The Economics of Discrimination: Equity, Equality and Diversity in the New European Constitution

1. Introduction

The proposed Constitution of the European Union serves a number of purposes. It should describe the mechanics of the governance of the Union. It should provide a concise statement of the purposes and objectives of the Union. Ideally, it should do so in language which gives inspiration to the citizens of the Union. The US Constitution, which achieves all of these, is one of the most important and influential documents in world history.

The US constitution has enduring influence because it was the product, not just of shrewed bargaining between interest groups – although that was important – but also the result of profound debate about the nature of the republic, the values of American society and the functions of a modern state. The development of a European constitution ought to be the result of similar insight and discussion over the description of European culture and European values. The collapse of political negotiations about appropriate governance arrangements may provide an opportunity to begin that wider intellectual debate. This chapter is written in the hope of provoking such discussion in an area in which the draft constitution contains some poorly conceived provisions – that of discrimination and non-discrimination.

A fundamental purpose of a constitution is to distinguish between strategic and tactical issues of policy formation in a democratic society. Strategic issues describe broad objectives; tactical issues concern the means by which these objectives are to be achieved. A constitution which is difficult but not impossible to amend limits the ability of government or legislature to compromise long-term objectives for short-term advantage. It is a mechanism of social and economic pre-commitment (Holmes 1991, 1996).

In this way modern constitutions typically enshrine freedom of speech and prohibit imprisonment without due process. These are not absolute rights and may be overridden in extreme circumstances. But the effect of establishing them as constitutional rights is to ensure that they are not lightly overturned. Restricting such rights requires time, careful consideration, and a wide political consensus. Making judges the defenders of constitutional principles gives them the role of defending broad social goals against pragmatic political pressures. This is one element in the checks and balances characteristic of a society which is both democratic and free.

This is, however, a more limited role than the judicial activism – the positive development of new social and economic policies – which has sometimes, and controversially, been undertaken by the Supreme Court of the United States. It is not a European tradition to follow this approach, and there is little inclination to adopt it: the development of policy is instead the function of democratic political institutions. The assertion of non-discrimination as a principle comparable to freedom of speech and due process is a fundamental mistake, because non discrimination is a value of a quite different kind, and one which requires subjective interpretation. The likely outcome of the process which will follow will not necessarily advance the worthy objectives of those who have advocated measures against discrimination. Their legitimate concerns relate to a disparate group of issues – the elimination of racism, the advancement of women in business and politics, the provision of social support for disabled people, and the creation of a true common market within the European Union. These issues have little in common with each other, save that each is most effectively handled by carefully tailored social and economic policies which are specific to time and place.

If the constitution's reiterated references to "non-discrimination" had purely declaratory force, they would matter little. The potential problem is that they may exclude precisely the specific and pragmatic approaches which are required to meet the underlying objectives. The potential consequence is that

policy is not determined by a political process or a rational assessment of costs and benefits, but emerges from judicial interpretation of the language of a constitutional provision.

Our fear that a principle of non-discrimination will not help and may hinder the search for policies that promote the substantive objectives of the European Union is not a purely theoretical concern. Practical experience of the reunification of Germany provides a clear example and warning. In that country, the political and constitutional imperative of non-discrimination between residents of the former eastern and western provinces has in practice worked against the interests of economic assimilation of the eastern zone. Extending to the east labour legislation and benefits designed for the much richer west put back long-term development goals in the east and imposed substantial economic burdens on the west. The danger is that this specific problem will be replicated in dealings between the existing EU members and the accession states, and that this example will be repeated in many other areas where a legal requirement not to discriminate conflicts with the achievement of widely held social and economic goals.

2. Non-discrimination in the draft constitution

The draft Constitution makes frequent and casual use of the phrase non-discrimination. Article 2 of the draft Constitution – the Union's values – declares that

> The Union is founded on the values of respect for human dignity, liberty, democracy, equality, the rule of law and respect for human rights. These values are common to the Member States in a society of pluralism, tolerance, justice, solidarity and non-discrimination.

Article 3 reiterates that "the Union shall combat social exclusion and discrimination".

But non-discrimination is not a value of the same kind as pluralism, tolerance, justice and solidarity. In fact, discrimination is essential to modern economic life. We discriminate in the students we admit, the friends we choose, the workers we employ, the contractors we hire. We discriminate between people who are guilty of crimes and those who are not. "The word to 'discriminate', once divested of its emotional connotation, simply means to distinguish or draw a line" (Fisk 1976, p.109). What is objectionable is not discrimination as such, but inappropriate discrimination – arbitrary discrimination, invidious discrimination. (Karst [1969], defines and distinguishes these latter terms).

