Two Models of Equality

— Frameworks to Define the Appropriate Extent of Affirmative Action for Women* —

Prof. Hiroshi Nishihara, LL. D.**

1. Introduction

In the second half of the 20th Century, we have experienced a huge development in the realm of human equality. Nowadays, discrimination upon racial, ethnic and sexual criteria is considered everywhere to be an evil that society should overcome. However universally this thesis is accepted, there is actually little consensus about the concept of equality and discrimination.

This problem of defining equality is now getting more difficult. The function expected of the equal protection clause in the national constitution was clear as long as legal discrimination against a particular group existed. In the last 50 years, however, we have reached in several countries the stage in which no apparent legal discrimination against minorities or women can be identified. Legal equality is now realized, at least in relation to the groups traditionally discriminated against. Nevertheless, some groups find themselves still discriminated against *de facto* in the social circumstances, and the law endorses a great part of such social circumstances. Here arises the difficult question about affirmative action. May the law treat persons differently, exactly on the bases of prohibited criteria, to realize social equality?

To answer this question, we have first to develop an appropriate measure to detect a violation of equality. The question can actually

---

* A revised version of an oral report presented at the 5th World Congress of the International Association of Constitutional Law, workshop 7, on July 13, 1999 in Rotterdam (the Netherlands).

** Professor of Constitutional Law, Waseda University School of Social Sciences (Tokyo).

be set forth in different ways, depending upon the fundamental understanding of equality. Assuming that equality is the right of every individual — I will call this position "the right-oriented model of equality" —, one may ask whether an exception of the right of equal treatment should be made in order to achieve the goal of social equality. If the question is put into these words, arguments for and against such an exception should, on the next step, be weighed against each other. However, for another conception of equality, it is not a question of exception. If one denies the existence of the right to be treated equally, it is not a problem of exception which is at stake. Then it must be asked whether and to what extent an affirmative action program represents a just accommodation among various components of equality — this position shall be called "the justice-oriented model of equality". Put into these terms, it may be further asked what belongs to these components, solely the equal opportunity of individuals or also the so-called group rights.

Between these two ways of setting forth the question, there is a significant difference. The first model takes equality as a right, and governmental acts curtailing this right are unconstitutional unless these acts are justified as means to achieve some overriding ends. On the contrary, the second scheme denies the legal quality of the right to be treated equally and requires a just arrangement by the lawmaker. This arrangement should, then, be oriented toward justice.

The conflict of these models derives from the fundamental difficulties in defining human equality. It requires the persons be equal, although no two persons are actually equal in all their features. Furthermore, it is just the purpose of the law to distinguish a group of persons from another — it distinguishes the murderers from non-murderers and treats each group differently. There can, therefore, be no general right to be treated equally. On what criteria, then, may the law distinguish among persons? To what extent?

Every statement relating to equal rights assumes some answer to these fundamental questions. In the following, I would like to show the various consequences of both models in order to compare them with each other. For that purpose, the analysis shall focus on the equality of a man and a woman. In this area, two systems trying to realise

that equality shall be compared with each other, the law of the European Community and the German Constitution. The former represents a kind of right-oriented model, the latter the justice-oriented model. Since the justice-oriented model has been more popular since the time of the classics, the second model shall be dealt with first.

2. The justice-oriented model

A traditional way to define equality is to rely upon a maxim of justice: You should treat equal persons equally and not equal persons differently according to their differences.(1) But, what kind of differences are relevant and what are not? The "equality" and the "difference" are, in this context, normative concepts, not descriptive ones. The point of view decides whether a difference should be recognised between two separate persons or circumstances. It is the law itself that sets measures of legally relevant and irrelevant criteria.

Consequently, the German theories have reduced the meaning of general principle of equality, guaranteed by article 3 paragraph 1 of the Basic Law (*Grundgesetz*), to the prohibition of legislative arbitrariness.(2) The legislator chooses justice-oriented criteria, which should dominate the statutory system in a specific field of regulation — people should be taxed according to their economic potential, not according to their weight; the refuse charge, on the contrary, could be demanded according to the weight of the refuse. A court applies standards of equality and attacks such a statutory system only if no reasonable argument can sustain the legislative choice.

