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## Equality After Brexit: Evaluating British Contributions to EU Antidiscrimination Law

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## ESSAY

# EQUALITY AFTER BREXIT: EVALUATING BRITISH CONTRIBUTIONS TO EU ANTIDISCRIMINATION LAW

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### *I. INTRODUCTION*

Before the Brexit referendum, Eleanor Sharpston, the current British Advocate General to the Court of Justice of the European Union (“CJEU”), said in an interview that “[t]he United Kingdom has made a very strong contribution to this court and the evolution of EU law since it joined in terms of injecting a degree of pragmatism . . . . Some very good [UK] people have served in the court – Lord Gordon Slynn, Sir Konrad Schiemann and Sir Francis Jacobs – and they have made a difference . . . . it would be a pity to lose this contribution.”<sup>1</sup> One area in which UK Advocates General made a distinctive and

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1. Owen Bowcott, “*We don’t decide national cases*”: ECJ veteran swipes away Euro-sceptic barbs, GUARDIAN (Apr. 19, 2016), <https://www.theguardian.com/law/2016/apr/19/we-dont-decide-national-cases-ecj-veteran-swipes-away-euro-sceptic-barbs>.

tangible contribution is the equality law that emerged from the CJEU. The United Kingdom played a significant role in this body of law through preliminary references from its courts as well as opinions by its advocates general. Because the United Kingdom had a more developed antidiscrimination law than other member states, references from its courts created occasions for the CJEU to define key concepts in equal pay and equal treatment law, particularly indirect discrimination and the justifications given to defeat prima facie cases of discrimination. In cases that originated in other member states, specifically regarding the scope of positive action, the special protection of motherhood, and discrimination on grounds of religion, Britain influenced the jurisprudence both by participating directly in the litigation, and through strong Advocate General opinions. As the process by which Britain leaves the European Union unfolds, one can only speculate about how EU law will evolve without Britain. This Essay analyzes the British contributions to EU equality law to understand the perspective that will soon be absent.

## II. INDIRECT DISCRIMINATION

### A. *Jenkins v. Kingsgate: The Prima Facie Case*

Many significant decisions of the CJEU defining discrimination and setting forth the legal framework by which discrimination can be established were the result of preliminary references by British courts in cases alleging sex discrimination. In 1981, the Court of Justice articulated the indirect discrimination theory in construing the Equal Pay guarantee of the Treaty Establishing the European Economic Community (“EEC Treaty”). *Jenkins v. Kingsgate*<sup>2</sup> is significant because it imported an American concept – that of disparate impact discrimination – into European jurisprudence, and applied that concept to the law of equal pay between men and women, a context in which US courts have to date rejected the disparate impact theory.<sup>3</sup> The case was referred to the Court of Justice by the Employment Appeals Tribunal (“EAT”) in the United Kingdom. The female

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2. *Jenkins v. Kingsgate (Clothing Productions) Ltd.*, Case 96-20, [1981] E.C.R. 911.

3. See Julie C. Suk, *Disparate Impact Abroad*, in *A NATION OF WIDENING OPPORTUNITIES: THE CIVIL RIGHTS ACT* at 50, at 283, 290-91 (Ellen D. Katz & Samuel R. Bagenstos eds., 2015).

plaintiff, Mrs. Jenkins, was a part-time worker who had been receiving an hourly rate of pay lower than that paid to one of her male colleagues, a full-time worker. She was represented by Anthony Lester, who had visited the United States in the early 1970s<sup>4</sup> and had explicitly embraced the US Supreme Court's decision in *Griggs v. Duke Power Company* holding that a racially neutral practice could constitute illegal discrimination under Title VII if not justified by the employer's business necessity.<sup>5</sup> In the proceedings before the Industrial Tribunal, Lester had argued that, while unequal treatment between part-time and full-time workers was not based directly or intentionally on sex, it constituted indirect discrimination in this instance, because of the insufficiency of the employer's justification for the practice.<sup>6</sup> The Industrial Tribunal had decided the case under the British Equal Pay Act of 1970, and had taken an approach quite similar to US courts on equal pay. Specifically, the Industrial Tribunal had taken the view that, if a part-time worker's weekly working hours only constituted 75% of the working hours of a full-time employee, this difference between the part-time worker and the full-time worker was sufficiently material that it could not constitute unequal treatment on the basis of sex.<sup>7</sup>

