelde, 1989, 495.

<sup>26</sup> Ibid., 495.

<sup>27</sup> Pope, 2002, 15-18.

<sup>28</sup> Text of the Anti-Injunction Bill approved by the Executive Council of the AFL (1931) cited in Pope, 2002, 39-40.

<sup>29</sup> For accounts of voluntarism of the American trade unions, see Flanders, 1974, 366-369, Fink, 1973 and Rogin, 1962.

collective labour rights in the Thirteenth Amendment could have led to individual employment rights, including anti-discrimination rights in employment, being grounded on the Amendment.<sup>30</sup> Notwithstanding this effort, it was not reflected in the new anti-injunction bill, the Norris-LaGuardia Act, although some legislators welcomed the trade unions' language of freedom.<sup>31</sup>

Despite the continuing struggle for free labour,<sup>32</sup> the National Labor Relations Act (NLRA) of 1935, also known as the Wagner Act, which gave workers the right to organise, to negotiate with employers and to strike, was based on the Commerce Clause. The Act was intended to settle an industrial dispute, and, as a result, helped to develop interstate commerce. The Act declares that it is 'the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization ...'.<sup>33</sup>

The constitutionality of the Wagner Act was examined by the Supreme Court shortly after its enactment. President Franklin D. Roosevelt's policy on appointments to the US Supreme Court and massive national workers' strikes led the Court to uphold the constitutionality of the Wagner Act.<sup>34</sup> By interpreting 'interstate commerce' broadly, in contrast to its previous decisions, the Court reasoned that the Congress had legitimate power to regulate industrial relations under the Commerce Clause.

However, the Court did not admit that there was an independent value sustaining workers' rights against economic liberty in the Constitution. The protection of workers' rights was subject to industrial peace affecting interstate commerce. For instance, when, in *Jones & Laughlin Steel Corp.*, the Court conceded that 'the right of employees to self-organization and to select representatives of their own choosing for collective bargaining' was a fundamental right, but it was not able to define the right's constitutional value. Rather, after reasoning that this case was involved with

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<sup>30</sup> See Pope, 2002, 115-119.

<sup>31</sup> Ibid., 24.

<sup>32</sup> See, eg, Letter from Andrew Furuseth, President, International Seamen's Union, to Senator Robert F. Wagner (16 April 1935) cited in Pope, 2002, 48-49.

<sup>33</sup> NLRA of 1935, s1.

<sup>34</sup> *NLRB v. Jones & Laughlin Steel Corp.*, 301 US 1 (1937); *NLRB v. Frehauf Trailer Co.*, 301 US 49 (1937); *NLRB v. Friedman-Harry Marks Clothing Co.*, 301 US 58 (1937).

an interstate company, the Court maintained that this right 'is often an essential condition of industrial peace',<sup>35</sup> without which 'interstate commerce is put in jeopardy'. Accordingly, citing the power of the Congress under the Commerce Clause, the Court ruled that Congress was able to provide employers' rights against, or to restrict, those of workers when it found that the Act did not give 'better assurances of fairness to both sides'.<sup>36</sup> Indeed, this sense of fairness to both employees and employers was later found in the Labor-Management Relations Act of 1947, known as the Taft-Hartley Act, in which workers' rights became more restricted, with the Wagner Act being amended.

Moreover, the Supreme Court was not able to rely on a direct and general counter-value underlying protection of workers' minimum labour standards when it finally held, in *West Coast Hotel*,<sup>37</sup> that a state law providing a minimum wage for women was constitutional, reversing its previous decisions, such as *Adkins*. As was mentioned above, the values, such as health, safety, or public welfare, had not been adopted as an underlying value of a minimum wage law. This was because health and safety, it was held, were not directly linked to a minimum wage and public welfare was too broad to specify a particular reason for protecting women workers. Nonetheless, instead of declaring that all workers were entitled to minimum standards of working conditions, the Court relied on the narrowly construed values in *West Coast Hotel*. For instance, unlike in its previous decisions, the Court maintained that the purpose of the Act was related to protecting the safety and health of workers.<sup>38</sup> In addition, it held that a denial of a living wage to workers would cause a 'direct burden for their support upon the community',<sup>39</sup> which could be regarded as a matter of public interest. In this way, the right to a minimum wage limiting freedom of contract was not specifically based on a particular clause in the Constitution, although it was constitutionally allowed. In this sense, the dissenting judges in the case were correct when they criticised the majority of the Court for simply assuming that a woman worker is 'entitled to receive a sum of money sufficient to provide a living for her, keep her in health and preserve her morals', which 'cannot be allowed

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<sup>35</sup> *NLRB v. Jones & Laughlin Steel Corp*, 301 US 1 (1937), 42

<sup>36</sup> *Ibid.*, 46.

<sup>37</sup> *West Coast Hotel v. Parrish*, 300 US 379 (1937).

<sup>38</sup> *Ibid.*, 393.

<sup>39</sup> *Ibid.*, 399.

to stand under the Constitution',<sup>40</sup> in which by interpretation freedom of contract was conceived of as exclusively important to achieve liberty. Furthermore, the Court held in *Darvy*<sup>41</sup> that the Fair Labor Standards Act (FLSA) of 1938, the federal regulation on minimum working conditions, was constitutional. In this case, it did not mention what kinds of values the Act relied on, focusing its ruling on whether or not the Congress had the power to regulate working conditions under the Commerce Clause.

### 7.3.3. Anti-discrimination on Which Value?

Given the failure to ground workers' rights in the Thirteenth Amendment, few constitutional alternatives were available when anti-discrimination law in employment was demanded. Discrimination in employment seems to be more remote from industrial peace than 'the right to organise and strike'. Health and safety were only indirectly concerned with those suffering employment discrimination. Public welfare was also too vague to specifically ground anti-discrimination in employment.

Against this backdrop, some state courts used the idea of the right to work to prohibit union membership discrimination on the basis of race. For instance, a state supreme court held in *James v. Marinship*<sup>42</sup> that trade unions' discrimination against black workers could constitute violation of the right to work under a closed shop agreement with employers. The court reasoned in this case that trade unions attained, through a monopoly of the supply of labour, a quasi public position similar to that of a public service business, because of which the business had certain corresponding obligations under the common law.<sup>43</sup> This reasoning was based on the fact that, due to the closed shop agreement, employment discrimination affected 'the fundamental right to work for a living',<sup>44</sup> whether a worker was a member of a trade union or not. In *Betts v. Easley*, which was concerned with a trade union that segregated black from white workers, moreover, a state court held that 'the denial to a workman, because of race, of an equal voice in determining issues so vital to his economic welfare, under the Railway Labour Act, is an infringement of liberty'.<sup>45</sup> In this sense,

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<sup>40</sup> A dissenting opinion of four judges written by Mr Justice Sutherland (Ibid., 411).

<sup>41</sup> *United States v. Darvy*, 212 US 100 (1941).

<sup>42</sup> 155 P. 2d 329 (1944).

<sup>43</sup> Ibid., 335.

<sup>44</sup> Ibid., 335.

<sup>45</sup> 169 P. 2d 831 (1946), 843.

we can see that the court assumed that this sort of liberty was guaranteed in the Fifth and the Fourteenth Amendments.

The reasoning of the state courts in which the importance of work for people's living was emphasised had two interpretational difficulties in light of the Constitution. Firstly, with the failure of reinterpreting the Thirteenth Amendment to guarantee 'free labour' as understood by the trade unions, there were hardly any constitutional clauses from which the significance of work was derived. Liberty as guaranteed in the Fifth and Fourteenth Amendment was not only too vague to point to the importance of work, but was also regarded as the source of economic liberty secured by freedom of contract and property rights, as far as economic domains were concerned. Secondly, it was difficult to conceive of discrimination by trade unions as involved with state action. This is because in the Fifth and the Fourteenth Amendments, liberty is protected from the federal government and states' interference. For these reasons, this reasoning based on the right to work was not endorsed by the Supreme Court and was not used again in the courts after the cases above.

However, equality was a value explicitly provided for under the Equal Protection Clause in the Fourteenth Amendment. What is important here is that, unlike the right to work, equality is not completely suppressed but is at least a visible value in the Constitution. Of course, relying on the Clause for the regulation of employment discrimination shared the same difficulty as relying on the right to work, as the Clause applied to state, but not private, action. Nevertheless, the comparison between the two approaches to discrimination in light of the US constitutional value structure regarding employment shows that the equality approach would be easier to adopt because it is more visible in the value structure and less in conflict with the dominant value of economic liberty.

Further, the argument of state action involvement in private employment became stronger in relation to the application of the Clause when the Supreme Court held, in *Corsi*,<sup>46</sup> that a state law against discrimination in employment was constitutional. In this case, the Court held that a state was able to protect workers 'from exclusion solely on the basis of race, color or creed by an organization, functioning under the protection of the state, which holds itself out to represent the general business needs

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<sup>46</sup> *Railway Mail Assoc. v. Corsi*, 326 US 88 (1945).

of employees'. Moreover, the Court extended the scope of the state action requirement under the Clause to cover judicial enforcement of restrictive housing covenants against blacks in *Shelley*.<sup>47</sup>

## 7.4. The Civil Rights Movement

### 7.4.1. The Role of the CRM

The imbalance between economic liberty and counter-values in relation to employment in the Constitution did not determine the equality-based nature of Title VII. This is because, in spite of the imbalance between economic liberty and its counter-values, anti-discrimination bills based on values other than equality were proposed, as was shown in Section 7.2. Moreover, the state action requirement of equality under the Fourteenth Amendment had still restrained its alternative use in grounding anti-discrimination in employment, although the Supreme Court showed the possibility of applying the Equal Protection Clause to some private discrimination in *Shelley*. Hence, it is necessary to explain another force which made the Congress and the executive pay attention to equality alone.

When they draft a bill section by section, the executive and the legislature are often influenced by ideologically dominant values. Further, they consider public opinion and the interests of the relevant interest groups. When a social movement has the mobilisation and national support to force the passage of a law, its influence on the government and legislature might be an important factor in basing the law on a specific value.

In the early 1960s, the CRM was influential enough to pressure the executive and the Congress not only to introduce the CRA of 1964 but also to enact it in the way preferred by the CRM. For instance, it was not until the Birmingham conflict in May 1963 that President John F. Kennedy sent the Congress a second message to propose a CRA, in which the Birmingham conflict was mentioned as an example of 'the cries of equality'.<sup>48</sup> Moreover, Title VII as understood today was included in the CRA of 1963 through the CRM's massive resistance and mobilisation against segregation and discrimination. In the original 1963 civil rights bill, there were no anti-

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<sup>47</sup>*Shelley v. Kraemer*, 334 US 1 (1948).

<sup>48</sup> Kennedy, 1963, 1.



discrimination provisions for private companies and trade unions. It simply gave a permanent statutory basis to the EEOC which was only involved with federal departments, agencies and federal contractors.<sup>49</sup> It was not until the March on Washington on 28 August 1963 and the bombing of a church in Birmingham, Alabama, which killed four black girls on 15 September 1963 that Subcommittee No. 5 of the Judiciary Committee in the House incorporated a separate bill prohibiting employment discrimination on the grounds of race in all areas of employment<sup>50</sup> into the CRA of 1963 as Title VII.<sup>51</sup>

The CRM hosted the Leadership Conference (LC) for civil rights, consisting of a variety of the CRM organisations. As far as Title VII was concerned, the LC's main concern was whether or not the prohibition of discrimination in employment would be inserted in the original CRA and subsequently the EEOC would have a cease-and-desist power. The LC never expressed its concern about the equality approach to discrimination in employment to the Congress or Government.

Given its position and power to demand an anti-discrimination law based on a value other than equality, the CRM's reason for the support for the equality approach to discrimination in employment can explain the change in the approaches to discrimination in employment in the Congress, as shown in Section 7.2. From this point of view, the following subsections will look at what brought about the CRM's support for the equality approach.

#### **7.4.2. Main Trade Unions**

There was a demand among the labour movement in which anti-discrimination rights in employment were based on the right to work in the early 1960s. For instance, the Negro American Labor Council (NALC) led by Philip Randolph, in preparing the March on Washington for Jobs and Freedom in 1963 (the largest in the history of the CRM) made anti-discrimination rights based on the right to work one of the two main demands:

##### **I. The Civil Rights demands include**

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<sup>49</sup> See Ibid., 7-11.

<sup>50</sup> Equal Employment Opportunity Bill (H.R. 405 (88<sup>th</sup>, 1963)). This bill was in progress in the Rules Committee after it passed the Committee on Education and Labor at the time that the CRA of 1963 was referred to the Judiciary Committee in the House.

<sup>51</sup> Rauh Jr, 1997, 56.

Passage by the Congress of effective and meaningful civil rights legislation in the present session, without filibuster. Immediate desegregation of the nation's schools.

An end to police brutality directed against citizens using their constitutional right of peaceful demonstrations

## II. The Job demands include:

A massive Federal Public Works Program to provide jobs for all the unemployed and Federal legislation to promote an expanding economy.

A Federal Fair Employment Practices Act to bar job discrimination by Federal, State, and Municipal governments, and by private employers, contractors, employment agencies and trade unions. Broadening of the Fair Labor Standards Act to include the uncovered areas of employment where Negroes and other minorities work at slave wages; and the establishment of a national minimum wage of not less than \$2.00 per hour.<sup>52</sup>

In this demand, discrimination in employment was distinguished from segregation and discrimination in other areas: the prohibition of discrimination in employment was a part of the demand to give black people more opportunities for decent jobs. In the organisation's perspective, because 'we cannot have fair employment until we have full employment', 'it would be dangerous and misleading to call for fair employment practices enforcement without at the same time calling attention to the declining number of employment opportunities'.<sup>53</sup> Therefore, we can say that this demand for anti-discrimination in employment was based on the right to work, as explained in Chapter 5.

However, the vast majority of the trade unions had been discriminating against blacks and were reluctant to prohibit such discrimination. While the Wagner Act was being discussed in the Congress, civil rights organisations, such as the NAACP and the National Urban League, launched a nationwide campaign demanding the 'inclusion of an amendment that would have denied the benefits of the legislation to any union which discriminated on the basis of race'.<sup>54</sup> However, the AFL strongly opposed the inclusion, the result of which was that although that amendment was provided in the original draft of the Wagner Act, it was removed from the Act.<sup>55</sup> Trade unions' attitudes reluctantly changed in the 1950s and the early 1960s towards supporting anti-discrimination law in employment to prohibit discrimination by both

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<sup>52</sup> 'Organizing Manual No. 1 of the March' cited in D. and C. Hamilton, 1997, 126.

<sup>53</sup> Testimony of A. Philip Randolph (25 July 1963), 88<sup>th</sup> Congress Senate Hearings before the Subcommittee on Employment and Manpower on Bills Relating to Equal Employment Opportunities

<sup>54</sup> Letter from Walter White to Senator Robert F. Wagner, 17 April 1934 (NAACP files) and NLRB, 1949 1058-1069 cited in Hill, 1977, 107.

<sup>55</sup> Hill, 1977, 108.

labour unions and employers. Some trade unions attended the LC and offered financial support to the CRM. George Meany, the president of the AFL-CIO, supported the introduction of an employment anti-discrimination law in 1962, acknowledging discrimination among its affiliates.<sup>56</sup>

Despite the official support for an anti-discrimination law in employment that included the prohibition of trade unions' discrimination against blacks, the AFL-CIO was defensive about its affiliates' persistent and widespread discriminatory practices.<sup>57</sup> The unions also declined to adopt strong measures against affiliate unions which were blatantly discriminatory against black workers. Because of the attitudes of trade unions, there was strong tension between the AFL-CIO and the NAACP in the 1950s and the early 1960s.<sup>58</sup> In addition, trade unions still feared that their seniority rights secured by collective agreements would be eliminated by a new anti-discrimination law during the legislative process of Title VII.<sup>59</sup> Thus, it was not in the main trade unions' interest to positively push through the enactment of the law.

