

A Measurement to Realisation of Equality and Non-Discrimination Clauses within the Rule of Law

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Abstract

This article starts from the point that a threefold operative approach is necessary to realise equality and non-discrimination clauses: that of legislators, that of judges and that of Public Administrations. All three of these authorities must necessarily come together in a coherent unity. None of the three may be omitted in a rule of law, as this would contravene the very assumptions inherent in the rule of law. This combines with yet another threefold approach comprising consideration of equality and non-discrimination clauses as a value, a principle and a fundamental right. Each of these sections is then analysed within the context of the European Union.

Keywords: Equality, Legislator, Judges, Public Administrations

Introduction: Notes on Equality

Equality as a legal concept implies that all people belong to the same constitutional community (Añón, 2001). Difficulties relating to the concept of equality arise from the dispersed nature of that equality, given the practicalities of bringing equality about by means of legal rules that are ranked differently and which exist in some form or another at virtually all levels of the legislative pyramid. The abstract definition of equality is established by the legislative system and details are then thrashed out in case law in accordance with the political, legal, economic and social structures of the collective group concerned and with the socially accepted values of a given era. Thus, if any particular legal and/or social inequality is found to be unfair this will be due to an alteration to the underlying values (Perelman, 1977; Rees, 1972).

Equality, as a value, has been used to establish certain general legal rules: reasonableness in relation to equality; specification of instances in which any unequal treatment provided within a legal standard must be deemed discriminatory; and criteria for scenarios in which unequal treatment may be regarded as positive. For its part, equality *per se* can clearly not be considered as a completely autonomous principle, given its content, but rather as a principle affecting all manner of legal relationships (Santamaría, 1997). Nevertheless, equality never comprises an isolated value but rather “consists of specifying substantive criteria for bringing about solidarity as a value, by creating the material conditions that can facilitate possible freedom for all and by contributing to judicial certainty through satisfying the needs of those unable to satisfy such needs through their own efforts” (Peces-Barba, 1999).

Specifically, equality as a value is proposed in the sense of a general clause and classified as a fundamental right, where the fundamental right is held to be the positive assertion of that equality (Santamaría, 1997). One need only look at the level of the debate on equality to see the importance, given the consequences that will arise. All in all and to return to the precept as initially noted, equality as a superior value is legislative in nature and is a compulsory value for all persons subject to those legal rules. Equality represents an ideal that the community has decided is one of the maximum objectives to be developed by the legal system.

We would say that the principle of equality should not be looked on as a legislative principle providing grounds for legal rulings and cannot therefore be considered as a legal rule but rather acquires greater emphasis according to the strength of the argument supplied (Belloubet-Frier, 1998; Calsamiglia, 1988; Paladin, 1965). Principles have an explanatory role and amount to the most abbreviated manner of expressing a legal rule or a set of legal rules, despite also being used to produce law and to construe and integrate law (Zapatero and Garrido, 2007).

With regard to the production of law, principles set the boundaries for legislative competencies of the subordinate source (which may not contain rules deemed incompatible with the corresponding principle). When it comes to construing and integrating law, principles provide a way to ensure that a legislative rule is construed in accordance with the content of a principle, and also to overcome any gaps that may be found in a particular legal system. Rules and principles are not therefore isolated and separate entities, but rather form part of one single reality, that of law considered as a whole or the legal reality of any one of its institutions.

The connection is such that one might go so far as to say that what gives sense to the rules are in fact the principles justifying those rules (Atienza and Ruiz Manero, 2006), even though principles cannot be applied directly to resolve a case in that there is an *a priori* need for rules to provide the legislative scope prescribed by the autonomous or supplementary nature of the rules (Díaz Revorio, 2008; Zagrebelsky, 2011). Given the lack of factual content in principles, they apply when it becomes necessary to safeguard the values guaranteed by those principles. In actual fact, principles in legislation are constructed in a minimum and indispensable manner so as to project values on social relationships, where the keynotes are: principle-based, i.e. having to do with the fundamental basis, the origin, the *raison d'être*, the condition and the cause; generality, i.e. opposing genus to species and plurality to singularity; vagueness, whenever there is a significant degree of semantic non-specification; and legal nature, referring to the structure legally established (Garrido, 2001).

Therefore, to speak of principles as legal rules and to fail to differentiate between them in any way depends on how one perceives the concept of the particular legal rule being defended. The underlying difference can be found, in our opinion, in the mandate providing the framework for the given principle, rather than the functional aspects of the principle. One can therefore conclude that functions attributed to principles are no different from the functions of sources of law and it might be more appropriate to refer to these as different ways of applying rules and principles (Beladiez, 2010). One can infer from that line of argument that principles of law comprise very general legal rules, actually the most general within the legal system.

At all events, one can better specify equality as a principle than equality as a value. This view provides a greater basis for breaking down the scenarios to which each applies and the legal consequences of that application can be seen in greater detail. Equality as a principle takes on two aspects and comprises equality of form and of substance. The aspect we are concerned with here, the first of these, involves the requirement to review whether generality and regularity continue to be guaranteed as arising from the legal system (Pérez Luño, 2009). Many requirements necessary for ensuring legal certainty are also principles of equality of form. One can, for example, cite the generality of legal rules, the prohibition of unfair discrimination and the binding force of precedents in this regard, although it may be preferable to argue that certain principles having to do with equal treatment might better be deemed concessions to legal certainty (Arcos, 2000).

Equality, however, with its multi-faceted nature, also comprises a fundamental right. On this point, this article attempts to show that when one speaks of fundamental rights, the reference is to the legal legislative aspect and particularly to the constitutional aspect. Whilst not forgetting the additional legislation for development of such a rule, the authors are of the opinion that validity of equality in this regard has to do with form and that such rights must therefore be upheld in accordance with the extent to which they are taken up in positive law and according to the consideration given by those representing citizens pursuant to democratic procedures. This being so, one should also not ignore the fact that certain moral standards remain outside constitutional law, serving as a critical reference for reviewing those already set down in law and that these may be built into subsequent texts when new legislation is drafted or when amending, completing or revoking current legislation. Fundamental rights must also reflect the values immersed in history and which serve to indicate whether the needs represented by those fundamental rights are in line with those sought overall. The above goes to show the transcendental nature of fundamental rights as socio-legal phenomena, with regard to the increasing number of assets considered worthy of legal protection, or the fact that entitlement to certain categorised rights has been extended to subjects other than man and also the fact of man considered according to his placement in society (Schneewind, 1998; Taylor, 2005).

Equality therefore presupposes consideration of a criterion for distributing the content of freedoms and that distribution criterion must be construed in the sense of generality, fairness, and negative and positive discrimination. Equality in this sense is an overarching right, a principle made up of the rights of freedom, considered as an equality of form applied across the rights of all persons despite individual differences, and social rights as equality of substance with regard to the rights of all persons to the social conditions necessary for survival (Bea, 1993).

The principle of equality goes back in time to a right originating under European Constitutionalism and has become synonymous in practice with legality. This concept of equality has been watered down and turned into equality as a right with regard to the legislator and the principle of prohibition of unfairness (Dworkin, 2002; Gardner, 1998; Rubio, 2000).

Taking this hypothesis as its basis, the idea of a system for fundamental rights brings one to the interdependency of the right to equality with other recognised rights, whilst establishing three common elements that serve to provide unity of meaning: unity, fullness and coherence. The systematisation process runs parallel to the development of the modern State and is a representative element of the most developed legal systems, in which it acts as a basic element for legal certainty. The system's structure is a specified whole with established boundaries and the system's characteristics underlie and are manifested as an element of the system (Pérez Luño, 2004). On the basis of these parameters, public authorities may intervene for the purpose of achieving "fair economic and social order" and "to foster progress that will ensure a dignified quality of life for all", as long as the structures that are absolutely essential have been created so that such values can be rendered real and effective.

The proposal set out here implies that limitations must be placed on the requirements and intentions of equality of form. Such requirements and intentions must be drawn up and protected in positive law to develop the concept of guaranteeing human dignity, given that such rights provide the legitimate interest of authority when acting either to protect a person or to integrate a person into society. In line with the arguments put forward, the content of fundamental rights must be drawn up on the basis of structure, taking the elements contained in such fundamental rights into account as well as the overarching relationship between those elements, the mediation models and the principles governing those relationships; and also on the basis of function, duly reviewing the intended purposes from the internal and external, objective and subjective points of view. The two bases are connected in such a manner that it becomes necessary to establish common areas of reference (Garrido, 2007).

Equality is the dimension where external identities, requirements and values take shape. Such demands generate a continuous dynamic of expansion-confirmation-expansion of rights intended to increase global levels of freedom and equality. The above serves directly to show how important fundamental rights are to equality as a social and legal phenomenon and this, to a large extent, expresses the recent proliferation of rights arising out of interdependent processes (Bobbio, 2000).

