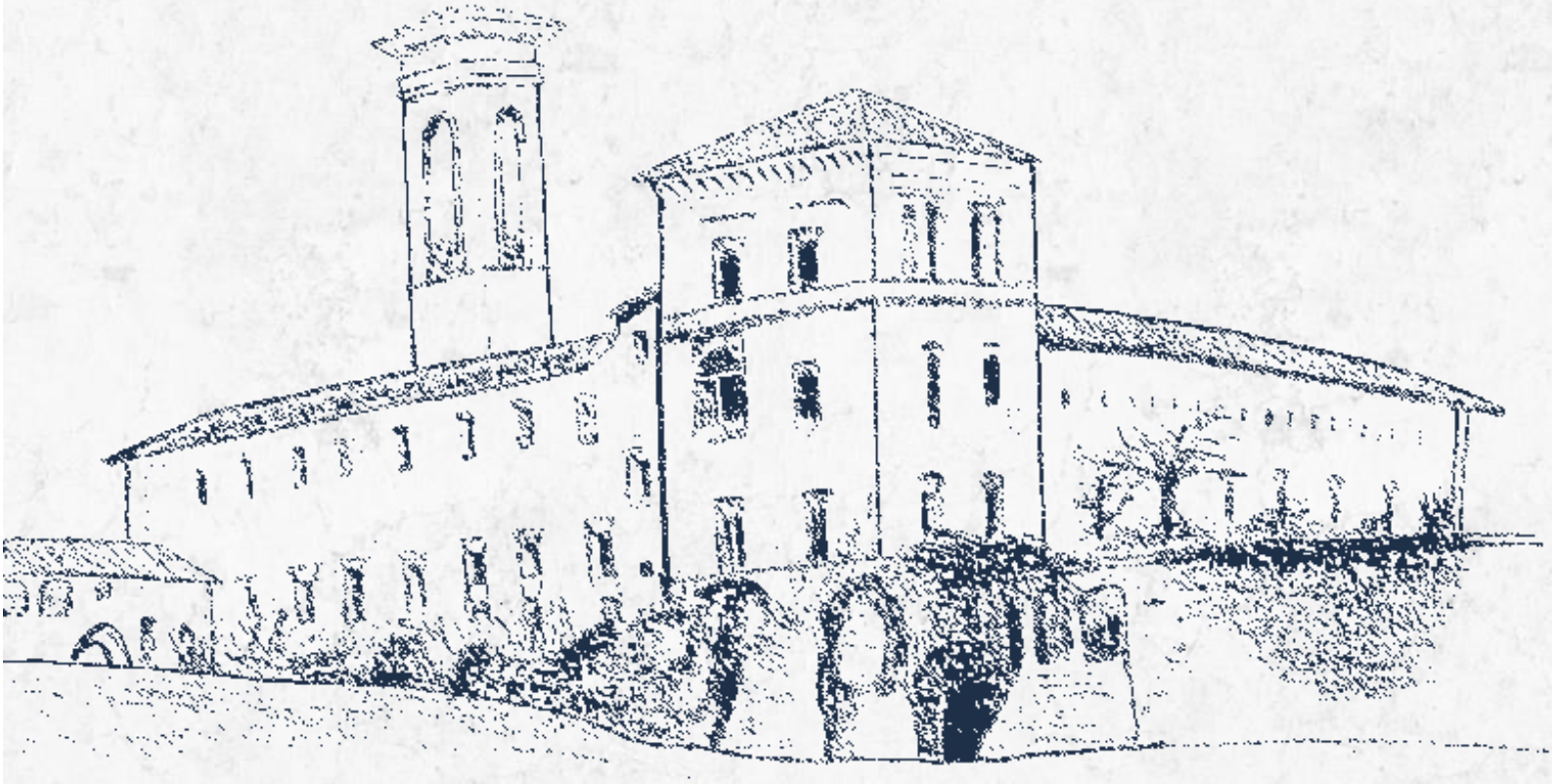
OPEN ACCESS
ISSN 2280-4056

E-Journal of International and Comparative

LABOUR STUDIES

Volume 4, No. 3 September-October 2015



ADAPT
www.adapt.it
UNIVERSITY PRESS

E-Journal of International and Comparative **LABOUR STUDIES**

ADAPT *International School of Higher Education in Labour and Industrial Relations*

E-Journal of International and Comparative

LABOUR STUDIES

Volume 4, No. 3 September-October 2015

ADAPT
www.adapt.it
UNIVERSITY PRESS

Online Publication of the ADAPT Series
Registration No. 1609, 11 November 2001, Court of Modena
www.adaptbulletin.eu

Indirect Discrimination 15 Years on

Erica Howard [*]

1. Introduction

European Union anti-discrimination law[1] prohibits direct and indirect discrimination, harassment and victimization on the grounds of gender, racial or ethnic origin, religion or belief, disability, age and sexual orientation. The focus of this article is on indirect discrimination, but the concept of direct discrimination and some of its distinctions from indirect discrimination will also be touched upon. Direct discrimination occurs where one person is treated less favourably than another is, has been or would be treated in a comparable situation on a prohibited ground. Indirect discrimination occurs where an apparently neutral provision, criterion or practice would put persons with a particular protected characteristic at a particular disadvantage compared with other persons, unless this is objectively justified by a legitimate aim and the means used to achieve that aim are proportionate and necessary.[2]

[*] Erica Howard is Associate Professor in Law in the School of Law, Middlesex University, London, UK: http://www.mdx.ac.uk/about-us/our-people/staff-directory/howard-erica.

[1] The main Directives are: Directive 2000/43/EC of 29 June 2000 Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin [2000] OJ L 180/22; Directive 2000/78/EC of 27 November 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation [2000] OJ L 303/16; Directive 2004/113/EC Implementing the Principle of Equal Treatment between Men and Women in the Access to and Supply of Goods and Services [2004] OJ L 373/37; and, Directive 2006/54/EC on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation (Recast) [2006] OJ L 204/23. The latter Directive repealed a number of earlier Directives prohibiting sex discrimination.

[2] See for the definition: Article 2(2)(a) (direct discrimination) and (b) (indirect discrimination) of Directives 2000/43/EC and 2000/78/EC, Article 2(a)and (b) of Directive 2004/113/EC and Article 2(1)(a) and (b) of Directive 2006/54/EC.

In this article, an overview of the development of the concept of indirect discrimination and the rationale for this development will be given. This is followed by an analysis of the elements of indirect discrimination which can be deduced from the definition: particular disadvantage and objective justification. The analysis of the term 'particular disadvantage' will include an examination of the question whether evidence is needed of actual group disadvantage and will conclude that this is not required. The examination of objective justification also discusses that the test for objective justification can be said to come close to imposing a duty of reasonable accommodation. The differences between direct and indirect discrimination as regards to justification will be addressed as well as the question whether objective justification of direct discrimination should be permitted.