From the social movement perspective, more importantly, they did not attempt to demand an anti-discrimination bill based on their free labour ideal in the 1960s. On the contrary, trade unions relied on the liberty argument, in which a private association was able to decide its own membership policy, when they went to court to defend denying membership to black workers.<sup>60</sup> In addition, they referred to freedom of contract in order to defend discriminatory collective agreements against black workers.<sup>61</sup> Their lack of the free labour version of anti-discrimination rights in employment in the 1950s and 1960s was in stark contrast with their willingness to constitutionalise their free labour ideal in the Thirteenth Amendment with regard to an anti-injunction bill against picketing and the Wagner Act in the 1920s-1930s. Given the trade unions' situation, the NALC's demands were an isolated incident in the whole picture of the trade unions.

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<sup>56</sup> See, eg, Testimony of AFL-CIO President George Meany in House Report No. 87-1370 reprinted in EEOC, 1968, 2158-2159.

<sup>57</sup> See Hill, 1993.

<sup>58</sup> See D. and C. Hamilton, 1997, Chapter 6.

<sup>59</sup> See Hill, 1998.

<sup>60</sup> See, eg, *Railway Mail Association v. Corsi*, 326 US 88 (1945); *Oliphant v. Brotherhood of Locomotive Firemen and Enginemen*, 262 F. 2d 359 (1959).

<sup>61</sup> See, eg, *Steele v. Louisville*, 323 US 192 (1944); *Brotherhood of Railroad Trainmen v. Howard*, 343 US 768 (1952); *Syres v. Oil Workers International Union*, 350 US 892 (1955).

### 7.4.3. The NAACP

When litigation is brought as part of social movements, it has a different meaning from normal litigation. What kind of legal arguments should be made are decided according to the goal and strategy of the social movements. Rulings in favour of the movement increase its membership and popular support. Furthermore, based on their experience of legal battles and lawsuits, the movements demand passage of laws to fulfil their goals and ideals. In this sense litigation is a process of social movements.<sup>62</sup>

This perspective can be applied to the NAACP, which is the oldest, the largest and the best organised CRM organisation.<sup>63</sup> It argued most legal cases on behalf of black workers. It chose which suits to bring to court and crafted the legal arguments, following its strategy to achieve its goals.<sup>64</sup> Thus, its choice of cases and arguments throughout the CRM period show the values it was based on and how those values changed in demanding anti-discrimination rights.

During the 1940s, the NAACP lawyers adopted both the right to work and the equality approaches to employment discrimination. They were in charge of the state court cases such as *James v. Marinsip*, in which the right to work argument was used to prohibit discrimination against blacks as was shown in subsection 7.3.3. As these cases demonstrate, they defended anti-discrimination in employment by relying on the right to work approach.<sup>65</sup> Thus, the NAACP had not decided in the 1940s which approach, in principle, should be utilised in grounding anti-discrimination in employment.

In the 1940s, the NAACP campaigned for full employment legislation and the inclusion of agricultural workers in the protection of the FLSA of 1938 and the increase of the national minimum wage as well as a federal anti-discrimination law in employment.<sup>66</sup> It did so because such legislative changes would, it thought, substantially benefit black workers, who were much more likely to suffer from unemployment and low wages. For instance, the organisation actively supported the idea of the right of 'all Americans to have the right to useful, remunerative, regular

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<sup>62</sup> Tushnet, 1987, xi.

<sup>63</sup> J. Davis, 2001, 155.

<sup>64</sup> See Tushnet, 1987.

<sup>65</sup> Generally see, Goluboff, 2005.

<sup>66</sup> See D. and C. Hamilton, 1997, Chapter 3.

and full time employment' in the Full Employment Bill of 1945 and demanded an additional anti-discrimination clause in the Act which 'prohibits discrimination on account of race, creed, color, or national origin in the administration of its benefits'.<sup>67</sup>

However, the NAACP lawyers gradually began to focus on the equality approach to discrimination in employment in the 1950s. In 1951, the NAACP for the first time passed a resolution that made opposition to segregation one of its tenets.<sup>68</sup> In addition, they deliberately avoided litigation over employment discrimination. Moreover, in 1951, when the NAACP lawyers held their annual conference, labour and employment were not dealt with, while other issues, such as public education, transportation, health, housing and recreational facilities, public gatherings and all places of public accommodation, had priority in their legal battles.<sup>69</sup> Although the NAACP did not stop confronting discrimination in jobs and unions in the 1950s, it did so through the National Labor Relations Board (NLRB) but not through the courts.<sup>70</sup> Moreover, its legal argument was no longer about the right to work: it was that the application of the Equal Protection Clause of the Fourteenth Amendment should not be confined to narrowly construed state action and accordingly should apply to discrimination by employers and unions.<sup>71</sup>

The change in the NAACP's approach to employment discrimination can be explained by several internal and external factors. Firstly, this approach was consistent with anti-discrimination in other domains of social life, such as housing, public accommodation and voting rights.<sup>72</sup> All of its cases could be explained by anti-discrimination based on equality. Thus, the anti-discrimination demand in employment was one part of the campaign for the equality of black people in numerous social domains.

Secondly, the NAACP's focus on equality resulted partly from the strong anti-Communist climate of the 1950s. This climate was exemplified by McCarthyism which dominated US society when the Cold War started after World War II.<sup>73</sup> Under the influence of this climate, the association adopted an anti-communism policy. In

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<sup>67</sup> Statement of Walter White (Aug. 29, 1945), 79<sup>th</sup> Congress Senate Hearings on S. 380.

<sup>68</sup> For detailed accounts, see Goluboff, 2005, 1479.

<sup>69</sup> *Ibid.*, 1457.

<sup>70</sup> See Lee, 2008.

<sup>71</sup> *Ibid.*, 328.

<sup>72</sup> Goluboff, 2005, 1427-1428.

<sup>73</sup> *Ibid.*

1950, for instance, the NAACP annual convention passed a resolution to set up a committee to explore the extent of Communist infiltration in the local branches and to suspend the charter of branches that were controlled by Communists.<sup>74</sup> This anti-communism policy narrowed the scope of its policies regarding employment discrimination, as the right to work approach to anti-discrimination in employment could be more easily attacked as a communist-type policy. Accordingly, anti-discrimination in employment was hardly perceived as the right to work; other employment rights that were to be accompanied by anti-discrimination in employment in the right to work approach were gradually divorced from anti-discrimination in employment in the NAACP's campaigns of the 1950s.

In contrast, thirdly, the NAACP's legal campaign for all civil rights of blacks, relying on the value of equality, led to encouraging victories in the Supreme Court. In one of the NAACP's cases,<sup>75</sup> the Supreme Court held that court enforcement of restrictive covenants against blacks was unconstitutional, violating the Equal Protection Clause. However, the NAACP saw the greatest victory in the *Brown* decision,<sup>76</sup> in which the Court held that segregation in public schools was in breach of the Clause, reversing its previous decision in *Plessy*.<sup>77</sup> This decision encouraged the CRM to strive for the mass mobilisation for blacks' civil rights in order to achieve desegregation and equality in all areas of social life. Because of its importance in the CRM, the *Brown* decision is described as giving 'black leaders a legal basis for arguing for equal treatment, not only in the school room but in the community generally'.<sup>78</sup>

As was demonstrated with the NAACP, the strength of the demand to prohibit segregation and discrimination in all areas of social life explains why anti-discrimination rights demands based on the right to work in the CRM were ignored, although they were present even in 1963 as one of the two official demands made by the leaders of the Washington March for Jobs and Freedom. The original demands for a \$2 minimum wage and a federal public works programme were not made in the March. As the initial programmes for the jobless were dropped, the priorities gradually shifted to civil rights demands in which, of the several job demands

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<sup>74</sup> For an account of the NAACP's anti-communism policy, see Berg, 2007, 88-94.

<sup>75</sup> *Shelley v. Kraemer*, 334 US 1 (1948).

<sup>76</sup> 347 US 483 (1954).

<sup>77</sup> *Plessy v. Ferguson*, 163 US 537 (1896).

<sup>78</sup> Loevy, 1997, 41.

adopted in the preparation of the March, anti-discrimination in employment alone was included.<sup>79</sup> The civil rights demands drew media attention.<sup>80</sup> In a meeting shortly after the March on the day, civil rights leaders attempted to persuade President Kennedy to include a provision against employment discrimination as one of the civil rights demands in the CRA of 1963.<sup>81</sup>

Overall, the CRM was not able to take a different approach to employment discrimination. This was because civil rights organisations adjusted to the strong conservative climate and pursued doctrinal consistency in relation to all kinds of discrimination against blacks. Moreover, persistent discrimination against blacks within the main trade unions prevented them from demanding anti-discrimination in employment based on a value such as free labour. From these findings, however, it does not follow that, had conditions been different, Title VII would have been established by reference to different values. Nonetheless, the explanation above shows why a different approach to anti-discrimination in employment was not distinctively present either in the legislative history of Title VII or in the demands of the CRM. In this regard, the CRM's internal and external conditions were an important factor in reaching an almost unanimous agreement that Title VII would have to be based on equality.

## **7.5. Establishment of Equality into Title VII**

The establishment of a particular value in a law is not always complete, as the law must contend with a complicated reality. Thus, even if Title VII was principally based on equality, some parts of the law could have been related to values other than equality as exceptions, or particular provisions in the law could have escaped the equality-based interpretation. However, this possibility was completely removed as some provisions were inserted in Title VII. This section will explore how equality was firmly established and what affected this complete establishment of equality during the legislative process of Title VII.

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<sup>79</sup> See C. and B. Whalen, 1985, 27; Pfeffer, 1990, 254.

<sup>80</sup> D. and C. Hamilton, 1997, 128.

<sup>81</sup> Pfeffer, 1990, 254.

### 7.5.1. Disjunction between Fair and Full Employment

As was mentioned in Section 7.2, Title VII created a link to anti-discrimination rights in relation to voting, public accommodation and public schools through the shared value of equality. At the same time, however, anti-discrimination in employment based on equality was separated from other employment rights during the legislative process of Title VII. In other words, grounding Title VII on equality severed it from other employment rights which could have been covered by the right to work approach.

In the message of President Kennedy to the Congress,<sup>82</sup> which was the start of the long process of enacting the CRA of 1964, the focus in the area of employment was the unemployment of blacks. Promoting employment opportunities that were aimed at 'fair and full employment' was so vital as to make other civil rights of blacks, such as voting rights and equal access to public accommodation, meaningless without it.<sup>83</sup> In order to give blacks more employment opportunities, not only racial discrimination in employment must be eliminated but also more education and training to raise the level of skills must be given to blacks.<sup>84</sup> Both the former and the latter were equally crucial and indispensable in order to tackle unemployment of blacks. In the end of the message, it was again emphasised that 'no false lines are drawn in assuring equality of the right and opportunity to make a decent living'.<sup>85</sup>

The close relation between the two measures of preventing unemployment of blacks shown in the President's message disappeared when they were separately dealt with in two different bills: while anti-discrimination rights of blacks in employment were guaranteed in Title VII based on equality along with the prohibition of racial discrimination in other domains in 1964, a separate law for full employment, the Economic Opportunity Act (EOA) was enacted in the same year. On the one hand, Title VII not only prohibits discrimination against blacks. It may sometimes prevent affirmative policies for blacks, as will be shown in the next subsection. On the other hand, the purpose of the EOA was to 'eliminate the paradox of poverty' 'by opening to everyone the opportunity for education and training, the opportunity to work, and

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<sup>82</sup> Kennedy, 1963.

<sup>83</sup> Ibid., 7.

<sup>84</sup> Ibid., 8-10.

<sup>85</sup> Ibid., 11.



the opportunity to live in decency and dignity'.<sup>86</sup> Thus, for instance, a work-study programme for youth of high school age and the public welfare work-relief and training programmes were provided for in the EOA. However, these programmes seemingly have nothing to do with measures for more education and training of blacks as stated in the message. In this sense, not only anti-discrimination and positive measures to alleviate unemployment of blacks were separately enacted, but also the intrinsic link between them could hardly be found in the two Acts in terms of their substance.

### **7.5.2. The Exclusion of Anti-equality Measures in Title VII**

Even though equality was declared to be the underlying value of Title VII, the ambiguity of equality and the variability in its use could have enabled Title VII to be interpreted to allow affirmative or protective measures for minority groups. For instance, an equal employment opportunity bill which passed the Senate Committee on Labor and Public Welfare illustrates this possibility:

The Congress further finds that because of the accumulated impact of prior discrimination and related disadvantages in employment, education, housing, and other areas, a nationwide effort is required to secure equal employment opportunity by the affirmative and conscious efforts of government, employers, unions, and others. Efforts to equalize disparities in employment opportunity should include all of the incidents and conditions of employment opportunity, including not only hiring, promotion, transfer, seniority, discharge, suspension, and retirement but also recruitment and recruitment advertising, apprenticeship and other job training programmes, access to all employment facilities and services, participation in employee organizations, and other incidents of employment opportunity necessary to the achievement of equality as an existing reality in the operation of the national job market.<sup>87</sup>

According to this section, affirmative measures in favour of black workers would be allowed if they were aimed at correcting the adverse effect of past discrimination. In other words, it could have been interpreted that the provision above encourages the government, employers and labour unions to adopt a variety of positive action programmes. Although this interpretation contradicts the meaning of equal treatment, it is apparent that the provision above would have enabled a variety of affirmative measures interpreted to be allowed.

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<sup>86</sup> EOA of 1964, s2.

<sup>87</sup> S. 1937 (88<sup>th</sup>, 1963), s2.

However, equality underlying Title VII became stricter in its application as the legislative process proceeded to the Senate. Even after the CRA passed the House after considerable amendment, being considerably moderated, objection to the bill in the Senate was still strong and well organised. Opponents of the bill exploited the filibuster by which the previous civil rights bills had been defeated.

Even though the Supreme Court held during the New Deal period that several employment laws which limited employers' economic liberty were constitutional under the Commerce Clause, the opponents of the bill continuously took advantage of the economic liberty argument when they criticised the bill during the legislative process in the Senate. Their premise was that the freedom of business is an important factor of the US prosperity and that limiting the freedom of business is really 'un-American'.<sup>88</sup> They asserted that Title VII would impair the freedom of business in several ways.<sup>89</sup> Facing the objection, proponents of the bill in the Senate made certain that Title VII was based on equality by inserting several provisions.

First of all, in relation to preferential treatment to which the objection was stronger, the opponents maintained that the bill would force employers to hire blacks in order to maintain racial balance and, as a result, it would legitimise racial quotas.<sup>90</sup> This criticism was intended to stir a fear that the American business culture based on economic liberty would be jeopardised.

In response to this kind of charge repeated during the whole legislative process, the proponents of the bill confirmed that the bill was aimed at securing equality. They argued that the bill did not limit employers' freedom of business and just prohibited discrimination because of race. By using the meaning of equality, they emphasised their argument that racial quota would not be allowed in the bill. In a letter to a Senator, for instance, the Department of Justice argued that 'what Title VII seeks to accomplish is equal treatment for all',<sup>91</sup> denying the argument that the introduction of Title VII would lead to preferential treatment in favour of blacks. Notwithstanding this endorsement, the opponents of the bill continued to attack the bill by naming it 'a quota bill'. Again defending the bill, a proponent succinctly emphasised the equality nature of Title VII:

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<sup>88</sup> See, eg, minority views of Senator Hill on S. 1937 in Senate Report, 88-867, 1964.

<sup>89</sup> Ibid., 40.

<sup>90</sup> See Senator Hill, 110 CR 4764 (1964).

<sup>91</sup> 110 CR 7207 (1964).