But the question of whether a particular form of discrimination is appropriate or inappropriate is inherently subjective and relative, and it is both proper and inevitable that the forms of discrimination we think appropriate and inappropriate change over time. The forms of discrimination that typically cause most concern – discrimination on grounds of race, gender and sexual orientation – cause such concern precisely because changing social values have led to changes in views of appropriate and inappropriate grounds of discrimination. The distinguishing characteristic of areas of potential discrimination such as race, gender and sexual orientation is that they are ones which have been the subject of recent contention – a century ago, such discrimination was a widely accepted social practice.

We do nothing about discrimination on grounds that most people would think inappropriate but few people have ever engaged in (e.g. discrimination on grounds of star sign or height, or the use of handwriting tests in selecting personnel) or about discrimination on grounds that most people would consider appropriate (e.g. discrimination on the basis of experience or educational qualifications).

A generalised non-discrimination requirement raises some fundamental issues to which answers are not at all obvious. What are the criteria by which appropriate and inappropriate grounds of discrimination are identified? In what circumstances should inappropriate discrimination – by public or private agents – be prohibited? What mechanisms should be put in place to limit inappropriate discrimination? These questions are considered further below.

Discrimination, whether appropriate or inappropriate, may be observed in several ways. The most straightforward is the blatantly discriminatory practice – the sign that says blacks will not be served, the job advertisement that excludes women. Discrimination may be inferred from the difference between the actual composition of a workforce or customer base and the composition of the potential workforce or customer base. Extreme cases are easy to identify, but in many instances the inference of discrimination may be difficult to draw or refute.

Most discrimination cases today are individual cases, in which a single person claims that a particular decision – to dismiss, to not promote, to refuse to serve – was made on inappropriate grounds. The existence of discrimination is not in dispute: it is the basis of discrimination which is at issue. Such cases are inevitably difficult to resolve because the court or other adjudicating body must infer motive from the circumstances of the decision. This is a powerful reason for limiting legal prohibition of discrimination to areas of policy in which urgent social or economic issues arise.

After the very general statement of Article 2, Article II-21 narrows the ground:

1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.
2. Within the scope of application of the Constitution and without prejudice to any of its specific provisions, any discrimination on grounds of nationality shall be prohibited.

The phrase "any ground such as" clearly envisages that the list is not exhaustive, but does not explain the criteria by which other grounds of impermissible discrimination might appropriately be added.

There is a striking contrast between the wide scope and definitive prohibition of Article II-21 and the weak reiteration of similar sentiments in Article III/8:

1. Without prejudice to the other provisions of the Constitution and within the limits of the power conferred by it upon the Union, a European law or framework law of the Council of Ministers may establish the measures needed to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. The Council of Ministers shall act unanimously after obtaining the consent of the European Parliament.
2. Any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment shall be prohibited.

Articles II-21 and III-8 give a clear indication of the intended scope of the declaration made in Article 2 and the objective – to combat discrimination – announced for the Union in Article 3. To understand their economic effects, it is necessary to consider why individuals, businesses and public organisations engage in discrimination.

3. The economics of discrimination

The principal literature on the law and economics of discrimination is found in the United States and inevitably reflects the legal framework there. The central constitutional provision is the Fourteenth Amendment, passed in the immediate aftermath of the Civil War, which declares that no State of the Union may "deny to any person within its jurisdiction the equal protection of the laws". This requirement is limited in extent and relates to government rather than private action: it superseded the notorious Supreme Court's *Dred Scott* judgement of 1857, which upheld slavery in the southern states and was, almost a century later, the basis for the 1954 decision in *Brown vs. Board of Education,* which declared separate school facilities for blacks and whites illegal and began the process of racial desegregation in the United States. The main anti-discrimination provisions of US law, however, are the Civil Rights Acts of 1964 and 1968, which attack discrimination by race and by gender, and the Disability Rights Act of 1990, which follows a similar model.

The economics of discrimination begins by asking why people engage in discrimination and what costs such discrimination imposes – on the person who discriminates, the person discriminated against and on society as a whole. It is conventional to distinguish two broad types of discrimination. Individuals may have what Becker (1957) calls "a taste for discrimination": they are motivated by animosity – dislike of a particular group or of the characteristics of that group. And individuals and organisations may practice statistical discrimination (Phelps 1972, Arrow 1973): selection on the basis of generalisations from the average characteristics of a group that are valid or believed to be valid – such as the use of test scores in student admissions.

