

# **POSITIVE ACTION**

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## **1. INTRODUCTION**

Positive action is a concept of great importance in the context of anti-discrimination law. It involves the use of special measures to assist members of disadvantaged groups in overcoming the obstacles and discrimination they face in contemporary society. Different types of special measures may be used to achieve this purpose. Employers may give preference to women or members of disadvantaged ethnic minority groups in selecting candidates for employment and for promotion. Government agencies or employers may provide special training, assistance and advice to members of disadvantaged groups. Universities may reserve or ‘set aside’ special places in their classes for members of minority groups. Governments may introduce laws that require private and state companies must have a certain number of women on their board of management.

Sometimes described as ‘affirmative action’ in the United States, positive action is widely used in Europe, North America, Africa and India to benefit different groups. Many national parliaments have passed laws requiring the use of positive action. Positive action in favour of women is common in the EU. So too is ‘affirmative action’ to assist Afro-Americans and other disadvantaged minority groups in the United States. Special measures are in place in South Africa and the United Kingdom (UK) to help members of African and Asian ethnic groups to overcome the obstacles that they may face in accessing employments, social services and the political process. In India, there are extensive positive action systems in place which are intended to assist members of lower castes and severely disadvantaged social groups. Many countries have positive action measures in place for disabled persons, including special employment arrangements. European Union (EU) legislation permits the use of special measures to combat the disadvantages faced by members of under-represented groups. International human rights law permits and may even require the use of positive action in certain circumstances. Therefore, the legitimacy of using positive action is now widely established.

However, the use of positive action can sometimes cause controversy. At times, members of majority groups have used legal or political methods to challenge the use of special measures to assist disadvantaged groups. Often, these challenges are brought by individuals who argue that the introduction of special measures to assist disadvantaged groups discriminates unfairly against them. Measures giving preferential treatment to disadvantaged groups in employment have proved to be particularly controversial. As a result, a variety of legal controls have developed in different states which attempt to clarify when positive action can be used. This paper discusses a) why positive action has become an important element of anti-discrimination law and policy; b) what type of measures are used as part of positive action initiatives; and c) the legal controls that exist in this complex area of law. Particular reference will be made to the law of the European Union, the United Kingdom and the United States to develop key arguments.

## 2. THE LIMITS OF ORDINARY ANTI-DISCRIMINATION LAW

To understand why the use of positive action may be necessary, it is useful to understand the nature of the disadvantages that affect women and members of other groups which are under-represented in employment and other areas of social life. Sometimes, direct discrimination may take place, where a woman or a member of another disadvantaged group is not employed or promoted or selected for a benefit because of their gender, ethnic group or social status. Indirect discrimination may also exist, where the application of apparently neutral and fair criteria to distinguish between individuals may have a disproportionately negative impact upon members of a disadvantaged group which cannot be justified. Both these forms of discrimination can have very bad consequences for members of disadvantaged groups, who often face social exclusion and the denial of equal treatment as a result.

As a result, anti-discrimination law usually prohibits both these forms of discrimination. Individuals are encouraged to bring legal actions if they have suffered direct or indirect discrimination, and offenders are punished through the civil law by the imposition of damage awards and other forms of legal remedy. By imposing this prohibition on such forms of discrimination, anti-discrimination law has been very successful in many countries, and in particular in Europe and North America. It has altered the behaviour of many employers and public bodies, changed social attitudes towards disadvantaged groups and prevented many forms of discrimination.<sup>1</sup>

However, it is also important to understand that using anti-discrimination law to eliminate the disadvantages faced by women and other under-represented groups may only be capable of bringing about a limited amount of social change. Discriminatory attitudes are often deeply embedded in society. Anti-discrimination law prohibits direct and indirect discrimination: however, it cannot stop discrimination where there is no clear evidence that discrimination has occurred, or where individuals are not willing to complain about the negative treatment they have suffered. Even if an individual may wish to complain about discrimination, the financial and social pressures to conform may be so great that the individual may decide not to proceed with the case.<sup>2</sup>

If there is a lack of individual complainants willing to bring an action in particular areas of economic activity or social life, then anti-discrimination law may have very little impact in those particular areas. For example, there have been problems with sex discrimination for some time in the huge financial services industry in London. Female employees of leading investment banks have often complained of sexist attitudes and resentment of pregnant workers taking time off.<sup>3</sup> However, until recently, very few cases of sex discrimination were brought in relation to gender equality issues within the City of London financial services sector. This has begun to change, with some female investment bankers receiving very large damage awards (including awards of over one million UK

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<sup>1</sup> For an analysis of the effectiveness of anti-discrimination law in the UK, see B. HEPPLÉ, M. COUSSEY, and T. CHOUDHURY, *Equality: A New Framework: Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation* (Oxford: Hart Publishing, 2000), para. 1.33.

<sup>2</sup> See S. FREDMAN, *Discrimination Law* (Oxford: Oxford University Press, 2001) p. 165. See also S. FREDMAN and E. SZYSZCZAK, 'Interaction of Race and Gender', in B. HEPPLÉ and E. SZYSZCZAK, *Discrimination: The Limits of the Law* (London: Mansell, 1992), p. 214-26.

<sup>3</sup> See the FAWCETT SOCIETY, *Sexism in the City* (London: Fawcett Society, 2007).

pounds sterling) for sex discrimination. However, victims of discrimination still appear slow to come forward with complaints, due to social pressures.

In addition, individuals complaining of discrimination may have great difficulty in establishing a clear case under anti-discrimination legislation. This is particularly true when it comes to indirect discrimination, where the law is complex and proving facts may be difficult. This can discourage use of anti-discrimination law.<sup>4</sup> Even if an action is successful, the remedies that an individual can obtain may be limited to redressing the immediate wrong: often, wider changes to how an organisation works, which may benefit more persons than just the individual victim who brought the discrimination case, will not be required under anti-discrimination law. This can seriously limit its impact.<sup>5</sup>

However, deeper problems may also exist. The views and expectations of employers, public bodies and other organisations will often be shaped by dominant social assumptions and stereotypes. Employers may have a clear idea of how a 'normal' employee is supposed to look and behave: this may result in candidates from dominant social groups being selected in preference to less obvious candidates who may be equally as qualified. Organisations may look for potential employees to be from similar backgrounds as the senior managers of the organisation: in this way, the dominance of particular social groups will be 'replicated', with other groups being left out in the cold. A man from a dominant ethnic group who is also from traditionally successful socio-economic background will often succeed where a woman or a person from a more disadvantaged background will not: this is a problem in most human societies.

Disadvantaged groups may also lack the social capital and access to networks of influence that members of dominant groups may possess.<sup>6</sup> For example, members of ethnic minorities, or persons with disabilities, or those from particular socio-economic backgrounds may find it difficult to access top universities as a result of educational and cultural barriers: this in turn may make it very difficult for those groups to access good jobs or enter positions of influence. Assumptions, expectations and stereotypes about how women and members of under-represented groups behave and act may cause them severe disadvantage, often in subtle ways that will not make it possible to bring a case under anti-discrimination law. For example, in European states, an employer might assume that a Muslim woman from a traditional religious background would not wish to do particular types of work, or to meet with men in certain circumstances, and decide not to employ her: as a result, she might lose out on the opportunity to prove her ability just because of casual assumptions and stereotypes.

Other problems may exist. Disadvantaged groups often suffer from neglect by central government and local authorities, often caused by lack of understanding of their specific needs, and the failure to take into account their particular circumstances. This neglect is often due to the limited participation of members of these disadvantaged groups in decision-making processes.<sup>7</sup> This problem can occur in both the public and private sectors, and can unfairly limit their opportunities to participate. For example, the

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<sup>4</sup> See N. BAMFORTH, M. MALIK and C. O'CINNEIDE, *Discrimination Law: Theory and Context* (London; Sweet & Maxwell, 2008), Chs. 6 and 7.

<sup>5</sup> See S. FREDMAN, *Discrimination Law*, 170-73.

<sup>6</sup> For the idea of 'social capital', see P. BOURDIEU, 'The Forms of Capital', in A. HALSEY, H. LAUDER, P. BROWN & A. STUART WELLS (eds.) *Education: Culture, Economy and Society* (Oxford: Oxford University Press, 1997), 46-58.

<sup>7</sup> See S. FREDMAN, *Discrimination Law*, 22-23.

lack of persons with disabilities at senior decision-making levels within most public and private organisations has led to the needs of disabled people being ignored in most societies for a long time. Also, where there are very few women and members of disadvantaged groups participating in particular areas of social activity, this can result in these areas becoming very unwelcoming to potential entrants from unusual or new backgrounds. The experience from North America and Europe is that it is difficult for minorities or women to enter into areas of employment or social activity which are completely dominated by men or members of dominant groups. The jokes, customs, practices and behaviour of those already in the organisation or involved in the activity in question may deliberately or unconsciously exclude newcomers.

There also may be a lack of 'role models', i.e. successful individuals from disadvantaged groups participating in particular activities or organisations, or employed in senior positions. If such 'role models' exist, this can encourage members of disadvantaged groups to enter the organisation or activity in question. British and American universities often have special policies which encourage and support members of disadvantaged groups to register as students, in the hope that this will encourage other members of such groups also to enter university. However, if no such 'role models' exist, this may severely discourage individuals from disadvantaged groups attempting to enter what will often appear to be hostile or alien environments.