It is generally accepted that this doctrine of prohibited arbitrariness does not apply if the legal differences are made on the basis of "suspect" criteria, i.e. criteria which are normally irrelevant to achieve legislative goals, but are historically often used to discriminate and de-

(1) The most popular formula of such a model was set forth by ARISTOTLE, *The Nicomachean Ethics*, fifth book, sixth capital, 1131a. This maxim has been accepted in the German constitutional theory through GERHARD LEIBHOLZ, *Die Gleichheit vor dem Gesetz*, 1925, p. 45.

(2) LEIBHOLZ, *ibid.*, p. 72. This theory is always relied upon since the precedence of BVerfGE 1, 15 (52) until the introduction of the so called new formula into the jurisdiction of the first chamber of the German Federal Constitutional Court.

grade certain groups, such as race, nationality, descent and sex.(3) Nevertheless, German theories rely on a justice-oriented argument also in the field of the constitutional prohibition of special discrimination, especially in relation to sex discrimination. According to the German Federal Constitutional Court, unequal treatment of men and women is prohibited unless "biological and functional differences of men and women" dominate the circumstances, regulated by the statute at issue, so that the comparable moments are not in sight or are not relevant. If the situations of both sexes are not comparable, it makes no sense to speak of "advantage" or "disadvantage" based on sex.(4)

The comparability test, applied by the German Federal Constitutional Court, supposes a certain understanding of equality. Equality establishes a rule: No differentiation may be made if the situations of both sexes are comparable. Exceptions to this rule are not allowed, but the application of this rule is limited by the conditional requirement. The court makes the judgement whether the situations of men and women are so different that the difference justifies the law in treating men and women differently. In this test, the means-ends relation as to some legislative intentions plays no role. The judgement about the relevance of factual differences decides the constitutional issue.

The constitutional guarantee of equality, however, contains no criterion according to which the relevance of a difference could be measured. The German Federal Constitutional Court found, in its early jurisdiction, "biological and functional differences" in a wide range of circumstances. The German Court saw the main task of sexual equality only in maintaining the equivalence between the positions of men and women, which the Constitutional Court acknowledged as a conse-

(3) The German Federal Constitutional Court proclaims that the constitutional prohibition of sexual discrimination assumes the legal irrelevance of sexual differences. BVerfGE 3, 222 (240); 10, 59 (73); 15, 337 (343); 39, 169 (186); 52, 369 (374); 63, (181). See GÜNTER DÜRIG, FamRZ 1954, p. 3; DÜRIG, in: Maunz/Dürig (ed.), *Grundgesetz-Kommentar*, Art. 3 II, Paragraph 1.

(4) BVerfGE 6, 389 (422); 11, 277 (281); 15, 337 (343); 21, 329 (343); 31, 1 (4); 37, 217 (249); 39, 169 (185); 43, 213 (225); 52, 369 (374); 63, 181 (194); 68, 384 (390); 74, 163 (179); 84, 9 (17). This test was established first in a decision in which the Federal Constitutional Court sustained the punishment of homosexual acts limited to male homosexuals as constitutional. BVerfGE 6, 389 (422).

quence of the maxim of justice.[5] The prohibition of sexual discrimination meant in this understanding not necessarily the requirement of the same treatment of both sexes. The Constitutional Court struck down a statute, on the ground of this theory, only if a statute disadvantaged women clearly — such as the provision giving fathers the last decision in the exercise of the rights of parents[6] or the statutory preference of men in the inheritance of a farmstead.[7]

On the other hand, the Federal Constitutional Court took the existence of "natural differences between men and women"[8] for granted and justified the statutory scheme according to which house keeping was the main obligation of married women. In 1963, the Constitutional Court found a dependency requirement for granting a widower pension constitutional although widows did not have to prove previous dependence upon their husbands.[9] The legislator could, according to this decision, rely on the "normal" relationship within a family so long as he did not burden a sexual group with a significant material disadvantage.

Such a jurisdiction shows that application of the comparability test depends largely on the notion of justice the majority of a society happens to accept at one time. Therefore, it reflected only the change in the view of society's members when the German Federal Constitutional Court limited the application area to "biological and functional differences". It argued, in the seventies, that the traditional notion of the gender-oriented division of labour no longer justified a legally un-

---

[5] The Federal Constitutional Court always tried to heighten the position of housewives so as to achieve the equivalence of legal positions enjoyed by both sexes. BVerfGE 3, 225 (246); 11, 277 (280); 17, 1 (13); 49, 280 (285); 61, 319 (346); 87, 1 (40). It has been forgotten that this effort underwrites the legal obligation for a married woman to be a housewife.