These forms of discrimination are often conflated, both by those who practice discrimination and by those who oppose it. Animosity towards a group may be fuelled by (true or false) beliefs about the characteristics of the group, and decisions purportedly based on statistical generalisation may in reality be

dictated by animosity. But many people display animosity without any statistical basis for their prejudices, and many people practice statistical discrimination without any animosity towards those they discriminate against.

This distinction is mirrored in an analysis of the costs and consequences of discrimination. Animosity leads to inappropriate selection criteria – as when the considerations that enter hiring decisions are not those which "fit" the proper purpose of finding the best employees for the job. Such criteria are both over and under inclusive (Tussman and ten Broek 1949) – leading to the appointment of unsuitable members of the favoured group and to the rejection of suitable members of the disfavoured group. Discrimination based on animosity is costly because of this irrationality (in the ordinary sense of the word irrational, rather than in the economists' sense, which normally relates to the maintenance of consistent preferences.)

The costs of such discrimination depend on the competitiveness of the market in which discrimination is practiced (Becker 1957). An individual trader (not based in Canada) who dislikes Canadians and refuses to deal with them imposes modest costs on his or her own business (by diverting a class of potential customers to competitors) and a very small cost on Canadians (who can obtain service or employment elsewhere). And because animosity imposes costs on the person who displays such animosity, it will tend not to survive or grow in competitive markets. The costs of discrimination become substantial only if a systematic pattern of animosity is displayed by many traders in the same market – if, in effect, there is a discriminatory cartel.

As with all cartels, the more effective the cartel the greater the benefits from cheating on it. If animosity towards a particular group is widespread, then traders who do not display such animosity can derive substantial competitive benefits from this behaviour. The practice of discrimination is therefore likely to continue only if other social and commercial pressures are brought to bear against those who deviate from the cartel behaviour. This was indeed the mechanism by which racial segregation in commercial life continued in the United States for many decades (Sunstein 2002, 158) and it also underpinned religious discrimination in many parts of Europe for decades, if not centuries.

Discrimination based on animosity will therefore have significant economic consequences in competitive markets if, and only if, it is associated with deeply and widely held patterns of animosity in society. While there can be little dispute that this was once true of both racial and religious animosity, it is more difficult to argue that such discrimination is common today. As with all economic cartels, once significant numbers of traders defect from the cartel – in this case, no longer feel either desire to discriminate or social pressure to do so – the arrangement rapidly unwinds, as the costs of continued adherence to the discriminatory practice outweigh the benefits.

Discrimination based on animosity is, properly, a particular concern in the public sector, which often holds a monopoly of access to particular functions. And it also raises problems in private sector monopolies also. European competition law recognises the link between the adverse consequences of discrimination and the existence of monopoly and cartels. Case law under Article 82 establishes that dominant firms have a "special responsibility" which means they may not discriminate between customers or refuse to supply without "objective justification": non-dominant firms are free to engage in price discrimination and to supply (and refuse to supply) as they choose (Bellamy and Child 2001).

Statistical discrimination finds such objective justification in data on group characteristics. It would not be possible to conduct business without statistical discrimination. Most decisions about hiring, about promotion, about the choice of suppliers rely at least to some degree on knowledge and experience of general properties of groups rather than specific knowledge of the future performance of the individual or business selected. It cannot be otherwise.

Thus while the reduction of discrimination resulting from animosity yields economic benefits, the elimination of statistical discrimination imposes economic costs. (Norman 2003). Such costs will not arise if the assumptions on which statistical discrimination is based are false. But if discrimination is based on misinformation rather than animosity it can be expected that the provision of valid information will quickly reduce it: legal and constitutional provisions should not be necessary.

Yet the acceptability of statistical discrimination does not hinge solely on the quality of the statistics which underpin it. In the nineteenth century, many – perhaps most – well educated, liberal people genuinely believed that the intelligence of blacks and

females was lower than that of white men, and on the limited evidence before them it was not unreasonable for them to believe this. It is because we know now that these beliefs were false that we are particularly sensitive today to race and gender based discrimination. But no research on the relative intelligences of different groups, whatever its results – and there is persuasive evidence of difference in the nature if not the quantity of male and female intelligences, (see, for example, Baron-Cohen 2003) – would today render racial or gender discrimination admissible. Our concern is that the widespread practice of rational statistical discrimination will lead to the creation, or continuation, of disadvantaged groups.