All of these factors explain why discrimination and disadvantage may persist in societies which have strong anti-discrimination laws. Collectively, they are often described as 'structural' forms of inequality, because they involve underlying social structures rather than individual acts of discrimination. Alternatively, the term 'institutional discrimination' is also sometimes used, as many of these factors relate to how institutions work and the influence played by the culture of public and private institutions.

The existence of these structural or institutional factors helps to explain why 'ordinary' anti-discrimination law will not always succeed in eliminating discrimination and disadvantage. As already discussed, anti-discrimination law has had great successes in Europe and North Africa over the last forty years, in particular in the context of gender equality. However, the primary focus of such law is on securing equal treatment for individuals. Structural forms of inequality often cannot be addressed using anti-discrimination law.<sup>8</sup>

This also explains why it is often necessary to take special measures to promote equality and to remove the disadvantages faced by some social groups. Women, disabled persons, ethnic minorities and other disadvantaged groups face many obstacles: giving preferential treatment to these groups in certain circumstances may assist them to overcome these obstacles. Also, disadvantaged groups may also suffer from a long history of discrimination and social exclusion. This can mean that they lack education, employment and state support, which may keep them in poverty or poor socio-economic conditions, which can make their disadvantaged position worse. This cycle can be very difficult to break. Social policy in Europe is increasingly directed towards finding ways of combating social exclusion.<sup>9</sup> As part of this policy development, it has become apparent that achieving progress requires that special measures are taken to ensure

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<sup>8</sup> Ibid. 7–11. See also J. SQUIRES, *Gender in Political Theory* (Cambridge: Polity Press, 1999).

<sup>9</sup> See H. COLLINS, 'Discrimination, Equality and Social Inclusion', 66(1) *Modern Law Review* 16-43.

socially excluded groups are able to participate in decision-making by public authorities, as well as in education, employment and other important areas of social life. Without such participation, social exclusion will remain a persistent problem. Active steps to promote greater equality are required.

### **What is Positive Action?**

The term 'positive action' can describe a wide variety of policies and initiatives. Sometimes positive action is understood as meaning preferential treatment for minorities, women and other disadvantaged groups. Giving preference to candidates from disadvantaged groups may be an important part of any positive action policy. However, positive action strategies can take a variety of forms, which may not always involve the use of preferential treatment.<sup>10</sup> Any well-designed positive action strategy will probably attempt to make use of several different forms of positive action. Different strategies may use different forms of positive action at different times, depending upon the nature of the disadvantages at issue and the relevant socio-economic and political context in question.

A broad definition of positive action could therefore include all measures which seek by means of positive steps to alter existing social practices so as to eliminate patterns of group exclusion and disadvantage.<sup>11</sup> Within this wide definition, Christopher McCrudden has identified five basic categories of positive action.<sup>12</sup>

#### *Category 1: Eradicating Prohibited Discrimination*

The first category consists of positive measures to eradicate discrimination, which involve organisations taking active steps to identify and put an end to any policies and practices which cause discrimination. In practical terms, this type of positive action will often involve the use of regular reviews of how an organisation selects its employees, conducts promotion and does its business. The aim of these measures is to put a stop to any discrimination which is taking place, or which may take place in the future. The organisation may change its employment policy, or how it consults with its workers, or how it provides goods and services to the public. These measures often help to eradicate direct and indirect discrimination: however, they may do little to eliminate the more complex problems of structural or institutional discrimination.

#### *Category 2: Purposefully Inclusive Policies*

The second category involves the use of policies and practices which do not give preferential treatment to disadvantaged groups on the basis of their gender, ethnic origin or other specific distinguishing feature, but which instead use general criteria as a basis for giving special assistance. For example, public authorities may provide special measures to assist unemployed persons back into work, or give special support to schools

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<sup>10</sup> C. MCCRUDDEN, 'Rethinking Positive Action' (1986) 15 *Industrial Law Journal* 219-243.

<sup>11</sup> This broad definition is adopted from C. BELL, A. HEGARTY AND S. LIVINGSTONE, 'The Enduring Controversy: Developments on Affirmative Action Law in North America' (1996) *International Journal of Discrimination and the Law* 233, at p. 234.

<sup>12</sup> C. MCCRUDDEN, 'Rethinking Positive Action' (1986) 15 *Industrial Law Journal* 219-243.

in a particular area which has many poor families. These policies may however indirectly benefit disadvantaged groups: for example, policies in the US which give special assistance to schools with a large proportion of immigrant or poor children will mainly benefit the Afro-American and Hispanic minority groups.

Governments often make use of such policies when they do not wish to be seen as giving special treatment to certain social groups. However, their disadvantage is that their general nature means that they may not benefit the groups most in need of special assistance. For example, in the UK, different ethnic groups have different social problems: the British Pakistani community (who come originally from Pakistan and who are overwhelmingly Islamic in religion) have particular problems arising from anti-Muslim prejudice and low numbers of their female population participating in employment that other ethnic minorities, such as the British Indian community (who usually come from wealthier backgrounds and from a variety of religious backgrounds) do not.<sup>13</sup> General measures aimed at poorer communities, or in schools in particular areas, might not address the specific problems faced by the British Pakistani community.

### *Category 3: Outreach*

The third category involves the use of ‘outreach’ programmes. These are strategies which public or private bodies put into effect with the aim of attracting more applications from disadvantaged groups for employment, promotion or entry into training or educational courses. This could include the use of targeted advertising, the establishment of special links with community groups, schools and ethnic minority organisations, and careful presentation by the body reaching out to disadvantaged groups to ensure that it is seen as open to diversity and applications from individuals from disadvantaged groups. Public bodies may also establish special outreach programmes to make sure that the health, transport, welfare and educational services that they provide are being used by disadvantaged groups. For example, public authorities in London, which is a very diverse and multi-cultural city, provide information on how individuals can access the public services in a wide variety of languages, including both Mandarin and Cantonese.

Other forms of outreach could involve the ‘setting aside’ or reservation of places at particular stages of the recruitment process (such as ensuring that a woman is always interviewed for every vacancy or promotion opportunity), or providing special forms of training for members of disadvantaged groups. For example, the UK Home Office, the central government department in charge of policing, immigration and internal security, has established a special scheme under which employees from ethnic minority groups are given special training in how to apply for senior positions within the department.<sup>14</sup> Special targets have also been established for senior management, who are encouraged to ensure that a certain proportion of senior staff come from minority backgrounds, with some success.<sup>15</sup> The advantage of such outreach and development schemes is that they

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<sup>13</sup> See the statistics as to comparative disadvantage among the UK’s minority groups contained in *Fairness and Freedom: The Final Report of the Equalities Review Panel* (London: Cabinet Office, 2007).

<sup>14</sup> See House of Commons Debates (*Hansard*), 3 November 2005, col. 1253W.

<sup>15</sup> See HOME OFFICE, *Employment Monitoring Report 2006/07* (London: UK Home Office, 2007), available at <http://www.homeoffice.gov.uk/documents/employment-monitoring-report.pdf> (last accessed 15th may 2008).

can compensate for the disadvantages and obstacles faced by members of disadvantaged groups: their weakness is that such schemes can encourage participation by disadvantaged groups, but cannot guarantee it, or ensure definite results.

#### *Category 4: Preferences*

Fourthly, giving preferential treatment of members of disadvantaged groups in employment (and at times in education) is an important category of positive action. A variety of ways may exist for giving preference to individuals from disadvantaged groups in recruitment, promotion and selection for senior management. In some countries, it is possible to reserve posts or positions for women, disabled persons or members of a particular minority group. Alternatively, a person's gender, ethnic background, disability or any other personal characteristic which links them to a disadvantaged group may be a factor which can be taken into account in recruitment and promotion decisions. For example, a company may decide that it does not have enough women in senior management: as a result, it may decide that a person's gender can be taken into account when interviewing candidates, and if two or more candidates are more or less equally qualified for the post in question, then preference can be given to a female candidate. This is known as applying preferential treatment as a 'tie-break'. Preferential treatment can also involve taking a candidate's link to a disadvantaged group into account as a 'plus-factor', i.e. it acts as a positive factor in favour of a candidate, which takes its place among the other factors that apply.

The considerable advantage that preferential treatment has over other types of positive action is that it usually guarantees a successful outcome. Often, preferential treatment is introduced when other forms of positive action have failed, because it is effective. For example, in Norway, years of positive action using alternative strategies has resulted in a considerable degree of gender equality throughout society. However, women remained very under-represented at the highest level on the management boards of private companies and public bodies. Therefore, in 2003, the Norwegian Parliament passed legislation that established that if companies did not take steps to ensure that their boards of management were made up of 40% female members within two years, companies would be legally required to implement this quota or face legal sanctions. The Parliament acted on its threat in 2006 after this target was not reached by many private companies, requiring all company boards to meet this quota by 2008 or else be fined or dissolved.<sup>16</sup>

The disadvantage with preferential treatment measures, which may be compulsory and imposed by legislation (with as the Norwegian law) or voluntary (as is more often the case in Europe and North America), is that it can provoke backlash in the form of legal and political challenges. Individuals from non-disadvantaged groups often allege that this form of positive action constitutes discrimination against them. Preferential treatment may also widen the gaps between different groups, increasing resentment and hostility,

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<sup>16</sup> For more information, see the comprehensive outline of the legislation available (in English) at the website of the Norwegian Ministry of Children and Equality, <http://www.regjeringen.no/en/dep/bld/Topics/Equality/rules-on-gender-representation-on-compan.html?id=416864> (last accessed 12<sup>th</sup> May 2008).

and may also be abused. (See the discussion below on the justification for positive action.)

