



Picture source:
<https://changefromwithin.org/2012/06/06/are-white-students-being-disadvantaged-by-affirmative-action/>



EU INTEGRATION & ETHICS

Affirmative action (2nd session)



Picture source:
<https://www.theodysseyonline.com/shortcomings-affirmative-action>



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POLITICALLY CORRECT By Jim Huber



Picture source: <https://changefromwithin.org/2012/06/06/are-white-students-being-disadvantaged-by-affirmative-action/>

EMPLOYMENT EQUITY



Picture source: <https://www.theodysseyonline.com/shortcomings-affirmative-action>



Synchronous* Learning

Webinars

Chats

Input, Lectures

Brainstorming

FAQs

2nd session (online): affirmative action | 17:00 - 19:15h

- Getting started
- Non-discrimination: general introduction (partly repetition)
- Case study US
- *Break*
 - Summary of case study
- Case study EU
 - Comparing cases &
 - Summary of case study
- Summary of this topic

“In that respect, it should be noted that, according to settled case-law, **discrimination** can arise only through the application of **different rules to comparable situations** or the application of the **same rule to different situations** [...]”

CJEU judgment in *Commission v the Netherlands* (three out of six years' rule), C-542/09, EU:C:2012:346, para. 41

“It should be recalled that the requirement relating to the **comparability of the situations** for the purpose of determining whether there is a breach of the principle of equal treatment must be **assessed in the light of all the elements which characterise them** [...]”

CJEU judgment in *CHEZ Razpredelenie Bulgaria*, C-83/14, EU:C:2015:480, para. 89

$A = B \Rightarrow$ treat A like B

$A \neq B \Rightarrow$ don't treat A like B

- Should women earn as much as men?
- Should women pay equally less at the hairdressers, such as men?
- Should Germans pay the same price for skiing in Austria, and Austrians the same price for swimming in Germany?
- Should homosexuals be treated in the same way as heterosexuals (e.g. also have access to Assisted Reproductive technologies, such as IVF, surrogacy)?
- Should young workers earn as much as older ones?
- Should Italians be treated like French people (i.e. they get cheaper tickets) in Disneyland Paris?

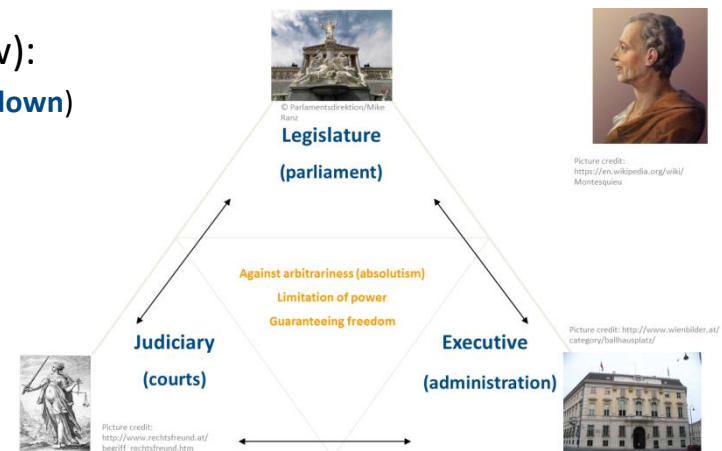
$A = B \Rightarrow$ treat A like B

$A \neq B \Rightarrow$ don't treat A like B

“Furthermore, Article 21 of the Charter, serving as the basis of the plea relating to the **prohibition of discrimination** on grounds of nationality or ethnic origin, is a **particular expression of the principle of equal treatment** (see, to that effect, judgment of 29 April 2015, *Léger*, C-528/13, EU:C:2015:288, paragraph 48) and **both that principle and the prohibition of any discrimination are simply two labels for a single general principle of law**, which prohibits both treating similar situations differently and treating different situations in the same way **unless** there are objective reasons for such treatment [...].”