Those opposed to H.R. 7152 should realize that to hire a Negro solely because he is a Negro is racial discrimination, just as much as a “white only” employment policy. Both forms of discrimination are prohibited. The language of that title simply states that race is not a qualification for employment. Every man must be judged according to his ability. In that respect, all men are to have an equal opportunity to be considered for a particular job. Some people charge that H.R. 7152 favors the Negro, at the expense of the white majority. But how can the language of equality favour one race or one religion over another? Equality can have only one meaning, and that meaning is self-evident to reasonable men. Those who say that equality means favouritism do violence to commonsense.<sup>92</sup>

Furthermore, Senator Allott, one of the proponents of the bill, proposed an amendment on 4 May in an effort to make it clear that ‘no quota system will be imposed if title VII becomes law’.<sup>93</sup> Although his amendment was not adopted on that day, the sense of this amendment was incorporated in the Dirksen-Mansfield compromise as a subsection in Title VII on 26 May 1964,<sup>94</sup> which became 703(j) in current Title VII without any further amendment. From this legislative history, one can see that the amendment in relation to preferential treatment was aimed at disallowing any interpretation based on other than equality.<sup>95</sup>

Moreover, the opponents of the bill argued that it would destroy seniority systems. Although this accusation was designed to attract opposition to the bill mainly from white male workers who feared that they would be deprived of their seniority rights by the bill, this criticism was theoretically based on economic liberty. This was because seniority rights achieved through collective bargaining were legally protected as a kind of contract.

The proponents defended the bill by emphasising that Title VII would have no effect on seniority systems even where an employer had been discriminating against blacks in the past and as a result had an all-white workforce.<sup>96</sup> This interpretation of

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<sup>92</sup> Senator Williams, 110 CR 8921 (1964).

<sup>93</sup> 110 CR 9881 (1964).

<sup>94</sup> ‘Nothing contained in this title shall be interpreted to require any employer, ... subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex or national origin of such individual or group ...’ (703 (j), the Mansfield-Dirksen Amendment in 110 CR 11926-11935 (1964).

<sup>95</sup> See Vaas, 1966; a dissenting opinion of Justice Rehnquist in *Weber* (443 US 193 (1979)); Rodriguez & Weingast, 2003, 1517-1520. However, it should be noted that the Supreme Court held in *Weber* that the legislative history on 703(j) suggests that employers are not ‘required’ to take affirmative action programmes and accordingly may be ‘allowed’ to voluntarily adopt them.

<sup>96</sup> Department of Justice, ‘Reply to Arguments Made by Senator Hill’, submitted at the request of Senator Clark in 110 CR 7207 (1964).

Title VII would be contrary to that of the equal employment opportunity bill illustrated above, which would allow employers to make compensation for past discrimination by means of affirmative measures. Further, in order to make this effect clear and as a result to gain more votes for closing the filibuster, a new provision was inserted in the Dirksen-Mansfield compromise.<sup>97</sup> This provision without any further amendment became the first part of 730 (h) in the final act.

### 7.5.3. The Exclusion of Non-equality Measures

The *Motorola* decision<sup>98</sup> involved a standard ability test for a job. A black applicant who was not able to meet a satisfactory score for the job claimed that he was denied a job because of his race. An examiner of the case in a state equal opportunity commission held that the test was not suitable for the culturally deprived and disadvantaged groups and as a result was so discriminatory that the black applicant was denied job opportunities even though his job experience and relevant qualifications afterwards proved that he was fully qualified for the job.

The fact that a popular ability test was ordered to be corrected worried Senators, who were reluctant to support the bill. The main reason for opposing the civil rights bill was, it was argued, that 'the regulations, law suits, and Federal pressures placed upon private business by this title are utterly unacceptable in a free economy',<sup>99</sup> which could be exemplified by *Motorola*. Even though dealing with these rules in Title VII would not be necessarily contrary to the nature of equality as it would be concerned with correcting them but not preferring blacks, they argued that it would still encroach upon the freedom of business based on economic liberty.

Responding to the charge using *Motorola*, the proponents of the bill maintained that this case would not take place under the civil rights bill. This was, they argued, because *Motorola* had no applicability to the provisions of Title VII as all tests made by employers were 'legal unless used for the purpose of discrimination'.<sup>100</sup> Thus, they assured the opponents that, under Title VII, 'an employer may set his qualifications as high as he likes, he may test to determine which applicants have

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<sup>97</sup> 'Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards ... pursuant to a bona fide seniority or merit system ...' (730 (h), the Mansfield-Dirksen Amendment, 110 CR 1926-11935 (1964).

<sup>98</sup> Illinois FEPC decision, No. 63 C-127, *Leon Myart v. Motorola* in 110 CR 5662-5664 (1964).

<sup>99</sup> Senator Clark and Case, Interpretative Memorandum on Title VII in 110 CR 7212-7215 (1964).

<sup>100</sup> Senator Humphrey, 110 CR 13505 (1964).

these qualifications, and he may hire, assign and promote on the basis of test performance'.<sup>101</sup>

Despite the confirmation of the proponents of the bill, Senator Tower, one of the opponents, during the legislative process of Title VII twice proposed an amendment confirming that using an ability test was not discriminatory at all. After the second failure, when he modified his amendment,<sup>102</sup> he finally succeeded in inserting the ability test provision. According to this provision, workplace rules on ability tests were beyond the scope of Title VII, unless the rules themselves were made on a racial distinction.

Overall, the legislative process in the Senate in relation to the provisions of preferential treatment and seniority rights illustrates that those provisions were inserted to confirm that Title VII was based on equality, in particular, equal treatment. This insertion was a response to the criticism that Title VII would result in a racial quota which would jeopardise the unique American system fully guaranteeing economic liberty. After the compromise, Senator Humphrey emphasised this point by saying that the subsection as regards preferential treatment (703 (j)) 'does not represent any change in the substance of the title. It does state clearly and accurately what we have maintained all along about the bill's intent and meaning.'<sup>103</sup> This was true of the other newly inserted provisions above. In this regard, it can be said that Title VII adjusted itself to strict equality so as to least impair economic liberty.

## 7.6. Conclusion

This chapter has explored why and how equality was chosen as the underlying value of Title VII. First of all, complete imbalance in the value structure regarding employment made it very difficult to ground anti-discrimination in employment on the right to work. With the failure to make the Thirteenth Amendment include the free labour ideal, the imbalance between economic liberty and counter-values was not successfully corrected. Because of this imbalance, collective labour rights secured during the New Deal were based on industrial peace derived from the

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<sup>101</sup> Senator Clark and Case, 110 CR, 7212-7215 (1964).

<sup>102</sup> 'Nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test or action upon the results is not designed, intended, or used to discriminate because of race, color, religion, sex, or national origin' (Amendment No. 952 in 110. CR 13724 (1964).

<sup>103</sup> Senator Humphrey, 110 CR 12721-12725 (1964).

Commercial Clause. Under these circumstances, equality was more likely to be available to ground anti-discrimination in employment as it is more visible in the value structure and less conflicting with the dominant value of economic liberty.

However, the narrowness of choice in establishing a value underlying anti-discrimination law in employment did not mean that it was impossible to ground the law in values other than equality. In effect, there had been attempts to establish anti-discrimination law relying on a different value in the 1940s. In addition, the prohibition of discrimination on the grounds of race in employment was demanded alongside other employment rights regarding the national minimum wage and full employment in the early 1960s. However, several factors made the main current of the CRM turn to equality as the underlying value of its anti-discrimination demands. The factors include the politically conservative climate, the CRM's pursuance of doctrinal consistency in relation to discrimination, and segregation in other areas. What is more, widespread and persistent discriminatory practices of trade unions prevented them from positively pursuing the regulation of discrimination in employment based on the right to work. This inability of trade unions was in contrast with their active pursuit of the free labour ideal in the 1920s and the 1930s in relation to collective labour rights.

Thirdly, during the legislative process of Title VII, the equality nature of the law was strengthened through pressure from its opponents. Their objections were mainly based on the fear that Title VII would seriously restrain economic liberty and deprive white workers of their seniority rights. In response to the objections, the proponents of the law made it clear by adding several amendments to Title VII that only equality would sustain Title VII. As a result of this legislative process, equality applied to Title VII strictly, removing the possibility that Title VII would allow exceptional interpretations based on other values. This legislative process shows that the dominance of economic liberty substantively contributed to the complete establishment of equality in Title VII.

Therefore, we have found that the choice of equality as the underlying value of Title VII cannot be understood properly as severed from the particular social and historical context in which the law was established. The attempts to ground anti-discrimination in employment on the right to work, to say the least, would have been more visible in the legislative history of Title VII in a different social and historical context. If a general value protecting workers' rights, such as free labour, had been guaranteed in

the Constitution, for instance, it would have been much easier to propose and adopt anti-discrimination law in employment based on the right to work. Even if it had not been, the force of the CRM might have had a different kind of Title VII proposed in the Congress in a less conservative political climate with the active support of the main trade unions.

## **Chapter 8 The Making of the Sex Discrimination Act 1975**

### **8.1. Introduction**

We may suppose that a variety of factors influenced the establishment of the SDA 1975. Of the possible factors, some people may pay attention to the US influence. Indeed, it cannot be denied that the case of US anti-discrimination law facilitated the introduction of the SDA 1975 as well as the RRA 1976. For instance, an EEOC official of the US was invited to give evidence to the Select Committee for sex discrimination legislation in 1973 and convincingly illustrated, in particular, the need for state intervention in sex discrimination in employment, which was previously regarded as a private matter.<sup>1</sup> What is more, the influence of the US experience on the SDA 1975 was illustrated by the legislative history of the insertion of indirect discrimination provision. Initially, the White Paper for the Act did not include indirect discrimination provisions; however, they were inserted after those drafting the Bill found during a visit to the US that ‘they [had] defined the concept of what discrimination means too narrowly in the White Paper’.<sup>2</sup>

Nevertheless, the US experience was simply an external reference. Foreign examples were used in order to strengthen the arguments in an attempt to introduce the law and to shape it according to the demands of all the relevant agents, such as political parties and social movements. In other words, the influence of foreign examples was exerted on the domestic politics surrounding the making of the law. Thus, the influence of the former should be distinguished from that of the latter, the unique features of which actually determined whether a particular law should be introduced and, if so, how the law should be shaped. In this sense, the US influence was not a factor equivalent to the value structure governing employment relations and social movements in the process of establishing equality in the SDA 1975.

On the other hand, others may point to the UK’s membership of the EEC as an influential factor in the establishment of the Act. Unlike the US influence, EEC

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<sup>1</sup> See the Memorandum submitted by Ms. S. Fuentes (Chief of the Legislative Counsel Division at the EEOC), and Examination of Mrs. C. East (deputising for Ms Fuentes) in HL Select Committee on the Anti-discrimination Bill 1972.

<sup>2</sup> Lester, 1995, 227.



membership may have been a factor equivalent to the politics and value structure. This is because, in principle, an anti-discrimination law passed in the UK must comply with EU law. Hence, equality-based EU anti-discrimination might have led to the establishment of equality in the Act, even though social movements might have demanded anti-discrimination law based on values other than equality. However, this was not the case with the introduction of the SDA 1975. As Davies points out, the introduction of the Act was inevitable because of strong domestic pressure from the Trade Union Congress (TUC) and the Women's Movement (WM), regardless of British membership of the EEC.<sup>3</sup> Indeed, the drafters never considered the ETD. This is illustrated by Anthony Lester's memory of drafting the SDA 1975, saying that he 'never saw the text of the draft directive before it was approved, on February 8, 1976.'<sup>4</sup>

Therefore, this chapter adopts the same perspective as the previous chapter, focusing on both the value structure governing employment relations and the influence of social movements on anti-discrimination law in employment. Drawing on this perspective, this chapter will look at how and why equality, rather than the right to work, was chosen as the underlying value of the Act. To this end, firstly, the chapter will consider the built-in value structure in employment relations at the time of its introduction. In particular, it will explore how the unique British principle in industrial relations, namely voluntarism, affected the development of counter-values against economic liberty. Then the chapter will consider how the establishment of equality was influenced by social movements, such as the WM and the Labour Movement. Lastly, it will look at how equality was established in the specific contents of the Act. This last section, in particular, will deal with how the protective legislation for women was treated in the process of the establishment of equality in the Act.

## **8.2. Different Approaches to Anti-discrimination in Employment**

In the 1960s and the early 1970s, before the SDA 1975 came into being, a particular kind of discrimination in employment was dealt with in the courts. This

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<sup>3</sup> Davies, 1988, 35-36.

<sup>4</sup> Lester, 1995, 228.

discrimination was concerned with professional organisations and trade unions, which had job control over a particular profession by means of, for example, a closed-shop agreement with employers. When such organisations discriminated against someone by refusing admission to or depriving membership of him or her, for unreasonable or capricious reasons, the courts – in which Lord Denning played an important role – ruled that this sort of discrimination was in breach of the right to work.

This right to work was derived from the fact that discrimination in employment prevented people from earning their living in a particular profession. Because of the importance of work for people's livelihood, they should be protected from all unreasonable or capricious discrimination. For instance, in a case where a worker was excluded from his trade union because of its fault and was refused readmission, Lord Denning explained the right to work to prevent discrimination as follows:

The reason lies in the man's right to work. This is now fully recognised by law. It is a right which is of especial importance when a trade union operates a 'closed shop' or '100 per cent membership': for that means that no man can become employed or remain in employment with a firm unless he is a member of the union. If his union card is withdrawn, he has to leave the employment. He is deprived of his livelihood. The courts of this country will not allow so great a power to be exercised arbitrarily or capriciously or with unfair discrimination, neither in the making of rules, nor in the enforcement of them.<sup>5</sup>

Furthermore, Lord Denning applied this sort of right in other cases, one where a woman was refused a license for a horseracing trainer on the grounds of her sex,<sup>6</sup> and another where a worker was expelled from his union because of his criminal record.<sup>7</sup> According to Lord Denning, these discrimination cases both breached 'a right to work at his trade or profession without being unjustly excluded'.<sup>8</sup> Of course, the right to work was confined to discrimination by voluntary organisations who had job control over a particular industry, although, as Hepple points out, it could be broadly interpreted as 'laying down a legally protected right to earn a living' and 'a corresponding duty on the part of an employer' not to discriminate against workers

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<sup>5</sup> *Edwards v. Society of Graphical and Allied Trades*, [1971] Ch 354, 376.

<sup>6</sup> *Nagle v. Feilden*, [1966] 2 QB 633.

<sup>7</sup> *Faramus v. Film Artistes' Association*, [1963] 1 All ER 636.

<sup>8</sup> *Nagle v. Feilden op. cit.* note 6, 644.

arbitrarily.<sup>9</sup> However, it is certain that as far as closed-shop agreements were concerned, the right to work prohibited trade union membership discrimination on all irrelevant grounds, relying on one of *the work values*, namely, subsistence. Despite his narrow focus, Lord Denning's approach to discrimination in employment was based on the right to work, as explained in Chapter 5.

In contrast to Lord Denning's view, the view of the government proposing the SDA of 1975, discrimination in employment was involved with equality, in particular equal opportunity or equal treatment. Equality was explicitly declared as the underlying value of the Act. Thus, having proposed sex discrimination legislation the White Paper concluded:

These are the Government's main legislative proposals to promote equality of opportunity for men and women and to deal with unfair discrimination against either sex. ... What matters, above all, is that these measures should encourage a major shift in the attitudes and actions of individual men and women so as to give reality to the ideals of justice and equality.<sup>10</sup>

The principle of equality recognises discrimination on the grounds of sex in every area of social life as 'morally unacceptable and socially harmful', causing the unequal status of women. The same principle of equality is applied in the RRA 1976 to prevent the discrimination against minority race groups, which leads to their unequal status. In this way, the prohibition of discrimination against particular groups was emphasized as an essential means of achieving equal status between these particular groups and other groups.

Overall, the right to work conceived as a right to earn one's living, was indeed used as an underlying value of anti-discrimination in employment before the Act. Nonetheless, in the Act, discrimination on the grounds of sex in employment was recognised as morally undesirable, since it breached the value of equality. Thus, the introduction of equality in regulating discrimination in employment can be understood in the context in which other possible values, such as the right to work, were ruled out.

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<sup>9</sup> Hepple, 1970, 252.

<sup>10</sup> Home Office, 1974, 27.

### **8.3. The Dominance of Economic Liberty and Voluntarism**

First of all, the choice of equality as the underlying value of the SDA 1975 can be seen as deriving from the value structure governing employment relations in the British legal system. This value structure is a precondition which legislatures and social movements had to face in seeking to base anti-discrimination in employment on a particular value. This section will consider how dominant values and their counter-values were configured in the governance of employment.

