Ms Goldschmidt is it true that you are deaf? That would really help us to meet the quota! Positive discrimination revisited…

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1. Introduction

The principle of equality was the subject of Titia Loenen's PhD,[1] and has remained one of the core themes of her work. Incorporating perspectives from different streams of feminist studies and human rights theory, she made a large contribution to this field. Our common interest here was reflected in many debates we had, mostly agreeing but fortunately also discussing and challenging different points of view. In 1989 I was invited to write a report for the Annual meeting of the Dutch Lawyers' Association (NJV) on 'Positive discrimination', in particular the constitutional aspects.[2] This offered me an opportunity to apply the feminist legal debate on the principle of equality as it developed in the same period, mostly in the US.

Some 25 years after this exercise the debate is still continuing on the obligations emanating from the principle of equality and the obligations of the State to promote *de facto* equality. Therefore, it seems challenging to reconsider some aspects of the views at that time against the background of the legal and actual conditions today.

In this short contribution I do not intend to give a complete academic overview, but I will highlight some issues relating the development of the improvement of the position of (in particular) women to the legal development and proposed new instruments.

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1 Loenen 1992.

2 Goldschmidt 1989.

My focus will be on the situation in the Netherlands, but as Dutch equality law is closely related to the law of the European Union, this will be taken into account where relevant.

2. Positive discrimination in equality law

First of all, there is a great deal of confusion about the terminology: positive action, positive discrimination, preferential treatment, affirmative action and reverse discrimination are used in different, sometimes overlapping, ways by different authors. My contribution deals with positive discrimination or reverse discrimination (I use both terms in the same meaning): this is a temporary measure where members of a disadvantaged group are given priority over the others to achieve *de facto* equality.
Positive discrimination has to be distinguished from positive action. Positive action (which in my view is more or less the same as affirmative action[3]), on the contrary, concerns all, in principle permanent, measures that intend to contribute to more equality, mostly by taking differences into account and/or including different perspectives in the law. Therefore, it is an essential aspect of the positive obligation that States have to promote equality. Positive discrimination or reverse discrimination, on the other hand, is conceived as an exception to the rule of equal treatment by specific temporary measures. This does not imply that these measures cannot be seen as being equally necessary, because positive discrimination aims to accelerate the achievement of *de facto* equality.[4] But they are seen as temporary, not as permanent measures, and demand a specific justification, based on the extent of *de facto* inequality and the availability of candidates.

Positive discrimination is an instrument to address a situation where the number of people from a specific group (e.g. women or the disabled) who are actually hired significantly lags behind the number of qualified candidates from that group. Because the long history of discrimination has persistent consequences even after the introduction of anti-discrimination law, it is

3 See: Bacchi 1996, at pp. 15-17: sometimes positive discrimination can (temporarily) be part of the measures.

4 See also: Freeman 2003.

necessary to allow positive discrimination or reverse discrimination to bring the excluded, disadvantaged groups to equal positions.

Opinions on whether this persisting *de facto* inequality of women justifies a form of positive discrimination or whether positive discrimination is just an 'over-inclusive' measure which amounts to discrimination against men differ, and they have done so since the beginning of the debate on this issue. As a consequence, the first legal measures legitimizing positive discrimination reflected this debate and left the legislators and judges only a very narrow margin of discretion to accept it: national and international legal instruments generally accept this kind of measure, under more or less strictly defined conditions related to proportionality, transparency, and due diligence. Positive discrimination was in practice only allowed when there was solid proof of disproportionate results (in relation to the women qualified for the positions), when men were not altogether excluded, when women were at least equally qualified (giving room for stereotype interpretations of equal qualifications), procedures were strictly temporary and transparent and special circumstances could be taken into account.

The legal debate focuses on these conditions and on the position of women.[5] In particular on the question whether an absolute priority, excluding male candidates altogether during a specific period, is acceptable. At the time I wrote my report in 1989 these types of cases hardly occurred and the general tendency was that preferential treatment should not completely exclude males. Similarly, quotas were not very much supported. The Court of Justice of the European Union and its predecessors reaffirmed these views and the very strict conditions defined by the Court in the cases of Kalanke,[6] Marschall,[7] Badeck[8] and Abrahamsson[9] left the national institutions with little or no room for other interpretations and more effective measures to promote equality in selection procedures.

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5 See also: Goldschmidt and Loenen 2014.

