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# The Formal Concept of Discrimination

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# Summary

According to the Principle of Formal Justice like cases must be treated alike, and different cases must be treated differently. This principle is derived from the Aristotelian concept of distributive justice. Aristotle held that ‘All men agree that what is just in distribution should be according to merit of some sort, but not all men agree as to what that merit should be’.<sup>1</sup>

The classical concept of illegal discrimination, in Community law referred to as direct discrimination, seeks to decide what these merits must not be. This is done by declaring disparate treatment on certain grounds, in certain circumstances, illegal. It is argued in this paper that exceptions to this principle are made through acknowledging that discriminations on prohibited grounds are sometimes justified, and that this should be called justified direct discrimination. It is submitted that it is only obscuring to the concept to suggest otherwise, since the concept of discrimination as such, just as the Principle of Formal Justice, should not be carrying substantive or emotive meanings.

The subsequent concept of indirect discrimination aims instead at prohibiting disparate impacts of neutral criteria. There is some ambiguity to this concept, specifically on what it is that amounts to ‘discrimination’ in this context, and how the available defences should be perceived. It is submitted that to pursue clarity, it must be acknowledged that this concept is built on the second element of the Principle of Formal Justice, i.e., that different cases must be treated differently, and that ‘discrimination’ occurs when discriminators omit to do so, causing disparate impacts statistically connected to prohibited grounds of discrimination. A justification defence, if successful, should in such circumstances prompt courts to hold that there has been discrimination, but that it is justified.

It is further argued that the concept of positive action is a formal concept through which disparate treatment is required on specific grounds, i.e., that the legislature in this case indeed recognises some ‘merits’ according to which distribution is ‘just’ (according to the legislature). Unlike direct and indirect discrimination, positive action is necessarily a one-way vessel, designed to promote preference for individuals belonging to a certain class of people identified by the positive action norm.

The author concludes that all these concepts are built upon a formal structure taken from the Principle of Formal Justice, and that the acknowledgment of this fact can contribute to clarity in anti-discrimination law.

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<sup>1</sup> Aristotle Book E, section 6 (1131a:25).

# Preface

The author wishes to thank his supervisor, associate professor Christian Dahlman, Lund University, for his invaluable contributions in the drafting of this paper. The author also wishes to thank associate professor Torben Spaak, Uppsala University, for offering some crucial points of departure in the work on this paper. Thanks also to professor Jonas Malmberg at the Swedish National Institute for Working Life, Stockholm, and assistant professor Per Norberg, Lund University, for inspiring conversations on aspects of anti-discrimination law.

# Abbreviations

AG	Advocate General (of the European Court of Justice)
TEC	Treaty establishing the European Community (Version used is found in Official Journal C 325 of 24 December 2002)

# 1 Introduction

The aim of this thesis is to assess the differing offers on concepts of illegal discrimination and to offer a new suggestion to such a concept. The thesis concentrates on the concept of illegal discrimination at an abstract level, analyzing its formal foundations and the implications of these foundations. The author believes that a proper conceptual understanding of the phenomenon of discrimination law will be beneficial to consistent litigation in discrimination cases. Also, as explained by Jonas Malmberg,<sup>2</sup> there is discrepancy between the legal concept of discrimination and the concept used in political debate. In the latter, a very broad concept seems to be used. Therefore, anti-discrimination law is often criticised on grounds of ‘ineffectiveness’. The author believes that this rests upon misconceptions of the capacity of anti-discrimination law to remedy structural inequalities in society. To be able to assess the limits of its capacity, it is vital to further analyse the formal aspects of the legal concept of discrimination, since they sets these limits. As a consequence of this focus on the formal aspects of the discrimination concept, issues on substantive morality in discrimination will be outside the scope of the thesis. Only the proper positioning of substantive moral values, set by law, within the formal structure will be discussed.

The contemporary construction of the prohibition on discrimination in Community law will be thoroughly analysed, with emphasis on the distinction between direct and indirect discrimination, the distinction between the defences of ‘no discrimination’ and ‘justified discrimination’, and the problems of finding a relevant comparator.

The construction of the prohibition on discrimination in American law will also be analysed, in order to shed light on the legal history of the discrimination concept and to provide an international outlook to the analysis of the Community concept.

The problem of positive action will be discussed. In literature, this problem has normally been discussed from a substantive justice point of departure. In this paper, it will be discussed from a formal justice point of departure, although some outlines of the substantive debate will be touched upon.

There is no Discussion section in this paper. The large number of concepts and scholarly debates touched upon require that discussions and conclusions are made upon each of these issues as we continue to examine them. Instead, there will be some brief conclusive remarks.

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<sup>2</sup> Jonas Malmberg, ‘Bevisfrågor i den nya diskrimineringsrätten’ (2005) Paper submitted to the 37. Nordiske Juristmöte (37th Nordic Congress of Lawyers), Reykjavik.

## 2 Formal Justice

It will be argued that the formal structures of anti-discrimination law stem from the Principle of Formal Justice, which urges us to ‘Treat like cases alike, and different cases differently’. This formula is an expression of a traditional concept of distributive justice commonly attributed to Aristotle.

Distributive justice in Aristotle’s *Nichomachean Ethics* concerns itself with the distributions of honour or property or other goods which are to be shared by the members of the State<sup>3</sup>. Distributive justice according to Aristotle is a justice of proportions or an “equality of ratios”<sup>4</sup>. The central passage for understanding the development into what we now know as the Principle of Formal Justice is perhaps this:

Quarrels and accusations arise, then, when those who are equal possess or are given unequal parts or when those who are unequal are given equal parts. (...) All men agree that what is just in distribution should be according to merit of some sort, but not all men agree as to what that merit should be.<sup>5</sup>

Corrective justice, on the other hand, is achieved when a judge equalises harm inflicted on one by another. According to Aristotle, the judge thereby restores equality to parties who became unequal through the harm.<sup>6</sup>

The Aristotelian concept of corrective justice, then, can be recognised from fields of law such as tort, contractual liability and criminal law. The concept is applicable where a specific event gives rise to certain duties and/or rights for individual agents. The concept of distributive justice, on the other hand, claims applicability in ongoing relationships within a group or society. As presented by Aristotle, the concept seems intended to apply more to matters of political economy than to law. Nevertheless, this is the concept from which the traditional perception of formal justice has drawn inspiration. Note also that Aristotle uses the term ‘merit’ as the criterion according to which social goods are to be distributed. Other notions of distributive justice sometimes use ‘need’ as such a criterion.<sup>7</sup> This distinction, however, is not crucial to our understanding of the Principle of Formal Justice.

The general concept of ‘justice’ should be distinguished from that of ‘morality’ in philosophical discussion. In an example of the difference

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<sup>3</sup> Hippocrates G. Apostle (tr), Aristotle, *The Nichomachean Ethics* (D. Reidel Publishing Company, Dordrecht 1975) Book E, section 5 (1130b:30).

<sup>4</sup> Ibid section 6 (1131a:30).

<sup>5</sup> Ibid section 6 (1131a:20).

<sup>6</sup> Ibid section 7 (1132a:25). The analysis of the concept of corrective justice begins in section 7 (1131b:25).

<sup>7</sup> See for example St Paul’s 2<sup>nd</sup> Letter to the Corinthians, 8<sup>th</sup> Chapter. This criterion is also widely used in socialist political economy.



provided by Herbert L A Hart,<sup>8</sup> cruelty to children is immoral, but not unjust. It should be noted that the Aristotelian concept of corrective justice implies that a sanction is imposed on the perpetrator in such a case. The concept of distributive justice, on the other hand, has no relevance to the example. Hart offers an example in which it does apply, however: when one of a number of children is arbitrarily deprived of common care. Certainly, such an act entails cruelty to the child concerned, but also an element of comparison. This element makes the concept of distributive justice applicable. It could be argued that this distinction between justice and morality is problematic. For instance, consider again the first example of a plain cruelty to children. If the cruel person is a sadist, does not this cruelty mean that he is choosing to give precedence to his own preferences over the preferences of the victimised child? Is this immorality or injustice? However, this approach merely redefines the situation and adds, again, a dimension of comparison. Therefore, we can at least conclude that ‘justice’ is the idiomatic concept used when considering moral situations entailing comparison.

According to Hart, ‘the general principle latent in these diverse applications of the idea of [distributive] justice is that individuals are entitled to a certain relative position of equality or inequality (...) its leading precept is often formulated as “Treat like cases alike”; though we need to add to the latter “and treat different cases differently”’.<sup>9</sup> The addition, which echoes Aristotle’s ‘when those who are unequal are given equal parts’, illustrates the point that equal treatment of unlike cases constitutes an injustice just as much as unlike treatment of like cases. For example, refusing to install elevators to meet the needs of a disabled employee cannot be justified through a statement of equal treatment for all. Justice must be perceptive of the inequality of possibilities and abilities of people concerned with an act which is capable of being just or unjust. This duality of the concept has repercussions on anti-discrimination law, and will be discussed further below.

The formula ‘Treat like cases alike, and treat different cases differently’, is completely in the abstract, however, and offers no help in determining what factors are relevant to identify ‘like’ or ‘different’ cases, in order to constitute a guide for action. According to Hart, the formula is the constant feature of justice, which must be completed by a shifting criterion used in determining when, for any given purpose, cases are alike or different.<sup>10</sup>

The fact that the Principle of Formal Justice does not in itself contain criteria of ‘alikehood’ is also noted by Alf Ross. According to Ross, ‘the practical content of the demands of justice depends on presuppositions lying outside the principle of equality (i.e. the Principle of Formal Justice, *my comm.*), namely, the criteria determining the categories to which the norm of equality shall apply’.<sup>11</sup> Ross exemplifies this by naming a number of

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<sup>8</sup> Herbert L A Hart, *The Concept of Law* (2<sup>nd</sup> edition. Clarendon, Oxford 1994) 158.

<sup>9</sup> *Ibid* 159.

<sup>10</sup> *Ibid* 160.

<sup>11</sup> Alf Ross, *On Law and Justice* (Stevens & Sons Limited, London 1958) 270. Ross seems to be applying only the first element of the Principle of Formal Justice.

classes in which cases are alike. In the view of the present author, and probably also in the view of Ross, it is impossible to definitively name a number of such categories that would be universally applicable. The criteria for like cases must vary indefinitely. In anti-discrimination law, those criteria are identified through the personal and circumstantial scope of the rule.

Louis I Katzner distinguishes between presumptivist and non-presumptivist conceptions of formal justice.<sup>12</sup> The non-presumptivist approach equals the description of the Principle of Formal Justice above in simply stating that ‘with regard to distribution, human beings who are the same must be treated the same, while those who are different must be treated differently (and in direct proportion to the differences between them)’.<sup>13</sup>

The presumptivist approach, on the other hand, gives emphasis to providing a guide to action in all cases, and is therefore attractive as basis for a concept of law. In this approach, all human beings must be treated equally until proper grounds for treating them differently is shown.<sup>14</sup> The presumptivist position is thereby necessarily connected to the concept of showing<sup>15</sup> or producing evidence, and serves as a decisive guide to action in *all* cases depending on what can or cannot be shown.<sup>16</sup> However, according to Katzner, this property of the presumptivist approach precludes it from being a formal concept of justice since it entails a substantive principle. To Katzner, a formal principle of justice cannot be a complete guide to action.<sup>17</sup> It is difficult, however, to find any substantive justice in the presumptivist approach. It seems rather to consist of the Principle of Formal Justice with the addition of an equally formal rule of evidence. It does not say what grounds are ‘proper’. In order to provide substantive content to the rule, it must offer guidance to the interpretation of such formal concepts.

Critique of the Principle of Formal Justice is, in general, either making the point that the principle is superfluous or that it cannot be used as basis for substantive justice.<sup>18</sup>

A critique of the first kind has been offered by Peter Westen. In essence, Westen first tries to show that the Aristotelian concept of distributive justice is violating Hume’s law by moving from an ‘is’ to an ‘ought’.<sup>19</sup> This is so, says Westen, since the formula ‘involves two components: (1) a determination that two people are alike; and (2) a moral judgment that they ought to be treated alike’.<sup>20</sup> However, it is a misconception to suggest that the Principle of Formal Justice is intended to form a syllogism in this way.

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<sup>12</sup> Louis I Katzner, ‘Presumptivist and Non-presumptivist Principles of Formal Justice’ (1971) 81 *Ethics* 253.

<sup>13</sup> *Ibid* 254.

<sup>14</sup> *Ibid* 253.

<sup>15</sup> *Ibid* 258.

<sup>16</sup> *Ibid* 256 (italics from Katzner).

<sup>17</sup> *Ibid*.

<sup>18</sup> Apart from such critique which deals with its usefulness as basis for a concept of discrimination, to which we will return in the next section.

<sup>19</sup> Peter Westen, ‘The empty idea of equality’ (1982) 95 *Harvard Law Review* 537, 543.

<sup>20</sup> *Ibid*.

The formula is properly described as a prescription: When cases are alike, they should be treated alike. It is then possible to add statements of circumstantial fact such as: Wendy and Karen are alike (in a certain regard). Combined with the Aristotelian formula, we can then create a syllogism which concludes: Wendy and Karen should be treated alike (in this regard). Louis P. Pojman and Robert Westmoreland describe the distributive aspect of the principle as a demand for 'equality of ratios'.<sup>21</sup> If Wendy has  $X$  degree of merit  $P$ , and Karen has  $Y$  degree of merit  $P$ , then Wendy should be awarded  $X$  degree also of the good  $Q$ , and Karen should be awarded  $Y$  degree of the good  $Q$ . Also in this aspect, the formula is a prescription (regarding distribution of goods). But to suggest like Westen that the formula itself is a syllogism must be erroneous.

Westen also criticises the assumption that there can at all be cases or treatments that are alike. According to Westen, there must be a moral rule which identifies the respect in which persons and treatments are morally alike. And if this is the rule which contains the substantive morality, what then is the use for the formal principle?<sup>22</sup> This is consistent with Westen's misconception that the Principle of Formal Justice is a syllogism. Even Aristotle admits that, when it comes to defining the very criteria or merits which are to be the grounds for identifying equal or unequal cases, 'not all men agree as to what that merit should be'.<sup>23</sup> Westen continues: 'Equality is an empty vessel with no substantive moral content of its own'.<sup>24</sup> This is true, but it does not cause problems to the Principle of Formal Justice, but in fact allows it to be useful as a universally applicable *formal* principle, not to be confused with substantive justice.

A critique of the second kind has been offered by David Lyons. Lyons criticises authors such as Chaïm Perelman and Alf Ross, but also Herbert Hart, who in the view of Lyons has offered the most important formalist propositions.<sup>25</sup> Lyons's criticism of Hart focuses on the section of *The Concept of Law* cited above, beginning with the division of justice into one constant factor and one shifting criterion. To Lyons, 'the idea of treating like cases alike does not appear to have any special connection with justice'.<sup>26</sup> To Lyons, the quote from Hart simply states that cases should be treated systematically. Justice, Lyons argues, rather requires certain kinds of treatment for certain classes of persons.<sup>27</sup> It is difficult to understand how this would be in contradiction to the Principle of Formal Justice. It rather seems that Lyons is objecting to a perception of the principle that assumes it to have substantive moral value. A systematic pattern of treatment is not equal to a just pattern of treatment, according to Lyons.<sup>28</sup> This is a

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<sup>21</sup> Louis P. Pojman & Robert Westmoreland, 'Introduction: The Nature and Value of Equality' in Louis P. Pojman and Robert Westmoreland (eds.) *Equality: Selected Readings* (Oxford University Press, Oxford 1997) 2.

<sup>22</sup> Westen 546-547.

<sup>23</sup> Aristotle section 6 (1131a:25).

<sup>24</sup> Westen 547. Westen refers to the Principle of Formal Justice as the principle of equality.

<sup>25</sup> David Lyons 'On Formal Justice' (1973) 58 Cornell Law Review 833, 848.

<sup>26</sup> Ibid 849.

<sup>27</sup> Ibid.

<sup>28</sup> Ibid 850.

restatement of what we have found above – formal justice is not substantive justice. Another possible interpretation is that Lyons omits to pay attention to the second element of the Principle of Formal Justice. As we will see, this is a common mistake, especially in the debate on anti-discrimination law.

Another type of criticism is offered by Norman Gillespie, who argues that the Principle of Formal Justice cannot be applied to all kinds of treatment without analysis of who is the actor and under what circumstances he is acting. According to Gillespie, actors have the duty to treat like cases alike for specific reasons, other than the fact that there are relevant similarities between the persons who are subject to the repercussions of the act.<sup>29</sup> This is so because formal justice only applies in this very type of context: Where people are subject to the repercussions of another's actions. It seems that, in Gillespie's interpretation, formal justice has something to do with the concept of power. In his words, the need to succumb to the requirements of formal justice occurs only when there is a 'need to protect the rights of certain individuals from abuse of others who have a certain power and discretion over what happens to them that gives rise to the demand of fairness'.<sup>30</sup>

The observation made by Gillespie brings us back to the origin of the Principle of Formal Justice. It was formulated by Aristotle as a principle of political economy, of fairness in the distribution of wealth. In the case of Aristotle, the actor is society, and citizens are receivers. In the case of discrimination in the field of employment, the actor is the employer, and the employees or applicants are receivers. As done by Anna Christensen, it is possible to summarise the possible actors in anti-discrimination law by referring to them as 'allocators of resources'.<sup>31</sup> In all cases of formal justice, then, there are resources in some form that are allocated, and the requirement of formal justice is that they are allocated equally among equal cases, and differently among different cases. Gillespie's observation is in fact that unless there resources to allocate, there is no need for a concept of distributive/formal justice, and that the requirements of the principle are a demand directed to the allocator of those resources (and not to the receiver). This seems to be correct.

However, in a more abstract interpretation of the Principle of Formal Justice, is it not a violation of the principle when, for instance, A offers to do B a favour, but omits to make the same offer to C under similar circumstances? Gillespie argues that we must, like Immanuel Kant, distinguish between perfect and imperfect duties, and that the demand to succumb to formal justice requirements applies only to perfect duties.<sup>32</sup> A perfect duty, according to Kant, is one that allows for no exceptions for

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<sup>29</sup> Norman C. Gillespie, 'On Treating Like Cases Differently' (1975) 25 *The Philosophical Quarterly* 151, 155.

<sup>30</sup> *Ibid* 154.

<sup>31</sup> Anna Christensen, 'Structural Aspects of Anti-Discriminatory Legislation and Processes of Normative Change' in Ann Numhauser-Henning (ed), *Legal Perspectives on Equal Treatment and Non-Discrimination* (Kluwer Law, The Hague 2001). Below, they will mostly be called 'discriminators', and the victim of discrimination will be referred to as the 'discriminatee'.

<sup>32</sup> Gillespie 152.

reasons of personal inclination.<sup>33</sup> An imperfect duty, on the other hand, would allow for such exceptions.<sup>34</sup> Since anti-discrimination law is mandatory, it necessarily does not allow exceptions for reasons of personal inclination. We must therefore regard the duties imposed by the law on allocators of resources as perfect duties. Seen this way, Gillespie's observations become somewhat trivial in the case of anti-discrimination law, although it may be very interesting to discuss, on a level of non-legal ethics, what makes duties perfect or imperfect. Such a discussion, however, is outside the scope of this paper. Furthermore, the distinction at issue seems to be one of substantive ethics. Imperfect duties seem to allow for personal inclination to create 'differentness' in the terminology of the Principle of Formal Justice. Therefore, Gillespie's point should not cause us to reject the Principle as such.

Pojman and Westmoreland argue that the Principle of Formal Justice amounts to a requirement of consistency.<sup>35</sup> Seen this way, the principle requires that all cases that are equal, according to some criterion, will fall within the scope of a rule saying that they are to be treated equally, that is, consistently. Unequal cases are then cases falling outside the scope of the rule, and therefore the requirement of consistency does not apply to them. The Principle of Formal Justice interpreted this way seems to amount simply to a requirement to apply rules with consistency, as noted by Lyons. We should add that the second element of the principle, treat different cases differently, can also define the treatments involved, and require specific different treatment. This does not follow from Pojman's and Westmoreland's argument. Their point deals exclusively with the first element, and cases outside of the scope of the requirement of consistency could be treated equally with those falling inside, in a consistently different manner, or completely *ad hoc*. That the second element of the principle can be used to require a specific differential treatment is important to our understanding of anti-discrimination law, as we will see.