#### **8.3.1. The Dominance of Economic Liberty under the Common Law**

Citizens' liberty in relation to their property is realised mainly through their contractual activities with other citizens. Thus a contract must be freely entered into and terminated in order that the economic activities of citizens can be freely performed. In this regard, freedom of contract is always regarded as indispensable to economic liberty. As far as employment relations were concerned, economic liberty achieved through freedom of contract was an established principle under common law. Anyone was entitled to be free to enter into an employment contract and to terminate it. Moreover, the working conditions set in an employment contract were legally valid once the contract was freely entered into. Hence, under common law, all matters in employment were supposed to be regulated according to an employment contract that was freely entered into.

Freedom of contract was rarely restricted under common law. This was the case even in relation to workers' health and safety. It was not until 1937 that under common law employers had an implied contractual duty of care in regard to their employees' safety.<sup>11</sup> This was because, however harsh and unbearable working conditions were, freedom of contract made them legally enforceable once these conditions were voluntarily agreed between employees and their employers.

Based on freedom of contract, employers were able to hire and dismiss workers freely. No matter how unreasonably workers were treated by employers, this was permitted under common law. As early as the late 19<sup>th</sup> century, for instance, Lord Davey declared in *Allen v Flood* that 'an employer may discharge a workman, or may refuse to employ one from the most mistaken, capricious, or morally reprehensible motives that can be conceived, but the workman has no right of action

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<sup>11</sup> *Wilson & Clyde Co. v English*, [1938] AC 57.

against him.’<sup>12</sup> This freedom of contract on the employers’ side was justified on the grounds that workers were also entitled to work for any employer they wished and to stop working for him freely with or without a reason.

This freedom of contract overrode individuals’ freedom of work. In the case mentioned above it was held that a person who was not able to engage with a particular employer any more because of pressure and threats from other workers belonging to a different union had no legal remedy for his unreasonable expulsion from his work. This was, according to Lord Davey, because ‘a man has no right to any particular employment if it depends on the will of another’.<sup>13</sup>

Therefore, the dominance of freedom of contract may explain the context in which Lord Denning’s right to work, discussed in the previous section, was confined to discrimination by voluntary organisations having job control in a particular industry. His reasoning based on the right to work conceived as a right to earn one’s living could lead, for example, to an employer’s refusal to hire, or his dismissal of, a person because of sex or race being prohibited if it means that such discrimination deters the person discriminated against from earning his or her living. However, he never intended his right to work to apply to unreasonable discrimination by employers. In his book, Lord Denning states that the right to work was relevant only to prevent the abuse of power by monopolistic voluntary groups, in particular trade unions with a closed-shop agreement.<sup>14</sup> The narrow focus of his right to work<sup>15</sup> was due to the dominance of freedom of contract under common law. Without generally limiting freedom of contract, discrimination by employers could not have been regulated, even though it was widespread enough to put people’s livelihoods at risk.

### **8.3.2. Voluntarism and Counter-Values against Economic Liberty**

Voluntarism, which was firmly established in the British industrial system until at least the 1960s,<sup>16</sup> seeks to avoid legal intervention from the state in industrial

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<sup>12</sup> *Allen v Flood*, [1898] AC 1, 172.

<sup>13</sup> *Ibid* 173.

<sup>14</sup> See Denning, 1979, Part Four.

<sup>15</sup> Due to this nature of Lord Denning’s conception of the right to work, it was disputed in the courts in the 1970s whether it was ‘simply a reformulation in positive terms of the old doctrine of restraint of trade’ or ‘a much broader category of judicial public policy’ (See Hepple, 1981, 79-80).

<sup>16</sup> Davies and Freedland argue that voluntarism was cumulatively destroyed from the 1960s (Davies and Freedland, 1993, 59).

matters.<sup>17</sup> It prefers all industrial matters to be autonomously regulated through collective bargaining by the subjects concerned, namely employers and trade unions. In this sense, voluntarism is sometimes termed collective *laissez-faire*.<sup>18</sup> This subsection will look at how voluntarism sought by trade unions affected the development of workplace counter-values against economic liberty.

### 8.3.2.1. Working Time

The Factories Act (FA) of 1830 was aimed at protecting children from long working hours and dangerous working environments. Women were for the first time included in the coverage of the FA of 1844, under which women workers as well as children were prohibited from working more than twelve hours a day. The daily maximum working hours set in the FA became shortened to 10 hours in 1847. Also, the FAs that initially applied to the textile industry were gradually extended to cover other industries by the 1870s. However, throughout this period, the Act excluded the protection of male workers, who constituted the main labour force of the time.

Those who have closely studied the history of the protective laws for women and young workers argue that the regulation of working hours for women and young workers only was not the initial intention of the Short Time Committee which pressured Parliament to introduce the legislation. The Committee initially campaigned for the working time of all workers to be regulated by the legislation. Even when the Committee decided to demand the limitation of the working hours of children and later women, it was argued that this was a tactical choice, described as the battle 'behind women's petticoats'.<sup>19</sup> In effect, trade unions expected that shortening female workers' working hours would help adult male workers to achieve the reduction of their working hours.<sup>20</sup> Moreover, it was demonstrated that some trade unions really believed that general regulation of working hours by means of legislation would be necessary in the future.<sup>21</sup>

Despite this expectation, it seemed undeniable that a substantial number of trade unions, based upon the *laissez-faire* policy, did not want their working time to be

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<sup>17</sup> See Fox, 1985, Flanders, 1974 and Deakin & Wilkinson, 2004.

<sup>18</sup> Kahn-Freund, 1959, 224.

<sup>19</sup> Webbs, 1920, 297.

<sup>20</sup> See Hutching and Harrison, 1966, 65.

<sup>21</sup> Ibid., 66.

regulated by legislation.<sup>22</sup> For this reason, even within the trade unions that were in favour of statutory legislation for working time, 'the fallacy that any legislative interference with male adult labour is an economic error' had to be fought.<sup>23</sup> Those unions who opposed state intervention in working conditions justified the FAs on the basis that women and children were 'weak, helpless creatures in need of protection'<sup>24</sup> and accordingly were not able to exercise self-help under the principle of freedom of contract. Moreover, some trade unions supported the protective law for women because they feared that female workers would be hired as cheap labour, replacing male workers.<sup>25</sup> They expected that the legislation would deter employers from employing women because of the limitations of the working conditions imposed on them by it. As for these trade unions, there seemed to be no need for adult male workers' working conditions to be regulated by the FAs.

The tendency to leave adult male workers' working conditions unregulated was strengthened when trade unions achieved immunity from criminal liabilities over trade union activities, such as conspiracy and breach of employment contract, through the Trade Union Acts in the 1870s.<sup>26</sup> This was because their arguments for freedom of association were based on economic liberty. They maintained that their freedom of association was consistent with freedom of contract because freedom of association demanded 'perfect freedom for a workman to substitute collective for individual bargaining' if he thought that it would be to his advantage to do so.<sup>27</sup> It was presupposed in the trade unions' argument for their freedom of association that employers were entitled to be free to treat workers under freedom of contract. In their argument, however, employers should also be entitled to concede that they would limit their power through a collective agreement with the trade unions. Representatives of the trade unions demonstrated this point in their memo to the Home Secretary as follows:

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<sup>22</sup> Fox, 1985, 115.

<sup>23</sup> Circular of December 11, 1871 by Thomas Mawdsley, the spinners' secretary, cited in Webbs, 1920, 311.

<sup>24</sup> Boston, 1987, 26.

<sup>25</sup> See Morris, 1986, 119.

<sup>26</sup> Trade Union Act of 1871 accompanied by Criminal Law Amendment Act 1871 Employers and Workmen Act 1875 and Conspiracy and Protection of Property Act 1875.

<sup>27</sup> Webbs, 1920, 294.

We do not seek to interfere with the free competition of the individual in the exercise of his craft in his own way; but we reserve to ourselves the right either to work for, or to refuse to work for, an employer according to the circumstances of the case, just as the master has the right to discharge a workman, or workmen; and we deny that the individual right is in any way interfered with when it is done in concert.<sup>28</sup>

Of course, when trade unions achieved criminal immunity for combinations and strikes, this partially amended the nature of the freedom of contract that was understood to regulate individual employment relationships between workers and their employers. First of all, trade unions themselves could be negotiating bodies that were recognised as competent to reach an agreement with an employer. Moreover, trade unions were entitled to limit individual workers' freedom to work for any employer by closed-shop agreements, because of which individual workers could not be employed without joining trade unions. However, this sort of amendment of the individual freedom of contract was understood as being aimed at securing equal freedom between employers and workers represented collectively by trade unions.<sup>29</sup> Although it gave rise to the restraint of the freedom of trade under common law, the closed shop demand of the trade unions was legitimised as flowing from 'the right, now fully admitted, of every man to dispose of his labour as he thinks proper, and to combine with others in order to obtain the best terms he can'.<sup>30</sup> In this regard, the amendment of freedom of contract by trade unions was a transformation into a new version, rather than a limitation, of freedom of contract. Therefore, the process of achieving freedom of association under voluntarism reinforced the tendency that held that statutory employment protection was relevant only to women and young workers.

Although the policy of voluntarism was challenged several times within the TUC,<sup>31</sup> it lasted until the late 20<sup>th</sup> century. As a result, the protective legislation for women and children only, which was initially regarded as a temporary achievement, became a fixed policy of the trade unions. There had been no general legislation to protect all workers in relation to working time until the WTR came into force in 1998. As was demonstrated by the FAs, employment protection in the domain of working time was

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<sup>28</sup> Trade Unions Memo to the Home Secretary in April 1875 in Webbs, 1920, 295.

<sup>29</sup> Wedderburn, 2004, 136-137.

<sup>30</sup> Royal Commission, 1875, 22.

<sup>31</sup> For conflict within the TUC in relation to the demand for eight hours legislation, see Roberts, 1958, 136-139.



‘selective and subsidiary’<sup>32</sup> in its scope under the general governance of economic liberty. Hence, as far as working time was concerned, there were no general counter-values that were legally accepted against economic liberty at the time of the introduction of the SDA 1975.

### 8.3.2.2. Statutory Minimum Wage

As the trade unions had much more political strength in the 20<sup>th</sup> century than in the previous century, their voluntarism became institutionalised in British industrial relations. Voluntarism became ‘the dominant paradigm for British industrial relations policy’<sup>33</sup> in the 20<sup>th</sup> century. Direct state intervention in industrial relations was avoided by the government as much as possible.<sup>34</sup> Even when a particular piece of legislation in relation to individual employment rights was forced into being by pressure groups other than the trade unions, the legislation had to be transformed in terms of the way the rights were protected in order to adapt itself to the dominant paradigm.

The NMW, which is currently enforced under the NMWA 1998, had already been proposed in the late 19<sup>th</sup> century. In 1898, for example, the Webbs proposed the introduction of ‘a National Minimum of wages – the enactment of a definite sum of earnings per week below which no employer should be allowed to hire any worker’.<sup>35</sup> This NMW, as the name indicates, would have to cover not only certain industries but also the whole community. According to them, just as the FAs provided workers with a National Minimum of working hours and safety conditions at work, the state would have to directly interfere with free bargaining between employers and workers in order to set the NMWs.<sup>36</sup>

However, the Trade Boards Act (TBA) 1909, which can be said to have been a result of the Anti-Sweating Campaign,<sup>37</sup> under the influence of economic liberty and voluntarism, was not the sort of minimum wage legislation that the Webbs had demanded. First of all, the Act adopted a sectoral approach to minimum wages rather

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<sup>32</sup> Deakin and Wilkinson, 2004, 10.

<sup>33</sup> Ibid., 1.

<sup>34</sup> However, there is a view in which, unlike the description of British industrial relations in terms of voluntarism, the state has made ‘in fact active and legally grounded intervention’, although it ‘did not use legal instruments as the chosen means of intervention’ (Ewing, 1998, 2).

<sup>35</sup> Webbs, 1919, 774.

<sup>36</sup> Ibid., 774.

<sup>37</sup> See Morris, 1986, Chapter 8.

than a national one. Four industries were initially chosen for statutory minimum wages. Which industries were additionally regulated was decided by means of a Provisional Order made by the President of the Board and approved by the House of Commons (HC). The National Minimum approach to minimum wages was abandoned in a discussion of a draft bill because of the fear that it would never get through Parliament.<sup>38</sup> Under the governance of both freedom of contract and voluntarism, it was regarded as inconceivable to have a statutory minimum wage covering all industries.

Secondly, the aim of the Act itself shows that voluntarism was deeply entrenched in the Act. Encouraging collective bargaining was as significant as guaranteeing a minimum wage in the Act, although it was originally intended to achieve the latter aim. This point was well illustrated by Winston Churchill, the then Cabinet Minister in charge as President of the Board of Trade:

The principles on which we are proceeding are to endeavour to foster organisation in trades in which, by reason of the prevalence of exceptionally evil conditions, no organisation has yet taken root, and which, in consequence, no parity of bargaining power can be said to exist; to use these organisations when formed as instruments to determine minimum standards below which the wages paid ought not to be allowed to fall.<sup>39</sup>

To this end, the level of the minimum wage in an industry was to be decided by a trade board, which consisted of equal numbers of employers' representatives, workers' representatives and an odd number of independent members. As Baylis points out,<sup>40</sup> the reason why a minimum wage in a particular trade was to be set not by the state but by a trade board of employers and trade unions was to avoid the suspicion of state interference with the free bargaining structure. This stance of the Government in dealing with a statutory minimum wage was consistent with the demands of the trade unions. The TUC supported the Sweated Industries Bill, which was aimed at building wage boards consisting of representatives from trade unions and employers and fixing a minimum wage in a particular industry.<sup>41</sup> These wage

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<sup>38</sup> See Stewart and Hunter, 1964, 140-142.

<sup>39</sup> W. Churchill, HC Deb. 2, col. 1791-92. 24 March 1909.

<sup>40</sup> Bayliss, 1962, 8.

<sup>41</sup> See Roberts, 2004, 215.

boards were very similar to trade boards in the TBA 1909 in their formation and function.

As collective *laissez-faire* was more firmly established as the principal policy of British industrial relations, trade boards gradually became a supplementary measure supporting collective bargaining. The TBA 1918 provided that the Minister of Labour had the power to set up a Board in any trade where 'no adequate machinery exists for the effective regulations of wages throughout the trade and accordingly, having regard to the rate of wages prevailing should apply'.<sup>42</sup> Furthermore, under the Wage Councils Act (WCA) 1945, trade unions and employers were jointly entitled to apply to the Minister for a wage council, as the trade board was renamed in the Act 'on the grounds that the existing machinery for the settlement of remuneration and conditions of employment is likely to cease to exist or be adequate'.<sup>43</sup> This transformation of trade boards made the protection of minimum wages completely dependent on collective bargaining. Trade unions and employers were jointly able to decide not only the level of the minimum wage in an industry where they belonged but also whether or not wage councils would be set up. The dependence of minimum wages on collective bargaining gave rise to the fact that even the most vulnerable workers were not able to be protected where no wage councils were set up. Moreover, where wage councils were set up, the level of minimum wages varied depending on which industry a worker was in.

Therefore, it can be said that the value protecting a vulnerable worker in a sweating industry was almost buried under the principle of collective *laissez-faire*. In this regard, the protection of individual workers in terms of their wages had not been an independent value. It had been a sub-value, which was always subordinate to collective *laissez-faire* and was accordingly ambiguous in its presence.

### **8.3.2.3. Unfair Dismissal**

The regulation of arbitrary dismissal was not introduced until 1971, as the trade unions had opposed the introduction of statutory machinery for unfair dismissal according to voluntarism. The momentum for unfair dismissal to be tackled in a certain way occurred when the UK Government ratified the ILO Recommendation No. 119 on Termination of Employment in 1964. It provides that dismissal without

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<sup>42</sup> TBA 1918, s1(2).

