Being Wary of Categories

Is It Possible to Move Away from Categorisations in Anti-Discrimination Law?

Maria Y. Lee

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I. Introduction

The use of categories such as "race", "gender", "disabled", etc. has been regarded with some suspicion in the humanities for some time.[1] For the category of "race", this unease prompted the UNESCO in 1950 to issue a "Statement on Race Problems" in which it clearly affirmed that race was a social construct: "The biological fact of race and the myth of 'race' should be distinguished. For all practical social purposes 'race' is not so much a biological phenomenon as a social

[1] See e.g. Brubaker: "Whether to count and categorize by race and ethnicity at all; what to count; whom to count; how to count; and how to report the results of counting and categorizing exercises – all of these questions are increasingly contested worldwide"; Rogers Brubaker, 'The Dolezal Affair: Race, Gender, and the Micropolitics of Identity', *Ethnic and Racial Studies* (2015) Vol. 39, No. 3, 414–48, p. 418.

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myth."[2] For the category of "sex" and "gender", Judith Butler led the way with a poststructuralist analysis of these terms in the 1990s.[3] The prevailing view is that identity is "a social construction that has been used to create and maintain subordination"[4].

In contrast to this unease about identity categories, antidiscrimination law fundamentally relies on categories to define prohibited discriminatory behaviour. Wariness about the use of categories and the problems associated with it has led several legal scholars to argue in favour of a move away from the categorical approach in the context of equality and antidiscrimination. Lauren Sudeall Lucas advances a "value-based approach" in connection with the US equal protection doctrine,[5] and Susanne Baer proposes a "post-categorical antidiscrimination law"[6] in a German/European law context.[7] This essay investigates the question whether it is, indeed, possible to move away from categorisations in antidiscrimination law and thereby bases its analysis on US and German/European equality law. The first part of this essay will describe the problems associated with the traditional categorical approach in antidiscrimination law. The second part will examine the two alternative proposals in turn. The third part will analyse the merits and demerits of these proposals. The fourth part will outline an alternative concept based on recognition. And the fifth part contains the concluding remarks.

II. The Trouble with the Categorical Approach

While the legal frameworks of the United States and Germany/Austria are quite distinct and (the judicial interpretation of) some concepts of equality law differ

[2] United Nations Educational, Scientific and Cultural Organization *Statement by Experts on Race Problems* http://unesdoc.unesco.org/images/0012/001269/126969eb.pdf (19 December 2016), 14. For an overview of the conception of "race" and the scepticism surrounding it, see Khiara M. Bridges, 'The Dangerous Law of Biological Race', *Fordham Law Review* 2013 Vol. 82, No. 1, 21–80.

[3] Judith Butler *Gender Trouble: Feminism and the Subversion of Identity*, Routledge Classics (Hoboken: Taylor and Francis, 2007 (1990)); Judith Butler *Undoing gender* (New York, NY: Routledge, 2009 (2004)); Judith Butler *Bodies that matter: On the discursive limits of "sex"*, Routledge Classics (Abingdon, Oxon, New York, NY: Routledge, 2011 (1993)).

[4] Lauren Sudeall Lucas, 'Identity as Proxy', *Columbia Law Review* 115 (2015) 6, 1605–74, p. 1642.

[5] Ibid.

[6] Susanne Baer, 'Geschlecht und Recht: Zur Diskussion um die Auflösung der Geschlechtergrenzen', RZ-EÜ (2014) 1, 5–11; Susanne Baer Chancen und Risiken Positiver Maßnahmen: Grundprobleme des Antidiskriminierungsrechts und drei Orientierungen für die Zukunft http://migration-boell.de/web/diversity/48_2635.asp (15 January 2016).

[7] This has been adopted by Ulrike Lembke, Doris Liebscher, Tarek Naguib, Tino Plümecke, and Juana Remus in their works which will also be subject of this analysis; see III.B.

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significantly, they also share many common themes.[8] Thus, many problems associated with categories can be found across jurisdictions. Even where some problems are specific to a certain jurisdiction, they might serve as a cautionary tale to demonstrate the disruptive potential of categories on our way towards equality.

Amendment XIV Section 1 of the US Constitution states: "No state shall [...] deny to any person within its jurisdiction the equal protection of the laws." Claims for violation of this equal protection clause are examined by the US Supreme Court on the basis of a two-stage test which it has developed. The court first asks whether the government action discriminated against the Plaintiff based on his/her inclusion in a certain "class". It then applies the level of scrutiny attached to that classification to examine whether the government action was justified. Heightened scrutiny is applied to certain classes such as race, sex, national origin, and non-marital parentage. The court will require there to be a compelling or important state interest and that the classification is necessary to serve that interest or that it is substantially related to the achievement of that interest.[9] Thus, with regard to these classes, the court is more likely to find the state action to be invalid, which means that they receive a higher level of protection than other classes which are merely subject to rational basis review.[10]

The origins of this jurisprudence can be traced back to footnote 4 of the case *Carolene Products* from 1938: "[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."[11] The US Supreme Court says that there are certain groups "who are relatively powerless to protect their interests in the political process" and thus require "extraordinary protection from the majoritarian political process."[12] It subsequently developed certain factors to define suspect classes that require such extraordinary protection, including "history of past discrimination, political powerlessness, immutability, and relevance

[8] E.g. disadvantaging someone based on that person's race is wrong. A woman should not be discriminated against at work because of her (potential) pregnancy.

[9] See Michael C. Dorf and Trevor W. Morrison *The Oxford introductions to U.S. law: Constitutional law*, Oxford introductions to U.S. law (Oxford, New York: Oxford University Press, 2010), pp. 143–4; Sudeall Lucas, 'Identity', pp. 1610–6.

[10] Under the rational basis review, the Plaintiff has to show that the state action is not rational; Dorf and Morrison, Oxford, p. 143.

[11] United States Supreme Court *United States v. Carolene Products Co.* 25 April 1938 304 U.S. 144 (1938), 152-153 n. 4.

[12] United States Supreme Court *San Antonio Indep. Sch. Dist. v. Rodriguez* 21 March 1973 411 U.S. 1 (1973), p. 411.

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of the group's defining trait to the group's ability to contribute to or participate in society."[13] Certain classes have then been carved out to represent these four criteria. According to Sudeall Lucas, these classifications serve as a "doctrinal shorthand",[14] ie the Court uses "identity as proxy" for the substantive criteria that apply to particularly pernicious types of discrimination.[15]

Antidiscrimination law of the European Union similarly relies on the use of categories to define unequal treatment that is deemed legally reprehensible. Art 21 of the Charta of Fundamental Rights of the European Union ("CFR") states: "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." Accordingly, Art 19 of the Treaty on the Functioning of the European Union ("TFEU") gives power to the Council to enact antidiscrimination rules: "the Council [...] may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation." And Art 157(3) TFEU accords to the Council and Parliament power to enact antidiscrimination rules with regard to "men and women" in the context of work.[16] Several Antidiscrimination-Directives have been passed on this basis, and all of them prohibit discrimination based on certain categories.[17]

According to Sudeall Lucas, it made sense historically to focus on categories when the law was used to expressly oppress certain groups, such as black people or

[13] Sudeall Lucas, 'Identity', p. 1615 with further references.

[14] Ibid., p. 1619.

[15] Ibid., p. 1641. Note that, broadly speaking, there is a much stronger focus on "identity" and identity politics in the United States than in Continental Europe which traditionally has its focus more on structural analysis. This might account for the choice of terminology ("identity as proxy") by Sudeall Lucas.

[16] „The European Parliament and the Council [...] shall adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value."

[17] See e.g. Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation ; 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 ; Directive 2006/54/EC of the European Parliament and of the Council 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 (recast) .

women and the aim was to combat these group-based oppressive systems.[18] Following this argument, one can say that in order to abolish e.g. race segregation[19] it was necessary to argue that the distinction between groups based on race was contrary to the equality doctrine. Similarly, in order to fight for women's suffrage, it was necessary to argue that withholding the right to vote from women was an impermissible discrimination against the group of women. However, most forms of direct discrimination which overtly make a distinction between different categories are gradually being eliminated and the prevailing form of discrimination nowadays is more covert, i.e. the contested act might be facially neutral but have in fact a discriminatory effect against members of certain groups.[20] Moreover, there are now state acts which expressly distinguish between different groups for benign reasons. Affirmative action measures in US law and positive action measures in EU law, which aim to further equality by supporting traditionally disadvantaged groups, are usually based on categorical distinctions. This can come into conflict with the rather formalistic approach to categories by the courts, as can e.g. be seen in the case *Adarand Constructors Inc. v. Pena*. There, the US Supreme Court held that no distinction should be made between traditionally disadvantaged and privileged groups.[21] This means that affirmative measures that aim to counteract the structural causes of oppression and disadvantage by specifically supporting traditionally disadvantaged groups are in danger of being struck down themselves for being "discriminatory".[22]

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[18] Sudeall Lucas, 'Identity', p. 1616.

