

Foundations of Indirect Discrimination Law

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Indirect Discrimination Law: Controversies and Critical Questions

HUGH COLLINS AND TARUNABH KHAITAN

I. THE FOX AND THE STORK

AESOP'S FABLE OF the fox and the stork invokes the idea of indirect discrimination. The story tells how the fox invited the stork for a meal. For a mean joke, the fox served soup in a shallow dish, which the fox could lap up easily, but the stork could only wet the end of her long bill on the plate and departed still hungry. The stork invited the fox for a return visit and served soup in a long-necked jar with a narrow mouth, into which the fox could not insert his snout. Whilst several moral lessons might be drawn from this tale, it is often regarded as supporting the principle that one should have regard to the needs of others, so that everyone may be given fair opportunities in life. Though formally giving each animal an equal opportunity to enjoy the dinner, in practice the vessels for the serving of the soup inevitably excluded the guest on account of their particular characteristics.

Chief Justice Burger invoked this fable of the fox and the stork in the decision of the United States Supreme Court in *Griggs v Duke Power Co.*¹ This famous case introduced the idea of indirect discrimination or disparate impact into the emerging law of discrimination. The issue concerned an employer's requirement that job applicants should pass a particular written test. The use of the test was challenged on the ground of race discrimination. The test could be taken by everyone and there was no explicit disadvantage applied to racial minorities. In practice, however, black applicants performed worse than white applicants on the test, a disparity that almost certainly reflected their different educational opportunities within a segregated school system. Moreover, it was found that good performance in the test seemed to be unrelated to good performance of the job. Speaking

¹ *Griggs v Duke Power Co* 401 US 424 (1971).

for the Court, Chief Justice Burger declared that discrimination could be established on such facts.

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 proffered be one all seekers can use. The Act proscribes not only overt discrimination, but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.²

The case decided that a rule or practice that is apparently neutral between racial groups may be found to be discriminatory if there is a disparate adverse impact on one group in comparison to another group and the need for the rule cannot be justified. Unlike in the fable, where the fox had a malign intention, according to the Court the wrong of what we now call disparate impact or indirect discrimination can be established without reference to intention or motive; instead, proof of the disparate adverse impact on a protected group such as racial minorities or women of an unjustified rule was sufficient in law to count as discrimination.

Many jurisdictions have imitated this idea of indirect discrimination in their laws governing discrimination.³ As well as including a prohibition against deliberate or intentional discrimination on grounds such as race and sex, which is called direct discrimination, or disparate treatment in the USA, their anti-discrimination legislation also tackles the disproportionate adverse effects of rules that are neutral on their face and may not harbour any discriminatory intent or unconscious bias. For instance, the law of the European Union (EU) provides that

indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.⁴

In almost identical terms, the Equality Act 2000 of the United Kingdom (UK) provides in section 19 that:

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

² *ibid* 431.

³ As well as the USA and the EU, indirect discrimination laws apply, for instance, in Australia, Canada, Hong Kong and South Africa.

⁴ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22, Art 2.2 (b).

- (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
- (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
 - (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
 - (c) it puts, or would put, B at that disadvantage, and
 - (d) A cannot show it to be a proportionate means of achieving a legitimate aim.

Using this terminology, facts similar to those in *Griggs v Duke Power* could be described as indirect discrimination in EU and UK law. The employer's requirement of a written test would count as a 'provision, criterion or practice'. The employer (A) applies the requirement both to white and black applicants, but the test puts the group of black applicants at a particular disadvantage compared to white applicants. An individual black claimant (B) suffers that disadvantage. And finally, the employer (A) is unable to demonstrate that the written test is a proportionate means of achieving a legitimate aim such as hiring those employees best suited for the job, so the employer will be found to have discriminated indirectly against B.