General Court judgment in *Voigt*, T-618/15, EU:T:2017:821, para. 98

- EU citizenship & fundamental freedoms (negative integration)
 - Non discrimination based on **citizenship**
- Harmonization of national law (positive integration)
 - No discrimination based on “**sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation**”
- Case-law vs. policy
 - Negative integration (i.e. application of fundamental freedoms):
 - By national courts (**bottom-up**) and CJEU (supporting national courts with interpretation of EU law)
 - **Judiciary**
 - Positive integration (i.e. harmonization of national law):
 - By EP and Council, based on a proposal of the Commission (**top-down**)
 - **Legislative**
 - Maybe followed by court cases, if necessary





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- Should someone who can get **pregnant** earn less?
- At the hairdressers, should someone with **long hair** pay more than someone with short hair, such as men?
- Should there be a reduction for ski resorts or swimming pools for **local residents**?



- EU citizenship & fundamental freedoms (negative integration)
 - No **open** discrimination based on **citizenship**
 - But also **disguised** discrimination based on **residence, language etc.** either
- Harmonization of national law (positive integration)
 - No **open** discrimination based on **sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation**
 - But also no **disguised** discrimination either

CJEU judgment in *Commission v the Netherlands (three out of six years' rule)*, C-542/09, EU:C:2012:346, para. 37:
In that respect, it should be noted that the equal treatment rule laid down both in Article 45 TFEU and in Article 7 of Regulation No 1612/68 prohibits **not only overt** discrimination on grounds of nationality **but also** all **covert** forms of discrimination which, through the application of other criteria of differentiation, lead in fact to the same result [...].

CJEU judgment in *D*, C-167/12, EU:C:2014:169, para. 48:

The Court has consistently held that **indirect discrimination** on grounds of **sex** arises where a national measure, **albeit** formulated in **neutral** terms, puts **considerably** more workers of one sex at a **disadvantage than** the **other** [...].

Which of these examples
constitutes direct /
indirect discrimination
(based on which criteria)?



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- Should someone who can get **pregnant** earn less?
- At the hairdressers, should someone with **long hair** pay more than someone with short hair, such as men?
- Should there be a reduction for ski resorts or swimming pools for **local residents**?

criteria	direct discrim.	indirect discrim.
sex		✓
sex		✓
citizenship		✓



CJEU judgment in Z, C-363/12, EU:C:2014:159, para. 6:

Under Article 5 of the **[United Nations Convention on the Rights of Persons with Disabilities]**, headed ‘Equality and non-discrimination’:

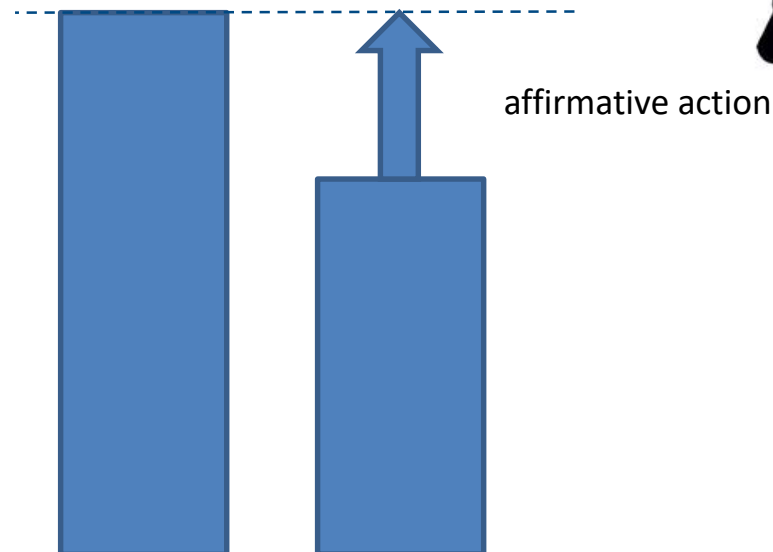
- ‘1. States Parties recognise that all persons are **equal** before and under the law and are entitled **without any discrimination** to the equal protection and equal benefit of the law.
2. States Parties shall **prohibit all discrimination** on the basis of disability and guarantee to persons with disabilities equal and **effective legal protection** against discrimination on all grounds.
3. In order to promote equality and eliminate discrimination, States Parties shall **take all appropriate steps** to ensure that **reasonable accommodation** is provided.
4. **Specific measures** which are necessary to **accelerate or achieve de facto equality** of persons with disabilities shall not be considered discrimination under the terms of the present Convention.’