2. Development of Indirect Discrimination

The origins of the concept of indirect discrimination can be traced to the US case of *Griggs v Duke Power*,[3] where the Duke Power Company required all employees applying for other than the lowest paid jobs to score well in two separate aptitude tests and to have a high school leaving certificate. These requirements, which were not directly related to the nature of the jobs, in effect almost fully excluded Afro-Americans from the higher paid jobs because they were less likely to pass the tests or have a high school leaving certificate. So, although the test appeared neutral and applicable in the same way to all employees, Afro-Americans were significantly disadvantaged. When the case reached the US Supreme Court, it held that the prohibition of racial discrimination in the Civil Rights Act 1964 did include the situation where neutral practices, procedures or tests were discriminatory in operation. The Court considered that, 'the touch stone is business necessity. If an employment practice, which operates to exclude negroes cannot be shown to be related to job performance, the practice is prohibited'.[4] The Court also held that it was up to the employer to show the relationship with the job performance ability. Therefore, it can be said that the US Supreme Court in this case established that the Civil Rights Act 1964 prohibited indirect discrimination. From then onwards, the US law on indirect discrimination developed and, in 1991, the concept was laid down in the Civil Rights Act 1991. This determines that a person

[3] *Griggs v Duke Power Co* 401 US 424 (1971).
[4] Ibid, 431.

establishes a prima facie breach of the Act's anti-discrimination provisions if they can show that an employer uses 'a particular employment practice that causes disparate impact on the basis of race, color, religion, sex, or national origin'. The employer can then defend themselves against this by showing 'that the challenged practice is job related for the position in question and consistent with business necessity', but, this defence will not succeed if the employee demonstrates that there is an alternative practice with less disparate impact which serves the employer's legitimate needs and the employer has refused to adopt this alternative practice.[5]

Griggs v Duke Power and the subsequent developments in the US influenced the inclusion of indirect discrimination provisions in the British Sex Discrimination Act 1975 (SDA 1975) and Race Relations Act 1976 (RRA 1976). Under the SDA 1975, the complainant had to show that 'considerable fewer women than men' could comply with a requirement and the RRA 1976 contained a similar provision on indirect race discrimination. This meant that statistical evidence was required to prove indirect discrimination and this led to difficulties for a complainant, not only because statistics might not be available, but also because, even if they were available, they might be difficult to obtain.[6]

US and UK anti-discrimination law and the concept of indirect discrimination influenced the development of the concept in the EU through the case law of the Court of Justice of the European Union (CJEU) on equal pay rules and gender discrimination. Barnard and Hepple write that 'the introduction of the concept of indirect discrimination into Community law is a remarkable example of judicial creativity'.[7] In 1981, in *Jenkins v Kingsgate (Clothing Productions) Ltd*,[8] the CJEU was asked whether lower hourly rates for part-time work constituted sex discrimination as women were more likely to work part-time than men. The CJEU held that this would not offend against the principle of equal pay 'in so far as the difference in pay between part-time work and full-time work is

[5] Civil Rights Act 1991, 105 Stat 1071, 42 USC 2000e-2(k)(1)(A)(i) and (ii).

[6] See, for example, C. Tobler, *Limits and Potential of the Concept of Indirect Discrimination,* European Commission, Office for Official Publications of the European Communities, Luxembourg, 2008, 40-41; and, D. Schiek, *Indirect Discrimination* in D. Schiek, L. Waddington and M. Bell (eds.), *Cases, Materials and Text on National, Supernational and International Non-Discrimination Law*, Hart Publishing, Oxford/Portland, Oregon, 2007, 397-422.

[7] C. Barnard and B. Hepple, *Indirect Discrimination: Interpreting Seymour-Smith*, in *Cambridge Law Journal*, 1999, vol. 58, n. 4, 400.

[8] C-96/80 *Jenkins v Kingsgate (Clothing Productions) Ltd* [1981] ECR 911.

attributable to factors which are objectively justified and are in no way related to any discrimination based on sex'.[9]
Bilka Kaufhaus[10] concerned part-time workers who were excluded from a pension scheme. This affected a far greater number of women than men. The CJEU established that indirect discrimination was prohibited by EU law and developed a test for justification of indirect discrimination: 'the employer must … put forward objective economic grounds relating to the management of the undertaking. It is also necessary to ascertain whether the pay practice in question is necessary and in proportion to the objectives pursued by the employer'.[11]
In 1997, this was laid down in law via Article 2(2) of Directive 97/80/EC, which determined that

> indirect discrimination shall exist where an apparently neutral provision, criterion or practice disadvantages a substantially higher proportion of the members of one sex unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex'[12]

So, here again, 'a considerable higher proportion' was required, which meant the need for statistical evidence. However, in 2000, when the EU adopted legislation against racial and ethnic origin, religion or belief, disability, age and sexual orientation discrimination, a different definition was chosen.[13] For example, Article 2(2)(b) of Directive 2000/43/EC determines:

> indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary

The reason for the new definition was that the EU Commission wanted to remove the need for statistical evidence as such evidence in sex discrimination cases is generally available in all Member States, but this is not the case for some of the other grounds of discrimination, like sexual

[9] Ibid, para 11.
[10] C-170/84 *Bilka Kaufhaus GMBH v Karin Weber von Hartz* [1986] ECR 1607.
[11] Ibid, para 36.
[12] Directive 97/80/EC of 15 December 1997 on the Burden of Proof in Cases of Discrimination based on Sex.
[13] See Article 2(2)(b) of both Directives 2000/43/EC and 2000/78/EC.

orientation or racial or ethnic origin.[14] Rather than following the definition provided in Directive 97/80/EC, the 2000 Directives followed the definition derived from EU law on the free movement of workers, where discrimination on the grounds of nationality is prohibited. In *O'Flynn v Adjudication Officer,*[15] the CJEU held that

> … unless objectively justified and proportionate to its aim, a provision of national law must be regarded as indirectly discriminatory if it is intrinsically liable to affect migrant workers more than national workers and if there is a consequent risk that it will place the former at a particular disadvantage. It is not necessary in this respect to find that the provision in question does in practice affect a substantially higher proportion of migrant workers. It is sufficient that it is liable to have such an effect[16]

As Fredman concludes, 'this approach is based on the risk or liability of disparate impact, rather than requiring proof that such impact has in fact occurred'.[17] This new definition was subsequently adopted in the EU Directives against sex discrimination and now applies to all protected grounds of discrimination.[18] EU law then influenced changes to the definition of indirect discrimination in British law and the present definition in S19 of the Equality Act 2010 contains a very similar definition to the one in the EU anti-discrimination Directives.

3. Rationale for Prohibiting Indirect Discrimination

The above examined how the concept of indirect discrimination developed, but it did not provide an answer to the question why it was developed. From the definitions discussed, it will be clear that indirect discrimination focuses on impact rather than on treatment, as direct discrimination does. Direct discrimination is concerned with unequal treatment, but indirect discrimination concerns equal treatment of everyone, it treats everyone in the same way, but this same treatment leads to 'particular disadvantage' or 'disparate impact' on certain groups. Schiek gives two rationales for the introduction of a concept of indirect

[14] A. Tyson, *The Negotiation of the European Community Directive on Racial Discrimination*, in *European Journal of Migration and the Law,* 2001, vol. 3, 201-203.
[15] C- 237/94 *O'Flynn v Adjudication Officer* [1996] 3 CMLR 103.
[16] Ibid, paras 20 and 21.
[17] S. Fredman, *Discrimination Law* (2nd ed.), Oxford University Press, Oxford, 2011, 187.
[18] See: Article 2(b) of Directive 2004/113/EC and Article 1(b) Directive 2006/54/EC. The latter Directive repealed Directive 97/80/EC.

discrimination in anti-discrimination law. The first is 'to prevent circumvention of one or several specific prohibitions to discriminate'[19] or, as Tobler puts it, 'the Court of Justice [CJEU] developed this concept [indirect discrimination] with the aim of enhancing the effectiveness of the prohibition of discrimination'.[20] The second rationale given by Schiek is 'to aid the attainment of the wider goals of discrimination law in social reality'.[21] Tobler puts the latter as follows: 'the concept of indirect discrimination can be seen as a tool to make visible and challenge the underlying causes of discrimination, which are often of a structural nature'.[22]

A good example of the first rationale is the already mentioned US case of *Griggs v Duke Power*. The Duke Power Company had always had a racially discriminatory employment policy and employed Afro-Americans only in low paid jobs but, when Title VII Civil Rights Act 1964 prohibited overt racial discrimination, the requirements and test as set out above were introduced. The US Supreme Court considered that the objective of Congress with Title VII:

> was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. *Under the Act, practices, procedures, or tests neutral on their face or even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices* [my italics].[23]

This, therefore, strongly suggests that indirect discrimination was partly introduced to avoid people using neutral provisions or rules to circumvent the prohibition of direct discrimination.

