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The Antinomy of Freedom and Equality

1. Freedom, Equality, and the Law of Modernity

If one allows oneself some reflective moments, a rather distanced view unconcerned with a finer charter of the various provinces of the realm of law, legal regulations protecting the equality of human beings have an interesting feature. They form a constitutive part of the very essence of the material concept of the law of modernity and are intrinsically related, not just opposed, to the project of liberalism.

This is first true for the body politick as such and its legal framework. The core property of modern statehood is its emancipation from feudalistic bonds and the establishment of a concept of citizenship that is based on a concept of equality of human beings. This concept has many sources: for example, the classic social contract theories,[1] authors of the Natural Law tradition,[2] and, of course, the law of reason of the Enlightenment.[3]

The history of thought offers other examples of the thesis that the equality of human beings is a bedrock principle for the normative order of liberal human associations. Since the age of the constitutional revolutions it is, in addition, not only such a formative principle in theory, but also the constitutive element of the real normative architecture of the body politick through the institutions mentioned before, especially equal citizenship status and corresponding rights. To be sure, it took a long time to make this principle a social reality. There were many obstacles to overcome, and not only the resistance of the feudalistic, aristocratic, and monarchic social powers. In addition, the exclusion, most

[1] For the history of liberalism, *see* J. Locke, Two Treatises on Government (1689).

[2] *See, e.g.*, S. von Pufendorf, De Officio hominis et civis juxta legem naturalem libri duo, [The two books on the duty of man and citizen according to natural law], Book I, VII. (1673).

[3] *See, e.g.*, I. Kant, Practical Philosophy, (M. J. Gregor, (trans. and ed.)), 393 (1999).

A. SAJÓ (ED.), Abuse: The Dark Side of Fundamental Rights, 217-232.

notably of women and slaves, by the social forces demanding emancipation had to be challenged. Other patterns of exclusion (for example, on the base of sexual orientation) that created much senseless suffering have only been addressed with some sincerity very recently.

Today, many social orders exist that do not recognize the equality of human beings in the political sphere at all. In all others, there are things to be improved. But one thing is certainly true: the battle for legitimacy was lost for these kinds of illiberal and fundamentally non-egalitarian orders a long time ago. Any political order fails the most basic test of legitimacy when it fails to realise the most basic aspects of the equality of human beings concerning basic rights and participation in the political process.

This equality is, of course, the equality of worth of human beings, as human beings are manifestly and fortunately quite different in all kinds of ways. This equality entails a stand towards liberty. A main consequence of the equality of worth of human beings is their equal liberty. As a result, nobody would argue that the equal right to vote unduly limits the freedom of an aristocrat (or some other privileged group of people) to influence public affairs, because there is no limitation of freedom. Yet, quite to the contrary, of course there is. In comparison to other arrangements (for example, of the skewed suffrage of the past), the equal right to vote does limit the freedom of the former privileged classes. But we would all agree without any thought that it does so quite duly and legitimately.

A second example illustrating the same point comes from private law. The equal freedom to enter into contracts is another watershed element of modern law. It is the very midwife of the economic order we live in. It is again something very alien to other times, where all kinds of limitations of contractual freedom existed, especially as to the contractual regulation of labour. The story of how the feudalistic bonds in this respect had to be broken to make a new economic order possible is a commonplace of social history. The universal access to the contractual regulation of one's own affairs is a great advancement of social history. One should not forget, however, that to reach this state of affairs, formerly privileged groups lost certain freedoms. They were, for example, deprived of the possibility to bind other human beings and direct their lives unilaterally in the framework of feudal relations without having to enter into the reciprocal (at least in principle, thought the social reality might be different) relations of a contract.

These two examples show a simple truism. Law that limits freedom for the sake of the equality of liberty, in order to maintain the equality of worth of human beings, creates the legal space we naturally operate in and is the jural air we breathe in the age of modernity. This truism teaches an important lesson: there is agreement in principle that there might be an antinomy between the désire of unlimited freedom (nice as it might be) and equality. But this practical collision can be reconciled in a civilised way. This is what modern law at

its core is about. It is the ground we walk on in very essential matters. The reconciliation is produced by something one might call an anti-discrimination law in a broad sense and of such a basic character that it is widely forgotten that the legal regulations are actually directed against discrimination. But the point of the often constitutional guarantees of equal citizenship rights or the preservation of equal contractual freedom in private relations, etc., is, of course, to protect against unequal treatment of human beings because of some characteristics of a personal or social nature, now perhaps unimaginable, but prevalent in the past.