When the plaintiff appealed, the EAT determined that this construction of the UK Equal Pay Act might be in conflict with the equal pay guarantee at Article 119 of the EEC Treaty. The EAT raised the question of whether equal pay for equal work required the same rate of pay for the same work, in the absence of a showing that the employer had any commercial benefit from encouraging every worker to work full time.<sup>8</sup> It also asked whether it was relevant if a considerably smaller proportion of female workers than of male workers was able to perform the minimum number of hours each week required to qualify for the full hourly rate of pay.<sup>9</sup> The CJEU concluded that the difference in pay between full-time and part-time

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4. See Lord Lester of Herne Hill (Anthony Lester), *Making Discrimination Law Effective: Old Barriers and New Frontiers*, 2 INT'L J. DISCRIMINATION & L. 161, 178 (1997).

5. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

6. See *Jenkins*, [1981] E.C.R. 911, ¶ 4.

7. See *id.* The lower court's approach is similar to that under the US Equal Pay Act, which permits differences in pay based on any factor other than sex. Equal Pay Act of 1963 § 3, 29 U.S.C. § 206(d)(1)(iv) (2017).

8. *Jenkins*, [1981] E.C.R. 911, ¶ 8.

9. *Id.*

workers would not amount to discrimination prohibited by the equal pay guarantee of the treaty “unless it is in reality merely an indirect way of reducing the pay of part-time workers on the ground that that group of workers is composed exclusively or predominantly of women.”<sup>10</sup> Nonetheless, it left open the possibility for plaintiffs to prove that an employer was indirectly discriminating on the basis of sex by using a factor other than sex.

In this litigation, Mrs. Jenkins was supported by the Equal Opportunities Commission, the agency created by the Sex Discrimination Act to enforce sex discrimination law and to promote women’s equality in the workplace. The British government participated in the preliminary reference proceeding, in support of the clothing manufacturer employer’s approach to equal pay. The *Jenkins* case illustrates how divisions within Britain regarding how to approach gender inequality in the workplace were brought to the European arena, with far-reaching effects for all the member states. The position ultimately adopted by the CJEU rejects the proposal that national courts should scrutinize, on the basis of the equal pay provision of the EEC Treaty, any form of non-sex-based unequal treatment that lacks a commercial justification. Rather, the Court adopts an approach quite similar to that advanced by the U.S. Supreme Court in *Griggs*. A practice lacking a business justification is scrutinized under *Griggs* only after a prima facie showing that it disproportionately disadvantages a group protected under the antidiscrimination statute. In *Jenkins*, the practice of paying part-time workers a lower hourly rate of pay than full-time workers is subject to scrutiny only when and because the practice has a disproportionate effect on women.<sup>11</sup>

The approach adopted by the Court was advanced by Advocate General Warner, the British advocate general to the CJEU from 1973-81. What is most striking about AG Warner’s opinion in *Jenkins* is his engagement with US law, at the urging of Jenkins’ counsel, Anthony Lester. Warner notes:

At the hearing Counsel for Mrs. Jenkins explained that . . . if, as was clearly the case, women were less able to work 40 hours a week than men, because of their family responsibilities, the

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10. *Id.* ¶22.

11. *Id.* ¶ 13.

requirement that an employee should work 40 hours a week to earn the full hourly rate must obviously hit, in a disproportionate way, at women, compared with men. That did not necessarily mean that there was discrimination, but it did mean that there was prima-facie discrimination in effect, which required ‘some special justification from the employer.’ Counsel called this the ‘Griggs approach’ after the decision of the Supreme Court of the United States in *Griggs v. Duke Power Company* (1971) 401 US 424.<sup>12</sup>

By way of the British advocate general and the litigating position of British litigants, US antidiscrimination law also traveled to Europe in the *Jenkins* case. The doctrine of indirect discrimination therefore became distinct from a general requirement that employers justify all forms of unjustified unequal treatment based on factors other than sex. In *Jenkins*, the doctrine was concerned with forms of unjustified treatment based on factors other than sex only when there was a disparate impact on women.

#### *B. Enderby v. Frenchay: Employer’s Objective Justification*

Another significant refinement of the CJEU’s indirect discrimination concept came through a preliminary reference about a decade following *Jenkins v. Kingsgate*. In *Enderby v. Frenchay*,<sup>13</sup> the Court of Appeal for England and Wales referred to CJEU the question of whether the employer must objectively justify differences in pay between job categories when the employees occupying each category of job were disproportionately one sex. The Industrial Tribunal within Britain had held that the differences in pay resulted from the structures specific to the professions and from collective bargaining agreements, and not from sex. In *Enderby*, a female speech therapist claimed that the lower pay of speech therapists (predominantly women) relative to pharmacists (predominantly men) had to be justified objectively by the employer.<sup>14</sup> The CJEU agreed. It determined that the mere fact of separate collective bargaining processes could not suffice to constitute an objective justification for the disparity in pay. Furthermore, the state of the employment market

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12. Opinion of Advocate General Warner, *Jenkins*, [1981] E.C.R. 929, 937.