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<sup>33</sup> Thomas Kingsmill Abbott (tr), Immanuel Kant, *Fundamental Principles of the Metaphysics of Morals* (Raleigh, N.C., Alex Catalogue. E-book, E-book ISBN 0585051372 <<http://www.netLibrary.com/urlapi.asp?action=summary&v=1&bookid=1085933>> accessed 14 February 2006) 27.

<sup>34</sup> Gillespie 152.

<sup>35</sup> Pojman & Westmoreland 3.

### 3 Formal Justice and Anti-Discrimination Law

The Principle of Formal Justice is the conceptual basis for anti-discrimination law.<sup>36</sup> Following this notion, the European Court of Justice has ruled that ‘discrimination can arise only through the application of different rules to relevantly similar situations or the application of the same rules to different situations’.<sup>37</sup> However, we will see that while there is general consensus that the classical concept of (direct) discrimination is conceptually built on the first element of the Principle of Formal Justice, there is also general confusion as regards subsequent concepts in anti-discrimination law, and their relationship to the second element of the Principle.

Formal justice applies, then, where equality or inequality of treatment is found through comparison of equal cases. Consider the first concept of the first element of the principle: The concept of equal cases.<sup>38</sup> The classic concept of discrimination applies to cases where undue attention has been given to some properties of a person. Thereby, there has been a distinction made between that person and another, real or hypothetical person (a reference person), in circumstances falling within the scope of the anti-discrimination rule, on grounds that are prohibited.<sup>39</sup> The comparison should not have been made on these grounds, since legally they must not be used to differentiate. This is so because the cases concerned are, in the view of the legislature, equal.

Where persons seem different on certain grounds, they must still be regarded as alike, if it is prohibited by law to use those grounds to make a distinction. To understand this it is vital to understand that in anti-discrimination law the dichotomy of likeness and unlikeness is absolute – ‘not like’ equals ‘unlike’, and reverse. Whenever the legal rule stipulates that, for example, there must be no (direct) discrimination on the basis of sex, this means that a difference of sexes must not constitute unlikeness. It follows that people of different sexes are alike, at least until they are distinguished from each other on some other, hopefully lawful, grounds. Moving back to the words of Aristotle, a quote in the first section included the sentence ‘All men agree that what is just in distribution should be according to merit of some sort, but not all men agree as to what that merit should be’.<sup>40</sup> In the system of anti-discrimination law, it is at least clear what the legislature does *not* tolerate to be included among such merits.

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<sup>36</sup> Christensen 32.

<sup>37</sup> Case C-279/93 *Finanzamt Köln-Altstadt v Schumacker* [1995] ECR I-225 para 30.

<sup>38</sup> The second element, equal treatment, is a much trickier issue. They are legally identified through the concepts of *direct* and *indirect* discrimination. Those concepts will be analysed further below.

<sup>39</sup> The common way of expressing this in American law is that a *classification* has been made. This clarifies that we are dealing with the sorting of people into cognitive categories.

<sup>40</sup> Aristotle Book E, section 6 (1131a:25).

Anti-discrimination law therefore constitutes a system of prohibited grounds of discrimination, defined by law with a certain substantive scope. The system builds on the assumption that there has been a comparison, although it is also possible to argue on hypothetical comparisons. This element is that which makes the concept of formal justice applicable and clarifying in understanding the way these rules work. However, some scholars argue that the Principle of Formal Justice is improper basis for a concept of discrimination. In this section, such critiques will be assessed. Most scholars criticizing formal justice as basis of anti-discrimination law do so since they believe it incapable of clarifying the concept of indirect discrimination or because arguments of formal justice have been used against the legitimacy of positive action schemes.

It has already been said that formal justice in itself is a concept void of substantive moral values. This is also true of ‘discrimination’, which in a strict sense simply means ‘perceiving, noting, or making a distinction or difference between things’.<sup>41</sup> Analysing anti-discrimination law, it is clarifying to hold such a neutral concept of discrimination in mind, thereafter distinguishing between *lawful* and *unlawful* discrimination, the latter identified by the fact that it is made on prohibited grounds. In essence, the here proposed understanding of the concept of discrimination is a non-ethical understanding. Bernard Williams has distinguished between ‘thick’ and ‘thin’ concepts in ethics. ‘Thick concepts’ refers to concepts such as ‘brutality’, ‘honesty’, and other concepts that seem to entail elements of both moral approval or rejection and descriptions of a physical reality. ‘Thin concepts’ are ‘purely’ ethical concepts such as ‘good’ and ‘bad’.<sup>42</sup> What is suggested in this paper is essentially that we should not perceive ‘discrimination’ as a ‘thick concept’, indeed, we should not think of it as an ethically charged concept at all. To discriminate is to distinguish, and only that. However, in some instances, discriminating leads to disparate treatment of or disparate impact to the classes of persons created by the discrimination at issue. To protect people from the disadvantages of this, we have made some discriminations illegal, but ethical concepts enter the picture only when assessing the moral repercussions of certain disparate treatments and impacts.

Andrew J Morris suggests that proper conceptual basis for anti-discrimination law is found not in the distributive justice of Aristotle, but rather in his concept of corrective justice.<sup>43</sup> In the view of Morris, at least indirect discrimination law follows the form of corrective justice. A plaintiff making a claim for reparation, based on alleged indirect discrimination to

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<sup>41</sup> *IV Oxford English Dictionary* (2<sup>nd</sup> edition, Oxford 1989) 758.

<sup>42</sup> Samuel Scheffler ‘Morality Through Thick and Thin: A Critical Notice of *Ethics and the Limits of Philosophy*’ (1987) 96 *The Philosophical Review* 411, 414, citing Bernard Williams, *Ethics and the Limits of Philosophy* (Harvard University Press, Cambridge 1985) 128-129.

<sup>43</sup> Andrew J Morris, ‘On the Normative Foundations of Indirect Discrimination Law: Understanding the Competing Models of Discrimination Law as Aristotelian Forms of Justice’ (1995) 15 *Oxford Journal of Legal Studies* 199, 208.

her or his disadvantage, has been wronged by the defendant.<sup>44</sup> Therefore, the judge is requested to order reparation. But what Morris is analysing, then, is *claims* made under anti-discrimination law – not the concept of discrimination itself. There is no contradiction between having conceptual basis for a rule in Aristotelian distributive justice and offering the remedy of pecuniary reparation in the case of a breach of the rule. Therefore, an analysis of available remedies offers no conclusions on the proper conceptual basis of the rule itself. Morris is quite right in saying that in order for a claimant to gain reparation under anti-discrimination law, there must be tort. However, this does not help us understand the rules of anti-discrimination law, since they instead describe what constitutes tort. It is the breach of the principle of distributive justice that gives rise to a claim of corrective justice.

Perhaps it could be argued that the second element of distributive justice (‘treat different cases differently’) moves in the direction of corrective justice, since it orders an adjustment of the distribution of goods in order to compensate for pre-existing differences. The difference from corrective justice, however, is that this element of distributive justice does not primarily concern itself with correcting inequalities caused by an agent, as corrective justice does. The second element of the Principle of Formal Justice is concerned primarily with inequalities that are present according to some determinator of the substantive content of the norm using its structure, regardless of who or what has caused them. The tort of indirect discrimination, upon which Morris is focusing, arises when an agent omits to take due regard to personal properties that the agent was required to consider under the indirect discrimination norm. But, again, the structure of the claim under this tort must be distinguished from the rule itself.

Feminist criticism of anti-discrimination law often raises the point that claims of tort are not able to properly remedy differences in preconditions that are due to personal properties. The argument is that since anti-discrimination law does not in fact alter the inequalities inherent in society, but only affords remedies in the case of specific dissimilar treatments, it is of no value (or at least insufficient) in the strive for real equality.<sup>45</sup> The view of this author is that while the point made is correct, we would certainly be no better off if we were to reject anti-discrimination law as such. However, it is good to rid ourselves of some illusions as to what it is capable of accomplishing.

Mary E Becker suggests that formal equality is misusing the Aristotelian notion of distributive justice, and suggests that discrimination is not necessarily the opposite of distributive justice.<sup>46</sup> This is so, says Becker, because

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<sup>44</sup> Morris 226.

<sup>45</sup> See, for instance, Evelyn Ellis, ‘The Importance of a Structural Analysis in the Field of Anti-Discrimination Law: Comments on Anna Christensen’s Article’ in Ann Numhauser-Henning (ed), *Legal Perspectives on Equal Treatment and Non-Discrimination* (Kluwer Law, The Hague 2001) 62.

<sup>46</sup> Mary E Becker, ‘Prince Charming: Abstract Equality’ [1987] *Supreme Court Review* 201, 208.



discrimination consists of repeatedly turning real or perceived differences into socially constructed disadvantages for women (...) For example, the fact that only women are disabled by pregnancy does not mean that a policy (...) under which new mothers (but not new fathers) lose their jobs is not discriminatory. Indeed, it is precisely because only women are disabled by pregnancy that a facially neutral policy (...) is part of the system which has kept women subordinate to, because economically dependent on, men.<sup>47</sup>

What Becker is suggesting, essentially, is that the concept of formal justice cannot offer analytical help when it comes to cases where a *prima facie* gender neutral policy has negative repercussions on one of the sexes, i.e., in cases of indirect discrimination. Becker thereby omits to pay attention to the second element of the Principle of Formal Justice; that different cases should be treated differently. As will be described below, the concept of indirect discrimination applies in situations where the consideration of a seemingly neutral factor has a disparate and adverse impact, and the adversity of the impact is connected to prohibited grounds of discrimination. In other words, the equal treatment by consideration of the neutral factor has unequal effects to one side of the dichotomy described by an anti-discrimination norm. This measure by the discriminator amounts to a failure to recognise that people have different preconditions. By introducing the concept of indirect discrimination, which is built on the second element of the Principle of Formal Justice, the legislature prohibits such failures.

In the view of John Hasnas, formal justice only underlies a specific interpretation of the discrimination concept which he calls the anti-differentiation approach. This approach is contrasted with those of anti-oppression, where anti-discrimination law seeks to eliminate *oppressive* unequal treatment directed at individuals because of their membership in a minority group, and anti-subordination, where anti-discrimination law seeks to eliminate conduct that has the effect of subordinating or continuing to subordinate a minority group.<sup>48</sup> Hasnas analyses case-law from the Supreme Court of the United States and distinguishes a period from *Brown v. Board of Education*<sup>49</sup> to *Griggs v. Duke Power Co.*<sup>50</sup> where the anti-differentiation approach was prevailing. He concludes that there was a time in America where racial differentiation was perceived as wrong in itself, thereby confusing the means of making some measures of discrimination illegal with the end of achieving racial equality.<sup>51</sup> This confusion also involves the confusion of formal and substantive moral principles.<sup>52</sup> Hasnas argues that

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<sup>47</sup> Becker 208.

<sup>48</sup> John Hasnas, 'Equal Opportunity, Affirmative Action, and the Anti-Discrimination Principle: The Philosophical Basis for the Legal Prohibition of Discrimination' (2002) 71 Fordham Law Review 423, 431.

<sup>49</sup> 347 U.S. 483 (1954).

<sup>50</sup> 401 U.S. 424 (1971).

<sup>51</sup> Hasnas 532.

<sup>52</sup> Ibid 533.

the Supreme Court came to a point in *Griggs* where the limits of strict anti-differentiation were too obvious to ignore, and the issues of real life inequality had to be addressed. Thus, the Supreme Court recognised the concept of *adverse impact*.<sup>53</sup> Differences between the periods are therefore reflections of differing normative needs in society, according to Hasnas, rather than differing moral values.<sup>54</sup>

The insufficiency of the anti-differentiation approach mainly amounts to its inability to achieve real equality. The Supreme Court therefore ruled that, in applying the rules of the Civil Rights Act, courts must take due consideration of the ‘posture and condition of the job-seeker’.<sup>55</sup> In a strict anti-differentiation interpretation, however, this amounts to discrimination by the courts, equally objectionable as ‘common’ discrimination, since according to the anti-differentiation approach no significance should ever be awarded the prohibited grounds of discrimination. Such consideration by itself, according to this approach, is what constitutes discrimination. This is clearly a problem for the anti-differentiation approach, but the Principle of Formal Justice as basis for a concept of discrimination still stands. The disparate impact concept is quite compatible with the Principle of Formal Justice, since it, as we have seen, is built on the second element of the Principle of Formal Justice. The difference is that the classic concept of discrimination, which is covered by the anti-differentiation approach, aims only at disparate treatment, while the concept of indirect discrimination – in American law known as systematic disparate impact - aims at disparate impact from any procedure or measure.

It deserves to be repeated that the Principle of Formal Justice is void of substantive values. It is for the legislature to fill it with such prohibitions and commands that will achieve the ends desired. In fact, the anti-subordination approach can be used to make substantive moral arguments on what grounds of discrimination should be required in schemes of positive action, and this can be applied through law based upon the Principle of Formal Justice.

A similar point of view is put forth by Evelyn Ellis, who argues that the use of formal justice, by seeking to treat everyone alike, results in the law forcing a ‘male, ethnic majority paradigm’ on all.<sup>56</sup> This is so, says Ellis, because a demand for equal treatment cannot remedy the underlying disadvantages of groups other than the dominant majority. Ellis continues to argue that a system seeking to achieve substantive justice must try to become aware of differences, rather than try to be blind to them. However, Ellis misses the point that such considerations are properly made by the legislature in deciding on what grounds of discrimination should be prohibited or required, what the circumstantial scope of the anti-discrimination rules should be, and whether they should apply to disparate impacts as well as disparate treatments. These considerations by the

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<sup>53</sup> In EC law known as *indirect discrimination*.

<sup>54</sup> Hasnas 531.

<sup>55</sup> *Griggs* 431.

<sup>56</sup> Evelyn Ellis, *EU Anti Discrimination Law* (Oxford EC Law Library, Oxford University Press, New York 2005) 6.

legislature do not compromise the fact that the basic structure of anti-discrimination rules, as applied by courts, follows the formula laid down in the Principle of Formal Justice.

To close this section, it is necessary first to analyse the proposition by Ellis that demands for equal treatment result in superimposition of the majority paradigm, actually strengthening the existing hegemony. Consider the disparate treatment example of a homosexual, who lives in partnership. The partners have adopted a child, but are denied a tax reduction, which only applies to married couples with children. I find it hard to see how the abolition of this differential treatment would impose a heterosexual paradigm on the homosexual person. Possibly, the very fact that such rules need to be removed in order to attain equal treatment can support the notion that homosexuality is a deviation from 'normality'.<sup>57</sup> However, if this is the problem, what is wrong with trying to remedy such differential treatment? Now, consider the disparate impact example of a woman applying for a job as school teacher of sports. The school informs the woman that to be teachers of sports you are required to be able to run 100 meters in a maximum of 12 seconds. In this example, and if we only consider the first element of the Principle of Formal Justice, Ellis's point on equal treatment becomes clear. Equal treatment of men and women will be disadvantageous to women in this example. But this only further highlights the necessity to distinguish the first element of formal justice from its second element. It is perfectly compatible with formal justice to argue that this equal treatment of men and women violates the second element of the Principle of Formal Justice. This simply requires a prohibition on indirect discrimination. Therefore, only the omission of a prohibition on indirect discrimination would result in a superimposition of the majority paradigm in the manner described by Ellis. Such an omission will not be defended in this paper, since, as we have seen, it is not a consequence of the Principle of Formal Justice to maintain such an interpretation. Rather, it is one of the central aims of this paper to highlight the importance of the second element of the principle.

As we have seen, many commentators of anti-discrimination law tend to dismiss the Principle of Formal Justice without reading it in full. It is submitted that we should recognise the full importance of the Principle of Formal Justice to anti-discrimination law, with due regard to both of its elements, and that this might put an end to some of the conceptual confusion dogging this area of law.

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<sup>57</sup> Cf. Christensen 35-36.

## 4 Substantive Justice and Anti-Discrimination Law

The role of substantive justice in the legal concept of discrimination is mainly found in the considerations made in the process of deciding on what grounds of discrimination should be prohibited, and under what circumstances. Prohibited grounds of discrimination always match personal properties, and typically such properties that cannot be altered by individual choice. Prohibited grounds of discrimination can also cover such properties that individuals should not be prompted to alter by reasons related to the circumstances defined in the scope of the anti-discrimination rule. For example, a prohibition on discrimination on grounds of religion in the field of employment is adopted because it would be substantively unjust to have a situation where people are inclined to renounce, or hide, their religious belief in order to get a job. The decision to prohibit a ground of discrimination seems therefore to entail a sociological inquiry on whether this ground of discrimination is used, in what sort of circumstances it is used, and whether this is to the disadvantage of any group in society. It also entails an ethical assessment of whether this should be tolerated by society. This assessment usually takes its point of departure in the concept of human rights. Since the legal concept of discrimination only applies to individual claims, based on adverse treatment of or adverse impact to an individual (although collectivistic evidence is sometimes used), the human rights invoked must be individual human rights. The debated concept of collective human rights rather applies to situations such as where ethnic or other groups are given some normative autonomy within a nation state.<sup>58</sup> Furthermore, it is not always simple to draw the line as to what kinds of measures are sufficiently adverse to the discriminatee to be illegal. This will be discussed shortly below.

Sandra Fredman<sup>59</sup> has identified three alternative ways to prohibit grounds of discrimination. In the first, which is exemplified by the so called Equal Protection Clause of the Fourteenth Amendment to the American Constitution, the legislature adopts a broad and open equal treatment guarantee. Here, courts have the discretion to establish what grounds of discrimination are to be prohibited. As will be examined below, the Supreme Court of the United States has used the Equal Protection Clause to prohibit nearly any irrelevant distinction, but has placed the burden of proof differently depending on the nature of the distinction made. In the second approach described by Fredman, the legislature provides a non-exhaustive

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<sup>58</sup> The clash of this autonomy with legislation promoting individual human rights is one of many interesting issues not touched upon in this paper. In anti-discrimination law, specific defences to direct discrimination claims have been granted to retain some normative autonomy of religious groups.

<sup>59</sup> Sandra Fredman, *Discrimination Law* (Clarendon Law Series, Oxford University Press, Oxford, 2002) 67-68.

list of prohibited grounds of discrimination, leaving courts with some discretion on what analogies may be made from the list. This approach is used in Article 14 of the European Convention of Human Rights. The third approach, adopted by the European Union, uses prohibited grounds of discrimination fixed by the legislature through an exhaustive list. Here, the legislature leaves no discretion to the courts, but reserves the right to decide what grounds of discrimination are to be considered illegal. The disadvantage of this approach, according to Fredman, is that it denies effective protection to groups that are commonly discriminated against, but that are distinguished from the majority on grounds marginally outside the limits of those prohibited by law. This creates pressure on courts to attempt to redraw the limits. Otherwise, the group concerned needs to await further legislation for their protection. This seems also to have provided the impetus for the development of the concepts of disparate impact and indirect discrimination, as well as shifting rules on burden of proof. However, court discretion seems to this author to be no guarantee that certain discriminations will be outlawed. Furthermore, it seems odd to suggest that from a substantive point of view it is better the more discriminations are outlawed.

It follows from the twofold requirement of the Principle of Formal Justice (treat like cases alike, and different cases differently) that grounds of discrimination can be prohibited but also required.<sup>60</sup> For example, it is prohibited under Directive 2000/78/EC, Article 3(1)(c), to discriminate, when setting wages for employees, on grounds of disability. On the other hand, it is required under Article 5 of the same directive that employers discriminate between disabled employees and employees of statistically normal abilities in order to allocate special resources to adapt the workplace to the disabled employee. Rules such as Article 5 of Directive 2000/78/EC are in fact positive action norms, that is, they require disparate treatment on grounds that it is normally prohibited to consider. Article 5 is also a ‘treat different cases differently’ application, like indirect discrimination norms. However, while the prohibition on indirect discrimination orders employers to abstain from certain measures that are proven liable to cause disparate impacts to classes of persons protected under anti-discrimination law, Article 5 orders employers to take certain positive measures of disparate treatment. We can conclude that it is possible to have a prohibition on discrimination under the first element of the Principle of Formal Justice, and a requirement of discrimination under the second element of the Principle, and that these norms both can identify the same grounds of discrimination.