<sup>43</sup> WCA 1945, s 2(1).

valid reasons should be prevented through national laws, collective agreements, work rules, etc. When the government subsequently sought opinions through the National Joint Advisory Council (NJAC) as to how to tackle arbitrary dismissal, the trade unions were reluctant to adopt the statutory regulation of dismissal. The final conclusion of the NJAC's report in 1967 was that company-based internal and industry-based external procedures should be voluntarily established.<sup>44</sup> The TUC General Council officially endorsed this conclusion.<sup>45</sup>

Afterwards, however, the government recognised that dismissal needed to be statutorily regulated in order to control unofficial strikes caused by dismissal. With the trade unions' power increasingly strengthened in the 1960s, the number of strikes arising from dismissals was not negligible: in 1964–1966 the NJAC's report revealed that on average 203 strikes took place annually in relation to disputes about dismissal in circumstances other than redundancy (constituting 9% of all stoppages).<sup>46</sup> Although the statutory regulation of dismissal would breach freedom of contract and voluntarism, the Government felt that preventing economic loss resulting from such strikes was necessary. In this context, the Donovan committee report proposed unfair dismissal law in 1968<sup>47</sup> and the then Labour Government included unfair dismissal provisions in the White Paper 'In Place of Strife', introducing an Industrial Relations Bill in 1969.

Although the trade unions strongly opposed the regulation of industrial relations that was envisaged in the White Paper, understanding it to be fundamentally contrary to voluntarism, the TUC decided to accept the unfair dismissal provisions contained in it. Probably, it was not able to defend its voluntaristic position in relation to the reality of unfair dismissal: it found that there was 'inadequate protection against arbitrary dismissal',<sup>48</sup> as was shown by the fact that less than 20% of all companies in the private sector had any sort of dismissals procedure<sup>49</sup> and that it was very unlikely to tackle it voluntarily.

However, the trade unions' acceptance of unfair dismissal law was not completely against voluntarism: their acceptance was made on the condition that voluntarily

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<sup>44</sup> See Ministry of Labour, 1967.

<sup>45</sup> See AR, 1969, 161.

<sup>46</sup> See Ministry of Labour, 1967, Appendix 2 and 3.

<sup>47</sup> Report of the Royal Commission (Cmnd 3623), 141-154.

<sup>48</sup> TUC, Annual Report (AR), 1969, 162.

<sup>49</sup> See Ministry of Labour, 1967, 6.

adopted dismissal procedures could be exempted from the statutory regulation of unfair dismissal; they expected that unfair dismissal law might encourage such voluntary procedures. The exemption clause was consistently maintained from the proposals of the Donovan committee to the Industrial Relations Act (IRA) 1971, in which unfair dismissal provisions were finally included. In this regard, unfair dismissal law was adjusted to the principle of voluntarism, although the extent of adjustment was relatively small compared to the regulations of wages and working time.

#### **8.3.2.4. Anti-discrimination Based on Which Value?**

As Chapter 5 revealed, the right to work approach would require the prohibition of discrimination on the grounds of a particular trait to be supplemented by other positive employment protection rights, such as the right to statutory minimum wages, certain working hours and job training. Thus, even this right to work approach focusing on discrimination on the grounds of a particular trait only would mean more constraints on freedom of contract than the equality approach. Based on these findings, moreover, we observed in the previous chapter that the equality approach to discrimination in employment was chosen as the underlying value of Title VII, since it conflicted less with the dominant value of economic liberty in the US.

In a similar vein, in the UK we find that it would have been much more difficult to rely on the idea of the right to work in an attempt to ground the prohibition of sex discrimination in employment on a particular idea when legislative proposals to prevent sex discrimination began to be put forward in the late 1960s and the early 1970s. As was discussed above, the trade unions in the UK opposed the statutory intervention of industrial relations necessarily accompanied by the introduction of positive employment protection rights. The protective legislation for workers had to be selective, subsidiary and sometimes subordinate to collective bargaining, as voluntarism became the major principle of British industrial policy. Voluntarism sought by trade unions did not change the dominance of economic liberty in the value structure at all.

Indeed, the consideration of economic liberty combined with voluntarism can be found when the government proposed an anti-discrimination law based on equality. In order to avoid the criticism that the SDA 1975 would interfere in economic liberty and collective *laissez-faire*, the White Paper had to emphasise that the issue of

discrimination against women was 'not a question of private relationships' but its effects on women were 'social questions', and accordingly were 'legitimate subjects of public interest' and were 'appropriate matters for government action.'<sup>50</sup> Moreover, positive measures for workers beyond the prohibition of discrimination were conceived of as 'a wide range of administrative and voluntary measures'.<sup>51</sup> Therefore, the choice of equality as the underlying value of the prohibition of sex discrimination in employment can be understood in the particular value structure in which the right to work approach to discrimination would have been in much greater conflict with the dominant value of economic liberty combined with voluntarism.

## **8.4. Social Movements and Suppressed Voices**

Discrimination against women in employment on the grounds of sex involves two different kinds of social movement issues, namely labour and women. As female workers increasingly participate in the labour market, on the one hand, their poor working conditions derived from discrimination against them should be one of the major concerns of the labour movement. On the other hand, given the importance of employment in people's social life, women's status in employment is one of the priorities of women's movements, which aim to generally improve women's status in our society. This section will consider how the two different social movements contributed to the establishment of equality in the Act despite different voices within them implicating the idea of the right to work.

### **8.4.1. Different Voices within the Trade Unions**

The TUC had bodies representing women's interests within its inner organisational structure. Women trade unionists within the TUC had had an annual conference (hereafter referred to as the Women's Conference (WC)) which discussed women's matters since 1931. The WC elected five representatives, all of which together constituted the Women's Advisory Committee (WAC). The Committee members were allocated two seats on the General Council of the TUC. Activities of the TUC relating to women's issues were undertaken by the Committee members. For

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<sup>50</sup> Home Office, 1974, 1.

<sup>51</sup> Ibid 5.

instance, the Committee members gave evidence to the Select Committee for the Sex Discrimination Bills in 1972 and 1973 on behalf of the TUC.

The WC generally acquiesced with the TUC's leadership in relation to anti-discrimination legislation. It agreed with the TUC's view that anti-discrimination legislation would not be desirable, in line with the tradition of voluntarism. It was not until April 1973 that, for the first time, the WC adopted a resolution to support anti-discrimination legislation, preceding the TUC Annual Congress' adoption of this resolution in September 1973.<sup>52</sup>

Nonetheless, women workers' views and demands expressed at the WC in relation to discrimination in employment were often different from those of the main trade unions. First of all, they viewed women's unequal pay as being combined with low wages. In 1970, the WM strongly opposed the fact that the EPA 1970 would not be extended to cover equal pay for work of equal value but was confined to equal pay for the same or equivalent work. From their point of view, women's low pay, where no comparators of the same or equivalent work were available, was supposed to be dealt with by introducing equal pay for work of equal value. In addition to this equality measure, however, the women workers at the WC linked discrimination in pay to a national minimum wage. In 1970, a woman worker at the WC proposed a motion to demand the introduction of a statutory minimum wage alongside equal pay for work of equal value. Her motion was based upon the view that minimum wage legislation would be complementary to the equal pay legislation in solving the issue of women's low pay. Furthermore, the reason why minimum wage legislation should be introduced was that collective bargaining was not effective because it was too slow and it was not able to cover unorganised industries. This idea of hers was explained as follows:

Because low pay is especially evident in certain industries and occupations which are difficult for unions to organise – and may I draw your attention to page 8 of the report, which says that kitchen hands, waitresses, shop assistants and cleaners are among the lowest paid – we think that some solution other than reliance on collective bargaining, which can have slow and incomplete success, is demanded. Some sort of statutory minimum wage national rate of earnings guarantee should be named. (...) A national minimum earnings guarantee of a similar figure, or even a higher figure, would help only those earning anything below that figure. It would be obviously of especial advantage to women

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<sup>52</sup> See TUC, Annual Women's Conference Report (AWCR), 1973, 69.

workers whose earnings are often restricted by the very nature of the job they perform – for example by the lack of opportunity to earn bonuses or other supplements.<sup>53</sup>

This motion was carried at the WC. Unlike other motions carried, however, there was no indication that the General Council considered it. The motion was not explicitly reported even to the annual Congress of the TUC. The fate of the motion was already expected when it was carried. While the WAC accepted it, it made it clear that the demand for a statutory national minimum wage in the motion was conditional, depending on whether the General Council would adopt minimum wage legislation rather than collective bargaining as a way of improving workers' low pay.<sup>54</sup> Eventually, the demand for a national minimum wage combined with the demand for equal pay for work of equal value was treated as just a 'contribution to the discussion on the whole question of equal pay'.<sup>55</sup>

Furthermore, women workers at the WC put discrimination in employment in the context of their other working conditions and domestic responsibilities. Pregnancy and maternity protection and childcare facilities had been their constant demand in the early 1970s. By adopting a series of resolutions during the early 1970s<sup>56</sup> the women workers at the WC continuously urged legislation to be made in order to provide more childcare facilities, such as nursery schools and day nurseries, for the convenience of working mothers. In addition, in 1974, when anti-discrimination legislation was about to be introduced, they pointed out that anti-discrimination legislation alone did not solve their difficulties at all. They linked the issue of discrimination to other positive legislative programmes, including childcare facilities. This was well explained by a woman delegate at the WC as follows:

Legislation against discrimination is a very negative approach. What we need is a positive programme to give women their real place in the world. Attention must be given to the problem of education and training and recognition also has to be given to women's dual role. While women's domestic responsibilities are equally, or nearly, as time-consuming to take any opportunities offered, it is no good having legislation if there are not the female support facilities for those

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<sup>53</sup> TUC, AWCR, 1970, 74.

<sup>54</sup> Ibid., 76.

<sup>55</sup> Ibid., 76.

<sup>56</sup> See each resolution in Reports of the WC in the early 1970s: TUC, AWCR 1970, 94; TUC, AWCR 1971, 25; TUC, AWCR 1973, 63.



women who want to progress further than the low-paid, dead-end jobs to which they are now relegated.<sup>57</sup>

Another different voice within the trade unions can be found in the Working Women's Charter (WWC) Campaign. The Campaign aimed to get the trade unions to adopt the Charter as their official policy. The Charter consisted of ten demands, as follows:

1. The rate for the job, regardless of sex, at rates negotiated by the trade unions, with a national minimum wage below which no wages should fall.
2. Equal opportunity of entry into occupations and in promotion regardless of sex and marital state.
3. Equal education and training for all occupations and compulsory day-release for all 16–19 year olds in employment.
4. Working conditions to be, without deterioration of previous conditions, the same for women as for men.
5. The removal of all legal and bureaucratic impediments to equality, e.g. with regard to tenancies, mortgages, pension schemes, taxation, passports, control over children, social security payments, hire-purchase agreements.
6. Improved provision of local authority day nurseries, free of charge, with extended hours to suit working mothers. Provision of nursery classes in day nurseries. More nursery schools.
7. 18 weeks' maternity leave with full net pay before and after the birth of a live child; 7 weeks after birth if the child is stillborn. No dismissal during pregnancy or maternity leave. No loss of security, pension or promotion prospects.
8. Family planning clinics supplying free contraception to be extended to cover every locality. Free abortion to be readily available.
9. Family allowances to be increased to £2.50 per child, including the first child.
10. To campaign amongst women to take an active part in the trade unions and in political life so that they may exercise an influence commensurate with their numbers and to campaign amongst men trade unionists that they may work to achieve this aim.<sup>58</sup>

It is apparent that the Charter was influenced by the WM, which will be explained in subsection 8.4.3. For instance, it included not only equal opportunity in employment (No. 2) but also equality in other areas (No. 5). Nonetheless, the Charter had some features which are not explainable by equality alone. First of all, it contained the demand of equal pay with a national minimum wage (No.1). Like the female workers at the WC above, it connected anti-discrimination in pay to a statutory minimum wage. Secondly, it included equal opportunity without

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<sup>57</sup> Miss J. C. Riddiough in TUC, AWCRC 1974, 69.

<sup>58</sup> Women's Report, 1975 (3/4), 2.

deterioration of previous conditions (No.4). By interpretation, this demand meant that the existing protective legislation for women should be extended to men rather than repealed, because to repeal protective legislation for women would lead to a deterioration of women's previous conditions. Hence, this demand was not only contrary to the maintenance of protective legislation for women only, which was supported by the TUC, but it was also different from the demand for the repealing of the legislation, which, as will be shown in subsection 8.4.3, was made by some organisations in the WM on the basis that it breached the principle of equality.

After the campaign started in early 1974, the Charter was, for the first time, adopted by the London Trade Councils in March 1974. Then it spread through dozens of trade unions and local trade councils and, by October 1975, 12 trade unions and 33 local trade councils had adopted the Charter.<sup>59</sup> Finally, it was proposed at the annual TUC Congress in 1975 that the WWC should be adopted as an official policy of the TUC. However, this motion was defeated by 3,697,000 votes to 6,224,000.

#### **8.4.2. The Main Trade Unions**

The trade unions had enormous power to influence the politics of the UK in the early 1970s. Although they had already become one of the most influential forces in British politics before the 1970s, their political strength was at its greatest in the early and mid-1970s.<sup>60</sup> Given their strong political influence, in the 1960s, the trade unions' pursuit of voluntarism was a major obstacle to the introduction of race discrimination legislation. Trade union groups of Labour MPs, for instance, influenced one MP, who had continuously proposed a race discrimination bill in the HC since 1953, to drop the area of employment in his bill in the early 1960s.<sup>61</sup> Moreover, it can be understood in this context that the RRA 1965 dealt only with racial discrimination in public places, despite other groups' campaign for the inclusion of discrimination in housing and employment.<sup>62</sup> Furthermore, when the Labour Government prepared race discrimination legislation, including employment, in the mid-1960s, the trade unions strongly objected to the application of the legislation to employment. For instance, they announced a joint statement with the

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<sup>59</sup> London WWC Newsletter, No.3, 8.

<sup>60</sup> Crouch, 1979, 93.

<sup>61</sup> Hepple, 1968, 131.

<sup>62</sup> Rose, 1969, 226.

Confederation of British Industry (CBI) declaring 'the existence of negotiated agreement establishing procedures for the settlement of grievances and disputes' and urging their members to 'utilize to the full the methods of voluntary settlement'<sup>63</sup> in an effort to deter the introduction of the legislation by showing their own solution to race discrimination based upon voluntarism. Although the trade unions were not able to frustrate the then Labour Government's attempt to introduce the legislation, they succeeded in changing the legislation to adapt it to voluntarism. In other words, the Labour Government made it compulsory in the RRA 1968 that a complaint about race discrimination should first be referred to the voluntary machinery set up by trade unions and employers.<sup>64</sup>

In a similar vein, the TUC opposed the proposal that the EPA 1970 should be extended in order to cover discrimination in areas of hiring and promotion, as well as contractual terms, such as pay, although it pushed the Government to enact the equal pay legislation. It explicitly mentioned that it was 'sceptical' about the idea that the prohibition of discrimination on the grounds of sex in relation to employment 'could be achieved through legislation.'<sup>65</sup> With this objection, the scope of the 1970 legislation was confined to the contractual terms of employment, despite the demands of women's organisations, as will be mentioned in the next subsection.

The trade unions' reluctant attitude towards sex discrimination legislation in employment changed when they had to give evidence to the Select Committees for sex discrimination bills by private members in the 1972-73 Parliamentary sessions. However, their change of attitude was a practically motivated decision. At that time, discrimination against women on the grounds of sex was an issue that was increasingly gaining public support, mainly because of the WM. Given these circumstances, the General Council of the TUC found that 'further bills on sex discrimination would be introduced and that, eventually, one might become law', and 'therefore decided to consider what would be the most practical form of legislation'.<sup>66</sup> Then, for the first time, the TUC adopted in its annual Congress of 1973 a resolution that 'effective legislation against discrimination in employment on

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<sup>63</sup> *Sunday Times*, 29 Jan. 1967 cited in Hepple, 1968, 4-5.

<sup>64</sup> RRA 1968, Sched. 2.

<sup>65</sup> TUC, AR 1972, 78.