6 Case C-409/95, *Kalanke v Freie Hansestadt Bremen*, [1995] ECR I-03051.

7 Case C-409/95, *Hellmut Marschall v Land Nordrhein-Westfalen*, [1997] ECR I-06363.

8 Case C-158/97, *Georg Badeck and others*, [2000] ECR I-01875.

9 Case C-407/98, *Abrahamsson v Fogelqvist*, [2000] ECR I-05539.

Only in 2012, after some years earlier (in 2006) the so-called Recast Directive[10] had reframed the provision on positive measures '… with a view to ensuring full equality in practice …'(art. 3), did the Dutch National Human Rights Institution, which succeeded the Equal Treatment Commission, use this change as a tool to broaden the scope for affirmative action and allow absolute priority for women in a case where the exclusion of women was very persistent.[11]

The preferential treatment of women is not only allowed as an exception to equal treatment (as it is constructed in the EU legislation mentioned above) but can also be constructed as an obligation emanating from the principle of equality, as codified in article 4 par. 1 of the CEDAW. In both cases, whether seen as an exception or as an aspect of the general obligation, the scope of the measure is the subject of debate.

3. Diffferent approaches and theory

The opinions in the debate on this issue are based on legal and more strategic arguments. The legal aspects were mentioned above: based on the requirements of proportionality and the prevention of the exclusion of others (than the preferred group). In my report in 1989 I referred to the necessity to take the differences in power between different groups in society into account. As some groups ('white male heterosexuals without a disability') can more easily influence the general rules and policies, the general rules and practices reflect the dominant standard. The transformation of these takes time and demands more inclusive institutions where the less powerful groups are participating. These elements related to the impact and implications of male dominance in the public sphere were introduced in the legal debate by feminist legal scholars such as Ann Scales, who argued that 'Disadvantage has a way of replicating and reinforcing itself'.[12] In this view preferential

10 Directive 2006/54/EC of 5 July 2006 on the Implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (OJ L 204 p. 23).

11 Opinion 2012-195 (2012), see also the Comments of Cremers-Hartman and Vegter 2013, at pp. 70-73.

12 Scales 1986.

treatment from a legal perspective is not seen as a measure to compensate past injustice (retrospective) but as a (necessary) step to achieve equality in the future (prospective).[13]

With regard to the legal arguments I emphasized the necessity of proportionality to balance the interests at stake and to do justice.

As mentioned, reasons not to support preferential treatment in its various forms can also be strategic. It seems to be quite common that women who have been appointed as a result of preferential treatment are perceived as not really good enough and certainly less qualified than the best male candidate. 'We need the best candidate for the job' or 'I do not want to be selected because I am a woman but because of my qualifications' are the arguments we often hear. Against this reasoning it is held that 'who has the best qualifications' is not easily established and that the entire selection process is more often than not 'gendered', not because the people involved are discriminating but because stereotyped perceptions play a role, even unconsciously[14] and unintentionally. In this context I am always surprised that we never hear 'never a man again' in cases where a very promising male candidate does not meet the expectations or even fails, whereas in similar cases when a woman was appointed (because of active policies or not), her sex is often seen as relevant for the failure.

Another, and in my opinion a more viable strategic argument against various forms of preferential treatment is that women who are appointed on this basis (in particular when there is strong resistance against the policy) will not receive a fair opportunity, will have to face a hostile environment and every minor mistake will be used to reaffirm that they were not the best candidate. On the other hand, if women get no opportunity at all they lack the possibility to show their qualities.

Yet another argument is that in the case of compulsory preferential policies, this may result in 'downgrading' the qualities of the female candidates to establish the far higher quality of a male candidate (no equal qualifications) or

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13 The (not mutually exclusive) arguments of both sides are summarized by Titia Loenen in her synopsis of the theoretical aspects of the Principle of Equality for students, Loenen 1998, at pp. 57-70.

14 The research carried out at Leiden University by Annelies van Vianen as early as 1987 is still very interesting as it discloses the invisible barriers in a selection procedure: van Vianen 1987.

even to disqualify the women (they do not meet the necessary qualifications): this may also be combined with amending the necessary qualifications during the procedure (e.g. the requirement of a certain amount of publications is changed into 'international' publications or publications in a certain field without a direct relevance to the position at stake). This argument can only be countered by guaranteeing and monitoring the neutrality of the procedures and thus trying to prevent any form of bias. Because this is not an easy task, more absolute forms of preferential treatment or quotas are seen as reasonable options despite the possible negative side-effects.