It is possible to establish, then, that the first role of substantive justice in the concept of discrimination is found in the legal definitions of grounds of discrimination. To return to Aristotle, distribution should be according to merit of some sort, but not all men agree as to what that merit should be.<sup>61</sup> The legal definitions of grounds of discrimination are the tools through

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<sup>60</sup> Grounds of discrimination not legally prohibited or required are, in this system, permitted, or at least tolerated.

<sup>61</sup> Aristotle Book E, section 6 (1131a:20).

which the legislature excludes certain personal properties from the list of possible merits, or, in the case of ‘treat different cases differently’, commands that certain personal properties are regarded as such merits.

The second role of substantive justice in the concept of discrimination is found in the circumstantial scope of the rules, i.e., what sorts of treatments are concerned by anti-discrimination law. Typically, anti-discrimination law only applies in quite limited circumstances. As it has been pointed out by Anna Christensen, however, this should not be interpreted as if the legislature feels that discrimination on grounds of sex, ethnicity *et cetera* is perfectly acceptable in circumstances uncovered. Such other differential treatment is simply not, as yet, considered to be sufficiently problematic to call for intervention in the form of a legislative prohibition on discrimination in those circumstances.<sup>62</sup>

To repeat, it has been submitted that it is also possible for the legislature to prohibit disparate treatment in some circumstances, and require the same in others. The latter will then conceptually be based on an application of the second element of formal justice, but must be distinguished from the application used in indirect discrimination, which focuses on disparate impact of neutral considerations. To require disparate treatment is the method of positive action.

The prohibited grounds of discrimination (between persons) under European Community law are (intra-Community) nationality (Article 12 TEC), sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation (Article 13 TEC). Grounds such as ethnic origin, belief and disability are conceptually ambiguous, and it will be for the European Court of Justice to make interpretations of their scope. It has been argued that the use of the term ‘disability’ excludes illegality of discriminating against persons of statistically normal abilities, in favour of disabled persons.<sup>63</sup> This interpretation is not indisputable, since it presupposes that the concept of discrimination is a ‘thick concept’, i.e., that it has pejorative meaning. If the concept of discrimination as such is interpreted as ethically neutral, then the use of the personal property of disability in discriminating has no implications as to whether this is done to the advantage or disadvantage of the disabled person.

In Community law, it is for the courts to apply the Principle of Formal Justice, guided by the legislature’s considerations on what cases are to be regarded as equal or different, and what treatments are to be regarded equal or different. As we have seen, the list of prohibited grounds of discrimination is considered exhaustive. This allocation of normative power is different from American constitutional law, where the Fourteenth Amendment simply states that no State may ‘deny to any person within its jurisdiction the equal protection of the laws’.<sup>64</sup> Under this open equality guarantee American courts have full discretion to decide on what

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<sup>62</sup> Christensen 34.

<sup>63</sup> Ibid 36.

<sup>64</sup> The so-called Equal Protection Clause. The evolution of American anti-discrimination law will be outlined below.

classifications are legitimate or illegitimate, i.e., what cases are equal and what cases are different. In between these two systems are systems where the legislature has provided courts with a non-exhaustive list of prohibited grounds of discrimination, from which courts have discretion to make extensions through legal interpretation principles.

Sandra Fredman has noted that the approach used by Community law is liable to cause some tension, when the protection of anti-discrimination law fails to cover groups and individuals marginally outside of the boundaries set up by the list of prohibited grounds of discrimination.<sup>65</sup> The most striking example is perhaps the problem of identifying the margins of discrimination grounds *sex* and *sexual orientation*. In the *P v. S* case a transsexual was dismissed on grounds of having undergone gender reassignment. This was defined as sex discrimination by the Court, which held that “such discrimination is based, essentially but not exclusively, on the sex of the person concerned”.<sup>66</sup> The Court claimed that the relevant comparison was to be made between treatment of P after gender reassignment and persons belonging to the sex which P belonged to before the reassignment. According to the Court, P was treated less favourably than such persons on grounds of sex. This presupposes, however, that P would have been treated in the same way if he had been a woman all along. Otherwise, the relevant comparison is to be made between persons undergoing gender reassignment and persons who are not. It could be argued that the latter interpretation of the facts of the case is the correct one. In the *Grant* case, however, the Court of Justice held that Community anti-discrimination law, at that point, did not cover discrimination on grounds of sexual orientation.<sup>67</sup> Fredman concludes that ‘everything then depends on who is chosen as the comparator’.<sup>68</sup> In the view of the present author, the choice of comparator cannot be separated from the identification of the prohibited ground of discrimination in the case. The problem faced by the Court of Justice in these cases is rather linked to the distinction between the concepts of sex and gender, and the ambiguity concerning which of these concepts is actually the prohibited ground of discrimination. If it is gender, we are faced with considerable problems since the limits of this concept are subject to intense debate among scholars. It is possible to argue that the gender concept entails a sexual orientation element. If it is sex, the jurisprudence of the Court is easier to understand. It is also possible, and perhaps appropriate, to create a special category of *reassigned persons* within the sex concept. The wording of the judgment does not seem to follow these lines, though. The word sex is also the one used in Article 13 TEC as well as in Directives 75/117/EEC, 76/207/EEC, 97/80/EC, 2002/73/EC and 2004/113/EC. The word gender does not appear in relation

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<sup>65</sup> Sandra Fredman, *Discrimination Law* (Clarendon Law Series, Oxford University Press, New York 2002) 68.

<sup>66</sup> Case C-13/94 *P v. S and Cornwall County Council* [1996] ECR I-2143 para 21.

<sup>67</sup> Case C-249/96 *Lisa Jacqueline Grant v South-West Trains Ltd.* [1998] ECR I-621 para 47. Note that the European Court of Human Rights has stretched the concept of sex to the inclusion of sexual orientation (*Salgueiro da Silva Mouta v Portugal* App No. 33290/96 (2001) 31 EHRR 47).

<sup>68</sup> Fredman 73. The problem of finding an adequate comparator will be analysed further below.

to anti-discrimination provisions as such, although it does appear in some of the directives in connection to provisions on reports on gender equality progress.

As hinted above, it can also be difficult to decide whether the consideration at issue is sufficiently adverse to the discriminatee to amount to illegal discrimination. For example, France recently banned the display of religious symbols in public schools. This had a strong impact on female Muslim students, who may interpret the commands of their religion as entailing a requirement to conceal their hair, arms and legs. This is most easily done with a traditional *khimar*. This garment has been considered to be covered by the ban of the French legislation. Does this amount to discrimination on grounds of religion? It could be argued that although this is in fact discrimination, but it does not affect the discriminatee adversely enough, since it is possible to comply with the rule with only little violation of personal integrity. This is a question on the strength of the right at issue, and therefore an issue of substantive morals. It is possible for the legislature to address such problems in anti-discrimination legislation, or to leave the decision to court discretion.

## 4.1 Discrimination on Combined Grounds

A prominent problem of anti-discrimination law has to do with the phenomenon of discrimination on combined prohibited grounds. For example, Muslim women may experience discrimination on grounds of the fact that they are Muslim women, as distinguished from being women, *per se*, or Muslims, *per se*. In the American case of *DeGraffenreid v General Motors Assembly Division*, black women sued their employer under the Civil Rights Act and argued that they had been discriminated against on the combined grounds of colour and sex. The District Court held that

The plaintiffs are clearly entitled to a remedy if they have been discriminated against. However, they should not be allowed to combine statutory remedies to create a new "super-remedy" which would give them relief beyond what the drafters of the relevant statutes intended. Thus, this lawsuit must be examined to see if it states a cause of action for race discrimination, sex discrimination, or alternatively either, but not a combination of both.<sup>69</sup>

The ruling was not changed, in this respect, by the Court of Appeals.<sup>70</sup> Another Court of Appeals has held, however, that such a remedy is justified on closer examination of the Act and the intentions of Congress.<sup>71</sup>

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<sup>69</sup> *Degraffenreid v General Motors Assembly Division* 413 F.Supp. 142 (1976) 143. Note that the American Civil Rights Act uses the system of an exhaustive list of prohibited grounds of discrimination, unlike the Equal Protection Clause. Cf. 42 U.S.C.A. §2000e-1.

<sup>70</sup> *Degraffenreid v General Motors Assembly Division* 558 F.2d 480 (1977).

<sup>71</sup> *Jefferies v Harris Community Action Association* 615 F.2d 1025 (1980) 1032.



According to Lynn Roseberry, this approach is now endorsed by most American courts.<sup>72</sup> However, claims of discrimination on combined grounds are generally examined from a 'sex-plus' perspective, maintaining a distinction between the grounds. The concept of 'sex-plus' discrimination (which applies to all prohibited grounds of discrimination) was created to deal with cases where women were discriminated against on grounds that they were women-plus-something-else, e.g. women and married, or women and parents. In such cases, the discriminator does not discriminate against women, and can produce evidence of this. However, the discriminator does discriminate against some women, and the doctrine of 'sex-plus' holds that this is equally illegal.<sup>73</sup> Roseberry shows that under this approach it can still be difficult for discriminatees to prove their case.<sup>74</sup>

The problem seems only to arise in anti-discrimination systems belonging to the third category described by Fredman, that is, systems that use an exhaustive list of prohibited grounds of discrimination. Systems belonging to the first and second categories should be able to cope with this problem without these problems. A solution to systems of the third kind, such as the Community system, is to phrase the list of grounds so as to allow for claims on combinations of the grounds. Courts should then be able to recognise the issue and make proper choices of comparator.

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<sup>72</sup> Lynn M. Roseberry, *The Limits of Employment Discrimination Law in the United States and European Community* (DJØF Publishing, Copenhagen 1999) 337.

<sup>73</sup> Cf. *Phillips v Martin Marietta Corp.*, 400 U.S. 542 (1971) and, in the European jurisdiction, case 23/83 *W. G. M. Liefting and others v Directie van het Academisch Ziekenhuis bij de Universiteit van Amsterdam and others* [1984] ECR 3225.

<sup>74</sup> Roseberry 336-337.

# 5 Concepts of Discrimination

## 5.1 Direct Discrimination - the Classical Concept

### 5.1.1 American Developments

Anti-discrimination law as we know it arguably began with the adoption of the Fourteenth Constitutional Amendment, ratified in 1868. This amendment was adopted after the American Civil War, and includes the so-called Equal Protection Clause, which enables federal institutions to act against oppressive State measures.<sup>75</sup> The wording of the Clause does not entail identification of prohibited grounds of discrimination, thus courts have discretion to identify which grounds are prohibited or arbitrary. According to Owen Fiss, the Supreme Court generally determines whether discrimination is permissible or arbitrary by a four-tier test. Firstly, the real (which is not necessarily identical to the stated) criterion used to discriminate must be identified. Secondly, the purpose of the State measure must be identified. Thirdly, the legitimacy of the State measure is examined. Finally, the court examines whether the criterion is adequately related to the purpose.<sup>76</sup>

John Hasnas traces some distinctive periods in the judicial history of the Equal Protection Clause, as regards race classifications. Hasnas argues that the Clause was drafted as an anti-oppression provision, rather than an anti-differentiation provision. Hasnas points to evidence that Congress rejected formulations making the Constitutional Amendment explicitly colour-blind, and that the same Congress adopted some race-conscious legislation.<sup>77</sup> Neither could it have been intended, like an anti-subordination provision, to pursue the social, political or economic advancement of newly freed slaves, says Hasnas, since Congress was only trying to restrict the legislative powers of States in order to keep them from adopting race 'castes'.<sup>78</sup>

Early significant cases are *Yick Wo v Hopkins*, in which the Supreme Court held that a facially neutral law may still be unconstitutional if applied 'so as practically to make unjust and illegal discriminations between persons in similar circumstances',<sup>79</sup> and *Plessy v Ferguson*.<sup>80</sup> The latter concerned a challenge to a Louisiana statute requiring railway companies to provide equal but separate accommodations for Caucasian and African-American

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<sup>75</sup> Hasnas 442-444.

<sup>76</sup> Owen M. Fiss 'Groups and the Equal Protection Clause' (1976) 5 Philosophy and Public Affairs 107, 109-111.

<sup>77</sup> Hasnas 445.

<sup>78</sup> Ibid 447.

<sup>79</sup> 118 U.S. 356 (1886) 374.

<sup>80</sup> 163 U.S. 537 (1896).

passengers. The Supreme Court upheld the statute, arguing that the Equal Protection Clause ‘could not have been intended to abolish distinctions made upon color, or to enforce social, as distinguished from political equality’.<sup>81</sup> According to Hasnas, this is a rejection of both the anti-differentiation and the anti-subordination approaches.<sup>82</sup> However, when opting for such a permissive approach, the Supreme Court (in the words of Hasnas) ‘guaranteed that the anti-oppression interpretation of the Equal Protection Clause could not fulfil its purpose of preventing oppressive discriminatory legislation’.<sup>83</sup> This situation gradually turned, as the doctrine of ‘equal but separate’ in subsequent case-law increasingly focused on ‘equal’. The Supreme Court consistently tightened its view on what segregated facilities were truly equal, converting the Equal Protection Clause into an anti-differentiation provision.<sup>84</sup> A break came in *Hirabayashi v United States* in which the Court held that ‘racial discriminations are in most circumstances irrelevant and therefore prohibited’.<sup>85</sup> Most commentators name *Brown v Board of Education* as the seminal case in establishing the anti-differentiation principle. Here, the Court concluded that ‘in the field of public education the doctrine of “separate but equal” has no place. Separate educational facilities are inherently unequal’.<sup>86</sup> In *Loving v Virginia*, the Court stated that ‘at the very least, the Equal Protection Clause demands that racial classifications (...) be subjected to “the most rigid scrutiny”’.<sup>87</sup>

Today, jurisprudence under the Equal Protection Clause conceptually entails a presumption of constitutionality regarding classificatory State measures in general. Anyone who challenges a State law under the Equal Protection Clause has the burden of showing that the classification has no rational relationship to a permissible governmental purpose and is essentially arbitrary.<sup>88</sup> Such a burden of proof is overwhelming, and it has been eased in certain classes of cases.

However, ‘classifications’ in general must be distinguished from ‘suspect classifications’. The concept of ‘suspect classifications’ indicates such classifications that significantly burden a protected group. Factors considered in determining whether a classification is suspect have included:

1. the historical purpose of the Equal Protection Clause
2. a history of pervasive discrimination against the class
3. the stigmatizing effect of the classification

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<sup>81</sup> *Plessy* 544. This passage was the aim of a famous dissenting view of Justice Harlan, who argued that ‘our Constitution is color-blind’ (559), earning himself a special place in American civil rights history.

<sup>82</sup> Hasnas 455.

<sup>83</sup> *Ibid* 458.

<sup>84</sup> Hasnas 458-459.

<sup>85</sup> 320 U.S. 81 (1943) 100.

<sup>86</sup> 347 U.S. 483 (1954) 495.

<sup>87</sup> 388 U.S. 1 (1967) 11.

<sup>88</sup> Barron & Dienes, *Constitutional Law* (3<sup>rd</sup> edition West Publishing Co., St Paul, Minnesota 1991) 188-189. The authors indicate that recent jurisprudence aims towards a general change to ease this burden of proof.

4. whether the classification is based on a personal property outside the control of the individual
5. whether the classification is disadvantageous to a 'politically insular minority'.<sup>89</sup>

The concept of suspect classifications also requires that the complainant proves a discriminatory purpose of the State measure. Such a purpose can be overt or covert, but a discriminatory effect is not considered to be sufficient evidence of a discriminatory purpose by itself.<sup>90</sup> The most famous example of intentional classification is perhaps *Brown v. Board of Education* in which intentional racial segregation in public schools was held inherently unequal and in violation of the Equal Protection Clause. However, as we have seen, it is also possible to challenge the discriminatory administration or enforcement of a neutral State law.<sup>91</sup> Note that such a case must be distinguished from a classification created unintentionally, that is, from so called disparate impact. The latter is not held unconstitutional.<sup>92</sup> If the court finds that there is a suspect classification, or that the State measure significantly burdens the exercise of a fundamental right, it will apply a test of strict scrutiny to the contested measure. Strict scrutiny shifts the burden of proof onto the government, requiring it to prove that the contested measure is necessary to achieve a compelling State interest, and that no less burdensome alternative is available for the achievement of the aim.<sup>93</sup>

The Supreme Court has not applied the strict scrutiny test to sex classifications. Indeed, it was only in 1971, in the *Reed v Reed* case, that the Supreme Court first ruled in favour of a woman complaining that her State had denied her the equal protection of its laws.<sup>94</sup> But, instead of the strict scrutiny test applied to suspect classifications, the Supreme Court will apply an intermediate test to sex classifications. The test requires the State to produce a justification to the classification which is "exceedingly persuasive", meaning that the State must show that the classification is substantially related to the achievement of important governmental objectives.<sup>95</sup>

The classical concept of discrimination is also outlawed by Title VII of the American Civil Rights Act, and the Employment Protection Act. These federal statutes both apply to private employers. Section 703(a) of Title VII makes it unlawful to 'discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin'. In case-law, three types of violation of this command have been developed: individual

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<sup>89</sup> Barron & Dienes 191.

<sup>90</sup> Ibid 193 citing *McCleskey v. Kemp*, 481 U.S. 279 (1987).

<sup>91</sup> Ibid 193 citing *Yick Wo*.

<sup>92</sup> Ibid 196. The Supreme Court ruled in *Washington v. Davis*, 426 U.S. 229 (1976), that the intent of the discriminator must be proven. This ruling has been widely criticised in the United States, see for example Theodore Eisenberg & Sheri Lynn Johnson 'The Effects of Intent' (1991) 76 Cornell Law Review 1151.

<sup>93</sup> Barron & Dienes 191.

<sup>94</sup> *Reed v Reed*, 404 US 71 (1971).

<sup>95</sup> Fredman 80.

disparate treatment, systematic disparate treatment, and systematic disparate impact.<sup>96</sup>

In disparate treatment, the claimant must prove a discriminatory motive. However, the Supreme Court may infer such a motive from the fact of differential treatment.<sup>97</sup> There are two kinds of illegal disparate treatment in American law: individual disparate treatment and systematic disparate treatment. To prove individual disparate treatment, the claimant must produce direct or circumstantial evidence that the discriminator intended to take adverse action against the individual discriminatee.<sup>98</sup> The circumstantial evidence option uses the following criteria: The claimant must (1) be a member of a class protected by Title VII, (2) be qualified for the position, (3) have been rejected for the position, and the discriminator must (4) have continued to search for a candidate with the same qualifications.<sup>99</sup> In systematic disparate treatment, intent is presumed if the claimant produces evidence showing that the employment or pay pattern of the alleged discriminator differs from the pattern expected if there is no discrimination, and that the disparity is such that it is unlikely to arise by chance.<sup>100</sup> The third kind of illegal discrimination in American law, disparate impact, will be described in the chapter on indirect discrimination.

## 5.1.2 European Developments

In European Community law, anti-discrimination began with the inclusion of Article 119 (now 141) in the Treaty of Rome. According to Christopher McCrudden, the inclusion of the Article was designed not so much to include equality of women and men in the values of the Community, as to protect the internal markets of Member States who had adopted equal pay provisions in their national legislation from the low-wage competition of Member States employing women to less pay than men.<sup>101</sup> After the Paris summit in 1972, however, the Community leadership began to incorporate social policy into the goals of the Community. As a part of this effort, Directives 75/117/EEC on equal pay and 76/207/EEC on equal treatment were adopted. In the *Defrenne II* case, the Court of Justice declared that Article 119 had direct effect in all Member States, allowing women to rely directly on the right to equal pay contained therein before national courts.<sup>102</sup> Furthermore, in the *Defrenne III* case, the Court ruled that the elimination of discrimination on grounds of sex forms part of the fundamental rights that it is a general principle of Community law to respect.<sup>103</sup>

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<sup>96</sup> Roseberry 83.