<sup>66</sup> *Ibid.*, 77-78.

grounds of sex together with determined action including industrial action by unions is necessary to ensure that equal opportunities for women in industry are provided.’<sup>67</sup>

Therefore, although the trade unions endorsed the proposals of anti-discrimination in employment, they did not combine them with demands for other employment protection rights. They approved only anti-discrimination legislation based on equality. They had already channelled such demands into those of collective bargaining. For instance, the TUC advised its affiliated unions to achieve through collective bargaining the demands of the Industrial Charter for Women of 1963, which included ‘special provisions for the health, welfare and care of women workers’ as well as ‘equal pay’.<sup>68</sup> As was mentioned in subsection 8.4.1, the motion of the WC, which required that the EPA 1970 should be supplemented by statutory minimum wages, was ignored by the TUC. Given these circumstances, to request the government to legislate positive rights guaranteeing such demands alongside the prohibition of sex discrimination would mean further violation of voluntarism.

Along the same lines, the reason why the WWC was not adopted in the annual Congress of the TUC was to do with voluntarism. Supporters of the motion for the adoption of the WWC claimed that national minimum wage legislation ‘would not in any way interfere with the freedom of unions to bargain with employers in the normal way’.<sup>69</sup> Nonetheless, opponents of the motion were still concerned about state interference on the grounds that ‘if there is to be a national minimum wage it is very difficult to avoid the possibility of statutory implications.’<sup>70</sup> Moreover, support for protective legislation for both women and men, which the fourth demand in the WWC implied, would have been a radical change from the principle of voluntarism, as it would have required the FA to extend it to cover male workers, as will be explained in detail in subsection 8.5.2.2.

However, voluntarism alone cannot fully explain the TUC’s attitude in relation to women’s employment. Exceptionally in its history, the TUC decided to demand legislation protecting general employment rights for individual workers and trade unions in collaboration with the Labour Party in 1973, although it made it clear that

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<sup>67</sup> TUC, AR 1973, 462.

<sup>68</sup> See Wrigley, 1999, 57-58.

<sup>69</sup> A motion by Mr C. Christie (Society of Civil Servants) to adopt the WWC in the TUC Congress of 1975 in TUC, AR 1975, 411.

<sup>70</sup> Miss A. Prime’s Remark in TUC, AR 1975, 415. It was in the 1980s that the TUC adopted a statutory national minimum wage as its official policy. See TUC AR 1986, 270-271.

it still maintained voluntary collective bargaining as the main method.<sup>71</sup> It reached an agreement with the Labour Party in which not only would the IRA 1971 by the Conservative Government be repealed, but also other employment rights would be established when Labour came into power. When Labour won the general election in early 1974, the TUC demanded that individual employment protection rights as well as rights to encourage voluntary collective bargaining should be established on the assumption that 'all workers would have certain minimum rights'.<sup>72</sup> As far as women's rights were concerned, however, it not only pursued them completely separately from anti-discrimination legislation, but also confined the scope of its demand to pregnancy and maternity protection alone, ignoring a variety of demands in relation to women's employment, such as childcare, minimum wages and flexible working, which had all been made at the WC.

Another reason can be found in women's position in trade unions. Women's trade union membership, the proportion of which was 15.4% in 1954, soared by almost 10% in 1973 as women increasingly participated in the labour market, accounting for a quarter of all the TUC workers in 1974.<sup>73</sup> Nonetheless, their representation in trade unions was not in proportion to their growth in trade union membership. Women made up only 4.4% of all full-time officers in the TUC trade unions and 11.4% of all the TUC delegates in 1975.<sup>74</sup> Male-dominated trade unions were not only insensitive to women's issues but also sometimes representative of male workers' interests only, as will be shown in subsection 8.5.2.2, which discusses the protective legislation for women.

The lack of representation of women's interests within trade unions was addressed at the WC. For instance, the woman delegate mentioned in the previous subsection, who recognised anti-discrimination as being related to positive legislative measures for women, suggested in 1974 that a new channel between the TUC and the Labour Party, directly representing women's interests in relation to discrimination against them, should be set up.<sup>75</sup> The intention was that women workers should be directly involved with the legislative process of sex discrimination legislation, pushing the

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<sup>71</sup> See the General Council's Proposals for an Employment Protection Bill in TUC, AR 1974, 74-80.

<sup>72</sup> Ibid., 65.

<sup>73</sup> TUC, AWCR 1974, 2.

<sup>74</sup> Equal Pay and Opportunities Campaign, 1976, cited in Hunt, 1982, 166.

<sup>75</sup> TUC, AWCR 1974, 69.

positive legislative measures to be included in the legislation.<sup>76</sup> However, this motion was simply remitted to the WAC on the basis that the current channel between the WAC and the Labour Party Women's Committee was being well operated.<sup>77</sup>

### **8.4.3. The Women's Movement**

Given the ignorant and reluctant attitudes of the trade unions, the WM alone had to push anti-discrimination legislation through. In the late 1960s their power, albeit growing, was substantively weak in comparison with that of the trade unions. When the Equal Pay Bill, which became the EPA 1970, was being debated in the HC in February 1970, Joyce Butler had already made her third attempt to introduce a sex discrimination bill.<sup>78</sup> Furthermore, she requested that her bill be included in the Equal Pay Bill.<sup>79</sup> Her request, as well as her bill, was not accepted by the Labour Government. Moreover, 16 women's organisations meeting at London University sent a resolution to the Government demanding the addition of the equal opportunity clause in all areas of employment in the Bill.<sup>80</sup> Nonetheless, the Act was finally enacted, dealing only with contractual elements of employment with a five-year delay in implementation.

However, the WM had grown since the late 1960s and reached a new peak in the mid-1970s since its achievement of equal voting rights for women in 1928. Its growing power changed the situation. The Movement succeeded in making discrimination against women a national issue, which political parties were hardly able to ignore or to delay dealing with. Although the Conservative Government initially opposed sex discrimination legislation in the early 1970s, the pressure from the WM helped a Sex Discrimination Bill by private members through the second reading in both the HC and the HL. The organisations involved with the Movement took a variety of measures, such as lobbying, mass demonstrations and a petition in order to push the Sex Discrimination Bill through. As a result of this pressure, the Conservative Government announced in June 1973 that it would introduce a Sex Discrimination Bill. Moreover, the Movement made the Labour Party, which had

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<sup>76</sup> Ibid., 69.

<sup>77</sup> Ibid., 70-71.

<sup>78</sup> Her sex discrimination bill was proposed on 4th Dec 1970 in the HC. The same bill was proposed on 18th Feb 1970 and 7th May 1968 respectively.

<sup>79</sup> Callender, 1979, 13.

<sup>80</sup> Ibid., 13.

refused to extend the EPA 1970 to cover other areas of employment, adopt the introduction of sex discrimination legislation as an election manifesto. In particular, the pressure from the National Joint Committee of Working Women's Organisations representing women's groups in the TUC and the Labour Party led to a change in the party's attitude towards sex discrimination legislation.<sup>81</sup> As a consequence of its growing influence, in short, the WM managed to force the two main political parties to agree to the introduction of sex discrimination legislation.

Furthermore, the Movement exerted its influence and partially succeeded in changing the actual contents of the Act. When the Labour Government published the White Paper to introduce the Sex Discrimination Bill, which finally became the SDA 1975, after it came to power in February 1974, the WM began to draw attention to the actual contents of the Bill. For instance, the National Council of Civil Liberty (NCCL), one of the major organisations involved with the campaign for the introduction of sex discrimination legislation, made a Model Anti-discrimination Bill.<sup>82</sup> This model bill was considered in the process of drafting the actual bill before the latter was submitted to Parliament. Moreover, while it was making a draft of a Sex Discrimination Bill, the Home Office discussed the bill with another major organisation, the Fawcett Society, which drew up comments on the White Paper.<sup>83</sup> As a result of lobbying by women's organisations, the Bill as envisaged in the White Paper was changed, for example, to allow positive action in job training. The Home Secretary, Roy Jenkins, explicitly admitted at the second reading of the Bill that he was 'persuaded of the validity of the criticisms of the White Paper made in these respects by many women's and other organisations'.<sup>84</sup> Overall, the WM not only strongly influenced the introduction of the Act, which otherwise would have been delayed, but also contributed to the formation of its detailed contents.

However, it would be an exaggeration to say that the WM's actual political strength was decisive in the making of the Act. For instance, the need for more women to take part in the labour market<sup>85</sup> or the political parties' efforts to attract political support

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<sup>81</sup> Ibid., 37.

<sup>82</sup> NCCL, 1974a. The Rights For Women Unit in the NCCL, which was set up in 1973, played an active role, in particular in the changes of the details and contents of the Sex Discrimination Bill (See Callender, 1979, 45).

<sup>83</sup> See the Fawcett Society Annual Report 1974-75.

<sup>84</sup> R. Jenkins, HC Deb. 889, col. 512. 26 March 1975.

<sup>85</sup> This point is illustrated in Callender, 1979.

might have facilitated the introduction of sex discrimination legislation. Hence, the SDA would eventually have been enacted some time later than 1975, even without pressure from the WM. Hence the WM alone did not play a decisive role in the making of the Act.

Nonetheless, the WM's role was significant in the establishment of equality in anti-discrimination law in employment, as its demand for anti-discrimination in employment based on equality was to do with its doctrinal consistency. While they endeavoured to appeal to the public and to gain their political support for sex discrimination legislation, most women's organisations put their focus on equality as the underlying value of anti-discrimination in various domains of social life. For most of the women's organisations constituting the WM, equality seemed to be a logically consistent value connecting the demands of anti-discrimination in employment, education, social welfare and taxation, etc. In this sense, they doctrinally pursued the value of equality in an attempt to tackle women's lower status in various domains of social life.

For instance, they thought that they were 'carrying on the work of feminists who had campaigned for women's suffrage'.<sup>86</sup> Just as voting rights were needed to achieve political equality for women, anti-discrimination in employment was essential to achieve economic equality.<sup>87</sup> From this equality point of view, discrimination in employment was a major cause of women's unequal social status. Hence women's organisations maintained that equal pay was not enough, but equal opportunity in employment was also necessary. Moreover, when the National Council of Women (NCW) gave evidence to the Select Committee of the HL, the organisation made the point that there was widespread discrimination against women on the grounds of sex in professional areas such as the mass media, medicine, public bodies and the church.<sup>88</sup> Its focus on the prominent areas of the professions shows its view that removal of discrimination in those areas by means of an anti-discrimination law would lead women to enter these areas and eventually help women to gain an equivalent status to men.

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<sup>86</sup> Coote & Campbell, 1987, 111.

<sup>87</sup> See, eg, Remarks of Joyce Butler when she for the first time proposed sex discrimination legislation to the HC in 1968 (HC Deb. 764, col. 215-216 7. May 1968).

<sup>88</sup> Evidence and Comments by NCW in HL Select Committee on Anti-discrimination Bill, 1972, 123-137.



In terms of its doctrinal consistency, the application of equality did not need to be confined to the domain of employment. Equal opportunity was needed in education, as women were not able to have a proper qualification for a job because of discrimination in this area. In this way, discrimination in every area of social life was regarded as causing women's inequality. Hence, more radical organisations demanded anti-discrimination legislation to cover the whole area of social life under the principle of equality. For example, when the Anti-Discrimination Act Campaign, launched by the Women's Liberation Movement (WLM), submitted a petition for an SDA to Parliament, its focus was put on statutory and administrative provisions to the same extent as on employment. Hence, they summarized the demand of the petition by saying that 'the petition asks for one simple straightforward Act granting women equal legal rights and responsibilities with men across the board – for example, in employment, tax, pensions and credit'.<sup>89</sup> What mattered to the WLM was the complete realisation of equality in all areas of social life related to women's social status. Its uncompromising stance in relation to equality led to the Act being severely criticized for its omission of non-discrimination in pensions, taxation, social security, etc. after Parliament finally passed it.<sup>90</sup>

As they grounded their demand for anti-discrimination on equality, it seemed to be natural to some women's organisations in the WM that the protective legislation for women, which was believed to limit women's equal opportunity, should be repealed. For instance, not only the radical organisation, the WLM, but also the Fawcett Society, one of the major women's organisations, argued that the protective legislation for women should be repealed.<sup>91</sup>

It can be admitted that some attempts were made to demand both anti-discrimination in employment and positive rights for women by some women's organisations. For instance, the NCCL started to draw attention to pregnancy and maternity protection in 1974 and demanded that provision for them in the Employment Protection Bill be strengthened.<sup>92</sup> However, this recognition of positive rights for women was simply a response to the Government's proposal for the Employment Protection Act (EPRA). It had not positively campaigned for it, whereas

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<sup>89</sup> Sex Discrimination Campaign Group papers.

<sup>90</sup> Women's Report, 1975 (3/4), 2.

<sup>91</sup> As to the attitude of the Fawcett Society, see Meehan, 52-53. For the stance of the WLM, see Sex Discrimination Campaign (Women's Liberation Movement) Conference Papers.

<sup>92</sup> See NCCL, 1974b, 7.

it had campaigned for anti-discrimination legislation. Much less did it view anti-discrimination as being conceptually connected to positive employment protection rights. However, as was previously mentioned, the WWC campaign was actually an attempt to combine anti-discrimination in employment with positive employment protection rights. It was organized mainly by women activists in trade unions who were inspired by the WM.<sup>93</sup> Nonetheless, it started too late to persuade the main trade unions to adopt and represent it in the process of legislating the EPrA 1975 and the SDA 1975. The trade unions had already agreed to legislate for anti-discrimination rights based on equality and had sent their demands for the EPrA as a completely separate move when the WWC was for the first time adopted by the London Trade Council in March 1974.

Overall, as far as social movements were concerned, the WM took the lead in grounding the SDA 1975 on equality. The movement sought 'equality' for anti-discrimination in several important areas of social life as the doctrinally consistent value underlying it. The trade unions passively followed the initiative of the WM. Women workers' voices based on the idea of the right to work were ignored because of trade unions' voluntarism and male-centeredness. Given that the trade unions had much more political strength than the WM at that time, the trade union's campaign based on such voices might have led to anti-discrimination legislation different from the equality-based SDA 1975. In this sense, the choice of the equality approach to anti-discrimination in employment can be understood in the context of the inner politics within the social movements concerning women, labour and women's labour.

## **8.5. The Establishment of Equality in the SDA 1975**

Generally speaking, the establishment of a particular value in a law is not necessarily complete, even when the value is adopted as the underlying principle of the law. This is because the legislatures do not consider the principle alone. Faced with a complicated reality or lobbied by politically powerful groups, it is a common feature that legislatures make some exceptions to the principle underlying the law. This section will explore the extent to which the principle of equality was established

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<sup>93</sup> See Hunt, 1975, 331-332.

in the SDA 1975, in particular in relation to positive action and the protective legislation for women.

### **8.5.1. Disjunction between Discrimination and Employment Protection**

The SDA 1975 is comprehensive in its scope. The Act prohibits discrimination on the grounds of sex in education, housing, public goods, facilities and services, such as banking and insurance, as well as employment. Compared with private members' bills in previous years, which dealt only with employment and education, the scope of the Act was much broader. For this reason, Roy Jenkins boasted that the Sex Discrimination Bill would 'be probably the most comprehensive of its kind in the world'.<sup>94</sup> Moreover, the Act did not confine its regulatory scope to discriminatory behaviour by private actors, such as employers, trade unions and the housing agency. It also dealt with the question whether seemingly discriminatory legislation against women, such as the protective legislation for women, would be repealed or not.

The vast coverage of the Act was decided on the basis that there was widespread discrimination against women in every area of social life and its related legislation. Using the term of equality, unequal treatment in every area of social life had to be corrected to achieve equal opportunities for women. Hence the principle of equality meant that all discrimination in those areas was regulated together in the Act. In this sense, it seems natural that the Act covering discrimination in several areas was seen as 'the formal endorsement of the principle of equality between men and women',<sup>95</sup> although there were still some areas that were ruled outside its scope. In this sense, based on the principle of equality, anti-discrimination in employment gained its link to discrimination in several other social areas apart from employment.

However, discrimination was not seen as the only barrier to women's equal status. In their working life, for instance, lack of childcare facilities, inflexible working hours and unprotected pregnancy and maternity in the workplace were as serious obstacles to women's employment as general discriminatory attitudes towards them. The White Paper recognised the significance of protective measures against such barriers by mentioning that 'some mothers will derive as little benefit from equal employment opportunity if there is inadequate provision for part-time work or

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<sup>94</sup> Roy Jenkins, 888 HC Deb. 888, col. 512. 26 March 1975.