[19] Race segregation was upheld in United States Supreme Court *Plessy v. Ferguson* 18 May 1896 163 U.S. 537 (1896) under the "separate-but-equal" doctrine and remained permissible until the landmark case of United States Supreme Court *Brown v. Board of Education of Topeka* 17 May 1954, 1954 347 U.S. 483 (1954), 495 in which the Court unanimously held that " [s]eparate educational facilities are inherently unequal."

[20] See Sudeall Lucas, 'Identity', p. 1617; Christa Tobler *Limits and potential of the concept of indirect discrimination* http://bookshop.europa.eu/en/limits-and-potential-of-the-concept-of-indirect-discrimination-pbKE8108420/ (13 December 2016), p. 24.

[21] United States Supreme Court *Adarand Constructors, Inc. v. Pena* 12 June 1995 515 U.S. 200 (1995), pp. 234–6. See also United States Supreme Court *Regents of the University of California v. Bakke* 438 U.S. 265 (1978), pp. 289–90: "The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal". Sudeall Lucas, 'Identity', p. 1620.

[22] In the context of university admissions programmes, the U.S. Supreme Court held that quota systems were not permitted and that "a university may consider race or ethnicity only as a 'plus' in a particular applicant's file"; United States Supreme Court *Grutter v. Bollinger et. al.* 23 June 2003 539 U. S. 306 (2003), p. 334; see also United States Supreme Court *Fisher v. University of Texas* 23 June 2016 579 U. S. (2016). The European Court of Justice has so far been similarly reluctant to give free reign to fixed quota systems and has defined narrow limits for the permissibility of positive action measures in an employment context. See e.g. CJEU *Marschall v. Land Nordrhein-Westfalen*

The use of categories also furthers and reinforces essentialism, i.e. the attribution of certain characteristics as essential to belonging to a certain group, on a normative level.[23] This fails to take account of the heterogeneity of any group and risks to marginalise sub-groups within those identity groups.[24] If, for example, pregnancy is regarded as an essential characteristic of women, those women who have not been and will not be pregnant – for whatever reason – are at risk of being implicitly devalued as not being "real" women.[25] Sudeall Lucas gives an example of an educational policy that focuses on race which risks to disregard the fact that experiences may vary significantly among descendants of American slaves, those of mixed-race backgrounds and those who have only recently immigrated to the United States[26] The use of categories also raises the question of who is entitled to represent the group at issue and whether there might be sub-groups who are marginalised within the groups. Baer mentions the German Islam Conference[27] in this context, where the issue of who is allowed to speak for whom has been

11 November 1997 C-409/95, 33 where the CJEU required job promotion quotas to apply only to candidates who were equally qualified and to contain a saving clause that ensured that all other criteria specific to the individual candidate were taken into account. See also CJEU *Kalanke v. Freie Hansestadt Bremen* 17 October 1995 C-450/93; CJEU *Badeck u.a.* 28 March 2000 C-158/97; CJEU *Katarina Abrahamsson, Leif Anderson v. Elisabeth Fogelqvist* 06 July 2000 C-407/98; CJEU *H. Lommers v. Minister van Landbouw, Natuurbeheer en Visserij* 19 March 2002 C-476/99.

[23] Baer says in this context: „Die Besonderheit des Juristischen liegt darin, diesen Essentialismus auch noch normativ zu fixieren und Auseinandersetzungen über soziale Konflikte in dieses normative Schema und dann auch in bestimmte institutionalisierte Verfahren zu pressen." Susanne Baer, 'Der problematische Hang zum Kollektiv und ein Versuch, postkategorial zu denken', in G. Jähnert (ed.), *Kollektivität nach der Subjektkritik: Geschlechtertheoretische Positionierungen*, GenderCodes - Transkriptionen zwischen Wissen und Geschlecht (s.l.: transcript Verlag, 2014), pp. 47–67, p. 52.

[24] See Sudeall Lucas, 'Identity', 1621–1622, 1626-27; Baer, Chancen und Risiken. For a more detailed account on the issue of essentialisations and marginalisations of subgroups, see Okin Susan M., Cohen Joshua, Howard Matthew and Nussbaum Martha C. (eds.) *Is multiculturalism bad for women?* (Princeton, N.J: Princeton University Press, 1999). But also note the debate on Okin and essentialism in Alison M. Jaggar, 'Okin and the Challenge of Essentialism', in D. Satz and R. Reich (eds.), *Toward a humanist justice: The political philosophy of Susan Moller Okin* (Oxford, New York: Oxford University Press, 2009), pp. 166–80. On the possible pitfalls of a patronizing essentialist Eurocentricity, see Birgit Sauer, 'Gewalt, Geschlecht, Kultur: Fallstricke aktueller Debatten um „traditionsbedingte" Gewalt', in B. Sauer and S. Strasser (eds.), *Zwangsfreiheiten: Multikulturalität und Feminismus*, Journal für Entwicklungspolitik Ergänzungsband, 2., unveränd. Aufl. (Wien: Promedia-Verl., 2009), pp. 49–62, and Elisabeth Holzleithner, 'Herausforderungen des Rechts in multikulturellen Gesellschaften: Zwischen individueller Autonomie und Gruppenrechten', in B. Sauer and S. Strasser (eds.), *Zwangsfreiheiten: Multikulturalität und Feminismus*, Journal für Entwicklungspolitik Ergänzungsband, 2., unveränd. Aufl. (Wien: Promedia-Verl., 2009), pp. 28–48.

[25] See Elisabeth Holzleithner, 'Intersecting Grounds of Discrimination: Women, Headscarves and Other Variants of Gender Performance', *Juridikum* (2008) 1, 33–6, p. 35.

[26] Sudeall Lucas, 'Identity', p. 1631.

[27] http://www.deutsche-islam-konferenz.de/DIK/EN/DIK/dik-node.html.

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contested from the very beginning.[28]

Furthermore, issues of intersectionality are generally disregarded in a categorical approach where the contested behaviour is analysed along a single categorical axis, e.g. race *or* gender, and intersections of several categories, e.g. race *and* gender, are not recognised.[29] In her seminal article "Mapping the Margins", Kimberlé Crenshaw demonstrated that the discourse on sex discrimination was modelled on white middle class women, while the discourse of race discrimination was modelled on black men. Black women were at the intersection of these two categorical discourses with experiences that differed from those of black men and white women and were therefore not acknowledged as discrimination.[30] European antidiscrimination law also fails to address issues of intersectionality, although it does at least mention at several instances that discrimination might occur on the basis of more than one ground.[31]

Moreover, the formalistic approach associated with categories gives ground to discrimination claims brought by claimants from traditionally privileged groups. An example for this in the United States is the case *Parents Involved*[32] where the School Districts used a student assignment plan based on race to achieve a numerical racial balance in their public high schools. Parents of white students sued under the Equal Protection Clause and the assignment plans were found to be unconstitutional.[33] Similarly, several cases brought before the CJEU were based on complaints by men

[28] Baer, Chancen und Risiken.

[29] See Sudeall Lucas, 'Identity', 1624.

[30] Kimberle Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color', *Stanford Law Review* 43 (1991) 6, 1241.

[31] E.g. Directive 2000/43/EC, Preamble para 14, Art 17; Directive 2000/78/EC, Preamble para 3, Art 19. However, no such mention of multiple grounds of discrimination can be found in the later Directive 2006/54/EC and Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC . For a detailed analysis of intersectionality and EU law see Dagmar Schiek and Jule Mulder, 'Intersektionelle Diskriminierung und EU-Recht: Eine kritische Reflektion', in S. Philipp (ed.), *Intersektionelle Benachteiligung und Diskriminierung: Soziale Realitäten und Rechtspraxis*, 1. Aufl. (Baden-Baden: Nomos, 2014), pp. 43–72; Caroline Voithofer, 'Mehrfach- und intersektionelle Diskriminierung als Herausforderung für den Zugang zum Recht', in S. Philipp (ed.), *Intersektionelle Benachteiligung und Diskriminierung: Soziale Realitäten und Rechtspraxis*, 1. Aufl. (Baden-Baden: Nomos, 2014), pp. 89–102.

[32] United States Supreme Court Parents Involved in Community Schools v. Seattle School District No. 1 28 June 2007 551 U.S. 701 (2007).

