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The EU Accession to the ECHR as an Opportunity for Conceptual Clarity in European Equality Law: The New European Paradigm of Full Equality

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I. INTRODUCTION

IN THE LAST few decades, European equality law seems to have entered a coming-of-age stage. The principle of equal treatment in its various forms and guises, refined through legislative developments and judicial interpretation by the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR), has become a core element of the European normative sphere, both as an individual non-discrimination right under the European Convention on Human Rights (ECHR) and as a foundational component of European Union (EU) law and policy. Arguably the most significant feature of this transformative process is the gradual repositioning of the meaning of equality towards more substantive lines. The reference to *full equality* in Protocol 12 of the ECHR and Article 157 of the Treaty on the Functioning of the European Union (TFEU) is an eloquent, albeit tacit, admission that existing inequalities cannot be adequately redressed through a formulaic and neutral principle¹ that creates primarily negative and minimally positive obligations.²

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¹ On the relationship between formal equality and state neutrality, see A Gutman, *Liberal Equality* (Cambridge, Cambridge University Press, 1980); M Sandell, *Liberalism and the Limits of Justice* (Cambridge, Cambridge University Press, 1982).

² Under the Convention system, Article 14 has been associated with positive obligations for the first time at the dawn of the new century in the case of *Thlimmenos v Greece* (2001) 31 EHRR 411 (see below, section III.B). In the subsequent case of *Stec (Stec and others v UK)*, Grand Chamber, 12 April 2006, ECHR 2006-VI the ECtHR explicitly acknowledged that 'in certain circumstances a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of the article' ([51]). A similar development has taken place within the framework of EU law, with 'fourth generation' equality duties introduced through secondary law instruments based on what was then Article 13 TEC in the Treaty of Amsterdam (now Article 19 TFEU). See B Hepple, M Coussey, and T Choudhury, *Equality: A New Framework: Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation* (Oxford, Hart Publishing, 2000); S Fredman, 'Equality: A New Generation?' (2001) 30 *Industrial Law Journal* 145, 163 et seq.

Despite these developments, the discourse on equality remains convoluted and fraught with doctrinal inconsistencies.³ Formal equality continues to cast its shadow over anti-discrimination mechanisms designed to achieve concrete results, and terms like positive action, reasonable accommodation and special treatment are often seen as interchangeable exceptions to equal treatment. The accession of the EU to the ECHR provides a unique opportunity to rethink the concept of equality and its *modus operandi* in the European normative space and to identify a singular, coherent and philosophically robust general legal principle of equal treatment for the whole *Civis Europeus*.⁴ With the ambition to make a small contribution to the wider debate, this chapter will attempt to shed some light on facets of the equality discourse that lack analytical clarity.

Instead of adopting the orthodox approach that views equality as oscillating between competing models, the analysis will challenge the philosophical integrity of formal equality as a distinct category of normative significance. Section II of this chapter, then, will endeavour to deconstruct formal equality, explain why it is an unfit philosophical premise for European anti-discrimination law and identify the ‘substantive’ turn in the case law of the two European courts. It will be argued that, despite the tentative emergence of a new paradigm of *full equality*, conceptual confusion continues to be part of the picture, especially insofar as the relationship between positive action and equal treatment is concerned. Section III therefore will discuss positive action as a key index of full equality and will use it as the backdrop against which to clarify the place of reasonable accommodation and forms of special treatment to vulnerable social groups. Section IV will turn to assess the possible impact of EU accession to the Convention on European equality law. Although EU equality law is obviously broader in scope and inevitably more sophisticated than a system built around a single Convention Article, accession can still become the driver for greater conceptual clarity and interpretative convergence. Section V concludes.

A final note on methodological choices is in order. Despite the fact that the discussion is not confined to any one protected ground or human characteristic, several arguments are designed to target gender equality in particular. This emphasis on gender is the most suitable means of exploring the differences between positive action, reasonable accommodation and special treatment. A similar caveat applies to the almost exclusive focus of that part of the enquiry on EU law, as the relevant mechanisms have drawn less attention within the context of the Convention. This notwithstanding, the claims advanced here are intended to cover the whole spectrum of European equality law in its broadest sense, with gender equality used as a proxy to develop a more general analytical framework.

³ On the conceptual complexity underlying European equality and non-discrimination law in general, see C McCrudden and S Prechal, *The Concepts of Equality and Non-discrimination in Europe: A Practical Approach*, Report by the European Network of Legal Experts in the Field of Gender Equality (European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities, November 2009). For remarkable attempts to work through the doctrinal inconsistencies, see C McCrudden and H Kountouros, ‘Human Rights and European Equality Law’ in H Meenan (ed), *Equality Law in an Enlarged European Union: Understanding the Article 13 Directives* (Cambridge, Cambridge University Press, 2007); O De Schutter, ‘Three Models of Equality and European Anti-discrimination Law’ (2006) 57 *Northern Ireland Legal Quarterly* 1.

⁴ Joined Cases C-132/91, C-138/91 and C-139/91 *Katsikas v Konstantinidis* [1992] ECR I-06577, Opinion of AG Jacobs [46].

II. THE MAGICAL (SUR)REALISM OF FORMAL EQUALITY⁵

Formal equality is one of the most cited and, arguably, ill-treated terms in the equality discourse. Liberal moral and political philosophy has claimed paternity of the term early on, attributing it to Aristotle, who is, in turn, often labelled an *ex post facto* unsuspecting recruit to the liberal cause.⁶ The famous ‘treating likes alike’ maxim⁷ has consistently been thought to constitute a foundational principle of liberal justice, underpinning the general legal principle of equal treatment in its various national constitutional endorsements.⁸ It is no surprise that this particular notion of equality remains at the epicentre of liberal thinking, as it is a good fit for a normative framework predicated on state neutrality⁹ and the primacy of the individual.¹⁰ Classical formal equality therefore usually translates into a general prohibition of discrimination involving primarily negative obligations, which may be coupled with minimal regulatory intervention horizontally when necessary to ensure a degree of gender neutrality in the private sphere.

This line of analysis was long thought to be mirrored by the rationale underpinning the prohibition of discrimination under the ECHR system, with the state obligation stemming from Article 14 ECHR accordingly understood as primarily a *negative* one. For quite some time, part of the theory asserted that Strasbourg case law was¹¹ reflective of ‘a clear preference for formal equality’,¹² in line with the ‘treating likes alike’ Aristotelian maxim.¹³ In this context, Article 14 of the Convention was used as a tool to ensure that individuals in *similar* situations received the *same* treatment by the respondent state.¹⁴ In recent years, however, a number of commentators have identified a shift in the Strasbourg Court’s conceptualisation of equality under the Convention¹⁵ from a *formal* to a more *substantive*

⁵ On magic realism as an artistic category and a literary genre, see W Spindler, ‘Magic Realism: A Typology’ (1993) 22 *Forum for Modern Language Studies* 75. As will hopefully become apparent in the course of this section, formal equality shares a conceptual affinity with magic realism in that it introduces surreal elements—namely the assumption that individuals or groups can be treated as starting from the same position—in an otherwise realistic normative environment.

⁶ SG Salkever, *Finding the Mean: Theory and Practice in Aristotelian Political Philosophy* (Princeton, Princeton University Press, 1990).

