DISCRIMINATION AND EQUALITY. THE REMEDIAL PERSPECTIVE OF EQUALITY IN SPAIN AND IN THE EUROPEAN UNION[1]

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ABSTRACT: *Many different versions of equality have been proposed and defended, but they can be organized around the emphasis that they give to three different perspectives: historical, economic, and remedial. The remedial perspectives expands on the historical perspective to consider the continuing effects of past discrimination. This perspective is most frequently invoked to justify programs of affirmative action. Here we focus on the programs of affirmative action in Spain in the last years within the legal framework of the European Union. I examine wether affirmative action measures, particularly quotas, violate the principle of equality.*

KEY WORDS: *DISCRIMINATION – EQUALITY – REMEDIAL PERSPECTIVE – AFFIRMATIVE ACTION - IMPLEMENTATION – SPANISH CONSTITUTION – EUROPEAN UNION -*

The concept of equality has been considered from different perspectives that serve to build different constructions of a theory of Justice corresponding to distinct ideologies. Classically, one divides the perspectives of equality with regard to employment discrimination law into historical, economic, and remedial.[2].

The historical perspective focuses on the inmediate past. From this perspective, discrimination is a historical condition for which appropriate legal remedies have already been enacted. Usually the historical perspective is termed "Equality as colorblindness": Any particular use of race, gender or creed is stigmatizing or stereotyping. This perspective presumes, based on past experience, that any use of race is undesirable[3].

While the historical perspective looks to the immediate past, the economic perspective focuses on the near future, examining the consequences of enforcing prohibitions against discrimination. The crucial question from this perspective is whether the gains from eliminating discrimination outweigh the costs of legal enforcement, and, in particular, whether a legal prohibition is superior to deterring discrimination through the competitive pressure of the market. This approach is associated with a neoliberal or libertarian position, one that limits legal intervention in order to foster free market competition. In terms of equality, it rests on a view of merit as "careers open to talents," assuring individuals the right to compete based on their existing abilities as determined by their natural endowments as augmented by education and experience. As Sandel has said about market societies: "They open careers to those with the requisite talents and provide equality before the law. Citizens are assured equal basic liberties, and the distribution of income and wealth is determined by the free market. This system –a free market with

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[2] This classification was made, among others, by RUTHERGLEN, GEORGE in his book *Employment Discrimination Law. Visions of Equality in Theory and Doctrine*, Foundation Press, Thomson Reuters, New York, Third ed. 2010.

[3] Vid. Ibidem, pp. 17-18.

formal equality of opportunity- corresponds to the libertarian theory of justice. It represents an improvement over feudal and caste societies, since it rejects fixed hierarchies of birth. Legally, it allows everyone to strive and to compete. In practice, however, opportunities may be far from equal"[4].

This conception of equality as merit[5] does not guarantee the results of the competition, nor indeed, even the opportunity to gain the talents necessary to prevail in the competition. Individuals must compete based solely on the qualifications that they bring to the labor market. Nevertheless, this is a positive conception of equality because, in contrast to the negative conception of the historical perspective, it tells employers what to consider, not just what to avoid. Equality as merit in the economic perspective tells employers to consider the productivity of individual employees within the firm. The distinctive institutional commitment of the economic perspective tends to confer greater discretion upon employers than the alternative perspectives, with their emphasis on the legal system as the institutional means of achieving equality. Unlike the alternative perspectives, the economic view prefers a system of private decision-making over legally enforced rules.

Thirdly, the remedial perspective emphasizes the degree to which the consequences of past discrimination are likely to persist in the absence of broad and vigorous remedial measures. This perspective takes the historical perspective and enlarges it to consider the continuing effects of past discrimination. The remedial perspective looks back to consider all of the effects resulting from past discrimination and looks forward to determine whether these effects are likely to persist despite the abolition of past discriminatory practices. From this perspective, the central inquiry is whether present practices, even if they do not repeat the precise forms of past discrimination, continue to perpetuate their unjust effects[6]: "This perspective adds to the historical perspective by going beyond a narrow examination of legal enactments and engaging in a deeper inquiry into the social consequences of past discrimination. It adds to the economic perspective a greater weight attached to the cost of discrimination in any form. Its focus is upon the continuing vestiges of past subordination and upon the steps that can be taken to eliminate them"[7]. To quote a famous school desegregation decision in the USA, past discrimination and its effects must be "eliminated root and branch"[8].