<sup>95</sup> Coote & Campbell, 1987, 115.

flexible working hours, or for day nurseries.’<sup>96</sup> Nonetheless, it understood those measures to be ‘a wide range of administrative and voluntary measures’.<sup>97</sup> Those protective measures were not considered to be enforceable through legislation. Hence the Paper suggested that not only the government but also social agents, such as employers and trade unions, must accept the responsibility for adopting those measures voluntarily.<sup>98</sup> In this regard, the dominant value of economic liberty combined with voluntarism made the protective measures above count as ones that were voluntarily achievable in the Paper.

Nonetheless, exceptionally, the Government provided one of the protective measures for women through the EPrA 1975 alongside the introduction of the SDA 1975.<sup>99</sup> The EPrA 1975 provided that women workers were entitled to 29 weeks’ maternity leave, including six weeks’ paid leave, and dismissal on the grounds of pregnancy was prohibited as unfair dismissal.<sup>100</sup> However, what should be paid attention to here is the differentiation of anti-discrimination in employment and pregnancy and maternity protection. This differentiation does not simply mean that the two Acts were separately enacted at the same time, the SDA 1975 being initiated by the Home Office and the EPrA 1975 by the Department of Employment. It was the structural differentiation of the two rights in terms of their underlying values. While anti-discrimination in employment based on equality was recognised as one of the civil rights, pregnancy and maternity protection were regarded as one of the employment protection rights, which were commonly taken to be vulnerable to the demands of business efficiency and productivity. Whereas, for instance, anti-discrimination in employment under the SDA 1975 protected workers in a broad sense and had no qualifying period of employment for its entitlement, pregnancy and maternity protection under the EPrA 1975, like unfair dismissal protection, had a threshold of 2 years’ employment and was applied to ‘employees’, the legal meaning of which was much narrower than that of ‘workers’. Although the two rights were essentially linked and, from the current perspective, even shared the same regulative scope, in particular, in relation to discriminatory dismissal on the grounds of

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<sup>96</sup> Home Office, 1974, 5.

<sup>97</sup> *Ibid.*, 5.

<sup>98</sup> *Ibid.*, 5.

<sup>99</sup> Both Bills were submitted to the HC in March 1975 and received the Royal Assent in November 1975.

<sup>100</sup> EPrA 1975, s34-35.

pregnancy, therefore, the prohibition of employment discrimination on the grounds of sex lost its link to protective measures for women's employment because of the differentiation depending on their underlying values.

## **8.5.2. Compromised Establishment of Equality**

### **8.5.2.1. Positive Action**

The NCCL proposed in its model anti-discrimination bill that discrimination in favour of a particular sex 'in order to maintain a balance between the sexes' should be allowed as an exception.<sup>101</sup> According to this model bill, employers would be allowed to fill a particular vacancy with a woman where women were underrepresented.<sup>102</sup> However, the Government did not accept the NCCL's proposal in relation to positive action in the White Paper. Viewing positive action as reverse discrimination, the Government made it clear that 'an employer who has excluded women from senior managerial positions will not be permitted to appoint women to such positions in preference to men'.<sup>103</sup> Even in February 1975, Roy Jenkins again confirmed the Government's objection to positive action in a speech to the Fawcett Society, based on his view that permission for positive discrimination in sex discrimination legislation would undermine the principles on which the legislation would be based.<sup>104</sup> However, some women's organisations, with help from trade unions, pressed the Government strongly<sup>105</sup> and it partly accepted positive action in relation to job training where a particular sex was underrepresented.<sup>106</sup> Roy Jenkins explained that the permission for positive action in training was justified on the basis that it aimed 'to compensate for the handicaps inherited from past discrimination.'<sup>107</sup>

Eventually, under the Act, a training agency or an employer was allowed to admit women only in its training courses in special circumstances, even though male candidates were as well qualified as, or better qualified than, women candidates. In this regard, equality in the SDA 1975 was not completely established. This partial

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<sup>101</sup> NCCL's Model Bill, s3(4)(b) in NCCL, 1974a.

<sup>102</sup> Ibid., 19.

<sup>103</sup> Home Office, 1974, 9.

<sup>104</sup> Meehan, 1985, 52-53.

<sup>105</sup> Callender, 1979, 49-51.

<sup>106</sup> SDA 1975, s47, s48.

<sup>107</sup> Roy Jenkins, HC Deb. 889, col. 513. 26 March 1975.

permission for positive action in the Act can be compared with the complete prohibition of any discrimination in Title VII of the US, as was shown in the previous chapter.

Although positive action was allowed in the Sex Discrimination Bill, this fact did not give rise to much debate, let alone to severe objections, in either the HC or the HL. As a result, the initial provisions providing for positive action in job training were passed with little change in light of their substantive content. It seems that not much attention was drawn to the provisions, as they would apply to training only. Apart from training, in which the effect of positive action would seemingly be minimal, the principle of equality was maintained in the SDA 1975. This was illustrated by an episode during a debate in the HC. An MP who had a suspicion that the positive action provisions would 'seek to redress the balance in employment opportunities and the actual employment of women' where women were underrepresented, proposed an amendment which would confirm that to pursue the balance between men and women was not the intention of the bill.<sup>108</sup> However, he immediately withdrew his amendment after the Government answered that 'the Government has made it clear that the Bill is not intended to lead to an imposition of quotas'.<sup>109</sup>

The prohibition of positive action for a particular sex beyond vocational training was clearly expressed in the SDA when the Conservative Government sought 'genuine equal opportunities' and 'the aim of improving the flexibility of the labour market'<sup>110</sup> in the 1980s. By means of the SDA 1986, a subsection was added to the positive action section in the SDA 1975 to the effect that positive action in training must not affect the prohibition of any discrimination by employers.<sup>111</sup> The government explained that the subsection was aimed at making it clear that the provision in relation to positive action in training 'does not allow offers of employment to persons of one sex only, either with a view to training them or on completion of their training'.<sup>112</sup>

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<sup>108</sup> Mr Alison, HC Deb. 893, col. 1572. 18 June 1975.

<sup>109</sup> Ibid., 1573.

<sup>110</sup> Kenneth Clarke, HC Deb. 98, col. 569. 22 May 1986.

<sup>111</sup> SDA 1975, s47(4), as substituted by SDA 1986, s4.

<sup>112</sup> Mr Lang, HC Standing Committees A & B, vol. I, col. 207. 1 July 1986.

### 8.5.2.2. Protective Legislation for Women

The FA, the protective legislation for women and young workers in factories, had developed further since the 19<sup>th</sup> century. As a result, under the FA 1961, into which most of the protective legislation for women and young workers was consolidated, women working in factories had basic working hours, namely nine hours a day and 48 hours a week and the basic rest hours of half an hour after continuous working for 4.5 hours.<sup>113</sup> They had an overtime limit of one hour a day and six hours a week.<sup>114</sup> Women were also prohibited from working at night<sup>115</sup> and on Sunday.<sup>116</sup> In addition to the provisions regarding working hours, there were several provisions in relation to women's safety and health. For example, they were barred from being employed to lift excessive loads<sup>117</sup> and clean dangerous machinery.<sup>118</sup>

The TUC kept insisting that the protection for women in the FA 1961 should not be repealed. It argued, for instance, that 'the lifting of the prohibition of night work by women which must not be removed until equal pay is fully implemented and unions and workers are not prepared to accept such a radical change'.<sup>119</sup> This objection shows that male-dominated trade unions feared that male workers would be replaced with women workers who were willing to work at lower wages.

The views on the protective legislation for women within the WM were divergent.<sup>120</sup> While, as was shown earlier, the Fawcett Society and the WLM supported the repealing of such protection, the NCCL kept pushing the Government to maintain the FA 1961 in close collaboration with the TUC. Because of this difference, women's organisations were not able to reach an agreement on the protection legislation even in Spring 1974, when they pushed the Labour Government to introduce sex discrimination legislation.<sup>121</sup> When the Inter-Organisational Committee, set up to coordinate pressure on the introduction of the sex discrimination legislation, made a proposal that the protective legislation should

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<sup>113</sup> FA 1961, s86.

<sup>114</sup> Ibid., s89, s90.

<sup>115</sup> Ibid., s86.

<sup>116</sup> Ibid., s93.

<sup>117</sup> Ibid., s72.

<sup>118</sup> Ibid., s20.

<sup>119</sup> TUC, 1973 in TUC, AWCR 1973, 34.

<sup>120</sup> See Meehan, 1985, 50.

<sup>121</sup> Ibid., 50.

not be repealed but should be extended to men after the White Paper was published in September 1974, most women's organisations finally agreed to the proposal.<sup>122</sup>

However, the new option was almost impossible to envisage at that time. Among other things, trade unions which had not fully given up voluntarism would have opposed the extension of the FA. Although their argument for retaining the protective legislation for women was vulnerable to the criticism that trade unions represented the interests of male workers only, they never considered the option of protective legislation for both women and men. Moreover, protective legislation applying to both men and women would have required a broader scope of coverage beyond that of the FA 1961. Unlike in the 19<sup>th</sup> century, factories were just one industry and many more workers were working in sectors other than factories in the 1970s. There seemed to be no reason why the scope of protective legislation for both sexes would have had to be constrained to factories only. To demonstrate the anomaly of the FA 1961 applying only to factories, the proponents of the repealing of the protective legislation for women pointed out the fact that whereas women working in a factory were barred from night work, nurses in a hospital were free to work at night.<sup>123</sup> In this sense, protective legislation for both sexes might have meant the statutory establishment of minimum working conditions for all workers in every industry. In short, given the radical change in the British industrial paradigm which could have been required by protective legislation for both sexes, this sort of option was hardly conceivable for the main trade unions as a matter of practicality.

The Government was in a difficult position when it had to decide whether the protective legislation for women should be repealed or not. On the one hand, the Government was not able to deny that the legislation was limiting women's employment, breaching the principle of equality. On the other hand, its repeal would give rise to strong objections from the trade unions, which at that time had much more power to influence the Government than the WM. In the event, as a compromise, the Government suggested in the White Paper that the protective legislation should be retained until the EOC had reviewed all the relevant provisions

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<sup>122</sup> Ibid 52. Nonetheless, it did not seem that the WLM accepted the proposal (See Sex Discrimination Campaign (Women's Liberation Movement) Conference Papers).

<sup>123</sup> See, eg. Mr. Alison, HC Deb. 893, col. 1585. 18 June 1975.



and submitted reports to the Government as to whether each provision was adequate in terms of safety, health or welfare at work.<sup>124</sup>

Following the duty imposed by the SDA 1975, the EOC submitted its report on the protective legislation for women in 1979. It concluded that most of the major provisions of this protection should be repealed on the grounds that the legislation 'constitutes a barrier – often an artificial one – to equal pay and job opportunities for women,' thus violating the principle of equal opportunity.<sup>125</sup> However, the EOC recommended that some minor provisions in the FA 1961, such as the provisions of rest and meal breaks, should be extended to men.

Despite this recommendation, the repealing of the protective legislation for women was not directly involved with the EOC's report. Rather, the decisive momentum for the repealing of this legislation emerged from the pressure of the EC. The EC pushed member states to abide by the ETD by means of the ECJ's several rulings and the recommendations of the European Commission.<sup>126</sup> However, as to the protective legislation which was needed for men as well as women, the Commission explicitly recommended levelling up, namely the application of such protections to both men and women rather than levelling down, namely repealing them. It is notable that the Commission's recommendation of levelling up did not rely on the ETD alone. Instead, it placed the basis of levelling up on another value expressed in the Treaty in relation to working conditions. Equality should be combined with a value aimed at the improvement of working conditions in the Commission's view:

The obligation to ensure equal treatment must be seen in the context of the need to improve working conditions set out in Article 117 of the Treaty. Equality should not be made the occasion for a disimprovement of working conditions for one sex, and it would be insufficient to simply take away necessary protections which are presently limited to one sex.<sup>127</sup>

The pressure from the EC made the Conservative Government amend the SDA 1975. However, the way that the Government implemented the principle of equality was different from the above recommendation made by the Commission. When it submitted a Sex Discrimination Bill amending the SDA 1975 in 1986, the

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<sup>124</sup> Home Office, 1974, 17.

<sup>125</sup> EOC, 1979, 92.

<sup>126</sup> *Johnson v. Chief Constable of the RUC*, Case 222/84 [1986] IRLR 263; *Marshall v. South West Hampshire AHA*, Case 152/84 [1986] IRLR 140.

<sup>127</sup> Commission of the European Communities, 1987, 7.

Government emphasized that the implementation of equality would contribute to the competitiveness of the economy which was promoted by the flexibility of the labour market. The emphasis on equality combined with this version of economic liberty was well expressed when the then Minister for Employment explained the aim of the Sex Discrimination Bill at the second reading of the HC:

The common thread in the various provisions is the Government's genuine commitment to promote equal opportunities in employment between men and women and, in particular, to eliminate all unreasonable discrimination on the grounds of sex. This commitment is consistent with our general aim of improving the flexibility of the labour market. The removal of barriers which hinder either men or women from making their full contribution to the economy will mark a significant step towards the achievement of greater efficiency, competitiveness and prosperity.<sup>128</sup>

In the event, seeking equality combined with economic liberty, the Government repealed the protective legislation for women through the SDA 1986 and finally the EA 1989. There was no levelling up even in the provisions, such as the provisions of rest and meal breaks, which were recommended to be extended to men by the EOC in its 1979 report. With this levelling down, equality became more firmly established in the SDA 1975, now allowing legislation protecting pregnancy and maternity only as exceptions to equality in accordance with the ETD.<sup>129</sup>

## 8.6. Conclusion

Using the same method of analysis as was used in the previous chapter, this chapter has explored what caused equality to be established in sex discrimination legislation in employment in the UK. First of all, the choice of equality as its underlying value can be understood in terms of the particular value structure governing employment relations. Although the trade unions in the UK were strong enough to establish counter-values in the value structure, the tradition of voluntarism prevented the legal establishment of counter-values from occurring. As the protective legislation for workers in the UK was basically selective and subsidiary in its scope, employment relations were generally governed by freedom of contract as operated by employers and individual workers or trade unions representing them collectively. In this value

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<sup>128</sup> Kenneth Clarke, HC Deb. 98, col. 569. 22 May 1986.

<sup>129</sup> SDA 1975, s51, as amended by EA 1989 s3.

structure, the right to work, requiring more constraints on economic liberty than equality, was very difficult to adopt for the regulation of discrimination in employment.

Secondly, the establishment of equality in anti-discrimination in employment took place in a situation where the voices opposing equality-based anti-discrimination were suppressed in the internal politics in relation to women's labour within the trade unions. Pursuing doctrinal consistency, the WM sought equality as the underlying value of anti-discrimination in employment, connecting it to anti-discrimination in other areas of social life in an effort to improve women's social status. The main trade unions, which had opposed discrimination legislation in employment in the 1960s, apart from the EPA 1970, reluctantly agreed to the introduction of sex discrimination legislation, passively following the initiative of the WM. It was not able to represent women workers' voices, which, based on the idea of the right to work, demanded positive legislative measures for childcare, maternity protection, flexible working and a national minimum wage, as well as the prohibition of discrimination. The suppression of these different voices was due to the trade unions' voluntarism and male-centeredness.

Against this backdrop, anti-discrimination in employment gained its link to anti-discrimination in other areas based on equality, while it lost its link to positive legislative measures for women's employment. As a result, pregnancy and maternity protection was categorised as one of the employment protection rights distinguished from sex discrimination in employment based on equality. However, the establishment of equality was not as complete in the SDA 1975 as in Title VII of the US, since positive action was partly allowed in the area of training and the protective legislation for women was temporarily retained. These exceptions to the principle of equality were made mainly due to the pressure from social movements. Nonetheless, the equality approach to the SDA 1975 became stricter when the Conservative Government, seeking equal opportunity combined with economic liberty, finally repealed such protective legislation in the 1980s rather than extended it to men.