Action of the Legislator with Regard to Equality and Non-discrimination Clauses

The ethical content represented by equality is content chosen by the authorities to represent the roots and purposes of what must be achieved by law and that content is built up with the support of the authorities. With ethics as the source, certain dimensions continue to have no legislative content at all but nevertheless carry out a critical function and exert pressure on areas of rights established in positive law, providing a greater depth of meaning. The basic principle of equality as a higher value represents the opinion of the legislator who may establish a principle, duly ratified by referendum, that goes on to receive wide social acceptance. That dimension of unity of higher values with the legal system means that equality has become an element by which one can identify the political system. This being so, a particularly broad margin for interpretation is permitted when developing equality by legislative or judicial means, although not in all regards. One must also bear in mind the fact that equality as a higher value is an expression of the justice and legitimacy of the particular political system (Peces-Barba, 1984).

In legal systems, the decision as to which values, principles and rights should be deemed most important in the event of conflict is reached according to a rule that specifies those priorities. One may decide which to apply on the basis of superiority of the authority issuing the ruling, or on which is the most recent or on the greater importance of the principle established in that value, principle or right (Dworkin, 1977). The fact that a series of fundamental rights refer to the legal value of equality has led to open interpretation with regard to legal acts. One cannot, in effect, detach equality from, and certainly not oppose equality to, freedom or solidarity as founding values from this point of view. Nor is it possible to establish a hierarchical ranking of rights according to the generation to which they belong. If one were to establish a hierarchy, this would be to the detriment of one category and in favour of another.

Equality as established by the legislator when creating the rule is by its very nature not an absolute equality, but rather depends on the particular criteria inspiring the rule; the advantages and disadvantages to be distributed and the estimated number of intended recipients of that distribution.

Taking the formalistic theory of law, any breach of the rule amounts to violation of the principle of equality to the extent that equality of treatment is the consequence that arises from the existence of and submission to that rule (Bobbio, 1995). The principles of equality in law and social equality are necessarily implicit in one another.

The path followed by equality of law in the Europe of constitutional monarchies was full of obstacles and exempt from any effective review as it derived from supremacy of the legislative act and was not subject to any constitutional checks beyond Parliament. Equality in application of the law also looked on unfairness of the executive power as exempted until that executive power became the same power that controlled the legality of legal regulations and administrative acts. Given that background and the fact that the only exceptions are the path followed by the USA and certain decisions taken in Switzerland towards the end of the 19th century, as well as Austria in the early 1930s permitting the principle of equality as an element that controlled the content of laws, this criterion did not become generalised until the end of World War II (Ruiz Miguel, 2000) and was first imposed in Germany and Austria, then extended to Italy, France and Spain (Fernández Ruiz-Gálvez, 2003).

This was an achievement of the liberal revolution and was won in the face of legal immunity of Old Regime authorities. Traditionally considered to be a right of first generation, there is a close connection with their naturalist and rationalist assumptions of those liberal revolutionaries whereby all men, by their very nature, are deemed equal. This is best expressed in the wording of Article 6 of the Declaration of Human Rights, dated August 26th, 1789, which established: "Law is the expression of the general will. Every citizen has a right to participate personally through his representative in its foundation. It must be the same for all, whether it protects or punishes. All citizens, being equal in the eyes of the law are equally eligible to all dignities and to all public positions and occupations, according to their abilities, and without distinction except that of their abilities and talents." The principle of equality before the law was subsequently included into later Constitutions and Civil Codes.

Legalism nevertheless began to lose ground due to the ever increasing number of legal regulations. The traditional paradigms that serve to uphold the rule of law (such as the division of powers, differentiation of legislation and administration, established boundaries between public and private areas of law, separation of the State and civil society) and the material assumptions traditionally held as points of reference for the models of economic democracy (free competitive market) and political democracy (Parliament) have been transformed (Barcellona, 1988). If one takes a close realistic look at contemporary models, legal systems show a divergence between the ideal, constitutional declaration of equality as a value, principle and right, and the extent to which that is established in law or put into practice, creating serious difficulties in turn when establishing relationships between the authorities and the law.

As for equality contained in legislation, the legislator has traditionally been responsible for ensuring equality and has the greatest obligation in this regard among all obligated public authorities. The legislator must guarantee that all citizens are treated equally and is prohibited *prima facie* from establishing any discriminatory legislation. The role of law in this regard is to provide categories and legal grounds, to establish lawful criteria to be applied to scenarios in order to equalise or differentiate. The legislator is limited in this regard (Martínez Tapia, 2000). Legislation has therefore become the parameter for discerning the existence of inequality, rather than *de facto* scenario in which citizens find themselves (Ezquiaga, 1994; Suay, 1985).

Whilst one may talk of equality of form as the primary objective of a social and democratic rule of law, given the transformations that have occurred as a result of globalisation and localization and the effect of complexity paradigms as referred to above, the question nevertheless remains as to which instruments need to be put in place in order for that pronouncement to become reality? In this sense, the traditional instruments brandished by the modernity paradigm are: democratic origin of law, guaranteeing impartiality; generality, expressed as law comprising general legal rules put in place for man and for the citizen, as abstract concepts; and abstraction, given that the content of legal rules describe instances of fact and their legal consequences, relating to all conceivable scenarios and situations. Therefore, the fact that we no longer consider everyone to have exactly the same rights and duties and that it is not possible for the legislator to include any differentiated treatment has arisen because current legal systems have incorporated new legal interests into their Constitutions that had not previously been taken into account (Martínez Tapia, 2000; Suay, 1985).

What we now have is a crisis in which legislation is the sole source of law, established by the State in favour of judges.

This effectively converts those judges into actual legislators as they attempt to better adapt legislation to social requirements (Gascón, 1994; Pérez Luño, 1994;). Legislative power should be exercised by adapting state competences to the legal order and should be able to rely both on preventative demarcation of those competences as well, as the case may be, on guidelines established in the Constitution. Just as one must, in all legal matters, respect the dignity of the person, the inherent inviolable rights of persons, free development of personality, respect for the law and for the rights of others, one must also meet extra legal requirements in the guise of rational behaviour in line with the politico-legislative needs of life as expressed in public opinion and the assumptions of the constituted legal order (Atienza, 1997; Hawkins, 1995).

From this point of view, objectivity in relation to equality can be said to have acquired an innovative meaning, adapted to new scenarios and going beyond mere identification of the term with generality and abstraction of legal rules, together with a reference to justiciability of the various distinctions made in such legal rules, i.e. the exclusion of arbitrary criteria (Perona, 1995; Ruiz Miguel, 2000). That innovative and adapted meaning refers in this sense to the description in factual terms of classifications set out within the legislation, although such descriptions should not be deemed necessary requirements. Concepts such as *good faith* in private law or *best offer* in creditors' arrangements for assets or services in public law would otherwise have to be excluded as contravening those same references (Ruiz Miguel, 2000).

Once one has acknowledged legislation to be an inherent dimension of fundamental rights in every rule of law, the author believes it necessary to emphasise that if the right to equality arises from constitutional accord, then the rules for debating important collective decisions should be kept short and the intentions of addressing needs presumed to be general needs should be voiced in accordance with the newly established criteria. In this sense, legislation on equality as a fundamental right forms part of the legal system because it meets the necessary criteria in that regard and a decision is taken by the authorities whenever legislative pronouncements are included into that system and subsequently become rights by means of positive law (Ansuátegui, 1997).

Insofar as ensuring equality within the content of law when drafting legislation, one should highlight the fact that legal rules, whether legal or non-legal, are put forward as prescriptive proposals. Nevertheless, to claim that the law amounts to a series of legal rules does not amount to proving that there cannot be any other type of proposal within a legal system. Definitions are an example of this, according to Alchourrón and Bulygin (Alchourrón and Bulygin, 1997), while other examples are provisions to revoke legislation and provisions on jurisdiction (Aguiló, 1995; Iturralde, 2003). One differentiates, with regard to provisions on conduct, between positive law (legislation and practice) and natural law (defended by *iusnaturalist* thinkers); general and individual legislation; rules for classification and theoretical rules.

Furthermore, insofar as the obligation to weigh up proportionality of the means used and the intended purpose of any unequal treatment, it is left up to the legislator to decide which scenarios must be differentiated and only as long as that decision does not contravene protected rights and freedoms and is properly reasoned. When considering proportionality of means and intended purpose, a distinction is made between congruence (true appropriateness of the two) and proportionality, taken into account as the degree to which the various points are related (Aranda, 2001; Necker, 2005). Decisions on equality must be justified on the basis of the relationship between the end purpose and the effects of the measure for consideration in each instance and reasonable proportionality must be established between the means used and the purposes one is attempting to achieve.