⁷ Aristotle, *Nicomachean Ethics* (Athens, Papyrus, 1975) V.3. 1131a10–b15; Aristotle, *Politics* (Athens, Papyrus, 1975) III.9.1280 a8–15, III. 12. 1282b18–23.

⁸ Most post-Renaissance national constitutions include some form of a general equality clause among their provisions. The same is true of most international legal texts on the protection of human rights, in which case, however, the provision often appears in the form of a general non-discrimination clause.

⁹ See, for instance, A Gutman, *Liberal Equality* (Cambridge, Cambridge University Press, 1980); M Sandell, *Liberalism and the Limits of Justice* (Cambridge, Cambridge University Press, 1982).

¹⁰ See, among others, W Kymlicka, *Contemporary Political Philosophy* (Oxford, Clarendon Press, 1990).

¹¹ At least up until the late 1990s. See K Henrard, *Devising an Adequate System of Minority Protection: Individual Human Rights, Minority Rights and the Right to Self-Determination* (The Hague, Martinus Nijhoff, 2000) 59 and 76.

¹² G Tarr, RF Williams and J Marco (eds), *Federalism, Subnational Constitutions and Minority Rights* (Westport, Praeger, 2004) 31.

¹³ OM Arnardóttir, *Equality and Non-discrimination under the European Convention on Human Rights* (Leiden, Martinus Nijhoff, 2002) 10; T Loenen, ‘Rethinking Sex Equality as a Human Right’ (1994) 12 *Netherlands Quarterly of Human Rights* 253.

¹⁴ *Fredin v Sweden* (No 1), Series A No 192 (1991) [60]; *Salgueiro da Silva Mouta v Portugal* (1999) 31 EHRR 47 [26]; *Edoardo Palumbo v Italy*, App No 15919/89 (ECtHR, 30 November 2000) [51].

¹⁵ Part of the literature has identified a similar shift from formal to substantive equality in the positive action case law of the CJEU, which will be explored in more detail later on.

notion.¹⁶ Accepting *difference* as an intrinsic element of the equal treatment rationale is thought to be the key in this alleged reconceptualisation, with the Court's ruling in the seemingly inconspicuous case of *Thlimmenos v Greece*¹⁷ often viewed as a turning point. In *Thlimmenos*, the Court, for the first time in almost half a century's worth of judgments, moves to explicitly suggest that: 'The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also *violated when States* without an objective and reasonable justification *fail to treat differently persons whose situations are significantly different*.'¹⁸

Despite what may appear to some as a revolutionary change of tack in Strasbourg's approach to equality, the *Thlimmenos* ruling does not constitute a theoretical leap away from formal equality. A closer look at *Nicomachean Ethics* should be more than enough to shatter such simplistic assumptions. The laconic maxim 'treating likes alike' only tells half of the story on equality as Aristotle intended it. If similar situations are to be treated according to the same norm, it is only logical that, by extrapolation, *different* situations call for *different* normative treatment. This is nothing more than a concrete expression of a general rule of rationality,¹⁹ although it is not always clear that 'equality as rationality'²⁰ is understood as including an obligation for differentiated treatment.²¹ In Aristotle's own words, 'this is the origin of quarrels and complaints—when either equals have or are awarded unequal shares, or unequals equal shares' because if two persons are not equals, 'they should not be entitled to enjoy equal shares.'²² Similarity and difference, then, are complementary criteria in determining the appropriate normative content of equal treatment and the CJEU has been quicker than its Strasbourg counterpart in explicitly recognising this as the correct interpretation of EU gender equality legislation.²³

Reasonable as it may sound, such an interpretation of formal equality leaves a lot to be desired in terms of conceptual integrity and theoretical robustness. Accepting difference as an intrinsic element of formal equality blurs the conceptual boundaries between formal and substantive equality insofar as the former is traditionally understood as a strict principle of consistency in the treatment of similar cases²⁴ embodying a notion of procedural justice.²⁵ In other words, by removing absolute gender neutrality²⁶ from the definitional content of formal equality, gender is no longer automatically classified as a

¹⁶ S Spiliopoulou-Akerman, 'The Limits of Pluralism—Recent Jurisprudence of the European Court of Human Rights with Regard to Minorities: Does the Prohibition of Discrimination Add Anything?' (2002) 3 *Journal of Ethnopolitics and Minority Issues in Europe* 5; R O'Connell, 'Commentary—Substantive Equality in the European Court of Human Rights?' (2009) *Michigan Law Review First Impressions* 107, 129.

¹⁷ *Thlimmenos v Greece* (2001) 31 EHRR 411.

¹⁸ *Ibid* [44], emphasis added.

¹⁹ I Berlin, 'Equality as an Ideal' in FA Olafson (ed), *Justice and Social Policy: A Collection of Essays* (Englewood Cliffs, Prentice Hall, 1961).

²⁰ C McCrudden, 'Chapter 11: Equality and Non-discrimination' in D Feldman (ed), *English Public Law* (Oxford, Oxford University Press, 2004) 581, 582.

²¹ From the point of view of English public law, for instance, McCrudden's analysis (*ibid* 614) seems to implicitly accept that equality as rationality entails both types of obligation, but he nonetheless refrains from exploring the nature, scope and limits of the obligation for differentiated treatment in any detail.

²² Aristotle *Nicomachean Ethics* (n 7).

²³ Case 106/83 *Sermide SpA v Cassa Conguaglio Zucchero* [1984] ECR 4209 [28]; Opinion of AG Van Gerven, 15 September 1993, Case C-146/91 *Koinopraxia Enoseon Georgikon Synetairismon Diacheiriseos Enchorion Proionton Syn PE (KYPED) v Commission* [1994] ECR I-4199.

²⁴ C Barnard and B Hepple, 'Substantive Equality' (2000) 59 *Cambridge Law Journal* 562.

²⁵ *Ibid* 563.

²⁶ Or neutrality on any other protected ground for that matter.

morally irrelevant characteristic²⁷ and it is therefore possible to suggest that the conceptual distance between formal and substantive conceptions of equality is significantly diminished. Effectively, then, the legitimacy of differentiated treatment under such a conception of formal equality would inevitably move from a normative to a *factual* level of enquiry, with a view to determining whether gender in that particular context is a factor that places men and women in relatively different situations. What counts as a normatively significant factual difference will remain, of course, a matter of interpretation and, arguably, considerable disagreement. The same is true a fortiori with regard to the actual content of the treatment afforded to individuals or groups in different positions, as factual differences per se will not automatically justify *every* deviation from the 'standard'. The point, however, is that such a conception of formal equality is not incompatible in principle and by default with *any* form of differentiated or even special treatment, up to and including positive action, as long as it can be justified in concreto.