*Category 5: Redefining Merit*

The fifth category of positive action identified by McCrudden consists of attempts to ‘redefine merit’, that is, to examine and redefine the criteria that employers use for filling posts (or that educational institutions use for selecting students) in such a way as to ensure greater participation from disadvantaged groups. Often, the manner in which the desired qualifications for a post are defined by an employer will exclude many potential applicants from under-represented groups. For example, an employer may decide that a post involves very long and irregular hours and assesses candidates on the basis that they must be able to work such hours. This may often disadvantage many female applicants, who may have child care responsibilities, and other applicants who care for older family members. However, this requirement may not actually be necessary: perhaps the workload for the post could be rearranged or adjusted in some way? Current conceptions of ‘merit’ may mask stereotypical assumptions and ignore other ways as to how a particular job could be performed.

It may therefore be possible to reconceptualise what qualities are required for many posts, and to redefine our concepts of ‘merit’ in a way that opens up employment and education to members of disadvantaged groups. In the US, as discussed below, the Supreme Court has recognised that having a diverse student body can improve the educational experience of students.<sup>17</sup> As a result, universities now may take the ethnic and socio-economic background of a student into account in admission decisions and treat membership of an under-represented group as a positive factor, on the basis that admitting more members of under-represented groups into the student body will improve its diversity and therefore the overall standard of education.

It may also be the case that being from a disadvantaged group may be a positive reason for appointing someone to a particular post. For example, for Western countries concerned about Islamist terrorist attacks, it is useful to have Muslim police officers, who may understand the background political context and work with Muslim minority communities in a better way than would other police officers. Therefore, being Muslim may be treated in some countries as a positive personal characteristic in recruiting members of the police and security services.

Having a certain proportion of senior figures in government and in elected bodies from disadvantaged groups may improve decision-making. Therefore, many European states in particular have reserved places in elected assemblies for members of particular ethnic groups, or require political parties to select a certain number of female candidates.<sup>18</sup> Some countries consider that the social imperative of combating the exclusion faced by disadvantaged groups is so compelling as to justify requiring very extensive inclusion of members of disadvantaged groups within education and employment. For example, both the Indian Constitution and subsequent legislation passed by the New Delhi Parliament make positive action in favour of the ‘disadvantaged castes’

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<sup>17</sup> See *Grutter v Bollinger* 539 US (2003).

<sup>18</sup> See C. O’CINNEIDE and M. RUSSELL, ‘Positive Action to Promote Women in Politics: Some European Comparisons’ (2003) 53 *International Comparative Law Quarterly* 587-614.

within India society a legal priority. A certain number of seats in the federal and state legislatures are reserved for candidates from lower castes, as are places in the leading Indian universities and in the public service.<sup>19</sup>

### **How and When Positive Action Is Used**

Positive action strategies can therefore take a variety of forms, often combining elements of several or even all of these different categories. Many of these forms of positive action have been used by different countries at different times. The use of such special measures often predates the introduction of anti-discrimination law. For example, many European and North American states introduced employment quotas and reserved particular posts for disabled persons in the aftermath of the First and Second World Wars, because of the very large number of seriously wounded survivors of both wars.<sup>20</sup>

Other forms of positive action measures were introduced initially in the USA in the late 1960s and early 1970s to remedy the wide-spread segregation of the Afro-American community. Many of these ‘affirmative action’ measures were originally introduced by court order in order to provide a remedy for direct or indirect discrimination.<sup>21</sup> However, the use of positive action measures in the USA expanded beyond their use as remedies in discrimination cases. A range of positive action measures are now used, and form a key part of the post-1960s drive to remove segregation and to ensure equality of treatment for Afro-Americans and other disadvantaged groups.

Examples of such positive action measures include the use of preferential treatment to benefit particular disadvantaged groups in university admission procedures. Preferential treatment for Afro-American and other under-represented groups is also common in awarding public sector supply contracts and in recruiting staff in the public sector and armed forces. There is ongoing political controversy about the use of preferential treatment, which is discussed in the next section. However, the strength of support in the US for the use of positive action can be seen in the support for such measures expressed by leading US politicians, as well as the armed forces and leading US business corporations, in the arguments submitted to the US Supreme Court in the case of *Grutter v Bollinger*.<sup>22</sup>

Within the EU, there is a wide diversity of approaches to the use of positive action. Differences exist not alone between different member states, but also within

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<sup>19</sup> See Articles 14-17 of the Indian Constitution: see also Constitution (Scheduled Tribes) Order 1950; Constitution (Scheduled Castes) Order 1950; Scheduled Castes and Scheduled Tribes Orders (Amendment) Act 1976; Constitution (Sixty-Fifth Amendment) Act 1990.

<sup>20</sup> See L. WADDINGTON, ‘Reassessing the Employment of People with Disabilities in Europe From Quotas to Anti-Discrimination Laws’ (1996) 18 *Comparative Labour Law Review* 62

<sup>21</sup> US legislation permits courts to issue ‘consent decrees’, where discriminating companies agree to take positive action measures to remedy the damage caused by their discriminatory policies. The US Justice Department under the Violent Crime Control and Law Enforcement Act 1994 may enter into consent decrees with municipal police departments alleged to have engaged in a ‘pattern or practice’ of conduct that infringes upon the civil rights of its persons as afforded by federal state and local laws. See 42 USC 14141 (Su IV 1998).

<sup>22</sup> 539 US (2003).

member states in how positive action is used to address different types of disadvantage.<sup>23</sup> Certain general pan-European trends can be detected. Generally, EC law permits, rather than requires, the use of certain forms of positive action (see below). Thus what form positive action takes in each country is decided by the member states themselves, rather than by the EU.

National laws usually permit more extensive positive action to be used to benefit disabled persons than for any other form of disadvantage: this reflects the extensive use of employment quotas in the post-war period.<sup>24</sup> The use of ‘strong’ forms of positive action, including preferential treatment, is relatively common when it comes to ensuring greater gender equality. For example, many German states have introduced ‘tie-break’ requirements that women be given preference where more than one candidate can satisfy the recruitment criteria for posts in the public service. These measures largely came about because of the influence of a major expert report which advocated that the German public service should become a ‘model’ of employment equality.<sup>25</sup>

In France, a failure to ensure a fair representation of women in the lists of candidates selected by political parties for elections can result in the loss of state funding. A variety of measures have been introduced in other European states to either permit or require political parties to take positive action measures in selecting female candidates.<sup>26</sup>

In contrast, positive action outside the gender and disability context is less common. In the UK, public authorities are subject to ‘positive equality duties’, which require them to monitor the impact of their policies on disadvantaged groups and to take action to remove obstacles to equality of treatment.<sup>27</sup> Other forms of positive action directed towards removing the disadvantages faced by minority groups are also increasingly common in the public and private sectors.

In Northern Ireland, a part of the UK which has been subject to severe inter-religious and ethnic violence between Protestant and Catholic minorities, a set of ‘fair employment duties’ have been imposed upon all private and public sector bodies who employ more than a fixed amount of employees. These duties require employers to monitor how many Catholics and Protestants are employed in their workforce and to take measures to remedy the under-representation of any group. These ‘fair employment duties’ have had considerable impact in improving the position of the historically disadvantaged Catholic minority.<sup>28</sup> The Northern Irish measures have generated better results than many other types of positive action approaches used elsewhere.<sup>29</sup>

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<sup>23</sup> See the discussion on the differences between member states when it comes to positive action on the grounds of ethnic origin in D. CARUSO, ‘Limits of the Classic Method: Positive Action in the European Union After the New Equality Directives’ (2003) 44 *Harvard International Law Journal* 331-386.

<sup>24</sup> For an account of the use of quotas for disabled persons, and the problems inherent in such schemes, see L. WADDINGTON, ‘Reassessing the Employment of People with Disabilities in Europe: From Quotas to Anti-Discrimination Laws’, 18 *Comparative Labour Law Review* (1996) 62.

<sup>25</sup> N. COLNERIC, ‘Making Equality Law More Effective: Lessons From the German Experience’ (1996) 3 *Cardozo Women’s Law Journal* 229-250. See also D. SCHIEK, ‘Sex Equality after *Kalanke* and *Marschall*’ (1998) 4(2) *European Law Journal* 148-166.

<sup>26</sup> See C. O’CINNEIDE AND M. RUSSELL, ‘Positive Action to Promote Women in Politics: Some European Comparisons’ (2003) 53 *International Comparative Law Quarterly* 587-614.

<sup>27</sup> See C. O’CINNEIDE, ‘Positive Action and the Limits of the Law’ (2006) *Maastricht Journal of European and Comparative Law* 351-365.