Conflict arises because achieving effectiveness when establishing equality by drafting legislation is highly ambiguous. Two types of criteria apply in that regard: the connection between the law as a social control mechanism in conjunction with the conduct of individuals subject to the law, and the extent to which that legislation affects the behaviour of those individuals. On the first point, whether these correspond is an aspect of the semantic relationship between the content of proposals and a state of affairs. With regard to the second criterion, the relationship implies the existence of a legislated system and one cannot define how effectively actions and prescribed behaviour correspond with one another when they comprise the specific conditions for the system to exist (Navarro and Redondo, 2000).

Thus, P.E. Navarro and C. Redondo (2000) have developed certain conclusions: a) in order for effectiveness to be useful as a concept, there must be a logical relationship with the concept of the prescribed behaviour; b) the link between effectiveness and prescribed behaviour certainly requires a connection but additionally requires a counterfactual element involving the way the regulatory systems will be affected; c) the concept of effectiveness when making pronouncements on that connection fails to express the regulatory nature of legal systems; and d) the combined concept of effectiveness and individual motivation serves as one criterion to evaluate acts, with the observation that the question being analysed does not develop from awareness of the state of affairs as adapted to the content of legislation.

Equality can be deemed the predominant effective rule of legal systems whenever: a) legal system Sn is effective (E2), as long as and only as long as most of the legislation is effective (E2); b) legal system Sn is effective (E2) if and only if the important legislation of that legal system is effective (E2) (Navarro, 1990). Whether or not legislation is accepted is one aspect of reasoning that explains the actions taken in accordance with that legislation. If one separates out teleological reasoning from other sources of law, it cannot then be used as a basis for legal justification, despite serving for social and political debate. That is not however as far as one can go in solving the problem. Several of the issues that Aarnio(1987) raises must be considered for the purpose: Do general criteria exist to cut through the chain of reasoning, so that grounds can be established to justify a particular interpretation? Is all justification thrown to the wind by legal dogma set out in opinions dispersed in all possible directions? And, looked at from the point of view of significance, are such opinions subjective? In order to respond to the issues as part of the thought process we are concerned with here one must differentiate between *factual* effectiveness and *real* effectiveness, or *real* effectiveness and *systemic* effectiveness of the particular legal rule as formally set down in law, where the very term can also be said to be ambivalent.

Then one must consider the most representative legislation established by the European Union, with a direct effect on individuals and groups and applying equally directly to community citizens, creating immediate rights within the legislation. In this regard, the Luxembourg High Court of Justice ruled to uphold that a principle of limitation exists with regard to the margin for evaluation by Member States of the European Union which goes further, for example, than the requirements of the European Convention on discriminatory legal protection by gender. A restrictive stand is still maintained on allowing exceptions when evaluating effective outcomes. Efforts are being made to overcome a strictly formalistic approach to differentiated treatment by observing that discrimination does not necessarily only occur when treating identical situations differently, but also when treating different situations as if they were the same. Discrimination in this regard mainly refers to matters of nationality and gender in the workplace (Hepple and Szyszczak, 1992; Hernu, 2003).

Prohibiting such discrimination is an attempt to end victimisation due to continued and systematic unfavourable treatment. The prohibited discrimination behaviours assume some degree of systematic behaviour deemed to be the outcome of a legal regulation that establishes different treatment and which has led to the particular legal rule being deemed standard, or social, therefore entailing a legal issue. Nevertheless, one is dealing in most instances with a social phenomenon where the difficulty does not lie exclusively with the starting point in that the outcome is basic. Furthermore, there may be reasons of a biological nature which may, for example, have to do with birth, race, gender or personal conditions or circumstances. Although one can say that human choice is the key with regard to religion, opinion and certain social conditions or circumstances, it must be said that rights and liberties are affected by the latter. Such grounds for discrimination converge given their relative interpretive values. The possibilities are extensive, as are the ways in which one may operate in practice, due to their deep foundations in society (Cohen, Nagel and Scalón, 1977; Rodríguez-Piñero and FernándezLópez, 1986).

Along these lines, the principle of equal remuneration for men and women for equal work has been enshrined in European Community Treaties since the Treaty of Rome. Nevertheless, the first European Directives dealing with this issue are based on Article 308, new Article 352 and 353 Treaty on the Functioning of the European Union (hereinafter TFEU), on Article 115 TFEU and on new Article 153 TFEU.

Some European Directives had already developed aspects in the 1970s in relation to the equal treatment of men and women in specific areas of Employment Law. The first Directive to do so was EEC/75/117, passed into law on February 10th, 1975, which sought to establish profiles for Article 119 and to introduce equal remuneration for work of equal value, rendering it compulsory for professional classification systems to apply common criteria to those employees when calculating remuneration (Bell, 2002; Rodríguez Manzano, Squires, 2007).

The second Directive to do so was EEC/76/207, passed into law on February 9th, 1976, which established the following under Article 2.1: “the principle of equal treatment in the sense of the following provisions assumes the absence of discrimination by gender”.

Directive 76/207 was nevertheless restrictive insofar as the concept of equality is concerned and considered equal treatment of men and women with regard to access to employment, promotion, professional training and working conditions. The specified element was non-discrimination, as established in Article 2.1, and measures for discrimination were found alongside measures to equalise and enhance formal equality, irrespective of the fact that Section 4 of Article 2 permits application of “measures intended to promote equal opportunities”. This section has been construed to support the use of positive action measures that belong with equality of formal treatment as a means of differentiation (GarcíaAñón, 1999).

The third Directive is Council Directive 79/7/EEC, of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security. The intention of this Directive is to remove all discrimination on grounds of gender, particularly in relation to matters referring to the scope of application of the various different social security regimes and conditions for accessing those regimes, contribution obligations and for calculation of benefits. Additionally, this Directive acknowledges the justiciability of the principle in Article 6 (Rodríguez Manzano, 2010).

Other Directives are Council Directive 86/378/EEC of 24 July 1986, amended by Council Directive 96/97/EC of 20 December 1996, on the application of the principle of equal treatment for men and women in occupational social security schemes. Directive 86/613/EEC, of 11 December 1986, on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and the protection of self-employed women during pregnancy and motherhood.

Also Directive 92/85/EEC, of 19 October 1992, on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding.

Subsequently, the Treaty of Amsterdam (which came into force in 1999) enshrined the principle of equality between men and women as a fundamental community objective and principle (Article 2). Article 8 TFEU (previously Article 3.2) also gave the Community the task of integrating equality between men and women in Community actions. The Treaty of Amsterdam extended the legal grounds for fostering equality and introduced significant elements. Article 19 TFEU (previously Article 13) included a provision to combat all forms of discrimination and Articles 153 (previously 137) and 157 (previously 141) of that Treaty allowed the European Union to act in the field of equal remuneration and in the widest sense regarding equal treatment and opportunities in matters of employment and occupation, whereas Article 157 TFEU allows positive discrimination in favour of women (Barrère, 2003a).

Thus, whereas the earlier Treaty guaranteed equal remuneration between men and women for the same work, there is now a new legal basis that attempts to integrate the European Court of Justice rulings in the cases of *Kalanke* and *Marschall*. As one can see, the ruling overcame the economic content of the Treaty of Rome which only provided for equality of men and women on matters of remuneration. One must furthermore add to this that the principle of equality of opportunity has been inserted, for the very first time in European Union source law, alongside the principle of equal treatment or legal equality; it would appear that there is now an obligation on community institutions to take positive action to favour women and a recognition of the legitimacy of such measures brought in by Member States (Chicano, 2011).

In this sense, Article 119.4 introduces an innovative slant when it establishes that “in order to guarantee full equality in practice between men and women during their working life, the principle of equal treatment may not prevent any member state from keeping or adopting measures that offer specific advantages aimed at enabling the less represented gender to exercise a given professional activity or to avoid or compensate disadvantages in their professional careers”.

Nevertheless, after the Treaty of Amsterdam was reformed, the primary economic aim sought by the principle of equal remuneration was displaced and this is now a secondary aim after the social objective of the equality principle comprising a fundamental human right. The Council Directives on equality introduced the principle of equal treatment and prohibited direct and indirect discrimination on the basis of gender, but failed to define such discrimination.

The European Court of Justice subsequently confirmed that the principle of equal remuneration according to gender includes Article 119 Treaty on European Union which is a defined, particular or specific expression of the general principle of equality and non-discrimination. As stated, the wording of Article 141.4 Treaty on European Union expressly establishes the exception that Member State policies on positive or preferential action are compatible with the principle of equal treatment.