The lack of conceptual clarity that is associated with formal equality has often led to terminological discrepancies and analytical confusion in the field of EU equality law. One of the most famous examples is to be found in the reactions to the CJEU's early ruling on positive action in the *Kalanke* case.²⁸ Although *Kalanke* is, indeed, a rather weak specimen of legal reasoning and rightfully attracted fierce academic criticism at the time,²⁹ there is no consensus in the literature on whether the fault lies in the CJEU's commitment to formal equality³⁰ or in its 'narrow and procedural approach to equality of opportunities',³¹ which is generally considered to fall within the broad spectrum of substantive equality.³² It is quite telling that this interpretative divergence exists even though EU gender equality law was, in theory, explicitly predicated on a conception of *equality of opportunities* rather than formal equality ever since the adoption of the original Equal Treatment Directive.³³

Far from indulging purely philosophical musings on the meaning of equality, this line of enquiry is laden with practical normative significance. It begs the question whether there is any room left within the combined normative framework of EU law and the ECHR for a conception of formal equality in the classical liberal sense, which may resonate with the ensuing state obligations and still be sufficiently distinguishable from rival notions of equality. In other words, is it possible to conceive of formal equality as a sufficiently defined self-standing notion that does not collapse into a 'less substantive' variant of substantive equality? Although any answer would not be fully convincing outside the framework of a

²⁷ J Nickel, 'Discrimination and Morally Relevant Characteristics' (1972) 32 *Analysis* 113.

²⁸ Case C-450/93 *Kalanke v Freie Hansestadt Bremen* [1995] ECR I-3051.

²⁹ A Peters, 'The Many Meanings of Equality and Positive Action in Favour of Women under European Community Law—A Conceptual Analysis' (1996) 2 *European Law Journal* 177; S Prechal, 'Case C-450/93, *Kalanke v Freie Hansestadt Bremen*, [1995] ECR I-3051' (1996) 33 *Common Market Law Review* 1245; E Szyszczak, 'Positive Action after *Kalanke*' (1996) 59 *MLR* 876.

³⁰ See, among others, M De Vos, 'Beyond Formal Equality: Positive Action under Directives 2000/43 EC and 2000/78 EC' (2007) *European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities* 22.

³¹ Barnard and Hepple (n 24) 577.

³² S Fredman, *A Critical Review of the Concept of Equality in UK Anti-discrimination Law: Independent Review of the Enforcement of UK Anti-discrimination Legislation* (Cambridge, Cambridge Centre for Public Law and Judge Institute of Management Studies, 1999) Working Paper No 3, para 3.12.

³³ Council 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.

robust European theory of equality,³⁴ it is possible to offer some preliminary suggestions in this direction. If disengaged from its alleged intellectual progeny, a liberal conception of formal equality can still make sense in a *non-comparative* context.³⁵ If one accepts that the allocation and enjoyment of certain rights is entirely independent of situational differences, it seems reasonable to suggest that the distinction between morally relevant and morally irrelevant characteristics is not applicable and, consequently, equal protection of the law in this context renders interpersonal comparisons redundant, if not outright unlawful.

The natural normative environment wherein such a conception of equality—tentatively termed here *non-comparative formal equality*—is intuitively resonant is the realm of *absolute rights*. Take, for instance, the right not to be tortured or subjected to inhuman or degrading treatment.³⁶ This is generally accepted as a ‘peremptory norm of jus cogens’³⁷ in international law—and recognised as such under the ECHR³⁸—which is not subject to degrees, limitations or restrictions of any kind. Over the years, Strasbourg has been careful to safeguard the absolute nature of the prohibition by firmly denying the legitimacy of all attempts to justify state policies and practices through reference to elements of comparison in any shape or form. Torture is prohibited irrespective of the circumstances of the victim’s conduct³⁹ and it does not lend itself to a balancing act between competing rights⁴⁰ or between the risk of harm to the victim and the danger he poses to the state.⁴¹

One might be tempted to extrapolate and suggest that, in the case of absolute rights, equal treatment is automatically tantamount to (gender) neutrality. Even if that were correct,⁴² however, the category of non-comparative formal equality would continue to suffer from the philosophical thinness attributed to its traditional liberal version. If the obligation to treat equally is exhausted by treating everyone *identically* solely by virtue of our shared ‘humanity’,⁴³ then equality becomes a normatively redundant concept⁴⁴ as it collapses into nothing more than a prohibition of direct discrimination.⁴⁵ In fact, according to part of the literature, it would make more sense to remove equality and discrimination altogether

³⁴ Which, inevitably, goes far beyond the limited scope and ambitions of the present enquiry.

³⁵ It is often suggested that the first part of the Aristotelian maxim corresponds to formal equality, whereas its second part is reflective of substantive equality. See L Waddington and A Hendriks, ‘The Expanding Concept of Employment and Discrimination in Europe: From Direct and Indirect Discrimination to Reasonable Accommodation Discrimination’ (2002) 18 *International Journal of Comparative Labour Law and Industrial Relations* 403, 2.1. This line of argument, however, is premised on the traditional but erroneous assumption that it is possible to conceptually decouple formal from substantive equality simply by reference to the similarity/difference dichotomy.

³⁶ Article 3 ECHR.

³⁷ *Prosecutor v Furundzija* (10 December 1998), ICTY, Case No IT-95-17/I-T (1999) 38 *International Legal Materials* 317 [144].

³⁸ *Al-Adsani v United Kingdom*, ECHR 2001-XI (2001) [61].

³⁹ *Lorse v The Netherlands*, App No 52750/99 (ECtHR, 4 February 2003).

⁴⁰ *Chahal v United Kingdom*, EHRR 1996-V (1996).

⁴¹ *Saadi v Italy*, App No 37201/06 (ECtHR, 28 February 2008).

⁴² Which is not necessarily the case, as the lack of consensus on the matter indicates.

⁴³ B Williams, ‘The Idea of Equality’ in P Laslett and WG Runciman (eds), *Philosophy, Politics and Society* (Oxford, Blackwell, 1962).

⁴⁴ P Westen, ‘The Empty Idea of Equality’ (1982) 95 *Harvard Law Review* 537.

⁴⁵ It goes without saying that any conception of equality that fails to recognise *indirect discrimination* as an intrinsic definitional element of the prohibition of discrimination is by default too narrow to encapsulate the current normative framework of European equality law. See, among others, E Ellis, *EU Anti-Discrimination Law* (Oxford, Oxford University Press, 2005); S Besson, ‘Evolutions on Non-discrimination Law within the ECHR and ESC Systems: It Takes Two to Tango in the Council of Europe’ (2012) 60 *American Journal of Comparative Law* 147.

from this kind of normative equation,⁴⁶ as the morally reprehensible and legally prohibited act par excellence in this case is the violation of the absolute right itself. Simply put, when torture is at issue, the gender of the victim⁴⁷ should be morally and legally irrelevant.

This line of argument may be correct in exposing the logical incoherence of formal equality in any of its conceptual guises, but it fails to capture the essence of the philosophical problem and is clearly at odds with the normative reality of European equality law. The Strasbourg Court has often considered the merits of complaints alleging a violation of Article 3 in conjunction with Article 14 of the Convention, where torture was thought to be the *result of discrimination*.⁴⁸ In its reasoning, the Court identified that racially motivated torture was 'a particular affront to human dignity'.⁴⁹ The corresponding state obligation, then, is interpreted as requiring 'authorities [to] use all available means to combat racism and racist violence, thereby reinforcing democracy's vision of a society in which diversity is not perceived as a threat but as a source of its enrichment'.⁵⁰ Transposed into the context of gender, this echoes feminist critiques of *jus cogens* as being reflective of a male perspective that permeates international human rights law⁵¹ and uses the public/private dichotomy⁵² as a mechanism to obfuscate the role that gender equality should play in the relevant philosophical discourse and corresponding normative framework.⁵³

With the Strasbourg Court apparently in tune with those arguing in favour of the need to incorporate an equality dimension even in the interpretation of absolute rights, it seems that there is hardly any room left for a conception of formal equality predicated on absolute neutrality. This rings even more true in the context of EU law, where gender mainstreaming has been introduced with the explicit aim of rendering gender equality an integral consideration across the spectrum of the whole normative agenda since the late 1990s.⁵⁴ The 'symmetrical' approach that formal equality is seen as encapsulating⁵⁵ may have enjoyed some currency in the not-so-distant past, but it is losing its legal and political lustre in the European normative space.