This perspective is most frequently invoked to justify programs of affirmative action that seek, in a variety of different ways, to compensate for present disadvantages

[4] SANDEL, MICHAEL J.: *Justice. What is the right thing to do?*, Farrar, Straus and Giroux, New York, 2009, p. 153.

[5] Of course, it is possible to have different views of merit and of the related positive conception of equality, and to endorse different institutional arrangement to ensure that employees are selected according to merit. Merit might be interpreted more broadly, as it has been, for instance, by John Rawls, who would require "full equality of opportunity": providing individuals not only with "careers open to talents", but also with the same opportunity to develop their talents, regardless of differences in social and class background. RAWLS, JOHN: *A theory of Justice*, The Belknap Press of Harvard University Press Cambridge, Massachussetts, London, England, 1971.

[6] I have treated this question in previous published articles. Vid. HERMIDA DEL LLANO, CRISTINA: <<Desafíos jurídico-políticos en aras de una mayor integración del inmigrante latinoamericano en la Unión Europea: una apuesta por la igualdad y el concepto de ciudadanía cívica>>, *Revista de Derechos Humanos de la Universidad de Piura*, 2/2011, Peru, January-December 2011, pp. 151-172; <<Equal opportunity as the basis for social-economic integration of immigrants in the European Union>>, *Annales Universitatis Apulensis*, Series Jurisprudentia 15/2012, Editura Aeternitas, Romania, 2012, pp. 105-116.

[7] RUTHERGLEN, GEORGE: *Employment Discrimination Law. Visions of Equality in Theory and Doctrine*, op. cit., p. 16.

[8] Green v. County Sch. Bd, 391 U.S. 430, 438 (1968).

attributable to past discrimination. In this context, it might be useful to remember a rights-oriented legal philosopher, R. Dworkin, who argues that the use of race in affirmative action policies does not violate anybody's right[9]. Segregation-era racial exclusion depended on "the despicable idea that one may be inherently more worthy than another", whereas affirmative action involves no such prejudice. It simply asserts that, given the importance of promoting diversity in key professions, being black or Hispanic "may be a socially useful trait"[10].

The legitimacy arguments that are most commonly put forward in favor of affirmative action measures include the following: they attempt to put right or redress historic injustices; they are aimed at redressing social / structural discrimination; they are of great social use; they tend to create diversity or a proportional representation of racial groups; they help prevent social disturbances; they are a way to build the nation and an effective way to guarantee equality, in its numerous forms: equality before the law, equal treatment and equal opportunities.

The remedial perspective also figures prominently in the justification for imposing liability upon employers for neutral practices with discriminatory effects. Both affirmative action and liability for discriminatory effects are characteristically dworkinian positions and so is the remedial perspective. This perspective would extend the laws against employment discrimination to intervene in labor markets to foster a broad conception of equality: one that ensured the opportunity of previously excluded groups not only to compete for jobs, but to compete free of the debilitating effects of past discrimination. Unlike the economic perspective, the remedial goes beyond a concern solely with equal competition according to present qualifications; it supports a conception of equality that ensures a greater degree of fairness in acquiring the relevant qualifications.

This conception of equality, although broader than merit in the economic sense, does not guarantee "groups right" or "equality of results". Instead only a right to compete, not a right to succeed. As President Lyndon Johnson said in a famous speech arguing for the passage of civil rights legislation: "You don't take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say '[Y]ou are free to compete with all the others,' and still justly believe you have been completely fair"[11].

Despite abundant and successful international implementation, affirmative action measures tend to be criticized. The main barrier to affirmative action measures is put up by those who are still reluctant to accept the validity of the basic principles of human rights, in particular the principles of equality and non-discrimination. "The principle objection claims that, however worthy the goal of a more diverse classroom or a more equal society, and however successful affirmative action policies may be in achieving it, using race or ethnicity as a factor in admissions is unfair…. They are Kantian or Rawlsian liberals who believe that even desirable ends must not override individual rights"[12].