These introductory remarks are intended to clear the ground for a sober discussion of the problems of modern anti-discrimination in the more narrow sense this term is usually and rightly used. The law is directed against specific discriminations of specific groups by officials and private persons. These remarks should make clear that the ideologically heated tone sometimes accompanying these debates is beside the point. The question is not whether such laws introduce some kind of unheard of limitation of freedom substantially alien to the law as it stands, but whether or not they successfully continue the project that constitutes the law of modernity: the project to protect adequately the freedom and equality of humankind.

The following remarks will not enter into any technical discussions.[4] They want to proceed to continue to state concisely what anti-discrimination law is about from the point of view of legal ethics and how its adherents can deal with fundamental challenges mounted against it. To this end, the following questions will be addressed:

- What concept of justice is convincing?
- What is the relation between freedom and equality according to this concept of justice?
- How does this concept of justice relate to anti-discrimination law?
- What does all this have to do with efficiency?

Some of these questions are rather grand ones, so the remarks will certainly not be conclusive, but perhaps good enough to point productively in a promising direction.

[4] For an instructive overview of various standpoints in the discussion, *see, e.g.*, C. MacCrudden (Ed.), Anti-Discrimination Law (2003), with a very illuminating introduction; C. MacCrudden, "The New Concept of Equality," talk delivered at the European Academy of Law, Tries (2 March 2003); S. Fredman, Discrimination Law (2002). For some more technical remarks on the German situation, *cf.* M. Mahlmann, *Prospects of German Anti-Discrimination Law*, 14 Transnat'l L. & Contemp. Probs. 1045 (2005); M. Mahlmann & B. Rudolf, Handbuch, Anti-Diskriminierungsrecht, [Manual on anti-discrimination law], (forthcoming).

2. A Concept of Justice and Its Relation to Liberty

Let us turn to the first two questions, the concept of justice and its impact on the relation between freedom and equality. A very good starting point to reflect upon the idea of justice and liberty (one could pick others) is a passage where the concept of justice does not appear. Kant famously formulated: "*Freedom* (independence from being constrained by another's choice), insofar as it can coexist with the freedom of every other in accordance with a universal law, is the only original right belonging to every man by virtue of his humanity."[5] Kant continues right after this formula with acknowledging that he has stated more than just a liberal principle:

> This principle of innate freedom already involves the following authorisations, which are not really distinct from it (as if they were members of the division of some higher concept of a right): innate *equality*, that is, independence from being bound to others to more than one can in turn bind them; hence a human being's quality of being his own master (*sui iuris*).[6]

Kant is quite right with this observation about the connection of this formula of right and equality. His right to freedom is one under the law of universalisation. Human beings only have a right to freedom that is universalisable. Universalisation, however, presupposes two things: the equality of the worth of human beings, and the basic normative principle of justice that equal entities (as human beings are according to the first presupposition) in fact have to be treated equally. Universalisation has a base only if from the standpoint of ethics every human being, due to these two presuppositions, counts equally, and his or her concerns have to be taken into account.

The core of equality for Kant is equal autonomy. Equality means, therefore, at its heart, that human beings are not subjugated under anybody's rule and in turn do not have the moral power to dominate others. The connection of freedom with equality establishes the link to justice. Kant does not make it explicit, and in Kant's ethics in general (on the surface, and in many historical reconstructions of his theory) justice plays no prominent role. But it is clearly present in his argument. Kant takes a distributive stance: the basic good 'freedom,' as autonomy, is to be allocated in an equal fashion. That is the basic point of his argument. Accordingly, Kant writes in the context that the law of freedom authorises, "to do others anything that does not in itself diminish what is theirs."[7] This leads to the heart of Kant's ethics, which is only on the surface a formal ethics of universalisation, but in its core a material ethics of the equality of worth of human beings. This equality of worth, the fact that human beings are ends in themselves (their dignity) implies rights, most basically, the right to an amount of freedom that is equal to that of other

[5] *See, e.g.*, Kant, *supra* note 3, at 393.
[6] *Id.*, at 393-394.
[7] *Id.*, at 394.

human beings, as nobody can legitimately claim more. The dignity of human beings as ends in themselves and the commands of justice give rise to a system of liberty. This system of liberty is not just the sum of the contingently drawn spheres of physical possibilities of various individuals to act without obstacle, but a system of legitimately determined normative freedoms. It is the realm of right, not of factual license. Thus, in Kant's formula, freedom and equality are thought together, intertwined, and reconciled in the ethics of the Categorical Imperative and its law of universal autonomy, which is an implicit law of justice.