Some directives of that period are: Directive 2002/73/EC, of 23 September 2002, amending Directive 76/207/EEC, of 9 February 1976, on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions. The aforesaid Directive includes a community definition of direct discrimination, indirect discrimination and harassment and sexual harassment, encouraging business owners to take preventive measures to combat sexual harassment, increasing penalties for discrimination and providing for the creation of institutions in Member States responsible for fostering equal treatment of men and women. One should also include Regulation (EC) n° 806/2004 of the European Parliament and of the Council of 21 April 2004, which provides for integration of gender equality promotion into the overall EU policy on cooperation and development and for adopting specific measures to improve the position of women. Council Directive 2004/113/CE, of 13 December 2004, implementing the principle of equal treatment between men and women in the access to and supply of goods and services. Directive 2006/54/EC of the European Parliament and of the Council on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and observation (recast): in order to contribute to legal certainty and clarity in application of the principle of equal treatment, this Directive combines: Council Directive 75/117/EEC on equal pay; Directive 76/207/EEC, as amended by Directive 2002/73/EC; Directive 86/378/EEC, as amended Directive 96/97/EC, on equal treatment in social security schemes; and Directive 97/80/EC on the burden of proof in cases of discrimination based on gender.

The Treaty of Lisbon subsequently came into force on 1 December 2009 and strengthened the principle of equality of men and women, including the European Union values and objectives (articles 2 and 3, Section 3, Treaty on European Union), establishing the principle of integrating equality of men and women into all European Union policies (Article 8 del TFEU¹).

Some of the more recent Directives on the issues referred to here are Council Directive 2010/18/EU, of 18 March 2010, applying the revised framework agreement on parental leave, concluded by BUSINESSEUROPE, UEAPME², CEEP³ and CES⁴, and the revoking of Directives 96/34/EC and Directive 2010/41/EU, on the application of the principle of equal treatment of self-employed men and women, which revoked Council Directive 86/613/EEC (Lombardo, 2006; Sierra, 2011).

Actions of Judges in Relation to Equality and Non-discrimination Clauses

The role of the judiciary can be established from a review of their established duties and without going into the authority they are granted. This is why it is said that judges: “a) have a duty to decide with regard to any claim in law, already in litigation or which may be disputed and having to do with an incorrect action, duly brought before such judges, with or without limitations as to the subject matter; b) judges have a duty to reach an opinion by reference to current standards in force on correct and incorrect behaviour, neither selected nor decided by the particular judge, except to the extent that a judge may construe or expand on existing standards when setting out the legal grounds on which such ruling is based; and c) judges have the monopoly of justified use of force within human society, by virtue of the prevailing standards of that society” (MacCormick, 1981; Ruiz Manero, 1990).

The principle of equality in judicial application of the law effectively acts as if it were a parameter establishing whether or not the rulings of judges are in line with the Constitution. In this sense, the way equality is dealt with is technically rather more complicated than just equality as contained in legislation and any approach must use a formula for equilibrium in this regard to overcome the contradiction between the principle of freedom of judicial interpretation and the principle of equality in implementation of the law.

¹In all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women.
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228848/7310.pdf

²European Association of Craft, Small and Medium-sized Enterprises.

³Central Europe Energy Partners.

⁴Economic and Social Council.

Nevertheless, despite neither seeking nor guaranteeing identical treatment of scenarios deemed equal, it must be said that what one seeks to guarantee is to ensure that judges do not act unfairly when interpreting and applying legislation (Martínez Tapia, 2000; Ollero, 2004). All in all, *ad personam* rulings cannot be allowed and criteria for differentiation may only be allowed to distinguish between individuals or scenarios as referred to within the particular law.

This all comes down to the existence of three factors acting to guarantee the law and serving to control or limit the exercise of authority by the law: generality, abstraction and legitimacy provided by the will of the people (Peña, 1997). Modernity in the traditional sense involves a supposedly necessary relationship between the principle of equality, the concept of national sovereignty and the idea of law as expressing the general will. In this scheme of things, a judge is subject to the rule of law, despite also being independent from the point of view that the judge is the only instrument capable of ensuring that submission and is required to rule without crossing over into matters comprising competences falling to the legislator.

The way in which one approaches law from within the inherent complexity of the law has much to do with the above. That is to say, that if one wishes to identify and find which components of the legal construction establish legal rules, then that approach reduces the law to a matter of linguistics or a series of pronouncements. In this sense, one might draw the conclusion that such a position is reductionist because it fails to take into account dynamic aspects, of internal development of such law. Nevertheless, neither does a structural approach deal with surrounding issues, such as the function of law or whether or not certain criteria of quality, aesthetics, etc., are followed. The former approach relies on functionality of each of the elements comprised in law, the particular social or individual need the law seeks to fulfil and the purpose of that need. In that scenario, and referring to a realist and sociological positioning of law, the authors have not limited this article merely to language and regulation and, finally, there is a third angle, which is the act of evaluation and is often deemed the same as iusnaturalism.

The review thus far therefore concerns three traditional stands on the concept of law, to which a fourth must now be added: law as a mechanism for solving practical issues. Such a view is instrumental, pragmatic and dynamic and adds meaning to the other three perspectives. There is considerable value to viewing the law in this way (Atienza, 2005), in that legal jurisdiction is currently deemed to refer to particular instances given special status and placed between the State and society. Pluralism and the manner in which judicial matters have become more culturally open have influenced that change; the idea of certainty of law has been altered and the end result is greater permeability (Andrés Ibáñez, 2003; LópezAyllón, 2004).

The model that arose out of the French Revolution actually began to clash with reality from the early 19th century onward when the formal separation of powers broke with the heterogeneous material of the functions of those powers. It is true to say that, from very early on, the concept of judges started to disintegrate. On the one hand, there were the actions of ordinary judges applying civil, criminal and commercial law; and, on the other hand there were judges who would rule in administrative litigation matters. The legislative role *per se* also became increasingly complex and heterogeneous; the concept of the legislator as representing the general public was no longer always a constant, whereas the role of the legislator became more formally established. Furthermore, individuals did not fit into one homogenous whole as equal beings, but rather into a heterogeneous whole comprising many differentiated groups and these continue to exist in actual and different scenarios (Rubio, 1997).

One must acknowledge that law not only comprises formal procedural aspects but also enshrines material aspects shaped by values, principles and fundamental rights; a rule of law has to reflect the interests and needs of all and must rise above what is merely the will of the majority group. A system of overarching rules must be drawn up in relation to the ground rules in democratic systems. The theory of guarantees, for example, is an attempt to provide a new slant to guarantee mechanisms drawn up in positive legislation, “updating guarantees and directing them as more than merely formal instruments of legal protection for enforcement of rulings or for fostering legislative programmes that are unfulfilled or not carried out” (Ferrajoli, 2011; Souza, 1998). Some of the key aspects are: separation of validity and efficacy, and a distinction between effectiveness and efficiency. When dealing with such issues, a judge does assume a certain degree of authority and must take an intermediary role standing between the law and its intended subjects, or, which amounts to the same thing, between the intention of the legislator and the expectations of citizens (Saavedra, 2007).

This being so, the concepts of judge and of the judicial role cannot be adequately described just in terms of legal rules establishing duties without being able to describe the correct judicial role, but rather one must also refer to the competences given to judges to hear and to decide proceedings. Medonça is of the view, on the basis of such ideas, that the legal modalities typically shaping the role of judges in developed legal systems comprise competences, powers, immunities, submissions and duties (Mendonça, 2000). Thus, in rules of law and within the framework established by the various different Constitutions, judges are obliged to establish law on the basis of legislation; this is the reasoning behind the suggestion that principles must be sought as the basis for the legal rules, together with the legal institutions, as well as looking at the social scope and consequences of the way principles operate (Saavedra, 2007).

The aspects as set out above form the basis for the idea that legal interest evolves according to the connection with legal concepts established in support of subjective rights and obligations. A mix of moral, cultural, social, political, economic, spatial or temporal factors, typically deemed changeable, provide the grounds for that development (Añón and GarcíaAñón, 2002; Guasp, 1971; Ornaghi, 1986). Viewed in this way, when rights of a social or political nature are claimed, they may often be reformulated in terms of individual and specific violations of a personal right. There may also be a specific victim. Nevertheless, one should note that even in scenarios where a case does not refer to a group, the outcome of any given case can certainly have a collective effect. One must be aware in such instances that the judiciary acts in the sense of guaranteeing a participative presence of some kind in the political arena (Abramovich, 2007).

That is why, traditionally, equality in application of the law was designed as an absolute right in that, once equality had been defined by the legislator, those applying the legislation were not permitted to differentiate further between titleholders of the rights and obligations except as established in the legislation, but must ensure that all are treated equally (Atria, 2000; GiménezGlük, 2004). The *tertiumcomparationis* is included into the legal standard and whosoever applies that standard must take the wording of the legislator into account. The basis for comparison must be a judicial scenario comprising the fact and its (legal) consequence, contrasted with the (legal) scenario being challenged. However, given that the purpose is to rule on the similarity of the scenarios and the different consequence in practice, rulings of this kind usually amount to opinions on similarities and differences between the scenarios. It lies with the plaintiff to allege such similarity. The court is not obliged to uphold the similarity or difference as valid, and must certainly reject the allegation if the reference is to an unlawful practice, or if there is a pre-existing and originating difference between the scenario of fact as upheld and the alleged basis for comparison (Giménez Gluck, 2004). Judges seek what is most appropriate, a solution involving the least sacrifice compatible with the greatest satisfaction of another asset or value. However, a negative function arises when ruling on legislation because one attempts to exclude any solution that might imply sacrificing a principle in the event that a particular principle cannot be adhered to alongside fulfilment of another different principle (Prieto, 2003).