[6] BVerfGE 10, 59.

[7] BVerfGE 15, 337.

[8] See for a theory emphasising the "natural" differences GÜNTHER BEITZKE, in: Neumann/Nipperdey/Scheuner (ed.), *Die Grundrechte*, Bd. II, 1954, p. 208.

[9] BVerfGE 17, 1. The Federal Constitutional Court rested in this decision upon the doctrine that the legislator was entitled to enact a statute responding to the typical needs of each group. In the later decisions, however, this doctrine has been paid less and less attention with the exception of BVerfGE 74, 163.

equal treatment.[10] The Constitutional Court found in 1975 that the same provision about the widower pension that it had sustained 13 years earlier was becoming unconstitutional, not because of the sexual classification itself, but because of the fact that the employment of married women was no longer an exceptional phenomenon and the legislator might rely no longer on the "normality" of housewifery as a duty of women.[11] In the eighties, the Constitutional Court succeeded in limiting "biological and functional differences" to those in which the necessity of a special treatment existed only in relation to one sexual group.[12]

The comparability test has been faced, however, by a considerable difficulty in the recent years. It does not work perfectly if applied to an affirmative action plan. The Federal Constitutional Court had to establish a third category of differences that legitimised the legislator to treat men and women differently, the social differences.[13] If women have suffered from social discrimination, they are entitled to enjoy some privileges that should compensate social disadvantage derived from the factual discrimination. This construction is now criticised.[14] It can, actually, justify every kind of affirmative action program so long as any social disadvantage of women can be recognised, irrespective of how drastically the program works. It is not at issue in the scheme of the comparability test how intensive the violation of rights to equality is and whether some less intensive means could equally achieve the legislative goal.[15] The right of men can not

---

(10) BVerfGE 52, 369 (376); 57, 335 (344); 84, 9 (18). The figure of "functional differences" has not been relied upon since the Federal Constitutional Court denied the legal relevance of the traditional notion.

(11) BVerfGE 43, 213.

(12) E.g. BVerfGE 52, 369; 57, 335; 63, 181. See MICHAEL SACHS, *Grenzen des Diskriminierungsverbots*, 1987, p. 325.

(13) BVerfGE 74, 163 (180). For the notion of "social differences", see UTE SACKSOFSKY, *Das Recht auf Gleichberechtigung*, 2nd edition, 1996, p. 170.

(14) SACHS, *supra* n. 12, p. 557.

(15) Actually, the Federal Constitutional Court recognised in the cited decision the constitutionality of the provision which allows women to recieve a pension at the age of sixty, earlier than men can (in the age of 65). It could be doubted whether this unequal treatment really represented an appropriate affirmative action compensating the previous discrimination suffered by women. Nevertheless,

work as a constitutional criterion any more. Here the doubt arises as to whether the comparability test can appropriately solve the problem of sexual equality.

3. The right-oriented model of equality

In the jurisdiction of the European Court of Justice, the principle of the equal treatment of men and women is considered to be an individual right, a fundamental right that the Court should safeguard. This conception is clearly shown by the proportionality test that the Court of Justice applies.

Exceptions to the principle of equal treatment can, according to European law, only be tolerated in the area in which directives expressly allow classifications on the criterion of sex. The directive 76/207/EEC permits exceptions only in three kinds of situation: (1) in occupational activities in which a specific sex is a determining factor in exercising that profession; (2) as to national provisions which aim at the protection of women, especially in respect to pregnancy and maternity; (3) in the field of measures to promote equal opportunity for men and women. The European Court of Justice always interprets these exception clauses very narrowly(16) so that they apply only if an exemption is necessary to achieve some important goals.(17)

The figure of indirect discrimination that the European Court of

---

the Federal Constitutional Court derived the constitutionality of statute at issue directly from the need for compensation. BVerfGE 74, 163 (180).

(16) In its earlier jurisdiction, the European Court of Justice applied these exception clauses also to the national provisions in which the necessity was not clearly proven. See Case 163/82 *Commission v Italy*: [1983] E.C.R. 3273; Case 165/82 *Commission v United Kingdom*: [1983] E.C.R. 3431; Case 184/83 *Ulrich Hofmann v Barmer Ersatzkasse*: [1984] E.C.R. 3047.