Statistical discrimination is normally what is at issue in complaints about age and gender discrimination since animosity towards old people or women is rare (in contrast to discrimination on grounds of race or sexual orientation, where animosity was historically widespread). Older people may, on average, be less well equipped to perform certain tasks, but that is not necessarily true of any particular individual. Such an argument does not differ in any fundamental way, however, from the argument that although, on average, doctors may have greater medical knowledge than laymen, this is not necessarily true in any particular case. It is hard to believe, however, that many people would regard provisions which demand medical qualifications from those who perform certain tasks as representing inappropriate statistical discrimination.

Legislative attacks on statistical discrimination must therefore balance the economic costs of its prohibition against the social benefits of anti-subordination (Fisk 1976) provisions which protect the interests of potentially disadvantaged groups. That is why we are untroubled by discrimination against unqualified medical practitioners. The costs of ignoring the statistics and allowing them to practice are potentially large – the costs of the stigma suffered by those excluded seems relatively minor. In other cases, however, the balancing of costs and benefits is more problematic.

Racial profiling exemplifies the issue. In the US racial profiling is sometimes described as the "driving while black" offence (Strauss 2003): it is rational for police confronted with statistics showing that young black men are on average more likely to be involved in crime to question a disproportionate number of young black drivers. Such racial profiling might be motivated by animosity, but this need not be the case – such a policy might well be implemented by black police officers.

The consequences of racial profiling, however, may be to increase the sense of exclusion which leads to the observation that gives rise to it. In general, law enforcement agencies feel required to issue (barely credible) denials that such profiling takes place. In *United States v. Martinez-Fuerte* (1976) the Supreme Court held that the immigration service did not act illegally when officers looking for illegal immigrants from Mexico interned disproportionate numbers of persons of "apparent Mexican ancestry". It is hard to see how the Court could sensibly have reached any other decision. But the consequences of racial profiling are such that it can never be an acceptable public policy.

These are issues with which honest and well-meaning people struggle and on which there are inevitable differences in the balances that are arrived at. And that is why a generalised principle of non-discrimination cannot and should not be, as the draft Constitution asserts, a fundamental European value. Discrimination of many kinds is an indispensable aspect of social and economic life which could not be eradicated even if it were desirable to do so. We should seek to eliminate inappropriate discrimination, but in itself that statement has no content beyond an exhortation to do the right thing. To give it meaning requires a careful, and pragmatic, analysis of the social costs and economic consequences of particular policies. The examples discussed below illustrate both how important, and how difficult, that task is.

4. Areas of non-discrimination

Article III-8 identifies the areas in which the European Union should combat discrimination: sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation, and Article III-18 adds nationality. Article II-21 includes property ownership but this is not reproduced in Article III-18. Political opinion also included in III-18, is perhaps reproduced as "belief" in Article III-18.

There is a certain irony in this list, because the convention which framed the constitution was selected with a view to maintaining a careful balance between

groups on almost all the criteria which the constitution deems as impermissible grounds of discrimination. The tension here is that between two senses of anti-discrimination: anti-discrimination may be defined as blindness to inappropriate distinguishing criteria such as race; or anti-discrimination may be represented as an anti-subordination principle in which society seeks to prevent the emergence of systematic patterns of disadvantage. The classic article by Fisk (1976) elaborates this distinction. The requirements of these two objectives are not the same, and may directly conflict: most clearly in the case of affirmative action (which would appear to be prohibited by the draft constitution, except in the case of gender, for which there is a specific provision in Article II-23). This tension has been a constant source of difficulty in the United States, most recently in the Supreme Court's inconclusive ruling in the case against the University of Michigan.

The inclusion of property in Article II-21, although not III-18, seems to be a mistake. It is hard to imagine that the architects of Article II-21 intended to prohibit residential mortgages, although Article II-21 might appear to have that effect. Property ownership is used extensively by financial institutions as a means of statistical discrimination, for example in credit scoring, and presumably it is not intended that the Article II-21 prohibition should exclude this.

But what then did this provision of Article II-21 intend to prohibit? This illustrates the difficulty of legislating through declaratory principles of this kind. The prohibition is probably aimed at practices such as imposing property ownership qualifications on voting rights, which were once widespread but are no longer. But if it is thought necessary to prohibit discrimination of that kind, it would be better to do so directly. Anti-discrimination provisions are aimed at "inappropriate" discrimination. But outside areas where the motivation for discrimination is animosity – race, and sometimes ethnicity and religion – discrimination rarely takes place unless there are some reasonable grounds for believing such discrimination is appropriate. The rationale for a prohibition must therefore rely on one or the other of two grounds. One is that the criteria employed to discriminate, although *prima facie* relevant, are in fact irrelevant. Statistical discrimination is engaged in, but mistaken. This is a difficult argument to develop where discrimination is a matter of commercial judgment and the trader concerned will suffer financial loss by his mistake. The alternative, and more powerful rationale for anti-discrimination rules is that the criteria of discrimination, although relevant to the provider, have adverse social consequences. That is the issue posed by racial profiling.