But when it comes to more absolute forms of preferential treatment such as quotas, other aspects also play a role. Quotas will also have to be proportional, i.e. they have to reflect the under-representation of women (for instance) in proportion to the number of women who are qualified for the specific position. This is not always easy to establish: which statistics are relevant: is the national rate also applicable in a small remote village? And it remains to be seen how quotas are used: do they give real opportunities to the women who need them or do they benefit the minority of women who have already achieved much and desire to have more opportunities? In 1989 when a Dutch University had a quota for disabled staff, I had the 'pleasure' of being welcomed by the head of the Human Resources department after selection by the Faculty: 'Ms Goldschmidt, is it true that you are deaf? That would really help us to meet the quota!'.

Because of all these legal and strategic barriers, in 1989 I supported a proportional approach, avoiding the total exclusion of male candidates and quotas, expecting that the increasing participation of women in (higher) education, the workforce, and the redivision of unpaid work between these well-educated, economically independent women and their partners who would also be happy to develop their other skills would gradually change the landscape. However, persistent social patterns of male and female capacities and roles, and stereotyped expectations, seem to be more difficult to change than I had hoped.

4. The reality after 25 years

Without giving a complete overview of the division of men and women in particular in the areas of work and education which are the areas where the debate on preferential treatment, positive discrimination and quotas usually takes place, some data may clarify the situation today with an emphasis on the European Union (after almost 40 years of equality laws).

In the 2010s new figures have shed an alarming light on the lack of progress in the participation of women in the higher professions, and the persisting gender pay gap. In 2011 the European Network of Legal Experts in the field of Gender Equality published its report entitled Positive Action Measures to Ensure Full Equality between Men and Women, including on Company Boards,[15] which indicates that the gender pay gap remains at 18% across Europe, and women still have a disproportional share of unpaid work and lower participation in paid work than men, even lower when they have 3 or more children: the employment rate for women without children is 75 %, for women with three children or more it is only 54%, against 80%, respectively 85%, for men (p. 2). Women in Europe are under-represented in decision making, only 24% of members of national Parliaments are female, for example.

The World Gender Gap report of 2014 explains that the gender gap now stands at 60% worldwide which means that it has closed by not more than 4 % since 2006. It will take until 2095 to close the gap under similar circumstances.[16] A remarkable feature is the fact that the gap is narrow in the field of education (94%), which also reaffirms the assumption that even an increase in qualified women does not automatically imply that they will have better opportunities. This aspect is discussed over and over again every time the alarming percentage of female professors is reaffirmed: the last monitoring in the Netherlands showed a percentage of 14.8 %.[17]

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15 Selanec and Senden 2012.

16 World Economic Forum, *The Global Gender Gap Report 2014*, available at: reports.weforum.org/global-gender-gap-report-2014/.

17 Monitor Vrouwelijke Hoogleraren 2012, available at: www.lnvh.nl/site/Monitor-Vrouwelijk-Hoogleraren/Monitor-2012.

This gap is also reflected in the Proposal of the European Commission to improve the gender balance on company boards, published in 2012.[18] The low number (13.7 %) of women who occupy corporate seats in the largest listed companies is the reason why the Commission proposes to impose a quota.

5. Behind the facts

These facts compel me to reconsider the optimist expectations of 1989 that increasing the education and participation of women in the public sphere would contribute to the gradual elimination of discrimination. I think that two aspects can explain why this optimism was not realistic. The first aspect lies in the fact that I underestimated how the implementation of laws and policies depends on the laws and policies that dominate the 'field' where they have to be applied. It was at a Conference on Comparative Non-Discrimination Law organised in Utrecht in 1998 by Titia Loenen and Peter Rodrigues that John Griffiths applied his theory on the social working of the law on the Dutch Equal Treatment legislation.[19] He explained that the effective implementation of the law will depend on the resistance of the (labour) organisations where the law has to be applied. Labour organisations, in particular large (multinational) companies, usually constitute a social field with its own, usually well-developed, system of formal and informal rules that apply and are enforced by official and informal mechanisms. Very often these systems of rules are largely incompatible with the demands of anti-discrimination law. For that reason it will be extremely difficult to get the latter laws accepted and even more so to make them also effective in practice. Thus, the enforcement procedures used to implement the equality legislation must take this into account and, by definition, weak instruments risk being ineffective versus the relatively strong internal normative systems. Apart from the necessity to have an adequate implementation system, it is most important to empower the groups, such as women, that invoke the equality

18 Proposal for a Directive of the European Parliament and of the Council on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures, COM(2012) 614.