(17) The proportionality test was established in Case 222/84 *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary*: [1986] E.C.R. 1651. Since that decision, the European Court of Justice has consistently applied this test and interpreted the exception clauses narrowly. E.g. Case 248/83 *Commission v Germany*: [1985] E.C.R. 1459; Case 318/86 *Commission v France*: [1988] E.C.R. 3559; Case C-345/89 *Germany v Stoeckel*: [1991] E.C.R. I-4047; Case C-13/93 *Office national de l'emploi v Madeleine Minne*: [1994] E.C.R. I-371; Case C-450/93 *Eckhard Kalanke v Freie Hansestadt Bremen*: [1995] E.C.R. I-3051; Case C-490/95 *Hellmut Marschall v Land Nordrhein-Westfalen*: [1997] E.C.R. I-6363.

Justice has developed also reflects the right-oriented model of sexual equality. In European law, a classification based on a facially sex neutral criteria can be also seen as a sexual discrimination if it affects women in a far higher percentage unfavourably than men.(18) In this case, the indirect discriminations are found to be illegal unless the differential treatments are a necessary means in achieving some overriding goals. The European Court of Justice tries to safeguard rights of women also against the discriminating effect of provisions which are formulated neutrally. It has contributed in this way to the reduction of discrimination against part time employees, who are for the most part women.(19)

In this conception, *prima facie* violations of equality are identified at first. The burden of proof, then, turns over and the differential treatment must be justified in terms of some overriding goals by applying the proportionality test. The factual differences between men and women play no role. In justifying the differential treatment, the Court of Justice relies solely on the means-end-relation.

The origin of such reliance can be, of course, seen in the "strict scrutiny" and "mid level scrutiny" in the jurisdiction of the U.S. Supreme Court. The "suspect" classifications, i.e. classifications on race and national origin, must be subjected to a "strict scrutiny". In apply-

---

(18) The figure of indirect discrimination was established first in Case 96/80 *J.P. Jenkins v Kingsgate Ltd.*: [1981] E.C.R. 911; Case 170/84 *Bilka-Kaufhaus GmbH v Karin Weber von Hartz*: [1986] E.C.R. 1607.

(19) To mention the most important decisions: Case 171/88 *Ingrid Rinner-Kühn v FWW Spezial-Gebäudereinigung*: [1989] E.C.R. 2743; Case C-102/88 *M.L. Ruzius-Wilbrink v Bestuur van de Bedrijfsvereniging voor Overheidsdiensten*: [1989] E.C.R. I-4311; Case C-33/89 *Maria Kowalska v Freie und Hansestadt Hamburg*: [1990] E.C.R. I-2591; Case 360/90 *Arbeitswohlfahrt der Stadt Berlin v Monika Bötel*: [1992] E.C.R. I-3589; Case C-57/93 *Anna A. Vroege v NCIV Instituut etc*: [1994] E.C.R. I-4541; Case C-317/93 *Inge Nolte v Landesversicherungsanstalt Hannover*: [1995] E.C.R. I-4625; Case C-444/93 *Ursula Megner etc. v Innungskrankenkasse Vorderpfalz*: [1995] E.C.R. I-4741; Case C-457/93 *Kuratorium für Dialyse und Nierentransplantation v Johanna Lewark*: [1996] E.C.R. I-243; Case C-278/93 *Edith Freers etc. v Deutsche Bundespost*: [1996] E.C.R. I-1165; Case C-1/95 *Hellen Gerster v Freistaat Bayern*: [1997] E.C.R. I-5223; Case C-100/95 *Brigitte Kording v Senator für Finanzen*: [1997] E.C.R. I-5289; Case C-246/96 *Mary Teresa Maggorian etc. v Eastern Health and Social Services Board etc.*: [1997] E.C.R I-7153.

ing this test, such classifications are only constitutional if they are the least restrictive means of achieving a compelling state interest. Classifications based on "quasi suspect" criteria, such as sex and age, could only be justified if they are substantially related to the achievement of an important governmental objective. In these tests, the existence of a legitimate means-end-relation decides the constitutional question.