[33] Many affirmative action cases are brought by those of traditionally privileged groups. See e.g. Adarand 515 U.S. 200 (1995); Bakke 438 U.S. 265 (1978).

who felt discriminated against women under positive action measures.[34] This stems from the notion that antidiscrimination law is symmetrical in that it protects all groups equally regardless of their history and social status.[35]

Sudeall Lucas also mentions the problem that the law provides pre-determined categories from which claimants are required to choose. This is further aggravated by the fact that the list of categories has little potential of expansion. Kenji Yoshino shows that the US "Supreme Court has formally accorded heightened scrutiny to classifications based on five characteristics – race, national origin, alienage, sex and nonmarital parentage",[36] and that "[a]t least with respect to federal equal protection jurisprudence, this canon has closed."[37] EU law appears to take a similar stance. Even though Art 21 CFR prohibits discrimination on "any ground such as [...]" and therefore provides a non-exhaustive list of possible grounds of discrimination, the enabling provision of Art 19 TFEU upon which several antidiscrimination directives have been passed, provides an exhaustive list. So far, antidiscrimination directives have been passed with regard to race and ethnic origin,[38] gender,[39] sexual orientation, disability, religion and belief, and age only.[40] Those who are not recognised as belonging to one of those pre-defined legal classifications will not enjoy the protection of heightened scrutiny under the US Equality Protection Doctrine or the EU Directives.[41] Doris Liebscher et.al.[42] refer to the *Ossi-case* where a job application was mistakenly returned to the candidate with the handwritten remarks: "- Ossi" and "DDR", clearly indicating that the applicant was unsuccessful because of her East-German upbringing. The Court did not recognise those from

[34] Kalanke C-450/93; Marschall C-409/95; Lommers C-476/99; CJEU Serge Briheche v. Ministre de l'intérieu, Ministre de l'Éducation nationale, Ministre de la Justice 30 September 2004 C-319/03.

[35] See above. See also the symmetrical wordings of Art. 21 CFR, Art. 19 and 157 TFEU. Note, in contrast, para 22 of the Preamble of Directive 2006/54/EC states: "[...] Member States should, in the first instance, aim at improving the situation of women in working life."

[36] Kenji Yoshino, 'The New Equal Protection', *Harvard Law Review* 124 (2011) 3, 747–803, p. 756.

[37] Ibid., p. 757.

[38] Directive 2000/43/EC.

[39] Directive 2006/54/EC; Directive 2004/113/EC; Directive 2010/41/EU.

[40] Directive 2000/78/EC. Note that the prohibitions based on disability, religion and belief, sexual orientation, and age are limited to work-related discriminations.

[41] See e.g. United States Supreme Court *Hernandez v. New York* 28 May 1991 500 U.S. 352 (1991), 371–372 where the prosecutor had used four peremptory challenges to exclude Latino potential jurors, arguing that they would not defer to court translations. The Court held that this was a race-neutral basis and that language was, in this case, not a pretext for race.

[42] Doris Liebscher, Tarek Naguib, Tino Plümecke and Juana Remus, 'Wege aus der Essentialismusfalle: Überlegungen zu einem postkategorialen Antidiskriminierungsrecht', *KJ* 45 (2012) 2, 204–18, 204 and 218.

the former East Germany as an ethnic group and therefore dismissed the claim of discrimination.[43] In a US context, those whose self-identifications do not align with the way they are externally classified, are in effect forced to identify themselves in a manner that is inconsistent with their own identity "in order to benefit from legal protections".[44] Sudeall Lucas mentions those of Middle Eastern descent and Latinos who are categorised by the court as white (regardless of their self-identification or their experiences which resemble those of racial minorities) as examples.[45]

Last but not least, the law itself is part of hegemonic discourse.[46] In other words, the categories adopted by the law are part of the hegemonic discourse that refers to socially constructed categories to subordinate members of certain groups.[47] This means that antidiscrimination law that has as its purpose to combat subordinations bears the paradoxical risk to reify and reiterate those very subordinations by invoking those categories.[48]

All these issues that arise in connection with the use of categories have led to an ever-growing wariness of categories in the law. Antidiscrimination being an area of law that heavily relies on the use of categories has, as a consequence, been the subject of two endeavours to move away from normative categories. The following part will examine these endeavours in turn.

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[43] ArbG Stuttgart *Ossi-Fall* 15 April 2010 17 Ca 8907/09. See also Naguib's reference to a German case where the denial of entry into a night club because the men were "from the Balkans" was not recognised as a prohibited discrimination, since "people from the Balkans" were neither a race, nationality nor ethnic group. Tarek Naguib, 'Postkategoriale ‚Gleichheit und Differenz': Antidiskriminierungsrecht ohne Kategorien denken!?', in S. Ast (ed.), *Gleichheit und Universalität: Tagungen des Jungen Forums Rechtsphilosophie (JFR) in der Internationalen Vereinigung für Rechts- und Sozialphilosophie (IVR) im September 2010 in Halle (Saale) und im Februar 2011 in Luzern*, Archiv für Rechts- und Sozialphilosophie (ARSP) : Beiheft (Stuttgart: Steiner, 2012), pp. 179–94, p. 190.

[44] Sudeall Lucas, 'Identity', p. 1629.

[45] Ibid., p. 1661. This is in contrast to the approach in the EU. In *CHEZ*, the claimant lived in a district which was predominantly inhabited by Roma. This was sufficient for the CJEU to acknowledge the possibility of discrimination on the grounds of ethnic origin; CJEU *CHEZ Razpredelenie Bulgaria AD v. Komisia za zashtita ot diskriminatsia* 16 July 2015 C-83/14. Similarly, the Austrian Supreme Court held that the ascription of membership in an ethnic group by her co-workers meant that the discriminatory behavior was on the grounds of ethnic origin; OGH *Polnische Küchengehilfin* 24 July 2013 9 ObA 40/13t.

[46] Elisabeth Holzleithner, 'Emanzipatorisches Recht - eine queer_intersektionale Analyse', in S. Philipp (ed.), *Intersektionelle Benachteiligung und Diskriminierung: Soziale Realitäten und Rechtspraxis*, 1. Aufl. (Baden-Baden: Nomos, 2014), pp. 103–24, pp. 104–5.

[47] See Sudeall Lucas, 'Identity', p. 1642.

[48] See also Baer, Kollektiv, p. 56. In the context of gender, Martha Minow calls this the "dilemma of difference"; Martha Minow, 'The Supreme Court, 1986 Term: Foreword: Justice Engendered', *Harvard Law Review* 1987 Vol. 101(1), 10–95, p. 12.

III. Moving away from Categories

A. The Value-Based Approach by Lauren Sudeall Lucas

In her article "Identity as Proxy" Sudeall Lucas proposes a return to the substantive criteria which the US Supreme Court had originally formulated in connection with the Equal Protection Clause. Instead of looking into the individual's identity group and the individual right to be treated the same as a person of another group, the focus should be shifted towards the structural causes and mechanisms of oppression. To this end, one should revert to the two substantive criteria which reflect these structural concerns. She calls this the "value-based approach". Under this value-based approach, the claimant would have to show that the nature of discrimination was such that it reflected (i) a history of past discrimination or (ii) political powerlessness.[49]

In contrast to the categorical broad-brush approach, this value-based model requires a case-by-case analysis to ensure that the criteria apply as accurately as possible and that the groups invoked are neither over- nor under-inclusive. Thus, the value-based approach does not abandon the notion of groups or categories as such, but rather allows the claimants to define the group that they belong to, instead of requiring them to choose from a limited number of categories that are predetermined by the court. The shift in focus would be reflected in the arguments of the claimants which would emphasise the discriminatory nature of the contested act by contextualising it in the relevant group's history in a given society.[50] As Sudeall Lucas herself acknowledges, this new model would not necessarily mean that results would differ from the categorical approach, "but the tenor and focus of the Court's primary opinion would surely reflect a different level of engagement."[51]

According to Sudeall Lucas, this value-based model would be more apt to adapt to changing notions and the proliferation of identities in modern society, because it allows claimants to define the groups they identify with themselves. This model is

[49] The other two criteria which were developed by the court (immutability of trait and relevance of the trait to the group's ability to contribute to or participate in society) in contrast, focus on the individual. They are used as an indicator of the extent to which the individual is not responsible for the oppression (but subjected to it without his/her own doing) and to determine the individual's contribution to society – both of which depend on the social construction of identity traits and the meaning and significance those traits are accorded to by society. The criteria of the individual's traits and the individual's contributions to society therefore do not appear to be of much use in trying to escape the pitfalls of individual categories. This is why Sudeall Lucas proposes to focus on the social/structural aspects reflected in the first two criteria only. See Sudeall Lucas, 'Identity', pp. 1637–48.

[50] See Ibid., p. 1668.

[51] Ibid., p. 1651.

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also supposed to address a concern which is peculiar to the US equality doctrine in relation to covert forms of discrimination,[52] which are facially neutral towards suspect categories on the face of it, but have a disparate impact on members of certain categories.[53] Such facially neutral state measures with disparate impact are only subject to heightened scrutiny, if discriminatory intent can be established. I.e. the decision maker must have chosen a certain course of action at least because of its adverse effect upon a certain group.[54] Discriminatory intent serves as an indication that facially neutral measures are in fact covert racial classifications.[55] Owing to civil rights movements and litigations to overrule overtly discriminatory laws and practices, there is less overt discrimination nowadays and more covert discrimination which is more difficult to recognise and prove. "If legislators have the wit – which they generally do – to avoid words like 'race' or the name of a particular racial group in the text of their legislation, the courts will generally apply ordinary rational basis review."[56] Under the value-based approach, there would be no need to establish discriminatory intent in order to obtain heightened scrutiny, because the analysis of the court would be directed at the substantive criteria without the intermediate step of determining the applicability of one of the pre-determined identity categories.[57]

One of the examples Sudeall Lucas mentions to demonstrate how this new model would work in practice is a single pregnant mother who would not claim discrimination as a member of the category of women, but rather argue that the class of single pregnant mothers whom she belongs to has a history of past discrimination or political powerlessness.[58] With regard to affirmative action plans, Sudeall Lucas suggests that the application of the value-based approach would lead policy makers to take account of the heterogeneity within groups and make a

[52] Ibid., pp. 1663–4.

