“Positive Action” How could anyone be against it? It is what has brought us together today. So, what about “negative action” or “negative inaction”? 

One could say that the struggle for equality for ethnic or religious minorities is about combating “negative action” and “negative inaction” - the racism, discrimination, harassment and victimisation - totally negative ways in which, for reasons of people’s identity -- or perceived or assumed identity -- their race or ethnicity or their religion or belief -- they are devalued, denied full participation in the economic and social and political life of our societies, denied access to work and housing and education, denied the dignity and respect that belongs to every human being.

And if we think about institutional racism, as it has been defined by the Stephen Lawrence Inquiry in Britain (which we in Britain erroneously believed would remain in the consciousness of government and people in power) is this not negative inaction on a grand and truly dangerous, destructive scale?

The collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture or ethnic origin.

The Inquiry team went on to explain, and to emphasise both its negativity and how it can occur from “inaction”:

It can be seen or detected in processes, attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness and racist stereotyping which disadvantage minority ethnic people.
And do remember, the Inquiry did not pull this definition from the sky or academic textbooks; it was a definition they developed after months and months of evidence regarding the failed criminal investigation or a racist murder followed by meetings to hear about the experiences of ethnic minority community groups across Britain.

If daily experience continues to include racism and discrimination - if this is where we are, where are we trying to go? Positive action will be an important vehicle, but we need to know our destination. What will the absence of direct and indirect discrimination look like? What does “equality” mean? Can we envisage institutional anti-racism, institutional equality?

Today “equality” is described in at least three different ways:

1. **equal treatment - formal equality** means that Likes should be treated alike. Equal treatment requires removal of group identity - take race out of the picture - each individual is to be treated on her/his merit without a racial or religious identity (therefore implicitly having the race/religious, gender, sexuality identity of the majority).

   Equal treatment is symmetrical - if race is irrelevant then equal treatment would protect members of white majority groups as well as ethnic minorities, men as well as women etc.

   To be “colour blind” is not the whole answer, since it ignores the actual race or ethnic imbalances of power, wealth etc. in society.

   **A second model is equality of opportunity** which involves removing the barriers that prevent equal access for different racial groups to employment, housing, education, health services etc. It is concerned with group, rather than individual, equality. Equality of opportunity developed on the recognition that equal treatment could, in practice, reinforce the inequalities that are part of the experience of minority groups. Treating all job applicants equally will not benefit members of ethnic minorities if they never apply, because job vacancies are not publicly advertised or
because irrelevant job requirements easily met by members of the dominant majority are beyond their reach.

A third model, “substantive equality,” reflects the fact that formal equality and equality of opportunity are not sufficient to realise what the directives refer to as “full equality in practice” - equality of results. It is based on the recognition of the need to treat differently people whose circumstances are different, it is colour aware not colour blind. It recognises the disadvantages or needs that are specific to particular racial or ethnic groups which, if not removed will ensure that inequality for those racial groups will persist indefinitely.

There is no benefit in saying the door (to work, housing, education, services) is open to all and all of the institutional barriers are removed if members of particular groups still cannot reach the door, let alone pass through it, because they lack education or skills or the language or knowledge of the system and how to use it, and so will continue to be excluded.

To achieve substantive equality needs more than the eradication of direct and indirect discrimination, it calls for more targeted measures to secure equality of outcomes for members of otherwise disadvantaged groups - it calls for positive action.

Positive action will have far more meaning if we consider some examples. A very helpful list of types of positive action are set out in a recently published report by the Network of Legal Experts listed on page 6-7 of the excellent ENAR background paper for today’s seminar. Thus “positive action” can include:

1. Examining, identifying and eradicating any discriminatory practices; this could be measures as simple as advertising jobs publicly rather than recruiting by word of mouth or allocating flats on the basis of housing need not on length of time in the area, adjusting ante-natal clinic hours so women working anti-social hours can attend, reviewing dress code. The crucial factor is examining practices to identify any adverse impact on particular groups and then taking appropriate remedial steps.
2. Adopting policies that are neutral on their face, that do not overtly discriminate, but which seek to increase the proportion of members of the under-represented groups; for example using criteria like living in a particular area (where a high proportion of residents are members of a particular ethnic minority group), giving priority for jobs in a new factory to long-term unemployed (a majority of whom will be from certain ethnic groups). An American project offered training and jobs to ex-prisoners of a particular prison in Texas who disproportionately were black or Hispanic.