Having established these parameters, one becomes aware that the principle of equality's application of the law by the judiciary means that it must not be possible to alter the applied meaning of rulings unfairly in materially identical cases. Thus, if a judge were to decide that a given case must be dealt with differently to earlier precedents, then the legal grounds for this must be sufficient and reasonable. Contradictions may, of course, arise between rulings issued by different jurisdictional bodies and it is established that the principle of equality in application of the law is compatible with the principle of judicial independence. Higher jurisdictional bodies are therefore responsible for re-establishing equality when violated and such rulings may be sought by ordinary or extraordinary appeal. Constitutional doctrine also sanctions lawfulness of interpretation as exercised by ordinary judicial bodies. It is not feasible here to evaluate grounds for such changes in criteria or to decide whether any legislation has evolved in that regard. Such evolution of the law is set out in the judicial rulings concerned and would require evaluating the extent to which the criteria for interpretation applied by judicial bodies across the initial stages of legislation.

Applying these parameters, the legal requisites necessary to prove a change in criteria are that an appellant must provide evidence of a suitable comparison; that the scenario used as the basis for comparison must be identical in essence to the scenario of the challenged decision; and that the contrasted decisions must have been issued by the same judicial body. Rulings on equality must also find and uphold: a) that the scenarios are *de facto* identical; b) that those scenarios were dealt with differently; and c) the extent to which the changes signify a change in criteria on the part of the judicial body (Rodríguez Piñero and FernándezLópez, 1986).

Constitutional Courts are not able to look at grounds that may have led to such a change. This can be said to detract from the significance of case law doctrine which is part and parcel of the Anglo-Saxon legal system. The necessary factor, however, is that the change must have been brought about consistently and that the different treatment was due to a generalized and impersonal change in criteria (Rodríguez Piñero and FernándezLópez, 1986). The distinction is therefore made between different enforceability in actual applications of the legal rule and unequal application of the rule. In other words, the issue is whether the legal rule is effectively applied differently to the same person. This must be considered in conjunction with regard for case law precedent set by the same judicial body and submission to jurisprudence of higher courts (Rodríguez Piñero and FernándezLópez, 1986).

One can therefore conclude from this that reasonable and sufficient legal grounds must exist for the change in interpretation of the legal rule and the following question then arises: with regard to what must judicial bodies be required to be reasonable? (Roca, 1986; Suay, 1985) The answer to this is that the measure of any given ruling to uphold or to dismiss lies in what has to be done with regard to the particular legal rule applicable to the case. Asymmetrically different treatment as equal or as unequal becomes clear when the application of that principle is positive, active or direct. Along those lines, whereas challenging a rule for violation of equality may lead a court to accept or dismiss the challenge in accordance with the criterion of importance and reasonableness followed by the court, whenever a rule is challenged because it provides equal treatment to a scenario which should have been treated unequally, one could say that courts would not in principle have any option other than to dismiss the challenge because of the absence of reference to that type of case in the clause on equality before the law (Ruiz Miguel, 2003).

One can therefore see the need for equality of form to be expressed as a malleable concept, so that the debate on equality and moral justification viewpoints have to adhere to guideline criteria as assumptions for equal distribution. This is why decisions on importance and reasonableness must consider capacity of choice and basic needs enabling capacity of choice as generically accepted. Those decisions must also adhere to guideline criterion confirming the capacity of moral agents to choose as being of equal value, assuming the equal participation of all. Satisfaction of basic needs and allocation of equal authority in the debate is implicit in both instances.

Furthermore, one should consider the possible presence of different kinds of inequality and different distribution criteria, bearing in mind the context for reviewing equality and the complex nature of the concept (Walzer, 2004). The need for diversity when taking appropriate measures is therefore justified, although one must always assess whether or not the measure and the criteria used are acceptable to the affected parties. Thus, any measure intended to satisfy a basic need and to maintain a capacity for choice, even differentiating measures, or any measure intended to guarantee that specific individuals will have equal authority in a given scenario, where they did not previously have it, must be deemed reasonable. This being so, any measure acceptable to the intended recipients must therefore also be deemed reasonable if one considers the circumstances of the unequal scenario, the context and possible criteria for distribution (Asís, 2000).

To sum up, the independence of the judiciary guarantees citizens the right to be judged according to legal parameters in such a way as to avoid unfairness, uphold constitutional values and safeguard fundamental rights (Andrés Ibáñez, 2012). For its part, another basic principle that must be dealt with is the division of powers, seen from the point of view of two sub-principles: firstly, the specialist tasks carried out in an exclusive and prohibitive fashion by specific bodies, and that of reciprocal independence. Reciprocal independence means that each body may act without interference from another body insofar as formation, operation and duration. Judges are, of course, independent in this regard and may not be appointed either by the executive or the legislative power, nor can their authority be revoked or removed by either (Guastini, 2003; Greppi, 2012).

However, whereas legislation is expected to evaluate and include decisions, judges must make value judgments with regard to the law. Flexibility occurs in judicial practice with extrapolation of analyses, upholding the criteria for which legislation was established, the rationality of the law, the intended purposes of the legislator or the social circumstances at the time the law is applied (Almoguera, 2009; Ely, 1980; Guastini, 2003).

Thus, as long as any inequalities established in legislation affect neither so-called basic rights nor any rights, interests or scenarios that it would be unacceptable or absurd to remove, one can say that clauses on equality before the law must be relative whenever the root of such legislation is a discriminatory trait and also in instances where there is an absence of such a root to the legislation.

One can conclude from these affirmations that it is possible to re-establish equality by refusing equal treatment to subjects with greater legislative advantages and by extending application of equal treatment to subjects excluded from that treatment (Ruiz Miguel, 2000).

The problem arises because the two principles conflict: differentiation and non-discrimination. For differentiation to be justified one must know the true situation of the particular person (Asís, 2000). Nevertheless, several possibilities are usually feasible for establishing equality as a general rule, unless the scenario is unfair, and there is a strong argument for bringing in non-discrimination rules when parity is used as an instrument. The issue has been raised as to whether it might be useful to check appropriateness in considering these concepts. There is certainly a case for political control of appropriateness, rather than merely running a legal check. Many inadmissible forms of discrimination will certainly occur if no checks are put in place, in that requirements would be relaxed and discriminatory scenarios of a cultural nature would be permitted to continue (Rodríguez-Piñero and FernándezLópez, 1986).

The fact that the aforementioned model commenced in the 19th century symbolises the failure of the previous classification and equality in legislation to equalise. The historical and relative nature of the concept of equality and non-discrimination means that one must primarily construe the concept according to the social reality of the era when the particular legal rule is applied. This overcomes the common difficulty of presuming one is dealing with a closed clause, not open to possibilities. In reality, formulation of such clauses is open, flexible and capable of adaptation to the variety of different current and future scenarios that might arise (Ferrajoli, 1993; Peces-Barba, 2000; Rabossi, 1990; Rodríguez-Piñero and FernándezLópez, 1986).

To continue along these lines, the principle of legal certainty means that judicial actions must be foreseeable and in line with earlier responses, in order to maintain coherence. Essentially, the important consideration when justifying discrimination is to consider whether one might sacrifice equality for the good of another constitutionally protected right (Rodríguez-Piñero and FernándezLópez, 1986; Strauss, 1998). The discriminatory effect of such differentiation must be taken into account in that regard and this explains why there is no simple answer to the question as to whether one can separate the right to equality from the right to non-discrimination (Armstrong, 2006; Soriano, 1999). If one looks at doctrine, there is the well-known polemic based on autonomy of the principle of non-discrimination, overcoming bilateralism and neutrality and starting out from a specific evaluation of the social reality by the creator. It is not therefore possible to confirm the existence of discriminatory behaviour by evaluating differences between compared categories, as one can when deciding on equality (Baker, Cantillon, Lynch and Walsh, 2004; Pumar, 2001; Rodríguez-Piñero and FernándezLópez, 1986).

Insofar as European Union Law is concerned, the first judgments to establish jurisprudence on this issue at the Luxembourg Court of Justice were the judgment of 25 May 1971, in the case of *Defrenne I* (80/70); judgment of 8 April 1976, case of *Defrenne II* (43/75); and the judgment of 15 June 1978, case of *Defrenne III* (149/77), among others. The issue of positive action was however not dealt with until the *Kalanke* case. In this scenario, the preliminary issue in the *Kalanke* case had to do with *Land* legislation in Bremen (Germany) on the equal treatment of men and women in public service, which establishes that selection, provision of jobs and promotion “shall be granted preferentially to women, against equally qualified male candidates in sectors where women are underrepresented”.