This kind of argument is not the invention of Kant. After him, others have restated its result, with a sometimes conceptually very advanced apparatus and an explicit connection to justice.[8] The concept of justice that most successfully accounts for the moral judgements behind these theories (they might accept it or not) is the concept of justice as proportional equality. According to this principle, two entities have to be treated proportionally equal in two dimensions. First, the treatment has to be proportionally equal to the occasion that causes the treatment: a reward proportionally equal to the merit, the punishment proportionally equal to the guilt, etc. Second, the treatment has to be equal in relation to other cases. The second aspect is relevant for the distribution of goods under the conditions of scarcity and the object of attacks of non-egalitarians[9] that fail to convince.[10]

This principle has to be applied to various distributive spheres.[11] These spheres have to be delineated, and the criterion for the distribution in each sphere has to be determined. Some cases are easy in this respect—no one would award grades according to need, or health care according to beauty. Other cases are more difficult. It is an insight as old as the Aristotelian theory of justice that the determination of the criterion of distribution as to certain spheres of distribution is the root of practically all and certainly the socially and politically most relevant fights about justice.[12] To take one of the important antique examples, which concerned Plato, among others:[13] Are political rights to be distributed according to natural merit, as in a aristocracy; as to liberty, as in a democracy; or as to wealth, as in an oligarchy? In each case the principle of proportional equality is applied, only the criterion of distribution varies.

There is a further dimension of complication, because in modernity a basic consensus has developed that on a very fundamental level, human beings are

[8] The classic example in recent literature is J. Rawls, A Theory of Justice (1999). J. Habermas, Faktizität und Geltung, [Between Facts and Norms], (1992) derives from the discourse principle a system of equal rights.
[9] *See. e.g.*, J. Raz, The Morality of Freedom (1988).
[10] *Cf.* S. Gosepath, Gleiche Gerechtigkeit. Grundlagen eines liberalen Egalitarismus, [Equal justice. Foundations of liberal egalitarianism], (2004).
[11] The "spheres of justice," as M. Walzer, The Spheres of Justice (1983), nicely put it.
[12] Aristotle, Nicomachean Ethics, Book V.
[13] Plato, Nomoi VI, 757.

equal, not in the sense of descriptive equality, but in the sense of the equality of worth, or as formulated today, of dignity. Therefore, the different spheres of justice demand for differentiation, the equal dignity for equality. The core riddle of a full theory of justice is therefore to find convincing criteria for the allocation of goods in rationally established spheres of distribution and to balance the ensuing difference with the basic equality of human worth. The first question has certainly seen some progress since Aristotle. That it could be conclusively argued that political rights should be distributed according to inborn merit of class or wealth, for example, is not a seriously entertained thesis of political justice anymore. Other problems persist: for example, as to the spheres where achievement should count for distribution and what achievement actually means. Is a nurse achieving more or less for society than an investment banker and in which respect?

The second problem of relating difference established in certain distributive spheres to the equality of worth of human beings in general poses nothing short of the fundamental problem of an equitable society—a problem that, not surprisingly, will not be solved here.

How does this concept of justice relate to concepts of justice that are today discussed under headings like equality of treatment, equality of result, and equality of opportunity or resources?[14] Equality of treatment demands equal treatment in a formal way. This kind of equal treatment can be, but is not necessarily, consistent with proportional equality as a foundational principle. In any social arrangement, there is an important place for it. In a legal system, it is, to a certain degree, the core of the matter. For a human right to free speech, for example, it is and must be irrelevant whether the speech is valuable, profound, and fostering the social good or useless, silly, and harmful. For the law of restitution, it does not matter whether the vase destroyed was hurting the eye of the beholder or not. The abstractness of the formal equality is a constitutive part of its liberal value. This is why Anatole France's notorious quote about the prohibition to sleep under bridges and its different effects on rich and poor sounds rather hollow if misunderstood as the whole truth about the law.[15] But the great virtue of abstractness can turn into a vice if it fails to account for differences that are normatively relevant. If that is so, this kind of formal equality can mean considerable injustice and remedies have to be

[14] R. Dworkin, Sovereign Virtue (2000).

[15] This is a very relevant point. There are some parts of post-modern and feminist thought that pursue a rather radical critique of the form of law as such, especially its generality and abstractness. It is maintained that this form of law is unable to accommodate difference and heterogeneity appropriately. For the most radical version of this kind of critique, *see* J. Derrida, *Force of Law*, *in* D. Cornell, M. Rosenfeld & D. G. Carlson (Eds.), Deconstruction and the Possibility of Justice 59 *et seq.* (1992), where he even goes so far as to see in human rights an embodiment of the Holocaust and its denial of heterogeneity. For some comments on this, *see* M. Mahlmann, *Law and Force: 20th Century Radical Legal Philosophy, Post-Modernism, and the Foundations of Law*, 9 Res Publica 19 (2003).

found. A classical example for this is the development of specialised legal regimes in private law like labour law. The Weberian formal rationality[16] of the law is modified in a crucial manner through such a regime. Special rules are established to account for the substantive difference between a contract about the purchase of a chicken and a contract about the (potential lifelong) work of a human being. The existence of a specialised regime of labour law is today taken for granted, but formed a major step in the legal development hotly debated at that time. The point of interest here is that the abstract formality of the law was modified in this area to do justice to the matters regulated—not disputed anymore in principle, but not less important for that matter.