The second rationale mentioned above refers to the aim which indirect discrimination, or anti-discrimination law more generally, is trying to achieve. Is anti-discrimination law aiming to achieve a more equal society? In this respect, a distinction can be made between formal and substantive equality. The principle of formal equality requires that like should be treated alike, that people in the same situation should be treated in the same way. This form of equality can be seen in the definition of direct discrimination in the EU Directives: direct discrimination takes place

[19] Schiek, *Indirect Discrimination*, *op. cit.*, 6, 324.
[20] Tobler, *Limits and Potential of the Concept of Indirect Discrimination*, *op. cit.*, 6, 24.
[21] Schiek, *Indirect Discrimination*, *op. cit.,* 6, 324.
[22] Tobler, *Limits and Potential of the Concept of Indirect Discrimination*, *op. cit.*, 6, 24.
[23] *Griggs v Duke Power, op. cit.*, 3, 429-430.

where one person is treated less favourably than another is, has been or would be treated in a comparable situation on a prohibited ground. But this does not recognize that people are often in different situations.

In contrast to this, the concept of substantive equality takes these material differences between individuals or groups into account. Substantive equality is often referred to as 'de facto equality' because it aims at establishing factual equality, while formal equality is then referred to as 'legal equality' or 'equality before the law'. Substantive equality takes into account the reality of the position of disadvantage that some groups are in because of past and ongoing discrimination and recognizes that persons are discriminated against as members of a particular group (like, for example, ethnic minorities, religious groups, women or disabled persons). Therefore, laws aiming to establish substantive equality aim to compensate for the social inequalities and disadvantages suffered by certain groups and are more sensitive to group aspects of discrimination. There are extra burdens and barriers to achieving equality for members of disadvantaged groups and laws aiming at substantive equality will take this into account.

As is clear from the definition, indirect discrimination focuses on the impact of a provision, criterion or practice on a group of people sharing a protected characteristic and can thus be said to aim at substantive equality. In *Homer*, the UK Supreme Court explained that 'the law of indirect discrimination is an attempt to level the playing field by subjecting to scrutiny requirements which look neutral on their face but in reality work to the comparative disadvantage of people with a particular protected ground'.[24]

Therefore, indirect discrimination focuses on the impact of a provision, criterion or practice and recognizes that an apparently neutral rule, which is applied to everyone equally, can put certain people at a particular disadvantage. It acknowledges that treating everyone equally, that simply prohibiting direct discrimination, might not be enough to achieve factual equality in society because some people are not in the same situation, are not at the same starting point. As Fredman writes, 'the whole point of indirect discrimination is to recognize that equal treatment may itself be discriminatory'.[25] So indirect discrimination would fit in with the substantive concept of equality as it aims at a more de facto equality and

[24] *Homer v Chief Constable of West Yorkshire Police* [2012] UKSC 15, para 17.
[25] Fredman, *Discrimination Law, op. cit.*, 17, 189.

can thus be seen as aiding 'the attainment of the wider social goals of discrimination law in social reality', as Schiek expresses it.[26]

4. Elements of Indirect Discrimination

After analyzing how and why the concept of indirect discrimination was developed, the concept itself will now be examined. The main elements of the definition in EU law are particular disadvantage and objective justification. However, before these are scrutinized, two other aspects will be discussed briefly: the meaning of 'provision, criterion or practice' and the need for a comparator.

4.1. Provision, Criterion or Practice

The expression 'provision, criterion or practice' appears to be interpreted widely. Bamforth *et al.* write that "'Provisions, criteria or practices" can be written or unwritten, formal or informal, explicit or implicit. What is required is that some differentiating fact is applied that has an impact upon the complainant'.[27] Although they write about British anti-discrimination law, there does not appear to be any reason why this should not be equally applicable to the same terms in the EU anti-discrimination Directives. This suggests that it is not necessary to identify which of the three terms applies to a rule or differentiating fact which is challenged. This is also clear from the Handbook on European Non-discrimination Law which states that 'there must be some form of requirement that is applied to everybody'.[28] The term certainly does not appear to create any difficulties for the CJEU. It is submitted that a wide interpretation of the term 'provision, criterion or practice' is preferable because it would mean that a challenge to an indirectly discriminatory practice would not fall at the first hurdle, but that the CJEU can examine it under objective justification where there is more room for considering a number of issues, as will become clear below. This is indeed the path the CJEU seems to take in cases of indirect discrimination.

[26] Schiek, *Indirect Discrimination*, *op. cit.*, 6, 324.
[27] N. Bamforth, M. Malik and C. O'Cinneide, *Discrimination Law: Theory and Context,* Sweet and Maxwell, London, 2008, 310. For examples, see: 310-312.
[28] Fundamental Rights Agency and European Court of Human Rights, Council of Europe, *Handbook on European Non-discrimination Law,* Publications Office of the European Union, Luxembourg, 2011, 29.

4.2. Comparators

The definition of indirect discrimination also states that the provision, criterion or practice would put persons with a protected ground 'at a particular disadvantage *compared with* other persons …' [my italics]. This suggests that a comparison must be made. The same is the case for direct discrimination, which is defined as when a person 'is treated less favourably than another is, has been or would be treated *in a comparable situation* …' [my italics]. Under the EU anti-discrimination Directives a comparator can be real or hypothetical. Fredman writes that 'the need for a comparator has been one of the most problematic aspects of direct discrimination'. This is because 'the choice of comparator itself requires a value judgement as to which aspects of the comparator are relevant and which are irrelevant'. [29] And, as McColgan points out, 'it is difficult to do comparison without explicitly or implicitly accepting one of the persons or things compared as the "norm", and assessing the other's entitlement to equal treatment, respect, outcomes etc, on the basis of the degree of fit they exhibit to the norm…'.[30] So, subjective and even prejudicial considerations might play a role in the choice of comparator and, even if a hypothetical comparator can be used, the choice can influence the outcome of a case, or can even, as Fredman points out, 'empty anti-discrimination law of any real impact'.[31]

In relation to indirect discrimination, where, as mentioned, a comparison is also required, this means that the rationale for introducing this concept, especially the aim of introducing a more substantive, de facto equality, could be undermined. Although the comparison here is with a group of persons, the same problem applies because 'the selection of the comparator group is an issue over which courts possess an important element of discretion', as Ellis and Watson write.[32] They also link this to substantive equality, as they continue that 'the extent to which they [the courts] take a sensitive approach to it bears directly upon the capacity of the concept of indirect discrimination to intervene to produce effective equality'.[33]

---

[29] Fredman, *Discrimination Law*, *op. cit.*, 17, 168.

[30] A. McColgan, *Discrimination, Equality and the Law,* Hart Publishing, Oxford/Portland, Oregon, 2014, 101.

[31] Ibid, 171.

[32] E. Ellis and P. Watson, (2012) *EU Anti-Discrimination Law* (2nd ed.), Oxford University Press, Oxford, 2012, 152.

[33] Ibid.

A good example to illustrate this is the *Österreichischer Gewerkschaftsbund* case[34] discussed by, amongst others, Tobler.[35] In this case, redundancy payments were calculated taking into account certain periods of absence: absence due to military service (mostly taken by men) was taken into account, but absence for voluntary parental leave (mostly taken by women) was not. The CJEU held that there was no indirect discrimination because men and women were not in a comparable situation. The periods of absence were not comparable, because parental leave was voluntary and taken in the interest of the individual, while national service was a civic obligation and was in the public interest, even if it was extended voluntarily.[36] As Tobler writes, 'had the Court looked at the activities behind the two types of absence in the light of their usefulness to society as a whole, it might well have arrived at a different conclusion'.[37] And, Ellis and Watson submit that 'the correct comparator group would have been all workers otherwise eligible for termination payments whose employment was temporarily interrupted in order to discharge an important responsibility'.[38]

Schiek opines that, because, with indirect discrimination, the emphasis is on effects and thus 'there is no place to introduce comparator arguments'. She states that introducing the category of comparability into the indirect discrimination test is 'dogmatically unsound'.[39] Waaldijk also argues that the comparability requirement does not apply to indirect discrimination.[40] However, Tobler, Waaldijk's co-author, does not agree and states that comparability remains 'an essential precondition' for both direct and indirect discrimination in EU law.[41] It is submitted, that the latter fits with the definition of indirect discrimination in the anti-discrimination Directives, which does contain the words 'compared with other persons'.