The Luxembourg Court judgment *Kalanke v. Land de Bremen*, of 17 October 1995 (C-450/93) ruled that the Bremen legislation contravened European Directive 76/207/EEC Article 2, paragraphs 1 and 4 because it established the automatic promotion of women over equally qualified men whenever women are underrepresented. The Commission construed that ruling as only condemning the automatic nature of the positive-action *Land* policy, in that such action might amount to unlawful discrimination against men.

The aforesaid ruling upheld the appeal lodged by a male employee who had been refused promotion to benefit a woman, thereby highlighting the difficulties of determining the meaning and scope of community law. The ruling considered that the principle of non-discrimination must apply to both the feminine and masculine genders and set aside the historic and factual discrimination of women as a collective group, furthermore establishing the formal priority of individual rights. This called into question the principle of real equality of treatment between the genders for the sake of achieving an outcome and rendered a strictly literal interpretation which may not be the most appropriate (Atienza, 1996; Ruiz Miguel, 1996).

Subsequently, the Luxembourg Court, in the case of *Marschall v. Rhineland-Westphalia Land*, of 11 November 1997 (C-409/95), established that the trial court had ruled that women should not be automatically preferred for promotion if there were motives that tipped the balance in favour of the male candidate (Article 25.5 Public Service Act, Rhineland-Westphalia Land). Council Directive 97/80/EC, on the burden of proof in sex discrimination cases, is particularly important in this regard. The Court declared in the case of *Marschall* that community law does not oppose national legislation on the promotion of women candidates in business sectors with fewer women than men as a compulsory priority, as long as the advantage is not automatic and male candidates are guaranteed that their applications will be reviewed and not excluded a priori.

There are substantial similarities between this scenario and the issue that arose in the *Kalanke* case: the problem occurred in the same geographical area (a German Land) and within the scope of legislation applicable to public services, although specifically related to the field of education. It is, however, the “open clause” establishing the possibility that is specifically similar (Barrère, 2003a). The Court ruled that in contrast to the legislation that had been reviewed in the *Kalanke* judgment, the disputed provision contains a clause establishing that women would not be automatically preferred for promotion whenever the qualities of the male candidate were such that the balance was tipped in his favour (referred to as the “open clause”) (Ballestrero, 1997; GarcíaAñón, 1999; Martín Vida, 1998).

Other cases exist in addition to the two well-known cases set out above, such as the matter of *Badeck v. Land in Hessen*, of 28 March 2000 (C-158-97). The ruling in question attempts to validate the two earlier cases of *Kalanke* and *Marschall*, declaring them to be compatible with Community Law as long as they do not automatically and unconditionally grant preference over male candidates to equally qualified female candidates and as long as applications are reviewed objectively bearing in mind the particular personal circumstances of all candidates”. All in all, the ruling establishes that Directive 76/207 is not contrary to Hessen law (Barrère, 2003a).

Finally, one should mention the judgment in the case of *Abrahamson*, of 6 July 2000 (C-407/98), which also interprets Articles 2, sections 1 and 4 of Directive 76/207. Community Law was deemed incompatible with the Swedish legislation in this instance in that preferred selection was not permitted when the difference in qualifications was not substantial, nor even when the difference was slight. Also, the case of *Lommers*, 19 March 2002 (C-476/99), which has similarities with the case of *Badeck* and considers an “open clause” upon evaluating the particular personal circumstances of the employees concerned (Sastre, 2004).

The Action of Public Policies Brought in by the Administration for Equality and Non-discrimination Clauses

There is currently a general trend in the sense that the actions by Administrations are seen as innovative and adapted to the new scenarios. This being so, the transformation of the State’s role is having a particularly noticeable impact on Administrative Law (Perona, 1995; Ruiz Miguel, 2000). The State is no longer merely a provider of benefits but rather takes particularly significant steps with regard to regulation, inspection, authorisation and sanctions. This reference is not to a police state in the 19th century sense and regulation is not merely a matter of external limitations, organisational minimums and novelties imposed on the citizens being organised. To sum up, the type of organisation and control we are seeing comprises a new public administration of Anglo-Saxon origins.

Furthermore, simplified procedural legislation has been encouraged and an increasing number of regulatory and control instruments has become available to the public authorities, deemed the arrival of reflexive law. These new powers of regulation and monitoring that can be used by the Administration are characterised by the significant extent to which the Administration may exercise its discretion. One must also remember the paradoxical effect of attempting to intensify, regulate and control the action of individuals more intensely, as manifested in the extended powers of self-regulation and self-determination (Mir, 2004).

There has been a proliferation of independent Administrations throughout Spain and Europe, and their aim has been to remove certain sectors of administrative actions that are particularly sensitive and complex from the struggle of partisan politics. The independent Administrations are conceived as mechanisms to correct alleged deficiencies of democracy, involving a fourth power. From this point of view, the transformed clause on the rule of law refers to the degree of freedom enjoyed by the particular Government and the Administration with regard to judges and legislators (González García, 2004; Mir, 2004). Because of this, there is a crisis today in the traditional Administrative Law model.

The new scenario furthermore goes further than a mere understanding of the general interest in a welfare rule of law and implies a level of general interest as legal instruments for controlling positive action with a drive towards participation of individuals and of collectives in actions by authorities. Symbolic evidence that a welfare rule of law has arisen can be found in the extended protection of fundamental freedoms and rights to persons to whom such freedoms and rights did not previously apply. That is why a rule of law is deemed to strengthen the connection between freedom and solidarity, which values were previously opposed to each other and has come about because measures to guarantee individual freedom can be found in the social structures that enable citizens to develop their personality.

All in all, the positive aspect is the achievement of greater stability and cohesion than in liberal States, the integration of better perfected and more efficient social justice objectives which suit new circumstances and necessities. This needs to be reviewed in greater detail. Crises arise in such States as a result of protection being granted to citizens-clients-beneficiaries in ways that can exclude immigrants, unemployed and minorities in many areas (Vidal, 1999). The welfare rule of law, to refer again to the State structure, should be more rigorously understood as a political tendency directed at achieving an innovative dimension of freedom. What one is actually attempting to achieve is to move freedom forward in the liberal and democratic sense, providing a degree of autonomy of the individual with regard to the State or a mechanism for involvement.

Seen in this way, the question that arises is: what is the social function to be carried out by the law within the scope of interest? From a general point of view, there are two responses depending on whether one adopts the functionalist or conflictive view of society. Those who accept the functionalist view of society consider the mission of law to be to mitigate potential elements of conflict and keep the mechanism of social relationships well oiled (Treves, 1998). Functionalists considered the law to be a system for social control or a set of procedures and means by which citizens adopt certain behaviours, take on and interiorise legal rules, and achieve the goals intended by the social group (Díaz, 1993). Integration of the individual is achieved by socialisation and this, when insufficient, has to refer to other instruments to bring behaviour into line (Merton, 1968), where law is such an instrument and acts to prevent and/or repress undesirable behaviour and to promote and/or reward socially desirable behaviour.

Nevertheless, aside from this necessarily abstract approach to law which sees law as a system of social control, a functionalist perspective has to deal with social functions and the results fall short of being satisfactory, usually ending up with rules for a heterogeneous list of functionalities (Bobbio, 1990). Along these lines, it would seem unlikely that a common list might be drawn up from a review of the different regulatory systems. The generalised nature of responses that must be provided by this approach can only be overcome by reviewing the specific functions accomplished by a regulatory system. That is why it would appear much more useful to analyse the functionality of each regulatory system and, more specifically, each regulation or institution. That is to say, the objectives sought, the greater or lesser effectiveness, dysfunctions and/or negative functions arising, and any undeclared but nevertheless real functions of each system, institution or regulation (Giner, 2009) that must materialise in a welfare rule of law based on redistributive and interventionist policies, in which there is significant provision of guaranteed minimum levels of material equality and which arises out of a regulating law that takes on the functions of controlling, managing and directing markets (Julios-Campuzano, 2007).

Following on with this hypothesis, differences must be treated by recognising rights or provisions within the framework of affirmative action that serve to transform the causes from which disadvantages arise based on a disadvantaged situation, oppression and lack of vital opportunities; the most significant of these being those that define the advantages provided by citizenship of a society (Añón, 2001; Häberle, 2001). All of this feeds into the welfare rule of law as the actions of general social policies refer to mechanisms that have become institutionalised by the public authorities or have taken the form of preferential directives offering a historical structural framework for the responsibility of the State with regard to the welfare of its citizens.