<sup>97</sup> Ibid 83.

<sup>98</sup> Ibid 84.

<sup>99</sup> Ibid 215-216.

<sup>100</sup> Ibid 88.

<sup>101</sup> McCrudden, 'Comparable Worth: A Common Dilemma' (1986) 11 *Yale Journal of International Law* 396, 398.

<sup>102</sup> Case 43/75 *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena (Defrenne II)* [1976] ECR 455.

<sup>103</sup> Case 149/77 *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena (Defrenne III)* [1978] ECR 1365 paras 26-27.

In the *Defrenne II* case, the Court seems to have distinguished between “direct and overt discrimination” and “indirect and disguised discrimination”.<sup>104</sup> In *Worringham v Lloyds Bank Ltd* of 1981, the Court omitted all such distinctions and reasoned more broadly on “all forms of discrimination”.<sup>105</sup> The Court used the terms of direct and indirect discrimination again in 1989 in *Ruzius-Wilbrink v Bestuur van de Bedrijfsvereniging voor Overheidsdiensten*, although without defining the terms.<sup>106</sup> In *Dekker*, 1990, the Court stated that the answer to whether a measure amounted to direct discrimination “depends on whether the fundamental reason for the refusal of employment is one which applies without distinction to workers of either sex or, conversely, whether it applies exclusively to one sex”.<sup>107</sup> This definition was thereafter upheld in a series of cases.

In 2000, direct discrimination was finally legally defined as occurring where a person is treated less favourably, on prohibited grounds, than another is, has been or would be treated in a comparable situation.<sup>108</sup>

### 5.1.3 The Contemporary Community Concept

Direct discrimination is conceptually built on the first element of the Principle of Formal Justice, and is applied through a strict assessment of whether it can be proven that the employer has made considerations, regarding personal properties of the claimant, that are prohibited. All human beings make a copious amount of cognitive classifications every day. These are made through association and distinction. We make these associations and distinctions on certain grounds such as shape, colour, *et cetera*. The concept of direct discrimination aims at some such distinctions made between persons, by other persons. As we have seen, not all discriminations are prohibited, nor should they be, since any process involving choices must inevitably entail discriminating among the options available.

There is consensus among legal scholars that direct discrimination occurs when the consideration of a prohibited ground of discrimination causes a disadvantageous unequal treatment to someone, in circumstances covered by the prohibition. The concept of direct discrimination thus entails legally equal cases receiving unequal treatment. The element of disadvantage follows from the legal character of the tort concept – there can

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<sup>104</sup> *Defrenne III* para 18.

<sup>105</sup> Case 69/80 *Worringham v Lloyds Bank Ltd* [1981] ECR 767 para 23.

<sup>106</sup> Case C-182/88 *M. L. Ruzius-Wilbrink v Bestuur van de Bedrijfsvereniging voor Overheidsdiensten* [1989] ECR 4311 para 20.

<sup>107</sup> Case C-177/88 *Elisabeth Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus* [1990] ECR I-3941.

<sup>108</sup> Directive 2000/43/EC on equal treatment between persons irrespective of racial or ethnic origin, Framework Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation; subsequently in Directive 2002/73/EC amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women; and Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services.

be no claim if there is no damage. The element of causality is more central to our understanding of anti-discrimination law.

To begin with, note that it is the classification made in the mind of the discriminator which must be causing the unequal treatment. It is perfectly possible that the discriminator is mistaken concerning the personal properties of the discriminatee. Consider an employer who does not want to employ homosexuals. During the course of a job interview, something convinces the employer that the applicant is homosexual. The employer therefore denies the applicant the job. It later turns out that the applicant was heterosexual. That does not alter the fact that there has been direct discrimination.<sup>109</sup> Vice versa, if the discriminator is unaware that the discriminatee has personal properties upon which the discriminator wishes to make classifications, it is not possible to have direct discrimination. In our example, had the applicant been homosexual, and had the employer been unaware of this and had still decided not to employ the applicant, there would not be direct discrimination. It is clear from this observation that direct discrimination conceptually entails some form of awareness in considering the personal properties that are prohibited grounds of discrimination, and therefore intent, however framed. It is not possible to discriminate directly through negligence (though it is possible to discriminate indirectly through negligence). However, intent, or any subjective motivation to discriminate, is not required by contemporary evidence rules for direct discrimination to be established.<sup>110</sup>

In Community law, requirements on the decisive influence of the prohibited discrimination have been taken as far as a ‘but for’-causation requirement. This means that if, but for the use of the prohibited criterion, the discriminatee would not have been disadvantaged, there is illegal discrimination.<sup>111</sup> For comparison, the Swedish legislature has taken a further step in regarding it as irrelevant whether the use of the prohibited criterion has in fact been decisive to the measure creating disadvantage to the discriminatee. In Sweden, it is sufficient to prove that the prohibited criterion has helped motivate the measure.<sup>112</sup> Community law does not go that far.

Following the formula of formal justice, the first question to be asked when confronted with a case of alleged discrimination must be whether there are equal cases. The legal concept of equality must of course not be understood in an absolutistic fashion, that the cases compared must be alike in every respect – such cases simply do not exist. What is prohibited is the use of prohibited criteria in distinguishing between people. Still, there may be good reasons to distinguish between the cases at hand. Therefore, the court must begin by considering whether the cases compared are ‘equal’, or rather

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<sup>109</sup> This point is also made by Ellis (2005) 106.

<sup>110</sup> Ellis (2005) 103. Ellis seems to interpret this fact as if there is no need for intent. This is only true insofar as intent means malice. However, we should use an intent concept encompassing any situation where the discriminator is aware of the fact that a prohibited classification is made. The line between intent and negligence is not easy to draw, but in general *awareness* must be the minimum criterion of intent.

<sup>111</sup> Ibid 106.

<sup>112</sup> (Swedish Labour Court) AD 2003 nr 58.

‘comparable’,<sup>113</sup> in the legal sense. As noted by Owen Fiss, the ideal of equality must in law be reduced to a principle of similar treatment of similar cases.<sup>114</sup> Whether the cases compared are relevantly similar naturally depends on the type of discrimination case. In equal pay cases, the court will essentially seek to determine whether the claimant and the comparator are performing work of equal value. To do this, the jobs and persons involved must be assessed. The court will *inter alia* assess the nature, conditions and requirements of the work and the education and experience of the persons. There is some controversy on whether the court should also assess their respective labour market status. In equal treatment cases, e.g., cases concerning access to employment or promotion, the court will essentially seek to determine whether the claimant and comparator are equally qualified for the position. Here, focus will be on personal qualifications, but also on personal properties that may be relevant to the position, such as social skills.

If the cases concerned are not relevantly similar (legally ‘equal’), anti-discrimination law is not applicable. Note, however, that in litigation the ‘unequal cases’ assessment is usually dealt with in the framework of the alleged discriminator’s defence, and therefore after the assessment we will now continue to describe; whether there is unequal treatment.

The second question to be asked, then, is whether the treatment is “unequal” in the moral sense. The court must decide whether there is a discrepancy in the terms of employment, and whether that discrepancy falls within the scope of anti-discrimination law (unequal pay, pension benefits, paid leave terms, *et cetera*). Since a court of law also presupposes that there is a claim in order to accept a case, this difference in terms of employment must be to the disadvantage of the claimant. If the court is able to establish that the claimant and the comparator are not treated similarly but to the disadvantage to the claimant, the claimant may be in a position to invoke anti-discrimination law to support a claim against his employer. If the differences between the terms of the claimant and the terms of the comparator seem to be caused by a consideration, on the part of the employer, of sex, colour, or any other prohibited ground of discrimination, the court will presume that there is a breach of the principle of non-discrimination.

The burden of proof then shifts to the alleged discriminator, who must show that this presumption is false.<sup>115</sup> It is in the course of this defence that the alleged discriminator will commonly produce evidence that the situations of the claimant and comparator are not relevantly similar, i.e., legally ‘equal’.

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<sup>113</sup> Cf. Case C-279/93 *Finanzamt Köln-Altstadt v Schumacker* [1995] ECR I-225 para 30. The term ‘relevantly similar’ is preferred by this author, since most any two phenomena are ‘comparable’ in some sense or other.

<sup>114</sup> Fiss 108.

<sup>115</sup> Directive 97/80/EC on the burden of proof in cases of discrimination based on sex, Article 4(1).



### 5.1.4 The Comparator Problem

The notion of ‘justice’ we have inherited from Hart suggests that we must make comparisons. The Principle of Formal Justice, speaking of ‘equal’ and ‘different’ cases, also implies this. However, there is some scholarly debate on the role of the comparator in anti-discrimination law. Sandra Fredman and Jonas Malmberg both suggest that the comparator, in the sense of a person on the other end of the dichotomy laid down by the prohibited grounds of discrimination, should be abandoned to some extent. Fredman submits that there are cases where there is no appropriate comparator, most obviously in cases of pregnancy discrimination.<sup>116</sup>

Malmberg argues that we must not be persuaded to go so far as to considering the availability of an appropriate comparator a necessary component of the concept of discrimination, but rest with using comparators as evidence of unequal treatment. This is possible, says Malmberg, since the role of the comparator is simply to prove that the different treatment is caused by an illegal use of prohibited grounds of discrimination. We should not, according to Malmberg, confuse this causation requirement with a comparator requirement.<sup>117</sup> But does this not sever a substantial blow to our idea that the concept of discrimination is built on the Principle of Formal Justice? If justice requires comparison, then does not the omission of a comparator mean that the discrimination concept moves away from the justice concept? In the *Dekker* case, the European Court of Justice held that to establish discrimination, it is sufficient that the contested decision is directly linked to the sex of the candidate, apparently supporting Malmberg’s view.<sup>118</sup> This case concerned a pregnant woman, and there were no male applicants to the position at stake. The Court nevertheless held that there was discrimination on grounds of sex, since only women can be refused employment on grounds of pregnancy.<sup>119</sup> The Court thereby dismissed the need of a comparator, and focuses on the causal link between treatment and grounds for treatment. But are we still dealing with grounds of *discrimination* in the proper sense, or simply with morally undesirable grounds of treatment?

In the view of the present author, the wording of the *Dekker* case is unfortunate in this respect. However, the Court is not straying from the structure of formal justice. On the contrary, the Court is going to lengths to preserve it, although perhaps without being very clear about it. By holding that the contested decision in the case is directly linked to sex, the Court makes holds also that there is adverse treatment on grounds of sex, that is, an adverse treatment that is motivated by consideration of a prohibited ground of discrimination. It follows that, had the discriminatee been of the opposite sex, the measure would not have been executed – a hypothetical comparison. Thus, there is discrimination on grounds of sex, in line with the structure of formal justice.

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<sup>116</sup> Fredman 99.

<sup>117</sup> Malmberg (2005) 248.

<sup>118</sup> Case C-177/88 *Elisabeth Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jonge Volwassenen (VJV-Centrum) Plus* [1990] ECR I-3941 para 17.

<sup>119</sup> *Ibid* para 12.

It is therefore submitted that the significance of *Dekker*, in this respect, is in how the Court interprets the grounds of discrimination, rather than the concept of discrimination itself. It would have been possible to preserve clarity by explicitly regarding pregnancy as a prohibited ground of discrimination in its own right, making an analogy from the prohibition on discrimination on grounds of sex.<sup>120</sup> It would also have been possible to argue explicitly that discrimination on grounds of pregnancy is an extension of discrimination on grounds of sex, and that the contingent harm to women is sufficient to establish a breach of the principle of equal treatment. While it is possible to speculate that the Court had one of these approaches in mind, there are no such statements in the *Dekker* case, which is why it is easily misinterpreted.

Returning to Fredman and Malmberg, we can conclude that it is true that there is no need for a natural person acting as comparator. What we need is to establish that the contested measure is linked to prohibited grounds of discrimination, by any form of evidence available. Acting in this direction, the Community has in recent anti-discrimination legislation<sup>121</sup> adopted the view that the comparator can be hypothetical. However, as pointed out by Fredman,<sup>122</sup> it is possible to question whether there is a need even for a hypothetical comparator. Malmberg suggests that such a wording is superfluous since the rules have already included in their wording that the discrimination is to be ‘on grounds of sex’ (or other prohibited grounds).<sup>123</sup> For reasons presented in the above analysis of the *Dekker* case, the present author agrees.

The case of *P v S and Cornwall County Council*<sup>124</sup> is also interesting from a comparator choice point of view. In this case, as we have seen above, the alleged discrimination occurred after the discriminatee had undergone gender reassignment. The Court of Justice made comparison between P and persons of the sex to which he belonged before surgery, stating that ‘to tolerate such discrimination would be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled, and which the Court has a duty to safeguard’.<sup>125</sup> The Court seems to be barking up two trees at the same time. On the one hand, it is acting in accordance with its ruling in *Dekker* by viewing any treatment linked to sex as falling within the scope of the prohibition of discrimination on grounds of sex. On the other hand, it is giving reasons for this in terms more closely related to an individual freedom to undergo gender reassignments. The question that the Court should have asked is whether P would have been treated disadvantageously if she had been a woman from the beginning.

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<sup>120</sup> Such an interpretation is made by Simon Honeyball in ‘Pregnancy and Sex Discrimination’ (2000) 29 Industrial Law Journal 43, 49. Honeyball however objects to the notion that pregnancy discrimination is properly seen as sex discrimination.

<sup>121</sup> Directive 2000/43/EC, Article 2(2)(a); Directive 2000/78/EC, Article 2(2)(a); Directive 76/207/EEC (as amended by Directive 2002/73/EC), Article 2(2); and Directive 2004/113/EC, Article 2(a).

<sup>122</sup> Fredman 100.

<sup>123</sup> Malmberg 248.

<sup>124</sup> Case C-13/94 *P v S and Cornwall County Council* [1996] ECR I-2143.

<sup>125</sup> *Ibid* paras 21-22.

From the facts of the case, this seems unlikely. In the view of this author, the judgment supports an interpretation that the Court was actually prohibiting discrimination on grounds of having undergone gender reassignment, rather than striking down on discrimination on grounds of sex. The relevant comparison, then, is really between P going through with surgery and P abstaining from surgery. For consistency, it would have been possible to give reasons closer to those we have drawn from *Dekker*.

### 5.1.5 Defences

Defences to allegations of illegal discrimination divide into two groups:

1. defences that there has been no discrimination, and
2. defences that the discrimination is justified.

The first type of defence is generally labelled ‘causation defences’. Conceptually, there is no illegal discrimination if the defendant proves, e.g., that she or he was unaware of the personal property of the claimant underlying the alleged discrimination, that there has been no unequal treatment, or that the inequality in treatment is explained by factors other than the personal properties at issue. The latter is done by producing evidence that the differences are connected to factors like skill, effort, responsibility or working conditions.<sup>126</sup> For example, in the *Macarthy's* case, the Court stated that “it cannot be ruled out that a difference in pay between two workers occupying the same post but at different periods in time may be explained by the operation of factors which are unconnected with any discrimination on grounds of sex”.<sup>127</sup> The first and last defences challenge the causality between the personal property of the claimant and the unequal treatment, i.e., they claim that the unequal treatment is caused by something other than the personal property at issue. Such defences are referred to in anti-discrimination law as causation defences.

Lotta Lerwall argues when the defendant is submitting a claim that the unequal treatment is caused by some factor other than sex, this is a justification defence.<sup>128</sup> This author submits that when there is no causal link between the personal property and the unequal treatment, there is no illegal discrimination. The term ‘justified discrimination’ should be reserved to cases where undisputed illegal discrimination is justified. An act cannot be ‘justified’ without being *prima facie* unjust. This situation should be distinguished, then, from situations of uncontroversially legal discrimination. In the former case, prohibited grounds of discrimination have been used. In the latter, permitted grounds of discrimination have been

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<sup>126</sup> While the first defences show that there has been no discrimination whatsoever, this defence (hopefully) shows that there has been legal discrimination, since the alleged discriminator is showing that the grounds of discrimination used are permitted, or at least tolerated, by the legislature.

<sup>127</sup> Case 129/79 *Macarthy's Ltd v Wendy Smith* [1980] ECR 1275 para 12.

<sup>128</sup> Lotta Lerwall, *Könsdiskriminering: En analys av nationell och internationell rätt* (Iustus, Uppsala 2001) 287.

used. To summarise, we must keep separated situations where there is (1) no, (2) legal, and (3) justified (illegal) discrimination.

Thus, where the defendant admits to having discriminated against the claimant on prohibited grounds, but holds that there are still good and legal reasons for this, there is a justification defence. As we shall see, the limits of such a defence are quite narrow in direct discrimination cases, but wide in indirect discrimination cases.

There are a number of specific justifications of direct discrimination in the Community directives. Firstly, genuine and determining occupational requirements, when legitimate and proportionate, are capable of justifying direct discrimination by reason of the nature of the occupational activities and the context in which they are carried out.<sup>129</sup> The following are examples of such justified discrimination available under contemporary Community law: discrimination between white and black actors when casting for the character of Othello,<sup>130</sup> and discriminating between men and women in employing imams or Catholic priests.<sup>131</sup> Secondly, the directives on equal treatment all include specific justifications special to them. Unfortunately, the Community legislature has adopted a wording in these provisions where they stipulate that such cases 'shall not constitute discrimination'. Properly analysed, we are dealing with justified discrimination.

Ellis chooses to refer to justification defences to direct discrimination allegations as 'exceptions' from the prohibition.<sup>132</sup> This seems to be consistent with her reluctance to accept the notion of justified direct discrimination.<sup>133</sup> This author submits that the terminology of justification adds clarity and consistency.

A number of commentators have advocated the view that there should be a general possibility of justified direct discrimination. Some, like Ann Numhauser-Henning, have done so in the context of debating positive action. According to Numhauser-Henning, 'there are no reasons for failing to treat direct discrimination as something that may occasionally be justified in the individual case (...) On the contrary, this comes across as an arrangement which – in different ways – agrees well with the individually designed prohibitions on discrimination'.<sup>134</sup> Erika Szyszczak has criticised this stance by making a parallel to the justification of indirect

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<sup>129</sup> Directive 76/207/EEC (as amended by Directive 2002/73/EC), Article 2(6); Directive 2000/43/EC, Article 4; Directive 2000/78/EC, Article 4.

<sup>130</sup> Directive 2000/43/EC, Article 4.

<sup>131</sup> This is held to follow from Directive 76/207/EEC (as amended by Directive 2002/73/EC), Article 2(6). From an Atheist standpoint, it is difficult to see why the job in question would genuinely require that the employee is male. From the religious standpoints at issue, this is genuinely required for reasons of having valid priestly service. The point to be noted, however, is that when comparing this situation to the first, we can see that the genuine character of the requirements may vary to a certain extent. It will be for courts to draw the lines, and courts will likely be reluctant to interfere with religious convictions.

<sup>132</sup> Ellis (2005) Chapter 6.

<sup>133</sup> Cf. *ibid* 111-113.

<sup>134</sup> Ann Numhauser-Henning 'On Equal Treatment, Positive Action and the Significance of a Person's Sex' in Ann Numhauser-Henning (ed), *Legal Perspectives on Equal Treatment and Non-Discrimination* (Kluwer Law, The Hague 2001) 245.

discrimination, saying that ‘the objective of a justification [of discrimination] is to show that a measure is objective and *unrelated to sex*. The purpose of positive action is that it is distinctly related to sex’.<sup>135</sup> We will return to the concepts of justified discrimination and positive action below. At this point, it is sufficient to note that the concept of a justification argued by Szyszczak, on a closer examination, might be a case of legal discrimination rather than justified illegal discrimination. However, within the concept of indirect discrimination, this distinction is not easily made.