<sup>28</sup> See C. MCCRUDDEN, R. FORD, and A. HEATH, ‘Legal Regulation of Affirmative Action in Northern Ireland: An Empirical Assessment’ (2004) 24 (3) *Oxford Journal of Legal Studies* 363-415. Note also that

In some states, private employers may be required to adopt positive action measures if they wish to tender for public sector contracts. In the US in 1961, President Kennedy introduced this form of positive action, requiring government contractors not only to abstain from unlawful discrimination, but also to increase the numbers of racial minorities in their workforces. Later extended by Executive Order 11246, these ‘contract compliance requirements’ are enforced by the US Office of Federal Contract Compliance Programs and apply to about 300,000 private sector contractors, who employ about 40% of the US workforce.<sup>30</sup>

This form of positive action has also been applied (in various forms) in Canada,<sup>31</sup> Australia,<sup>32</sup> and South Africa, where positive action in the aftermath of the racism of the previous apartheid state is common.<sup>33</sup> In the EU, recent modifications to the rules which govern how public bodies can make contracts with private companies for supplies and services have increased the ability of public bodies across Europe to use similar ‘contract compliance’ measures.<sup>34</sup>

Another important form of positive action should also be mentioned. Various ‘mainstreaming’ policies or ‘diversity strategies’ have been implemented in the EU by public authorities. It can be unclear what ‘mainstreaming’ means: the word is prone to a variety of interpretation.<sup>35</sup> However, it has been defined by the Council of Europe as the incorporation of a concern with achieving equality in all public sector policies at all levels and at all stages in policy making.<sup>36</sup> McCrudden has identified two main components of effective mainstreaming: ‘impact assessment’, which examines the impact of public policies on disadvantaged groups, and ‘participation’, which encourages the involvement of these groups in decision-making processes.<sup>37</sup> Mainstreaming as a strategy has attracted support from the UN, the EU, Commonwealth Secretariat, ILO and OECD in recent years.<sup>38</sup> Almost all of the EU states, as well as the EU institutions, have

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the Police (Northern Ireland) Act 2000 requires that 50% of persons recruited to the NI Police Service as police trainees or support staff are to be Roman Catholics: these measures are intended to overcome the historic under-representation of Roman Catholics in the Northern Irish Police Service.

<sup>29</sup> See H. C. JAIN, P. J. SLOANE and F. M. HORWITZ, *Employment Equity and Affirmative Action: An International Comparison* (London: M.E. Sharpe, 2003).

<sup>30</sup> See further B Hepple, M. Coussey and T. Choudhury, *Equality: A New Framework Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation* (Oxford: Hart Publishing 2000) 65.

<sup>31</sup> Employment Equity Act 1995

<sup>32</sup> Equal Opportunity for Women in the Workplace Act 1999, amending and consolidating the Affirmative Action (Equal Employment Opportunity for Women) Act 1986

<sup>33</sup> Employment Equity Act 1998

<sup>34</sup> See Colm O’Cinneide, *Taking Equal Opportunities Seriously* (London: Equality and Diversity Forum, 2003), Part VIII.

<sup>35</sup> See T. Rees, *Mainstreaming Equality in the European Union* (London: Routledge, 1998).

<sup>36</sup> See *Gender Mainstreaming: Conceptual Framework, Methodology and Presentation of Good Practices*, Final Report of Activities of the Group of Specialists on Mainstreaming (EG-S-MS (98), (Strasbourg: Council of Europe 1998 May).

<sup>37</sup> C. McCrudden, “Mainstreaming Equality in the Governance of Northern Ireland” (1999) 22 (4) *Fordham International Law Journal* 22.

<sup>38</sup> UN Fourth World Conference on Women (1995) *Global Platform for Action - Beijing*. New York; United Nations Publishing. See also S. Razavi and C. Miller, “Gender Mainstreaming: A Study of Efforts by the UNDP, the World Bank and the ILO to Institutionalise Gender Issues”, Occasional Paper No. 4, UN Fourth World Conference on

implemented gender mainstreaming programmes of varying degrees of effectiveness and ambition.<sup>39</sup> There have been also some limited attempts to mainstream disability issues into EU law and policy,<sup>40</sup> but there has been no comprehensive cross-ground programme of equality mainstreaming.<sup>41</sup> Mainstreaming does clearly have great potential as a positive action strategy. However, a major problem with mainstreaming policies is that the implementation of effective mainstreaming often only happens when all the necessary ingredients of political good-will, organisational capacity, strong leadership and expert advice are in place.<sup>42</sup> This reflects a recurring experience in discrimination law: equality initiatives often have little impact in the absence of a clear legal framework regulating their use and strong political support.<sup>43</sup>

In general, positive action measures can take different forms. Sometimes they are required by law. At other times, they can be introduced voluntarily by public or private bodies, if national law permits this. There is no fixed formula for automatic success.<sup>44</sup> Different measures have very different impact in different contexts.<sup>45</sup> For a positive action strategy to be effective, it should be designed for the particular environment within which it will be applied, and have clear justifications, goals and targets.<sup>46</sup>

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Women, 1995. For a very comprehensive account of mainstreaming initiatives and best practice, see F. Mackay and K. Bilton, *Learning From Experience: Lessons in Mainstreaming Equal Opportunities* (Edinburgh: Scottish Executive Social Research, 2003), available at [www.institute-of-governance.org/index.html](http://www.institute-of-governance.org/index.html) (last accessed 15 October 2003).

<sup>39</sup> See Final Report of Activities of the Group of Specialists on Mainstreaming, *Gender Mainstreaming: Conceptual Framework, Methodology and Presentation of Good Practices*, EG-S-MS (98), (Strasbourg: Council of Europe, May 1998); F. Mackay and K. Bilton, *Learning From Experience: Lessons in Mainstreaming Equal Opportunities* (Edinburgh: Scottish Executive Social Research, 2003).

<sup>40</sup> Shaw, 'Mainstreaming Equality and Diversity', 264.

<sup>41</sup> See J. Shaw, *Mainstreaming Equality in European Union Law and Policy-Making* (Brussels: European Network Against Racism, 2004). Shaw suggests that Article III-118 of the Constitutional Treaty could open the door to the development of a comprehensive mainstreaming programme, especially if read with the equality provisions of the Charter of Fundamental Rights and other provisions of the Constitutional Treaty. see also M. Bell, 'Equality and European Union Constitution', 33 *Industrial Law Journal* (2004) 242-260.

<sup>42</sup> For example, criticism has been expressed that gender equality considerations have been noticeably absent from the development of the European Employment Strategy. See J. Rubery, 'Gender Mainstreaming and Gender Equality in the EU: The Impact of the EU Employment Strategy', 33 *Industrial Relations Journal* (2002) 500; J. Rubery *et al*, 'Gender Equality Still on the European Agenda – But For How Long?', 34 *Industrial Relations Journal* (2003) 477-97; J. Rubery *et al*, 'The Ups and Downs of European Gender Equality Policy', 35 *Industrial Relations Journal* (2004) 603.

<sup>43</sup> See C. McCrudden, "Equality" in C.J. Harvey (ed.), *Human Rights, Equality and Democratic Renewal in Northern Ireland* (Oxford: Hart, 2001) for a comprehensive discussion of these limitations in the Northern Irish context.

<sup>44</sup> See G. Stephanopoulos *et al*, *Affirmative Action Review Report to the President* (Washington DC: White House 1995), Parts 3 and 4.

<sup>45</sup> J. Wrench and T. Modood, 'The Effectiveness of Employment Equality Policies in Relation to Immigrants and Ethnic Minorities in the UK', Report commissioned by the International Labour Office, International Migration Papers 38 (Geneva: ILO, 2000).

<sup>46</sup> See J. E. Kellough, *Federal Equal Opportunity Policy and Numerical Goals and Timetables* (New York: Praeger, 1989). See also J. S. Leonard, 'What Promises are Worth: The Impact of Affirmative Action Goals' (1985) 20 (1) *Journal of Human Resources* 3-20.

## Criticisms of Positive Action

Experience from Canada, the Netherlands, the USA, Australia, the UK and elsewhere has shown that the success of positive action policies often depends upon the extent to which the justification and purpose for such measures is understood by the population at large.<sup>47</sup> Positive action measures are often be attacked, misunderstood or challenged through the courts or the political process. At times, positive action is regarded by some as involving unfair ‘special treatment’ for particular groups, or as an unjust manipulation of the normal rules of society. Sometimes, positive action is accused of being ‘discrimination in reverse’, on the basis that by giving special treatment to some groups, other groups are treated unequally and lose out in their turn.<sup>48</sup> Where these criticisms of positive action become widely accepted, than courts, legislatures and policy makers often become reluctant to permit the use of special measures to assist disadvantaged groups.

Many forms of positive action do not require any particular justification. This is particularly true of policies which aim to root out prohibited discrimination, or to eliminate polices and practices which unfairly disadvantage particular groups. However, other forms of positive action can cause some conceptual difficulties, as they may involve preferential treatment for certain disadvantaged groups.

Also, positive action may involve the use of a factor such as a person’s ethnic group or gender or religion to define the groups who receive special assistance. However, most of anti-discrimination law is concerned with trying to eliminate the use of these factors as a way of distinguishing between different people. As a result, positive action is sometimes criticised for using ways of classifying people which anti-discrimination law generally attempts to eliminate.