13. *Enderby v. Frenchay Health Authority*, Case C-127/92, [1993] E.C.R. I-5566.

14. *Id.* ¶¶ 4-5.

could form an objective justification, if the predominantly male jobs are paid at a higher rate because of the scarcity of workers willing to perform that job and the employer's need to attract employees into that job.

In *Enderby*, the German government had taken the position that the job of speech therapist and pharmacist were not comparable, and therefore, there was no need to examine the employer's justifications for paying different salaries under Article 119.<sup>15</sup> By contrast, British courts had taken an approach requiring and evaluating the objective justification before making the determination of whether the two jobs were comparable.

*Enderby* is an illustration of how litigation before the CJEU created a discursive space for dialogue between German and British approaches to the law of gender equality. As Claire Kilpatrick observed, Germany and the United Kingdom have been key players in making EC gender equality dialogue happen.<sup>16</sup> Courts in Germany and the United Kingdom were responsible for most of the preliminary references to CJEU on gender equality issues during the 1970s, 1980s, and 1990s, when the CJEU established many important legal principles in equality and non-discrimination.

### III. GENDER QUOTAS AND POSITIVE DISCRIMINATION

In recent years, the European Commission has proposed a new directive requiring gender balance on corporate boards of directors.<sup>17</sup> Since the proposal in 2012, the United Kingdom has been one of the most vocal opponents of the proposed EU legislation. The UK has invoked subsidiarity to oppose the directive.<sup>18</sup> But the opposition is not merely about the competence of the EU to legislate in this area. The hostility to gender quotas on the EU level is consistent with the UK's litigating position in several positive discrimination cases in

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15. *Id.* ¶ 8.

16. See Claire Kilpatrick, *Gender Equality: A Fundamental Dialogue*, in *LABOUR LAW AND THE COURTS: NATIONAL JUDGES AND THE EUROPEAN COURT OF JUSTICE* 31, 41 (Silvana Sciarra ed., 2001).

17. European Commission, Proposal for a Directive of the European Parliament and of the Council on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures, COM (2012) 614 final, (Nov. 2012).

18. See Matthew Holehouse, *Britain seeks to halt EU gender quota plan*, TELEGRAPH, Dec. 4, 2015, <http://www.telegraph.co.uk/news/worldnews/europe/eu/12034462/Britain-seeks-to-halt-EU-gender-quota-plan.html>.

which the CJEU developed its jurisprudential limitations on gender quotas.

The line of cases is well known. In four cases, three of which were referred by German courts, and one by a Swedish tribunal, the CJEU established the following approach: The Equal Treatment Directive prohibits a preference to the candidate of the underrepresented sex when choosing between two or more candidates with equal qualifications, unless the positive action scheme includes the possibility of overcoming the sex-based preference based on circumstances unique to the individual being considered.<sup>19</sup> Indeed, within Germany, where these cases originated, there were divisions within the legal community as to whether gender quotas in the civil service should be permitted, and if so, how rigid any sex-based preference could be in light of equality guarantees in both the German constitution and European law. The divisions within Germany migrated and took center stage at the European court. The litigating position of the UK government, and a robust Advocate General opinion by British Advocate General Jacobs in one of the cases, helped shape the EU law of affirmative action in a very restricted direction.

In the *Kalanke* case, the CJEU determined that the Bremen Law on Equal Treatment for Men and Women in the Public Service went against the European Equal Treatment Directive (76/207/EEC).<sup>20</sup> The Bremen law provided that, if women made up less than half the staff in certain job categories, the female candidate would automatically be given priority in hiring for such a job, but only if she were equally qualified to the male candidate. In this proceeding, both the United Kingdom and the European Commission participated. The UK government supported the male plaintiff's position urging that the Bremen law was inconsistent with the equal treatment guarantee in the directive, whereas the European Commission defended the law in light of the European policy of promoting real equality between men and women.