“the **practice of improving** the educational and job opportunities of members of **groups** that have **not been treated fairly in the past** because of their race, sex, etc.”

<http://www.merriam-webster.com/dictionary/affirmative%20action>

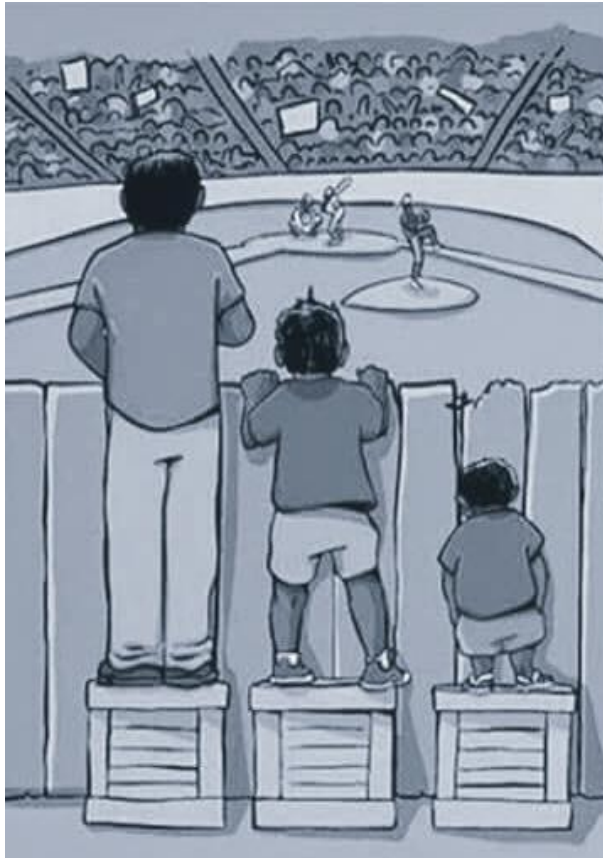
“[...] a **leg-up** to members of **certain** racial, ethnic, or other **groups** by holding them to different standards”

The Economist (Apr 27th 2013). *Time to scrap affirmative action: Governments should be colour-blind.*