This notwithstanding, the relevant discourse continues to oscillate between the 'formal' and the 'substantive' that are seen as occupying opposite ends of the equality spectrum. It is the dichotomy itself, then, that lies at the heart of the philosophical problem. The mistake of recognising formal equality as the conceptual *altera pars* of substantive equality is not rectified by accepting the latter as the preferred interpretation of equal treatment. The

⁴⁶ J Raz, *The Morality of Freedom* (Oxford, Clarendon Press, 1986) ch 9.

⁴⁷ Or any other characteristic that may constitute a ground for discrimination.

⁴⁸ *Nachova and others v Bulgaria* (2005) ECHR 2005-VII; *Bekos and Koutropoulos v Greece* (2005) ECHR 2005-XIII; *Stoica v Romania*, App No 42722/02 (ECtHR, 4 March 2008); *Virabyan v Armenia*, App No 40094/05 (ECtHR, 2 October 2012). All these cases involve an allegation of torture as a result of racial rather than gender discrimination, but the argument regarding the relationship between equal treatment and absolute rights holds true vis-a-vis all grounds of discrimination.

⁴⁹ *Virabyan v Armenia* (n 48) [199], emphasis added.

⁵⁰ *Ibid.*

⁵¹ H Charlesworth and C Chinkin, 'The Gender of Jus Cogens' (1993) 15 *Human Rights Quarterly* 63, 67.

⁵² *Ibid.* 72.

⁵³ H Charlesworth, C Chinkin and C Wright, 'Feminist Approaches to International Law' (1991) 85 *American Journal of International Law* 613, 624.

⁵⁴ C Boothand and C Bennett, 'Gender Mainstreaming in the European Union' (2002) 9 *European Journal of Women's Studies* 430; MA Pollack and E Hafner-Burton, 'Mainstreaming Gender in the European Union' (2000) 7 *Journal of European Public Policy* 432.

⁵⁵ S Fredman, 'After Kalanke and Marschall: Affirming Affirmative Action' (1999) 1 *Cambridge Yearbook of European Legal Studies* 199, 200.

thrust of the analytical claim advanced here is that the concept of equality is *singular* and should not be fragmented into binary schemas. Simply put, the *modus operandi* of equal treatment as a general legal principle requires that *personal circumstances* are *always* a core element of the reasoning, even if only to ascertain the absence of any normatively significant differences. As explained earlier, if this is true even for absolute rights, then it should be true a fortiori with regard to every other type of right. If this line of analysis is correct, it begs the question whether the notion of formal equality should be abandoned altogether.

Part of the theory has attempted to offer a less radical solution by striking a conceptual compromise. Besson, for instance, explains that the different dimensions of equality may give rise to multiple binary dichotomies, such as between symmetrical and asymmetrical equality and between formal and material equality.⁵⁶ According to this schema, symmetrical equality amounts to both treating comparable situations similarly and different situations differently, with asymmetrical equality covering cases where special treatment is required.⁵⁷ Besson seems to argue that both symmetrical and asymmetrical equality can be accommodated under a conception of formal equality, but then goes on to acknowledge that the latter does not always amount to material equality due to the effects of past discrimination. In these cases, positive action becomes a legitimate means to bridge the gap between formal and material equality.⁵⁸

Although this approach leaves a lot to be desired in terms of conceptual clarity, it does help identify a significant problem with the equality discourse. This is none other than the conflation between special treatment and positive action, which are often seen both in the EU and in the ECHR contexts as interchangeable deviations from the norm of formal equality. Besson's analysis offers some useful insights into why only special treatment should be regarded as asymmetrical, but rests firmly rooted in the assumption that formal equality is the norm. It follows that any move towards a substantive paradigm of equality is virtually impossible without a clearer image of where special treatment and positive action fit into the normative picture.

III. CONCEPTS AND CONCEPTUAL BOUNDARIES: POSITIVE ACTION, REASONABLE ACCOMMODATION, SPECIAL TREATMENT AND SUBSTANTIVE EQUALITY

A. Clarifying the Concept: A Typology of Positive Action and the Interpretative Status Quo in EU Law

According to a moderate, comprehensive and relatively non-controversial definition, positive action denotes the deliberate use of race or gender-conscious criteria for the specific purpose of benefiting a group that has previously been disadvantaged or excluded from important areas of the public sphere on the grounds of race or gender respectively.⁵⁹ Two important points regarding the notion of group employed here become immediately

⁵⁶ S Besson, 'Gender Discrimination under EU and ECHR Law: Never Shall the Twain Meet?' (2008) 8 *Human Rights Law Review* 647, 673.

⁵⁷ *Ibid* 674–75.

⁵⁸ *Ibid* 675–76.

⁵⁹ S Fredman, *Discrimination Law* (Oxford, Oxford University Press, 2002) 126.

obvious. First, any category of persons that have been or are being discriminated against on grounds of a shared characteristic should, in principle, be entitled to claim the status of a social group for the purposes of positive action.⁶⁰ In other words, there appears to be nothing in the definition of positive action to suggest that its use should be limited to particular social groups.⁶¹ Second, the benefiting groups may be either disadvantaged or under-represented as a result of the invidious use of the shared characteristic. The relationship, however, between disadvantage and under-representation is severely under-theorised, which undermines doctrinal clarity and threatens normative consistency.

In the EU law jargon, positive action is an 'umbrella' term that is understood in a deliberately open-ended manner, so that it can potentially encompass a wide range of equality and non-discrimination policies and practices. Although there is no terminological consensus in the literature,⁶² the view that positive action can take a number of different shapes or forms became the default position early on.⁶³ It is obvious that this lack of conceptual specificity obfuscates the relevant discourse and creates unnecessary confusion. Distinguishing, then, between different types of positive action should be an analytical priority in order to lay down success standards and accurately assess the effectiveness of such measures in achieving the aim of 'full equality in practice'.⁶⁴

The most successful recent attempt to provide a comprehensive typology of positive action in employment has been undertaken by De Schutter,⁶⁵ Who identifies six types of positive measures in employment:⁶⁶

- 'Monitoring the composition of the workforce in order to identify instances of under-representation and, possibly, to encourage the adoption of action plans and the setting of targets' (type 1).
- 'Redefining the standard criterion on the basis of which employment or promotion are allocated (in general, merit)' (type 2).
- 'Outreach measures, consisting in general measures targeting underrepresented groups, such as the provision of training aimed at members of the underrepresented groups or job announcements encouraging members of such groups to apply' (type 3).
- 'Outreach measures, consisting in individual measures such as the guarantee to members of underrepresented groups that they will be interviewed if they possess the relevant qualifications' (type 4).
- 'Preferential treatment of equally qualified members of the underrepresented group, with or without exemption clause (also referred to as "flexible quotas")' (type 5).
- 'Strict quotas, linked or not to objective factors beyond the representation of the target group in the general active population' (type 6).