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19. See *Badeck and Others*, Case C-158/97, [2000] E.C.R. I-1902; *Abrahamsson and Anderson v. Fogelqvist*, Case C-407/98, [2000] E.C.R. I-5562; *Marschall v. Land Nordrhein-Westfalen*, Case C-409/95, [1997] E.C.R. I-6383; *Kalanke v. Freie Hansestadt Bremen*, Case C-450/93, [1995] E.C.R. I-3069.

20. See *Kalanke*, [1995] E.C.R. I-3069.



Shortly thereafter, the CJEU took a somewhat more permissive approach towards positive discrimination. In *Marschall v. Land Nordrhein-Westfalen*<sup>21</sup> in 1997, the CJEU upheld a positive action program that was nearly identical to that at issue in *Kalanke*, with one significant difference: the preference for the equally qualified female candidate was not automatic, and could be overcome by reasons specific to an individual male candidate to tilt the balance in his favor. In addition, in this proceeding, the UK was not the only national government to participate. The Austrian, Finnish, Swedish, and Norwegian governments defended the national rule, taking a position similar to the one that ultimately prevailed. On the other hand, the UK and France argued that the affirmative action program did not come within the scope of the derogation in Article 2(4) of the directive. Just two years after that, France amended its constitution to require statutes to promote equal access by men and women to elected office, effectively permitting gender quotas.<sup>22</sup> The UK, by contrast, continued to articulate a position that was hostile to gender quotas.

In the *Marschall* case, the UK Advocate General Francis Jacobs issued an opinion urging the court to invalidate the affirmative action program.<sup>23</sup> He quoted and cited an industrial tribunal in the UK considering the lawfulness of all-women shortlists for the selection of Labour Party candidates for certain positions:

It may well be that many would regard [redressing the imbalance between the sexes in the House of Commons] as a laudable motive but that is of no relevance to the issue of whether the arrangement as applied to the facts before us results in direct unlawful sex discrimination against the two male applicants.<sup>24</sup>

Advocate General Jacobs' approach can be contrasted with that of Advocate General Tesauo in his opinion for the *Kalanke* case. AG Tesauo, while arguing against the automatic preference for the female candidate authorized by the Bremen law, nonetheless

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21. See *Marschall*, [1997] E.C.R. I-6383.

22. See Loi constitutionnelle 99-569 du 8 juillet 1999 relative à l'égalité entre les femmes et les hommes [Constitutional Law 99-569 of July 8, 1999 Concerning Equality Between Women and Men], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 9, 1999, p. 10175 (Fr.).

23. Opinion of Advocate General Jacobs, *Marschall*, [1997] E.C.R. I-6365.

24. *Id.* ¶ 46 (citing *Jepson v. The Labour Party* [1996] INDUS. REL. L. REP. 116, 117 (UK)).

presented a long discussion of substantive equality, and was mindful of the “particular social structure which penalizes women, in particular because of their dual role, on account of past discrimination.”<sup>25</sup> British AG Jacobs’ opinion in *Marschall* went against the approach adopted by the court in that particular case. Jacobs argued against sex-based preferences, even in circumstances where the affirmative action scheme left some flexibility for the consideration of individual circumstances of the male applicant. There is absolutely no recognition of the concept of substantive equality or the need for some forms of affirmative action to compensate for women’s disadvantage.

However, the more restrictive British approach to affirmative action won the day in a later case, decided in 2000, on preliminary reference from Sweden.<sup>26</sup> In that case, a Swedish university had given a preference to a female candidate for a professorship pursuant to a regulation that required a preference for the candidate belonging to an under-represented sex.<sup>27</sup> Under the regulation, as long as a woman had sufficient qualifications for the post, she could be chosen over a male candidate who would otherwise have been chosen, provided that the difference in their respective qualifications was not so great as to be contrary to the requirement of objectivity in making appointments.<sup>28</sup> Although both the male and female candidates were sufficiently qualified for the professorship, the decisionmaker had acknowledged that the male candidate had stronger research qualifications than the female candidate who was selected. The CJEU held that this positive action program was not permitted under the Equal Treatment directive because *Marschall* had only permitted a non-automatic sex-based preference to the equally qualified candidate of the underrepresented sex, and not to sufficiently but unequally qualified candidates.<sup>29</sup> This strong limitation on gender quotas remains the CJEU’s approach, and there is a tension between this jurisprudence and recent legislation in member states requiring quotas to achieve gender balance on corporate boards and other leadership roles.

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25. Opinion of Advocate General Tesauro, *Kalanke*, [1995] E.C.R. I-3053, ¶ 14.