Another notion is equality of result. Again, this can be, but does not have to be, consistent with proportional equality. If two exams are equally well written, there should be equality of result: the same mark. If, however, the one is knowledgeable, the other the deplorable fruit of laziness, equality of result would be unjust. On the other hand, there is the basic equality of human worth. Given this foundational equality, there should be at least to a certain degree equality of result, as at least in some aspects the equality of human worth must mean something. Equality of result can perhaps be best understood as a warning light—if the results are too different it has to be ascertained that proportional equality has been duly preserved.

Equality of opportunity takes account both of the equality of human worth irrespective of properties and natural fortune, and of individual responsibility for the consequences of one's actions. Equality of resources refines the idea of equality of opportunity by looking at opportunities not only in a formal way, but by looking at the preconditions to use these opportunities as well. This is certainly commonsensical, though perhaps implied in a not too narrowly understood equality of opportunity.

Equality of opportunity (not naively overlooking the preconditions of using opportunities) is, to a certain degree, the core good to be allocated in a social arrangement under the auspices of justice if one does not forget that due to the equal dignity of human beings some equality of result should be maintained. For example, it is rightly not regarded as just to create equality of result irrespective of the action of the agent. If a person loses his savings on the stock market speculating against a currency, the community certainly has no responsibility to balance his losses, though the obligation to provide at least a subsistence living (and thus that much equality of result), given the equality of worth, entitles him to that much solidarity.

Equality of opportunity is more encompassing than equality of participation in democracy, something sometimes discussed as an alternative to the equal opportunity approach.[17] Equal opportunity encompasses the opportunity

[16] *Cf.* M. Weber, Wirtschaft und Gesellschaft, [Economics and Society], (1984).

[17] The rationale for demanding equality of participation can be one of individual justice and one of expected outcome of the participation. The latter entertains the hope that equal participation

to participate in democracy and to be an active citizen. On the other hand, participation in democracy is not all; access to goods like jobs, services, etc., are of importance as well.

Equality of treatment, result, and opportunity (and resources) are not alternatives to equality of human worth or human dignity. They are located on different positions in the foundational structure. The basis is the equality of human dignity, which leads under the auspices of justice to equality of treatment, result, and opportunity as *prima facie* maxims of justice with their explained relative validity. If one does not accept that human beings, because of their humanity, are worth being treated with respect irrespective of other properties like sex, ethnic origin, disability, sexual orientation, etc., there is no reason why you should treat them (with the explained qualifications) equally, consider the equality of result, or care for the equality of opportunity. There is no way around human dignity in a full statement of justice.

In equality discourses there is discussion about recognition of a particular individuality or identity as the central object of justice. These identities are sometimes taken to be rather strongly connected to the belonging to certain groups, even to be buttressed by 'identity politics.' It seems that the most important form of recognition is the recognition of this shared dignity as human beings. Whatever the legitimate concerns for some other aspects of human identity are, one should not lose sight of this most basic issue.

3. Justice, Liberty, Efficiency, and Anti-discrimination Law

With these clarifications achieved, let us now turn to the second set of questions about anti-discrimination law and its relation to justice, liberty, and efficiency. The first distinction to be made is between the public and the private sphere. There are, of course, many debates about this division. And there are real problems, especially through the privatisation of public assets. Is a formerly public airport, for example, after privatisation under the same public law obligations, say of fundamental rights, as it was before? Notwithstanding these problems, there is an important grain of truth in the division. There is a difference between personal affairs and community issues that should never be taken for granted, but should not be denied in principle, either.

As a consequence, there are good reasons for a differentiated regime of anti-discrimination law for the public and the private sphere. The regime of the public sphere is the theoretically less problematic, though ridden with severe problems, like structural xenophobia and racism as officially established in

of formerly excluded groups will foster the political wisdom of decisions. That origin determines opinions is a rather crude assumption of political theory. The former rationale is therefore the relevant one.

some countries,[18] and certainly the social reality in others, which are less advanced in openly addressing these kinds of unpleasant problems.