For example, when Afro-Americans are given preferential treatment in admission systems for US universities, some opponents of positive action argue that the use of their race and ethnic origin to identify Afro-Americans as a group requiring special assistance is not justified. They argue this on the basis that such forms of positive action involves the use of distinctions based on race and ethnicity which US anti-discrimination has spent decades attempting to prohibit. Also, opponents of positive action often argue that the use of special measures to help disadvantaged groups maintains social distinctions between groups and contributes to the fracturing of society along religious, ethnic, racial and social lines. Some critics also argue that positive action is a form of unhealthy ‘social engineering’, where governments attempt to change society using artificial and counter-productive policies.<sup>49</sup>

In contrast, supports of positive action argue that special measures are necessary to correct the structural discrimination aced by disadvantaged groups. The argument is also made that the use of positive action is justified by the goal of achieving real and substantive equality for all in society: the special treatment of disadvantaged groups compensates for and redresses the persistent inequalities to which they are subject.<sup>50</sup>

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<sup>47</sup> See the essays in Agocs *et al*, above.

<sup>48</sup> M. Frase-Blunt, ‘Thwarting the Diversity Backlash Develop an Inclusive Plan that Highlights the Bottom-line Effect and Benefits to all Employees (2003) 48 (6) *HR Magazine* 137-138 141-144

<sup>49</sup> See M. Abram, ‘Affirmative Action: Fair Shakers and Social Engineers’ (1986) *Harvard. Law Review* 1312-26

<sup>50</sup> See e.g. R. Dworkin *A Matter of Principle* (Cambridge MA Harvard University Press 1985); G. Ezorsky, *Racism and Justice The Case for Affirmative Action* (Ithaca NY Cornell University Press 1991)

Supporters of positive action also argue that positive action need not in any way undermine the quality of job performance or of employees, if applied properly.<sup>51</sup>

Much of this debate centres around the question of the legitimacy of the use of 'suspect' characteristics such as ethnicity and gender to decide who benefits from positive action. At first glance, the standard approach of anti-discrimination law should be to treat equality as involving a right to have decisions that affect the individual taken without reference to particular personal characteristics such as race, sex and so on. This has been described as an 'anti-classification' approach: it assumes that anti-discrimination law should aim to eliminate the use of particular forms of suspect distinctions.<sup>52</sup>

However, supporters of positive action often counter these arguments by suggesting that the use of positive action is justified where the lack of participation by disadvantaged groups in important areas of social activity may contribute to the social exclusion of these groups.<sup>53</sup> This is sometimes known as the 'anti-subordination' approach, as it approves of the use of positive action where necessary to remedy the subordination of disadvantaged groups within society.

Positive action is also sometimes justified on the basis that it ensures greater social 'diversity', or compensates for 'past injustice'. Both these two particular rationales for positive action can be described as a little dubious. Using 'diversity' as a justification for special treatment for particular groups could open the door for every social group to make a claim. Arguments based on 'past injustice' may fail where no clear link exists between the past discrimination and the current individuals or groups making the claim.<sup>54</sup> In general, the argument that positive action can provide an effective remedy for group disadvantage may be the strongest case in its favour.<sup>55</sup>

The argument can also be made that it makes little sense to treat positive action as being equivalent to unfair discriminatory measures that attack the dignity of disadvantaged groups.<sup>56</sup> The leading US academic, Elizabeth Anderson, has criticised the argument that states must refrain from using 'suspect' characteristics and adhere rigidly to the anti-classification principle. She argues that anti-discrimination law is built around the idea of stopping the use of 'suspect' classifications in a negative or harmful manner.<sup>57</sup> Anderson concludes by discussing the use of positive action to correct the disadvantages faced by Afro-Americans in the USA:

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<sup>51</sup> H J Holzer and D Neumark 'What Does Affirmative Action Do?' (2000) 53 *Industrial and Labour Relations Review* 240-66

<sup>52</sup> J. Balkin and R. Siegel, 'The American Civil Rights Tradition: Anticlassification or Antisubordination?' (2004) 58 *U. Miami L. Rev.* 9.

<sup>53</sup> See R Fiscus *The Constitutional Logic of Affirmative Action* (Durham NC Duke University Press 1992)

<sup>54</sup> CITE US MATERIAL – CROSS REFER

<sup>55</sup> See Elizabeth Anderson, 'Integration, Affirmative Action and Strict Scrutiny', 77 *N.Y.U. L. Rev.* (2002), 1195.

<sup>56</sup> See J. Gardner, 'Liberals and Unlawful Discrimination', *Oxford Journal of Legal Studies* 9 (1989), 1; reprinted in Christopher McCrudden (ed), *Anti-Discrimination Law* (Aldershot: Dartmouth, 1991) and J. Gardner, 'On the Grounds of Her Sex(uality)', *Oxford Journal of Legal Studies* 18 (1998), 167. See also in the specific context of the use of 'motive' in the context of direct discrimination and its relevance to positive action programmes Lizzie Barmes, 'Promoting Diversity and the Definition of Direct Discrimination' *I. L. J* 32(3) 200 – 213.

<sup>57</sup> Elizabeth S Anderson, 'Integration, Affirmative Action and Strict Scrutiny' (2002) *NYUL Rev* 1195

‘There is no contradiction...in using race-conscious means to eradicate the causes of race-based disadvantages. Surgery is often needed to repair knife wounds.’<sup>58</sup>

Another leading US academic, Professor Owen Fiss, has similarly argued that ‘affirmative action’ measures that aim to break down what he describes as ‘caste’ patterns of disadvantage and subordination should not be treated as discriminatory measures requiring special justification, but rather as special support and remedial measures.<sup>59</sup> The leading UK academic in this area, Professor Sandra Fredman, has similarly argued that the use of positive action is legitimate and does not involve discrimination at all. She suggests that such types of positive action can be necessary to break down structural forms of indirect discrimination, and can therefore be conceptualised as a *remedy* for discrimination. She contrasts this ‘substantive equality’ perspective with approaches that emphasise ‘formal equality’, i.e. sameness of treatment and the rejection of distinctions based on suspect grounds. She argues that if too much reliance is placed upon securing ‘formal equality’ for all, this will mean that combating discrimination will all too often become a matter of proving formal guarantees of equal treatment, rather than assisting and empowering disadvantaged groups.<sup>60</sup>

In South Africa, equality legislation prohibits ‘unfair discrimination’ rather than ‘discrimination’ and defines inequality not in terms of making classifications upon suspect grounds but as constituting a denial of dignity and the imposition of harmful and demeaning burdens upon particular groups. Therefore, positive action that uses ‘suspect’ ways of classifying people, such as their race, will be fair where it is directed towards removing group disadvantage and is objectively justified. Section 15(2) of the Canadian Charter adopts a similar approach.

Other theories have suggested alternative means of justifying positive action. The British academic Professor Hugh Collins has suggested that the goal of achieving ‘social inclusion’ for all groups in society justifies positive action.<sup>61</sup> Others, such as the Canadian philosophers Charles Taylor and Iris Marion Young, have argued for special measures to accommodate the different groups in society.<sup>62</sup>

All of these arguments in favour of positive action are based around the central idea that positive action is a useful method of promoting full equality in substance and practice for disadvantaged groups.<sup>63</sup> However, even strong supporters of positive action often accept that the use of positive action should have to be shown to be objectively justified and only be maintained for the minimum period necessary to achieve its goals. There may be important instrumental reasons for this. Even positive action measures that

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<sup>58</sup> *Ibid.* 1270

<sup>59</sup> Owen M Fiss, ‘Groups and the Equal Protection Clause’ (1976) 5 *Phil & Pub Aff* 107, 126.

<sup>60</sup> See O Fiss ‘Groups and the Equal Protection Clause’ in Cohen M T Nagel and T Scanlon (eds) *Equality and Preferential Treatment* (Princeton NJ Princeton University Press 1977) 85

<sup>61</sup> H. Collins, “Discrimination, Equality and Social Inclusion”, 66(1) *MLR* 16-43.

<sup>62</sup> See I. M. Young, *Democracy and Inclusion*, (Princeton, N.J.: Princeton University Press, 2000). See also A. Phillips, *Which Equalities Matter?* (Cambridge: Polity Press, 1999).

<sup>63</sup> Research has shown in a number of different public and private sector contexts that concentrating upon complying with anti-discrimination norms alone yields limited results: patterns of inequality and exclusion are extremely difficult to break down unless positive action is taken. See H. C. Jain, P. J. Sloane and F. M. Horwitz, *Employment Equity and Affirmative Action: An International Comparison* (London: M.E. Sharpe, 2003); Federal Glass Ceiling Commission, *Good for Business: Making Full Use of the Nation's Human Capital* (Washington D.C.: Printing Office, 1995).

set out to remedy disadvantage may lack a firm rational basis, or be manipulated to support special interests or cliques, or may unduly penalise others outside of the disadvantaged group in question. There may be an interest in not causing unnecessary tensions between different social groups. All of these reasons indicate why it is necessary to examine the impact of positive action measures, and to maintain some legal controls on their use.<sup>64</sup>

Some states maintain tight controls on the use of positive action, preferring a 'forma equality' or anti-classification approach', where the use of positive action is kept to a minimum. Other states adopt a 'substantive equality' or 'anti-subordination' approach, which is much more welcoming to the use of positive action. The trend in most North American and European states is towards the greater use of positive action measures, as it is in India, South African and elsewhere. International human rights law also increasingly recognises the importance of positive action, while often requiring that the use of special measures to assist particular groups be temporary in nature and kept under review. This position is also adopted by many states.