It would not be plausible, along these lines, to overlook the fact that public authorities must be responsible for taking the initiative and must carry out measures for achieving true equality using policies for redistribution that are capable of overcoming national frontiers and reducing inequalities in a globalised world. The author considers the appropriate direction to be that of further empowering solidarity, whilst decreasing jurisdictional boundaries. There is an urgent need for this in that the market is unable to resolve the situation without assistance. Even though one refers to designs and approaches as being global, this does not mean that one can speak of absolute uniformity, quite the opposite.

Administrations and Administrative Law must bear local peculiarities in mind and must turn to the instances for decision making and enforcement that are most closely placed to the citizens because such matters have local dimensions and are of local interest (Desdentado, 1999).

The aspects as listed above give rise to concepts in the sense that legal interest develops from connections to legal concepts that support subjective rights and obligations. A combination of ethical, cultural, social, political, economic, spatial or temporal factors characteristically considered to be mutable provide the grounds for that legal significance (Beck, 2008; Delmas-Marty, 1998; Mir, 2004; Stiglitz, 2010). Seen in this light, claims for rights of a social or political nature can often be reformulated in terms of individual and specific violations of a personal right, involving a specific victim. One should nevertheless be aware that, even in the event that the particular scenario is not a collective scenario, there would be an effect on the collective group. That is why, in such instances, one must also understand that judicial action implies guaranteeing some degree of participation in the political arena (Añón and GarcíaAñón, 2004; Guasp, 1971; Omaghi, 1986).

Given the references cited, one must conclude that joint and complementary work needs to be carried out in which actions by the authorities do not occur on an isolated basis but rather in permanent combination. Such complementary legislative strategies must start out from a procedural approach. Therefore, as Abramovich states “one is not seeking a provision nor directly challenging a policy or measure affecting rights, but rather one attempts to guarantee conditions that will render it possible to adopt procedures for deliberation in order to produce legislative rules or administrative acts” (Abramovich, 2007).

The starting point for achieving the practical realisation of equality of form as set down in all Constitutions of contemporary rule of law and in International Law, is that one must preclude acting in a discriminatory fashion. Furthermore, in order to establish instances in which differentiated treatment is allowable, it is necessary to carry out a preliminary evaluation that will provide the legal basis for such rulings. Governing and guiding criteria are also necessary in order to make that evaluation. Administrations are nevertheless still perceived as organisations that are instrumental in nature. That is why it is particularly important for societies to have an administrative model that serves the public interest effectively and for the governing legal system to establish appropriate routes and steps to achieve this. Thus, one can state immediately that efficacy is one of the basic principles of administrative action, alongside legality.

Such assumptions show the need for Administrations to be subject to regulations that can establish better quality, efficacy and efficiency, insofar as possible, as well as respect for the rest of the legal system and particularly for constitutional principles. The aforementioned principles have to do, when not referring to the principle of legality, with the principles of prohibiting unfairness, of objectivity, of equality before the law, of free competition, of control of public spending, public announcement and transparency; of access to public function roles according to merit and capability, involvement of interested parties in administrative decisions and respect for, promotion of and protection of rights and legitimate interests of individuals. However, even if one agreed no general reserve with regard to Administrative Law, partial reserves, limits and principles nevertheless exist and must be guaranteed at all events irrespective of the particular type of legislation to which administrative acts are subject (Abramovich, 2007; Garrido, 2010).

Neither should one forget when analysing implementation of equality by public policy, and particularly within the European Union, that a strategy of legal convergence has been fostered between Member States by establishing coherence, stability and jurisdiction of common policies. This has arisen in view of the current scenario and bearing in mind that the diversity and complexity of the existing systems make it possible to establish minimums. There is a significant degree of political and social consensus in this regard. The established objectives serve as guidelines for adapting national systems to needs as they arise, thereby guaranteeing continuity and acting as stimuli to develop protection.

Insofar as fundamental rights are concerned, the welfare rule of law implies a level at which such rights are regarded as legal instruments for controlling positive action, necessarily geared to individual and group participation when the authorities act. There have, nevertheless, been significant advances in that the appearance of the welfare rule of law is symbolic of protected freedoms and fundamental rights being extended to those to whom those freedoms and fundamental rights had not previously applied. That is why the welfare rule of law is said to strengthen the connection between freedom and solidarity.

Those values had been opposed until now, in that guarantees of individual freedom lay with the social structures in which citizens had developed their personality. Along these lines, the only available guarantees are those established by the rule of law. All virtual effects of the formula must be considered if one is to achieve high levels of democratisation and social emancipation (Desdentado, 1999).

All in all, the positive aspect of social States is that they achieve greater stability and cohesion than liberal States and integrate better perfected, more efficient goals on social justice adapted to new scenarios and needs. This requires a more in-depth review because where crises can arise for such States is in the protection granted to citizens-clients-beneficiaries and the way that immigrants, unemployed and minorities can be excluded in many areas (Pérez Luño, 2010). Welfare States, even if one refers to the state structure, must be understood in strict terms as states with policies directed at achieving an innovative dimension of freedom. The true aim is to advance freedom in the liberal and democratic sense, to provide individual autonomy with regard to the State or a mechanism for participation (López Guerra, 1989; Vidal, 1999).

The need for relevance and reasonableness means rejecting both radical anti-egalitarianism and absolute egalitarianism. Equality as negative differentiation implies equal treatment of different situations or circumstances deemed irrelevant with regard to title, exercise or guarantees. Positive differentiation, on the other hand, treats differently situations or circumstances that are deemed irrelevant. Equality as negative differentiation highlights the problem of negative discrimination, i.e. formally neutral treatments exerting a negative effect on a particular group or category of subjects. With regard to positive differentiation, the greatest problems arise in connection with positive action and inverse discrimination, in that these occur as direct discriminations (Balaguer, 2002; Bidart, 2001; Díaz, 1998-2000; González Moreno, 2002).

This all goes to show that law no longer considers the citizen in the impersonal sense as an undifferentiated recipient but legislative effects refer rather to broad social groupings. Law, in that sense, has clearly vanished into thin air and the contents of law have become heterogeneous. The Constitution has taken its place and become the rule of thumb *par excellence* (Asís, 2000). Social rights have furthermore meant positive techniques being practised that did not fit into those previously known (Zagrebel'sky, 2011).

According to Ferrajoli, one sees in this regard that the national State, in its capacity as a sovereign subject, is undergoing a crisis both from above and from below. The crisis from above is caused by abundant transfers of the majority of previously inherent functions to supra-state or non-state authorities, e.g. defence, directing the economy, monetary policy or the fight against crime. The crisis below is due to centrifugal forces, breakdown processes and developments in international communication which render national unity and internal peace increasingly difficult and precarious. Nevertheless, at the present time and even in the most advanced democratic nations, we are seeing a profound and growing crisis of law notwithstanding the fact that, in *iuspositive* tradition, legal reason has the advantage born of the progress of constitutionalism over the last century and that this has permitted constitutionalism to configure itself as an artificial system of guarantees previously established by Constitution to protect fundamental rights (Martínez de Pisón, 2001).

Legal equality is absolutely necessary in this regard, as we have already seen, if one is to achieve real equality in the negative sense. This is because whenever legal discriminations come together they act to put a stop to the qualities achieved whereas, in the positive sense, matters may be brought to court to counteract discrimination. Furthermore, equality of form clearly does not suffice but one rather requires effective application of regulations to maintain boundaries for vulnerable groups. The principle of social equality therefore comprises a principle of compensating inequalities, carried out by raising or promoting disadvantaged persons or by limiting or reducing riches and power of those with the greatest advantages.

In comparative terms, inverse discrimination is a type of differentiation for the sake of equality and requires non-egalitarian or even discriminatory legislation. Inverse discrimination comes into play in scenarios that stand out because of the converging and rare elements of such scenarios. It has been shown that positive action comprises formally unequal treatment that favours certain collective groups because they have a particular differentiating trait. Inverse discrimination is characteristically transparent and immutable, comprising specific non-discrimination clauses. Technically, such clauses are intended for groups who have become unequal for cultural reasons, such as women; for physical, mental or sensory reasons, such as the disabled; for reasons of age, such as minors and the elderly; for economic reasons, such as consumers; and those subject to special conditions, such as soldiers or prisoners; or for health reasons, such as the sick.

Insofar as the open clauses usually established within constitutional rules and in international treaties, the groups for which open clauses have been proposed are minors and the elderly, homosexuals, the disabled, the sick, the poor and ethnic minorities (Ferrajoli, 2010).

In this sense, the principle of equality works on two fronts. Firstly, with regard to the legislator or the regulatory authority, where both are prevented from configuring scenarios of fact within the legislative rules in such a manner that persons in the same situation from all legitimate points of view might be treated differently. Also, with regard to application of the law, where the body applying the law may not establish any difference for persons or circumstances other than as specifically set out within the legal rule. In instances of inequality before the law, one must evaluate the *de facto* scenario that brought about legislative regulation, as well as the regulation itself; and, in instances of inequality in application of the law, the content of the legislation in question is found to be the key paradigm.