The study of the legislative history of the SDA 1975 shows that different approaches to discrimination in employment based on the idea of the right to work actually existed. However, the approaches did not develop further because of the dominance of economic liberty combined with voluntarism and the under-representation of women workers in the internal politics within the social

movements. Thus we can confirm that in the UK as well as in the US the choice of equality as the underlying value of anti-discrimination in employment was made in a particular social and historical context, without which anti-discrimination in employment might have been grounded on counter-values other than equality.

## **Chapter 9 Conclusion**

### **9.1. The Findings of the Thesis**

This thesis aimed to explain and justify anti-discrimination rights in employment with reference to the two different value-laden approaches, namely, those of equality and the right to work. To this end, firstly, from the analytical and moral viewpoints, each of the four types of anti-discrimination rights in employment was examined as to its relationship with equality, on the one hand, and the right to work, on the other hand. Secondly, from the socio-legal viewpoint, the formation of the first systemic and comprehensive anti-discrimination laws in the US and the UK respectively was explored in an attempt to explain why equality was chosen as the underlying value of anti-discrimination rights in employment.

The thesis began its exploration of the relationship between anti-discrimination rights in employment and equality, on the one hand, and the right to work, on the other hand, by conceptually analysing what both equality and the right to work mean. Chapter 2 argued that, among a variety of conceptions of equality, we can find the underlying concept as consisting of two basic elements, namely, 'comparison' and 'equalisation'. Regardless of the hugely diverse conceptions of equality, recognising these two common elements, we can refer to each of them as a kind of equality. Further, the chapter showed that equality commonly faces two justifiability issues, irrespective of its conceptions. As the conceptual elements operate in every conception of equality, firstly, all conceptions of equality face the levelling down issue: for the realisation of equality, a morally important aspect can be equalised by either giving all people the benefit which the aspect is concerned with or by giving it to none of them. Secondly, another justifiability issue arises when equality is applied in relation to people's personal traits for which it is designed to be realised: racial equality, for instance, places a limit on the scope of the distribution of what is valuable, as its distribution by this sort of equality is made along racial lines, and accordingly it is indifferent to its importance for other groups.

Unlike equality, there are few conceptions of the right to work that are available in order to examine their relationship with anti-discrimination rights in employment.

Thus, Chapter 4 constructed a new conception of the right to work relying on its subcategories as basic conceptual elements, namely, 'a right' and 'work'. It discovered that, following the interest theory of a right viewing it as a legally protected interest, the right to work is a right protecting workers' interests in relation to work. Then, of the workers' common interests, the chapter drew attention to subsistence and self-realisation which are principally achieved through work. The former is involved with people's physical existence; the latter with the realisation of their potential and their contribution to society. The chapter also demonstrated the positive relationship between the two interests and other morally important values, such as self-esteem, personal autonomy and social inclusion, in which achieving the former necessarily contributes to the enhancement of the latter. Therefore, the two chief interests in relation to work, which are referred to as *the work values*, are important enough to deserve protection. Hence, the right to work is defined as legally protected interests reflecting *the work values*. However, the chapter also showed that the right to work conceptually faces two common justifiability issues. Firstly, the right to work held against employers is confronted by the criticism that it limits business freedom, as it conceptually exists as a constraint on employers' freedom of contract. The second objection to the right to work is that it will bring about uncompetitive business, as it is necessarily realised in the way that business is regulated.

The findings of the exploration of the relationship between anti-discrimination rights in employment and equality in Chapter 3 were different according to the nature of the four types of anti-discrimination rights in employment. In relation to the prohibition of direct discrimination, first of all, equal treatment focusing on a particular personal trait explains that any treatment is prohibited if it is unequal along the lines of the personal traits on the basis of which discrimination is prohibited. Moreover, the current prohibition of direct discrimination on several grounds can be explained by a congregation of several independent kinds of equal treatment of a personal trait. Furthermore, equal treatment explains that under current UK anti-discrimination law, hypothetical comparison is required to prove discrimination in the *single person reductio*, where there is only one worker in a company who is discriminated against because of, for instance, her sex and accordingly there is no one to be compared with to prove unequal treatment. Therefore, the chapter argued that it is undeniable that the current prohibition of direct discrimination is based on

equality. Nonetheless, Chapter 3 argued that those features that were mentioned above produce morally undesirable results. In the first place, as any treatment is not prohibited as long as it is equal among people along the lines of the personal traits on the grounds of which discrimination is prohibited, equally bad treatment as one form of levelling down is also allowed to take place. Thus, the prohibition of direct discrimination may not necessarily lead to improving the quality of the working life of those who are vulnerable to discrimination. Moreover, the current prohibition of direct discrimination on several grounds rules out protection for people who suffer arbitrary discrimination on other grounds. For this reason, not only discrimination which is frequent but not as prevalent as sexual or racial discrimination, such as discrimination on the grounds of being HIV positive, but also newly emerging discrimination, such as discrimination on the grounds of being overweight, has not been successfully regulated.

As to the current prohibition of indirect discrimination, secondly, the chapter demonstrated that it is based on equality, in particular, equality of the impact of workplace rules on groups of workers categorized according to their personal traits. Under the prohibition of indirect discrimination, nonetheless, rules with disparate impacts and morally undesirable rules are two different things. As a result of this difference, the prohibition of indirect discrimination may, under certain circumstances, deter the adoption of positive measures with disparate impacts in favour of disadvantaged groups. What is more, the prohibition of indirect discrimination excludes equally disadvantaged members of advantaged groups from its protection.

When it comes to specific protections for women and for people with disabilities, Chapter 3 showed that equal treatment does not explain why they are designed to protect only such groups. In addition, equal opportunity as understood broadly does not explain that positive rights for these groups, such as the right to maternity leave and the duty of making reasonable adjustments, are guaranteed regardless of the extent of the opportunities that other groups have in comparison. In the same vein, lastly, the chapter argued that both positive action programmes for women and ethnic minorities are not explained by reference to equality. In particular, it showed that substantive equality, when it attempts to explain its asymmetric operation in relation to hard positive action programmes for women and ethnic minorities, does not actually rely on the concept of equality.

In an attempt to examine the relationship between the right to work, as defined in Chapter 4, and anti-discrimination rights in employment, Chapter 5 found that this right recognises discrimination in employment to be the selective degradation of *the work values*. Thus, the right to work requires discrimination in employment to be prohibited in order to prevent people from suffering the loss of *the work values*. Therefore, the meaning of discrimination in the right to work approach would be constructed differently from that in the equality approach. First of all, there is no need to rely on the element of comparison to constitute discrimination in the right to work approach. For this reason, the comparison element from the current meaning of discrimination in UK discrimination law, which is completely dependent on the other element, 'on the grounds of' and accordingly does not play any substantive role in constructing discrimination, would be removed. In this sense, the meaning of discrimination would be clearer in the right to work approach. Moreover, as the reason for regulating discrimination in employment is its harmfulness to people's pursuit of *the work values*, the discrimination to be prohibited cannot be confined to that on the grounds of several personal traits: discrimination on all the grounds that are irrelevant to business necessity would be prohibited. Thus the prohibited grounds of discrimination would be extended inexhaustively under the right to work approach. This inexhaustive extension of the proscribed grounds of discrimination would not be undermined by the consideration of employers' freedom and business productivity, as it could encourage their rational decisions based on people's merits and the persistent irrational bias of some of them against a particular trait does not deserve protection. Furthermore, as the prohibition of discrimination based on *the work values* is only designed to protect people against the selective degradation of their work values, it is also required that it should be supplemented by provisions or rights preventing the general degradation of *the work values*. Hence equally bad treatment is recognised as morally bad in the logic of the right to work approach. Based on these features of the prohibition of direct discrimination with reference to the right to work, the chapter argued that the right to work approach would explain the prohibition of direct discrimination in a more justifiable way.

In relation to the prohibition of indirect discrimination, the finding in the chapter was that the direct protection of workers from the disadvantages caused by workplace rules rather than the protection through the disparate impact analysis of these rules would be consistent with the right to work approach. Moreover, the direct



regulation of workplace rules would solve the justifiability issues of the prohibition of indirect discrimination by both protecting all workers from the adverseness of workplace rules, regardless of whether they belong to a particular group, and by not requiring a particular group of workers to prove the disparate impact of the workplace rules on them. However, the direct regulation of a workplace rule would face the criticism that it would undermine business freedom and productivity. Nevertheless, Chapter 5 argued that the benefits of the direct regulation of workplace rules in particularly important areas, such as protection for part-time workers and the right to request flexible working, could outweigh the considerations for business and accordingly would have to be strengthened in order to overcome the shortcomings of the current prohibition of indirect discrimination.

Chapter 6 examined whether the right to work approach can explain and justify anti-discrimination rights for a particular group alone. To begin with, it argued that specific protections for women and for people with disabilities can be interpreted as being aimed at protecting such groups from the selective degradation of their work values. The reason for protecting these groups in particular is that without their unique needs being accommodated, they would face serious difficulties in pursuing their work values. In comparison with the right to work approach, the group status perspective, by focusing on the subordinated status of women and people with disabilities as social groups, makes invisible *the work values* as common interests which they individually desire to achieve in employment. In relation to positive action, Chapter 6 showed that soft positive action is allowed and sometimes required by the right to work approach. However, the chapter argued that hard positive action is not explained by reference to the right to work as it encroaches on *the work values*. Nevertheless, it argued that hard positive action may be justifiable where *the work values* may be outweighed by the benefits or values, such as social integration, which hard positive action aims to achieve. In these justifiable circumstances, the right to work approach suggests that the beneficiaries of hard positive action should meet the qualifications necessary to perform a job successfully and that, of a variety of hard positive action programmes, the one that minimises the encroachment on other groups' work values should be chosen.

The socio-legal reasons why the equality approach, rather than the right to work approach, was firmly established in the anti-discrimination rights in employment of the US and the UK were discovered in the last two chapters. Chapter 7 demonstrated

that several socio-legal factors contributed to Title VII being based on equality. First of all, the complete imbalance between economic liberty and workers' rights in the regulation of the workplace in the US made it difficult to ground anti-discrimination in employment on values other than equality. The trade unions' initial attempt to make the Thirteenth Amendment include the free labour ideal failed and subsequently other rights of workers were adopted, relying on the Commerce Clause of the Constitution during the New Deal. Nonetheless, there existed attempts to view discrimination in employment in terms of the right to work, as was shown in anti-discrimination bills introduced in the 1940s and in several court cases. However, the then politically very conservative climate and the CRM's pursuit of doctrinal consistency led it to turn to equality as the underlying value of the first comprehensive anti-discrimination law in employment. In addition, the relationship between the CRM and the trade unions showed the reason why the right to work approach was not introduced or pursued. Mainly reflecting white workers' interests, the trade unions sometimes defended their persistent discriminatory behaviour against blacks and were reluctant to introduce anti-discrimination laws, let alone to pursue the introduction of the prohibition of discrimination based on their free labour ideal.

Drawing attention to similar socio-legal factors to those discussed in the previous chapter, Chapter 8 lastly explored the making of the SDA 1975 in the UK. As was the case with Title VII of the CRA of the US, possible approaches, such as the right to work approach, were not regarded as suitable for the regulation of discrimination in employment because of the dominance of economic liberty in the value structure governing the workplace in the UK. Although the trade unions of the UK were influential enough to enable the right to work approach to be established in the regulation of employment, the tradition of voluntarism had led them to oppose the regulation of the workplace itself. As the then protective legislation for workers of the UK was basically selective and subsidiary in its scope, employment relations had been generally governed by freedom of contract as voluntarily operated by employers and individual workers or trade unions representing them collectively. Secondly, voices different from the equality-based anti-discrimination approach were suppressed within trade unions. Women workers within trade unions demanded positive legislative measures for child care, maternity protection, flexible working and the national minimum wage, as well as the prohibition of discrimination in

employment. These voices were not able to influence the policies of the trade unions, because they were contrary to voluntarism avoiding legal intervention in the workplace and the then male-dominated trade unions were insensitive to them. Separated from these voices, the WM sought equality as the underlying value of anti-discrimination in employment, connecting it to discrimination in other areas of social life in an effort to improve women's social status.

Overall, the thesis firstly found that the right to work approach to anti-discrimination in employment, as an alternative to the equality approach, would explain anti-discrimination rights in employment more clearly and consistently: the meaning of discrimination in the prohibition of discrimination would be clearer, as it would not have to rely on comparison, whether it is actual or hypothetical; anti-discrimination law in employment would be more consistent, as the right to work approach would be able to explain both the prohibition of direct discrimination and specific protections for women and people with disabilities. Secondly, it showed that, with reservations on some parts of the prohibition of indirect discrimination, the right to work approach would transform the prohibition of direct and indirect discrimination in a more justifiable way than the equality approach, as the former would solve the justifiability issues caused by the latter. Nonetheless, the equality-dominated anti-discrimination rights of the US and the UK were formed in a particular socio-legal context, where economic liberty was dominant in the regulation of the workplace and the social movements which pushed anti-discrimination laws to be adopted were separated from the trade unions, mainly reflecting male or white workers and neglecting the voices of those who were vulnerable to the then prevalent discrimination.

## 9.2. Implications

The UK anti-discrimination rights are currently under review for a single equality law. Although it was proposed in an influential independent review of UK anti-discrimination legislation that the grounds of discrimination should be extended inexhaustively,<sup>1</sup> this is not accepted in the Consultation Paper for a Single Equality Bill: it makes it clear that the single anti-discrimination law will provide protection from discrimination on several grounds only and that the addition of new grounds

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<sup>1</sup> Hepple, Coussey, and Choudhury, 2002, para. 2.57-2.63

will only be made if 'to do so would be a proportionate response to a real problem experienced by individuals who share a particular characteristic.'<sup>2</sup> Moreover, positive measures in employment aimed at improving general employment conditions for workers but giving more benefits to disadvantaged workers are generally regarded as being beyond the scope of anti-discrimination law in the consultation paper. Although, for instance, the right to request flexible working is taken as being more beneficial for women workers, the policies to strengthen it are not pursued in the discrimination law reform.<sup>3</sup>

The findings of the thesis could imply that the direction of the current discrimination law reform is inescapable unless it adopts the right to work approach as far as employment is concerned. This is because the unsatisfactory features of the discrimination law reform mentioned above stem from the conceptual aspect of the equality approach. In this approach, discrimination on newly emerging grounds is very hard to regulate until it is prevalent enough. In addition, the right to request flexible working does not gain any momentum to be strengthened in the discrimination law reform under the equality approach as it, albeit recognised as being beneficial for women, is not endorsed in the light of its importance for workers' subsistence and self-realisation in general by the dominant approach. However, the findings of the thesis do not imply that these features of the discrimination law reform could be easily corrected by simply changing the approaches. The finding that the anti-discrimination rights in employment of the US and the UK were a product created in a specific social, political and historical context might imply the opposite: constructive reform for more justifiable anti-discrimination rights in employment would be likely to be made only in a context in which the importance of work for people's subsistence and self-realisation and economic liberty are properly balanced in the regulation of the workplace. Further, it may imply that this might only be achieved when workers' interests in relation to *the work values*, including those of the most disadvantaged workers, are properly represented and subsequently accepted in the relevant political process.

However, the findings of the thesis do not necessarily suggest anything in relation to anti-discrimination rights in areas other than employment. This is because,

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<sup>2</sup> DES *et al.*, 2007, para.8.1

<sup>3</sup> Ibid., para. 4.8-4.11.

although these anti-discrimination rights are involved with equality, they are not to do with the right to work. Going beyond the scope of this thesis, the relationship between anti-discrimination rights in areas other than employment, such as education, and equality, on the one hand, and values emphasising the importance of these areas, such as the right to education, on the other hand, remains to be explored. Moreover, the thesis would not necessarily imply that the anti-discrimination rights in employment of other countries, such as Germany and France, where the right to work is believed to have a relatively firm basis in the regulation of the workplace, is based on this right. The formation of anti-discrimination rights in employment based on a particular value is influenced by diverse socio-legal factors. It is not determined by the pre-established value structure in the regulation of the workplace alone.

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