3. Using outreach programmes to accelerate the inclusion of under-represented groups; considering both the content of advertisements – encouraging applications from particular groups - and how/where adverts appear – including publications or websites which are likely to be seen by target groups; offering training to members of under-represented groups so they can compete with majority applicants on more equal terms. Where under-representation has an historical context, no one from that group had done such work, then outreach programme could include ways of making the particular area of work more familiar. In the UK very successful outreach was done by the Household Cavalry which, after a formal investigation, the CRE had found to have been discriminating indirectly in their recruitment, with the effect that there were no Black members of the Household Cavalry. The most senior officer decided to change this. His soldiers joined in at sports centres used by Black and Asian young men, he arranged visits to communities to meet parents to persuade them that the Army was a good career for their sons and daughters, he arranged visits to schools, he invited Black and Asian young people to see what the Household Cavalry does and the training it offers, with the result that in about 4 years ethnic minority recruitment had jumped from 0% to about 14%.

4. Adopting diversity policies with targets for under-represented groups - targets not quotas - so not involving preferential treatment. The UK government, responding to negative publicity about the under-representation of BME men and women in the police, set targets (not quotas!) for every police force - requiring the percentage of new recruits and percent of total staff from BME communities after 3 years, 5 years etc. to approximate the BME local population. To try to make this happen each force
needed to train officers doing recruitment, consider forms of outreach to attract BME applicants, review employment practices generally so that BME officers were not leaving because of racism and harassment.

5. Devising accommodation programmes to meet special needs of disadvantaged groups. A frequent example is language classes, but it could also be basic education or training for particular types of jobs so that people from under-represented groups can compete on more equal terms with members of the dominant majority.

6. Actual preferential treatment - favouring members of under-represented groups over members of the dominating group. As other speakers today will discuss far more fully, it has been this form of positive action to overcome under-representation of women which EU member states have adopted and on which the ECJ has been asked to rule. Any such provision must not be an “absolute and unconditional rule” and must meet the test of proportionality, about which you will hear more later this afternoon.

7. Making group membership part of “merit”. In an EU context the Legal Experts Group suggest this is only theoretically possible, but in the US the Supreme Court upheld what it described as a “race-conscious” admissions policy of the Law School at the University of Michigan\(^1\) (which Pres. Bush had challenged) accepting the Law School’s educational judgment, that “diversity is essential to its educational mission”. The Court also received findings of expert studies showing that such diversity promotes learning outcomes generally and better prepares students for an increasingly diverse workforce, for society and for the legal profession. While quotas or separate admission tracks for ethnic groups could not have been accepted, the Court was satisfied that the use by the Law School of ethnicity as a ‘plus’ alongside other non-academic factors meant that each applicant is evaluated as an individual and not in a way that makes race or ethnicity the defining feature of the application. The Court also accepted the Law School’s submission that “because law schools

\(^1\) *Grutter –v- Bollinger et al.* Supreme Court of the United States 23 June 2003
represent the training ground for a large number of the Nation’s leaders the path to leadership must be visibly open to talented and qualified individuals of every race and ethnicity.”

A common essential precondition for each of these forms of positive action is an analysis of the factors creating or maintaining the inequality or disadvantage - what is happening and why? - so that the appropriate forms of positive action can be chosen to achieved the desired outcome. Both in the US and in the EU sweeping positive action measures that could not be shown directly to rectify situations of disadvantage or discrimination have been rejected by the courts. Of course, the better your data and your analysis the better able you will be to plan and carry out well-targeted measures that go directly to the problem. Drawing from ICERD and CEDAW, positive action measures should not be continued “after the objectives for which they were taken have been achieved”. In the Michigan Law School case the US Supreme Court also stated “race-conscious admission policies must be limited in time.”

One of the very important points to note from this list of 7 different forms of positive action is that most of what is being done, or could be done, to work toward full equality in practice will not conflict with the rules of formal equal treatment and non-discrimination: in most cases, positive action will not involve exception or exemption from the prohibition of discrimination.

If you can carry forward one message from this conference, my wish is that it would be that positive action is positive, it is not threatening, should not set one group against another, should not be divisive or raise political hackles or concerns about breach of fundamental constitutional principles of equal treatment.

OK now how are we going to bring about any of the different forms of positive action. Who in positions of power, who with resources, is prepared to commit to and invest in securing “full equality in practice” for minority groups in our societies?

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2 Grutter v. Bollinger, op cit. page 30
One answer, and possibly the best answer we have so far, is that the State, through its very institutions, should be expected, preferably legally bound as well as morally bound, to be committed to securing “full equality in practice” for groups currently protected under the Directives and national equality laws. In practice, what this would mean is that all public bodies would see achieving substantive equality as an integral part of their functions and would build the promotion of equality, including relevant positive action, into all that they do.