[53] In EU law, these cases would be called indirect discrimination which is defined as: "where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary"; Art 2(b) Directive 2004/113; Art 2 (1)(b) Directive 2006/54EC; Art 3(b) Directive 2010/41/EU; see also Art 2(2)(b) Directive 2000/78/EC; Art 2(2)(b) Directive 2000/43/EC.

[54] See United States Supreme Court *Personnel Adm'r of Massachusetts v. Feeney* 05 June 1979 442 U.S. 256 (1979); United States Supreme Court *Arlington Heights v. Metropolitan Housing Dev. Corp.* 11 June 1977 429 U.S. 252 (1977); United States Supreme Court *Washington v. Davis* 07 June 1976 426 U.S. 229 (1976).

[55] Sudeall Lucas, 'Identity', p. 1664.

[56] Yoshino, 'The New Equal Protection', p. 764.

[57] Sudeall Lucas, 'Identity', p. 1664.

[58] Ibid., p. 1657.

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distinction between "ascendant" blacks with two black parents or a more direct connection to the American history of racial discrimination and multiracials with some black heritage or black recent immigrants. By avoiding the use of "race" as a "triggering factor", affirmative action plans would also be more resistant to constitutional attack.[59] This model could thus address the problems raised by the symmetrical[60] understanding of antidiscrimination law. She also contends that the outcome of some controversial cases might have been different under the value-based approach. In e.g. *Parents Involved*, the white plaintiffs would have had to show that the school allocation policy exacerbated or perpetuated a history of discrimination against white students in the relevant jurisdiction, or that it obstructed or diluted their ability to effectively utilise the political process.[61]

With this value-based approach Sudeall Lucas is proposing a shift in US jurisprudence that strives "for a substantive notion of equality less susceptible to manipulation or distortion."[62] The following section introduces a kindred approach in the European context.

B. Post-Categorical Antidiscrimination Law by Susanne Baer et.al.

Susanne Baer has proposed in a number of essays a post-categorical discrimination law to avoid the pitfalls of identity categories.[63] Ulrike Lembke, Doris Liebscher, Tarek Naguib, Tino Plümecke, and Juana Remus have adopted and are pursuing this model in their works.[64] Under this approach, the analysis is shifted away from categorising the individual towards social processes and interactions.[65] The current categorical approach first and foremost asks which category the claimant belongs to in order to examine whether the claimant was discriminated against. The post-categorical model, in contrast, refrains from categorising the claimant as a first step, but instead asks whether the contested act is racist/sexist/ableist etc. One might perhaps say that this model is more action-focused. In other words, instead of invoking e.g. the category of gender, the law should address gender-specific

[59] See Ibid., 1631 and 1658.

[60] See above Pt. II.

[61] Ibid., p. 1650.

[62] Ibid., p. 1673.

[63] Baer, Chancen und Risiken; Baer, Kollektiv; Baer, 'Geschlecht und Recht'.

[64] Liebscher, Naguib, Plümecke and Remus, 'Wege';Naguib, Postkategoriale; Ulrike Lembke and Doris Liebscher, 'Postkategoriales Antidiskriminierungsrecht?: Oder: Wie kommen Konzepte der Intersektionalität in die Rechtsdogmatik', in S. Philipp (ed.), *Intersektionelle Benachteiligung und Diskriminierung: Soziale Realitäten und Rechtspraxis*, 1. Aufl. (Baden-Baden: Nomos, 2014), pp. 261–89.

[65] See Baer, Kollektiv, p. 63.

problem situations.

The post-categorical approach calls for a clear distinction between the regulatory level and the application of the law. On a regulatory level, no mention of identity categories should be made in the sense that the prohibitions of discrimination should not be defined on the basis of race, sex, disability, ethnic origin, etc. Instead, regulations should prohibit racist, sexist, ableist, heterosexist, linguicist, genetic etc. discrimination.[66] They should provide a normative standard against which a given case would be assessed. The evaluation of the facts of a case takes place at the level of application. Those who are called to apply the law (judges, lawyers, administrators) would be required to take due regard of structural hierarchies in the given jurisdiction/society in order to determine whether the contested action was racist/sexist/ableist etc.[67] It appears that the proponents of this approach intend the list of types of discriminatory behaviour to be open-ended, i.e. that other types of discrimination in addition to sexist, racist, ableist, and religious/belief-based discriminations might be included.[68]

With regard to positive action measures under the post-categorical model, Baer says that e.g. assessment criteria for qualifications could be designed to make allowances for childcare duties and care for close relatives. This would acknowledge and duly reflect the fact that there are, indeed, men who take on such care duties and that there are women who do not have such commitments.[69] Naguib says that the Swiss case of the disabled child that was denied schooling in a mainstream school[70] might not necessarily be decided differently under the post-categorical approach, but the focus of the analysis would be different. While the first question under the traditional categorical approach is about the disability of the child, a post-categorical analysis would first determine that the failure to integrate the child raised the presumption of a *de iure* infringement of the child's welfare. As a second step, it would examine what was *de facto and in concreto* required for the integration and

[66] Ibid., p. 63; Liebscher, Naguib, Plümecke and Remus, 'Wege', pp. 217–8; Lembke and Liebscher, Postkategoriales, pp. 283–4.

[67] Liebscher et. al. suggest that the prohibition on the regulatory level could be supplemented by a definition of "discrimination" in an explanatory memorandum („Gesetzesbegründungen"). I.e. some guidance on the interpretation could be offered in legally non-binding supplementary materials to the statutes to assist the judges in their application. Liebscher, Naguib, Plümecke and Remus, 'Wege', p. 218.

[68] Liebscher et. al. propose an open-ended formulation of a regulatory prohibition: "Diskriminierung, insbesondere rassistische, sexistische, ableistische, heterosexistiche, linguizistische, genetische Diskriminierung und Diskriminerung anknüpfend an Lebensalter und Religion (etc.) ist unzulässig." Ibid., p. 218

[69] Baer, 'Geschlecht und Recht', p. 10.

[70] BGE 130 I 352.

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whether that would require a disproportionate effort or would be a disproportionate infringement on third party interests. This would emphasise the inclusive character of society and stress the acceptance of all individuals on the basis of their simple "being" and "suchness".[71] Similarly, a post-categorical examination of the Ossi-case[72] would not need to concern itself with the question whether "East Germans" constituted an ethnicity or not, but would enquire whether there was a socially relevant East-West-disparity that was discursively and structurally embedded in German society.[73]

IV. Merits and Demerits of the Proposed Models

A. General Remarks

Both the post-categorical and the value-based approach attempt to move away from pre-determined, rigid categories in order to be able to capture the complexity of society and the continuously changing nature of discriminatory processes.

The value-based approach continues to refer to "groups" or "categories" as a reference point, albeit no longer as an analytical short-cut, but embedded in the definition of the substantive criteria. And those groups may be defined freely by the claimants themselves, thereby avoiding or at least mitigating many of the problems associated with the existing pre-determined classifications. The post-categorical model, in contrast, would avoid categorisation of the claimant on the regulatory level completely and instead use regulations that describe and prohibit reprehensible processes and interactions. One could perhaps say that the post-categorical model is an attempt at changing our thinking through the use of language at a normative level and is therefore the more "radical" of the two new models.

The value-based approach examines actions on the basis of substantive criteria derived from judicial precedents and thereby provides some sort of guidance to the judges. It is rooted in the values developed in the existing judicial framework which might lower the threshold for the courts to make the proposed shift. The post-categorical model, in contrast to the value-based approach, needs to develop definitions of the reprehensible and prohibited behaviours to begin with. It appears that the judges, lawyers, and administrators would be expected to formulate and recognise racist/sexist/ableist etc. behaviour themselves in applying the law.

Both proposed models require adjustments to our way of thinking about

[71] „Da- und Sosein"; Naguib, Postkategoriale, p. 192.

[72] See Pt. II above.

[73] Liebscher, Naguib, Plümecke and Remus, 'Wege', p. 218.