---

[34] Case C-220/02 *Österreichischer Gewerkschaftsbund, Gewerkschaft der Privatangestellten v Wirtschafts-kammer Österreich,* [2004] ECR I-5907.

[35] Tobler, *Limits and Potential of the Concept of Indirect Discrimination, op. cit.*, 6, 40; see also: Schiek, *Indirect Dicrimination, op. cit.*, 6, 468-469; and, M. Bell, *The Principle of Equal Treatment: Widening and Deepening,* in P Craig and G de Búrca, (Eds) *The Evolution of EU Law*, Oxford University Press, Oxford, 2011, 632.

[36] *Österreichischer Gewerkschaftsbund, op. cit.,* 34.

[37] Tobler, *Limits and Potential of the Concept of Indirect Discrimination*, *op. cit.*, 6, 40.

[38] Ellis and Watson, *EU Anti-Discrimination Law, op. cit.*, 32, 153, footnote 53.

[39] Schiek, *Indirect Discrimination, op. cit.,* 6, 471.

[40] C. Tobler and K. Waaldijk, *Case C-267-06, Tadao Maruko v Versorgungsanstalt der deutschen Bühnen, Judgment of the Grand Chamber of the Court of Justice of 1 April 2008, not yet reported,* in *Common Market Law Review,* 2009, vol. 46, 745.

[41] Ibid.

With Tobler, author would suggest that comparability is required for indirect discrimination as well, but national courts and the CJEU, when called upon to decide on cases of indirect discrimination, should be 'very careful about the issue of comparability' and 'should be careful not to assume non-comparability too easily'. They should 'remember that the comparison should always be between the groups of people relevant in the context of the type of discrimination at issue'. [42] Bell writes that 'the focus on the search for a comparator can often obscure a more penetrating inquiry about the cause or effects of the measure under scrutiny' and uses the *Österreichischer Gewerkschaftsbund* case to illustrate this.[43] His conclusion is that

> Cases such as the above illustrate how the requirement of comparability can constitute a preliminary hurdle, a means of obfuscating the issues at the heart of the dispute. In *Österreichischer Gewerkschaftsbund*, the underlying question concerned the State's prioritizing of military service over child-raising, but the Court of Justice avoided stepping into such sensitive terrain by its precursor finding about the comparator.[44]

It is submitted that to avoid this, the CJEU and the national courts should readily accept that there is comparability and then move on to scrutinize the issue in more detail to decide whether the provision, criterion or practice is objectively justified.[45] The next parts discuss the two main elements of the concept of indirect discrimination: particular disadvantage and objective justification.

4.3. Particular Disadvantage

The definitions of indirect discrimination in the EU anti-discrimination Directives state that the complainant needs to show that the provision, criterion or practice would put persons with whom he/she shares a protected ground at a particular disadvantage. As seen above, indirect discrimination requires a comparison to be made between groups: the complainant's protected group must be compared with a group that does not have that protected ground. It can thus be argued that indirect

---

[42] Tobler, *Limits and Potential of the Concept of Indirect Discrimination, op. cit.,* 6, 40.
[43] Bell, *The Principle of Equal Treatment: Widening and Deepening, op. cit.*, 35, 632.
[44] Ibid.
[45] For further reading on the comparator requirement see, for example, Fredman, *Discrimination Law, op. cit.*, 17, 168-175; and, McColgan, *Discrimination, Equality and the Law, op. cit.*, 30, 101-134.

discrimination is defined by group disadvantage. But does it also require evidence that there is a factual group that is disadvantaged? In other words, does the complainant have to show that someone else is disadvantaged through the provision, criterion or practice? The lower courts and the Court of Appeal (CA) in the British case of *Eweida v British Airways Plc* appears to read this into Article 2(2)(b) of Directive 2000/78/EC.[46] Eweida worked for British Airways as a member of their check-in staff. She was a devout Christian and wanted to wear a small silver cross with her uniform in a visible manner, but this went against the employer's uniform policy. Both the Employment Tribunal (ET) and the Employment Appeal Tribunal (EAT) rejected the claim of indirect discrimination because Eweida had not shown that the uniform requirement put persons of the same religion at a disadvantage. Therefore, as there was no evidence of group discrimination, it was held that there was no indirect discrimination.[47]
Regulation 3(1)(b) of the Employment Equality (Religion or Belief) Regulations 2003[48] prohibited, amongst other conduct, the following:

> For the purposes of this Regulation, a person (2A") discriminates against another person ("B"), if … A applies to B a provision, criterion or practice which he applies or would apply equally to persons not of the same religion or belief as B, but — which puts or would put persons of the same religion or belief as B at a particular disadvantage when compared with other persons, which puts B at that disadvantage, and which A cannot show to be a proportionate means of achieving a legitimate aim.

Eweida's appeal against the decision of the EAT was rejected by the Court of Appeal which held that the term 'persons', both in the British Employment Equality (Religion or Belief) Regulations 2003 and in Directive 2000/78/EC, could not be read as including a single person.[49] The detriment in this case, according to the court, was suffered by Eweida alone: neither evidentially nor inferentially was anyone else similarly

[46] *Eweida v British Airways Plc* [2009] IRLR 78 (EAT); [2010] IRLR 322 (CA). Eweida took her case to the European Court of Human Rights in Strasbourg, where it was heard with 3 other cases against the UK, see: *Eweida, Chaplin, Ladele and McFarlane v. the United Kingdom*; (2013) 57 EHRR 8.
[47] *Eweida* (EAT), *op. cit.*, 46, paras 61-64.
[48] These were the Regulations in force at the time. Section 19 of the Equality Act 2010, which repealed these Regulations, describes indirect discrimination in the same way.
[49] *Eweida (*CA), *op. cit.*, 46, para 15.

disadvantaged.[50] The same decision was reached in *Chaplin v Royal Devon & Exeter NHS Foundation Trust*,[51] where a nurse wanted to wear a crucifix on a chain around her neck while at work. There was another nurse who had also been asked not to wear a cross in this way, but she had complied with the rules, while Chaplin refused to do so. The majority of the ET held that this other nurse had not been put at a particular disadvantage since her religious views were not so strong as to lead her to refuse to comply with the rule. So there was no indirect discrimination because the rule did not put 'persons' at a particular disadvantage.[52] These cases suggest that actual, factual group disadvantage needs to be shown for a finding of indirect discrimination.

Under Section 19(2)(c) of the British Equality Act 2010, the complainant will also have to prove that he/she suffered a particular disadvantage. Recently, the Court of Appeal, in *Home Office v Essop*, confirmed both requirements and held that it is 'necessary in indirect discrimination claims for the claimant to show *why* the PCP [provision, criterion or practice] has disadvantaged the group and the individual claimant' [italics in original][53] and that 'group disadvantage cannot be proved in the abstract'.[54]

However, it is submitted that this is not the correct reading of Article 2(2)(b) of Directive 2000/78/EC and that neither actual group disadvantage nor actual individual disadvantage is required under this article. The wording of Directive 2000/78/EC differs from the wording in the Employment Equality (Religion or Belief) Regulations 2003 and the Equality Act 2010. The latter two instruments use the words 'puts or would put persons … at a particular disadvantage...', while the Directive only states: 'would put persons…'. This could suggest, as Bamforth *et al.* argue,[55] that:

> the new UK definition is more restrictive by appearing to require evidence that there is a *group* defined by a particular characteristic which is disadvantaged, while under the wording of the Directives, indirect discrimination could potentially occur when only *one person* defined by the particular characteristic was put at a disadvantage [italics in original].