John Bowers QC and Elena Moran have also suggested a general possibility of justified direct discrimination, mainly for clarity reasons. The authors suggest that there is a common sense consensus among lawyers that direct discrimination can be justified for cost reasons, and that courts are at present forced to twist the legal framework to reach fair decisions. The authors suggest that a general justification defence is introduced to get rid of this problem.<sup>136</sup> Bowers and Moran also refer to the fact that in the directives on discrimination against part-time and fixed-term workers, there is a general possibility of justified direct discrimination.<sup>137</sup> The authors see no reason why this should not apply to other anti-discrimination rules.<sup>138</sup>

In a reply to Bowers and Moran, Tess Gill and Karon Monaghan argue that such a cost proportionality test would be devastating to the scope of direct discrimination, allowing employers to deny contracts to pregnant women and also to persons that the employer believes would be otherwise detrimental to their business because of their personal properties. Gill and Monaghan use the example of transsexuals, concluding that ‘the more prejudiced the consumer base, the more justified the discrimination’.<sup>139</sup> Gill and Monaghan submit that such a justification defence would contribute to uncertainty rather than clarity.<sup>140</sup> Regarding the possibility of justified direct discrimination on grounds of part-time and fixed-term contracts, the authors argue that discrimination on grounds of personal properties is in violation of human rights and therefore unjustifiable, while discrimination on grounds of contractual properties does not violate human rights and can therefore be justified.<sup>141</sup>

Bowers and Moran, joined by Simon Honeyball, have replied that the existing specific justification defences to direct discrimination prove that Gill and Monaghan are wrong in arguing that direct discrimination can

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<sup>135</sup> Erika Szyszczak ‘On Equal Treatment, Positive Action and the Significance of a Person’s Sex: Comments on Ann Numhauser-Hennings Article’ in Ann Numhauser-Henning (ed), *Legal Perspectives on Equal Treatment and Non-Discrimination* (Kluwer Law, The Hague 2001) 256. Italics in original.

<sup>136</sup> John Bowers QC and Elena Moran ‘Justification in Direct Sex Discrimination Law: Breaking the Taboo’ (2002) 31 *Industrial Law Journal* 307, 319-320.

<sup>137</sup> Directive 97/81/EC concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC, Clause 4(1) of the Annex; Directive 1999/70/EC concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, Clause 4(1) of the Annex.

<sup>138</sup> Bowers and Moran 309-310.

<sup>139</sup> Tess Gill and Karon Monaghan ‘Justification in Direct Sex Discrimination Law: Taboo Upheld’ (2003) 32 *Industrial Law Journal* 115, 120.

<sup>140</sup> Gill and Monaghan 121.

<sup>141</sup> *Ibid* 115-116.

never be justified.<sup>142</sup> The authors submit that it can be justified to discriminate on any grounds affecting the ability of the discriminate to perform the work in question (and that sex can be such a factor), and that courts should be granted a general justification possibility to address these problems with due flexibility.<sup>143</sup> The present author finds it hard to see how this suggested justification rule would add anything of value to the specific justification relating to genuine and determining occupational requirements.

The Court of Justice seems to have rejected the notion of a general possibility of justified direct discrimination in the *Dekker* case. After deciding that the complainant had suffered direct discrimination, the Court continued: ‘Such discrimination cannot be justified on grounds relating to the financial loss which an employer who appointed a pregnant woman would suffer for the duration of her maternity leave’.<sup>144</sup> It follows that a discrimination claim will be successful if unequal treatment on grounds of sex is proven, and that reasons for the measure are irrelevant unless covered by the statutory justifications. Ellis explicitly points out that, while we are dealing with direct discrimination, once unequal treatment and causation have been proved, this is the end of the matter.<sup>145</sup> It should of course be added that the ‘end of the matter’ rests also with the possible applicability of the specific defences to direct discrimination allegations.

## 5.1.6 Interpretations

Evelyn Ellis has identified adverse impact (i.e. unequal treatment) and causation as ‘the two constitutive elements of discrimination’.<sup>146</sup> To establish direct discrimination, then, we must answer the two questions

1. whether, but for the personal property at issue, the claimant would have been awarded higher pay/the position (etc)
2. whether the treatment of the claimant is more adverse than a comparator would receive (outside the scope of likely treatment of anyone within the comparator class).<sup>147</sup>

This view seems consistent with the Principle of Formal Justice. However, ‘adverse impact’ is not a proper term to use in the context of direct discrimination. The American terminology of ‘disparate treatment’ seems more fitting for a legal translation of the ‘unequal treatment’ in the Principle of Formal Justice. In fact, Ellis uses the similar term ‘adverse treatment’ under the heading of ‘adverse impact’. Although there cannot be adverse disparate treatment without adverse disparate impact, the two should conceptually be held apart. In direct discrimination, we are dealing

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<sup>142</sup> John Bowers QC, Elena Moran and Simon Honeyball ‘Justification in Direct Sex Discrimination: A Reply’ (2003) 32 *Industrial Law Journal* 185, 185.

<sup>143</sup> *Ibid* 186-187.

<sup>144</sup> Case 177/88 *Elisabeth Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jonge Volwassenen (VJV-Centrum) Plus* [1990] ECR 3941 para 12.

<sup>145</sup> Ellis (2005) 112.

<sup>146</sup> Evelyn Ellis, ‘The Definition of Discrimination in European Community Sex Equality Law’ (1994) 19 *European Law Review* 563, 564.

<sup>147</sup> *Ibid* 566-567.

with disparate treatment. In indirect discrimination, we are concerned with disparate impact of equal treatment. Ellis has later altered her definition, and in recent work her definition is instead that ‘discrimination occurs where a person is treated adversely on a prohibited ground’.<sup>148</sup>

Anna Christensen acknowledges that anti-discrimination law is built on the Principle of Formal Justice, and that the crucial issue of substantive justice is what cases are to be considered equal, under what circumstances.<sup>149</sup> According to Christensen, the prohibition on discrimination amounts to a demand of equal treatment. Groups who are subject to differential treatment, in an unfavourable manner, when compared to a reference group, are to be treated in the same way (or at least not worse). In Christensen’s words, both groups must be covered by the same norm. Christensen refers to the group protected in this way as the protected group, and to the group already covered by the norm as the reference group. Christensen refers to the norm at issue as the reference norm.<sup>150</sup> Anti-discrimination rules, says Christensen, are always based on a comparison between the protected group and the reference group.<sup>151</sup> Consequentially, the rules on equal pay regardless of sex do not as such demand the same wages for all, but that salaries are set by the same norms regardless of sex. The prohibition on discrimination works as a mandatory extension of the reference norm to the protected group.<sup>152</sup> In the view of the present author, this is the same as saying that sex must not be a distinguishing factor or merit (a ground of discrimination) in the setting of wages. The terminology used by Christensen is elegant, but might blur the structure of anti-discrimination law. Her terminology will nevertheless be used in citations of her work.

Christensen says direct discrimination is present if “the allocator of resources does not apply the norm pertaining to the reference group to members of the protected group, too, irrespective of whether his failure to do so is due to malice, prejudice, or statistical discrimination”.<sup>153</sup>

Sandra Fredman argues that the concept of direct discrimination is based on a concept of equality as consistency, where ‘it is not the treatment *per se* that is at issue, but the fact that one person is treated less favourably than another of the opposite sex or race’.<sup>154</sup> Fredman criticises the concept from a substantive equality perspective, stating *inter alia* that the concept is blind

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<sup>148</sup> Ellis (2005) 112.

<sup>149</sup> Christensen 32.

<sup>150</sup> Note that this ”norm” can in fact be a system of norms.

<sup>151</sup> Christensen 32.

<sup>152</sup> Ibid 33. It is a merit of Christensen’s interpretation that it does not confuse the reference group with the reference norm(s). As an example of such confusion, Karin Lundström (‘Indirect Sex Discrimination in the European Court of Justice’s Version’, in Ann Numhauser-Henning (ed), *Legal Perspectives on Equal Treatment and Non-Discrimination* (Kluwer Law, The Hague 2001) 146) claims that the concept of formal equality in anti-discrimination law necessarily presupposes that ‘men are the norm according to which women are to be treated’.

<sup>153</sup> Christensen 42.

<sup>154</sup> Fredman 94.

to whether equality is fulfilled through the granting of benefits to all or the removal of benefits from all.<sup>155</sup>

This is obviously a limitation of the capabilities of the concept of direct discrimination as we know it, but it is also an interesting critique of the ‘protected groups’ approach of Christensen. If the concept of discrimination is blind to whether its application causes equal benefit or equal misery, what room is there then for an approach of ‘protected groups’? There will only be a prohibition on classifications, resulting in inequalities between the groups on either side of the line drawn by the prohibited ground of discrimination. It is submitted that the ‘group protection’ concept of discrimination elaborated by Christensen, despite of its merits, should be rejected on these grounds, at least in the analysis of the formal concept of discrimination. As the Supreme Court of the United States held in *Bakke*, the standards of anti-discrimination law can only be upheld consistently if judicial protection is aimed at prohibiting classifications, rather than protecting certain classes as such.<sup>156</sup> The protection of classes is certainly the aim and substantive reason of anti-discrimination law, but the vessel of direct discrimination simply does not take this protection anywhere else than to the point of prohibiting certain classifications. To take further steps, we need other vessels, and some of these will be described below.

The interpretation of the present author is essentially that the concept of direct discrimination follows closely a concept of discrimination built on the first element of the Principle of Formal Justice. ‘Treat equal cases equally’, that is, do not treat legally equal/relevantly similar cases unequally on grounds prohibited by law. From this elementary concept a number of amendments and constructions have been made in order to make the concept work better in litigation. None of these, however, seems to have altered the fundamental structure of the concept.

Can the second element of the Principle of Formal Justice (‘treat different cases differently’) be significant to the concept of direct discrimination? It is submitted that the answer must be negative. Direct discrimination occurs when illegal considerations are made, i.e., in cases of disparate treatment. The second element of formal justice requires disparate treatment in that it has to do with situations where required considerations are not made. This element, however, is central to indirect discrimination.

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<sup>155</sup> Fredman 95.

<sup>156</sup> *Regents of University of California v Bakke* 438 U.S. 265 (1978) 299.



## 5.2 Indirect Discrimination

### 5.2.1 American Developments

As noted above, unintentional disparate impact of a measure is not held unconstitutional by the Supreme Court. However, it may constitute a violation of Title VII of the Civil Rights Act. The concept of disparate impact was created by the Supreme Court in *Griggs v Duke Power Co.*<sup>157</sup> and was adopted into legislation by the 1991 amendments to Title VII.<sup>158</sup> In essence, illegal disparate impact is presumed if the claimant proves, by statistical evidence, that a facially neutral practice adversely affects members of a racial, religious, sex, or national origin class. Note that claimants must be able to demonstrate that ‘specific elements of the [discriminator’s] hiring process have a significantly disparate impact’<sup>159</sup> – it will not suffice to simply show patterns of discrepancy in the allocation of goods or positions. This makes it difficult to bring a successful lawsuit when the disparate impact arises from purely discretionary measures, but the Supreme Court held that employers could not be held liable for the disparate impact of ‘the myriad of innocent causes that may lead to statistical imbalances’.<sup>160</sup>

If the claimant is able to meet these requirements, the burden of proof shifts to the defendant. The defendant must then demonstrate that the challenged practice does not have a disparate impact, or is job related for the position in question and consistent with business necessity.<sup>161</sup>

According to John Hasnas, the Civil Rights Act of 1964 was intended to be interpreted as an anti-differentiation provision, like the Equal Protection Clause was at that time interpreted as such a provision (*Brown, Loving*). However, just as the ‘separate but equal’ doctrine was to prove the downfall of the anti-oppression approach, so Title VII proved to be the downfall of the very principle it was designed to implement.<sup>162</sup> The transition to the anti-differentiation interpretation sprung from the realisation that the anti-oppression interpretation was in fact causing inequalities to be maintained. Likewise, the anti-differentiation interpretation was now deemed as prolonging the inequality of races that had been caused by centuries of subordination. In *Griggs*, the Supreme Court was confronted with an employer who had, until the adoption of the Civil Rights Act, excluded African-Americans from the workplace. After the Act was adopted, the employer had substituted this flagrant discrimination for a system of aptitude tests that functioned as a bar on African-Americans. The Supreme

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<sup>157</sup> 401 U.S. 424 (1971)

<sup>158</sup> Proof requirements are now found in 42 U.S.C. § 2000e-2(k) (§ 703(k) of Title VII).

<sup>159</sup> *Wards Cove Packing Co. v Atonio*, 490 US 642 (1988) 658.

<sup>160</sup> *Ibid* 657.

<sup>161</sup> 42 U.S.C. § 2000e-2(k)(1)(B)(ii) and (A)(i), respectively.

<sup>162</sup> Hasnas 474.

Court ruled that, since neither of the tests was shown to ‘bear a demonstrable relationship to the successful performance of the jobs for which it was used’,<sup>163</sup> and the tests ‘operated to disqualify Negroes at a substantially higher rate than white applicants’,<sup>164</sup> they were not permissible.

Hasnas sees *Griggs v Duke Power Co.* as the adoption, by the Supreme Court, of an anti-subordination interpretation, since it argues that ‘practices, procedures or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to “freeze” the status quo of prior discriminatory employment practices’.<sup>165</sup> While this is along the lines of the anti-subordination interpretation in that it strikes down on practices that have the effect of continuing the subordination of minorities, it is inconclusive evidence of the Supreme Court embracing other aspects of the anti-subordination approach, as explained by Hasnas, such as requiring positive action. This is not recognised by Hasnas, who finds contradictions between *Griggs* and *Regents of the University of California v Bakke*,<sup>166</sup> a case we will examine below.

In another interesting section of *Griggs*, the Supreme Court refers to the fable of the stork and the fox drinking milk:

Congress has now provided that tests or criteria for employment or promotion may not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox. On the contrary, Congress has now required that the posture and condition of the job-seeker be taken into account. It has – to resort again to the fable – provided that the vessel in which the milk is offered be one that all seekers can use. The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation.<sup>167</sup>

This section highlights the analytically very interesting fact that, when confronted with indirect discrimination, we must consider the second element of the Principle of Formal Justice, i.e., that different cases must be treated differently. Thus, an awareness of significant differences must be added to the pursuit to obliterate undesirable differential treatment. We will return to this feature of indirect discrimination below.

## 5.2.2 European Developments

In Europe, the United Kingdom has been at the fore of pursuing equality through anti-discrimination law. In 1968, the Race Relations Act was passed, in which there was a general rule that colour, race and ethnic or national origin were irrelevant criteria for the distribution of certain

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<sup>163</sup> *Griggs* 431.

<sup>164</sup> *Ibid* 424.

<sup>165</sup> *Ibid* 430. Hasnas offers it as evidence of the Supreme Court indorsing the anti-subordination interpretation at 476.

<sup>166</sup> 438 U.S. 265 (1978).

<sup>167</sup> *Griggs* 431.

resources.<sup>168</sup> However, the Act was soon to be considered ineffective in attaining its aim. The reasons had to do with burden of proof (showing intent was required), but also with what sort of discriminatory phenomena in society fell within the scope of the prohibition. The legislature therefore made an effort to prohibit the use of criteria that had the effect of excluding disproportionate numbers of minority groups regardless of intent. The Sex Discrimination Act of 1975 and the Race Relations Act of 1976 required close scrutiny of exclusionary practices, and demanded evidence that such practices were motivated by a real need.<sup>169</sup> The Acts made use of the concept of ‘indirect discrimination’, based on the approach of the Supreme Court of the United States in *Griggs*.

As seen above, indirect discrimination as a concept of Community law began in *Defrenne II*. At this point, however, the concept of indirect discrimination seemed to mean covert discrimination. The Court made a distinction between

direct and overt discrimination which may be identified solely with the aid of the criteria based on equal work and equal pay referred to by the Article in question and, secondly, indirect and disguised discrimination which can only be identified by reference to more explicit implementing provisions of a Community or national character.<sup>170</sup>

These concepts seemed to contradict the general understanding of the terms, Ellis notes, since both forms of discrimination can be either overt or disguised.<sup>171</sup> By 1981 the Court had dropped this wording.<sup>172</sup> In the *Jenkins* case, the Court began to develop its contemporary concept of indirect discrimination. The case concerned pay discrepancy between part-time and full-time workers, and the Court ruled that

If it is established that a considerably smaller percentage of women than of men perform the minimum number of weekly working hours required in order to be able to claim the full-time hourly rate of pay, the inequality in pay will be contrary to Article 119 of the Treaty where (...) the pay policy of the undertaking in question cannot be explained by factors other than discrimination based on sex. (...) a difference in pay between full-time workers and part-time workers does not amount to discrimination prohibited by Article 119 of the Treaty unless it is in reality merely an indirect way of reducing the level of pay of part-time

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<sup>168</sup> Christopher McCrudden, ‘Changing Notions of Discrimination’ in Stephen Guest & Alan Milne (eds), *Equality and Discrimination: Essays in Freedom and Justice*. Steiner, Stuttgart, 1985, 83.

<sup>169</sup> *Ibid.*

<sup>170</sup> Case 43/75 *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena (Defrenne II)* [1976] ECR 455 para 18.

<sup>171</sup> Ellis (2005) 89.

<sup>172</sup> Cf. case 69/80 *Susan Jane Worringham and Margaret Humphreys v Lloyds Bank Limited* [1981] ECR 767 para 23.

workers on the ground that that group of workers is composed exclusively or predominantly of women.<sup>173</sup>

The position on indirect discrimination thus adopted still bears great resemblance with covert direct discrimination. In the seminal case of *Bilka - Kaufhaus GmbH v Karin Weber von Hartz* the Court of Justice reached a new definition of indirect discrimination:

If (...) it should be found that a much lower proportion of women than of men work full time, the exclusion of part-time workers from the occupational pension scheme would be contrary to Article 119 of the Treaty where (...) that measure could not be explained by factors which exclude any discrimination on grounds of sex.<sup>174</sup>

(...) If the national court finds that the measures chosen by Bilka correspond to a real need on the part of the undertaking, are appropriate with a view to achieving the objectives pursued and are necessary to that end, the fact that the measures affect a far greater number of women than men is not sufficient to show that they constitute an infringement of Article 119.<sup>175</sup>

The development of the concept of indirect discrimination as regards discrimination on grounds of sex paralleled that of the same concept as regards discrimination on grounds of nationality in Community law. However, in the *John O'Flynn v Adjudication Officer* case, the Court added measures of contingent harm to the claimant to the scope of the prohibition on discrimination on grounds of nationality, stating that

it is not necessary (...) to find that the provision in question does in practice affect a substantially higher proportion of migrant workers. It is sufficient to note that it is liable to have such an effect.<sup>176</sup>

Indirect discrimination on grounds of sex was formally defined in Directive 97/80/EC on the burden of proof in cases of discrimination based on sex, Article 2(2):

(...) 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.

Note that this wording does not include contingent harm. In Directives 2000/43/EC and 2000/78/EC, however, contingent harm was included in the definitions of indirect discrimination.<sup>177</sup> Claimants under sex discrimination law were finally granted a remedy in cases of contingent harm by the

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<sup>173</sup> Case 96/80 *J.P. Jenkins v Kingsgate (Clothing Productions) Ltd* [1981] ECR 911 paras 13, 15.

<sup>174</sup> Case 170/84 *Bilka - Kaufhaus GmbH v Karin Weber von Hartz* [1986] ECR 1607 para 29.

<sup>175</sup> *Ibid* para 36.

<sup>176</sup> Case C-237/94 *John O'Flynn v Adjudication Officer* [1996] ECR I-2617 para 21.

<sup>177</sup> Article 2(2)(b) in both directives.

amendments to Directive 76/207/EEC by Directive 2002/73/EC. The new definition, in Article 2(2), reads

- indirect discrimination: where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.