26. See *Abrahamsson*, [2000] E.C.R. I-5562.

27. *Id.* ¶ 14.

28. *Id.*

29. *Id.* ¶ 45.

*IV. MATERNITY*

In litigating positions and an opinion by the British Advocate General Slynn, Britain also shaped the European Court of Justice's ("ECJ's") skeptical approach to the special protection of maternity in construing the Equal Treatment Directive. The European Commission brought a proceeding against France resulting in a judgment by the Court of Justice in 1988.<sup>30</sup> The Court determined that France had failed to adopt Article 9(1) of the Equal Treatment Directive (76/207/EEC), specifically by adopting a law in 1983 that created special employment rights for mothers. Article 5 of the Directive required Member States to take measures necessary to ensure that "any provisions contrary to the principle of equal treatment which are included in collective agreements . . . shall be, or may be declared null and void or may be amended."<sup>31</sup> Article 9 required Member States to adopt laws, regulations, or administrative provisions necessary to comply with the directive within 30 months. For France, the deadline was August 12, 1978, but in 1983, the French legislature adopted a statutory amendment to the Labor Code that gave rise to this litigation. The statutory amendment invalidated any terms of collective bargaining agreements reserving benefits to any employees on grounds of sex, but carved out an exception for any provisions relating to pregnancy, nursing, or pre-natal or post-natal rest.<sup>32</sup> This statutory amendment was part of a larger statute purportedly guaranteeing equality between men and women at work.

The French government defended the statute on the grounds that some special rights for women were motivated by a concern to protect women and to ensure their actual equality with men.<sup>33</sup> The French Government understood the French statutory amendment to exempt a range of collective bargaining agreement provisions from legal nullification by the EU equal treatment implementation. Many collective agreements provided for maternity leaves longer than the statutorily required period, the shortening of working hours for women over 59 years of age, a younger retirement age than that

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30. See *Commission v. France*, Case 312/86, [1988] E.C.R. 6332.

31. See Council Directive 76/207 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, 1976 O.J. L 39/40, art. 5(2)(b).

32. See *Commission v. France*, [1988] E.C.R. 6332, ¶ 3.

33. See *id.* ¶ 7.

available to men, entitlement to leave to care for an ill child, additional days of annual leave calculated based on the number of children, a one-day leave at the beginning of the school year, time off work on Mother's Day, daily breaks for women working on keyboard equipment or employed as typists or switchboard operators, the granting of extra points for pension rights in respect of second and subsequent children, and the payment of an allowance to mothers to cover the costs of childcare centers or babysitters.

The Court of Justice acknowledged that the Equal Treatment Directive, while prohibiting discrimination on grounds of sex, explicitly provides that the directive is "without prejudice either to provisions concerning the protection of women, particularly as regards pregnancy and maternity, or to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities . . . ."<sup>34</sup> It conceded that, consistent with a recent decision resulting from a German preliminary reference,<sup>35</sup> special protections for pregnant workers or those who have recently given birth were permitted by the directive. However, the Court insisted that the entitlements for mothers in many French collective agreements, as listed above, did not arise from pregnancy or childbirth. Furthermore, the Court rejected the French government's framing of these motherhood protections as measures to promote equal opportunity for men and women, or measures to remove existing inequalities which affect women's opportunities.

The reasoning and philosophy underscoring the Court's ruling is set forth in the opinion of the Advocate General, Sir Gordon Slynn, who served as the British Advocate General to the ECJ from 1981-1992. Slynn was particularly bothered by the French Government's account of how the rights of mothers fit into the exception in the Equal Treatment Directive for measures to promote women's equal opportunity.<sup>36</sup> France had asked the Court to recognize the social reality of the role of mothers in French society. Collective agreements accorded special entitlements to mothers because they were "designed to take account of the situation existing in the majority of French

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34. *Id.* ¶ 12

35. Hofmann v. Barmer Ersatzkasse, Case 184/83, [1984] E.C.R. 3048, at 3055.

36. Opinion of Advocate General Slynn, *Commission v. France*, [1988] E.C.R. 6325, at 6328.

households.”<sup>37</sup> The Court concluded, however, that the special rights preserved in these agreements “relate to the protection of women in their capacity as older workers or parents – categories to which both men and women may equally belong.”<sup>38</sup> While noting that both men and women “may” be parents, Slynn did not address the contention that, in most French households, women tend to do more parenting, which causes inequalities that the collective agreements attempt to alleviate. Later on in the opinion, Slynn pointed out:

A father, in modern social conditions, may just as much be responsible for looking after sick children or need to pay childminders; he may no less for health reasons need to retire early or to have time off from some certain stressful jobs. France’s insistence on the traditional role of the mother, as I see it, ignores developments in society whereby some men in ‘single-parent families’ have the sole responsibility for children or whereby parents living together decide that the father will look after the children, in what would traditionally have been the mother’s role, because of the nature of the mother’s employment.<sup>39</sup>

With regard to time off accorded to adoptive mothers, Slynn noted, “it may be that in some Member States even quite a young child may be adopted by a man.”<sup>40</sup> While it appears that France had argued that the mothers’ rights were a measure to compensate for the fact that mothers had faced discrimination and disadvantage in the labor market, Slynn’s simple response was that it was not permissible to argue “that any provisions in favour of women in the employment field are per se valid as part of an evening up process.”<sup>41</sup> Following Slynn’s reasoning, the Court concluded, “The French Government has therefore not succeeded in demonstrating that the unequal treatment which forms the subject-matter of this application, and which it acknowledges, falls within the limits laid down by the directive.”<sup>42</sup> In response to the French government’s contention that withdrawing these mothers’ rights from collective agreements would be a “socially

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37. *Commission v. France*, [1988] E.C.R. 6332, ¶ 11.

38. *Id.* ¶ 14.

39. Opinion of Advocate General Slynn, *Commission v. France*, [1988] E.C.R. 6325, at 6328.

40. *Id.*

41. *Id.*

42. *Commission v. France*, [1988] E.C.R. 6332, ¶ 16.

retrograde step,” Slynn noted that equality could be achieved “equally well” “by a levelling-up process applying the same benefits to men.”<sup>43</sup> Yet, neither Slynn’s opinion nor the Court’s ruling requires a levelling up process; it merely requires women and men to be treated the same with regard to entitlements associated with parenting.

Through its Advocate General, Britain influenced European sex equality law in a way that caused tension with the motherhood protections that were enshrined in many postwar constitutions, including those of Germany,<sup>44</sup> France,<sup>45</sup> and Italy.<sup>46</sup> British participation in these cases sustained a discourse imagining a larger role for men and fathers in parenting and caregiving, and questioning the traditional role of mothers in the family. At the same time, this discourse was committed to a largely formal concept of equality; it did not require the member-states to eradicate the disadvantages of motherhood so long as it treated mothers and fathers the same in their entitlement or non-entitlement to any social protections.

#### V. RELIGION

Finally, the coming absence of Britain from the EU has implications for the development of the EU-level norm against religious discrimination. The distinctive contribution of the United Kingdom is illustrated in the CJEU’s recent decisions evaluating employers who fired employees for wearing the Islamic headscarf in the workplace.<sup>47</sup> UK Advocate General Sharpston issued an opinion<sup>48</sup> that was much more protective of the Islamic employee’s religious freedom in construing the scope of EU protection from religious discrimination than the approach taken by German Advocate General

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43. Opinion of Advocate General Slynn, *Commission v. France*, [1988] E.C.R. 6325, at 6330.

44. GRUNDGESETZ [GG][BASIC LAW] art. 6(4), *translation at* [https://www.gesetze-im-internet.de/englisch\\_gg/englisch\\_gg.html#p0040](https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0040) (Ger.).

45. 1946 CONST. pmbL., § 10 (Fr.).

46. Art. 27 Costituzione [Cost.] (It.).

47. *Achbita v. G4S Secure Solutions NV*, Case C-157/15, 2017, <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:62015CJ0157>; *Bouagnaoui v. Micropole SA*, Case C-188/15, 2017, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62015CJ0188>.

48. Opinion of Advocate General Sharpston, *Bouagnaoui*, C-188/15, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62015CC0188>.

Juliane Kokott.<sup>49</sup> Although Kokott's approach is closer to the reasoning adopted by CJEU, Sharpston's opinion led the Court to limit the employer's discretion to ban the headscarf, notwithstanding the Court's decision to accept the employer's pursuit of neutrality as a legitimate justification for banning the headscarf.