[50] Ibid, para 28.
[51] *Chaplin v Royal Devon & Exeter NHS Foundation Trust* [2010] ET, Case Number: 17288862009, 6 April 2010.
[52] Ibid, paras 27-28.
[53] *Home Office (UK Border Agency) v Essop and Ohters* [2015] EWCA Civ 609, para 57.
[54] Ibid, para 59.
[55] Bamforth, Malik and O'Cineide, *Discrimination Law: Theory and Context*, *op. cit.*, 27, 307-308.

The same authors also point out that:

> It is worth noting that the post-2000 Directives do not appear to contain this requirement of individual exposure to disadvantage: it may be the case that the Directives permit an action to be brought if one is simply a member of a group that is subject to disadvantage, without requiring any additional evidence of specific individual impact.[56]

The submission of the British Equality and Human Rights Commission to the European Court of Human Rights in *Eweida and Chaplin v the United Kingdom*, supports the view that there is no requirement for group disadvantage where it states that the definition of indirect discrimination in Directive 2000/78/EC 'does not require a person to show that others who share the religion are actually put at a disadvantage by the employer's actions'.[57] Therefore, it is submitted that neither actual group disadvantage nor actual individual disadvantage are required for indirect discrimination under EU law.[58] Support for this can also be found in the already mentioned fact that the definition of indirect discrimination in Directives 2000/43/EC and 2000/78/EC was derived from *O'Flynn v Adjudication Officer,* which showed that, for indirect discrimination to be established, it was sufficient that the provision, criterion or practice 'is liable to have such an effect'.[59] In other words, is liable to lead to particular disadvantage, or, as Fredman expresses it, this approach does not require 'that such impact has, in fact, occurred'.[60]
This suggests that the definition of indirect discrimination in Section 19(2)(b) of the British Equality Act 2010 is too restrictive, and that the requirements of both actual group disadvantage and actual individual disadvantage do not conform to the EU anti-discrimination Directives.

---

[56] Ibid, 321.
[57] Submission Equality and Human Rights Commission in the European Court of Human Rights, *Eweida and Chaplin v the United Kingdom*, App. Nos 48420/10 and 59842/10, (2012), http://www.equalityhumanrights.com/uploaded_files/legal/ehrc_submission_to_ecthr_sep_2011.pdf, para 28.
[58] Author has argued that the Court of Appeal in *Eweida* should have referred the question whether actual group disadvantage is required for indirect discrimination under Directive 2000/78/EC, to the CJEU, see: E. Howard, *Protecting Freedom to Manifest One's Religion or Belief: Strasbourg or Luxembourg?* in *Netherlands Quarterly of Human Rights,* 2014, vol. 32, n. 2, 161-163.
[59] *O'Flynn, op. cit.,* 15, para 21.
[60] Fredman, *Discrimination Law, op. cit.*, 17, 187.

Moreover, the recent CJEU case of *CHEZ RB*[61] suggests that the British Court of Appeal decision in *Essop*[62] does not conform to EU law in another way. In *CHEZ RB*, an electricity company in Bulgaria installed electricity meters in districts with predominantly Roma inhabitants at about 6 to 7 metres above the ground, while in other districts these meters were put at a height of about 1.7 metres. The reason given for the difference by the electricity company was that this was to prevent tampering and unlawful connections to the electricity network. A shop keeper in one of these Roma neighbourhoods, Ms Nikolova, who was herself not of Roma ethnic origin, complained that she had been discriminated against on the ground of racial or ethnic origin because she suffered the same disadvantage as her Roma neighbours. The CJEU held that the concept of discrimination on the grounds of ethnic origin must be interpreted as being intended to apply irrespective of whether that collective measure affects persons who have a certain ethnic origin or those who, without possessing that origin, suffer, together with the former, the less favourable treatment (*i.e.* direct discrimination) or particular disadvantage (*i.e.* indirect discrimination) resulting from that measure.[63] The CJEU decision thus means that a person can claim direct or indirect discrimination on one of the protected characteristics even if they do not themselves possess that protected characteristic. The CJEU also held that the concept of 'particular disadvantage' in the EU measure against racial or ethnic origin discrimination does not refer to serious, obvious or particularly significant cases of inequality, but denotes that it is particularly persons of a given racial or ethnic origin who are at a disadvantage because of the provision, criterion or practice at issue.[64] Therefore, the test used by the CJEU is much less strict than the test given by the British Court of Appeal in *Essop*[65] and it is submitted that the latter does not conform to EU law in this regard as well.

[61] Case C-83/14 *CHEZ Razpreldelenie Bulgaria AD v Komisia za Zastita ot Diskriminatsia*, 16 July 2015 [2015] ECLI:EU:C:480.
[62] *Op. cit.* 53.
[63] *Chez RP, op. cit.,* 61, para. 129 under 1.
[64] Ibid, para. 129, under 4.
[65] *Op. cit.,* 53.

4.4. Objective Justification of Indirect Discrimination

The definition of indirect discrimination in the EU anti-discrimination Directives makes clear that indirect discrimination can be objectively justified if the provision, criterion or practice has a legitimate aim and the means used to achieve that aim are appropriate and necessary. The burden of proving this is on the person applying the provision, criterion or practice.[66] The CJEU has explained, in *Bilka Kaufhaus*,[67] that there are three parts to the objective justification test for indirect discrimination: first of all, the means chosen must correspond to a real need; secondly they must be appropriate with a view to achieving the objective pursued; and, thirdly, they must be necessary to that end.

The term 'must be necessary to that end' also indicates that the test includes a consideration of the question whether there is an alternative, less far-reaching and less discriminatory way of achieving the aim pursued. If there is an alternative which affects the individual less, than that should be chosen. Schiek concludes that 'from this one can conclude that, where there is a less discriminatory alternative, the measure is not objectively justified'.[68] This is supported by case law of the CJEU, for example, in *HK Danmark v Dansk Almennyttigt Boligselskab and HK Danmark v Dansk Arbejdsgiverforening,* Advocate General Kokott opined that the provision, criterion or practice 'must also be necessary, which is to say that the legitimate aim pursued must not be capable of being achieved by more moderate but equally appropriate means',[69] while the CJEU considered that 'it must be examined whether that difference of treatment is objectively justified by a legitimate aim and whether the means used to achieve that aim are appropriate and *do not go beyond what is necessary* to achieve the aim pursued by the Danish legislature' [my italics].[70] And, in *Dansk Jurist,* Kokott stated that 'a measure is "necessary" where the legitimate aim pursued cannot be achieved by an equally suitable but more benign means'.[71] As discussed above, the provisions on indirect discrimination were influenced by the disparate impact case law in the US

---

[66] See Fundamental Rights Agency and European Court of Human Rights, *Handbook on European Non-discrimination Law*, *op. cit.*, 28, 126.

[67] *Bilka Kaufhaus, op. cit.*, 10, paras 36-37.

[68] Schiek, *Indirect Discrimination, op. cit.*, 6, 357.

[69] C-335/11 and C-337/11 *HK Danmark v Dansk Almennyttigt Boligselskab and HK Danmark v Dansk Arbejdsgiverforening*, AG, [2013] 3 CMLR 21, para 70.

[70] Ibid, para 77.

[71] C-546/11 *Dansk Jurist- og Økonomforbund v Indenrigs- og Sundhedsministeriet*, AG, [2014] 1 CMLR 41, para 38.

and there, too, less discriminatory alternatives are very much part of the justification test.[72]

4.5. Duty of Reasonable Accommodation as Part of the Justification Test

All this is summed up well by Fredman who writes that 'the Court of Justice [CJEU] has consistently stressed that the standard of necessity requires an investigation of alternative measures that are less invasive of the right'.[73] Therefore, alternative measures need to be considered and it is suggested that this comes close to a duty to make reasonable accommodation as laid down for disabled people in Article 5 Directive 2000/78/EC. According to this Article, employers must 'take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer'.