## EU LAW AND POSITIVE ACTION

EU equality directives as interpreted by the European Court of Justice (ECJ) permit the use of positive action in certain circumstances.<sup>65</sup> The case of *Kalanke*, which was the ECJ's initial decision on the use of preferential treatment as a form of positive action, concerned a regulation of the Bremen state government which gave automatic priority to a woman over an equally qualified man in recruitment to ranks within the government service where women were generally under-represented. This regulation was challenged by an opponent before the CJ on the grounds that it was incompatible with EC law's prohibition on sex discrimination.<sup>66</sup> Article 2(4) of the Equal Treatment Directive 1976 provided that 'this Directive shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities...'<sup>67</sup> However, the ECJ considered that the use of this type of preferential treatment for female applicants was a departure from the general principle of equal treatment on the grounds of gender. The Court was concerned that the manner in which the regulation gave automatic reference to women over men in certain circumstances appeared to involve direct sex discrimination against men. Therefore, despite the fact that the regulation was intended to remedy disadvantages faced by

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<sup>64</sup> S. Fredman, 'European Community Discrimination Law: A Critique' (1992) 21(2) *ILLJ* 119, at 130

<sup>65</sup> Mark Bell has argued that a 'patchwork of models' of equality has developed within EU equality law and policy, made up of three main strands: the standard anti-discrimination approach, a newer attachment to substantive equality, and a desire to manage diversity. See M. Bell, 'The Right to Equality and Non-Discrimination', in T. Hervey and J. Kenner (eds.) *Economic and Social Rights under the EC Charter of Fundamental Rights: A Legal Perspective* (Oxford: Hart Publishing, 2003), 91. See also G. More, 'Equal Treatment of the Sexes in European Community Law: What Does 'Equal' Mean?', 1 *Feminist Legal Studies* (1993), 45.

<sup>66</sup> Case C-450/93 *Kalanke v Freie Hansestadt Bremen* [1995] ECR I-3051.

<sup>67</sup> This was supported by Recommendation 84/635/EC that encouraged the Member States to adopt positive action policies to promote a better balance between the sexes in employment. The decision in *Grimaldi v Fonds de Maladies Professionnelles* [1989] ECR 4407 confirmed that the Recommendation was an interpretative guide to Art 2 (4).

women as a result of past discrimination, the ECJ held that the regulation fell outside the scope of permissible positive action.

This judgment by the ECJ was subject to strong criticism by NGOs, academics and some politicians.<sup>68</sup> However, the ECJ in subsequent decisions has shown a greater willingness to accept the use of positive action.<sup>69</sup> In the case of *Marschall*,<sup>70</sup> the ECJ took the view that the positive action at issue in this case was compatible with the gender equality principle. This case involved another regulation passed by a German state government, which made provision for female candidates to be given preferential treatment in recruitment to the state government service, but only where the men and women candidates affected have been individually assessed and found to have equivalent qualifications. The ECJ considered that the requirement for individual assessment of each candidate meant that women were not receiving automatic preference over men, as the possibility existed that a man could always show that he was a superior candidate to others and deserved to be appointed. Therefore, the Court held that principle of gender equality was not breached.

This more permissive approach was also adopted in the case of *Badeck*. Here, another German state law required that preferential treatment for women in the initial stages of recruitment prior to the actual hiring decision: for example, places were reserved for female candidates at the final job interviews. However, the ECJ decided that these requirements did not involve giving women automatic preference over men and so this form of positive action was acceptable.<sup>71</sup>

After the *Marschall* and *Badeck* decisions, the ECJ appears to have established that positive action to compensate for past disadvantages is permissible when used to distinguish between more or less equally qualified candidates, provided that an opportunity for individual merit assessment is always available.<sup>72</sup> The provisions of the Race Equality,<sup>73</sup> Framework Equality<sup>74</sup> and revised Gender Equality Directives,<sup>75</sup> all

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<sup>68</sup> The Commission proposed an amendment to the Equal Treatment Directive along the following lines: 'Possible measures shall include the giving of preference, as regards access to employment or promotion, to a member of the under represented sex, provided that such measures do not preclude the assessment of the particular circumstances of an individual case.' This amendment was subsequently rejected. See COM (96) 88 final, and (97/C 30/19) OJ C.30/57 30<sup>th</sup> January 1997.

<sup>69</sup> Case 450/93 *Kalanke v Bremen* [1995] ECR I-3051. See C. Tobler, 'Positive Action under the Revised Second Equal Treatment Directive', in AFFA and EWLA (ed.) *L'égalité entre femmes et hommes et la vie professionnelle; Le point sur les développements actuels en Europe* (Paris: Dalloz, 2003) 59-92 for an excellent analysis of this gradual shift in position.

<sup>70</sup> Case C-409/95, *Helmut Marschall v Land Nordrhein Westfalen* [1987] ECR I - 6363

<sup>71</sup> Case C – 158/97, *Badeck v Landesanwalt beim Staatsgerichtshof des Landes Hessen* [1999] ECR I – 1875

<sup>72</sup> see *Badeck* [2000] ECR I-1875.

<sup>73</sup> See Article 5 Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin: 'With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin.'

<sup>74</sup> See Article 7(1) Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation: 'With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to any of the grounds referred to in Article 1.'

<sup>75</sup> See Article 3 of Directive 2006/54/EC of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation: 'Member

agreed since 2000, now give wide scope to member states to use positive action. Article 141(4) of the EC Treaty as inserted by the Treaty of Amsterdam<sup>76</sup> makes express provision for the use of positive action. Article 23 of the EU Charter of Fundamental Rights also recognises the legitimacy of positive action.<sup>77</sup> These provisions establish that positive action is permissible when it is used to compensate for specific disadvantages faced by particular groups.

The new shift towards a greater embrace of the substantive equality approach can be seen in the ECJ decisions in the cases of *Schnorbus*<sup>78</sup> and *Briheche*.<sup>79</sup> In these cases, the Court accepted that wide discretion should be given to states in deciding how to use positive action measures to remedy the disadvantages faced by women. In the case of *Lommers*, the ECJ considered that a child care scheme which gave priority to women was compatible with the principle of gender equality, on the basis that the child care scheme in question was intended to address the under-representation of women.<sup>80</sup> However, in the cases of *Abrahamsson*<sup>81</sup> and *EFTA Surveillance Authority v Norway*,<sup>82</sup> the ECJ confirmed that giving automatic preference to females would remain a violation of the principle of gender equality.

This case-law thus continues to cause some difficulties. The ECJ has not yet clarified what exactly constitutes giving automatic preference to women. This means that the position of the Court on positive action remains ambiguous and uncertain. This lack of clarity may at times discourage the use of certain forms of positive action in member states, as governments can be reluctant to risk a negative decision by the ECJ.

Some experts have suggested that the ECJ should give member states even more discretion when it comes to the use of positive action on the grounds of ethnicity or religion.<sup>83</sup> However, this suggestion remains controversial. Other commentators have expressed fears that member states may use positive action measures to give unfair advantages to some religious or ethnic groups, or to uphold existing policies which by 'protecting' women and other disadvantaged groups may actually perpetuate gender stereotyping, the unequal division of family life responsibilities between the genders, and other problematic practices. Therefore, there may be a case for retaining some legal controls on the use of positive action: member states should perhaps be required to show

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States may maintain or adopt measures within the meaning of Article 141(4) of the Treaty with a view to ensuring full equality in practice between men and women in working life'. See also Article 6 of the Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services.

<sup>76</sup> See Article 141(4) EC Treaty: 'With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.'

<sup>77</sup> See Article 23(2) of the Charter: 'The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.'

<sup>78</sup> Case 79/99 *Julia Schnorbus v Land Hessen* [2000] ECR I-10997.

<sup>79</sup> Case 319/03 *Briheche v Ministre de l'Intérieur*, Judgment of 30 September 2004, not yet reported.

<sup>80</sup> Case C-476/99, *Lommers* [2002] ECR I – 2891.

<sup>81</sup> Case 407/98, *Abrahamsson and Andersson v Fogelqvist* [2000] ECR I-5539

<sup>82</sup> Case E-1/02, 24 January 2003. See the discussion of this case by C. TOBLER, 41 *Common Market Law Review* (2004) 245-260.