The unique feature in the jurisdiction of the European Court of Justice is that it applies the proportionality test consistently according to its right-oriented model of equality. This is not always the case if a court relies on the proportionality test. The U.S. Supreme Court has developed the intermediate level scrutiny not as a right-oriented test, but rather a justice-oriented one, asking whether a classification rests upon some reasonable ground of differences having a fair and substantial relation to the objective of the legislation.[20] The original form of the strict scrutiny shows some right-oriented moments by speaking of the necessity of restricting the liberty of a single racial group.[21] But this test also has not functioned as a criterion to find out how far the right may be infringed in order to achieve some external governmental goal. Rather, it could distinguish, at best, cases in which "suspect" criteria are used benignly for compensatory purposes. On the contrary, the Court of Justice of the European Communities uses the proportionality test in determining whether and how far an exception of the principle of equal treatment should be made to achieve some governmental goals.

To clarify the intention of right-oriented use of the proportionality test, a difference should be made between "external" governmental objectives and "internal" considerations orienting themselves on the justice criteria dominating in a specific field of state regulations.[22] Suppose, X1 must pay income tax and Y1 not because X1 earned much more than Y1 did. Here, the differential treatment in taxation is explained by referring to the principle of taxation according to one's financial potential. Suppose, on the other hand, X2 must pay income tax and Y2 not while they earned just the same amount, because Y2

[20] *Reed v Reed*, 404 U.S. 71 (1971), at 76.
[21] *Korematsu v U.S.*, 323 U.S. 214 (1944).
[22] To this distinction see STEFAN HUSTER, *Rechte und Ziele*, 1993, p. 164.

contributed money to charity organisations and can subtract the contribution. In this case, the differential treatment can only be explained by pointing out the governmental policy in supporting charity organisations by various benefits in its tax system. The difference between X1 and Y1 is justified because it is just to treat them differently, i.e. on an internal consideration of justice. The difference between X2 and Y2, on the contrary, is not just in itself in respect of the persons being treated differently, but justified in terms of an external governmental interest.

In the conception of the European Court of Justice, the sex is always irrelevant in legal regulation. Differential treatments on the ground of sex can, therefore, never be justified internally; it can at best defended in terms of external governmental purposes. Classifications on sex are a *prima facie* infringement of equality and an evil, which can be tolerated as a compromise with other state interests.

4. Applicability of the proportionality test in direct sex discrimination

The German Federal Constitutional Court and the Court of Justice of the European Communities have a somewhat different understanding of sex equality. Neither argument is false in its logical structure. The two doctrines represent only another understanding of what a fundamental right is. Nevertheless, this slight, but important difference in the basic doctrine can be an obstacle placed in the way of European integration, in the face of the directly binding effect of European law on the member states. It is, at first, a problem as to the result of argument. But, to make changes in the result plausible, the national courts must also change their way of argument.

The German Federal Constitutional Court has developed a new test for sexual equality since 1992, in order to adjust its decisions to those of the European Court of Justice. To strike down a statutory prohibition of night work for female workers in accordance with the decision of the European Court of Justice in the case of *Stoeckel*,(23) the

(23) Case C-349/89 *Germany v Stoeckel*: [1991] E.C.R. I-4017.

German Constitutional Court adopted a new test. Differentiating regulations are, in the new test, allowed, so long as they are imperatively necessary to solve problems that can arise, due to their nature, either only for men or for women.[24] The Constitutional Court confirmed this test again in 1995[25] in order to accept the decision of the European Court of Human Rights in the case of *Karlheinz Schmidt*.[26]

In Germany, it is still disputed whether the new test is a kind of proportionality test or is a developed form of the comparability test.[27] The formulation of the new test is also, probably intentionally, open to this question. But, if we consider that the new test is caused by the influence of EC law, the German theory should interpret the new standard in the sense of the proportionality test. The comparability test is, actually, confronted with a difficulty as to the constitutional limitation of affirmative action programs so that the need of some change has been forecasted.

The comparability test, and the underlying justice-oriented model of equality, was and is an appropriate one in a stage of destructing legal discrimination. Although the application area can be narrowed by judicial discretion about the width of relevant factual differences, the comparability test safeguards sex equality from being made relative in terms of some external purposes. Therefore, it can limit effectively the legislative intention to perpetuate legal discrimination. On the other hand, it is no longer the best standard in a society where the basic consensus against legal discrimination exists. Here, it does not outline sharply enough the legitimate exception of equality, especially in relation to affirmative action. Furthermore, the comparability test does not reflect the social understanding of equality if the sensibility regarding discrimination has grown so that every differential treatment is considered to be a potential infringement of the right to equality.