It has been suggested that EU law and national law in European countries should contain a duty of reasonable accommodation for all the grounds covered by anti-discrimination law. This duty would be subject to the proviso that this should not impose a disproportionate burden on employers or service providers.[74] Such a duty could be useful in relation to other protected grounds in EU law as well. For example, it could be useful where an employee requests time off work to perform a religious duty. It can be said that EU law itself makes certain accommodations in relation to sex, for example, in the regulations protecting pregnant and breast feeding women, and in relation to age, where it protects younger workers. However, it can be argued that it is not necessary to expand the duty in Article 5 Directive 2000/78/EC to include all other grounds of discrimination covered, because such a duty can be seen as part of the justification test for indirect discrimination: considering whether there are less discriminatory alternatives comes very close to such a duty.

---

[72] See: Civil Rights Act 1991, 105 Stat 1071, 42 USC 2000e-2(k)(1)(A)(i) and (ii), mentioned *op. cit.*, 5.

[73] S. Fredman, *Addressing Disparate Impact: Indirect Discrimination and the Public Sector Equality Duty*, in *Industrial Law Journal,* 2014, vol. 43, n. 3, 349. 356.

[74] See, for example, Council of Europe, Opinion of the Commissioner for Human Rights on National Structures for Promoting Equality, CommDH(2011)2, under 6.1, point 2, https://wcd.coe.int/ViewDoc.jsp?id=1761031#P66_5638; and, Equinet (2008) *Beyond the Labour Market New Initiatives to Prevent and Combat Discrimination,* Equinet, Brussels, at 8, http://www.equineteurope.org/IMG/pdf/EN_-_Beyond_the_Labour_Market_-_Opinion_2008.pdf.

Waddington writes that 'the obligation not to discriminate indirectly against a worker or other individual can, on occasions, result in positive duties to accommodate difference'.[75] Rorive states that 'the question is nowadays whether an indirect discrimination could be justified where reasonable accommodation is conceivable'[76] and argues that EU anti-discrimination law has developed with 'the emergence of the concept of reasonable accommodation to test whether an indirect discrimination is objectively and reasonably justified'.[77] Vickers writes that 'it is arguable that the Directive [2000/78/EC] creates an indirect duty to make reasonable accommodation',[78] as 'a failure to accommodate a request for different treatment by religious employees may amount to indirect discrimination, unless the refusal to accommodate is justified'.[79] All this suggests that an implicit duty of reasonable accommodation could be read in the EU provisions against indirect discrimination.

Support for the above can be found in the case law of the CJEU and of some national courts, where the courts hold that alternative ways should have been explored and even sometimes suggest alternative, less discriminatory means. For example, in *Dansk Jurist,* the CJEU did not accept the justification brought forward because it considered that 'the legitimate objectives pursued by the legislation at issue in the main proceedings may be attained by less restrictive, but equally appropriate, measures'.[80] Advocate General Kokott went even further and opined that:

> even considering the legitimate interest of the administration to avoid excessive expenditure, there would have been less restrictive means. A more benign means which would also spare the employer from excessive administrative costs would in this connection be to impose on civil servants the burden of demonstrating and proving their availability.[81]

And, in *Napoli,* the CJEU considered that:

---

[75] L. Waddington, *Reasonable Accommodation*, in Schiek, Waddington and Bell, *Cases, Materials and Text on National, Supernational and International Non-Discrimination Law*, *op. cit.*, 6, 754.

[76] I. Rorive, *Religious Symbols in the Public Space: in Search of an European Answer*, in *Cardozo Law Review*, 2009, vol. 30, 2693.

[77] Ibid, 2695.

[78] L. Vickers, *Religion and Belief Discrimination in Employment – EU Law*, Office for Official Publications of the European Communities, Luxembourg, 2006, 22.

[79] Ibid, 21.

[80] *Danks Jurist,* CJEU, *op. cit.*, 71, para 69.

[81] Ibid, AG, para 58.

> it seems possible to conceive of measures which would interfere less with the principle of equal treatment between men and women than the measure at issue in the main proceedings. Thus, as the referring court has itself observed, the national authorities could, if appropriate, contemplate reconciling the requirement to train candidates fully with the rights of female workers by providing, for a female worker who returns from maternity leave, parallel remedial courses equivalent to the initial training course so that that female worker may be admitted within the prescribed period to the examination enabling her to be promoted, without delay, to a higher grade and also meaning that the development of her career is not less favourable than that of the career of a male colleague who has been successful in the same competition and admitted to the same initial training course.[82]

Some national courts and tribunals in the Member States have found that a provision, criterion or practice was not objectively justified because alternative means to achieve the legitimate aim were not explored and, in some cases, alternatives were suggested by the Courts.[83] This is a clear way of saying that the practice can be accommodated. An example can be found in a case of the Dutch Equal Treatment Commission concerning two Muslim women who refused to take off their headscarves and were then denied access to a restaurant. The restaurant had a policy of excluding anyone wearing anything on their head. The aim of the policy was to attract smarter and more mature customers and to avoid people with baseball caps and similar attire. The Commission considered that the restaurant could achieve their aim by specifying what they did not consider to be smart dress, like sports attire. In this way, smartly dressed women with headscarves, which the women in this case were and which was never contested by the restaurant, could be allowed access. The policy was held not to be proportionate and necessary and thus indirectly discriminatory.[84]
Therefore, it is submitted that the three part test to establish whether indirect discrimination is justified and proportionate can be seen as including a duty to reasonably accommodate a request for exemption from a generally rule applicable to everyone equally. The question whether

[82] C-595/12 *Napoli v Ministero della Giustizia, Dipartimento dell'Amministrazione penitenziaria*, [2014] ICR 486, para 38.
[83] See: E. Howard, *Reasonable Accommodation of Religion and other Discrimination Grounds in EU Law*, in *European Law Review*, 2013, vol. 38, n. 3, 360-375 and the cases referred to in there.
[84] *Commissie Gelijke Behandeling* (Equal Treatment Commission), Judgment 2004-112. Since 2 October 2012 this Commission has become part of the *College voor de Rechten van de Mens* (Netherlands Institute for Human Rights). All judgments of the Commission are available (in Dutch) from the Institute's website: www.mensenrechten.nl.

the defendant in an indirect discrimination case has considered ways of accommodating a request for exemption of a neutral and general applicable provision, criterion or practice for reasons based on one of the protected grounds would thus be one of the issues to be taken into account to establish whether the means used to achieve a legitimate aim are appropriate and necessary and thus whether the indirectly discriminatory rule is objectively justified.[85] This would fit in with the description Fredman gives of indirect discrimination as an 'invitation to forward-looking and pre-emptive remedial action'.[86] She also writes that 'it is strongly arguable that indirect discrimination includes a duty to take pre-emptive action to address a pattern of disparate impact, even in the absence of litigation' because 'it is now well established that the justification defence [for indirect discrimination] cannot be made out if there are alternative, less discriminatory means to achieve the stated purpose'.[87]

4.6. Justification of Direct Discrimination

It appears to be generally accepted that the EU anti-discrimination Directives do not allow for justification of direct discrimination, except in situations prescribed in the Directives itself, like for example, for genuine occupational requirements[88] or for positive action.[89] As Bell writes:

> EC anti-discrimination Directives, like most national legislation, do not expressly declare that direct discrimination cannot be justified. Rather this is implicit from the absence of any textual reference to justification (unlike indirect discrimination, where objective justification is specifically mentioned).[90]

The question can be asked, as Bell also does, 'why direct discrimination should be subject to a restrictive scheme of narrow exceptions in contrast

---

[85] See further for this argument: Howard, *Reasonable Accommodation of Religion and other Discrimination Grounds in EU Law*, *op. cit.,* 83.
[86] Fredman, *Addressing Disparate Impact: Indirect Discrimination and the Public Sector Equality Duty, op. cit.*, 73, 349.
[87] Ibid.
[88] See for example, Articles 4 in both Directives 2000/43/EC and 20000/78/EC and Article 14(2) Directive 20006/54/EC
[89] See Article 5 Directive 2000/43/EC, Article 7 Directive 2000/78/EC and Article 3 Directive 2006/54/EC.
[90] M. Bell, *Direct Discrimination*, in Schiek, Waddington and Bell, *Cases, Materials and Text on National, Supernational and International Non-Discrimination Law*, *op. cit.*, 6, 273.

to indirect discrimination'.[91] A justification defence for direct discrimination is certainly not unknown. Directive 2000/78/EC itself allows for justification of direct age discrimination, because Article 6(1) determines that Member States may provide that age discrimination is not unlawful if it is objectively and reasonably justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. This justification defence of direct age discrimination is thus the same as for indirect discrimination under the EU anti-discrimination Directives.

Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) prohibits discrimination in the enjoyment of the rights and freedoms in the Convention on a large and open-ended number of grounds, - open-ended because it contains the terms 'or other status' and thus allows for the recognition of grounds which are not mentioned. But Article 14 can only be invoked in conjunction with another right and thus does not provide a free-standing right to non-discrimination. Protocol 12 to the ECHR does provide such a free-standing right, as it prohibits discrimination on the same, open-ended list of grounds in the enjoyment of any right set forth by law.[92] However, neither Article 14 nor Protocol 12 makes a distinction between direct and indirect discrimination and both allow for justification. In the *Belgian Linguistics* case, the European Court of Human Rights (ECtHR), the Court overseeing the Convention, held that the principle of equal treatment is violated if the distinction made has no objective and reasonable justification. To be justified, a difference in treatment must pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realized.[93]

So there are instances where a justification defence is also available for direct discrimination. Some authors have suggested that such a defence should be applicable to direct discrimination in EU and/or the national laws of the EU Member States as well, although those in favour are generally stressing that this should only be done in very limited

[91] Ibid, 269.

[92] All EU Member States have signed and ratified the Convention, but Protocol 12 has been signed and ratified by only a small number of these states.

[93] See: *Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium v Belgium* App. Nos 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64) (1979-1980) 1 EHRR 252, under THE LAW, B para 10. This also applies to Protocol 12, as the ECtHR in *Sejdic and Finci v Bosnia and Herzegovina* stated that Protocol 12 should be interpreted in the same way as Article 14 ECHR (*Sejdic and Finci v Bosnia and Herzegovina* App. Nos 27996/06 and 34836/06, 22 December 2009, para 55).

circumstances and that the standard of proving such justifications should be very high.[94] Lady Hale, the vice-president of the UK Supreme Court, stated in a speech that 'one problem is that, under EU law, there is no general defence of justification for direct discrimination, whereas there is such a defence for discrimination which is merely indirect. … But the distinction is by no means easy to draw'.[95] Lady Hale seems to suggest that a justification defence for direct discrimination could be useful in cases of clashing rights, an opinion which Gerards echoes.[96]

But should justification of direct discrimination be allowed because the distinction is not easy to make? Even if there are some cases in which it is not easy to distinguish the two forms of discrimination, in many cases there does not appear to be a problem. It has been suggested that courts and other adjudicating bodies sometimes opt for one form or the other because they want to include or exclude justification or, as Bowers *et al.* write, the distinction 'can be one of convenience and judicial interpretation'.[97] For example, Gerards mentions the strategy of the Dutch equality body to formulate a distinction which is fairly clearly based on a protected ground as indirect discrimination, so it can consider justification.[98] And, Tobler and Waaldijk write that 'it has been suggested that the CJEU (in *Maruko*) 'opted for a finding of direct discrimination in

---

[94] See, for a discussion on this a series of three articles in the Industrial Law Journal: J. Bowers and E. Moran, *Justification in Direct Sex Discrimination Law: Breaking the Taboo*, in *Industrial Law Journal,* 2002, vol. 31, n. 4, 307-320. For a reply which disagrees, see: T. Gill and K. Monaghan, *Justification in Direct Sex Discrimination Law: Taboo Upheld*, in *Industrial Law Journal,* 2003, vol. 32, n. 2, 115-122. A reply to this by the original authors, who adhere to their opinion that justification of direct sex discrimination should be made available: J. Bowers, E. Moran and S. Honeyball, *Justification of Direct Sex Discrimination: A Reply*, in *Industrial Law Journal,* 2003, vol. 32, no. 3, 185-187. Another author who advocates introducing a general justification for direct discrimination is J. Gerards, *Nieuwe Ronde, Nieuwe Kansen: naar een Semi-open Systeem van Gelijkbehandelingswetgeving? (New Round, New Chances: towards a Semi-open System of Equal Treatment Law?),* in *Nederlands Tijdschrift voor de Mensenrechten (Netherlands Journal of Human Rights),* 2011, vol. 36, n. 2, 133-158.

[95] *Lady Hale gives the Annual Human Rights Lecture for the Law Society of Ireland Freedom of Religion and Belief,* 13 June 2014, < www.supremecourt.uk/docs/speech-140613.pdf. See also Bell, *Direct Discrimination, op. cit.*, 90, 270, where it is stated that 'the boundary between direct and indirect discrimination can be rather thin on occasions'.

[96] Gerards, *Nieuwe Ronde, Nieuwe Kansen: naar een Semi-open Systeem van Gelijkbehandelingswetgeving? op. cit.*, 94, 154-155.

[97] Bowers, Moran and Honeyball, *Justification of Direct Sex Discrimination: A Reply, op. cit.*, 94, 186.

[98] Gerards, *Nieuwe Ronde, Nieuwe Kansen: naar een Semi-open Systeem van Gelijkbehandelingswetgeving? op. cit.*, 94, 149-150.

order to exclude the objective justification argument'.[99] It can therefore be argued that, if the courts and other adjudicating bodies 'manipulate' the distinction to allow them to consider or avoid justification, maybe justifications of both forms of discrimination should be allowed. This would provide flexibility and leave room for a proportionality test and the balancing of interests in each case.

The other argument for allowing justification of direct discrimination, mentioned above, was that this could be useful in situations of competing rights, for example where the right to freedom to manifest your religion or belief and to be free from religious discrimination clashes with someone else's right not to be discriminated against on the ground of their sexual orientation. Here, again, this would provide flexibility for adjudicating bodies and courts and would allow for a balancing of interests where necessity and proportionality can be taken into account. Both Gerards and Bell mention that Directive 2000/78/EC already contains a provision, in Article 2(5), that allows this.[100] Article 2(5) reads as follows:

> This Directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others

Gerards points out that, although there are no equivalent provisions in the Directives against racial and ethnic origin or sex discrimination, all Directives contain in their preambles references to fundamental rights and stress the importance of respect for these rights.[101] Therefore, Gerards argues, the starting point of all anti-discrimination Directives is that the principle of equal treatment cannot force acting against other fundamental rights and thus all Directives appear to leave room for a general exception along the lines of Article 2(5) Directive 2000/78/EC in national law.[102]

---

[99] Tobler and Waaldijk, *Case C-267-06, Tadao Maruko v Versorgungsanstalt der deutschen Bühnen, Judgment of the Grand Chamber of the Court of Justice of 1 April 2008, not yet reported, op. cit.*, 40, 736.

[100] Gerards, *Nieuwe Ronde, Nieuwe Kansen: naar een Semi-open Systeem van Gelijkbehandelingswetgeving? op. cit.*, 94, 155; Bell, *Direct Discrimination, op. cit.*, 90, 289-290. Bell discusses some examples.

[101] See Recitals 2, 3 and 4 Preamble Directive 2000/43/EC; 1, 2 and 3 Preamble Directive 2004/113/EC and 20 Preamble Directive 2006/54/EC.

[102] Gerards, *Nieuwe Ronde, Nieuwe Kansen: naar een Semi-open Systeem van Gelijkbehandelingswetgeving? op. cit.*, 94, 155.