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antidiscrimination law. Yet the extent of adjustment appears to be greater with the post-categorical approach which aims to change the way we think about the very concept of "discrimination" by forsaking on the regulatory level the use of categorisations altogether and instead adopting language that describes interactions. The aim is to re-signify categories which are recognised as effective means to describe social hierarchies and ascriptions, but whose ontologising and solidifying qualities are reflected upon.[74] The post-categorical approach very much relies on the judges to be open, flexible, and enlightened in matters of historically grown social hierarchies, the pitfalls of essentialism, intersectionality and the fact that the law itself is part of hegemonic discourse. Yet the same might be said about the value-based approach, if only to a lesser extent, because it relies on substantive criteria which have a basis in the US Supreme Court's own jurisprudence and which already refer to historically grown social hierarchies.

B. Reasons Behind the Use of Categories

On a more fundamental level, the question arises whether the open-ended nature of the list of types of discrimination would allow an endless proliferation of prohibited discriminations and, taken to its logical end, dilute antidiscrimination law down to a general equality principle ("allgemeiner Gleichheitsgrundsatz"). The threshold for fulfilling a general equality principle would be much lower (rational basis review under US law, *Willkürverbot* under German law) and therefore actually run counter to the aims pursued by both new models. Under US equality law, the rational basis review merely requires the law or policy to be rational and thereby grants substantial leeway to the law and policy makers in making their decisions which are essentially political in nature. The court merely asks whether the law or policy is rational, i.e. "[s]o long as the court can imagine a state of facts that would render the challenged law or policy rational, the challenge will fail."[75] This deference towards the political decisions made by those who were democratically elected for the very purpose of making those decisions is a vital and necessary feature of any democratic system that subscribes to the principle of separation of powers.[76] It conversely means that claimants are not afforded much protection through the rational basis review in court. The idea behind this is that the claimant's interests in that regard should be represented by the democratically elected legislator. This does not apply quite so nicely to vulnerable groups. For

[74] Ibid., p. 217.

[75] Dorf and Morrison, Oxford, p. 43.

[76] The degree of deference, admittedly, appears to vary across democratic systems and may shift over time. See Theo Öhlinger, Harald Eberhard and Öhlinger-Eberhard *Verfassungsrecht*, 10., überarb. Aufl. (Wien: Facultas, 2014), p. 339

vulnerable groups who are defined through their political powerlessness[77] which entails an underrepresentation of their interests in and through the political process, being merely subject to the rational basis review would result in a protection gap where neither the political/legislative nor the judicial process would afford relief. The creation of stricter levels of scrutiny for traditionally underrepresented groups and politically powerless groups fills this gap.

The German constitutional court has developed a proportionality test with a sliding scale to examine the fulfilment of the *allgemeine Gleichheitssatz* in Art. 3(1) German Basic Law (general equality principle). The degree of judicial scrutiny depends on the degree of unequal treatment. Distinctions based on personal characteristics, such as age, level of education, family status, religious, sexual orientation have to fulfil a higher threshold of proportionality which will be raised even further in accordance to the degree to which such characteristics are not at the individual's disposal or to which they converge towards the categories mentioned in Art. 3(3) German Basic Law. At the lower end of the scale of scrutiny, the general equality principle is reduced to a prohibition of arbitrariness (*Willkürverbot*) which merely precludes actions for which no reasonable ground arising out of the nature of the matter or other obvious reasons can be found to justify them.[78] Similar to the rational basis review under US law, this leaves substantial leeway to the legislator to regulate matters as they see fit. Removing categorisations based on personal characteristics from the equation, as is suggested by the post-categorical approach, would therefore bear the risk of entering the realm of the general equality principle at its lowest level of scrutiny, thereby according little protection to those who are traditionally regarded as lacking the social power to advance their interests in the political sphere.[79]

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[77] See the definition of Carolene Products 304 U.S. 144 (1938), fn. 4, above Pt. II.

[78] See Volker Epping, Sebastian Lenz and Philipp Leydecker *Grundrechte*, Springer-Lehrbuch, 6. Aufl. (Heidelberg: Springer, 2015), pp. 386–98.

[79] The Austrian equality principle comes with its own set of peculiarities. It requires equal treatment of what is essentially equal (*wesentlich Gleiches*). The answer to the question of what qualifies as "essentially equal" is historically contingent and dependent on the particular context. It depends on the value choices made. And here the issue arises of who makes these value choices. Öhlinger criticises that those value choices are in fact political decisions and that the Austrian Constitutional Court, under the prevailing interpretation of the equality principle, is given power to "correct" the political decisions made by the democratically elected legislator. It raises the concern that decisions which should rather be made by the people through their democratically elected representatives might be replaced by what judges deem to be the correct interpretation of the law. Öhlinger, Eberhard and Öhlinger-Eberhard, Verfassungsrecht, pp. 339–41. See also Alexander Somek *Rationalität und Diskriminierung: Zur Bindung der Gesetzgebung an das Gleichheitsrecht*, Springer Rechtswissenschaft (Wien: Springer, 2001), pp. 257–73 who elaborates on the necessity of mutual self-restraint of the legislative and the judiciary. Pöschl, in contrast, does not appear to share this

It follows that being dependent on the general equality principle alone would expose vulnerable groups to the risk of falling into a protection gap due to the greater freedom of the legislator to make policy decisions. The concern is that vulnerable groups lack the political power to assert their interests through political processes.[80] Where the balance of power is in danger of being disrupted, there should be forces to counteract this imbalance. There is not *the* one ultimate force, but several instances that contribute to the re-establishment of the equilibrium. The individuals who constitute the people in a given democratic state communicate and assert their interests at multiple levels including *inter alia* collective legislative and individual administrative or judicial procedures.[81] And it follows that there is not just one instance of vulnerability at either the political or the judicial level, but several instances of vulnerability that correspond to the multiple levels on which diverse interests are being asserted and furthered.

With the value-based approach in US law, the categories used by the judiciary would be replaced by the substantive criteria. Those cases that fulfil the substantive criteria would be subject to heightened scrutiny. The substantive criteria might prevent a dilution of antidiscrimination law and preserve the balance of power. The post-categorical approach would replace the categories on the regulatory level with normative definitions of discriminatory behaviour. Whether or not the balance of power will be affected depends on the quality and application of those definitions. Well-formulated definitions of what sexism, racism etc. mean that are also implemented wisely and sensitively, would appear to be an effective stop on the

concern, as she says that the Austrian constitutional court examines under the *Gleichheitsgebot* whether the contested act conforms to principles and rules which emanate from the equality clause itself. See in particular Magdalena Pöschl *Gleichheit vor dem Gesetz*, Zugl.: Innsbruck, Univ., Habil, 2004 (Wien: Springer, 2008), 274, 879-896.

[80] In the context of the Austrian general equality principle, the problem arises at the seemingly opposite end. There, we would enter into the realms of the test for *Sachlichkeit* which arguably affords the courts greater freedom at the expense of the legislative's room for manoeuvre. The concern is that members of vulnerable groups would be at a loss without the "support" of collective normative guidance to the courts. (Under the current system, normative guidance in the form of categories is being provided by e.g. Art 7(1) and (2) Austrian B-VG, Art 1(1) Austrian BVG-Rassendiskriminierung; Art 3 Abs 3 Satz 1 German GG; Directive 2000/43/EC; Directive 2000/78/EC; Directive 2004/113/EC; Directive 2006/54/EC.) Comparing the equality principles of the United States and Germany on the one hand and that of Austria on the other hand, what appears as the problem at one end is regarded as the solution at the other end, because the ultimate aim is to achieve a balance of power which is essential for any healthy democracy. Thus, in either of the two seemingly contradictory cases, a counterbalance is introduced. At one end (in the United States and Germany), the use of categories by the court offers heightened scrutiny and thereby a higher level of protection to vulnerable groups. At the other end (in Austria), the use of categories on a normative level gives guidance to the court in deciding cases involving members of vulnerable groups. The two new models now propose to make do without the categorical counterbalance.

[81] See Pt. V below.

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slippery slope towards the general equality principle and thereby maintain the equilibrium.[82] And here it becomes clear that the main challenge of the post-categorical approach lies in its reliance on the persons who are called to implement the law. In an ideal world, judges, lawyers and administrators would already be sensitive to social hierarchies and circumvent the pitfalls of essentialism, and the problems associated with the categorical approach would not exist. Expecting these same persons to develop the required flexibility and insight to define[83] and apply a neutrally formulated prohibition that circumscribes discriminatory behaviour might perhaps appear somewhat optimistic.

Furthermore, the potentially endless proliferation of types of discrimination which is inherent in both new models also raises the question if there might be some sort of rule or logic underlying the selection of and limitation to certain categories in the current system of antidiscrimination law and how this might be reconciled with an open-ended catalogue of protected types of discrimination. Looking at the traditionally protected categories of race/ethnicity, sex, religion/belief, and disability, what they appear to have in common is a sense of oppression due to a characteristic which is deemed more or less immutable[84] and which is recognised as forming part of a person's core identity. Western democratic societies have decided that these characteristics ought not to be relevant in deciding if and to what degree an individual could and should participate in, contribute to and benefit from social life. To a certain extent, this imposed irrelevance of certain traits may override rational considerations of private actors, i.e. non-state actors such as employers or providers of goods and services.[85] Society makes a value judgement here. The point of departure is an ideal image of society where all have the equal opportunity to self-realisation. To this end, we need to remove obstacles and at the same time impose

[82] „[...] gibt gleichzeitig einen Rahmen gegen beliebige Entgrenzung in Richtung eines allgemeinen Gleichheitssatzes vor." Lembke and Liebscher, Postkategoriales, p. 284.