### **5.2.3 The Contemporary Community Concept**

It is prohibited under anti-discrimination law, not to make distinctions between persons as such, but to put some such distinctions into concrete effect in certain circumstances. For instance, in the procedure of employing, it is prohibited to allow the classificatory distinction between a Muslim job applicant and an Atheist job applicant to have consequences in the decision on who will get the job. Such consequences fall within the scope of anti-discrimination law and are therefore properly referred to as illegal discrimination. When a court is trying to determine if this has occurred, it must assess the facts of the case in order to decide whether it has been proven that it has occurred, overtly or covertly. If the court finds that it has indeed occurred, there is tort under anti-discrimination law, for which the claimant is entitled to reparation. Such a case is difficult to prove, however, as has been the experience in all legal systems upholding the prohibition on such discrimination. Therefore, the concept of indirect discrimination was introduced. However, the concept has evolved to become a tort of its very own kind.

Since the introduction of indirect discrimination, employers have been obliged not only to refrain from considerations of prohibited grounds of discrimination (direct discrimination) but to scrutinise all considerations in order to ascertain whether they cause patterns of disparate impact. If they do, they must be objectively justified, removed, or altered, so that the different preconditions of persons protected by anti-discrimination law are accounted for – the same differences that must be ignored under the prohibition on direct discrimination. The requirement of scrutiny of all considerations thereby amounts to a duty to treat different cases differently, which means that it is conceptually built on the second element of the Principle of Formal Justice. The definition of indirect discrimination however entails a possibility to set a limit to the consideration of different preconditions if there are objectively justified and proportionate reasons. This resembles the specific defence of genuine and determining occupational requirements in the case of direct discrimination, as seen above, but the scope of the justification to indirect discrimination is broader.

Indirect discrimination thus occurs when an employer has applied a criterion, provision or procedure which is seemingly neutral to prohibited grounds of discrimination, but on closer examination is found to create discriminatory effects, i.e., effects with a statistical connection to personal properties that are prohibited grounds of discrimination. Note that if the criterion, provision or procedure is not neutral in this sense, there is direct

discrimination.<sup>178</sup> It is sufficient for the court to find a statistical connection between the application of the criterion, provision or procedure, and a prohibited ground of discrimination. The connection is indirect in the sense that it is not as such caused by a consideration of prohibited grounds of discrimination, but by consideration of grounds that are neutral from a disparate treatment point of view. Moreover, it is not necessary to establish that the criterion, provision or procedure has in fact caused disparate impact. It is sufficient that it is 'intrinsically liable' to have disparate impact.<sup>179</sup>

However, not any degree of disparate impact has been accepted by the Court of Justice. In the *Seymour-Smith* case, the Court ruled that

(...) it must be ascertained whether the statistics available indicate that a considerably smaller percentage of women than men is able to satisfy the condition of two years' employment required by the disputed rule. That situation would be evidence of apparent sex discrimination (...) That could also be the case if the statistical evidence revealed a lesser but persistent and relatively constant disparity over a long period between men and women (...) In this case, it appears from the order for reference that in 1985, the year in which the requirement of two years' employment was introduced, 77.4% of men and 68.9% of women fulfilled that condition. Such statistics do not appear, on the face of it, to show that a considerably smaller percentage of women than men is able to fulfil the requirement imposed by the disputed rule.

The requirements on the statistical evidence were also touched upon in this case.

It is also for the national court to assess whether the statistics concerning the situation of the workforce are valid and can be taken into account, that is to say, whether they cover enough individuals, whether they illustrate purely fortuitous or short-term phenomena, and whether, in general, they appear to be significant.<sup>180</sup>

## 5.2.4 The Comparator Problem

According to Evelyn Ellis, it is crucial to the establishment of indirect discrimination that the discriminatee 'is able to identify a group of persons with whom to make a comparison so that it can be alleged that the comparators receive a more advantageous treatment'.<sup>181</sup> Ellis argues that the discretion of courts to identify the relevant comparator group is problematic for the efficiency of the indirect discrimination concept. Sandra Fredman

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<sup>178</sup> If the criterion, provision or procedure is knowingly used to create discriminatory effects, there is covert direct discrimination, which must be distinguished from the concept of indirect discrimination. This will be elaborated below.

<sup>179</sup> Case C-237/94 *John O'Flynn v Adjudication Officer* [1996] ECR I-2617 para 20; Directive 76/207/EEC (as amended by Directive 2002/73/EC) Article 2(2).

<sup>180</sup> *Seymour-Smith* para 62.

<sup>181</sup> Ellis (2005) 95.

holds that an unfortunate choice of comparator is liable to reinforce discrimination,<sup>182</sup> and exemplifies this with the American Supreme Court case of *Wards Cove Packing Co. v Atonio*.<sup>183</sup> In this case, a workplace was segregated so that minority workers performed unskilled tasks while Caucasians occupied the skilled positions. The Supreme Court held that in order to ascertain whether there was disparate impact, the proper comparison should be made only between minority and Caucasian workers with the necessary qualifications for the skilled positions.<sup>184</sup> Fredman submits that the Supreme Court failed to realise that minority workers were unskilled because of inherited inequalities, and that the employer could have educated them for the skilled positions.<sup>185</sup> The present author submits that Fredman in this respect has expectations that the concept of indirect discrimination is not able to meet. In *Griggs*, the main reason for the Supreme Court to establish disparate impact was that the qualification requirements lacked 'a demonstrable relationship to successful performance of the jobs for which it was used'.<sup>186</sup> In *Wards Cove* Fredman agrees that the requirements were related to the jobs. It seems, then, that the consideration of education was objectively justified.

## 5.2.5 Disparate Treatment or Disparate Impact?

In the *Seymour-Smith* case,<sup>187</sup> the European Court of Justice held that indirect discrimination occurs when a measure has a (significant) disparate impact as between (in discrimination on grounds of sex) women and men, unless the measure is justified by objective factors unrelated to any discrimination (on grounds of sex). The formula was repeated, in essence, in 2003.<sup>188</sup> This raises the question whether indirect discrimination simply means discrimination by effect (i.e. disparate impact), or discrimination through disparate treatment on grounds that have an indirect connection with prohibited grounds of discrimination?

Jonas Malmberg sees the concept of indirect discrimination as a concept focusing on the prohibited grounds, and extensions of those grounds.<sup>189</sup> According to Malmberg, the concept of indirect discrimination covers measures where a distinction is made on grounds functioning as an extension of prohibited grounds, if distinctions on these (suspicious) grounds lead to a discriminatory effect, i.e. disparate impact. The effect in itself is evidence that the measure must be scrutinised, which shifts the

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<sup>182</sup> Fredman 109.

<sup>183</sup> *Wards Cove Packing Co. v Atonio* 490 US 642 (1988).

<sup>184</sup> *Wards Cove* 650-655. Interestingly, the Court of Appeals held that this discriminatory pattern in itself amounted to a *prima facie* case of adverse impact, without further identification of the consideration responsible. The Supreme Court held that the Court of Appeals erred in this respect.

<sup>185</sup> Fredman 109-110.

<sup>186</sup> *Griggs* 431.

<sup>187</sup> *Seymour-Smith* paras 58, 65.

<sup>188</sup> Joined cases C-4/02 and C-5/02 *Hilde Schönheit v Stadt Frankfurt am Main* (C-4/02) and *Silvia Becker v Land Hessen* (C-5/02) [2003] ECR I-12575 para 69.

<sup>189</sup> Malmberg (2005) 249.

burden of proof, and there is then an obligation of the employer to prove that the measure, despite its discriminatory effect, is justified by objective factors. Note that whether the suspicious grounds function as extensions of prohibited grounds must be decided on a case-to-case basis, as distinguished from grounds such as pregnancy and gender reassignment, which have been identified by the Court as such extensions in all cases.<sup>190</sup>

Malmberg's argument implies that the causation in indirect discrimination lies not, as in direct discrimination, between the prohibited ground of discrimination and the disadvantage of the discriminatee, but between the extension of the prohibited ground, i.e., the suspicious ground of discrimination, and the disparate impact. To argue that causation in indirect discrimination should originate in the (original) prohibited ground of discrimination would in fact be to deny the usefulness of the concept of indirect discrimination, since a relation between the prohibited ground of discrimination and a disparate impact must be presupposed in any understanding of the concept of discrimination. This is crucial also to our understanding of what sort of defence the discriminator must produce, as will be discussed below.

However, there are alternatives to Malmberg's interpretation. On strict interpretation of the *Seymour-Smith* approach to indirect discrimination, the concept could be described as a prohibition on discriminatory patterns *per se*, i.e., a prohibition on statistical connections between prohibited grounds of discrimination and (in this case) conditions of employment. This approach focuses on the disparate impact in itself, and leaves the disparate treatment on suspicious ground aside. It is submitted that such an approach contributes to clarity.

Fredman nevertheless opposes this interpretation.

A disparate impact is not itself discriminatory. Unequal results are legitimate if no exclusionary barrier can be identified, or if the inequality can be justified by reference to business needs or State social policy. (...) Equality of results is therefore not the end to be achieved. Instead, the results are part of the process of diagnosis of discrimination. Under-representation of a group makes it likely that an exclusionary criterion is operating; but then, the applicant must go further and find a practice, requirement, or condition which leads to this effect and which cannot be justified.<sup>191</sup>

In Fredman's and Malmberg's version, the pattern is only suspicious, or evidence that there *seems to be* illegal discrimination. In the suggested interpretation, the pattern itself amounts to indirect discrimination, which can however be justified. Starting with the distinction between disparate treatment and disparate impact, it is submitted that Fredman's and Malmberg's approach takes a detour to disparate treatment which can be disposed of. Malmberg submits that if discrimination on grounds of the seemingly neutral criterion leads to disparate impact, then disparate

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<sup>190</sup> Cf. *Dekker and P v S*.

<sup>191</sup> Fredman 115.



treatment on this ground works, by extension, as disparate treatment on prohibited grounds.<sup>192</sup> For example, if an employer requires applicants to a job to have a driver's license, this statistically causes a disparate impact disadvantageous to people who have little or no vision. Therefore, to discriminate on grounds of whether people have a driver's license works by extension as discrimination on grounds of vision disability. If this is not objectively justified, i.e., unless the employer proves that the use of the criterion is justified, there is indirect discrimination.

It is submitted that it would be sufficient to simply say that whenever a neutral criterion, provision or practice has a disparate impact statistically connected to prohibited grounds of discrimination, there is indirect discrimination. Such an approach would be clear in holding any equal treatment causing disparate impact connected to prohibited grounds of discrimination presumably illegal, since the discriminator has failed to treat different cases differently. In fact, Fredman's and Malmberg's approach threatens to blur the foundation of the concept of indirect discrimination in the second element of the Principle of Formal Justice, since it seeks to go back to disparate treatment. If we think of indirect discrimination in terms of disparate treatment, it seems we should pursue equal treatment of equal cases. But then we have lost sight of the very *ratio* of indirect discrimination. If a female applicant to a position as sports teacher is denied the job on grounds that she can't run 100 meters in under 12 seconds, discrimination occurs not because she should receive equal treatment with male applicants, but because she should be treated differently. Of course, it could be argued that 'equal' in this case means 'different', but that leads us to an endless labyrinth of blurred concepts that is helpful to nobody. It is submitted that with the second element of the Principle of Formal Justice, the concept of indirect discrimination is in a far better place.

Which of these interpretations is closer to contemporary Community law? To find the answer, we must closely examine the concept of indirect discrimination. Firstly, it is necessary to distinguish this issue from the burden of proof rules that hold that when a *prima facie* case of discrimination is established, it is for the alleged discriminator to prove that there is no breach of the non-discrimination principle. This applies to direct and indirect discrimination both.<sup>193</sup> In the case of *Kuratorium für Dialyse und Nierentransplantation e.V. v Johanna Lewark*, the European Court of Justice held that to establish indirect discrimination on grounds of sex

it must be considered that the application of legislative provisions such as those at issue in the main proceedings in principle causes indirect discrimination against women workers, contrary to Article 119 of the Treaty and to the Directive. It would be otherwise only if the difference of treatment found to exist was justified by objective factors unrelated to any discrimination based on sex.<sup>194</sup>

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<sup>192</sup> Malmberg (2005) 249.

<sup>193</sup> Cf. Directive 97/80/EC Article 4(1).

<sup>194</sup> Case C-457/93 *Kuratorium für Dialyse und Nierentransplantation e.V. v Johanna Lewark* [1996] ECR I-243 paras 30-31. The phrase 'unrelated to any discrimination on

The wording of the Court is not entirely clear, but the words ‘It would be otherwise’ seem to suggest, if we consider the previous sentence, that if the difference of treatment (or rather, disparate impact) is justified by objective factors unrelated to any discrimination on grounds of sex, the legislative provisions at issue *do not* in principle cause indirect discrimination against women workers. A similar analysis of the *Seymour-Smith* formula leads to the same conclusion: indirect discrimination *does not* occur when a measure has a (significant) disparate impact as between (in discrimination on grounds of sex) women and men, but is justified by objective factors. Thus, it seems, Fredman’s and Malmberg’s interpretation is closer to the concept of indirect discrimination in contemporary Community law. The elements of indirect discrimination must therefore be identified as disparate impact, causation and unjustifiability.

A related issue is that of whether Community law requires, like American law does, that the neutral consideration causing the disparate impact is identified. This is not clear from the materials examined by this author, although the cited section of Fredman, above, clearly suggests that in Fredman’s view, it must be identified. Evelyn Ellis has distinguished between the situation in United Kingdom law, where ‘it is essential to be able to point to a particular hoop through which women are required to jump’, and Community law, which ‘is unencumbered by this technicality’.<sup>195</sup> Ellis notes, however, that the Court of Justice has not been specific in this matter, but maintains that claimants are free under Community law to prove disparate impact in any appropriate way. The wording of *Seymour-Smith*, above, does not explicitly require identification of the ‘hoop’. Furthermore, the word ‘practice’ in the legislative definition of the concept could be interpreted as an opening to more loosely defined considerations. From a burden of proof point of view, it could be desirable for claimants to be able to prove simply that there are discriminatory patterns in the working-place at issue. The wording of Directive 97/80, Article 4(1), that it is sufficient for the claimant to provide facts from which it may be presumed that there has been illegal discrimination supports such a notion. Note also Article 4(2), which allows Member States to ease further the burden of proof of claimants. It is therefore submitted that, at the very least, it is possible for Member State legislatures to drop any requirement of identification of the consideration causing disparate impact.

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grounds of sex’ is unfortunate, since if the factors were related to such discrimination, we would be dealing with direct discrimination. Furthermore, as we have seen, indirect discrimination is not caused by *different* treatment but by *equal* treatment causing an adverse impact connected to prohibited grounds of discrimination.

<sup>195</sup> Ellis (1994) 569.

## 5.2.6 Defences

In the light of the directive definition of indirect discrimination, we can conclude that there is no indirect discrimination if

1. there is no disparate impact connected to prohibited grounds resulting from the discrimination, or
2. the disparate impact is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.

As we have seen, both these defences are properly conceived as defences that, if successful, will prompt courts to hold that there has been no indirect discrimination. However, only the first is properly referred to as causation defence, aimed at breaking the causal link between the suspicious consideration and the disparate impact. If it were to become clear under Community law also that the hoop to jump must be identified, and the claimant pointed to such a hoop, it is also conceivable that the defendant could successfully thwart the claim of illegal discrimination by showing that the hoop at issue had not been considered.

The second defence presupposes that there is causality, but aims at showing that it is justified and proportionate to limit the duty of the discriminator to consider the different preconditions of discriminatees in this case. Therefore, this is a justification defence, but one that leads to the conclusion that there has been no indirect discrimination. Lotta Lerwall concludes that while it is possible to make exceptions from the prohibition on direct discrimination, this is not possible in the context of indirect discrimination. Lerwall argues that, in indirect discrimination, the justification defence aims at providing reasons, unrelated to prohibited grounds of discrimination, for the use of the neutral consideration at issue, ruling out any hidden connection between the disparate impact and prohibited grounds of discrimination. If successful, the defendant has proven that there has been no indirect discrimination.<sup>196</sup> Ellis explains that ‘objective justification reflects the element of causation where the discrimination is indirect: if the adverse consequences to one group can be shown to be attributable to an acceptable and discrimination-neutral factor, then there is no discrimination’.<sup>197</sup> We must distinguish, then, between the justification defences to direct discrimination allegations and the justification defence which has been built into the prohibition on indirect discrimination. This does give rise to some systematic difficulties, that may help explain why Ellis prefers to call the justification defences to direct discrimination allegations ‘exceptions’.<sup>198</sup>

However, if we were to adhere to the interpretation of the concept of indirect discrimination suggested by the present author, the issue of justification by objective factors unrelated to any discrimination becomes an

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<sup>196</sup> Lerwall 287.

<sup>197</sup> Ellis (2005) 112.

<sup>198</sup> Ibid Chapter 6.

issue of justifying the pattern, which is in itself prohibited. The notion ‘justified (illegal) discrimination’ must analytically refer to cases where there has indeed been a differentiation between legally equal cases, or equal treatment causing disparate impact connected to prohibited grounds of discrimination, but where the legislature has chosen to grant a possibility of justifications, excuses, or exceptions, whichever term is preferred. With such an interpretation, the first defence above would be a causation defence. The second would be a justification defence which in this interpretation could cause courts to hold that there had in fact been indirect discrimination (through disparate impact), but that the use of the criterion, provision or practice causing this disparate impact was nevertheless objectively justified by a legitimate aim, if the means of achieving that aim were appropriate and necessary. This would contribute to clarity and consistency in the concepts of discrimination.

Leaving this discussion aside, we may ask what usually constitutes a justification defence? As stated above, the definition of indirect discrimination entails a possibility to set a limit to the consideration of different preconditions if there are objectively justified and proportionate reasons. Jeremy Waldron discusses the most common justification argument, the economical one. According to Waldron,

‘justifiability’ (...) can refer to some (but not all) of the costs that altering a presumptively invalid condition might impose on an employer. The costs that an employer may face here fall into three categories: (1) there are the costs of ascertaining whether his practices constitute indirect discrimination (...); (2) there are the relative costs of operating alternative practices that do not amount to indirect discrimination (...); and (3) there are the costs of actually switching from the practice referred to in (1) to that referred to in (2).

Clearly, the notion of justifiability refers to a certain level of costs under heading (2). (...)

Unfortunately, costs under headings (1) and (3) cannot be considered<sup>199</sup>

Waldron calls for the economic justification defence to be more exactly outlined in terms of what levels of costs are, at least, manifestly unfair to impose on employers in the pursuit of substantive equality. Waldron also points out that costs under headings (1) and (3) can be quite substantial, and asks why such costs are not considered.<sup>200</sup> In order to explain how the costs defence functions in contemporary law, Waldron offers the example of a firm advertising for secretaries. The ad requires candidates to be able to type. This condition is challenged on the ground that it has disparate impact to black youths. Waldron holds that although it is possible to prohibit the use of this condition, the economic repercussions on the employer could be unbearable and therefore courts should regard such a condition as

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<sup>199</sup> Jeremy Waldron ‘Indirect Discrimination’ in Stephen Guest & Alan Milne (eds), *Equality and Discrimination: Essays in Freedom and Justice*. Steiner, Stuttgart, 1985, 98-99.

<sup>200</sup> Ibid 99-100.

objectively justified.<sup>201</sup> Waldron thus examines the justifiability of the condition by comparing it to the costs repercussions of the option to remove the condition causing disparate impact altogether. As we have seen, there is also the possibility of altering a criterion, provision or practice so as to avoid causing disparate impact. It is difficult to find such an option in Waldron's example, but consider the following: An employer requires employees to be available at the office from 8 in the morning until 17 in the evening, Mondays to Fridays. A Muslim employee challenges this provision holding that it is liable to have disparate impact to orthodox Muslims, who wish to attend Friday prayers. In this situation, the provision could be altered to allow for some discretion regarding Fridays. Employers should not typically suffer great costs from allowing Muslim employees to leave the office for part of Fridays, as the loss in work done could be compensated for on other days.