However, this does not seem to align with the fact that the CJEU has consistently held that restrictions and limitations to individual rights in EU law, including the right not to be discriminated against, should be interpreted strictly.[103] In *Petersen,* the CJEU held in relation to Article 2(5) Directive 2000/78/EC that, as it is an exception to the principle of the prohibition of discrimination, it must be interpreted strictly. The terms used in Article 2(5) also suggest such an approach.[104] Moreover, the CJEU has clearly rejected justification of direct sex discrimination. In two recent cases, *Kleist* and in *Kuso,* the CJEU clearly stated that direct sex discrimination cannot be justified.[105] There appears to be no reason why this should not also apply to indirect discrimination on the other grounds of discrimination covered by the EU anti-discrimination Directives and, as the CJEU is generally concerned with a uniform application of EU law, it is expected that it will apply the same rule to all grounds.

As already mentioned, the EU has implicitly rejected a justification defence for direct discrimination and has only made an exception for direct age discrimination. If it wanted to make justification of direct discrimination available to all grounds of discrimination, it would have done so in the anti-discrimination Directives. Therefore, it is submitted that providing for justification of direct discrimination in national law would be a breach of EU law and case law.

But, there are a number of other reasons why introducing a general justification defence for direct discrimination is 'misconceived and undesirable'[106] or 'neither necessary nor desirable'.[107] First of all, the EU

[103] See: C-222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary,* [1986] ECR 1651, para. 36; C-273/97, *Sirdar v The Army Board and Secretary of State for Defence,* [1999] ECR I-7403, para. 23; C-285/98, *Kreil v Bundesrepublik Germany,* [2000] ECR I-69, para. 20; C-341/08, *Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe,* [2010] IRLR 254, para. 60; and, C-447/09, *Prigge and Others v Deutsche Lufthansa AG,* [2011] ECR I-8003, paras. 56 and 72. The first three cases concerned sex discrimination and the EU sex discrimination directives, while the latter two concerned age discrimination and Directive 2000/78//EC.

[104] *Petersen, op. cit.,* 103, para 60.

[105] C-356/09 *Pensionsversicherungsanstalt v Christine Kleist*, [2010] ECR I-11939, para 41; and, C-614/11 *Niederösterreichische Landes-Landwirtschaftskammer v Kuso*, [2014] 1 CMLR 32, paras 50 and 51.

[106] Ellis and Watson, *EU Anti-Discrimination Law, op. cit.*, 32, 174.

[107] Gill and Monaghan, *Justification in Direct Sex Discrimination Law: Taboo Upheld*, *op. cit.,* 94, 120.

system of only allowing for exceptions that are prescribed by law provides for legal certainty and clarity.[108]

Secondly, justification of direct discrimination misconceives the concept of direct discrimination. As Bell writes, direct discrimination tackles less favourable treatment specifically because of a suspect and prohibited characteristic and this is treated by the law 'as taking into account irrelevant considerations'.[109] This is thus a more invidious form of discrimination which causes an 'affront to human dignity'[110] and 'is more corrosive of society'.[111] If justification of direct discrimination was provided for, it would allow irrelevancies to be taken into account. By not doing so, the law signals that less equal treatment on a prohibited characteristic is not permitted and it recognises the serious effect direct discrimination can have.

Another related argument is that 'the inability to justify direct discrimination also serves to advance substantive equality', according to Bell. He links this to the fact that direct discrimination is often linked to stereotypes or generalisations and that 'by excluding the justification of direct discrimination, the law becomes a potent weapon to deconstruct such stereotypes'.[112] This is supported by Gill and Monaghan who argue that 'justifying direct discrimination will *reinforce* [their italics] rather than challenge existing discriminatory patterns. This of course cuts across the whole scheme of the anti discrimination legislation and frustrates its purpose'.[113]

Ellis and Watson sum up the above very well where they write that the possibility of justifying direct discrimination 'permits a raft of undefined excuses for discrimination which are not articulated in EU law. This has the potential gravely to undermine the operation of the principle of equality…'.[114] Therefore, a justification defence of direct discrimination should not be laid down in EU law and the defence should stay confined to cases of indirect discrimination.

---

[108] See on this; Gerards, *Nieuwe Ronde, Nieuwe Kansen: naar een Semi-open Systeem van Gelijkbehandelingswetgeving? op. cit.,* 94, 146.

[109] Bell, *Direct Discrimination, op. cit.*, 90, 270.

[110] Gill and Monaghan, *Justification in Direct Sex Discrimination Law: Taboo Upheld*, *op. cit.*, 94, 121.

[111] Bowers and Moran, *Justification in Direct Sex Discrimination Law: Breaking the Taboo, op. cit.*, 94, 315.

[112] Bell, *Direct Discrimination, op. cit.* 90, 270.

[113] Gill and Monaghan, *Justification in Direct Sex Discrimination Law: Taboo Upheld*, *op. cit.*, 94, 121.

[114] Ellis and Watson, *EU Anti-Discrimination Law, op. cit.*, 32, 173.

5. Conclusion

In this article, the development of the concept of indirect discrimination via US, UK and EU law and case law was examined and this was followed by an analysis of the rationale of this development. Both of these have influenced the present provision against indirect discrimination in the EU anti-discrimination Directives. Providing protection against indirect discrimination in anti-discrimination law can be seen as a positive development because this aims at a more substantive concept of equality and acknowledges that formal equality might not be enough to achieve real equality in society.

After a short discussion of the term 'provision, criterion or practice', and the requirement of a comparator for a finding of direct and, it was submitted, also for indirect discrimination, the main elements of the definition of indirect discrimination - particular disadvantage and objective justification – were scrutinised. In relation to particular disadvantage, it was submitted that neither actual group disadvantage nor actual individual disadvantage is required under the EU Directives' definition of indirect discrimination, although this has not yet been clarified by the CJEU.

It was also submitted that the objective justification test included the consideration of the question whether less far-reaching and less discriminatory alternatives could be used to achieve the aim of the provision, criterion or practice and, if there was such an alternative but it was not used, then the provision, criterion or practice would be held not to justified and thus indirectly discriminatory. It was argued that this comes very close to imposing a duty of reasonable accommodation like the duty towards disabled people under Article 5 Directive 2000/78/EC and that support for this can be found in the case law of the CJEU.

In the last part, the question whether a general justification defence should be made available for direct discrimination in the same way as this has been done for indirect discrimination, was examined. The answer to this question was a clear 'no' and a number of arguments for coming to this conclusion were given, including that this would go against the EU anti-discrimination Directives and CJEU case law.

From the above, it can be concluded that the concept of indirect discrimination in the new definition given in the 2000 Directives (2000/43/EC and 2000/78/EC) has played and is playing a very important and positive role in EU anti-discrimination law because it provides an additional layer of protection for individuals and groups across the EU who are particularly vulnerable to discrimination. The

concept of indirect discrimination, with a narrow interpretation of any restrictions on the principle of equal treatment, a strict objective justification test which includes a duty of reasonable accommodation and the continued absence of a justification defence for direct discrimination will continue to advance substantive equality.

Adapt International Network

ADAPT is a non-profit organisation founded in 2000 by Prof. Marco Biagi with the aim of promoting studies and research in the field of labour law and industrial relations from an international and comparative perspective. Our purpose is to encourage and implement a new approach to academic research, by establishing ongoing relationships with other universities and advanced studies institutes, and promoting academic and scientific exchange programmes with enterprises, institutions, foundations and associations. In collaboration with the Centre for International and Comparative Studies on Law, Economics, Environment and Work, (DEAL) the Marco Biagi Department of Economics, University of Modena and Reggio Emilia, ADAPT set up the International School of Higher Education in Labour and Industrial Relations, a centre of excellence which is accredited at an international level for research, study and postgraduate programmes in the area of industrial and labour relations. Further information at *www.adapt.it*.

For more information about the E-journal and to submit a paper, please send a mail to *LS@adapt.it*.

DEAL Centre for International and Comparative Studies Law Economics Environment Work
THE MARCO BIAGI DEPARTMENT OF ECONOMICS
UNIVERSITY OF MODENA AND REGGIO EMILIA

AdaptInternational.it
Building the Future of Work