Discrimination related to property and property ownership illustrates these problems clearly. Lenders have commercial incentives to make their credit scoring procedures as refined as possible. Their practices are not generally irrational or driven by animosity. But such practices may have adverse social consequences, as in the practice of "red-lining" by mortgage lenders: people in disadvantaged areas find it difficult or impossible to obtain mortgages or other forms of credit. These policies may provoke a spiral of further decline and decay in the areas concerned.

The courts are not equipped to assess the quality of credit scoring procedures, still less to propose strategies of urban regeneration. And the practical consequence of prohibiting red-lining is likely to be a reluctance on the part of major financial institutions to engage in low quality lending at all, rather than the adoption of a policy of indiscriminate lending in such areas.

Credit assessment is an example of an area where policy developed in conjunction with financial institutions with a deliberate objective of tackling anti-subordination offers some prospect of achieving desirable social goals, while a policy of prohibiting statistical discrimination is likely to have opposite effects. The nature of markets characterised by statistical discrimination requires subtle analysis. Gender discrimination in insurance, which is discussed in the next section, illustrates the issue well.

5. Gender discrimination in goods and services

The Commission has recently put forward proposals (IP/03/1501, memo/03 216, November 2003) for a directive prohibiting discrimination by gender in the supply of goods and services. In practice, this directive is about insurance. Other examples cited of markets in which complaints about gender discrimination in the supply of goods and services have been received are trivial. With the exception of insurance, there are proposals for specific exemption of the small group of industries which routinely practice gender discrimination, such as hairdressers, beauty salons, swimming pools and gentlemen's clubs.

Female mortality is lower at all ages than male mortality and in consequence life insurance and annuity rates are lower for women. Some forms of health insurance, particularly permanent health insurance, are more expensive for women, but motor insurance is generally cheaper. This differentiation is particularly marked in the UK, where competition in insurance markets has led to particularly sophisticated risk-based pricing.

Risk-based pricing in insurance markets exemplifies statistical discrimination. The insurer determines premiums using a range of variables correlated with claims experience. The effect of these variables may be causal, but often is not. It is unlikely that gender as such affects the probability of involvement in a motor accident: gender here acts as a proxy for other variables, such as attitude to risk, which insurers cannot measure directly. It is probable that gender does have a direct effect on mortality: however the observed relationship is confounded by the influence of other variables, such as occupation and stress, which are correlated with gender but not directly caused by it. Statistical discrimination is fundamental to insurance: if there were complete knowledge of the determinants of risk, the pooling and sharing of uncertainties, which is intrinsic to the concept of insurance, would be impossible.

The suppression of statistical discrimination leads to the problems famously analysed by Akerlof (1970). A situation where information is known to both parties, but may not be used by one of them, is analytically identical to the situation described in his "market for lemons", where information is available to only one party to the transaction. There is a cumulative problem of adverse selection. People for whom the product is underpriced tend to buy it, and those for whom it is overpriced do not. As a result, the population served is not representative of the market as a whole. This leads to a rise in prices, followed by further adverse selection, driving the better risks out of the market. The overall effect is to reduce demand for the product and in extreme cases the market may disappear altogether.

The degree to which the disallowance of gender as a variable in risk assessment will raise average prices will depend on the extent of adverse selection and the ability of insurers to work around the prohibition by finding alternative proxy variables that achieve the same effect. The effect will be least significant for third party motor insurance, where purchase is compulsory, and the impact of adverse selection correspondingly reduced. It will be larger for products where demand elasticities are relatively high – such as term life insurance (life insurance without a savings component) – or where the insured product can be effectively substituted by non-insurance products, such as uninsured retirement savings. When insurers are not allowed to differentiate premiums between men and women, men will be driven out of the annuity market because they will find the rates that are needed to reflect the greater longevity of women unattractive.

One method of avoiding adverse selection effects is the provision of goods and services to groups rather than to individuals – as when an employer buys coverage for the whole workforce. If group membership is effectively compulsory, the characteristics of the insured population will be closer to the characteristics of the population as a whole. Such group purchasing is common in health insurance, with the consequence that rates for group insurance are substantially lower than the rates for similar cover sought by individuals: in the UK, annuity rates for tax-exempt pension savings (which require the purchase of annuities) are, for similar reasons, higher than general annuity rates (for which adverse selection is a problem). Thus the restriction of statistical discrimination in insurance creates two distinct kinds of market distortion. Insured products become less attractive relative to individual arrangements which can be used to achieve similar outcomes. Among insured products, collective provision is favoured over individual purchase.