[83] It is not entirely clear whether the definition of what constitutes racist/sexist/disablist etc. behaviour would be included in the regulations, supplemented in explanatory memoranda to the regulations, or be defined freely by the judges themselves. See also Note 67 above.

[84] "Immutable" is understood here in the sense that certain opinions, traits or stances may be regarded as sacrosanct in a free society; Alexander Somek, 'Gleichheit und politische Autonomie', in F. Bornmüller, T. Hoffmann and A. Pollmann (eds.), *Menschenrechte und Demokratie: Festschrift Georg Lohmann* (Munich: Alber Verlag, 2013), pp. 207–24, p. 218.

[85] E.g. purely rational business considerations might call for a service provider who caters to racist and/or sexist customers to discriminate against ethnic minorities and/or women when hiring staff. Society makes the value judgement that this *private* employer should bear the responsibility to correct the collective structural causes of discrimination. It assigns the task of bearing the collective societal responsibility to the private employer.

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limits.[86] Yet *which* obstacles should society remove for the individuals? Stereotypes and bias against the traditionally protected categories are recognised as "worthy" of society's special attention. But what about the unattractive, the obese, the academic low achievers, the intellectually challenged, the less talented, or the less eloquent? Would it not be fair to say that they, too, are disadvantaged and/or are politically powerless and therefore deserve to be protected through heightened scrutiny or a definition of discrimination that includes them? Let us consider just one of the examples, academic achievement, to very briefly demonstrate the complexity of the value judgements that need to be made. The prospects of a child's academic achievements are still to a large extent dependent on their parents' socio-economical and academic status.[87] One might therefore argue that this could be regarded as an immutable[88] trait worthy of special protection. Attempts to grant the academically disadvantaged access to universities via quota systems[89] or a system of free access to universities (*freier Hochschulzugang*) might be seen as an attempt to remove the obstacles associated with it. However, quota systems that are struck down by the courts and the introduction of entrance exams [90] indicate an unwillingness to recognise low academic achievement as a characteristic to be protected from discrimination. This unwillingness might stem from the idea that this characteristic is subject to one's own responsibility or that the obstacles should rather be tackled at the structural level of the welfare and school systems. Either way, it bespeaks an unresolved tension between individual responsibility on the one hand and collective societal responsibility on the other.

The question of how to resolve this tension, of who bears which responsibility to

[86] If a person's self-realisation were e.g. to include the killing and eating of people, this would need to be curtailed.

[87] Education at a glance 2015: OECD indicators (2016), at 78-91.

[88] It may by some be regarded as "immutable" in a wider sense that the individual has been marked by (early) childhood influences to a degree that does not allow for much effective counter-action by the individual.

[89] See n.22 above. See also the ongoing debate surrounding the universities of Oxford and Cambridge for their failure to increase their number of students from state schools. Daniel Boffey, 'Oxford and Cambridge condemned over failure to improve state school access', Guardian 12 December 2015; Anthony Costello, 'How to loosen the grip of independent schools on Oxbridge?', Times Higher Education 25 February 2016.

[90] For a list of university courses with numerus clausus in Germany see Hochschulkompass *Studientyp: beides Zulassungsmodus: Örtliche Zulassungsbeschränkung, zwingend mit NC* https://www.hochschulkompass.de/home.html (10 February 2017). Medical universities in Austria require the passing of an entrance exam; Medat *Aufnahmeverfahren Medizin* https://www.medizinstudieren.at/ (10 February 2017). See also e.g. the list of entrance exams at the University of Vienna at univie.ac.at *Aufnahme- und Eignungsverfahren an der Universität Wien* http://aufnahmeverfahren.univie.ac.at/home/ (10 February 2017).

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what extent is inherent in each and every one of the contenders for protection. The answer is contingent on society itself. There are no hard and fast rules, but only controversial public discussions, careful balancing of interests, and political compromises that must, however, ultimately be based on the constitutional principles and the core concern of antidiscrimination law: to ensure equal freedom and dignity.[91] In short, there is no unreservedly clear solution to the question of who should benefit from the special protection of antidiscrimination law.[92] By removing categorisations and opening up the catalogue of protected types of discrimination, judges would be expected to arrive at clean-cut decisions on these multifaceted, complex, and, ultimately, political issues. In fact, this is already the case with the US Equal Protection Doctrine where the characteristics requiring heightened scrutiny were developed by the US Supreme Court itself and may partly account for the court's reluctance to expand that list. The post-categorical approach would appear to almost entirely rely on the judges to make the "right" decision. This, of course, comes with the reservations already mentioned above (lack of democratic legitimacy and over-reliance on the judges to be sage). It also raises the question of optimal decision-making. The courts decide on concrete contentious matters. Despite the need for some degree of abstraction, their decisions emanate from and are based on concrete facts of a given case; the basis is a narrow one. Law and policy makers, on the other hand, are called to formulate rules that become generally applicable and therefore draw on broader, more comprehensive and, arguably, more future-oriented facts and considerations. One might therefore be inclined to say that the law and policy makers are better placed to decide on complex and contentious issues involving fundamental value judgements of a given society.

One more aspect in connection with the reliance on the judiciary should be mentioned only briefly for the sake of completeness. It is the notion of continuity which is inherent in any court decision. Continuity describes the idea that a court that settles a particular matter brought before it is embedded in a continuous chain of precedents emanating in the past and reaching well beyond it into the future, impacting on court decisions yet to come. It will invariably look at past decisions on similar matters to either confirm and apply the findings of those past cases to the present matter or distinguish the facts to arrive at a different conclusion. While the concept of *stare decisis* may only be regarded as constitutive of the common law

[91] Let us assume for a moment that this is at the core of equality law. For an in-depth philosophical discussion of the core principles of discrimination law, see Hellman Deborah and Moreau Sophia (eds.) *Philosophical Foundations of Discrimination Law*, Philosophical Foundations of Law (Oxford: OUP Oxford, 2013).

[92] See also Pt. V below.

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legal systems, referring to and applying precedents is nonetheless an integral part of any court's decision making process, including those in civil law systems.[93] It is contended that this notion of legal continuity accounts for a "conservative" impulse, a tendency for the courts to revert to what it considers well-tried and familiar. Requiring the courts to move away from a categorical approach might, viewed from this perspective, be regarded as somewhat of a challenge. It may be an advantage of the post-categorical model that it radically removes the problematic categories from the regulatory level and thereby prescribes a discontinuity in the chain of precedents. This interference which emanates from the regulatory level may potentially be more efficacious than one which attempts to instigate change from within the judicial level (as is the case under the value-based approach).

C. Displacement of the Problems

Having said all that, both Sudeall Lucas and Baer et. al. accurately and justly identified the risk of stereotypes and essentialisms being normatively reified through the use of categories. Still, I think that it could be argued that this risk is not unavoidable under the current categorical system. One could argue that it is, indeed, possible to interpret "gender", "race", "ethnicity" etc. in broader and more nuanced ways. Maybe it is possible to achieve all those aims, which are being pursued through the value-based and post-categorical proposals, under a categorical system. The situation in the United States might admittedly be special in the sense that the US Supreme Court has repeatedly shown a firm reluctance towards adopting a more flexible approach, which is why shifting the focus on the substantive criteria might actually be a much-needed impetus for change.[94] The invocation of the substantive criteria which were developed by the Court itself might promote its willingness to adjust its approach.

The post-categorical model, on the other hand, has no immediate basis in the jurisprudence of the courts, which means that the shift required of the courts is a greater one. Moreover, it bears the risk of making discrimination less visible in a certain sense. To illustrate this point, let us take the example of defining qualifications in a work context. Baer identifies the stereotypical expectation that women assume more family care duties as a gender-specific problem situation.[95]

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[93] For an analysis of the similarities and differences between common and civil law in this regard, see Somek, Rationalität, pp. 69–77.

[94] See Pt. II. above.

[95] She says that a possible post-categorical formulation of positive action measures would provide for times of parental/care leave to be rated positively in assessing qualifications in a work context; Baer, 'Geschlecht und Recht', p. 10.