As many here will be aware, legal duties on public bodies to promote equality are now part of UK law - first on 9 grounds under the Northern Ireland Act 1998, and then, after the Stephen Lawrence Inquiry, on grounds of race in the RR(A)A 2000. Disability and gender equality duties have come into force in GB in the last two years. So far as I am aware, but I would love to be corrected, the only other equality legislation that specifically imposes a duty on the state to achieve equality outcomes is the Bulgarian Protection Against Discrimination Act, which states in Article 10, “In the course of exercising their powers, state and local government bodies shall take all possible and necessary measures in order to accomplish the aims of this Act.” I do not suggest, however, that every other EU member state does not have similar responsibilities:

All will be signatories of UN conventions requiring equal treatment, including the mandatory duty to take positive action in Article 2(2) of CERD

All will be signatories of the ECHR which commits them to ensure that Convention rights may be secured without discrimination, and case law which Lilla will discuss later today, has established obligations to go beyond ensuring formal equal treatment.

All will be signatories of the Framework Convention for the Protection of National Minorities and therefore committed to positive action measures to promote equality of national minorities in various spheres of public life.
All will have approved Treaty Articles 13 and 141 in the full knowledge that EC legislation would require every member state to give effect to the principle of equal treatment.

But even without international legal obligations, our experience in the UK is that proper mainstreaming of equality has the result for the public authorities concerned that it helps rather than hinders them to do more effectively what they were set up to do. So, for example, if there is evidence of inequality in educational achievement of children from different racial groups, then the municipality that has responsibility for education mindful of equality obligations, should be expected to act to bring about change: firstly to collect data and analyse why such disparities exist and then to take appropriate steps to achieve more equal outcomes - so they can do properly, professionally and appropriately the job of educating all of the children for whom they are responsible.

And, picking up another increasingly important thread, as public authorities enter into contracts with the private sector, for services and for goods and works, authorities with a commitment to mainstreaming equality will ensure that their contractors adopt the same approach. Where contractors are providing public services, for example leisure services or welfare services, it will be possible for the contract specification to require some of the types of positive action I have mentioned to secure equal take-up by all potential users. And with regard to a contractor’s workforce, while it may not always be possible to require positive action, conditions requiring non-discrimination and evidence of equality of opportunity may in fact lead contractors to adopt some of these types of positive action to meet these conditions.

In conclusion, I would like to quote some extracts from a 1984 EU Council Recommendation on promotion of positive action for women, leaving it to you to add race alongside gender:

3 Council Recommendation 84/635/EEC on the promotion of positive action for women, 13 December 1984
Firstly, from the preamble:

Whereas existing legal provisions on equal treatment, which are designed to afford rights to individuals, are inadequate for the elimination of all existing inequalities unless parallel action is taken by governments, both sides of industry and other bodies concerned, to counteract the prejudicial effects on women in employment which arise from social attitudes, behaviour and structures;

Then, among the recommendations to Member States:

1. To adopt a positive action policy designed to eliminate existing inequalities affecting women in working life and to promote a better balance between the sexes in employment....

   (a) to eliminate or counteract the prejudicial effects on women in employment or seeking employment which arise from existing attitudes, behaviour and structures based on the idea of a traditional division of roles in society between men and women;

   (b) to encourage the participation of women in various occupations in those sectors of working life where they are at present under-represented, particularly in the sectors of the future, and at higher levels of responsibility in order to achieve better use of all human resources.

   “4. To take steps to ensure that positive action includes as far as possible actions having a bearing on the following aspects:

   - informing and increasing the awareness of both the general public and the working world of the need to promote equality of opportunity for working women,

   - respect for the dignity of women at the workplace,

   - qualitative and quantitative studies and analyses of the position of women on the labour market,

   - diversification of vocational choice, and more relevant vocational skills, particularly through appropriate vocational training, including the implementation of supporting measures and suitable teaching methods,

   - measures necessary to ensure that placement, guidance and counselling services have sufficient skilled personnel to provide a service based on the necessary expertise in the special problems of unemployed women,
- encouraging women candidates and the recruitment and promotion of women in sectors and professions and at levels where they are underrepresented, particularly as regards positions of responsibility,

- adapting working conditions; adjusting the organization of work and working time,

- encouraging supporting measures such as those designed to foster greater sharing of occupational and social responsibilities,

- active participation by women in decisionmaking bodies, including those representing workers, employers and the self-employed.”

These recommendations were issued eight years after the Equal Treatment Directive when the need to go beyond providing individual rights to equal treatment had been recognised. Today, only seven years after the Race and Framework Equality Directives, we are giving careful thought to these same issues, with the benefit of the experience of gender-related positive action and with the knowledge and experience of everyone present.

I wish you a successful seminar.

29 November 2007