

Chapter 30

Affirmative Action in the United States and Positive Action in the European Union in the Context of Comparative Law

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ABSTRACT

The concept of “formal” equality is an expression of the Aristotelian principle that “δειν τοις ίσοις ίσον είναι” (“treats like cases as like”). However, formal equality may not be sufficient to provide “equality in practice” or “substantive equality.” The implementation of substantive equality often requires the adoption of compensatory policies or measures designed to correct the effects of discrimination suffered by various population groups in the past or present. Such compensatory measures are known as affirmative or positive action. The term “affirmative action” had its beginnings in the 1960s in the USA, as a response to the racial segregation rooted in the country’s history and still prevalent in that decade. In the European Union, the concept of positive action appeared in the 1970s, and was initially associated with promoting gender equality, and subsequently with “substantive” equality of men and women in the workplace. In this chapter the legislative framework and the case law of the Supreme Court is examined in respect to affirmative action in the United States followed by the corresponding European Union legislation and the case law of the ECJ, attempting, finally, to give a comparative review of the law of affirmative action. This study should help us, through the spectrum of Comparative Law, to better understand not only the concept of social rights but also the different values and different perceptions of the law prevailing in different legal cultures.

INTRODUCTION

The concept of ‘formal’ equality is an expression of the Aristotelian principle that ‘δειν τοις ίσοις ίσον είναι’ (“treats like cases as like”) (Ross, 1957). However, formal equality may not be sufficient to

provide ‘equality in practice’ or ‘substantive equality’ (Barnard & Hepple, 2000; Maniatakis, 1978; Yotopoulou-Marangopoulou, 1998a; Gerapetritis, 2007; Papadopoulou, 2006). The implementation of substantive equality often requires the adoption of compensatory policies or measures designed to

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correct the effects of discrimination suffered by various population groups in the past or present. Such compensatory measures are known as affirmative or positive action (De Schutter, 2007, pp. 759-869). The question of whether this affirmative action is a derogation from the general principle of equality in itself is highly critical. Where such an action is considered a derogation, it is interpreted narrowly (Waddington & Bell, 2001) meaning that the taking of affirmative action is seen as a form of preferential treatment in favor of a particular category of citizens breaching the right to equal treatment of all other citizens (Schiff, 1985). If, however, affirmative action is seen as a necessary means to achieving substantive equality, then it is not only a permissible but a necessary means of securing complete equality within the broader context of the international protection of human rights (Yotopoulos-Marangopoulos, 1998c).

The term 'positive action' in the case law terminology of the European Court of Justice (ECJ), or 'affirmative action' in that of the Federal Supreme Court of the United States (Supreme Court), covers a wide range of measures, some 'rigid' and some 'soft.' 'Rigid' affirmative action pertains to the privileges of the favored groups and has often been described, in the case law of the ECJ or Supreme Court, as 'positive discrimination' or 'reverse discrimination.' It might involve measures, which seek the automatic and unconditional preferential treatment of one population group over another relatively more privileged group, such as, for example, the quotas intended to ensure the appointment or promotion of women less well-qualified for a position than their male counterparts, in order to increase the participation of women in the labour market. An example of 'soft' positive action, on the other hand, would be a job advertisement in which the employer stated it would welcome applications from members of population groups not adequately represented in its workforce (e.g. women) (Bell, 2001, p. 7).

The concept of affirmative action had its beginnings in the 1960s in the USA, as a response to the racial segregation rooted in the country's history and still prevalent in that decade. It was identified largely with reverse discrimination, since the measures adopted in favor of African Americans were often 'rigid' in nature rather than 'soft,' and as a consequence they were seen to impinge on the privileges of white Americans. In the European Union, the concept of positive action appeared in the 1970s, and was initially associated with promoting gender equality, and subsequently with 'substantive' equality of men and women in the workplace. Both EU legislator and the ECJ were influenced in their approach to positive action by the earlier legislation and the case law of the United States. However, European law subsequently expanded the scope of the new concept to take in other population groups suffering from discrimination, while endowing the notion of positive action with a different content to what it had in the American theory and case law. The difference is reflected in the terminology—the use of the terms 'positive action' by the Europeans and 'affirmative action' by the Americans being more than a random linguistic choice. It must be stressed that the use of these different terms reflects different perceptions of the concept of social rights in Europe and the United States.

In this chapter the legislative framework and the case law of the Supreme Court will be examined in respect of affirmative action in the United States followed by the corresponding European Union legislation and the case law of the ECJ, attempting, finally, to give a comparative review of the law of affirmative action. This study of affirmative action in Europe and the USA should help us, through the spectrum of Comparative Law, better understand not only the concept of social rights but also the different values and different perceptions of the law prevailing in different legal cultures. In the area of affirmative action, law is directly involved with both politics and the historical and social evolution of the legal systems under scrutiny.

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