What other justification defences are available? Certainly, the justification defence of genuine and determining occupational requirements, applicable to direct discrimination, must also apply here. For example, if the job really requires that you have a driver's license, then the inclusion of such a criterion is justifiable regardless of the fact that it has disparate impact to persons with a vision disability. Another example is the common practice of 'last in, first out' in labour law. As noted by Christopher McCrudden, this practice causes disparate impact to young employees, thus there is (presumably) indirect discrimination on grounds of age. However, the practice is justifiable for reasons of fairness in working life.<sup>202</sup>

This is an example of how courts, in assessing a justification defence, may be weighing the substantive moral purpose of the prohibition on indirect discrimination against other substantive moral interests and principles. This is a very interesting field of inquiry, and how this is done in practice should be investigated further. Unfortunately, such an inquiry is not within the scope of this paper.

## 5.2.7 Interpretations

To Anna Christensen, indirect discrimination occurs 'when the norm applied by an allocator of resources appears to be neutral, but its practical application results in worse terms for the protected group than for the reference group'.<sup>203</sup> This means that the norm(s) cause disparate impact. In such cases, says Christensen, the allocator of resources must show that the norm applied nevertheless is objectively justified and also that it forms an appropriate and necessary means for attaining his aim.<sup>204</sup> This entails

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<sup>201</sup> Ibid 98-99.

<sup>202</sup> Christopher McCrudden 'Institutional Discrimination' (1982) 2 Oxford Journal of Legal Studies 303, 358.

<sup>203</sup> Christensen 42.

<sup>204</sup> Cf. the justification test of Directive 76/207/EEC (as amended by Directive 2002/73/EC), Article 2(2), which provides that a norm shown to have discriminatory effect constitutes indirect discrimination unless it is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary. The latter part of the test is also known as the proportionality test.

weighing the interests of the protected group against the legitimate aim pursued. For Christensen, '[t]he act of extending prohibitions against discrimination so as to make them cover indirect discrimination as well comprises a qualitative leap in anti-discriminatory legislation'.<sup>205</sup> While the prohibition on direct discrimination demands the extension of the reference norm to the protected group, the prohibition on indirect discrimination allows courts to 'scrutinize the actual content of the reference norm itself'. This means that courts are able to review the content of the applied norm, and determine whether it fulfils the criteria of the justification test. The fact that the prohibition on indirect discrimination prohibits discriminatory effects to the disadvantage of protected groups (that are not objectively justified), makes Christensen define allegations of indirect discrimination a form of class action.<sup>206</sup> If this remedy was transposed to any circumstances of society, it could for instance be claimed that the fundamental principle of freedom of contract has a discriminatory effect on women. Therefore, it should be abolished unless objectively justified. Christensen comments on this by stating that 'everyone knows that it will not do for a court of law to question the most fundamental norms in the societal structure – for instance the structural dissimilarities caused by the free market – and that no court of law was ever intended to do anything of the kind'.<sup>207</sup>

In a comment on Christensen's article, Evelyn Ellis argues that the problem rather lies with the incapability of courts to do anything to remove the discriminatory reference norms. Courts can only highlight this discriminatory effect, and decide on whether they constitute tort for which the defendant is liable to pay damages.<sup>208</sup> A similar point is made by Sandra Fredman, saying that although an indirect discrimination claim may improve the situation of women working part-time, the concept does not alter the fact that a vast majority of women work part-time.<sup>209</sup> It is submitted that this remark highlights the limits of what can be expected from the vessel of a prohibition on indirect discrimination. The main flaw of Christensen's approach is rather that of the limits of the 'protected group' approach. This indicates one-way prohibitions, protecting one of the two groups identified by the dichotomizing line drawn by prohibited grounds of discrimination. The approach taken in this paper is instead one of focusing on the Principle of Formal Justice, and the identification by the legislature of what considerations must not be tolerated. In indirect discrimination, this approach amounts to focusing disparate impacts connected to the prohibited grounds of discrimination. In either case, the question of whether there is illegal discrimination turns on whether there is a link between the contested measure and prohibited grounds of discrimination. Focusing on prohibited grounds offers more dynamic than focus on protected groups, since the latter threatens to blur the fact that the prohibition on discrimination swings both ways. Furthermore, focusing on protected groups blurs the conceptual basis of anti-discrimination law in the Principle of Formal Justice, and the

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<sup>205</sup> Christensen 42.

<sup>206</sup> Ibid.

<sup>207</sup> Ibid 42-43.

<sup>208</sup> Ellis (2001) 62.

<sup>209</sup> Fredman 115.

element of comparison which it entails. Christensen's interpretation lies more within a morality discourse than a justice discourse, if you will.

However, Christensen does distinguish between one-way and two-way prohibitions on discrimination.<sup>210</sup> A one-way prohibition only declares that the protected group must not be treated disadvantageously compared to the reference group. Under such a rule, it is perfectly legal to treat the protected group advantageously to the reference group. A two-way prohibition, then, declares that disadvantageous treatment to any of the groups is illegal. It might be added that this is simply a question of shifting groups; for example, if there is disadvantageous treatment of a woman on grounds of sex, men are the reference group and women are the protected group. If the situation is reversed, women are the reference group and men are the protected group. The difference between one-way and two-way prohibitions, then, is that under the former such a shift is not possible by law. Christensen notes an increasing tendency in Europe towards constructing two-way prohibitions, and interpreting them as meaning that the abolition of differential treatment *per se* is the goal (i.e., the achievement of formal justice in itself, regardless of substantive impact), rather than the achievement of substantive justice.<sup>211</sup> Christensen speculates that such an interpretation may contribute to the resistance against the concept of positive action, and may lead to women losing the remedial benefits provided to them by anti-discrimination law so far. The parallel to the so-called anti-differentiation approach of Hasnas, as explained above, is obvious. Christensen however fails to take the leap of faith to embrace that if anti-discrimination law is based on the Principle of Formal Justice, it inevitably is a two-way prohibition. Of course, this does not mean that it is not possible to pursue substantive equality by specifically promoting subordinated groups. Firstly, we can use the second element of the principle to require consideration of personal properties in cases where there are good reasons to do so. Secondly, we can apply different circumstantial standards to the application of the first and second elements. Thirdly, we can of course also create one-way prohibitions.

Christopher McCrudden argues that the concept of indirect discrimination differs from that of direct discrimination in that it is 'positive as well as negative in its requirements'.<sup>212</sup> Under the prohibition on indirect discrimination, employers must operate his recruitment and promotion procedures so that the different preconditions of groups covered by anti-discrimination law are accounted for, so that disparate impacts of appointment criteria are foreseen and blocked.<sup>213</sup> McCrudden considers this an attempt to remedy past injustices.

It is submitted that indirect discrimination, as pointed out by Christensen and Fredman, is not a vessel designed to break through inherited differences at large, but only to remedy disparate impact of discriminator considerations. Such disparate impact may of course be linked to inherited

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<sup>210</sup> Christensen 37.

<sup>211</sup> Ibid.

<sup>212</sup> McCrudden (1985) 84.

<sup>213</sup> Ibid.

inequalities in general, but this fact is not such as to alter the function of the concept of indirect discrimination. Instead, to remedy such substantial inherited inequalities we use the strong medicine of positive action. It also is conceptually built on the second element of the Principle of Formal Justice, but what makes it controversial is, firstly, that it so obviously limits the discretion of employers and, secondly, that it seemingly collides with the prohibition on direct discrimination. Whether the second view is a correct one will be discussed below, but if we were to uphold this notion, then it must be accepted that indirect discrimination too violates the prohibition on direct discrimination, since it entails consideration of the very personal properties that must not be considered under direct discrimination rules. It is submitted that there is not so much drama involved here, but rather the use of different formal vessels in order to attain the same substantive goal of equality.

Some of the terminological confusion surrounding the concept of indirect discrimination can undoubtedly be attributed to the fact that the concept sounds so similar to direct discrimination, while in so many respects it is quite different. If the discriminator is obliged under the prohibition on indirect discrimination to differentiate between applicants on grounds of their personal properties, why is this called ‘discrimination’? This concept is derived from the classical concept, i.e., direct discrimination, under which it is prohibited to consider personal properties such as ethnicity, sex, and age. The transition of the concept to the new tort has not been easy, and it could be questioned whether indirect discrimination is properly called ‘discrimination’ at all. However, there are some reasons to do so. Firstly, the act required is an act of discrimination, where the employer acknowledges and accounts for the differences of the groups at issue. This trait of indirect discrimination is shared with the concept of positive action, which is sometimes referred to as ‘positive discrimination’. Secondly, the foremost similarity of direct and indirect discrimination is that they deal with adversity by comparison. In direct discrimination, there is disparate treatment. In indirect discrimination, there is – or should be - disparate impact.

Perhaps the ambiguity of indirect discrimination arises from a remaining failure to distinguish between covert direct discrimination and indirect discrimination. Even in 1995, AG Tesauro equated indirect discrimination and ‘covert discrimination’.<sup>214</sup> In American law, we can recall that there are three concepts of illegal discrimination: individual disparate treatment, systematic disparate treatment and systematic disparate impact. In systematic disparate treatment, discriminatory intent is presumed if the claimant produces evidence showing that the employment or pay pattern of the alleged discriminator differs from the pattern expected if there is no discrimination, and that the disparity is such that it is unlikely to arise by chance.<sup>215</sup> In systematic disparate impact, a *prima facie* case is established if the claimant proves, by statistical evidence, that a facially neutral practice

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<sup>214</sup> Opinion of Mr Advocate General Tesauro in case C-450/93 *Eckhard Kalanke v Freie Hansestadt Bremen* [1995] ECR I-3051 para 12.

<sup>215</sup> Roseberry 88.



adversely affects members of a racial, religious, sex, or national origin class. The defendant must then demonstrate that the challenged practice does not have a disparate impact, or is job related for the position in question and consistent with business necessity.<sup>216</sup> To uphold the distinction between direct and indirect discrimination consistently, the American concept of systematic disparate treatment must be translated into the Community concept of covert direct discrimination, although the burden of proof has been eased. Claimants do not need to show that the discriminator has explicitly considered prohibited grounds of discrimination. Likewise, the American concept of systematic disparate impact must be translated into the Community concept of indirect discrimination.

The two concepts are, and should be, distinct as regards their definitions, the scope of available justification defences, and their respective conceptual foundations in the first and second elements of the Principle of Formal Justice. Moreover, direct discrimination seems to presuppose some form, however weak, of intent, while the concept of indirect discrimination, in the interpretation of the present author, analytically excludes any possibility of requiring intent. Contemporary Community law is not clear on this point. Also, if covert direct discrimination is proven, the defences available are limited compared to those available under indirect discrimination. The concept of indirect discrimination must therefore be kept from confusion with covert direct discrimination. In the view of the present author, the use of a justification defence to prove that there has been 'no discrimination' is liable to cause such confusion. Furthermore, indirect discrimination may have been created to ease the burden of proof of discriminates, but the notion that this is still the role of the concept is liable to cause confusion. To repeat, whenever a neutral criterion is used with the intent to discriminate on prohibited grounds, there is in fact covert direct discrimination, as in the American concept of systematic disparate treatment. The concept of indirect discrimination cannot consider intent, and this trait has led to the phenomenon that what is perhaps covert direct discrimination is often deemed illegal as indirect discrimination, for lack of evidence. However, this should not mislead us to confuse the concepts. Indirect discrimination is now, and should be, a tort of its own kind.

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<sup>216</sup> 42 U.S.C. § 2000e-2(k)(1)(B)(ii) and (A)(i), respectively.

# 6 Positive Action

## 6.1 American Developments

The concept of positive action was addressed by the Supreme Court in *Regents of the University of California v. Bakke*, where a State university medical school had reserved a number of positions in the education programme for minority students. Justice Powell held for the Court that ‘we have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals (...) it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another’.<sup>217</sup> However, Justice Powell went on to add that ‘an admissions program which considers race only as one factor is simply a subtle and more sophisticated – but no less effective – means of according racial preference (...) [no] facial infirmity exists in an admissions program where race or ethnic background is simply one element – to be weighed fairly against other elements – in the selection process’.<sup>218</sup>

Nor did Justice Powell refer to the test of strict scrutiny in *Bakke*. Powell came close, however, in holding that the ‘inherently suspect’ nature of racial classifications ‘of any sort (...) call for the most exacting judicial examination’.<sup>219</sup> According to Barron & Dienes, the Supreme Court has later come to distinguish between State and local schemes of positive action and federal schemes of positive action. In the former case, the government needs to pass the test of strict scrutiny. In the latter case, however, the contested measure must serve important government interests within the power of Congress and must be substantially related to the achievement of those objectives.<sup>220</sup> Fredman argues, however, that Justices on closer examination apply different ‘strict scrutiny’ standards. In the *Adarand* case, Fredman says, Justices Thomas and Scalia upheld the strict scrutiny standard from a symmetrical point of view, although this case concerned a measure by the federal government. Justice O’Connor (who gave the judgment) instead held that the federal government might well have a compelling interest to act on the basis of race to overcome the ‘persistence of both the practice and lingering effects of racial discrimination against minority groups’.<sup>221</sup> It seems remarkable to this author that the strict scrutiny test has been extended to positive action, since the criteria of suspect classification, cited above, include ‘a history of pervasive discrimination against the class’, ‘the stigmatizing effect of the

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<sup>217</sup> *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) 307-309.

<sup>218</sup> *Ibid* 318.

<sup>219</sup> *Ibid* 291.

<sup>220</sup> Barron & Dienes 198-199.

<sup>221</sup> Fredman 148; Citation from *Adarand Constructors, Inc. v Pena* 515 U.S. 200 (1994)

classification’, and ‘whether the classification is disadvantageous to a “politically insular minority”’. This strongly suggests that classifications aimed at promoting such classes should not be regarded as suspect classifications, and thus that the strict scrutiny test should not apply.

Positive action case-law on Title VII of the Civil Rights Act has been more permissive. In *United Steelworkers of America v Weber* the Court upheld a race-based positive action scheme. Although the Court held that there was no need to ‘define in detail the line of demarcation between permissible and impermissible affirmative action plans’,<sup>222</sup> it nevertheless outlined a test which has been applied in subsequent case-law. The Court stated, firstly, that the ‘purposes of the plan mirror that of the statute (...) to break down old patterns of racial segregation and hierarchy (...) [and] to open employment opportunities for Negroes’. Secondly, ‘the plan does not unnecessarily trammel the interests of white employees (...) [since it] does not require the discharge of white workers and their replacement with new black hires (...) [nor creates] an absolute bar to the advancement of white employees’. Thirdly, ‘the plan is a temporary measure; it is not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance’.<sup>223</sup>

The second and third criteria were to some extent specified in *Johnson v Transportation Agency of Santa Clara County*. On the second criterion, that the interests of majority employees (in the *Johnson* case male employees) are not to be unnecessarily trammelled, the Court noted that the positive action scheme at issue excluded no applicants automatically, but guaranteed that all applicants had their qualifications weighed against those of all other applicants. The Court added that the positive action scheme unsettled no legitimate and firmly rooted expectations.<sup>224</sup> Concerning the third criterion, the Court held that the ‘manifest imbalance’ must relate to a ‘traditionally segregated job category [so that] the interests of those employees not benefiting from the plan will not be unduly infringed’. To consider whether there is a ‘manifest imbalance’, a comparison is to be made between the percentage of minorities or women at the working-place and ‘the percentage in the area labor market or general population’, or, in the case of jobs requiring special training, ‘those in the labor force who possess the relevant qualifications’.<sup>225</sup>

## 6.2 European Developments

The concept of positive action has had a roller-coaster history in Community law. Under Article 2(4)<sup>226</sup> of Directive 76/207/EEC, Member States have had discretion to make exemptions from the prohibition on discrimination by introducing measures to promote equal opportunity for

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<sup>222</sup> *United Steelworkers of America v Weber*, 443 U.S. 193 (1978) 208.

<sup>223</sup> *Ibid.*

<sup>224</sup> *Johnson v Transportation Agency of Santa Clara County*, 480 U.S. 616 (1987) 638.

<sup>225</sup> *Ibid* 631-632.

<sup>226</sup> Article 2(8) after amendments to the directive through Directive 2002/73/EC.

men and women, in particular by removing existing inequalities which affect women's opportunities. Until the 1990's, this was perceived as a specific exception from the main rule of non-discrimination, on par with the specific exceptions for occupational requirements and measures protecting women during pregnancy and maternity.<sup>227</sup> Accordingly, the Commission considered moving on to making positive action schemes mandatory in the Community's own institutions and in public bodies of the Member States. In the end, the Commission chose to maintain the discretion of the Member States by turning the draft Directive into a Recommendation, which was adopted by the Council in December 1984 as Recommendation 84/635.<sup>228</sup> The Commission also issued a 'Guide' to the implementation of positive action schemes in 1988, in which the concept was defined as 'any measure contributing to the elimination of inequalities in practice' and described as an effort to 'complement legislation on equal treatment'.<sup>229</sup>

Many lawyers were therefore surprised when the Court of Justice passed judgment in the *Kalanke* case.<sup>230</sup> Before *Kalanke*, it was believed that positive action was at the very least permitted as a 'tie-break' measure, i.e., when two or more applicants competing for a position had equal merits in all other aspects.<sup>231</sup> In such a case, it was believed, female candidates could be chosen over male candidates explicitly on grounds of sex, in order to remedy the sex segregation on the labour market. If you will, sex was conceived as a prohibited ground of discrimination up until the point where no applicant had better merits than another (i.e., where permitted grounds of discrimination were exhausted). At this point, however, it became a permitted ground of discrimination, in order to break the deadlock. The substantive justice argument was that no male careers would be thwarted by such a system, since male applicants would always be chosen over female applicants if their merits were ever so slightly better than those of the female applicant.<sup>232</sup> In the *Kalanke* case, the Court examined such a tie-break system. The Court ruled that the provision of Article 2(4), as derogation from the right conferred upon individuals by the directive, i.e., the right not to be unlawfully discriminated against, was to be interpreted narrowly. The Court continued:

National rules which guarantee women absolute and unconditional priority for appointment or promotion go beyond promoting equal

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<sup>227</sup> Article 2(2) and 2(3), respectively.

<sup>228</sup> Published in OJ [1984] L331/34. Background on the draft is from Ellis (2005) 299.

<sup>229</sup> See Ellis (2005) 300. The full name of the Guide is *Positive Action – Equal Opportunities for Women in Employment – A Guide*. It was published by the Office for Official Publications of the European Communities, Luxembourg (Ellis (2005) 300, note 120).

<sup>230</sup> Case C-450/93 *Eckhard Kalanke v Freie Hansestadt Bremen* [1995] ECR I-3051.

<sup>231</sup> Ellis (2005) 303.

<sup>232</sup> And, it should be added, vice versa. Of course, any selection system will inevitably favour candidates over other candidates, and in that sense it is nonsensical to argue that applicants that do not get the position by a system are not disadvantaged by it. The more proper argument is that the tie-break system entails a disadvantage to male applicants that they will have to suffer for the greater good of the pursuit of equality.

opportunities and overstep the limits of the exception in Article 2(4) of the Directive. Furthermore, in so far as it seeks to achieve equal representation of men and women in all grades and levels within a department, such a system substitutes for equality of opportunity as envisaged in Article 2(4) the result which is only to be arrived at by providing such equality of opportunity.<sup>233</sup>

The ruling meant that the previous concept of legal positive action under Community law had to be revised, but there was confusion on the normative space left for positive action schemes. It seemed clear that tie-break systems had been outlawed, but there was uncertainty as to how the words “absolute and unconditional priority” were to be interpreted. However, subsequent case-law served to lessen the impact of *Kalanke*.

In the subsequent case of *Hellmut Marschall v Land Nordrhein-Westfalen* the Court, in Full Chamber, distinguished situations like those in *Kalanke* from situations where the selection of women is subject to the application of a saving clause, whereby there is ‘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’.<sup>234</sup> It is difficult to establish how this is compatible with the perception that tie-break systems were outlawed by the ruling of *Kalanke*. The very idea of a tie-break must be that if there is a tie, the prohibited consideration becomes permitted. In the situation described by the Court, there seems to be no tie, since there are relevant criteria that tilt the balance. In the case of *Badeck*, however, the Court stated that this objective assessment was to take account of ‘the specific personal situations of all candidates’.<sup>235</sup> The judgment clarified that the aim of the Court was to prevent positive action schemes from blocking male candidates who had a personal situation similar to that which is generally liable to block female candidates, i.e., men who were equally disadvantaged because of their dedication to family work.<sup>236</sup> In the *Lommers* case, the Court examined a working-place practice to offer nursery places to the children of female employees. The places were made available to male employees only in cases of emergency. The Court acknowledged that there was discrimination on grounds of sex, and aired some concerns that the offer could reinforce traditional stereotypes.<sup>237</sup> However, since the number of nursery places was limited to all, and not entirely closed to male employees, the Court settled for holding that ‘a measure which would exclude male officials who take care of their children by themselves from access to a nursery scheme subsidised by their employer would go beyond

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<sup>233</sup> *Kalanke* paras 21-23.