At such a stage, it is worth adopting the right-oriented model and the proportionality test. The condition of this model is that the sex-

[24] BVerfGE 85, 191 (206).

[25] BVerfGE 92, 91 (109).

[26] ECHR, Série A 291-B, p. 32.

[27] As a theory denying the relationship between the new criterion and the proportionality test SACHS, JuS 1997, p. 129.

ual differences are acknowledged to be no more relevant to state regulations. Under this condition, statutes must adopt sexually neutral formulation as far as possible, because differential treatment can only be justified as a necessary means to achieve an external end. The protection of maternity should, speaking extremely, be designed neutrally in terms of the health of children and pregnant people so that men can also enjoy the protection if they happen to be pregnant; it is actually the effective way to exclude the case in which the concept of maternity includes the care of small babies, which men also can do, and perpetuates the burdens shouldered traditionally by women.

The affirmative action must also be justified following the basic model of equality. Under the justice-oriented model, they are defended by pointing out factual differences between men and women and by the argument that it is just to treat them differently in the face of those differences. For that purpose, affirmative action programs are considered to be compensations for disadvantages suffered by women. But, if equality is individual rights in a strict sense, the compensation argument applies only if the person advantaged is the victim of the past discrimination. Since this is normally not the case, this argument has to take moments of group rights into account and depart from the usual form of human rights arguments.

On the contrary, under the application of the proportionality test, the affirmative action can be justified in relation to several governmental purposes. They can be defended as means to achieve the political goal of sexual parity or equality of opportunity of each individual. In the first case, the constitutional legitimacy of that goal itself must be put in question. In the second case, it must be further asked how an affirmative action plan is designed to reach the goal: by showing examples of successful women and affecting the social mind, or by adjusting present disadvantages resulting from the fear of employers that women are not, or will not be in the future, engaged flexibly due to their family duties.

The last argument, adopted by the European Court of Justice in the case of *Marschall*,(28) represents so far the best solution in terms

(28) Case C-409/95 *Hellmut Marschall v Land Nordrhein-Westfalen*: [1997] E.C.R. I-6363. The Court of Justice of the European Communities pointed out in this de-

of limiting the scope of the permissible affirmative action in relation to their narrowly expressed goal. According to this view, a system of a legal obligation to preferential employment of a woman can be only accepted if the qualification of both candidates is shown to be equivalent. A statute demanding the employment of less qualified female candidates must be seen as unlawful in the field of employment; such a system of rigid quotas can be at best adopted in the lower level of education and job training.

The right-oriented model succeeds or fails according to the willingness of society members, and feminist theories, to accept circumstances in which differences in sex are no longer relevant to state regulations. Under this condition, the privileges traditionally enjoyed by women are also diminishing. In a country where compulsory military service exists, the question arises whether women are ready to arm, insofar as they are physically capable to do that work.(29)

5. The right to be treated equally

Theoretically, it is possible to accept the right-oriented model consistently in the field of sexual discrimination. The model can also be expanded to other criteria, such as race and national origin, which are normally not legitimate bases of differential treatment in law. But, how does that right to be treated equally in terms of these criteria relate to general equality? Since the proportionality test includes some moments of balancing, it is not enough to say that there is a right to be treated equally. The question is the place value of this right.

As is pointed out at the outset, there is no general right to be

---

cision a tendency that a man is employed if he and a woman have the same qualification, because the employer normally anticipates that a woman often interrupts their employment or shoulders family burdens so that her working time can not be organised as flexibly as her male colleagues. In this situation, there is a need for an adjustment with a counterweight. An affirmative action plan which obliges the employer — in this case: one in the public sector — to employ a female candidate if she has the same qualification as her male rival could represent such a counterweight.

(29) As the first step in this direction see Case C-273/97 *Sirdar*: [1999] E.C.R. I-7403; Case C-285/98 *Kreil*: [2000] E.C.R. (in printing).

treated equally. In recent jurisprudence, the fundamental right is not seen in the right to equal treatment, but in the right to equal respect: People have the right to be treated respectfully as an equal.(30) This principle does not always correspond to the right to equal treatment, but it sometimes does. This is in principle the case if a differential treatment is made on the basis of criteria on which the individual has no influence and therefore no responsibility.