For both spheres, it should be emphasised that, as indicated, the abstractness of the law is a precondition of its liberal value. There will be no liberal legal system without such abstract rules. The price for this is the acceptance that deplorable kinds of behaviour will have legal protection. This is the natural outcome of the separation of law and morality. Legal liberalism necessarily includes the possibility to behave badly. For anti-discrimination law, this is a particularly important point. Some champions of it appear prone to try to purge any kind of reproachable discriminatory behaviour even, for example, in the closer private sphere. Apart from its practical impossibility, this misses the liberal point of the law. There is therefore a need to say openly that even under a full anti-discrimination regime, many areas of discrimination should be allowed. Reproachful opinions about other ethnic groups are legitimately protected by freedom of speech, for example, and there is no reason to exclude the possibility for a devout protestant to let a room in her flat only to protestant students.[19]

If one agrees with this liberal starting point, the next problem arises. What are the limits of this formal liberty? Where is formal equality not a close enough approximation to the demands of proportional equality? Some limits are unproblematic, say, bodily harm. Others are more difficult, say, hate speech. Other examples are certain kinds of behaviour regulated by private law. There is, despite voices that assert the opposite, no disagreement in principle that in the private law will does not reign supreme.[20] For example,

[18] *Cf.* the famous MacPherson Report, Home Office "Report on the MacPherson Inquiry" Cmd. 4262 (24 February 1999).

[19] The recent secondary law on anti-discrimination is aware of this problem. The preamble of the Council of the European Union Directive 2000/43 EC (29 June 2000) states that due consideration shall be paid to privacy concerns: "It is also important, in the context of the access to and provision of goods and services, to respect the protection of private and family life and transactions carried out in this context," *id.*, Recital 4. There is, however, no explicit justification of unequal treatment on these grounds, though member states have argued that Recital 4 opens the possibility for such a justification. Directive 2004/113 EC (13 December 2004) contains an explicit exception for the private sphere: "Within the limits of the powers conferred upon the Community, this Directive shall apply to all persons who provide goods and services, which are available to the public irrespective of the person concerned as regards both the public and private sectors, including public bodies, and which are offered outside the area of private and family life and the transactions carried out in this context." *Id.*, Art. 3.1.

[20] An eminent private lawyer in Germany heavily criticised German attempts to transpose the anti-discrimination directives on the basis of the maxim *pro ratione stat voluntas*, [will, not reason, determines the action]. *Cf.* F.-J. Säcker, *Vernunft statt Freiheit - Die Tugendrepublik der neuen Jakobiner*, [Reason instead of liberty—the virtue republic of the new Jacobinist], Zeitschrift für Rechtspolitik 286 (2002), arguing that the whole point of private law is to free itself from any substantial constraints because of the insight in the necessarily higher rationality of an order created by free contractual relations.

there are not many legal regimes that would not regard a contract through which one party enslaves the other as null and void. Without doubt, there are limits to contractual freedom, drawn by bona fides clauses and the like. The problem is a much more mundane and therefore harder one: which are the concrete circumstances that legitimise boundaries to private legal relations?

For anti-discrimination law, a major problem arises concerning the differentiation of people according to certain characteristics. Which, if any, should be banned? In discussions about anti-discrimination law, one often encounters an attempt by enemies of this body of law to win the day by a *reductio ad absurdum* asking: Why is there not a prohibition of differentiation on the basis of designer clothes? Or hair colour? There is even a point here, given some rather unconvincing recent legislation that includes extensive lists of incriminated characteristics, including general clauses covering anything.[21] But in general this attack misses the point of sober anti-discrimination law.

One should note first that many human rights regimes on a national[22] or international level[23] include not only specialised anti-discrimination provisions, but also general constitutional equality clauses. For the supranational EU law this is also true.[24] Experience teaches that such clauses can be doctrinally controlled by a measured set of standards of scrutiny, depending on the kind of characteristic in question, asking at least for strict scrutiny for personal characteristics not open to wilful change, perhaps supplemented by something like a suspicious categories test.[25]

For specialised anti-discrimination law, there is a clear yardstick for determining why one picks certain characteristics and not others. Differentiation on the basis of some characteristics is doing too much harm. The relevant characteristics are not particularly difficult to discern: for example, in the case of sex, most of the world history of the treatment of women identifies rather clearly this candidate for being a suspicious characteristic. Other candidates are ascribed race, ethnic origin, disability, sexual orientation, religion, and belief. Age is another possible candidate, though it differs from the others.[26]

[21] *E.g.*, the Belgian or Hungarian transposition of the anti-discrimination directives of 2000.