In *Achbita v. G4S Secure Solutions*, the Belgian Hof van Cassatie referred the case to CJEU, hearing an appeal in cassation of a labor court's dismissal of the employee's claim. *Bougnaoui v. Micropole SA* was referred by the French Cour de cassation, which was hearing an appeal of the Paris Cour d'Appel. Both the French Court of Appeal and the Labor Court had arrived at the conclusion that the employee's wearing of the Muslim headscarf constituted a genuine and serious reason for the employee's termination. In both cases, the employee claimed that a dismissal for failure to remove the Muslim headscarf in the workplace constituted discrimination on grounds of religious belief. Article 1 of Directive 2000/78 identifies its purpose as "to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation," and, in that vein, prohibits both direct and indirect discrimination by employers on any of those grounds.<sup>50</sup>

Both of the decisions turned on the construction of Article 4(1) of the directive, which permits differences of treatment "where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate."<sup>51</sup> In each of these cases, the employers put forth a justification for prohibiting the employee from wearing the veil. In the *Bougnaoui* case, the employee worked as a design engineer for a company specializing in advice, engineering and specialized training for the development and integration of decision-making solutions. A client of the firm had requested that Ms. Bougnaoui's headscarf was upsetting to its employees, which then motivated the company's

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49. Opinion of Advocate General Kokott, *Achbita*, C-157/15, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62015CC0157>.

50. Council Directive 2000/78/EC of 27 November 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation, 2000 O.J. L 303/16, art. 1.

51. *Id.* art. 4.

requirement that Ms. Bougnaoui stop wearing the headscarf.<sup>52</sup> In the *Achbita* case, Ms. Achbita was a receptionist for G4S Secure Solutions, a company that provided security, guarding, and reception services to public and private sector entities. G4S had an unwritten company rule prohibiting employees from wearing any religious, political, or philosophical symbols while on duty.

AG Kokott analyzed the employer G4S's termination of the employee for wearing the headscarf as a form of indirect religious discrimination, with the central question being whether it could be justified as a proportionate pursuit of a legitimate aim.<sup>53</sup> Kokott understood G4S's alleged aim to be a "policy of religious and ideological neutrality." The Belgian discrimination legislation implementing Directive 2000/78 provides, consistent with the directive, that genuine occupational requirements pursuing a legitimate objective, in pursuit of which the requirement is proportionate, do not constitute discrimination. Kokott noted that the evaluation of legitimate aims was necessarily a normative exercise, to be undertaken in consideration of the EU's fundamental values.<sup>54</sup> "For example," she notes, "if an undertaking wished to create for itself a corporate identity that promoted an inhuman ideology, that course of action would be blatantly at odds with the fundamental values of the European Union."<sup>55</sup> In addition, Kokott notes, pointing to CJEU case law, that employer's purely economic interest in pursuing its business and pandering to its clients for purely economic gain cannot be automatically accepted as a legitimate aim. Nonetheless, G4S's policy of religious and ideological neutrality "does not exceed the bounds of the discretion it enjoys in the pursuit of its business." On the contrary, the policy of neutrality is "absolutely crucial, not only because of the variety of customers served by G4S, but also because of the special nature of the work which G4S employees do in providing those services, which is characterized by constant face-to-face contact with external

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52. See *Bougnaoui*, C-188/15, ¶ 14.

53. Nonetheless, the opinion acknowledges and addresses at great length the possibility of framing the problem as direct discrimination. In Kokott's view, both direct and indirect discrimination would be subject to justification by the proportionate pursuit of a legitimate aim.

54. Opinion of Advocate General Kokott, *Achbita*, C-157/15 ¶ 87.

55. *Id.* ¶ 88.



individuals and has a defining impact not only the image of G4S itself but also and primarily on the public image of its customers.”<sup>56</sup>

Next, in determining whether the headscarf ban is a proportionate means of achieving this legitimate aim, Kokott considers some less intrusive alternatives on the grounds that they do not advance the aim of neutrality. For example, it was argued that the employer could require the employee to wear a headscarf that matched the uniform; yet such a practice would still enable the employee to manifest her religion and thus violate the employer’s vision of neutrality. Kokott identified several factors relevant to proportionality analysis, including whether differences of treatment on other grounds, such as sex, are also present. Here, it was argued that a ban on religious and ideological symbols particularly burdened women. In response, Kokott notes:

we should not rush into making the sweeping assertion that such a measure makes it unduly difficult for Muslim women to integrate into work and society . . . Ms Achbita worked as a receptionist for G4S for approximately three years without wearing an Islamic headscarf at work and was thus fully integrated into working life as a Muslim woman, despite the headscarf ban.<sup>57</sup>

In sum, Kokott’s analysis of whether a private employer’s headscarf ban constitutes religious discrimination presents a vision of religious and ideological neutrality, as embraced by the private sector employer, as a furtherance of fundamental EU values. Banning the headscarf permits the workplace to be a neutral space for people with a plurality of religious and ideological leanings to provide services on equal terms. The headscarf ban is not discrimination, in large part because it plays a role, at least in some contexts, in furthering the equality goal of antidiscrimination legislation in diverse societies.