The Commission's proposal exemplifies declaratory non-discrimination. It fails to provide any statement of benefits in terms other than the rhetorical. The proposals do not appear to be necessary or useful in tackling either of the general groups of problems which anti-discrimination provisions seek to address – the process irrationality of discrimination driven by animosity or the subordination of disadvantaged groups. And the Commission's assessment of its planned directive contains no substantive discussion of the consequential effects on prices and the demand for affected services.

The attempt to prohibit particular forms of statistical discrimination in insurance raises a broader issue. It is very likely that in coming decades there will be rapid increases in the ability to predict health and life expectancy through the use of genetic informa-

tion. At present, many countries discourage insurers from using the relatively small number of genetic markers – such as those for Huntington's Chorea and breast cancer – which have been identified. Insurers do, however, use other variables for purposes of statistical discrimination – hypertension, which is mainly genetic in origin, is a key variable in life insurance rating.

Existing redistribution from the healthy to the unhealthy and young to old within the insurance systems of member states may therefore be progressively undermined by the increased sophistication of statistical discrimination. Prohibition of statistical discrimination based on genetic factors seems a possible solution – and indeed Article II-21 might be interpreted as having this intention or effect. However, in order to avoid the problem of adverse selection as explained above it is necessary that no one, not even the insurees themselves, can obtain the genetic information. Just preventing one side of the market from using the information would not lead to viable outcomes.

These are difficult problems. It is impossible, however, not to observe the contrast between the subtlety and complexity of issues raised by statistical discrimination in the insurance market and the poor quality of analysis and argument presented in the Commission's proposals on gender discrimination in the provision of goods and services. If Europe is to make good policies in these areas, it needs to be better served.

6. Disability discrimination

Most EU states have for some time had legal provisions to assist disabled people, in the form of measures of social support and assistance in obtaining employment. The widespread use of the term discrimination in this context and the assertion of disability "rights" are relatively recent developments. It appears to result from a belief by lobbyists, initially in the United States, that processes of the kind which had been used against racial and gender discrimination might be used with advantage on behalf of disabled people. The Disability Rights Act, passed in 1990, was consciously modelled on the Civil Rights Act, which had tackled race and gender discrimination.

There is a hierarchy of four levels of disability discrimination:

(i) The most basic is a form of prejudice or animosity, as when employers refuse work to disabled people who are in all relevant respects qualified for the job because they attach stigma to disability in general, or to particular forms of disability.

(ii) The next level is statistical discrimination against disabled people. People with disabilities may, on average, be less effective in a particular role than others, but this is not necessarily true of any particular disabled person: however disability is used as a characteristic to screen applicants.
Discrimination of type (i) or type (ii) results in the unjust exclusion of disabled people from activities for which they are fully qualified. More expansive interpretations of discrimination concern activities for which disability is a genuine handicap.

(iii) It is not enough for disabled peolple to be given the same opportunities if they are not in practice able to take advantage of them. The disadvantages which result may be described as discrimination. This concept of discrimination implies that a form of affirmative action is required to permit equality of outcome. The most familiar example is the provision of wheelchair access to buildings and transport.

(iv) Yet another concept of discrimination demands blindness to disability even when its consequences are objectively relevant. Such a concept of discrimination would prevent the exclusion of physically disabled people from the armed forces, psychologically disturbed persons from positions of responsibility or the learning disabled from advanced education.

This is the ultimate logic of a position which implies that disability is an inappropriate basis for discrimination (and not merely an inappropriate basis) when, as in (i) and (ii), it is objectively irrelevant.

While (iv) represents an extreme position, there is increasing willingness to interpret disability discrimination in this way: the broad idea is that individuals should not suffer disadvantage from actions or events that are not their fault and may therefore be interpreted as disability. UK cases have included examples of successful claims of disability discrimination against a police authority which refused employment to a person suffering from manic depression and by an individual sacked for employment-related misconduct while a psychiatric inpatient (Sayle 2003). Implicit in this approach is that

individuals should not be accountable for their actions if these are the product of an illness, rather than something for which they are culpable.

Measures to combat discrimination of types (i) and (ii) are relatively uncontroversial. While there are costs to the prohibition of any form of statistical discrimination, the cost of expecting an employer to enguire into the specific characteristics of a disabled person seem modest relative to the potential benefits of such a policy in terms of anti-subordination arguments.