[22] *E.g.*, in the 14th Amendment of the US Constitution, or Art. 3.1 of the German Basic Law.

[23] Art. 14 of the European Convention on Human Rights is interpreted in this way, though this provision is accessory to the other rights granted in the Convention, a situation to change through Protocol No. 12 to the Convention.

[24] *E.g.*, Hochstrass *v.* European Court of Justice, C-147/79 [1980] ECR 3005.

[25] For the jurisprudence of the US Supreme Court, *see, e.g.*, Korematsu *v.* U.S., 323 U.S. 214 (1944) and U.S. *v.* Carolene Products Co., 304 U.S. 144, at n.4 (1938), elaborated in the case law. The German Federal Constitutional Court applies a strict test of proportionality if the treatment is based on a personal characteristic not open to change, similar to the explicitly forbidden characteristics of Art. 3.3 of the Basic Law, or if it endangers civil liberties. For other characteristics, the standard requires merely reasonable considerations of public good, *cf.* BVerfGE 97, 35 (1997).

[26] People are not often discriminated against just because of their age—anti-ageism is not really the issue. People are rather discriminated against because age is taken as an indicator for something else that is the real basis for the treatment, for example, health or professional capacity. The question of age discrimination is therefore: when is the ascription of such and such property actually rational, and when is it legitimate to act on the basis of the characteristic that is rationally disclosed by age? The voting age is an example of a rational ascription of a certain property, namely, some kind of ability of judgement in political matters, that legitimately plays a role in a certain treatment, the right to vote.

Perhaps genetic features form an additional category. Others are certainly not—like income, outward appearance, etc.[27] There is an important lesson to be learned here. There is an end to specialised anti-discrimination law. It is not ever expanding. The list of possible characteristics is finite. And we can see that end, though there will be changes and adjustments.

Another question is an equally serious one. Does anti-discrimination law help? Is it at its best perhaps nothing but symbolic policy and at its worst harmful over-regulation? It is clear that it helps only to a limited degree. Anti-discrimination law evolved slowly.[28] Experience with this body of law discloses various problematic areas. There is first the problem of not only determining which distinctions should be ruled out, but—the next step—how these characteristics are actually defined. This is not always easy, even though some of the interpretational struggles result not so much from the conceptual intricacies as such. Rather, the reason for the difficulty is the attempt to include in some protective regime discriminations that are really based on other grounds under the heading of a prohibited characteristic, because the latter is the subject of special laws, but not the former.[29] Another problem concerns the definition of discrimination. Here the distinction between direct and indirect discrimination evolved, the latter including seemingly neutral behaviour with discriminating effects on certain groups. In this context the need for a comparator appears, which might be hard to find. Recent anti-discrimination law therefore uses a hypothetical comparator.[30] There is also the problem of the burden of proof. On the one hand, there is the difficulty for the person discriminated against to prove facts lying regularly in the sphere of the other party; on the

[27] Art. 20 of the European Charter of Fundamental Rights lists sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age, or sexual orientation.

[28] Standard accounts of its development distinguish three stages. First, the dismantling of legal obstacles to equal treatment. Second, anti-discrimination law as such. Third, the establishment of positive duties on public bodies and private individuals, including reverse discrimination. *Cf.* Fredman, *supra* note 4, at 6 *et seq.*

[29] *See* the struggles with the differentiation between ethnic origin and religion under English law: Mandla *v.* Lee [1983] 2 AC 548 (HL) (Sikhs are an ethnic group); Dawkins *v.* Department of Environment [1993] IRLR 284 (CA) (Rastafarians are not an ethnic group); J. H. Walker *v.* Hussain [1996] IRLR 11 (EAT) (Muslims are not an ethnic group). *See also* the question whether discrimination on the basis of sex includes discrimination on the basis of sexual orientation: Salgueiro da Silva Mouta *v.* Portugal, Decision of 21 December 1999, 1999 ECHR 176, at 28 states that the list in Art. 14 ECHR is not exhaustive and covers sexual orientation as well.