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Following from this, one could post-categorically prohibit discrimination on grounds of actual or anticipated care duties for close family members. If an employer then hired or promoted the male candidate and the female candidate wanted to claim discrimination, the employer could argue that men, too, could have children and take their care duties seriously and thus take time off work; the "risk" of potential care duties were the same with both candidates and therefore no discrimination had taken place. It would then be – paradoxically, one might say – upon the female candidate and the judge to invoke the stereotypes and essentialisms attached to the category of "women" to examine whether the employer's act was discriminatory or not. The problems associated with the use of categories are merely shifted from the level of regulation to the level of application. In order to demonstrate that the contested act was in fact stigmatising, discriminatory, and marginalising,[96] it is necessary to invoke and argue on the basis of the very stereotypes and essentialisms one intends to overcome – the only difference being that it is now done at the level of application instead of regulation.[97] In this sense, a better term to describe the post-categorical approach might be "neo-categorical" as proposed by Nikolaus Benke.[98] Baer et. al. stress the importance of norms on a symbolic level which is why they propose to avoid categorisations on the normative level.[99] The contention that the normative (i.e. regulatory) level is important on a symbolic level is undoubtedly true. It is, however, equally true that norms which are formulated with great sensitivity and care are not sufficient in themselves. They require in addition a judiciary that is capable and willing to recognise the structural causes of discrimination.

It has been shown that a move away from categorisations entails the risk that fundamental value judgements which should be the result of political discourse are surrendered to the judiciary. Moreover, the problems associated with the categorical antidiscrimination law might arguably be merely relocated from the level of regulation to the level of application – more so with the post-categorical model and to a lesser extent with the value-based approach. There might also be a risk that

[96] „Diskriminierungen im Sinne des Rechts sind demnach Stigmatisierungen, Benachteiligungen und Ausgrenzungen von gesellschaftlicher Teilhabe und Anerkennung, die auf historsch, strukturell und diskursiv verfestigten Ungleichheiten beruhen." Lembke and Liebscher, Postkategoriales, p. 284.

[97] See also Berger and Zilberszac on their assessment of the post-categorical model. They question how one could develop an argument about who is affected in what way from such expectations without again perpetuating re-essentialising assumptions. Christian Berger and Nicole Zilberszac, 'Feministische Rechtskritik: Was ist, was soll, was kann ›Geschlecht im Recht‹?', *Forum Recht* (2016) 3/16, 94–8, p. 97.

[98] See Ibid., p. 97.

[99] Baer, 'Geschlecht und Recht', p. 8.

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discrimination is made even less visible. It follows that we need to look further for an alternative approach.

V. Recognition

It has so far been established that an alternative approach that avoids the pitfalls associated with categories cannot abandon the concept of categories altogether. Categories are indispensable in order to address the effects of structural disadvantages and essentialist ascriptions. Indeed, even the value-based and the post-categorical models cannot help but rely on "groups" or "categories" in some form to define and analyse discriminatory processes. It is contended that the categories could be retained at the level of both regulation and application, if a broader understanding of the respective categories were adopted. This may be described as a concept based on recognition.

The point of departure for a model based on recognition is Judith Butler's concept of gender. Butler uses the notion of a hegemonic cultural matrix in which sex, gender, sexual practice, and desire have to align in a certain way for coherent and continuous gendered beings to emerge. This matrix is governed by heteronormativity and gender binarism in the service of reproduction.[100] So, the individual who is named "a girl" is expected to submit to and act in accordance with the hegemonic gender norms.[101] Failure to do so would result in her to be unintelligible in the given cultural matrix, which effectively means that she would not be recognized as a viable subject in this society. She would be vulnerable to verbal and physical attacks, exclusions, and humiliations. It is in view of this violation and disregard of human existence that Butler proposes the destruction and rearticulation of the human, to enable individuals with "unconventional" gender performances a liveable life.[102]

> *„[...] it is necessary to learn a double movement: to invoke the category and hence, provisionally to institute an identity and at*

[100] Butler, Gender, pp. 23–4.

[101] Stereotypical gender norms for girls might include playing with dolls, wearing pink clothes, growing up to be pretty, obliging, maternal, to speak and move in a "feminine" way. The opposite would be expected from boys. See also in this context the case of the postal worker who was harassed for not appearing "masculine" enough; U.S. Court of Appeals, Sixth Circuit *Dillon v. Frank* 15 January 1992 952 F.2d 403, 1992 WL 5436.

[102] "This means that we must learn to live and to embrace the destruction and rearticulation of the human in the name of a more capacious and, finally, less violent world, not knowing in advance what precise form our humanness does and will take. It means we must be open to its permutations, in the name of nonviolence." Butler, Undoing, p. 35.

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> *the same time to open the category as a site of permanent political contest."*[103]

Note that Butler does not suggest that we abandon the use of the category „women", but explicitly states that it is necessary to continue to speak of "women".[104] This means that we cannot do without categories, but we are required to acknowledge that they are incomplete, ever-evolving, and open to new interpretations.

Translating Butler's concept of gender into the sphere of antidiscrimination law means to recognise that this field of law, as it currently stands, protects individuals only to the extent that they fit under the narrowly and rigidly defined categorical shield. The category only affords the freedom to be a person with the typical characteristics ascribed to the respective category. E.g. women may become pregnant and men may love men without the need to hide, duck, self-efface or pass. Yet there are many who are not protected due to the limited circumference of this protective shield. Women with short hair, "masculine" clothes and/or demeanour might be degraded as being unattractive, unfeminine or aggressive. Heterosexual "effeminate" men might be belittled as not being "real men". Individuals who may not clearly be identified as either women or men might be disparaged as unattractive, weird or freaks. The task is now to include those that currently do not fit under the narrow categorical shield by widening the meaning of these categories. The question of who gets included in this widened scope of protection will be answered in accordance with the purpose of antidiscrimination law (equal freedom and dignity) which is the basis for every individual's self-realisation.[105] To this effect, the prohibition of gender discrimination aims at liberating individuals from the rigid gender norms which are historically and geographically contingent and are something that individuals are confronted with as they enter and move within a given society.[106] Women thus gain the freedom to be forceful and rid themselves of

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[103] Butler, Bodies, p. 168.

[104] "This speaking will occur, and for feminist reasons, it must; the category of women does not become useless through deconstruction, but becomes one whose uses are no longer reified as 'referents', and which stand a chance of being opened up, indeed, of coming to signify in ways that none of us can predict in advance." Ibid., p. 5.

[105] Somek says that "protection from discrimination lifts from persons pressures of adaptation." Alexander Somek *Engineering equality: An essay on European anti-discrimination law* (Oxford: Oxford Univ. Press, 2011), p. 181. See also Pt. IV.B above.

[106] Note that the question of what constitutes gender-based discrimination is not one that may be answered by random individuals at their whim. Borrowing an example of A. Somek, this means that an individual claimant may not arbitrarily decide that his propensity to yell at and humiliate his staff is part of his male gender performance and as such protected under the categorical shield of gender – at least not in modern US and European societies.

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"feminine" beauty regimes. Men are free to swing their hips when walking down the streets. And individuals are free to transition to their gender of identification and entertain sexual relations that may then be described as gay or lesbian.[107]

This call to open categories to new meanings was answered in the context of gender and law by Elisabeth Holzleithner with an understanding of "gender as recognition"[108] and Laura Adamietz with a concept of "gender as expectation"[109]. Under Holzleithner's concept of recognition, the law is required to recognise every individual's gender performance regardless of his/her biological sex. Recognition is understood threefold. First, the concept of gender is widened to include all non-binary individuals.[110] Second, unconventional gender performances are recognised as legitimate forms of "being" (e.g. men wearing jewellery). Third, recognition of intersectional aspects of gender refers to the particular ways of performing gender due to religious, cultural or other motives (e.g. Muslim women wearing headscarves). The concept of gender as recognition requires the courts to adapt its understanding of gender discrimination to include discriminatory behaviours in relation to these three types of cases.[111]

One more aspect of recognition – which may be so obvious and self-evident that it may for that very reason needs to be recalled – deserves to be explicitly mentioned here for the sake of completeness. It is the recognition of every individual as a subject, i.e. as a person of equal worth and dignity. Even if one's gender performance corresponds to what is conventionally and stereotypically perceived to be an adequate reflection of one's biological sex, one might still be vulnerable to gender-based discrimination. E.g. women may be treated less worthy or be assigned more menial tasks simply for being women. This phenomenon relates to the failure to recognise "women" as subjects and instead relegating them to the position of

[107] Thereby defying not only the prescribed concurrence of sex and gender, but also heteronormativity.

[108] Elisabeth Holzleithner *Bekleidungsvorschriften und Genderperformance: Gutachten für die Gleichbehandlungsanwaltschaft* (2015) http://www.gleichbehandlungsanwaltschaft.at/DocView.axd?CobId=61160 (09 December 2016), at pp. 6–7; Elisabeth Holzleithner, 'Gerechtigkeit und Geschlechterrollen', *Rechtsphilosophie* (2016) 2, 133–51, p. 138; Elisabeth Holzleithner, 'Legal Gender Studies: Grundkonstellationen und Herausforderungen', *Juridikum* (2015) 4, 471–81, p. 478.