<sup>83</sup> D. CARUSO, 'Limits of the Classic Method';

that preferential treatment is objectively justified as necessary to reduce disadvantage and under-representation.<sup>84</sup>

Furthermore, in the recent decision of Case [C-104/09](#) *Pedro Manuel Roca Álvarez v Sesa Start España ETT SA* (not yet reported), the ECJ took the view that not every measure designed to reflect the fact that women bear the bulk of child-caring responsibilities will qualify as positive action. In particular, positive action measures which are ‘underinclusive’ (i.e. only assist a proportion of the disadvantaged group) may be vulnerable. The Court’s reasoning is important, and bears quoting in detail:

34. The aim of Article 2(4) is to achieve substantive, rather than formal, equality by reducing de facto inequalities which may arise in society and, thus, in accordance with Article 157(4) TFEU, to prevent or compensate for disadvantages in the professional career of the relevant persons (see, to that effect, *Kalanke* , paragraph 19; Case C-407/98 *Abrahamsson and Anderson* [2000] ECR I-5539, paragraph 48; and Case C-319/03 *Briheche* [2004] ECR I-8807, paragraph 25).

35. As stated in paragraph 21 of this judgment, the leave at issue in the main proceedings takes the form of permission to be absent during the working day or a reduction of its duration. Certainly, such a measure could have the effect of putting women at an advantage by allowing mothers whose status is that of an employed person to keep their job and to devote time to their child. That effect is reinforced by the fact that if the father of the child is himself an employed person, he is entitled to take this leave in the place of the mother, who would not suffer adverse consequences for her job as a result of care and attention devoted to the child.

36. However, to hold, as the Spanish Government submits, that only a mother whose status is that of an employed person is the holder of the right to qualify for the leave at issue in the main proceedings, whereas a father with the same status can only enjoy this right but not be the holder of it, is liable to perpetuate a traditional distribution of the roles of men and women by keeping men in a role subsidiary to that of women in relation to the exercise of their parental duties (see, to that effect, *Lommers* , paragraph 41).

37. As the Advocate General points out at point 47 of her Opinion, to refuse entitlement to the leave at issue in the main proceedings to fathers whose status is that of an employed person, on the sole ground that the child’s mother does not have that status, could have as its effect that a woman, such as the mother of Mr Roca Álvarez’s child, who is self-employed, would have to limit her self-employed activity and bear the burden resulting from the birth of her child alone, without the child’s father being able to ease that burden.

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<sup>84</sup> P. SKIDMORE, ‘The EC Framework Directive on Equal Treatment in Employment: Towards a Comprehensive Community Anti-Discrimination Policy?’ (2001) 30(1) *Industrial Law Journal* 126-132, 129-30. C. O’CINNEIDE,

38. Consequently, a measure such as that at issue in the main proceedings cannot be considered to be a measure eliminating or reducing existing inequalities in society within the meaning of Article 2(4) of Directive 76/207, nor as a measure seeking to achieve substantive as opposed to formal equality by reducing the real inequalities that can arise in society and thus, in accordance with Article 157(4) TFEU, to prevent or compensate for disadvantages in the professional careers of the relevant persons.

In general, the EU's experience of positive action has been that it is an essential policy tool for addressing problems of disadvantage. However, there is a need for legislation and consistent court decisions to clarify when preferential treatment in particular can be used. Also, it appears to be better if public and private bodies are given flexibility and a margin of discretion in how to apply positive action measures. Attempts to control the use of such measures can result in uncertainty and a lack of clarity. However, it may be useful to maintain some legal controls in place, in particular to require that positive action measures be shown to be objectively justified and not misused or manipulated.

## **POSITIVE ACTION IN THE UK**

EC law controls the extent to which member states can introduce positive action measures. However, the member states can choose whether or not to make use of positive action strategies: there is no express obligation in EC law to do so. The UK has historically avoided the use of certain types of positive action measures: successive UK governments have been reluctant to introduce forms of preferential treatment, except in the special and difficult context of Northern Ireland (see above). However, in recent years, public and private bodies in the UK have increasingly made use of a wide variety of positive action strategies.<sup>85</sup> Recent legislative reforms now require public authorities to take some forms of positive action, while the Equality Act 2010 now makes it easier for public and private bodies to take positive action measures.

In general, the UK's anti-discrimination legislation, much of which predates the equivalent EU legislation, prohibits any unequal treatment on the grounds of race, ethnic or national origin, nationality, disability, sexual orientation, gender, religion or belief, and age. This has been interpreted as prohibiting most forms of preferential treatment, as this is defined as a form of discrimination, even though it is done for positive reasons.<sup>86</sup>

The exceptions permitted to this general prohibition of preferential treatment are limited. Sections 37 and 38 of the UK Race Relations Act 1976 (the 'RRA') allows employers to provide special training and 'encouragement' to members of disadvantaged ethnic minority groups. This permits 'outreach' initiatives to encourage members of disadvantaged groups to apply for employment or promotion within an organisation. Such outreach initiatives are now widely used in the public and private sectors. However, measures that gave automatic preferment or substantial advantages to minority candidates

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<sup>85</sup> See L. BARMES, 'Promoting Diversity and the Definition of Direct Discrimination' (2003) 32 (3) *Industrial Law Journal* 200; see also L. BARMES and S. ASHTIANY, 'The Diversity Approach to Achieving Equality: Potential and Pitfalls' (2003) 32 (3) *Industrial Law Journal*.

<sup>86</sup> H. SLATER, 'Making a Positive Difference: A Legal Guide to Positive Action' (2002) 111 *Equal Opportunities Review* 12-17.

remain unlawful, for now.<sup>87</sup> Section 35 of the RRA permits the provision of special services in the form of education, welfare, training and other benefits to address the special needs of particular minority groups. This permits a wide range of positive action measures: many UK public authorities have special policies in place to assist disadvantaged groups, especially recently arrived migrant communities. However, there remains considerable uncertainty as to what types of positive action to assist members of disadvantaged ethnic groups are lawful and which are not.<sup>88</sup>

A similar position applies across all of the other equality grounds. For example, section 47 of the UK Sex Discrimination Act 1975 (the 'SDA') again only permits special measures to train and "encourage" women. Section 49 of the SDA also permits very limited positive action by trade unions, employer organisations and professional bodies, who can reserve positions on their representative bodies for women.<sup>89</sup> The Sex Discrimination (Election Candidates) Act 2002 also permits preferential treatment by political parties in selecting candidates for election.<sup>90</sup> However, in general, UK legislation has restricted the ability of public and private bodies to give preferential treatment to members of disadvantaged groups. The major exception is the Disability Discrimination Act, which permits preferential treatment for disabled persons.<sup>91</sup>

However, many private and public sector organisations have in recent years introduced various positive action measures to encourage more participation in employment and other areas of social life from members of disadvantaged groups.<sup>92</sup> However, many of these positive action measures exist in a legal grey zone.<sup>93</sup> Any measures that could be interpreted as giving preferential treatment to members of disadvantaged groups run the risk of being declared by the courts to be unlawful.<sup>94</sup> Greater clarity and coherence are required.

The recent report of the Discrimination Law Review, an internal government assessment of the existing strengths and weaknesses of UK anti-discrimination law,

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<sup>87</sup> See *Hughes v Hackney London Borough Council* The Sex Discrimination (Electoral Candidates) 2002 permits preferential treatment in the selection of parliamentary candidates, but this is confined to gender. See C. O'Connell and M. Russell, 'Positive Action to Promote Women in Politics: Some European Comparisons' (2003) *International Comparative Law Quarterly*. See also R. Ali and C. O'Connell, *Our House? Race and Representation in British Politics* (London: Institute for Public Policy Research, 2002).

<sup>88</sup> See L. BARMES, 'Promoting Diversity and the Definition of Direct Discrimination' (2003) 32 (3) *Industrial Law Journal* 200.

<sup>89</sup> See M. RUSSELL, *Women's Representation in UK politics: What can be done within the law?* (London: The Constitution Unit, July 2001).

<sup>90</sup> See C. O'CONNEL and M. RUSSELL, 'Positive Action to Promote Women in Politics: Some European Comparisons' (2003) *International Comparative Law Quarterly* 587-614.

<sup>91</sup> See S. FREDMAN, 'Disability Equality: A Challenge the Existing Anti-Discrimination Paradigm?', in A. LAWSON and C. GOODING, *Disability Rights in Europe* (Oxford: Hart, 2005) 199-218.

<sup>92</sup> For a discussion of the strengths and problems of "diversity management" strategies, see L. Barmes with S. Ashtiany, 'The Diversity Approach to Achieving Equality: Potential and Pitfalls' (2003) 32 *Industrial Law Journal* 274-96; J. Wrench, 'Diversity Management Can Be Bad For You' (2005) 46(3) *Race and Class* 73-84.

<sup>93</sup> *Ibid.*

<sup>94</sup> See L Barmes, "Promoting Diversity and the Definition of Direct Discrimination" (2003) 32 (3) *ILJ* 200. Similar problems apply in Ireland: see C. Costello, "Positive Action", in C. Costello and E. Barry (eds.) *Equality in Diversity: The New Equality Directives* (2003) 177-212, especially at 199-206.

concluded that greater scope for positive action should be permitted in UK law.<sup>95</sup> The Equality Act 2010 has now given effect to these proposals, in effect lining up UK law with the position that exists under EU law (see above).