<sup>234</sup> Case C-409/95 *Hellmut Marschall v Land Nordrhein-Westfalen* [1997] ECR I-6363 para 35.

<sup>235</sup> Case C-158/97 *Georg Badeck and Others, interveners: Hessische Ministerpräsident and Landesanwalt beim Staatsgerichtshof des Landes Hessen* [2000] ECR I-1875 para 38.

<sup>236</sup> *Ibid* paras 31-36.

<sup>237</sup> Case C-476/99 *H. Lommers v Minister van Landbouw, Natuurbeheer en Visserij* [2002] ECR I-2891 para 41.

the permissible derogation',<sup>238</sup> thereby reinforcing the impression from *Badeck* that the personal situation that is to be accounted for is the family work situation.

Through the Treaty of Amsterdam, a provision on Member State discretion as regards permissible positive action was added to Article 141 TEC:

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 pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.

In *Abrahamsson v Fogelqvist*, the Court ruled on a positive action measure that went beyond the 'tie-break' situation. The Swedish legislature had passed an Act whereby some university posts were reserved for female candidates with sufficient qualifications, as long as the difference in qualifications between the female candidate and a male competitor was not such as to cause an appointment of the female candidate to be 'contrary to the requirement of objectivity'.<sup>239</sup> It was clear from settled case-law that the measure violated Article 2(4) of Directive 76/207/EEC. The question, then, was whether it was permissible under the new Treaty provision. The Court however ruled, in a very brief statement that may reflect internally dissenting views on the motivation of the ruling, that such a measure went beyond the scope of permitted positive action in Article 141(4) TEC, since it was 'on any view (...) disproportionate to the aim pursued'.<sup>240</sup> The contemporary state of Community law was not clarified by the subsequent *Briheche* case, in which the Court stated that 'irrespective of whether positive action which is not allowed under Article 2(4) of the Directive could perhaps be allowed under Article 141(4) EC, it is sufficient to state that the latter provision cannot permit the Member States to adopt conditions (...) which prove in any event to be disproportionate to the aim pursued'.<sup>241</sup>

In the *Abrahamsson* case, the European Court of Justice used the term 'positive discrimination', seemingly distinguishing between concepts of positive discrimination and positive action, the latter used in cases *Marschall* and *Badeck*. Evelyn Ellis makes reference to this distinction and attributes it to cases like *Abrahamsson* and *Kalanke*, where there was an automatic preference based on sex.<sup>242</sup> However, on closer reading of the cases, it seems the Court merely stuck to the terminology of the national jurisdiction. This interpretation is reinforced by the fact that in the *Briheche* case, in which the Court refers to the precedent of *Abrahamsson*, the term

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<sup>238</sup> Lommers para 47.

<sup>239</sup> Case C-407/98 *Katarina Abrahamsson and Leif Anderson v Elisabet Fogelqvist* [2000] ECR I-5539 para 9, citing Article 15a of Chapter 4 of (Swedish) Regulation 1993:100.

<sup>240</sup> *Abrahamsson* para 55.

<sup>241</sup> Case C-319/03 *Serge Briheche v Ministre de l'Intérieur, Ministre de l'Éducation nationale and Ministre de la Justice* [2004] ECR I-8807 para 31.

<sup>242</sup> Ellis (2005) 311.

‘positive action’ is used again. It is not possible to conclude, then, that there is any distinction between these concepts in Community law.

### 6.3 The Contemporary Community Concept

Positive action is conceptually derived from the second element of the Principle of Formal Justice, but it is an entirely different concept from indirect discrimination. Firstly, positive action is a concept of disparate treatment, not a concept of disparate impact. Positive action occurs when grounds of discrimination that are usually prohibited become required. Thus positive action is on collision course with the concept of direct discrimination. Under the latter, the cases at issue, e.g. Buddhists and Hindus, must be regarded as legally equal, and receive equal treatment. Under the former, the same cases are to be regarded as different, and receive different treatment. Therefore, positive action must be regarded as a justification defence to direct discrimination, or an exception from the prohibition on direct discrimination, if you will. The European Court of Justice has consistently referred to the concept of positive action as derogation from the right to equal treatment. Secondly, positive action is necessarily a one-way vessel. Of course, it is possible to construe a positive action requirement in neutral terms, such as ‘preference for the under-represented colour’, but it remains undisputable that the concept would be meaningless if it applied both ways. Positive action specifically requires preference for one above the other on grounds of personal properties otherwise prohibited to consider, or at least that these properties are seen as an extra merit. Consider again the quote from Aristotle, ‘All men agree that what is just in distribution should be according to merit of some sort, but not all men agree as to what that merit should be’.<sup>243</sup> In positive action the legislature has in fact decided on what one such merit should be, within the scope of the positive action norm.

It has been submitted that positive action is a concept of disparate treatment rather than disparate impact, since it conceptually entails deliberate disparate treatment on grounds normally prohibited to consider, with the intentional aim to remedy structural inequalities related to those grounds. It follows that the concept of positive action is an inverted version of direct discrimination.

Ann Numhauser-Henning has argued that there can be positive action through indirect discrimination,<sup>244</sup> which must mean that there can be positive action through requiring the consideration of neutral criteria with disparate impact. However, as noted by Erika Szyszczak, ‘we are dealing with a very different situation with positive action in that there is a clear *intention* to “discriminate”’.<sup>245</sup> Therefore, we are dealing with (overt or

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<sup>243</sup> Aristotle Book E, section 6 (1131a:25).

<sup>244</sup> Numhauser-Henning 243, 245.

<sup>245</sup> Szyszczak 256 (italics in original).

covert) direct discrimination. Indirect discrimination, as we have seen, can never be intentional without transforming into direct discrimination. The question, then, is whether this direct discrimination can be considered justified on any of the specific grounds provided for in Directive 76/207 and Article 141(4) TEC. As we have seen, the European Court of Justice has been both narrow and, in the case of Article 141(4) TEC, unclear in determining whether this is possible. Szyszczak argues that the concept of a justification necessarily entails that it is shown that the measure is objective and unrelated to sex.<sup>246</sup> With the terminology suggested in this paper, the use, for example, of genuine and determining occupational requirements to directly discriminate on prohibited grounds is seen as a justification defence. Such a terminology helps clarify the concepts of anti-discrimination law and contributes to its coherence. The argument of Szyszczak risks instead to confused the concepts of direct and indirect discrimination, since her definition of justification is drawn from the justification concept built into the legal definition of indirect discrimination. It is submitted that this persistence to reserve the concept of justification to indirect discrimination is linked to a general reluctance to use the term 'justification' to direct discrimination defences. However, it cannot be argued that the use of genuine occupational requirements to cast a black actor to play Othello is anything but direct discrimination. With this said, it is also clear that the direct discrimination is justified in this case. To resist the use of this terminology is to retain the pejorative emotive meaning of the word 'discrimination', a phenomenon that carries with it a risk of blurring the concept and confusing judges.

The foremost feature of indirect discrimination that may resemble positive action is that there is an option to remedy a disparate impact through a limited measure of disparate treatment. We may recall that in order to remedy the disparate impact of a neutral consideration, the discriminator has the option *inter alia* to alter the criterion, practice or provision at issue so that it accounts for different preconditions related to prohibited grounds of discrimination. The alteration of the consideration is thus a form of positive action, since it entails disparate treatment on grounds that are normally prohibited. This may perhaps account for some of the confusion on indirect discrimination and positive action. The difference to positive action as we know it in the 'pure' sense is, however, that in the context of indirect discrimination the positive action is done to remedy a particular disparate impact, while 'pure' positive action is a measure designed to remedy larger disadvantageous structures in society. Furthermore, on a closer examination this remedy to disparate impact does not amount to justified indirect discrimination, but a measure, again, of justified direct discrimination. The lesson to be learned is therefore only that the concept of justified direct discrimination measure should not be perceived as alien or contradictory to our understanding of anti-discrimination law.

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<sup>246</sup> Szyszczak 256. Szyszczak seems to imply that positive action must be seen as an 'exception' to the prohibition on direct discrimination rather than a 'justification'. This author is open to using these concepts synonymously, but sees no point in a distinction between them that may blur concepts.



It must be concluded that positive action as such can only be interpreted as justified direct discrimination, and not as justified indirect discrimination.

## 6.4 Interpretations

In the debate on positive action, most commentators have argued from a substantive justice point of departure. Some of these arguments will inevitably be touched upon here, but the aim of the discussion is to show that positive action is one of several formal concepts, applying the structure of the Principle of Formal Justice, that can help pursue the aim of equality. Preconceptions on the morality of formal concepts are misguided, since formal concepts are not substantive, but only vessels through which substantive aims can be pursued.

The famous Opinion of Advocate General Tesauo in the *Kalanke* case may be taken as a point of departure in this section. In his opinion, AG Tesauo held that positive action must be ‘directed at removing the obstacles preventing women from having equal opportunities’ but not ‘towards guaranteeing women equal results’.<sup>247</sup> The argumentation of the Advocate General turns on this distinction between equality of opportunities, which is the phrase used in Directive 76/207/EEC Article 2(4), and equality of results. Although AG Tesauo acknowledged the fact that there are structural inequalities and that anti-discrimination law is designed to promote equality, he therefore concluded that the prohibition on direct discrimination could only allow for very specific exceptions, and that the exception in Article 2(4) could not apply to anything but measures designed to attain ‘equality of opportunities’.<sup>248</sup> AG Tesauo continued:

The very fact that two candidates of different sex have equivalent qualifications implies in fact by definition that the two candidates have had and continue to have equal opportunities: they are therefore on an equal footing at the starting block. By giving priority to women, the national legislation at issue therefore aims to achieve equality as regards the result or, better, fair job distribution simply in numerical terms between men and women. This does not seem to me to fall within either the scope or the rationale of Article 2(4) of the directive.<sup>249</sup>

This statement was not addressed by the Court of Justice until the *Marschall* case, in which it held that

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 (...) For these reasons, the mere fact that a male candidate and a female candidate are equally

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<sup>247</sup> Opinion of Mr Advocate General Tesauo in case C-450/93 *Eckhard Kalanke v Freie Hansestadt Bremen* [1995] ECR I-3051 para 19.

<sup>248</sup> *Ibid* para 13.

<sup>249</sup> *Ibid*.

qualified does not mean that they have the same chances. It follows that a national rule in terms of which, subject to the application of the saving clause, female candidates for promotion who are equally as qualified as the male candidates are to be treated preferentially in sectors where they are under-represented may fall within the scope of Article 2(4) if such a rule may counteract the prejudicial effects on female candidates of the attitudes and behaviour described above and thus reduce actual instances of inequality which may exist in the real world.<sup>250</sup>

The Court thereby seems to have dismissed the holding of the Advocate General, and to have recognised that positive action is a tool to remedy structural disadvantages, although the fact that Article 2(4) is an exception to Article 2(1) of the directive also led the Court to limit its scope. In the terminology preferred in this paper, Article 2(4) offers a justification defence.

Luisa Antonioli Deflorian argues that the most difficult issue in positive action is establishing what the content of the concept is. Deflorian notes that Community law has so far not defined it, and submits that the Community legislature is likely to be reluctant to do so since they realise that any definition would ‘blatantly clash with the principle of formal equality’.<sup>251</sup> Deflorian criticises the distinction between ‘equality of opportunities’ and ‘equality of results’ advocated by AG Tesauero, and submits that the result of such an assessment, in any given situation, ‘turns simply on how you look at it, as a starting point, or as a point of arrival’.<sup>252</sup> Such a criterion seems unsuitable to Deflorian, who offers the example of comparing the American cases of *Brown* and *Bakke*. Both cases dealt with admission to schools, but were decided in contradicting ways. Deflorian asks whether admission to schools an opportunity or a result? Deflorian argues that the same problem applies even in job recruiting, and seems to conclude that the distinction made by Tesauero upon examination disintegrates to mere rhetoric.<sup>253</sup> This author can see the point of AG Tesauero, but also that of Deflorian. The distinction between equality of opportunity and equality of results is indeed ambiguous. Furthermore, it seems quite superfluous. AG Tesauero has a point from a legal interpretation of legislation point of view, but the content of the distinction remains obscure. If we recognise that positive action is a one-way vessel designed to remedy structural disadvantages to women, we only need to know the circumstantial scope of the rule in order to apply it. That scope should be worded more clearly than in the Advocate General’s attempt.

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<sup>250</sup> Case C-409/95 *Hellmut Marschall v Land Nordrhein-Westfalen* [1997] ECR I-6363 paras 29-31.

<sup>251</sup> Luisa Antonioli Deflorian ‘The Dilemma of Affirmative Actions: A Comparison Between European Community Law and the American Experience’ in Iain Cameron & Alessandro Simoni (eds), *Dealing with Integration: Perspectives from Seminars on European Law 1995-1996* (Iustus, Uppsala 1996) 111. The ‘principle of formal equality’ in Deflorian’s article seems to be synonymous to the first element of the Principle of Formal Justice.

<sup>252</sup> *Ibid* 112.

<sup>253</sup> *Ibid* 113.

Deflorian also holds that the problems of positive action flow from the specific trait of law that it strives for neutrality, while positive action is not a neutral concept. Instead, it infringes individual human rights of those male competitors who are denied a position they would otherwise get. According to Deflorian, 'if law is used openly to achieve purposes of distributive justice, it becomes the target of criticism of bias and partiality'.<sup>254</sup> Therefore, says Deflorian, we need new legal concepts to tackle the problem of positive action. The argument of injury to third parties, which is a substantive argument, will be touched upon below. The present author wishes only to note that the concept of positive action defined in this paper should do, that is, the definition that positive action occurs when the legislature requires disparate treatment on grounds that are normally prohibited, in order to create advantages to individuals belonging to a class of persons structurally disadvantaged in society. The nature of this disparate treatment, as well as the identification of the class of persons to which the applicant must belong (and thereby the identification of the required ground of discrimination), is to be defined by the legislature (or, when given such discretion, the courts).

Ellis is highly critical to the concept of positive action. To Ellis, 'there is something deeply unattractive about trying to remedy the shortcomings in the non-discrimination principle by further acts of discrimination: two wrongs simply do not make a right'.<sup>255</sup> Instead, Ellis argues that deep-seated structural inequalities must be remedied through measures of mainstreaming, articulating equality targets and monitoring requirements for employers.<sup>256</sup> The concept of mainstreaming has been described by the Commission as 'mobilising all general policies and measures specifically for the purpose of achieving equality'.<sup>257</sup> Deflorian makes a similar distinction between 'direct affirmative actions', i.e., mainstreaming measures, and 'indirect affirmative actions', i.e., what we are discussing here.<sup>258</sup> To this author, there is nothing unattractive about using a legislative vessel suitable to remedy structural inequalities, which is what positive action is designed to do. Furthermore, we may repeat that just as the Principle of Formal Justice is void of substantive values, so should the concept of discrimination be. If we use the term this way, the mists of unattractiveness of 'further acts of discrimination' clear, and we are able to perceive the concept of positive action as it is. By recognizing that positive action is an issue of determining in what circumstances the usually prohibited grounds of discrimination are instead to be required in the pursuit of equality, we allow legislatures and courts to have the opportunity to examine the substantive moral and sociological arguments for and against using the concept, and make a decision, free from shadowy preconceptions on the morality of formal concepts.

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<sup>254</sup> Deflorian 109.

<sup>255</sup> Ellis (2005) 309.

<sup>256</sup> Ibid 308-309.

<sup>257</sup> Commission Communication 'Incorporating equal opportunities for women and men into all Community policies and activities' COM (1996) 67, 2; cited in Ellis (2005) 116.

<sup>258</sup> Deflorian 107.

The problem of positive action thus arises through the fact that it contradicts the prohibition on direct discrimination. Both apply the concept of disparate treatment, but while direct discrimination rests upon the first element of the Principle of Formal Justice, i.e., that equal cases must be treated equally, the concept of positive action rests upon the second element, i.e., that different cases must be treated differently. Since there are structural differences in the opportunities of, for example, men and women, the legislature decides to require preference for women by disparate treatment. The flip-side of this is that there is a repercussion to the male competitors. This is where substantive counter-arguments to the concept usually aim. For example, Sandra Marshall has argued that the damage to third parties renders the concept immoral.<sup>259</sup> Katherine O'Donovan, in a reply, submits that men are enriched by structural inequalities, and that this amounts to unjust enrichment, for which men must make some restitution.<sup>260</sup>

It has been the aim of this discussion to show that these considerations belong to the substantive discussion that must precede the decision to use a requirement of positive action, but that they cannot aim at the concept itself, since it is a formal concept void of substantive value, just as the Principle of Formal Justice upon which it is built. It is for the legislature to fill it with such commands that will achieve the ends desired.

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<sup>259</sup> Sandra Marshall 'Reversing Discrimination' in Stephen Guest & Alan Milne (eds), *Equality and Discrimination: Essays in Freedom and Justice* (Steiner, Stuttgart 1985).

<sup>260</sup> Katherine O'Donovan 'Affirmative Action' in Stephen Guest & Alan Milne (eds), *Equality and Discrimination: Essays in Freedom and Justice* (Steiner, Stuttgart 1985).

## 7 Conclusive Remarks

We have seen that, according to the Principle of Formal Justice, like cases must be treated alike, and different cases must be treated differently. This principle is derived from the Aristotelian concept of distributive justice. Aristotle held that ‘All men agree that what is just in distribution should be according to merit of some sort, but not all men agree as to what that merit should be’.<sup>261</sup> The classical concept of illegal discrimination, in Community law referred to as direct discrimination, seeks to decide what these merits must not be. This is done by declaring disparate treatment on certain grounds, in certain circumstances, illegal. It has been argued that exceptions to this principle are made through acknowledging that discriminations on prohibited grounds are sometimes justified, and that this should be called justified direct discrimination. It has been submitted that it is only obscuring to the concept to suggest otherwise, since the concept of discrimination as such, just as the Principle of Formal Justice, should not be carrying substantive or emotive meanings.

The subsequent concept of indirect discrimination aims instead at prohibiting disparate impacts of neutral criteria. We have seen that there is some ambiguity to this concept, specifically on what it is that amounts to ‘discrimination’ in this context, and how the available defences should be perceived. It has been submitted that to pursue clarity, it must be acknowledged that this concept is built on the second element of the Principle of Formal Justice, i.e., that different cases must be treated differently, and that ‘discrimination’ occurs when discriminators omit to do so, causing disparate impacts statistically connected to prohibited grounds of discrimination. A justification defence, if successful, should in such circumstances prompt courts to hold that there has been discrimination, but that it is justified.

It has further been argued that the concept of positive action is a formal concept through which disparate treatment is required on specific grounds, i.e., that the legislature in this case indeed recognises some ‘merits’ according to which distribution is ‘just’ (according to the legislature). Unlike direct and indirect discrimination, positive action is by nature a one-way vessel, designed to promote preference for individuals belonging to a certain class of people identified by the positive action norm.

The aim of the paper is achieved, then, in that we have been able to find a way to clarify how the Principle of Formal Justice conceptually underlies all of these concepts of the normative conglomerate known as anti-discrimination law.<sup>262</sup> The next step must be to evaluate and compare the normative reasons underlying the prohibition on and/or requirement of grounds of discrimination.

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<sup>261</sup> Aristotle Book E, section 6 (1131a:25).

<sup>262</sup> Perhaps the title of the paper should have been ‘The Formal *Concepts* of Discrimination’.

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