Internationally, therefore, one no longer speaks of individualist and formalistic treatment of discrimination, but rather attempts to give discrimination an autonomous meaning related to international judicial protection. Additionally, European Union Law is directly effective on individuals and groups, affecting community citizens directly and furthermore creating immediate rights for them. The Luxembourg Court has clearly stated the principle which limits room for evaluation by European Union Member States and which, for example, transcends the measures established in the European Convention for prevention of discrimination by gender. A restrictive position is maintained in this regard and exceptions are allowed when evaluating effective outcomes. One attempts to overcome a strictly formalistic posture on different treatment by observing that discrimination may comprise not only different treatment for identical situations, but also treating different situations equally. The types of discrimination that have been reviewed, in the main, refer to matters of nationality and gender in the workplace.

The measures found to have the most problematic effects and most debated in the European Union, out of all of them, are positive actions. In this sense, positive action is the term used in Europe to translate what has been referred to in the United States of America and other English-speaking countries as *affirmative action*. The term *affirmative action* originated from an American 1935 law drafted within the framework of employment Law but which has come to have a public political significance or be deemed *policy*, within the context of the legal reaction to protests carried out by the Black American population and other minorities and movements providing a social response and this gave rise to anti-discriminatory legislation (Barrère, 1997; Schutter, 2001).

Specifically, so-called moderate affirmative acts focus on disadvantaged groups and as long as they remain moderate there are no harmful effects. The effect is just indirect and helps life to develop on all levels. GarcíaAñón distinguishes in this regard between measures to raise awareness, measures to incentivise, measures bestowing preferential treatment and compensatory measures.

To use his words, measures *to raise awareness* are usually “training methods or publications aimed at influencing opinion or rendering the issue sensitive”. Measures to *facilitate*, or to *foster* or to *promote* comprise “preliminary measures for achieving the purpose: elimination of the disadvantage. Such measures are intended to promote and foster equality in the future”. Garcia Añón further distinguishes between such measures as follows: a) measures to *incentivise* in order to “increase the means or reduce the disadvantage”; b) *inverse discrimination* or *affirmative measures* which are characterised as “in the event of two unequal scenarios, unequal treatment must be carried out to benefit the more poorly situated”. There are two important requirements here: preference for certain traits and a particular lack of resources (Ruiz Miguel, 1996); c) measures providing *preferential treatment*, which establish “preferential or unequal treatment in scenarios with a similar starting point, on the understanding that disadvantages exist in the contextual scenario”; and, finally, d) measures to *remunerate*, *compensate* or *affirmative sanctions*. These involve “measures taken after the desired action has been carried out” (Campoy, 2004; GarcíaAñón, 1999).

Particular reference must be made in this section to anti-discriminatory law with regard to one specific issue: affirmative action on sex discrimination in the European Union. As it is, promotion of gender equality has evolved gradually in the European Union. In this sense, the fluctuating progress has continued in line with advances in European integration and, insofar as the priority on economic issues, Article 119 EEC is known to have been subject to various interpretations because it enshrines the principle of equal pay for similar work.

The principles that count in this regard are the principle of equal treatment and the principle of equal opportunity, based on the general assumptions already referred to above (Rodríguez Manzano, 2010).

However, although progress in this area is confirmed as stated above, there is also a need to highlight the stages of progress in this particular field and state the limitations. The first stage occurred throughout the 1950s and in the late 1970s and is marked by defending equality of form and equal treatment. The second stage took place in the early 1990s, with a prevalence of affirmative action measures in favour of women. The third stage has to do with the commitments given at the fourth World Conference on Women in Beijing (1995), where gender perspectives came to be seen as pivotal for action. The stages are not mutually exclusive but rather complement each other and are accumulative. The words used to qualify those changes have been “slight adjustment”, “adaptation” and “transformation” respectively (Rees, 2002; Rodríguez Manzano, 2010).

Conclusion

From the legislative point of view and using these parameters, legal grounds are still necessary to justify acts of the legislator. One must prove there is a legitimate need for compulsory legislation for the particular purpose. Positive action must address the fight against structural subordination of certain collective groups, which is one manifestation of discrimination. If one wishes anti-discrimination legislation to serve as an instrument for group justice, then a deep review is necessary and has to begin with its definition. Judges nowadays carry great responsibility for the way the law operates and form part of the law. We must ensure that everyone takes care of the law, which can belong to no man (Zagrebelky, 2008). All in all, a dynamic understanding of the argument put forward here must combine both the descriptive and explanatory aspects and start out from the single concept of rationality in the creation and application of legislation (Atienza, 1997).

Thereafter one might use two lines of thought: one focused on moving the legal concept of discrimination based on different treatment to subordination based on different status. The other line requires extending the legal concept of affirmative action and ensuring it is not merely restricted to equal opportunities (Barrère, 2003b; Heinze, 2003).

The tension between equality in law and equality in fact manifests as a collision of principles which must be resolved casuistically using the relative weightings technique. As for derivatives, the objective is to find a method for inclusion and integration which establishes the rules to be followed between the majority group and other groups. The key questions in this regard are: How should one evaluate difference and identity? How do these connect with equality? What is the route for achieving mutual and equal respect between all cultural groups? And where does one establish the point of cohesion in a socio-political context?(Fariñas, 2004; Malgesini and Giménez, 1997).

From this position, it must be stated that there is no autonomous right to equality, existing alone, but that the content of the right to equality can only be established in accordance with specific legal relationships. Furthermore, equality has repeatedly gained a reactive nature with regard to other rights. It should also be said that equality is unlikely not to simultaneously infringe another right (Pumar, 2001). Anyone wishing to benefit from the right to equality may call on the right not to be treated unequally, but not on the right to be treated equally. Thus, the right to equality cannot give rise to further rights but only to rights that can be re-established after having been infringed (Pumar, 2001).

With respect to the European Union, the following point must particularly be debated: the lack of specific conceptual proposals; concepts and terminology established as doctrine in jurisprudence with no connection either to national or European legislation, or to national or European jurisprudence rulings; an absence of concepts drawn up either on the basis of legal reasoning or using reductive grounds (GarcíaAñón, 1999). Specifically, Council Directive 76/207/EEC was a transcendental step and has subsequently been reformed to prioritise access to employment and promotion of the underrepresented gender. The Treaty of Amsterdam amended the European Community Treaty and introduced the possibility of affirmative action (Article 141.4 ECT; current Article 157 TFEU). That regulation has been completed by Article 23.2 of the European Union Charter of Fundamental Rights (Sierra, 2011). From this perspective, one must specifically consider the affirmative action measures directed at correcting neutrality of gender with regard to rights and opportunities and establishing a set of advantages to counteract the disadvantages which a supposedly objective system generates for women (in this instance), but nevertheless built on the basis of a patriarchal model of organised authority(Sierra, 2011).

Affirmative action, which according to Barrère is deemed an exception to an individual right enshrined in the Directive, must be interpreted in a restrictive manner and the Court has yet to agree with regard to applying the principle of equal opportunity (Ballestrero, 2006; Barrère, 2003; Rosenfeld, 1991).

It is also important to note that the European Court of Justice is opposed to rendering interpretation of European Union Law compatible with comparatively advanced national legislation for developing affirmative action and which present two options: to provide for selection of women, where the only requirement is equal qualifications and underrepresentation (as in Germany) or to provide for the selection of women even in instances when there is a slight discrepancy when calculating suitability of female qualifications (less qualified than men) as in Sweden.

One major obstacle is the ideological language used overall both by the national legislation and the Court of Justice, which has helped an individualist vision of equality to prevail (Barrère, 2003a; Bengoetxea, 1993; Robin-Oliver, 1999). GarcíaAñón has suggested that reducing affirmative action measures to measures that are compatible with equal opportunity is to reduce the concept held by the Court. This would not, however, reduce the concept of equality as considered in both dimensions: substantive equality and formal equality.

All in all, advances have been made in policies for equality when legislative in jurisprudence criteria are specified with regard to scenarios not deemed to be “automatic preference” scenarios. Such a legislative framework serves to extend the relationship between subjects, object, scope and content of measures to be applied in order to render the principle of equality effective. In this sense, and bearing in mind the social, political and economic context, one must ensure that affirmative action measures and also, in some instances, inverse discrimination measures are put in place for all disadvantaged collective groups and not just with regard to women: foreigners, ethnic minorities, language minorities, the disabled, etc. Depending on the particular field, these measures should also be applied to areas other than employment, such as economics (in the broad sense), politics, care and education. Therefore, the extended measures must also be put in place in relation to the object, not only with regard to gender but also allowing other factors to be considered such as race, and also generic consideration of “disadvantaged groups”(GarcíaAñón, 1999).

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