[30] *See* Art. 2 Directive 2000/43 and Art. 2 Directive 2000/78 in this respect.

other hand is the need to protect individuals against spurious claims, which are often referred to by the opponents of anti-discrimination law, but which of course exist.[31] There is the problem of remedies for discrimination. Is a duty to contract legitimate and helpful? What about punitive damages? As the last problem in the list (which can be continued), legal standing will be mentioned. As in other aspects of law, it is with good reason primarily an individualistic remedy against grievances. Some promoters of anti-discrimination law are very sceptical about this function, as the results are not far reaching enough. But if law helps to ensure justice in a singular case, this is quite an achievement. One should never forget that the law is not everything and that many things, especially general political or cultural change, are beyond its modest, but important reach. There are some possibilities to enhance this reach, for example, by giving legal standing to organisations in order to create the possibility of representative or class action. Another way pursued in some countries for decades and now mandatory for all European Union member states[32] is to establish an independent monitoring body, sometimes with some inquisitorial, judicial, or quasi-judicial competencies of a varying scope. These kinds of instruments might help to overcome disparities. Another much debated instrument in this respect is positive action. Positive action is not contentious if it means nothing but the fostering of disadvantaged groups (e.g., as to education, vocational training, etc.) or campaigns to raise consciousness of patterns of discrimination.

The great issue is reverse discrimination. There is a real problem of justice as proportional equality concerning reverse discrimination. Simply put, part of the current generation pays a price for past injustices. To a certain degree this might be mitigated by the fact that some possibilities of the present depend on past disadvantages of others. Some men, for example, might not be where they are competing with women if the past had been more just. This is, however, often not true. The really hard question then arises: how can it be ethically justified that a person is disadvantaged in comparison to another, without any basis in the individual comportment of the persons concerned? How can this be legally conceptualised? There are various answers to these questions, referring to ideas of unjust enrichment, remedial justice, group rights, and the like. In any case, there is an element of sacrifice demanded from members of the previously advantaged groups that should be acknowledged openly and that should serve as a constraint for any such schemes.[33] The member of the former, and perhaps still, privileged group should have, however, the ethical strength to support such acts of solidarity.

[31] For European anti-discrimination law, the answer is provided by an ease of the burden of proof in civil litigation: *cf.* Art. 8.1 Directive 2000/43; Art. 10.1 Directive 2000/78; Art. 9.1 Directive 2004/113.

[32] Art. 13 Directive 2000/43; Art. 12 Directive 2004/113.

[33] The jurisdiction of the European Court of Justice on preferential treatment of women that has slowly evolved might raise some questions, but seems to offer in general a quite equitable result: the possibility of preferential treatment for equally qualified women if the consideration of special circumstances on the side of the male applicant can be considered. *Cf.* Kalanke *v.* Freie Hansestadt Bremen, C-450/93 [1996] ECHR I-3051; Marschall *v.* Land Nordrhine-Westphalia, C-409/95 [1997] ECR I-6363; and Abrahamsson *v.* Fogelqvist, C-407/98 [2000] ECR I-05539.

The last question to be addressed is this: Will anything else than anti-discrimination law serve better? In the perception of many people there is a very strong candidate. It has been maintained that market forces are the best remedies against discrimination.[34] The market and its forces will eradicate whatever is irrational about discrimination, it is asserted. This is sometimes buttressed by a principled adherence to the economic analysis of law.[35] There are two shortcomings to this approach. The first is that it overlooks an important empirical fact. Discrimination is persistent even under conditions of competition. The discrimination of women is highly inefficient, but one of the most persistent and universal phenomena in social history. It did not cease when markets in the modern sense appeared on the socio-economic scene. There is an important conceptual lesson here. The irrationality of human beings in the real world is a highly important historical factor, not to be forgotten. Marxist theory was rightly criticised for its mono-causal economic determinism, overlooking the 'subjective factor,' the vastly irrational motivational recourses of the human mind. The champions of efficiency fall into a similar trap. They overestimate the importance of instrumental rationality and underestimate the power of other motives.[36]

In addition, equality can be a value outweighing efficiency. It might be, for example, that the inclusion of a certain number of disabled persons in a certain workforce, as mandatory in various legal regimes,[37] is in fact less efficient than the exclusion. But efficiency is not the only value. It is certainly the central concern for the economic sphere, but only within certain normative limits. It can and always has been modified to accommodate other values. The distribution of burdens following from that is a quite different question from the general normative approach. It might be that, for example, in case of special duties, not the employer, but the community at large is the right addressee to pay for the realisation of the value, through public funds or through schemes for the compensation of special burdens.

[34] R. A. Epstein, Forbidden Grounds: The Case against Anti-Discrimination Law (1992).

[35] *See id.*, for a frontal attack on anti-discrimination law.

[36] Some at least partly realise that their argument has only limited force given certain historical realities. "So great were the abuses of political power before 1964 that, knowing what I know today, if given an all-or-nothing choice, I should still have voted in favour of the Civil Rights Act in order to allow federal power to break the stranglehold of local government on race relations. History often leaves us with only second-best devices to combat evils that are in principle better controlled by other means," *id.*, at 10.

[37] In Germany, for example, on the basis of SGB X (Social Code, Book IX).