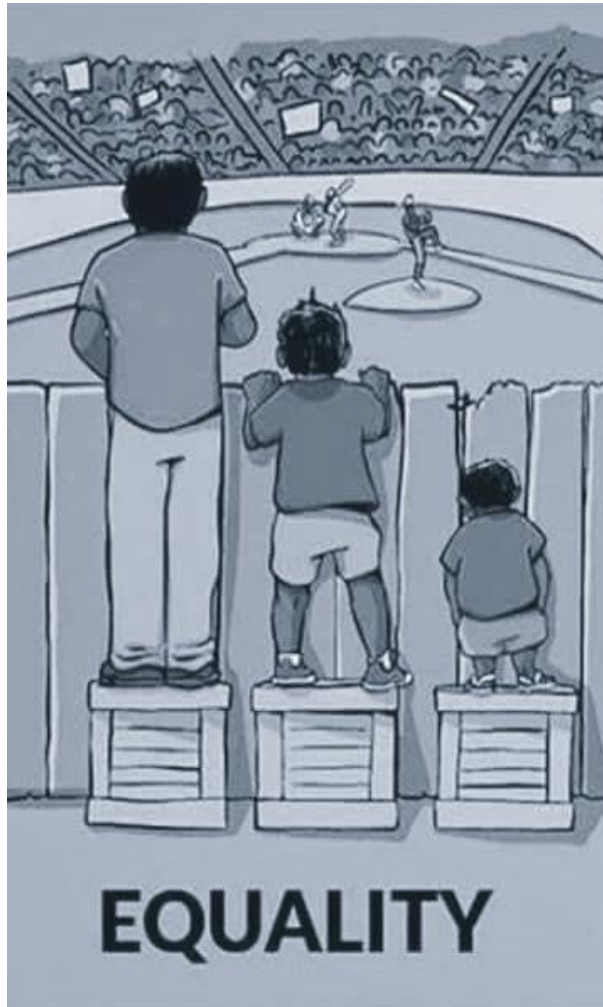


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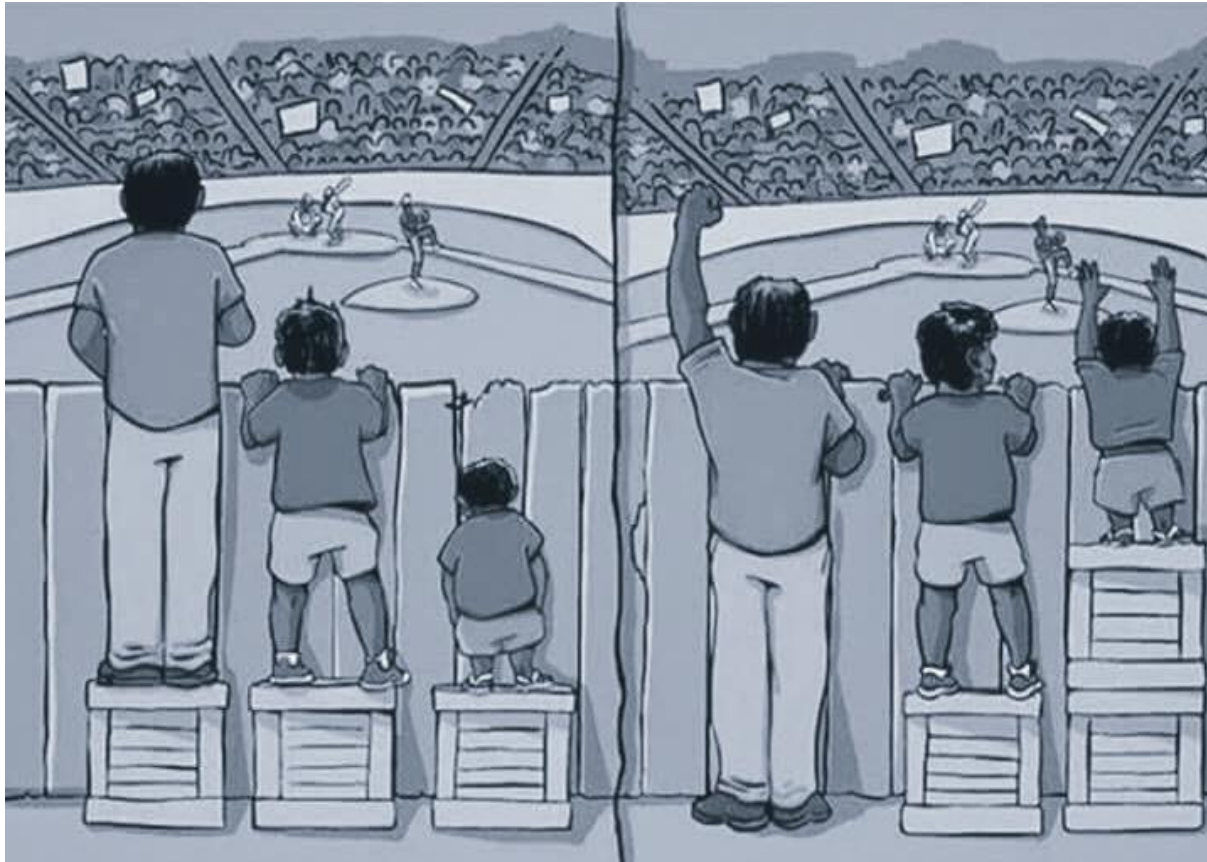


- Not an issue of discrimination.
- Maybe they brought those boxes themselves.