Discrimination is not a helpful concept in dealing with issues of type (iv). The distinction between what is culpable and what is not culpable is hard to make, and the underlying rationale would seem to be that misfortune, which is not culpable, should, at least in part, be a shared social concern. But this is an issue of solidarity, not discrimination. By treating it as thelatter, the costs are transferred to the other party of an economic transaction (generally the employer) and in a manner which is likely to arouse resentment rather than reinforce solidarity. There are no evident arguments of equity or efficiency for doing this and the practical consequence is to raise the costs of engaging in any such exchange. As in the other cases cited above, the liability creates a strong incentive to avoid situations which might potentially give rise to such claims – to screen out potentially difficult cases, on objectively defensible grounds, from the beginning.

Complex issues in disability discrimination mainly arise under (iii). In practice, expenditure motivated by this concern seems to have been very substantially directed towards wheelchair users. It is not apparent why this should have priority over assistance to victims of other common forms of disability, particularly deafness and blindness. But the objective of access for wheelchair users is relatively easy to define and monitor, while equality of outcome for those with hearing or visual impairments is incapable of achievement. Priority in expenditure appears to depend on the ease with which a charge of discrimination can be levied.

Thus in this area policy is also shaped by rhetoric and semantics rather than by assessment of the costs and benefits of alternative policies. The Commission's recent report on disability discrimination (European Commission 2003) is remarkable, not only for the absence of information on costs and benefits, but for its lack of concern about this dearth of information. We do not know how many non-institutionalised wheelchair users there are in the EU or in most of its member states. While the costs of providing disabled access in new public buildings is generally relatively small, the cost of providing it in existing buildings may be large, but there is little information on the magnitude of these costs or on how it is divided between public and private sectors. While it is important that some taxis everywhere should be wheelchair accessible, a requirement that all taxis be wheelchair accessible may not be a cost effective means of meeting the needs of disabled people. Ronald Dworkin's (1984) famous phrase describes "rights as trumps", identifying the nature of a right as a claim that is not commensurable with other claims: so the creation of rights precludes discussion of the cost effectiveness of implementing these rights. The exclusion of cost benefit analysis of provisions to assist disabled people is not generally in the interests of disabled people themselves.

Policies on disability are properly the province of solidarity, not discrimination. The claim to rights has force only if there is concomitant willingness to assume obligations and extravagant assertions of such rights, such as those under (iv) above, ultimately undermine the solidarity, which is the real basis of social support for disabled people. A balanced approach to such issues would also recognise differences between member states in willingness and capacity to provide that support. This is not a problem that has an important Community dimension, and provision for disabled people is an issue properly covered by the principle of subsidiarity. In other areas of welfare provision, however, EU level policies are essential: most particularly in relation to welfare provision and the free movement of labour.

7. On grounds of nationality

Economic integration is central to the objectives of the European Union. The accession of ten new states, whose income levels are substantially below the average of existing members, creates significant problems of integration. The goals are clear: the promotion of growth, which will allow the accession countries to converge towards the productivity and living standards that have already been achieved by the EU's other members, and the establishment of the four economic freedoms, including the free movement of labour, defined by the Treaty of Rome.

The best means of achieving these goals, however, require carefully calculated policies. Substantive, rather than rhetorical, non-discrimination requires that economic life in these accession countries is similar to that in the rest of the Union – something which is far from the case at present. This outcome may not be best accomplished by imposing a requirement of non-discrimination on the process of assimilation.

Political and constitutional imperatives imposed a range of non-discrimination requirements in the reunification of Germany. In particular, migration was freely permitted, labour market regulation and social benefits were aligned, and substantial wage convergence was imposed. The effect of these measures taken as a whole was the virtual collapse of tradable goods production in the east combined with a large and prospectively indefinite burden of transfer payments from the west; see Sinn (2002) and EEAG Report (2003, Chapter 3).

The provision by New York City in the late 1960s of a range of benefits on terms more generous than elsewhere in the United States led to an influx of poor people from other parts of the United States. In the early 1970s, the City became technically bankrupt, and these policies were scaled back. The cases of west Germany and New York, taken together, illustrate the incompatibility of the distinct objectives of non-discrimination, subsidiarity, and the economic development of poorer areas.

Non-discrimination provisions of the Constitution relevant to nationality are found in two areas. First, discrimination in conditions of employment by reference to nationality is explicitly prohibited. Second a migrant worker who is an EU citizen may receive benefits in any member state as if he or she were a national of that state.

The impact of migration flows depends on the size of the differentials in income and social benefits across the Union and on the scale of these flows (which is itself a function of these income differentials). The transitional provisions for accession countries allow existing member states to restrict immigration for employment from accession countries for up to seven years and Germany – the largest likely recipient – will impose such restrictions, although the UK will not. (See chapter 5 for details of these provisions.) There will be no restrictions on migration for residence.