AG Sharpston offers a contrasting approach. First, she draws a sharp distinction between the European Court of Human Rights’ approach of conflating religious discrimination with the right to religious freedom, and the proper approach to be taken by CJEU in enforcing Directive 2000/78’s prohibition of discrimination. In addition, unlike Kokott, she views the French employer’s termination

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56. *Id.* ¶ 94.

57. *Id.* ¶ 124.

of the employee for wearing a headscarf during client contact as direct discrimination, not indirect discrimination. In the *Bougnaoui* case, it does not appear that the employer Micropole made any effort, like G4S in the Belgian case, to frame its action as a policy of religious and ideological neutrality. Rather, Micropole required the complainant to remove her headscarf during client meetings simply because the client experienced embarrassment due to the veil. Third, and very interestingly, Sharpston's opinion presents sociological data, including the average percentage of Christians in EU member states, and perceptions of discrimination on grounds of religion in the member states, which she reports as being 66% in France and 60% in Belgium.

Although Micropole had not presented its policy as one consciously pursuing religious neutrality or other values related to a democratic society, Sharpston refutes any potential effort to invoke such a justification. She notes at many points in the opinion that the French constitutional value of *laïcité* does not in general apply to employment relationships in the private sector (as recognized by the Cour de cassation itself). She says outright, "I reject the idea that a prohibition on employees wearing religious attire when in contact with customers of their employer's business may be necessary for the protection of individual rights and freedoms which are necessary for the functioning of a democratic society."<sup>58</sup> She also expresses extreme skepticism of gender equality-based justifications for banning Muslim women's religious attire.<sup>59</sup>

In *Achbita*, the CJEU largely followed AG Kokott's opinion, and recognized the legitimacy of the employer's aim of "a policy of political, philosophical, and religious neutrality," and left it to referring courts to determine whether the means of achieving the aim was appropriate and necessary.<sup>60</sup> The Court suggests that, as long as the employer applied the neutrality policy generally to the manifestation of political, philosophical, and religious beliefs, without singling out the Islamic headscarf, a neutrality policy that excluded the headscarf would not be discriminatory.<sup>61</sup>

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58. Opinion of Advocate General Sharpston, *Bougnaoui*, C-188/15, ¶ 105.

59. *Id.* ¶ 54 (citing *S.A.S. v. France* [GC], Eur. Ct. H.R. (2014)).

60. *Achbita*, C-157/15, ¶ 44.

61. *Id.* ¶ 41.

In *Bougnaoui*, CJEU concludes that “the willingness of an employer to take account of the wishes of a customer no longer to have the services of that employer provided by a worker wearing an Islamic headscarf cannot be considered a genuine and determining occupational requirement” within the meaning of the Directive 2000/78/EC. Following a point on which Kokott and Sharpston seem to agree, the CJEU protects the employee wearing the headscarf only to the degree that the prohibition of the headscarf is premised merely on the preferences of the employer’s clients. Both of these judgments leave it legally possible for employers to fire employees for wearing the Islamic headscarf without being liable for discrimination on the basis of religion, but adopt standards that would make it difficult for the referring court to legitimize the terminations that occurred in these particular cases. Surely Sharpston’s strong arguments in favor of protecting religious liberty helped shaped these outcomes. With regard to the intersection of antidiscrimination protections and religious liberty, the absence of a British voice on the European judiciary may reduce the legal protections available to Muslim employees over time.

#### *VI. CONCLUSION*

In this brief essay, I have examined the contributions of the United Kingdom, as litigant and through Advocates General, to the development of CJEU jurisprudence on antidiscrimination law. Britain shaped the indirect discrimination framework in a manner that initially tracked the US approach in *Griggs*. British participation also constrained gender quotas, both before the Court and in recent debates about proposed EU legislation requiring gender quotas on corporate boards. British participation has also encouraged a formal rather than substantive approach to sex classifications and the protection of maternity. Finally, the headscarf cases draw out some important differences in sensibility with regard to the legitimate aims that could potentially be pursued by employer restrictions on religious garb. Nonetheless, the United Kingdom’s contributions to EU antidiscrimination law over the last four decades have been so significant across a range of doctrines and problems that they will likely remain, even if Britain does not.