To this can be added the conceptual confusion that has arisen here from using the term *positive discrimination*. Committee for the Elimination of Racial Discrimination (CERD) doctrine states that it is a contradiction to use this term, and that it should,

[9] Vid. SANDEL, MICHAEL J.: *Justice. What is the right thing to do?*, op. cit., p. 153.
[10] DWORKIN, RONALD: "Why Bakke Has No Case", *New York Review of Books*, vol. 24, November 10, 1977.
[11] II Public Papers of the Presidents of the United States: Lyndon B. Johnson, 1965 at 636 (1966).
[12] SANDEL, MICHAEL J.: *Justice. What is the right thing to do?*, op. cit., p. 173.

therefore, be avoided. In the opinion of Mr. Marc Bossuyt, "If it is discrimination it cannot be positive, and if it is positive it cannot be viewed as discrimination"[13].

Increasing doubts are being voiced about affirmative action as a remedy for past discrimination: "As opponents of affirmative action note, those who benefit are not necessarily those who have suffered, and those who pay the compensation are seldom those who are responsible for the wrongs being rectified. (…) Even if it can be argued that compensation should not be understood as a specific remedy for particular acts of discrimination, the compensatory rationale is too narrow to justify the range of programs advanced in the name of affirmative action"[14].

Nevertheless, the remedial perspective has been extended in surprising ways, and, in particular, to justify compensation of natural disadvantages or, more accurately, disadvantages not resulting from past discrimination. Both with respect to sex discrimination and discrimination on the basis of disability, the law has required employers to accommodate conditions, such as pregnancy and physical or mental impairments, that do not in any way result from past discriminatory practices. To be sure, these laws still speak in terms of prohibiting discrimination, seemingly in the negative sense of not taking account of an individual's sex or disability, yet the obligations imposed upon employers are just the opposite: to consider these characteristics, and to some degree, to compensate for them.

The remedial perspective does not explain existing law so much as assume a critical attitude towards it. A remedial conception of equality must offer an independent baseline for determining what constitutes past discrimination and its continuing effects that must now be remedied. Legal theorists from a variety of movements have offered different elaborations of the baseline from which the adequacy of different remedial measures can be assessed. These movements tend, at least in recent years, to be focused on specific groups so that, for instance, critical race theorists, feminists, and disability rights advocates offer different accounts of the disadvantages that the law should remedy. Critical race theorists, on the one hand, emphasize the continuing effects of centuries of slavery and segregation and persistent patterns of racism established in earlier eras, especially, in the USA. Feminists, on the other hand, emphasize the variety of social traditions that have confined women to the domestic sphere of home and children under the overall control and authority of men. These differences are multiplied when we look at the differences within these groups themselves. Not all ethnic groups identify the same wrongs and consequences that need to be remedied, and not all women identify the same traditions as sexist. And some members of these groups do not endorse the remedial perspective in any form. As Rutherglen said: "The value of the remedial perspective is that it brings these issues out into the open, and in doing so, reveals the gap between what the law seeks to achieve and what it has, in fact, accomplished"[15].

As I said before, this remedial perspective is most frequently invoked to justify programs of affirmative action. The most important step in evaluating affirmative action is

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[13] BOSSUYT, MARC: <<El concepto y la práctica de la Acción Afirmativa>>. Final report presented by the Special Reporter, under the terms of United Nations Sub-Commission on the Promotion and Protection of Human Rights Resolution 1998/5. 53rd period of sessions. Subject 5 on the provisional programme, Preventing Discrimination.

[14] SANDEL, MICHAEL J.: *Public Philosophy. Essays on Morality in Politic*s, Harvard University Press, Cambridge, Massachussetts, London, 2006, p. 102.

[15] RUTHERGLEN, GEORGE: *Employment Discrimination Law. Visions of Equality in Theory and Doctrine*, op. cit., p. 28.

to understand what it is. In the European Union (EU), the term for affirmative action is "positive action" or "positive discrimination." Although the EU has no official definition of affirmative action, Council Directive 76/207[16], amended by Directive 2002/73 CE[17], gives the general definition that the concept of positive action embraces all measures which aim to counter the effects of past discrimination, to eliminate existing discrimination and to promote equality of opportunity. This is because the EU places an emphasis on equality of opportunity. Arguments in favor of compulsory measures in the European Union are based on the premise that *slow changes perpetuate barriers*. In other words, quotas seek to achieve a gender balance rather than reserve jobs.