⁶⁰ On a very significant discussion on the normative construction of the concept of social group, see IM Young, *Justice and the Politics of Difference* (Princeton, Princeton University Press, 1990) 42–48; IM Young, 'Polity and Group Difference: A Critique of the Ideal of Universal Citizenship' (1989) 99 *Ethics* 250.

⁶¹ This is, indeed, the rationale behind the ongoing expansion of the scope of anti-discrimination law towards a more inclusive approach. Besides race and gender, other human characteristics, such as age, ethnicity, disability and sexual orientation, have been gradually added to the list of protected grounds of discrimination. Note, for instance, the phrasing of Article 14 ECHR and of Article 1 of Protocol 12 to the Convention.

⁶² See Fredman (n 59) 125–36.

⁶³ See, among others, C McCrudden, 'Rethinking Positive Action' (1986) 15 *Industrial Law Journal* 219.

⁶⁴ Article 157(4) TFEU.

⁶⁵ O De Schutter, 'Positive Action' in D Schiek, L Waddington and M Bell (eds), *Cases, Materials and Text on National, Supranational and International Non-discrimination Law* (Oxford, Hart Publishing, 2007).

⁶⁶ *Ibid* 762.

De Schutter's typology is meticulous and covers a wide range of measures and schemes. In essence, though, it is premised upon a simpler binary distinction. On the one hand, there are 'true positive measures' that involve some form of preferential treatment to members of the disadvantaged groups and, on the other hand, 'outreach measures' that aim primarily at improving the competitiveness of the group in the labour market without granting preferential treatment. According to this criterion,⁶⁷ measures of types 4, 5 and 6 fall under the former category, while measures of types 1, 2 and 3 fall under the latter.⁶⁸

Turning from theory to practice—and bearing in mind that a detailed examination of the CJEU case law on positive action lies beyond the limited scope of the present enquiry—it can be safely argued that the legitimacy of soft measures under EU law is currently beyond doubt. The legality of strict measures, on the other hand, depends on whether they satisfy the test the CJEU laid down in its *Badeck* ruling.⁶⁹ According to the three-pronged *Badeck* test, the measure must:

- be designed to address a de facto *inequality* between men and women in employment;
- be *flexible* with regard to the achievement of desired results, so that the allocation of the benefit is *not automatic*;
- contain a *saving clause*, so that the allocation of the benefit is *not unconditional*.

The Court explicitly or implicitly refers to each of these criteria in all of the judgments⁷⁰ and all three must be satisfied if the measure is to pass the Court's scrutiny successfully.

A final note on the position of the CJEU on positive action is necessary here. Although *Badeck* provoked a surge of enthusiasm at the time from pro-equality lawyers and theorists who regarded it as evidence of a shift from formal to substantive equality,⁷¹ its alleged radicalism has been significantly overplayed. The Court in *Badeck* refined the test that was already introduced in its previous *Marschall* ruling⁷² in order to adapt it to the requirements of former Article 141(4) (now Article 157(2) TFEU),⁷³ but, in reality, the link from the severely criticised *Kalanke* to *Marschall* to *Badeck* remained unbroken.⁷⁴ *Badeck* confirms that 'soft' quotas are permissible in principle and maybe proved that Member States could feel confident that carefully designed positive action schemes will survive the scrutiny of the Court. Nevertheless, the Court was not really faced with a hard case: if positive

⁶⁷ De Schutter argues that there is a second criterion according to which positive measures can be classified into two categories, namely whether they require that the beneficiary is a *member of the* (disadvantaged) *target group*. Although it is true that, in certain cases, non-members can take advantage of a programme designed primarily for the benefit of a specific group, it is submitted that this is a direct consequence of the principle of equal treatment understood as full and effective equality.

⁶⁸ De Schutter (n 65) 762.

⁶⁹ Case C-158/97 *Badeck v Landesanwalt beim Staatsgerichtshof des Landes Hessen* [1999] ECR I-1875.

⁷⁰ Case C-366/99 *Griesmar v Ministre de l'Economie* [2001] ECR I-9383; Case C-476/99 *Lommers v Minister van Landbouw, Natuurbeheer en Visserij* [2002] ECR I-2891; Case C-319/03 *Briheche (Serge) v Ministère de l'intérieur, de la sécurité intérieure et des libertés locales* [2004] ECR I-8807. Specifically, on the first criterion, see para 46 in *Griesmar*, para 41 in *Lommers* and para 22 in *Briheche*; on the second criterion, see para 56 in *Griesmar*, para 43 in *Lommers* and para 23 in *Briheche*; and on the third criterion, see para 57 in *Griesmar*, para 45 in *Lommers* and para 23 in *Briheche*.

⁷¹ N Burrows and M Robinson, 'Positive Action for Women in Employment: Time to Align with Europe?' (2006) 33 *Journal of Law and Society* 24.

⁷² Case C-409/95 *Marschall v Land Nordrhein Westfalen* [1997] ECR I-6363.

⁷³ The *Marschall* test was tailored to the original Equal Treatment Directive.

⁷⁴ This link is cleverly characterised by Fredman as an 'individualistic straitjacket'. See Fredman (n 55) 390.

action is a contentious issue that calls for elaborate theoretical exercises in legal reasoning, *Badeck* was a let-off.⁷⁵ As with *Marschall*, the *Badeck* quota would pass the threshold of legality even against the theoretical backdrop of a *less substantive* notion of *equality*.

The explicit reference to substantive equality, then, as a legitimate state objective may be welcome, but its implications are symbolic rather than normative. Accepting the legitimacy of selection criteria that ‘are manifestly intended to lead to an equality which is substantive rather than formal’⁷⁶ is not enough to guarantee anything more than the abandonment of strict or non-comparative formal equality. This, however, begs the question whether *Badeck* had anything to add to our existing understanding of the concepts involved, given that the rejection of ‘strict’ formal equality can be directly inferred from Article 157(4) TFEU without the need to engage in a rigorous interpretative process. Even more significantly, the formal/substantive equality dichotomy continues to underpin the legal reasoning, which in itself undermines the robustness of the concept of equality at play.