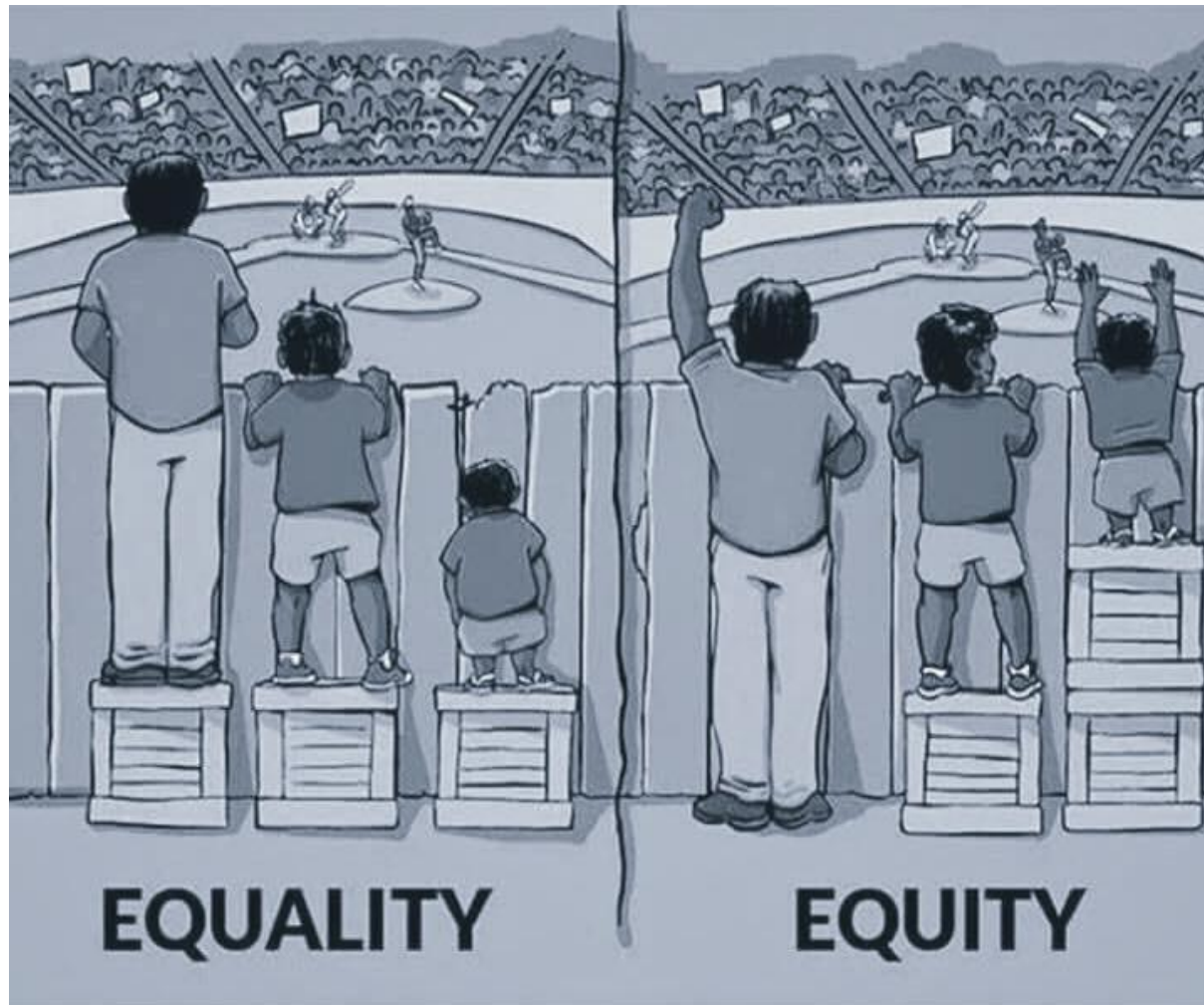
Equality vs. equity (one perspective)



Equality vs. equity (one perspective)



Equality vs. equity (one perspective)





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- Assume, there is a white young lady coming from a rather poor family. Raised by a single mother, she struggled hard in school to achieve good grades and then applied at a University for admission as a student. Although she performed very well in the admission test, she was not admitted.
- However, the University had admitted several applicants belonging to certain minorities who had worse school grades and lower test scores than our young lady.
- As she argued to be discriminated, the University responded that they apply an “affirmative action policy” that should give preference to minority applicants. The University also referred to its mission, which was to increase racial and ethnic diversity not only at University, but also later on in the respective professional fields, where graduates would afterwards work.

Source: inspired by *Cheryl Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996); see Sandel, 2010, pp. 168-9



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Try to find reasons, why
you argue that she
should / should not have
been admitted?
(30 min. time)

Adobe Connect Break Out Session

1. Try to find pros
2. Try to find cons
both concerning her case,
as well as in general
3. Try to find a joint solution

- Use the abridged version published on Sakai for your group work.
- If you fall out of the breakout room you will end up in the main room (and I will put you back into your group).