[109] Laura Adamietz Geschlecht als Erwartung: Das Geschlechtsdiskriminierungsverbot als Recht gegen Diskriminierung wegen der sexuellen Orientierung und der Geschlechtsidentität, Humboldt-Univ., Diss.--Berlin, 2010, Schriften zur Gleichstellung (Baden-Baden: Nomos Verlagsgesellschaft, 2011), vol. 34.

[110] Individuals who cannot and/or do not wish to fit into the binary gender categories of "men" and "women", e.g. intersex people, trans* people and any other non-binary people.

[111] Holzleithner, Bekleidungsvorschriften, pp. 6–7.

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objects that reflect and confirm the subject status of "men".[112] It thereby relates to the structural dimension of inequality and ties in to the question of positive action measures. The lack of recognition as a subject of equal worth and dignity accounts for the necessity and justification of positive action measures.

Laura Adamietz states that the law has certain expectations in relation to gender. First, one is expected to be categorised in accordance with one's genitalia. Second, one is expected to fit into a category in the first place. Third, one is expected to desire a member of the opposite sex and to enter a long-term legal union with that partner, which is reflected in the privilege accorded to same-sex marriage.[113] Adamietz demands that antidiscrimination law acknowledge the fact that failure to fulfil these expectations is sanctioned by society through discriminatory behaviour against the "failing" individuals.

Both Holzleithner's and Adamietz' concepts continue to rely on the category "gender", but they advocate a broader and more nuanced understanding of it. While "expectation" and "recognition" are different concepts, they might be described as kindred spirits that equally aim to adopt a broader and more flexible definition of gender, only highlighting the same issues from slightly different angles. It is contended that the other categories such as "race", "ethnicity", "disability", "religion" etc., may also be interpreted in similar broad ways.

The opening up of categories, too, requires a substantial amount of openness, flexibility and sensibility of all who participate in the discourse of antidiscrimination law and is thus faced with the same difficulties as the value-based and post-categorical models. Thus, in order to address the problems highlighted above[114] it is inevitable that judges and lawyers must be persuaded to take account of the issues raised by the stereotyping and essentialisations in a given society. They must recognise the existence of and the content of prevailing gender norms in order to be able to define the scope of prohibited discriminations in a way that takes due account of the need to recognise every individual as a subject of equal worth and dignity. The merit of the approach of recognition is that it refrains from tampering with the balance of power which is essential for a democratic system based on the

[112] For a detailed analysis with references to Jaques Lacan, see Butler, Gender and Butler, Bodies.

[113] "Sich dem Geschlecht zuordnen zu lassen, auf das die Genitalien verweisen [...], ist eine Erwartung, die das Recht stellt, und die als verfassungswidrig erkannt wurde. Sich überhaupt einem Geschlecht zuordnen zu müssen, ist eine Erwartung, die das Recht derzeit stellt. Das ‚andere' Geschlecht zu begehren und sich dauerhaft rechtlich mit ihm zu verbinden, ist eine Erwartung, die das Recht stellt, wenn und solange sie diese Lebensform privilegiert." Adamietz, Geschlecht, vol. 34, p. 258.

[114] See Pt. II above.

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separation of powers.[115] It retains the familiar structure of antidiscrimination law and therefore does not imply a complete legislative overhaul of that area of law. It might also pose less of a psychological hurdle for judges, lawyers and administrators. More importantly, with the concept of recognition, the group aspect of discrimination remains visible by the explicit reference to categories while the diverse range of "beings" of all individuals, i.e. the heterogeneity, within each category is duly acknowledged and taken account of.

Retaining a broad notion of the categories comes with another advantage that may be explained through Alexander Somek's notion of "*Wollen und Kämpfen*" (will and fight) in connection with private and political autonomy in the Habermasian sense.[116] Private autonomy describes the citizens' autonomy, i.e. biggest possible freedom to act, in the private sphere which is expressed and protected by legal rights. Through the exercise of their political democratic rights of participation, these citizens are also the collective authors of the laws that protect their private autonomy; this is called political autonomy. Due to this interdependence of private and political autonomy, Habermas describes them as "co-original".[117] Based on this understanding of autonomy, Somek says that individuals who are confronted with behaviours and structures that violate their equality rights, i.e. where their private autonomy is undermined, need to fight against it by using the means provided by their political autonomy. (This, of course, presupposes that they have political autonomy to begin with.) Applied to our concept based on recognition, this means that those affected – together with those who act in solidarity with them – need to exercise their political rights, i.e. use their political autonomy, to effect a new broader understanding of categories. This, in Somek's words, is not a matter of philosophical ponderings or legal analysis, but requires the citizens' "will and fight" for the recognition of their such-ness ("*Sosein*").[118] As an example, he mentions the achievements of the gay rights movements.

Thus, for an individual claiming discrimination in court, it will be easier to argue a case successfully, if the argument can make reference to and be based on the achievements that have been made in the political sphere – by way of public awareness, political debate, legislative efforts etc. These political efforts may or may not also include the recognition of certain groups as falling within the scope of one

[115] See Pt. IV.B above.

[116] Somek, Gleichheit.

[117] Ibid., pp. 207–8 with reference to Jürgen Habermas *Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats*, 5. Aufl. (Frankfurt am Main: Suhrkamp, 1997).

[118] Somek, Gleichheit, 220 and 223.

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of the protected categories (e.g. Latinos or those of East-German upbringing)[119] or even the recognition of new categories. The fight for recognition is not one that can be fought alone in the courtroom, but presupposes a political backing that is inevitably facilitated by interest *groups*. In order to campaign successfully in the political sphere, it is necessary for individuals to group together and present themselves as a unitary front.[120] I.e. the individual private autonomy and the group-based political autonomy are co-original. If the notion of categories were removed completely on a regulatory level, the individual claimant would be faced with the challenge to formulate a claim that convincingly describes the systematic, structural nature of the discriminatory act that operates with ascriptions (in the sense of prejudices) to individuals who are or are perceived to be members of a certain group, without being able to make direct reference to categories in the antidiscrimination rules. In the example mentioned above about the employer who claims that there is a possibility with both male and female employees to take on care duties in the family, it might arguably simplify the claimant's argument, if she could refer to the category of women who are faced with the prejudice of being/becoming the main care-giver in the family – with this claim being supported by the fight for recognition of such realities on a collective political level. She would not have to take the argumentative detour through structural hierarchies and ascriptions to substantiate her claim that the employer had acted upon this prejudice against women.

Understanding gender as recognition (Holzleithner) or expectation (Adamietz) opens up the categories to new and broader meanings that are flexible enough to address the complex nature of discrimination in an ever-changing society.

VI. Conclusion

The value-based approach and the post-categorical approach were developed in very different jurisdictional contexts of the United States and Europe/Germany respectively with the aim of addressing very similar problems encountered by the traditional categorical approach. Sudeall Lucas draws on the substantive criteria developed by the US Supreme Court itself and thereby appears to be proposing a less radical model than Susanne Baer et.al. who propose to eliminate

[119] See Pt. II above.

[120] See also Butler who acknowledges the need to take recourse to categories and at the same time cautions against the risks that it involves: „As much as it is necessary to assert political demands through recourse to identity categories, and to lay claim to the power to name oneself and determine the conditions under which that name is used, it is also impossible to sustain that kind of mastery over the trajectory of those categories within discourse." Butler, Bodies, p. 173.

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categorisations on the regulatory level altogether. The post-categorical model in particular sets high demands on judges to be sensitive, open, and well-versed in the issues associated with the use of categories. The level of these expectations might arguably be so high as to affect this approach's feasibility in practice. Leaving aside the question if and how likely it is that these proposals might be realised in their respective jurisprudences in the foreseeable future, they both highlight the failings of the current categorical approach and offer a valuable contribution and impetus to the debate on how these problems might be addressed. Still, it appears that the problems associated with the categorical antidiscrimination law might merely be relocated from the level of regulation to the level of application and thereby be made even less visible. Moreover, the potentially endless proliferation of prohibited types of discriminatory behaviour entails the risk of value judgements that should rather be the result of comprehensive political discourses to be surrendered to the judiciary – which must be viewed critically in a democratic society.

An alternative approach that might be able to avoid the problems associated with the use of rigid categories and still address the structural and group aspects of discrimination might be a concept based on *recognition* as proposed by Holzleithner. This would recognise a wider range of subject positions, adopt a broader understanding of the respective categories by recognising different ways of being within each category, and recognise diverse forms of discriminations that continue to evolve in our changing society. It would dismantle stereotypical and essentialising expectations attached to the categories, as proposed by Adamietz.

Regardless of which, if any, of the alternative models of antidiscrimination law is adopted, equal freedom and dignity requires both *the will and the fight for recognition* by those affected and those acting in solidarity with them. Somek accordingly says that "being weak is not for the weak."[121] The prerequisite for any of the alternative models described here to prevail is a concerted effort on both fronts, the private/individual (through the courts) and the political/group sphere (through political and legislative processes).

[121] Somek, Gleichheit, p. 221.

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