Within these bounds, efficiency is very important for anti-discrimination law. It buttresses its case. By overcoming the irrationalities detrimental to many economic activities, it is widely acknowledged to play a potentially very beneficial role for organising an efficient economic sphere.[38]

4. Anti-discrimination Law and Pluralism – Liberty and Equality Resumed

A last word on the relationship between equality and pluralism, because it is sometimes maintained that anti-discrimination law means denial of difference and the slow death of freedom. This is a misunderstanding. The protection of the equality of worth of all human beings is not a contradiction to the heterogeneity of human beings and the differentiated culture they fortunately unfold. The protection of equality of worth does not deny this heterogeneity. It only negates that any property of human beings—be it colour, sex, ethnic origin, religious, philosophical or political belief, disability, sexual orientation, etc.—constitutes the legitimate basis for a qualitative hierarchy of human beings. The consequence of a legal regime safeguarding the equality of human worth is therefore not mechanical uniformity, but protected pluralism. Such a legal regime creates the normative preconditions for the many experiments of living to be pursued unmolested and without regard to the particular contingent properties of their agents.

Anti-discrimination law does reduce certain liberties of human beings. There is no doubt about it. If it works, agents are, for example, effectively hindered from concluding certain contracts with discriminatory content. But it does so for freedom's sake. It is only from a narrow perspective the dagger in the heart of civil liberties, most importantly of private autonomy and the freedom to contract. It is also not (at best) a necessary sacrifice of liberty for the sake of equality, as even some anti-discrimination lawyers assert. To the contrary, it has an intrinsic liberal value, as one of its core aims is to extend liberty to those partly excluded from enjoying it due to social patterns of discrimination. If you are black and cannot conclude certain contracts, you do not just have a problem of equality, but a hindrance of your freedom to contract. Anti-discrimination law wants to provide a remedy against that. The core of anti-discrimination law properly conceived is thus the universalisation,

[38] The most recent Community law on anti-discrimination refers explicitly to increasing efficiency through anti-discrimination policies, through referring to discrimination as an impediment to a "high level of employment," and the "raising of the standard of living," Recital 9, Directive 2000/43. MacCrudden quite convincingly makes the point that the discussion about the rationale of anti-discrimination law is beside the point; there might be various reasons for the different grounds. *See* MacCrudden, Anti-Discrimination Law, *supra* note 4, at 13.

not the limitation, of liberty in the social aggregate. Anti-discrimination law, rightly conceived, is a deeply liberal concern.

The doctrinal reconstruction in contemporary fundamental rights law of the problems of anti-discrimination law as an expression of the conflict of equality rights and fundamental freedoms often misses, therefore, the complexity of the fundamental rights issues involved. As a consequence, some liberal critique of anti-discrimination law is illiberalism in liberalism's disguise. The liberty defended is not the liberty of all, especially not the liberty of minorities that are the victims of discrimination, but the liberty of a majoritarian culture or even, sometimes, of the happy few.

5. Summary

The equality of worth of human beings is the cornerstone of the modern concept of law. In connection with the normative basic principle of justice as proportional equality, it provides the yardstick for the limitation of individual freedom: it is the protection of the dignity and autonomy of all. The need for a reconciliation of the value of a wide sphere of liberty of the individual and the demands of justice is embodied in the core architecture of modern legal institutions.

The concept of proportional equality is the foundational principle of the relatively valid *prima facie* principles of equality of treatment, result, and opportunity or resources. Anti-discrimination law is a continuation of the project of the reconciliation of individual freedom and justice characteristic of the project of modern law both in public and private law. The protection of the equality of worth of human beings should, however, have the self-confidence to allow in many areas of society comportment that is offensive and even immoral. Anti-discrimination law should be carefully crafted to protect core areas of human life against discrimination without even hoping to solve social problems beyond its scope. Anti-discrimination law should not degenerate into symbolic policy without hard legal effects. It has to be narrowly tailored to pressing social needs. The list of possible characteristics that are not allowed to be the basis of discrimination is therefore limited. The characteristics included are determined by the empirical facts of persistent patterns of harmful behaviour of a distinguished kind. Anti-discrimination law faces many practical problems as to the definition of characteristics, the concept of discrimination, remedies, legal standing, and positive action (including reverse discrimination) that are only partly solved. The results of anti-discrimination law will continue to be limited. There is, however, no reason to underestimate the worth of justice achieved in individual cases and

some of its influence on structural patterns of behaviour. Market forces alone will not solve existing problems, because of the force of irrationality of human motivation.

As in other areas, a culture of human rights will be the product of social and cultural struggles and practices, not of the law alone.