- 8 groups (à approx. 5 participants)
- Same task for all groups
- N.B. for this task you have slightly more time, as this is your first group work
- At the end, one participant (having a functioning microphone) should be able to present the bottom line of the discussion.
- One group can be randomly chosen by lecturer
- To be presented at the end:
 - Whether in favour or against affirmative action
 - Short argumentation (approx. 50 words)



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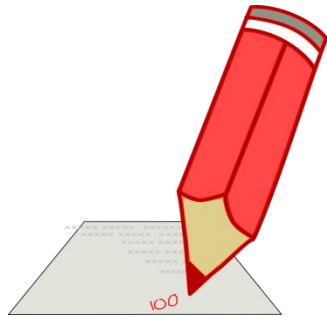


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Presentation of your
findings
(in total: approx. 20 min)

1. Try to find **pros**
2. Try to find **cons**
both concerning her case,
as well as in general
3. Try to find a **joint solution**

- 8 groups (à approx. 5 participants)
- Same task for all groups
- N.B. for this task you have slightly more time, as this is your first group work
- At the end, one participant (having a functioning microphone) should be able to present the bottom line of the discussion.
- One group can be randomly chosen by lecturer
- To be presented at the end:
 - Whether in favour or against affirmative action
 - Short argumentation (approx. 50 words)



- **Correcting of insufficiencies** of the facts that have been taken into account for the decision
 - Assuming that minorities don't have access to same quality schools, thus resulting in worse grades (if school grades taken into account for admission) ...
 - ... and at the same time, minorities might be worse prepared for admission tests



- **Compensation** for past injustices
 - Assuming that minorities have been discriminated in the past, ...
 - ... they should now be favoured over others



- **Diversity** argument
 - Both at university, ...
 - ... as well as in the relevant professions (after graduation) ...
 - ... and for society at large

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Picture credits:
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- Hellmut Marschall applied for promotion to an A 13 post at the comprehensive school Schwerte.
- The German law at the time provided as follows:
*“Where, in the sector of the authority responsible for promotion, there are **fewer** women than men in the particular higher grade post in the career bracket, women are to be given **priority** for promotion in the event of equal suitability, competence and professional performance, **unless** reasons specific to an individual [male] candidate tilt the balance in his favour.”*
- The competent District Authority informed him that it intended to appoint a female candidate to the position.
- The German court concluded that Mr Marschall and the woman candidate selected were **equally qualified** for the post.

CJEU judgment in **Marschall**, C-409/95, EU:C:1997:533

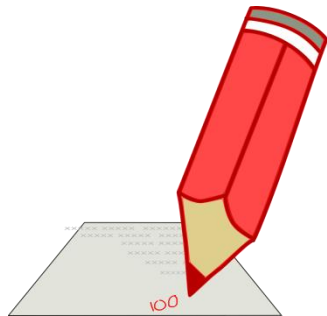
➔ **Adobe Connect
Break Out Session**

Now discuss, if these
arguments can also be
applied to discrimination
based on sex
(15 min. time)



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- 8 groups (à approx. 5 participants)
- Same task for all groups
- At the end, one participant (having a functioning microphone) should be able to present the bottom line of the discussion.
- One group can be randomly chosen by lecturer
- To be presented at the end:
 - Whether affirmative action in case of the situation discussed before the break can also be applied to discrimination based on sex
 - Short argumentation (approx. 40 words)



- **Correcting of insufficiencies**
 - Ethnic minorities
 - Women
- **Compensation** for past injustices
 - Ethnic minorities
 - Women
- **Diversity** argument
 - Ethnic minorities
 - Women



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What was the
solution to the
Marschall case?