For many years, the European Member States have worked towards achieving a high level of employment and social protection, increased standards of living and quality of life, economic and social cohesion and solidarity. They have also endeavored to create an area of freedom, security and justice. In EU countries, where social programs have a strong history and enjoy wide support, the concept of affirmative action is fundamentally in line with the tenets of society. Although societal issues are an important factor in determining whether or not affirmative action will be effective, it is also important to examine how affirmative action is placed in the political system. The EU has made an effort to incorporate affirmative action into law and has made the policy a more natural and, therefore, more accepted program.

Affirmative action measures enjoy worldwide support in relevant international instruments like the International Convention on the Elimination of Racial Discrimination (ICERD), in which Article 1.4, reads as follows: "Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved"[18]. Furthermore, the Convention not only allows affirmative action but, in Article 2.2[19], clearly imposes a burden on states to adopt positive action meaures if there is

[16] 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.

Art. 1:

1. The purpose of this Directive is to put into effect in the Member States the principle of equal treatment for men and women as regards access to employment, including promotion, and to vocational training and as regards working conditions and, on the conditions referred to in paragraph 2, social security. This principle is hereinafter referred to as "the principle of equal treatment."

2. With a view to ensuring the progressive implementation of the principle of equal treatment in matters of social security, the Council, acting on a proposal from the Commission, will adopt provisions defining its substance, its scope and the arrangements for its application.

[17] Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC 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. Vid. *Official Journal* L 269, 05/10/2002, pp. 0015 – 0020.

[18] International Convention on the Elimination of All Forms of Racial Discrimination. Adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965 entry into force 4 January 1969, in accordance with Article 19.

[19] Article 2.2: "States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal

evidence that such are needed in order to ensure equality of outcome. It refers to *special and concrete measures*. For CERD, this expression is the functional equivalent of special measures[20].

Likewise, Article 4 in the Convention on the Elimination of Discrimination against Women[21] reads as follows: "1. Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.

2. Adoption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory". The scope and extent of this provision have been determined by CEDAW in General Recommendation XXV. Also worthy of mention is International Civil and Political Rights Pact Committee General Recommendation No. XVIII.

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enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved".

[20] According to Committee for the Elimination of Racial Discrimination (CERD) doctrine, the special measures or affirmative action measures concept is based on the principle that laws, policies and practices that are adopted and applied for meeting the obligations established in the Convention should be complemented, when circumstances so dictate, by the adoption of temporary special measures aimed at guaranteeing that underprivileged groups can fully and equally enjoy their human rights and fundamental liberties. Special measures form part of the set of provisions established in the Convention that seek to eliminate racial discrimination.

In General Recommendation No. XXXII, CERD expressed its concern at the fact that affirmative action measures often tend to get confused with the constitutional rights of groups that are traditionally discriminated against, and it pointed out that the obligation to adopt special measures differs from the general positive obligation that states party to the Convention have of guaranteeing the human rights and fundamental liberties of persons and groups under their jurisdiction in a non-discriminatory manner; this is a general obligation which derives from the provisions established in the Convention taken as a whole, and is one they all have, the Committee stated.

In line with international case law and doctrine, CERD stresses the temporary nature of special measures, and clearly states that this means there is a need for a continuous follow-up system on application and results which uses quantitative or qualitative evaluation methods, as the case might be. The Committee thus tells states party to the Convention that they should provide information in their periodic reports about the following matters: the terminology applied to the special measures, as understood in the Convention; the justification for the special measures being adopted, including relevant data and statistics and information about the general situation the beneficiaries find themselves in; a brief description of how the disparities that need remedying arose and the expected results of applying the measures; who the beneficiaries of the affirmative action will be; the series of consultations which led to the measures being adopted, including those with the beneficiaries and civilian society in general; the nature of the measures and how they promote progress, development and protection for the groups and individuals they apply to; areas of action or sectors where the special measures have been adopted, and the institutions responsible for applying the measures; the mechanisms that exist for carrying out follow-up on and evaluation of the measures and the reasons why these mechanisms are considered adequate, together with involvement of the beneficiaries in the institutions applying the measures; and provisional results of application, plans for adopting new measures and the justification therefore, and information about the reasons why measures have not been adopted in view of the situations which seemed to justify their being adopted.