B. Clarifying Conceptual Boundaries (I): Positive Action v Reasonable Accommodation

Disability discrimination in employment is one of the most rapidly developing areas of anti-discrimination law in Europe. This is in no small part due to the Framework Equality Directive⁷⁷ that imposed on Member States an obligation to implement anti-discrimination measures for the protection of disabled persons in employment.⁷⁸ In Article 5 the Directive introduces the notion of *reasonable accommodation*, which is intended to occupy centre-stage in eliminating discrimination on grounds of disability. The positive duty⁷⁹ of reasonable accommodation entails that employers should take ad hoc measures ‘to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training’.⁸⁰ The Directive, then, purports to achieve a double aim: first, to establish

⁷⁵ The *Badeck* scheme involved public service rules that gave priority to women in promotions, access to training and recruitment. Such priority, however, was neither *automatic* nor *unconditional*: it was only allowed in sectors of the public service where women were under-represented, when the female candidate was equally qualified to her male counterpart and only if no reasons ‘of greater legal weight’ that might tilt the balance in favour of the male candidate were put forward. According to the German government, these reasons ‘of greater legal weight’ concerned ‘various rules of law ... which make no reference to sex and are often described as social aspects’ (*Badeck* (n 69) [34]). The *Badeck* positive action system amounted to what is usually described as a ‘flexible result quota’. In para 28 of the ruling, the Court itself attributed two main characteristics to this system: it does not ‘determine quotas uniformly for all the sectors and departments concerned’ and it ‘does not necessarily determine from the outset—automatically—that the outcome of each selection procedure must, in a stalemate situation where the candidates have equal qualifications, necessarily favour the woman candidate.’

⁷⁶ *Badeck* (n 69) [32].

⁷⁷ Directive 2000/78/EC.

⁷⁸ A Lawson and C Gooding, ‘Introduction’ in A Lawson and C Gooding (eds), *Disability Rights in Europe: From Theory to Practice* (Oxford, Hart Publishing, 2005) 1.

⁷⁹ Fredman (n 59) 59.

⁸⁰ Article 5 of Directive 2000/78/EC reads as follows: ‘In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned.’

reasonable accommodation as a *general norm* that applies to all employers in the public and private sectors; and, second, to affirm that the *absence* of it amounts in and of itself to discrimination.⁸¹

Domestic legislation in most Member States has also adopted the approach taken in the Directive. A characteristic example is the UK Disability Discrimination Act 1995, as amended in 2005, which introduces the term 'reasonable adjustments' as equivalent to reasonable accommodation.⁸² As Fredman points out, through the notion of reasonable adjustments, the Act does not simply require employers to conform to the 'able-bodied norm', but to modify that norm with a view to 'afford[ing] genuine equality to disabled persons'.⁸³ The language of the Directive and of the domestic implementing provisions echoes the traditional formal/substantive equality dichotomy, with commentators keen to suggest that the obligations in question are clearly inspired by a conception of substantive equality.

It is exactly this perceived adherence to substantive equality that led some commentators to regard reasonable accommodation as a form of positive action,⁸⁴ although not necessarily as 'reverse or positive discrimination'.⁸⁵ Such an interpretation, however, is erroneous and has been rightfully contested,⁸⁶ as it confuses two substantively and procedurally distinct normative techniques.⁸⁷ Reasonable accommodation should be conceived of as 'a particular kind of non-discrimination legislative provision, related to, but not synonymous with, the established forms of *direct* and *indirect discrimination*'.⁸⁸ It is thus an instrument designed according to the 'difference model of discrimination', which is in turn premised on an 'asymmetric notion' of equality.⁸⁹ In other words, the recognition that disabled persons are in a substantially different situation from able-bodied persons entails that the equal treatment principle in this case requires *different* treatment of the respective groups.

From this point of view, it is evident why reasonable accommodation does not amount to positive action. Whether or not disabled persons can be classified as a disadvantaged or under-represented group in particular employment cadres is *irrelevant*. Reasonable accommodation is thus understood as possessing an 'individualised character',⁹⁰ contrary

⁸¹ United Nations Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, 'The Concept of Reasonable Accommodation in Selected National Disability Legislation', 2005, available at www.un.org/esa/socdev/enable/rights/ahc7bkgndra.htm.

⁸² For a more detailed analysis of the UK Disability Discrimination Act and its interpretation by national courts, see C Gooding, 'Disability Discrimination Act: From Statute to Practice' (2000) *Critical Social Policy* 533.

⁸³ Fredman (n 59) 59.

⁸⁴ See, for instance, H Fenwick, *Civil Liberties and Human Rights* (London, Cavendish Publishing, 2002) 1043.

⁸⁵ B Doyle, 'Enabling Legislation or Dissembling Law? The Disability Discrimination Act 1995' (1997) 60 *MLR* 64, 74. In the US context, see BP Tucker, 'The ADA's Revolving Door: Inherent Flaws in the Civil Rights Paradigm' (2001) 62 *Ohio State Law Journal* 335, 365.

⁸⁶ And not only in the European discourse. For a discussion of the matter from a US point of view, see C Jolls, 'Antidiscrimination and Accommodation' (2001) 115 *Harvard Law Review* 642.

⁸⁷ L Waddington, 'Reasonable Accommodation' in D Schiek, L Waddington and M Bell (eds), *Cases, Materials and Text on National, Supranational and International Non-discrimination Law* (Oxford, Hart Publishing, 2007) 745.

⁸⁸ DG Employment, Social Affairs and Equal Opportunities, *International Perspectives on Positive Action Measures: A Comparative Analysis in the European Union, Canada, the United States and South Africa* (European Commission Publications Office, 2009) 27, emphasis added.

⁸⁹ *Ibid.* See also Fredman (n 59) 126–30, especially 128–29.

⁹⁰ DG Employment, Social Affairs and Equal Opportunities (n 88) 28.

to the group approach that is instrumental in the conceptualisation and operation of positive action. Admittedly, the boundaries between the two are not always clear in practice. Systems that introduce a *disability quota*, requiring that a minimum percentage of the workforce should consist of disabled persons, as is the case in France, Austria and Sweden,⁹¹ go beyond reasonable accommodation and into the realm of positive action. This, however, does not undermine the doctrinal distinctiveness of the two concepts.

Although the Commission's interpretation of reasonable accommodation is generally correct, one cannot help but notice the echoes of the traditional formal/substantive equality dichotomy. Insofar as the official language of equality remains entrapped in this parochial analytical schema, a return to a formalistic conception of equality as nothing more than due process remains theoretically possible, even if unlikely.

C. Clarifying Conceptual Boundaries (II): Gender Equality between Disadvantage and Vulnerability

The practical impact of EU gender equality law has been seriously contested from a feminist perspective both at the early stages of its development⁹² and even after the recent additions to the normative framework.⁹³ Most commentators recognise the contributions of new legislation and of the policy and governance tools that have been employed, such as gender mainstreaming,⁹⁴ in improving the socio-economic status of European women, especially during the last decade.⁹⁵ Significant gender inequalities across the spectrum, however, continue to exist despite the efforts of European institutions and national legislators.

For some, this is the inevitable result of a general institutional mentality that 'condemns' EU social policy to the back seat in a primarily market-oriented policy agenda.⁹⁶ In feminist writings, however, the problem lies primarily with the conception of equality at play, which fails to recognise and adequately structural disadvantage.⁹⁷ This is particularly evident in the case of *pregnancy* and the way in which the CJEU has interpreted the relevant legal provisions.

McGlynn, for instance, accuses the Court for adopting the 'dominant ideology of motherhood'⁹⁸ across its case law on gender equality. Although its motives may be benign, the aim of addressing structural discrimination against women is only superficially served. If traditional assumptions about the socially constructed role of women are not

⁹¹ Ibid 29.

⁹² S Fredman, 'European Community Discrimination Law: A Critique' (1992) 21 *Industrial Law Journal* 119.