19 Griffiths 1999.

legislation. It will be important for them to find partners such as social organisations, trade unions or parts thereof to increase the susceptibility of the organisation to the 'imposed' equality legislation.

Another aspect that influences the slow progress in the elimination of discrimination is the endurance and persistence of stereotypes. I mentioned above the research by Annelies van Vianen in 1998, and unfortunately various researchers since then have reaffirmed the fact that unconscious assumptions and barriers are not easily erased.
The persistence of stereotypes is also increasingly related to the case law of the human rights courts in the context of achieving equal rights: Lourdes Peroni and Alexandra Timmer analysed the risk of stereotyping in the use of the concept of vulnerable groups.[20] As Titia Loenen already explained in her dissertation in 1992, substantive equality can only be achieved when the norms themselves which have to be applied equally are really neutral., i.e. not merely reflecting dominant views and patterns.[21] This will require more 'inclusive' concepts, or, from the position of Rikki Holtmaat, 'a different law'[22] and subsequent implementation. As we can now see, it takes more than 25 years to abolish these stereotypes and to change the dominant normative system to become more neutral, to open the eyes of those who have to apply the law to inherent stereotype mechanisms, and to open the various strong social fields that successfully resist the penetration of equality law. This forces me to reconsider my opinion that we do not need quotas, and that a well-balanced, proportional, limited possibility for preferential treatment would be enough to achieve equal opportunities for women (and other less powerful groups) in addition to the effective implementation of non-discrimination law in general.

6. Conclusion: positive discrimination revisted

Some 25 years after my 1989 report on Positive Discrimination I feel somewhat sadder and wiser. Sadder because the optimism underlying my

20 Peroni and Timmer 2013.
21 O.c. Loenen 1992, at p. 266.
22 Holtmaat 1988.

more careful approach to proportionality and avoiding absolute priority or quotas seems to have been denied by the facts. Although I can accept that social changes need time, I cannot accept that we need 80 more years at least to close the gender gap. After all, it is about the fundamental rights of women, and about ALL of the fundamental rights of women because the gap and the stereotypes affect women in all aspects of their lives, including e.g. physical integrity: the Fundamental Rights Agency on gender-based violence repeatedly mentions the relevance of attitudes as both a cause of gender-based violence and as an essential aspect of solving the problem.[23]
Equal rights are essential to achieve human rights; we cannot perceive the unequal participation of women as a violation of the principle of equality only: it is also a violation of the right to work, including equal opportunities and equal pay, the right to education and other rights. This human rights approach entails positive obligations that all possible instruments are used to achieve equality. When, as I must conclude from the facts, the more gentle approaches of proportionality and 'soft' measures do not result in tangible improvements without objective justifications, it is not only justified but even mandatory from the perspective of the progressive realisation of human rights to take more compulsory measures. Thus, I agree with the Dutch National Institute for Human Rights, which has the role of an Equality Body, when it ruled in 2012 that the Technical University of Delft was allowed to adopt a special tenure track programme for women only, considering the enduring gap between men and women in academic positions.[24]
After 25 years I agree that we need preferential treatment in a less committed way and quotas to ensure results that are in accordance with human rights. This also means that the state and other authorities have to ensure that relevant instruments exclude as much as possible concepts that, without further definition, can be interpreted in a typical way (such as 'equal qualifications').
For this and other reasons (the obligation is still not very strict) the proposed Directive on quotas for women (and, surprisingly, also allowing quotas for

23 European Agency for Fundamental Rights 2014.
24 See College voor de mensenrechten, Opinion 2012-195, available at: www.mensenrechten.nl/publicaties/oordelen/2012-195/detail.

men) on the board of companies has been criticized as having only limited added value and many shortcomings. But, on the other hand, it is essential to take at least some steps to achieve more equality as extensively explained by Linda Senden and Mirella Visser, who provide recommendations to improve the Directive that seem to be absolutely necessary to make it effective.[25]

I can only hope that after another 25 years the debate on quotas and preferential treatment will have become a non-issue because we will then have achieved justice and that gender, disability, ethnicity or other grounds that exclude groups will in no way be decisive for the enjoyment of human rights and dignity.

25 Senden and Visser 2013.

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