[21] On 18 December 1979, the Convention on the Elimination of All Forms of Discrimination against Women was adopted by the United Nations General Assembly. It entered into force as an international treaty on 3 September 1981 after the twentieth country had ratified it. By the tenth anniversary of the Convention in 1989, almost one hundred nations have agreed to be bound by its provisions.

Likewise, the Framework Convention for the Protection of National Minorities[22] also includes language that highlights the need for affirmative action saying, in article 4:
"1. The Parties undertake to guarantee to persons belonging to national minorities the right of equality before the law and of equal protection of the law. In this respect, any discrimination based on belonging to a national minority shall be prohibited.
2. The Parties undertake to adopt, where necessary, adequate measures in order to promote, in all areas of economic, social, political and cultural life, full and effective equality between persons belonging to a national minority and those belonging to the majority. In this respect, they shall take due account of the specific conditions of the persons belonging to national minorities.
3. The measures adopted in accordance with paragraph 2 shall not be considered to be an act of discrimination"[23].

These Conventions are further strengthened by the Racial Equality Directive and the Employment Framework Directive, which contain definitions of direct and indirect discrimination, harrassment, and victimization, and also allow for affirmative action measures to be taken.

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[22] The Framework Convention for the Protection of National Minorities, drawn up within the Council of Europe by Ad Hoc Committee for the Protection of National Minorities (CAHMIN) under the authority of the Committee of Ministers, was adopted by the Committee of Ministers of the Council of Europe on 10 November 1994 and opened for signature by the member States of the Council of Europe on 1 February 1995. Non-member States may also be invited by the Committee of Ministers to become Party to this instrument.

[23] In my opinión, it could be useful to recall the Resolution CM/ResCMN(2013)4 on the implementation of the Framework Convention for the Protection of National Minorities by Spain, adopted by the Committee of Ministers on 10 July 2013 at the 1176th meeting of the Ministers' Deputies. The Committee of Ministers, under the terms of Articles 24 to 26 of the Framework Convention for the Protection of National Minorities (hereinafter referred to as "the Framework Convention")[23] adopted the following conclusions with respect to Spain: "Spain has taken important steps to develop its legal and institutional framework against discrimination. A comprehensive Bill on Equal Treatment and Non-Discrimination has been elaborated, in consultation with civil society organisations which, if adopted, would widen protection against discrimination and remedy current shortcomings of the legislation in force.
The Council for the Promotion of Equal Treatment of all Persons without Discrimination on grounds of Racial or Ethnic Origin was established in 2009 as an independent body in charge of monitoring the situation in the field of discrimination and raising awareness of these issues in society as a whole. The Council established a Network of assistance to victims of discrimination, operating at the local level with the support of various NGOs.
A Comprehensive Strategy against Racism, Racial Discrimination, Xenophobia and other Related Forms of Intolerance was adopted at the end of 2011. Special Prosecutors against discrimination and hate crime have been appointed at regional and State levels. The Spanish Observatory of Racism and Xenophobia continues to carry out research and actions to raise public awareness of these problems. The authorities have undertaken substantial work to improve the management of the various challenges arising out of cultural and religious diversity, notably through the "Observatory of Religious Pluralism". Policies to support the integration of immigrants in society and promote tolerance and intercultural dialogue continue to be implemented.(…)
1. Adopts the following recommendations in respect of Spain:
The authorities are invited to take the following measures to improve further the implementation of the Framework Convention:
- take more resolute measures to implement effectively the policies aimed at improving the situation and the integration of the Roma, in close co-operation with Roma representatives; ensure that these policies are adequately resourced and are not disproportionately affected by budgetary restrictions;
- eliminate the practice of "ethnic profiling" by the police which targets persons belonging to some minority groups; increase training of the police to combat racism and discrimination, on the basis of existing good practices;
- consult with representatives of the Berber community regarding ways and means of improving the situation of the Berber community in keeping with the spirit of the Framework Convention (…)".