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EU law **allows** affirmative action for **women** in employment, because there are **actual inequalities**

- EU law “authorize[s] measures which, although discriminatory in appearance, are in fact intended to **eliminate or reduce actual** instances of **inequality** which may exist in the reality of social life”. (para. 26)
- “It thus authorizes national measures relating to access to **employment**, including promotion, which give a specific advantage to **women** with a view to improving their ability to compete on the labour market and to pursue a career on an equal footing with men”. (para. 27)
- Reference to a recommendation of the Council of the EU, according to which existing legal provisions are **not enough** to eliminate inequalities between men and women. (para. 28)
- “it appears that even where male and female candidates are equally qualified, male candidates tend to be promoted in preference to female candidates particularly because of **prejudices** and **stereotypes** concerning the role and capacities of women in working life and the fear, for example, that women will interrupt their careers more frequently, that owing to household and family duties they will be less flexible in their working hours, or that they will be absent from work more frequently because of pregnancy, childbirth and breastfeeding”. (para. 29)

CJEU judgment in *Marschall*, C-409/95, EU:C:1997:533 ([Link](#))

What was the
solution to the
Marschall case?



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However, those measures must **not** be **absolute** and give require an **opening clause** (i.e. also to take into account other criteria)

- “However, [...] such a national measure specifically favouring female candidates **cannot** guarantee **absolute and unconditional priority** for women in the event of a promotion [...]”. (para. 32)
- Prerequisites: if “it provides for male candidates who are equally as qualified as the female candidates a guarantee that the candidatures will be the subject of an objective assessment which will take **account of all criteria** specific to the individual candidates and will override the priority accorded to female candidates where one or more of those criteria tilts the **balance** in favour of the male candidate. In this respect, however, it should be remembered that those criteria must not be such as to discriminate against female candidates”. (para. 33)

CJEU judgment in **Marschall**, C-409/95, EU:C:1997:533 ([Link](#))

- EU social policy

Article 157 TFEU (opening clause):

1. Each Member State shall ensure that the **principle** of **equal pay** for male and female workers for equal work or work of equal value is applied.

...

4. With a view to ensuring full equality in practice between men and women in working life, the **principle** of equal treatment shall **not prevent** any **Member State** from **maintaining or adopting** measures providing for specific **advantages** in order to make it easier for the **underrepresented sex** to [1.] pursue a vocational activity or [2.] to prevent or compensate for disadvantages in professional careers.





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- Who can take such “positive measures”?
- ... also social partners and companies?
- In which field does this apply?
- Who benefits from this treatment?
- Is there a subjective right for workers on a respective decision of MS?
- What are the prerequisites?
- What degree of under-representation has to exist?
- What kind of measures can be taken?
- Member States [MS], not EU
- No, only MS
- working life
- the underrepresented sex, not only women
- no
- needs to be proportional, and specific; cf. CJEU: not automatic, but opening clause
- not defined, but the bigger the gap, the more measures are possible; i.e. proportionality
- “advantages”

- | | | |
|-----------------|---|--|
| • Where: | US | EU |
| • Criteria: | ethnicity etc. | sex |
| • Field | University access | employment |
| • Prerequisites | strict scrutiny test, special state interests | no automatic priority and opening clause |



Picture credits:
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- All invited to participate
- Same task for everyone
- If you have a good contribution, just raise your hand



Asynchronous* Self-paced Learning

Websites, Readings

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Videos, Podcasts

Simulations, Multimedia

Tests & Quizzes

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- What would be a utilitarian (“the greatest good for the greatest number”) answer to affirmative action?
- Do we need to assess these questions from a collective, or from an individual perspective?
- What would be an answer following the idea of “distributive justice”?

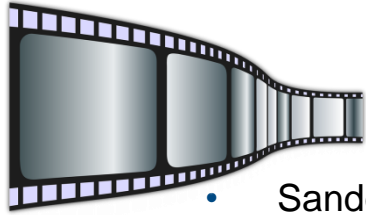
Philosophers

John Rawls (1921-2002): A Theory of Justice (1999)