⁹³ A Masselot, 'The State of Gender Equality Law in the European Union' (2007) 13 *European Law Journal* 152.

⁹⁴ F Beveridge, 'Building against the Past: The Impact of Mainstreaming on EU Gender Law and Policy' (2007) 32 *European Law Review* 193; J Shaw, 'Mainstreaming Equality and Diversity in European Union Law and Policy' (2005) 58 *Current Legal Problems* 255. See, however, a more sceptical view in F Beveridge and S Nott, 'Mainstreaming: A Case for Optimism and Cynicism' (2002) 10 *Feminist Legal Studies* 299.

⁹⁵ For an overview of the disadvantaged status of women across the EU at the end of the twentieth century, see A Glasner, 'Gender and Europe: Cultural and Structural Impediments to Change' in J Bailey (ed), *Social Europe* (London, Longman, 1998).

⁹⁶ S Prechal, 'Equality of Treatment, Non-discrimination and Social Policy: Achievements in Three Themes' (2004) 41 *Common Market Law Review* 533, 533.

⁹⁷ Fredman (n 92) 134.

⁹⁸ C McGlynn, 'Ideologies of Motherhood in European Community Sex Equality Law' (2000) 6 *European Law Journal* 29, 31–32.

shattered, then under-representation of women in positions of power near the top of the socio-political hierarchy will continue to mar any superficial success of equality strategies.⁹⁹

But what McGlynn goes on to suggest is far more radical than that. In her view, the underlying problem is that EU gender equality law revolves around a ‘paternalistic “protection” principle’¹⁰⁰ that overrides equal treatment. In other words, the ‘rhetoric of protection’¹⁰¹ that presents women as a *vulnerable* social group is itself at fault for the perpetuation of vulnerability.¹⁰² If this is true for pregnancy-related legislation,¹⁰³ then it is true a fortiori for positive action. The echoes of the typical social stigma argument are loud and clear.¹⁰⁴ It would be redundant to rehearse the full set of counter-arguments, especially in view of the fact that the real point here seems to be more refined compared to its classical formulation in the US literature.

To do justice to this critique, one needs to move beyond the feminist reluctance of labelling women as vulnerable and understand the thrust of the argument in the following terms: women should be treated as a vulnerable group in need of *special protection* only when they are *actually vulnerable* because of attributes specific to their gender.¹⁰⁵ When they are *disadvantaged* because of their gender, on the other hand—that is, because of the simple fact that they are women—the matter should be dealt with as a case of direct or indirect *gender discrimination*. Eradicating disadvantage that stems from discrimination or from gender-biased normative perceptions does *not* qualify as special protection, even though it may require ‘asymmetric’ legal tools such as positive action.

Distinguishing between *vulnerable groups* and *disadvantaged groups* is no easy task in practice, but it is normatively significant. It is a necessary condition to understand positive action as an *expression of equal treatment* and *not* as a form of *special treatment* as in its classical conception. Disadvantaged groups, then, are entitled to positive action,¹⁰⁶ whereas vulnerable groups are entitled to the special benefits provided for in general policies that promote *social inclusion*,¹⁰⁷ according to the basic ideals of the welfare state.

This latter dichotomy between positive action and general welfarist or social inclusion policies is clearly and coherently presented in the recent Report on Positive Action of the European Commission.¹⁰⁸ Drawing insights from the Report, one can also make sense of the further distinction between disadvantaged and vulnerable groups introduced here. *Children*, for instance, constitute an emblematic and arguably uncontested case of a

⁹⁹ On the normative attitudes towards women, see generally Fredman (n 32).

¹⁰⁰ McGlynn (n 98) 35.

¹⁰¹ *Ibid.*

¹⁰² The argument here is not a distinctly feminist one, in the sense that it applies equally to other disadvantaged or under-represented social groups.

¹⁰³ J Conaghan, ‘Pregnancy and the Workplace: A Question of Strategy?’ (1993) 20 *Journal of Law and Society* 71, 82–83.

¹⁰⁴ For a recent empirical analysis of the argument in its racial dimension, see A Onwuachi-Willig, E Houh and M Campbell, ‘Cracking the Egg: Which Came First—Stigma or Affirmative Action?’ (2008) 96 *California Law Review* 1299.

¹⁰⁵ These attributes are not necessarily—if at all—biological. The argument here refers primarily to *social attributes* that may render women a vulnerable group in a specific social context. Women of a particular ethnic or religious background, for instance, may be subjected to cultural or religious rituals, without their consent, as a matter of custom or religious doctrine. In this case the *external* perception of gender imposes additional burdens on women that need to be taken into account when allocating legal protection.

¹⁰⁶ Or, in any case, can become legitimate target groups for positive action programmes.

¹⁰⁷ On social inclusion as the principal goal of anti-discrimination law, see H Collins, ‘Discrimination, Equality, and Social Inclusion’ (2003) 66 *MLR* 16.

¹⁰⁸ DG Employment, Social Affairs and Equal Opportunities (n 88) 28.

vulnerable social group. They are thus allocated special protection exactly because of their perceived vulnerability, without this violating the general principle of equal treatment.¹⁰⁹ Free education for young persons is a good example of such special protection.¹¹⁰ As cogently pointed out in the Report, the fact that free education is only available for this particular age group does not entail that the education system is ‘an age-related form of positive action.’¹¹¹

Admittedly in some cases there will be inevitable overlap, as disadvantage and vulnerability may appear as concomitant elements of the social condition of the same group. *Ethnic minority children*, for instance, are not simply a vulnerable group but may additionally suffer from disadvantage related to their ethnic origin. In this case, it may be necessary to supplement the ‘standard’ protection reserved for children in general with positive measures specifically designed to cancel out the effects of the additional disadvantage this particular group of children is burdened with.

IV. TOWARDS A COMMON EUROPEAN CONCEPTION OF FULL EQUALITY: EU ACCESSION TO THE ECHR AS AN OPPORTUNITY?

It would be premature, if not outright erroneous, to suggest that the EU’s accession to the Convention would have an automatic impact on the conceptualisation of equal treatment in general and of gender equality in particular. After all, the act of accession in and of itself is, in actual fact, little more than an official proclamation of an already-acknowledged symbiotic relationship between the two systems. It is, however, reasonable to predict that such a move is likely to produce effects that go above and beyond mere institutional symbolism. Although Luxembourg and Strasbourg are generally keen to avoid a head-on conflict, the convergence in their interpretations of equal treatment is neither absolute nor always consistent.¹¹² Part of the problem lies with the apparent reluctance of the two European courts to provide a systematic theoretical account of their respective anti-discrimination regimes,¹¹³ which, admittedly, would be a rather difficult task without an underlying theoretical account of equality. The EU’s accession to the Convention may, indeed, provide the opportunity for an alignment of both normative theory and judicial practice with the emerging European paradigm of *full equality*.¹¹⁴

By the same token, however, accession in and of itself is extremely unlikely to resolve the conceptual inconsistencies identified throughout this analysis. Despite the fact that both European courts appear to be moving away from strict formal equality, EU equality law is considerably more developed and sophisticated than the Convention system in this regard. All three substantive dimensions of equal treatment—positive action, reasonable accommodation and special treatment—have a concrete textual basis in secondary EU law, coupled with the interpretative scrutiny of the CJEU. The ECtHR, on the other hand, may have found it more difficult to translate the non-discrimination guarantee of Article 14

¹⁰⁹ It is interesting to note that this is true under *any* conception of equal treatment, even under the formal/substantive dichotomy.