Of course, approving of affirmative action at high-minded conventions is not enough. Instead affirmative action must also seem normal on a level much closer to home, and the EU states have made great strides in bringing this idea back to each individual country. Unlike in the United States, European court cases have recently been expanding the powers of affirmative action programs. In the well known case of *Marschall v. Land Nordrhein-Westfalen*, a German law giving priority to women for promotions, barring special circumstances, affirmative action was upheld[24]. And in 2000, it was ruled in *Connors v. UK* that "there is a positive obligation imposed on the Contracting States by virtue of Article 8 to facilitate the gypsy way of life"[25].

I would like to refer now to the decision of the Luxembourg Court of 22 November, 2012, on the case C-385/11, Isabel Elbal Moreno v. Instituto Nacional de la Seguridad Social (INSS), Tesorería General de la Seguridad Social (TGSS)[26]. The plaintiff,

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[24] Marschall v Land Nordrhein- Westfalen, Case C-409/95 [1997] ECR I-6363. Jurisdiction: European Court of Justice (ECJ), reference for a preliminary ruling from Germany.
Date of Decision: 11 November 1997. Link to full case: http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=695J0409

[25] Case of Connors v. the United Kingdom. *(Application no. 66746/01).* Judgment. Strasbourg. 27 May 2004. The applicant complained that he and his family had been evicted from a local authority gypsy caravan site, invoking Articles 6, 8, 13 and 14 of the Convention and Article 1 of Protocol No. 1.

[26] Judgment of the Court (Eighth Chamber) 22 November 2012. (Article 157 TFEU – Directive 79/7/EEC – Directive 97/81/EC – Framework Agreement on part-time work – Directive 2006/54/EC – Contributory retirement pension – Equal treatment for male and female workers – Indirect discrimination on grounds of sex). Case C-385/11, Isabel Elbal Moreno v Instituto Nacional de la Seguridad Social (INSS), Tesorería General de la Seguridad Social (TGSS).

"9 On 8 October 2009, aged 66 years, Ms Elbal Moreno – the applicant in the main proceedings – applied to the INSS for a retirement pension. Previously, she had worked exclusively as a cleaner for a Residents' Association part-time for four hours a week (10% of the 40-hour statutory working week in Spain) for 18 years.

10 By decision of 13 October 2009, Ms Elbal Moreno's application for a pension was refused on the ground that she had not completed the minimum contribution period of 15 years, required for entitlement to a retirement pension, as provided under Article 161(1)(b) of the LGSS.

11 A complaint lodged by Ms Elbal Moreno on 30 November 2009 was dismissed by decision of the INSS on 9 December 2009. Whereas, in Ms Elbal Moreno's case, proof was required of a minimum contribution period of 4 931 days, the decision recognised that she had completed a contribution period 1 362 days.

12 Following the dismissal of her complaint, Ms Elbal Moreno brought an action before the Juzgado de lo Social de Barcelona (Social Court of Barcelona) in which she submitted that the Seventh Additional Provision of the LGSS, under which her application for a pension had been refused, entailed a breach of the principle of equality. That provision requires a part-time worker to pay contributions for a longer period than a full-time worker, even with the correcting factor represented by the 1.5 multiplier, in order to obtain a pension which is already proportionately lower. Ms Elbal Moreno also submitted that that rule entails indirect discrimination, since it is an indisputable statistical fact that women workers are the principal users of this type of contract (approximately 80%).

(…)

29 In that respect, it should be noted that, according to the settled case-law of the Court, indirect discrimination for the purposes of Article 4 of Directive 79/7 arises where a national measure, albeit formulated in neutral terms, works to the disadvantage of far more women than men (see, inter alia, *Brachner*, paragraph 56).

(…)

32 It follows that such legislation is contrary to Article 4(1) of Directive 79/7, unless it is justified by objective factors unrelated to any discrimination on grounds of sex. That will be the case where the measures chosen reflect a legitimate social-policy objective of the Member State whose legislation is at issue, they are appropriate to achieve that aim and they are necessary in order to do so (see, to that effect, *Brachner*, paragraph 70).