As discussed in Chapter 5, cost estimates suggest that the scale of economic migration will be modest (Boeri and Brücker 2000; Home Office 2003). However, there is little comparable historic basis for extrapolation. Heavy reliance is placed on the experience of the Southern accession countries – Portugal, Spain and Greece. But these states were relatively much richer at accession than those that will join in 2004. And while Spain, Portugal and Greece had encouraged outward migration prior to their EU membership, the former Communist regimes had prohibited it. Thus there may be an untapped reservoir of potential migration in Eastern Europe that never existed in Southern Europe. We do not suggest that Western Europe will be swamped by immigrants from the accession states. We do believe that there is simply no way of knowing what the impact of free movement of labour on the economies of either existing or accession members is likely to be, and in these circumstances there should be as much scope as possible for flexible and adaptive policies.

The wages of economic migrants tend to lie between the wages of employees in their home country and employees in their host country (Olson 1996). This outcome is not mainly, or necessarily at all, the outcome of discrimination based on animosity. Some of it arises because of inefficient allocation of workers to jobs in a labour market with which they are unfamiliar. But there are also reasons why such discriminatory outcomes are consistent with an efficient labour market. And workers from accession states have, on average, less developed modern labour market skills and experience than residents of existing member states. More broadly, nationality is a strong proxy for variables such as mother tongue and cultural experience, which are relevant to labour market performance. These correlations are a basis for statistical discrimination by employers. There is likely to be evidence of inferred discrimination when employers use discriminating factors that are not themselves nationality but are correlated with nationality as a basis for selection.

These are not significant issues within the existing EU. To date, income differentials across member states have not been sufficiently large to make it attractive to recruit groups of migrant workers from other states on any substantial scale. After accession, the Union will experience an income dispersion wide enough to create many opportunities of this kind. And hitherto, concern over nationality-based dis-

crimination has largely been confined to explicit policies. But the attack on racial and gender discrimination has moved on from blatant discrimination to inferred discrimination. The same must be expected to happen in relation to statistical discrimination related to nationality if substantial observed differences between the wages of home and foreign EU national workers emerge within individual member states, as they inevitably will.

Economic migration which offers workers from accession states better paid jobs in other parts of the EU imposes costs but also offers significant benefits. Migration stimulated by social benefits available in other states is economically damaging to the state that receives migrants and socially damaging to the state from which they come. The attractions of such migration will be much greater in the enlarged EU than before. Purely social migration in search of benefits is restricted under existing EU legislation by the requirement that the claimant be connected to the labour force, but this is not a overly demanding requirement.

Discrimination by nationality would be a powerful means of restricting social migration if, at least for a period, some of the tax-financed benefits were related to those which would be received in the home state rather than the host state (Sinn 2000). Social migration on any scale will undermine the legitimacy of free movement of persons as a fundamental EU goal and may, as in the New York case, make the maintenance of differing levels of social benefits in different EU states – reflecting both the principle of subsidiarity and the wide range of earnings level across the EU – increasingly difficult to sustain (see Chapter 3 of EEAG Report 2003).

8. Conclusions

We have examined the application of non-discrimination rules in three broad areas of European policy. In each of them, policy will be better if it is made by the careful analysis of costs and benefits in relation to objectives than by the legal application of general principles that sound rhetorically attractive but whose precise meaning and practical consequences are often unclear and must necessarily be the subject of future judicial determination.

We advocate this approach in all the areas in which the draft Constitution asserts the principle of non-discrimination. If it is thought desirable to – for example – abolish mandatory retirement ages or to prevent employers excluding groups of potential workers automatically on the grounds of age; such policies would be better implemented by specific measures than by assertion of a general principle of age discrimination. In the other areas covered by the proposed anti-discrimination provisions we suggest that in general the Constitution should contain non-binding statements of objectives and give the Commission and member states the responsibility of introducing specific measures of implementation. We tentatively suggest that the relevant provisions of the Constitution should be as follows:

- it is an objective of the European Union to combat racism and to promote the development of employment opportunities for women and their access to positions of influence in politics, business and other areas of public life.
- freedom of expression, of religion, of political opinion, and of sexual orientation are fundamental values of the European Union.
- no citizen of the Union shall suffer economic disadvantage through exercising these freedoms, in areas unrelated to the practice or profession of such beliefs (this is an area where some discrimination is clearly appropriate.
- the member states of the Union shall promote economic and social opportunities for disabled people.

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