¹¹⁰ DG Employment, Social Affairs and Equal Opportunities (n 88) 28.

¹¹¹ *Ibid.*

¹¹² Besson (n 56).

¹¹³ *Ibid.* 651.

¹¹⁴ According to the Preamble to Protocol 12 ECHR and to the equivalent phrasing of Article 157(4) TFEU.

and Protocol 12 into a coherent and full-fledged principle of full equality, but it also seems more willing to make a tentative leap in that direction.

In *Runkee*,¹¹⁵ for instance, the ECtHR opens up a new path to full equality, but seems reluctant to follow it through. The Court indirectly confirms that positive action can be a legitimate means to redress factual inequalities insofar as the specific measures are proportionate¹¹⁶ and finds that reserving the widowers' benefits to female widows until 2001 could be objectively and reasonably justified.¹¹⁷ More importantly, it goes so far as to suggest that 'in certain circumstances a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of the article'.¹¹⁸ Hinting that signatory parties may be under a *positive obligation* to introduce positive action is a far more progressive stance on equality than the CJEU has ever attempted to entertain and fits well with the full equality paradigm. At the same time, however, the Court does not appear to have any problem with the UK government's policy choice 'to bring about equality through "levelling down"'.¹¹⁹ Combined with a wide margin of appreciation 'usually allowed under the Convention when it comes to general measures of economic or social strategy',¹²⁰ this approach effectively eliminates the possibility of imposing any meaningful positive obligation on national legislators. Once again then, the problem seems to lie first and foremost in the lack of conceptual integrity that makes it impossible to gauge what the true meaning of full equality is.

A relatively more coherent attitude emerges in *Konstantin Markin*, where the Grand Chamber chastises the Russian government for misconceiving positive action,¹²¹ despite failing to explain that the misconception lies in the conflation of positive action and special treatment. The case involved a national rule stipulating that only female military personnel would be entitled to three years of parental leave. Although the Court is correct to dismiss the 'special biological link' argument¹²² as inapplicable to the three-year period following childbirth,¹²³ it still goes on to consider the possibility that women have a 'special role' in bringing up children.¹²⁴ Distinguishing between childbirth and upbringing echoes the CJEU's approach in *Griesmar*¹²⁵ and also reflects the way in which positive action and special treatment are distinct equality mechanisms. Reserving parental leave for female personnel only is not intended to correct the disadvantaged position of women in that employment area and, as such, it cannot qualify as a positive action measure.¹²⁶ On the other hand, Strasbourg observes that 'contemporary European societies have moved towards a more equal sharing between men and women of responsibility for the upbringing of their children'.¹²⁷ This emerging European consensus makes it difficult to justify

¹¹⁵ *Runkee and White v United Kingdom*, App No 42949/98 and 53134/99 (ECtHR, 10 May 2007).

¹¹⁶ *Ibid* [35].

¹¹⁷ *Ibid* [40].

¹¹⁸ *Ibid* [35].

¹¹⁹ *Ibid* [41].

¹²⁰ *Ibid* [36].

¹²¹ *Konstantin Markin v Russia*, App No 30078/06 (ECtHR, 22 March 2012) [141].

¹²² *Ibid* [116].

¹²³ *Ibid* [132].

¹²⁴ *Ibid* [139]–[140].

¹²⁵ *Griesmar v Ministre de l'Economie*. In *Konstantin Markin*, the ECtHR examined *Griesmar* in detail in [65]–[66].

¹²⁶ *Konstantin Markin v Russia* (n 121) [141].

¹²⁷ *Ibid* [140].

the national rule in question as special treatment, especially since it seems to perpetuate stereotypes about traditional gender roles.¹²⁸

Although the Court's reasoning in *Konstantin Markin* is generally beyond reproach, the thrust of the matter remains that this 'clean' picture of the Convention system has little, if anything, to contribute to current EU equality law. The latter is broader, more sophisticated and nuanced to the extent that one would naturally expect Strasbourg to be mostly at the receiving end of any fruitful judicial dialogue. The only meaningful effect of EU accession would be to produce a direct link between the notion of full equality and a positive obligation to address existing gender inequalities through any means available, including positive action. Strasbourg is better placed to entrench and defend such a substantive conception of equality, as it claims to maintain the coveted position of a neutral arbiter that moves forward only after European consensus has been achieved. The CJEU, on the other hand, is bound to tread more lightly in view of its limited human rights mandate and in the face of a precarious political balance within the EU. As things stand at the moment, however, there is little evidence that Strasbourg is willing to take the pole position in this respect and dictate the terms of a genuinely common European paradigm of full equality.

V. CONCLUSION

The story of European equality law so far is one of continuous evolution and qualified success. It is impossible to deny that a number of equality indexes have noticeably improved across European societies in the last few decades. The lion's share of the credit rightfully belongs to Strasbourg and Luxembourg for gradually developing a mature understanding of equal treatment that goes beyond the narrow confines of formalism. This is also reflected in a tentative shift in the law towards an emerging paradigm of *full equality*, intended to reconcile normative intentions with social reality. At the heart of this transformative process is the recognition that formal equality fails to account for and redress endemic inequalities stemming from past and present discrimination. Such recognition, however, remains partial and half-hearted. Despite rhetorical declarations to the contrary, the two European courts seem generally reluctant to commit to the new equality paradigm unequivocally and pursue its legal consequences to their full extent. Formal equality continues to be treated not as a dead concept, but rather as a valid—albeit not always preferred—alternative interpretation of equality. On the same token, the blurred conceptual boundaries between distinct anti-discrimination mechanisms and the conflation between positive action and special treatment make it difficult to envisage what the proper meaning of a common European conception of equality really is.

The possible accession of the EU to the Convention system may provide the impetus to instil much-needed clarity into the normative picture. The first step in this direction will be an explicit abandonment of formalism that eschews normatively significant situational differences between individuals or groups and makes unrealistic assumptions about past and present social realities. The combined interpretative efforts of the two European courts, coupled with academic scholarship, can translate the European vision for full equality into a coherent analytical framework, wherein positive action, reasonable accommodation and

¹²⁸ Ibid [127], [139], [142] and [143].

special protection of vulnerable groups will feature as affirmations of genuine equality of treatment. The second and more decisive step, however, will depend on the willingness of Strasbourg to use the language of positive obligations in its Article 14 and Protocol 12 jurisprudence. If the paradigm of full equality is to have any substantial impact on policy making, it must be seen as generating concrete state responsibilities. There is hardly anything novel, let alone revolutionary, about the suggestion that European states have an obligation, both under the Convention and as a matter of EU law, to address social inequalities through appropriate means. Holding states liable for failure to act upon positive equality obligations is clearly within Strasbourg's mandate, but it is admittedly a precarious political move, likely to attract severe criticisms of unwarranted judicial activism on the part of the ECtHR. Post-accession, however, the reinforced position of the Strasbourg Court, with the support of its Luxembourg counterpart, should be enough to guarantee that the leap towards full equality has every chance of succeeding.