(…)

Ms Elbal Moreno, was denied a pension in Spain despite having worked as a part-time cleaner for 18 years because she had not completed the mínimum contribution period of 15 years required for entitlement to a retirement pension in Spain. Ms Elbal Moreno argued that the rule entails indirect discrimination, since it is an indisputable statistical fact that women workers are the principal users of this type of contract (approximately 80% in Spain). The Court ruled: "Article 4 of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security must be interpreted as precluding, in circumstances such as those of the case before the referring court, legislation of a Member State which requires a proportionally greater contribution period from part-time workers, the vast majority of whom are women, than from full-time workers for the former to qualify, if appropriate, for a contributory retirement pension in an amount reduced in proportion to the part-time nature of their work".

With this decision, the European Court of Justice has dealt a hard blow to the politics of pensions in Spain. The Court of Justice of the EU used a gender argument to find discriminatory treatment. As women hold most of the part-time jobs, the obstacles that the law create for them to obtain a pension implies gender discrimination, although indirect. In fact, the plaintiff would have had to work one hundred years to obtain the right to a pension.

In this context, I would like to mention the Spanish Law 3/2007, of 22 March 2007, for the effective equality of women and men (LOIE)[27], that incorpórate into Spanish Law the Council Directive 2002/73[28], the Council Directive 2004/113/EC[29] and the Council Directive 97/80/EC[30]. Implicitly this law also addresses the main aspects of Council Directive 75/117/ECC[31], representing an important step for gender equality in Spain.

The aim of Article 1 of the Law is to implement the principle of equal opportunities between women and men in matters of employment and occupation. Article

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38 Consequently, the answer to Question 4 is that Article 4 of Directive 79/7 must be interpreted as precluding, in circumstances such as those of the case before the referring court, legislation of a Member State which requires a proportionally greater contribution period from part-time workers, the vast majority of whom are women, than from full-time workers for the former to qualify, if appropriate, for a contributory retirement pension in an amount reduced in proportion to the part-time nature of their work".

[27] SEVILLA MERINO, J. / VENTURA FRANCH, A.: <<Fundamento Constitucional de la Ley Orgánica 3/2007, de 22 de marzo, para la igualdad efectiva de mujeres y hombres. Especial referencia a la participación política>>, *Revista del Ministerio de Trabajo e Inmigración* nº VII, Septiembre 2007, Extra. Igualdad, pp. 15-50. This Law is in force but is being appealed before the Constitucional Court by the Partido Popular. The appeal focuses mainly on the articles which regulate the parity conditions for the electoral lists for candidates to political office in Spain.

[28] To amend the Directive 76/207/CEE about equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

[29] Vid. Council Directive 2004/113/EC of 13 December 2004, implementing the principle of equal treatment between men and women in the access to and supply of goods and services.

[30] The Law also follows the recommendations of the Commitee of CEDAW. *Cfr. Observaciones finales del Comité para la Eliminación de la Discriminación contra la Mujer*: Spain. A/54/38; 30º. y 31º Session Periods, 12 to 30 January and 6 to 23 July, 2004: paragraph "Principales esferas de preocupación y recomendaciones".

[31] Although Law 3/2007 does not make direct reference to Directive 2006/54/EC, the Spanish Government considers that with Law 3/2007 for equality, the Recast Directive has already been transposed in Spain. Regarding Directive 86/378/CEE, regulation in Spain has no changed with Law 3/2007 of equality, except the matter related to collective insurance that is one of the instruments that can be used to guarantee the managerial obligations as for pensions. On this point, the Government is allowed to elaborate a Royal Decree in order to introduce some proportionate differences using the possibility of Article 5.2 of Directive 2004/113/EC.

5 indicates that this principle of equal opportunities will be guaranteed in the access to employment in the private sector, to employment in the public sector and also in self-employment, in vocational training, in professional promotion and in work conditions.

Law 3/2007 establishes a general frame for the adoption of measures of positive action, including any action that aims to correct situations of inequality of women with respect to men. Positive actions may be taken by the public authorities, but also by individual persons, and moreover it is specifically allowed to introduce measures of positive action by means of collective labor agreements to facilitate the effective implementation of the principle of equality of treatment and non-discrimination in working conditions between women and men. In Spain the occupational pension schemes are usually established through a collective labor agreement and from this point of view it could also be possible to take positive action in this field.