Also, as also discussed above, various positive equality duties have now been imposed upon UK public authorities, which require them to take active steps to eliminate discrimination and to promote equality of opportunity for disadvantaged groups, through ‘mainstreaming’ and other positive action initiatives. These duties have been praised as a new and effective policy response to problems of inequality. They are an ambitious attempt to make equality issues a core concern for public authorities: under these duties, which are legally enforceable, public authorities are required to take positive action measures to combat disadvantage.<sup>96</sup> However, it remains unclear which positive action measures public authorities can adopt in implementing these duties. Therefore, it makes sense to reform the law to permit more flexibility for both public and private bodies in using positive action.

An interesting debate also exists in the UK as to whether the positive duties imposed in Northern Ireland on private employers should be extended to all private employers throughout Britain. An independent expert review of UK anti-discrimination law recommended in 2000 that positive duties be imposed upon British employers to take measures to promote equality of opportunity in their employment practices.<sup>97</sup> However, in the recent Discrimination Law Review, the UK government decided not to adopt this approach.

### **The US Experience with Affirmative Action**

The Equal Protection Clause of the US Constitution requires federal and state authorities not to discriminate. Any use of ‘suspect’ forms of classification, such as a person’s race or gender, has to be shown to be clearly justified.<sup>98</sup> As in the UK, this restriction on the use of such forms of classification also applies even they are used for the purposes of assisting disadvantaged groups. Therefore, the use of preferential treatment to assist Afro-Americans will be unlawful unless it can be shown to be clearly justified.<sup>99</sup> Other forms of positive action are more acceptable.

Affirmative action practiced by private or public employers and unions is subject to similar review under Title VII of the Civil Rights Act of 1964. In general, the US courts give more flexibility to the use by private sector bodies of preferential treatment measures than is given to public authorities.<sup>100</sup> Also, where positive action measures are introduced to remedy existing discrimination, the courts are again are willing to permit

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<sup>95</sup> See *A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain* (the Discrimination Law Review) (London: Department for Communities and Local Government, June 2007), paragraphs 4.44 - 4.57.

<sup>96</sup> paragraphs 3.37-3.50.

<sup>98</sup> The use of race or ethnic origin to differentiate between individuals will be subject to ‘strict scrutiny’ by the US courts: see *Brown v Board of Education of Topeka* (1954) 347 U.S. 483. For the less strict standard applied in gender cases, see *Craig v Boren* (1976) 429 US 190. For the much weaker standard applied in age discrimination cases, see *Massachusetts Board of Retirement et al v Murgia* 427 U.S.307 (SC).

<sup>99</sup> See the famous decision in the case of *University of California v Bakke*

<sup>100</sup> See *United Steelworkers of American v Weber* 443 US 193 (1979).

the use of preferential treatment.<sup>101</sup> The US Supreme Court in the case of *Sheet Metal Workers v EEOC*<sup>102</sup> clarified that employers and unions could voluntarily adopt positive action measures (including preferential treatment) to undo the legacy of past discrimination: the Court also confirmed that under the Civil Rights Act 1964 US courts could also require discriminating employers to implement positive action measures.

In assessing the lawfulness of positive action measures, the US courts assess both the purpose of the positive action measure used and the means it employs. When the ‘strict scrutiny’ test is applied, as will be the case when public bodies use preferential treatment measures, there must be a compelling government interest in achieving the aim of the measure in question, and the means employed to achieve this aim must be ‘narrowly tailored’, i.e. use preferential treatment to the minimal degree possible.<sup>103</sup>

This analysis is similar to the ‘objective justification test sometimes employed by the European courts. However, the US case-law has controversially established that the fact that a group suffers discrimination and disadvantage in general in society cannot by itself justify the use of preferential treatment measures, even if it may justify other forms of positive action.<sup>104</sup> This has tended in practice to limit the use of positive action measures.<sup>105</sup> However, the courts have been willing to accept the use of preferential treatment and other forms of ‘strong’ positive action measures in university admission policies where such measures promote ‘diversity’.

Originally applied by Justice Powell in his judgment in the case of *University of California v Bakke*, this approach was confirmed by the Supreme Court in the recent case of *Grutter v Bollinger*.<sup>106</sup> The Court upheld the University of Michigan Law School's affirmative action programmes which gave bonus points to applicants if they came from an under-represented group, on the basis that this was done to promote the diversity of the student population and also because the Law School's admission system permitted each applicant to be examined on their own merits. However, the Supreme Court confirmed in the even more recent decision of *Parents Involved In Community Schools v Seattle School District No. 1*<sup>107</sup> that the ‘strict scrutiny’ standard would still continue to be applied to the use of distinctions based on race, even if these distinctions were for the purposes of implementing positive action measures. This has produced a complex case-law, which has been criticised as too restrictive: many commentators argue that the US, with the UK and the EU as a whole, should give public and private bodies greater flexibility in adopting positive action measures.

## **International Human Rights Law**

International human rights standards appear to permit the use of positive action measures, which may at times be required to be implemented to make the right to equality meaningful for all. Article 26 of the International Covenant on Civil and Political Rights

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<sup>101</sup> *Johnson v Transportation Agency* 480 US 616 (1987).

<sup>102</sup> 478 US 421 (1986).

<sup>103</sup> *Adarand Constructors Inc v Pena* [1995] 515 US 2000

<sup>104</sup> See *Bakke*, above.

<sup>105</sup> See in particular Elizabeth S Anderson ‘Integration, Affirmative Action and Strict Scrutiny’ (2002) *NYUL Rev* 1195.

<sup>106</sup> 539 US (2003).

<sup>107</sup> 551 US (2007), 28<sup>th</sup> June 2007.

(the ‘ICCPR’) provides that ‘[a]ll persons are equal before the law’ and that States Parties ‘shall . . . guarantee to all persons equal and effective protection against discrimination on any ground’. In its General Comment 18 on the ICCPR, the UN Human Rights Committee (HRC), which is charged with interpreting the Covenant, stated that ‘[not] every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.’<sup>108</sup> At paragraph 10 of the General Comment, the HRC expressly recognised the need for positive action:

‘[T]he principle of equality sometimes requires States to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. For example, in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions. Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population. However, as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant.’”

This General Comment therefore clarifies that positive action is fully compatible with the right to equal treatment, and may actually be required in certain circumstances to give effect to this right.<sup>109</sup> This logic is also adopted in Article 4(1) of the Convention on the Elimination of All Forms of Discrimination Against Women (‘CEDAW’), which states that:

‘Adoption by States Parties of temporary special measures aimed at accelerating de facto equality for men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.’

The same article also provides that ‘special measures... aimed at protecting maternity shall not be considered discriminatory.’ Articles 2(e) and 3 of CEDAW go further and impose a strong positive obligation upon States Parties to take active steps to secure equality for both sexes. Article 5(1) CEDAW illustrates the breadth of this requirement, with its obligation upon states to ‘modify the social and cultural patterns of conduct of men and women, with a view to achieving the end of prejudices ...and all other practices which are based on the idea of the inferiority ...of either of the sexes or on the stereotyped

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<sup>108</sup> General Comment 18, para. 13, at 28 (1994).

<sup>109</sup> In General Comment 23 the HRC recognised that (in paragraph 6.2) that “positive measures by states may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practice their religion, in community with other members of the groups.”

roles for men and women.’ Article 7 of CEDAW makes clear that such ‘temporary special measures’ may be used to secure equality of political representation.

Other international instruments take a similar position, including the UN Conventions on the Elimination of Racial Discrimination (‘CRED’) and the Rights of Persons with Disabilities (‘CRPD’). The ILO Discrimination (Employment and Occupation) Convention (No. 111) classifies special measures for those needing special assistance as falling outside the definition of discrimination. A series of UN policy documents have also adopted similar views, such as the Beijing Declaration of the Fourth World Conference on the Rights of Women and the 1995 Copenhagen Declaration.

For another example, the European Court of Human Rights has interpreted the European Convention on Human Rights as recognising the legitimacy of positive action measures, if they can be objectively justified. In the *Belgian Linguistics* case, the Court made clear that positive action is not incompatible with Article 14, finding that ‘certain legal inequalities tend only to correct factual inequalities’.<sup>110</sup> In *Thlimmenos v Greece*, the European Court of Human Rights held that discrimination might arise if states “without objective and reasonable justification fail to treat differently persons whose situations are significantly different.”<sup>111</sup>

Therefore, there is a broad consensus that international human rights law permits the use of temporary and proportionate positive action measures, and even may impose certain obligations upon states to use positive action.

## Conclusion

Positive action is a very important tool in the fight against discrimination and disadvantage. It involves the use of special measures to assist disadvantaged groups in overcoming the structural forms of discrimination that limit their opportunities to participate in society. Different forms of positive action may be used in different circumstances: there is no fixed formula. It is important to have legal controls in place to regulate the use of positive action and to encourage public and private bodies to make use of special measures to assist disadvantaged groups. However, experience from the EU, the UK and the USA indicates that if legal controls on the use of positive action are too restrictive, this may impede its effectiveness. Positive action should not be seen as a departure from the principle of equal treatment: instead, when applied in a proportionate manner, positive action can play a vital role in ensuring substantive equality of treatment for the disadvantaged.

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<sup>110</sup> *Belgian Linguistics* [1967] 1 EHRR 241.

<sup>111</sup> No. 34369/97, 06/04/2000. See also the judgment of the ECtHR in *Nachova v Bulgaria*, Nos. 43577/98 and 43579/98, 28/02/2004.