The conduct of a person may always trigger some differential treatment in the law. The law treats people differently according to legal responsibility which is based on one's will and previous conduct. The equality standard required in the civil revolution pursued the rule of law, in which the law follows only secular purposes and applies universally, irrespective of the social status of a person. It belongs to the fundamental feature of the law, established since then, to treat people only according to their will and performance. On this account, the differential treatment on the criteria that the individual can not change should be scrutinised skeptically.

For that purpose, the German Federal Constitutional Court tries partly to establish a new formula in applying the general equality right. According to it, the equality principle tries to avoid that a group of people is treated differently from another although, between two groups, no difference of a nature and of an importance exists that could justify the differential treatment.(31) The more the difference is made in reference to personal features, the more justifications are needed to pass equality tests.(32) This new conception can be connected with the right-oriented model of sex equality. Equality excludes the regulation based solely on personal features for which individuals have no responsibility and which they can not change. Among such features, however, there is still a gradation of potential legal relevance, from intelligence, for example, to race. Some criteria traditionally used for discriminatory purposes stand at the end of this gradation and es-

(30) RONALD DWORKIN, *Taking Rights seriously*, 1977, p. 227; DWORKIN, *A Matter of Principle*, 1985, p. 190.

(31) For example BVerfGE 55, 72 (88); 75, 348 (357); 78, 232 (247); 88, 87 (96); 92, 26 (51); 93, 99 (111).

(32) PAUL KIRCHHOF, *Die Verschiedenheit der Menschen und die Gleichheit vor dem Gesetz*, 1996, p. 14.

tablish a right, not treated differently on these criteria.

This right can conceivably be acknowledged only where such criteria are actually used in legal classification. According to this point of view, the figure of indirect sexual discrimination in the jurisdiction of the European Court of Justice is not free from theoretical confusion. Its original form, indicated in the case of *Jenkins* to identify hidden, intentional discrimination,[33] can be explained as a consequence of the right-oriented model. But indirect discrimination is found, in recent decisions, if a rule burdens in much greater portion women than men. This is not a problem of the right to equal treatment. The European Court requires national courts to apply the proportionality test to scrutinise the justification of such indirect discrimination, but this test is not appropriate in this context. This test functions only in relation to some external goals and leads to a tautology where the differential treatment is justified by some internal justice considerations. For, in such circumstances, the purpose of the regulation is to treat different things differently according to their differences, and it makes no sense to ask whether the means selected necessarily advances that end. Consequently, the only test applicable to the cases of indirect discrimination is the comparability test, which finds out which justice standard dominates the regulation at issue.

The criteria to distinguish the application area of the proportionality test from that of the comparability test is whether the regulation refers to a difference conditioned by sex itself or one resulting from personal decision. The greater percentage of women in the group of part-time employees requires, of course, heightened attention to the discrimination against them. It must however be noted, that the equality of part-time employees can be seen as a corollary of sex equality only temporarily in the factual existence of family burdens solely on the shoulders of women. If the Community law widens the application area of the principle of equal treatment of men and women in the

[33] Case 96/80 *J.P. Jenkins v Kingsgate Ltd.*: [1981] E.C.R. 911. The European Court of Justice clarified in the later jurisdiction that the discriminatory intention is not significant in identifying the indirect discrimination, but in answering the question whether the identified indirect discrimination can be legitimised by showing objective factors. Case 170/84 *Bilka-Kaufhaus GmbH v Karin Weber von Hartz*: [1986] E.C.R. 1607.

course of expanding its scope of regulations, the proportionality test in the area of indirect discrimination can have a fatal effect. Is it an indirect discrimination based on sex that an old single employee gets more pension than a widow never in the job market only because there are much more housewives than housekeeping husbands? The European Court of Justice needs a mechanism in which it can take the factual difference of two separate groups into account.

The right-oriented understanding of equality aims at a situation in which each individual can fulfil him or herself irrespective of the stereotype imputed to the group to which he or she happens to belong. In this sense, equality guarantees personal autonomy. The right to equal treatment requires the lawmaker to judge a person only on the basis of their personal decision and personal quality, not on their outward features. The right-oriented model of equality is a model of freedom. This is why the proportionality test, originally designed for the justification of *prima facie* infringement of personal liberty, applies to the right to an equal treatment.