The law envisions and justifies a general framework for the adoption of the affirmative actions to achieve the effective real equality between men and women, measures that the Spanish Constitutional Court has supported in its jurisprudence[32]. The Spanish law transmits to all public insitutions a mandate to correct the situations of relevant factual inequality that are not properly amended by the principle of juridical or formal equality. The law contemplates a special consideration to the case of double discrimination and refers to the particular difficulties that women suffer in a situation of special vulnerability because they belong to minorities, are immigrant women, or women with disabilities, a situation that has worsened with the economic crisis in Spain.

The law addresses special attention to correct inequality in the area of laboral relations. According to several measures, the right to reconcile personal, family and work life is recognized. For this purpose the law promotes a greater joint responsability shared between women and men regarding family obligations.

It is remarkable that the Spanish jurisprudence of the Constitutional Court reaffirms the traditional roles of men and women: the mothers should take care of the children and the fathers must dedicate themselves to their work outside of the home. This point of view has been criticized as a sexist position that does not help in achieving the real effective equality between men and women[33].

In the specific decision 128/1987, the Spanish Constitutional Court used sexist criteria to recognize that a social reality exists that is the result of a long cultural tradition in which the women fulfill the majority of the family obligations, in particular the care of

[32] There are several decisions by the Spanish Constitutional Court to which I would like to refer because they are inspired by the goal of promoting de reconciliation beween family life and the careers of mothers in the workforce. The first one is the decision 128/1987, July 16, that has a special significance for the Spanish Constitutional jurisprudence on affirmative actions[32]. The second one is the decision 109/1993, March 25[32]. This case concerned the demand of a male worker against a rule that allowed as a worker's right time off for mothers to nurse their children. This case provoked a great debate that led to amending the Law 3/1989, March 3. This Law extended maternity leave and established special measures to promote the equal treatment of women in the work force, saying as follows: "This leave can be taken equally by the father or by the mother when both of them work". Despite this amendment, the decision of the Spanish Constitutional Court STC 109/1993, March 25, FJ 5º, affirmed that the rule was not discriminatory to men that work. This decision was based on the biological reality and in the necessity to adopt special measures in favor of disadvantaged groups, such as women in the work force. *Ibíd*., FJS 4º and 6º.

[33] In this sense, OLLERO affirms: "the principal disadvantages of the female citizens, as the discriminated gender, can lead to them being put in a box, with the apparent intention to protect them, as though they were in need of tutelage; in reality this will perpetuate a vicious circle of dependency". OLLERO, ANDRÉS.: *Discriminación por razón de sexo. Valores, principios y normas en la jurisprudencia constitucional española*, Madrid, Centro de Estudios Políticos y Constitucionales, 1999, p. 56.

children. Therefore, the Court found that the special measures that try to incorporate into the workforce socially disadvantaged groups are not discriminatory[34].

Even though the distinction is not completely clear between the affirmative actions that do not genuinely protect women and affirmative actions that are constitutionally legitimized, what is true is that "the principle which regulates the existing social relations between the two sexes — the legal subordination of one sex to the other — is wrong itself, and now one of the chief hindrances to human improvement; and that it ought to be replaced by a principle of perfect equality, admitting no power or privilege on the one side, nor disability on the other", in words written by John Stuart Mill[35] more than a century ago, today is still a pending task in Spain, which according to the law 3/2007, requires new legal intruments[36].

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[34] *Ibíd*., F.J. 10º.

[35] STUART MILL, JOHN: *The Subjection of Women*, 1869. Chapter 1. See also STUART MILL, JOHN; MILL, HARRIET TAYLOR: *Ensayos sobre la igualdad sexual*, Cátedra, 2001.

[36] Some of the most important and specific legal norms in the scope of the equality of opportunity between men and women in Spain are the following: L.O. 39/1999, para promover la Conciliación de la Vida Familiar y Laboral de las personas trabajadoras; L.O. 1/2004, de Medidas de Protección Integral contra la Violencia de Género; L.O. 3/2007, para la Igualdad Efectiva de Mujeres y Hombres; L.O. 13/2007, de Prevención y Protección Integral contra la Violencia de Género.

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