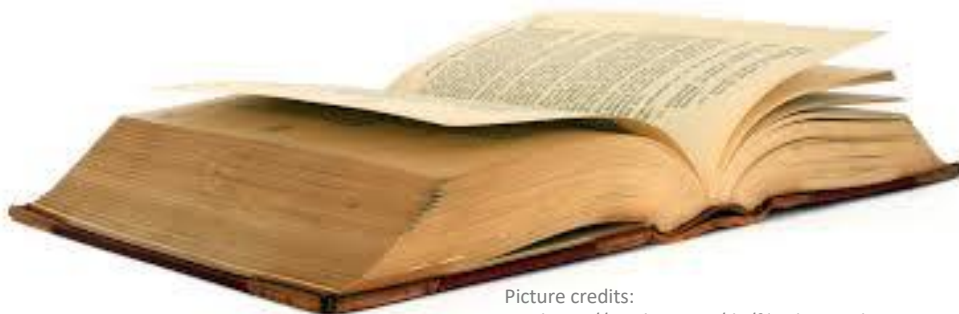
- On **distributive** justice
- Rawls sees society as a system of **collaboration**, which shall foster the interests of **every** single member – **not only** of some of them (Luf, 2014, p. 90)
- In this system, justice shall be established by **fairness**; this can result in advantages or disadvantages for the individual (Luf, 2014, p. 90)
- Important that there is **consensus** about the fundamental structure of a society (Luf, 2014, p. 91)
- Based on the classical social contract theories of Rousseau and Kant, he creates a **thought experiment** of a “original position”, where people forget about certain standpoints that support their actual situation; i.e. the hypothetical situation of the “**veil of ignorance**” (Luf, 2014, p. 92)



Picture credit:
https://en.wikipedia.org/wiki/John_Rawls



- Sandel, M. J. (2010). *Justice*: Lecture 17 (before: part 9); <http://justiceharvard.org/lecture-17-arguing-affirmative-action/>
- Sandel, M. J. (2010). *Justice: What's the right thing to do?* (1st ed.). New York: Farrar, Straus and Giroux. pp. 167-183
- Boxill, B. (2010). Discrimination, Affirmative Action, and Diversity in Business: Chapter 18. In G. G. Brenkert & T. L. Beauchamp (Eds.), *[Oxford handbooks]. The Oxford Handbook of Business Ethics* (pp. 535–562). Oxford, New York: Oxford University Press.



Picture credits:

- <https://pixabay.com/de/film-kino-video-motion-picture-158157/>
- <https://www.flickr.com/photos/brenda-starr/5076790282>

- Case D

- Surrogacy is regulated in the UK: Yes ☐ No ☐ (para. ...)
- In this case the partner's sperm was used: Yes ☐ No ☐ (para. ...)
- In this case the woman's eggs were used: Yes ☐ No ☐ (para. ...)
- Has she (Ms D) been pregnant herself? Yes ☐ No ☐ (para. ...)
- What was the legal problem in this case? (para. ...)

- Case Z

- Surrogacy is regulated in Ireland: Yes ☐ No ☐ (para. ...)
- Surrogacy is regulated in California (US): Yes ☐ No ☐ (para. ...)
- Where did IVF / the egg transfer take place? (para. ...)
- In this case the partner's sperm was used: Yes ☐ No ☐ (para. ...)
- In this case the woman's eggs were used: Yes ☐ No ☐ (para. ...)
- What was the medical problem in this case? (para. ...)
- What was the legal problem in this case? (para. ...)
- Which additional legal problem was addressed in this case? (para. ...)

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Events Index

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- ☒ presentation [0:00:00]
- Guest speech [0:18:16]**
- presentation [1:11:48]

Chat (Everyone)

User 1: Do you have a question Nynke
User 8: Would it be a problem that I am here as MM 2? I do not know how I did that ...
User 1: you can also participate as MM2 :-)
User 8: :D thank you ...
User 11: i try to solve it but the wizard also doesnt show any mic options i really dont know why because i had a few sessions before and there was no problem
User 1: one option could be to restart the computer, and or to plug in out the headset
User 1: k thanks now it runs bot very silent hope you here me than
User 1: k Switzerland linked with EU ?
User 13: i don't see the slides anymore, what can i do?
User 3: mee too
User 28: Close the whole session and start it again, happened to me too
User 13: Yes it works again, thank you!

Video (1)

User 1

Surrogacy GWF 112017.pptx

Surrogacy: Biomedical Perspectives

Gabriele Werner-Felmayer
Division of Biological Chemistry
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Medical University of Innsbruck, Austria

ethucation
ethics education on science and medicine

Austrian Unit
International Network
UNESCO Chair
in Bioethics (IL)

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mentoring the motivated.