A wide range of examples may fit within this legal prohibition against indirect discrimination. In the USA, disparate impact was found when a woman challenged a requirement in Alabama that prison guards should possess a minimum weight of 120 pounds and a minimum height of 5 feet 2 inches in circumstances where about 33 per cent of women were excluded by the former requirement and 22 per cent by the latter, whereas only about one per cent of men fell below those threshold requirements.⁵ Indirect discrimination on grounds of sex was applied to invalidate a rule controlling access to a post in the UK civil service to those aged between 17.5 and 28 years on the ground that the proportion of women who could comply with the rule was considerably smaller than the proportion of men who could because many women were engaged with child-rearing within that age range.⁶ In another example, indirect discrimination on grounds of ethnic group was applied to prevent a private school using its school uniform policy to exclude boys who wore a turban in line with their practices in the Sikh community.⁷ In these cases and many others, the predominant pattern is established of an apparently neutral rule that has a disproportionate adverse effect on a protected group such as women and minorities being invalidated even without proof of a discriminatory intent, unless it can be

⁵ *Dothard v Rawlinson* 433 US 321 (1977).

⁶ *Price v Civil Service Commission* [1978] ICR 212 (EAT).

⁷ *Mandla v Dowell Lee* [1983] 2 AC 548.

justified as necessary for performance of the job or other kind of valuable opportunity.

II. THE PARADOX OF INDIRECT DISCRIMINATION

Evidently, the law of indirect discrimination has become firmly established as part of the law of discrimination in many legal systems. Yet this aspect of the law of discrimination continues to provoke controversies and debates about its moral and political foundations. Few would openly advocate or condone breaches of the law of direct discrimination by favouring explicit sex or race discrimination. Today the moral wrong of treating someone adversely simply by reason of gender or race is widely acknowledged and forms part of a consensus of values that bind a liberal society together. In line with that moral consensus, in recent years, that shared moral condemnation of conduct involving treating people unequally and with disrespect has been extended to other protected characteristics such as sexual orientation, disability, and age. Whilst the law against intentional discrimination has become an accepted foundation of the legal order in many societies, the law of indirect discrimination continues to provoke controversy about its existence, its scope, and its justification. The source of the controversy is not hard to find. The law of indirect discrimination presents an apparent paradox in our moral reasoning.

The central philosophical puzzle raised by the law of indirect discrimination is how can a rule or practice that treats people equally be regarded as an instance of discrimination or unequal treatment? How can equal treatment be labelled by the law as unequal treatment and therefore discrimination? Is there confusion in a law that, in the name of requiring equal treatment and opportunities for all, prohibits the use of rules or practices that offer equal treatment for all? The fable of the fox and the stork tells us that formally equal rules can in practice entail the denial of equal opportunities. But does that disadvantageous practical effect of the rule justify a condemnation of the rule that on its face has no discriminatory purpose at all but rather treats everyone the same?

This paradox can be resolved by insisting that the law of discrimination is seeking something more than formally equal treatment. The law is not simply concerned to uphold the principle of the equality of citizens before the law. The fable of the fox and the stork teaches us that sometimes the valuable moral principle that in general others should be treated equally or as an equal must be qualified by another principle that is concerned not just with the process of equal treatment but is oriented towards the substance of actual outcomes.

That resolution of the paradox by reference to another and partly competing moral principle leads us to ask a number of questions. What is this

other substantive principle that seems to underpin the law of indirect discrimination? Is it a principle of equal opportunity, or fair opportunity, or one that seeks to impose substantively equal outcomes? Or perhaps the law of indirect discrimination is best understood as not relying at all upon a moral foundation that is comprised of a conception of equality. If so, the law of indirect discrimination might be explained by a range of alternative moral principles, such as those concerned with the welfare of disadvantaged groups or other principles concerned with the rights or liberties of individuals. It might be argued, for instance, that the law of indirect discrimination tackles problems of social integration and social inclusion by ensuring that disadvantaged groups in society do not encounter nearly insuperable obstacles in becoming integrated through education, work and participation in social life.⁸ For instance, Julie Suk in this volume argues that the European Court of Human Rights (ECtHR) has used the idea of indirect discrimination to compel the integration of disadvantaged minorities into the regular public school system. Or it might be argued that in order to protect and enhance the autonomy of individuals in a liberal society, they should have access to many valuable opportunities such as education and work, and so the task of the law of indirect discrimination is to remove unjustifiable barriers to the enjoyment of such a degree of autonomy.⁹ Numerous possible formulations of this alternative substantive principle have been articulated. Many of them will be examined further in many of the chapters in this book.

III. THE PUZZLES IN INDIRECT DISCRIMINATION LAW

Yet even if we can identify more clearly the moral principle or principles that underpin and justify the development of the law of indirect discrimination, we are then left with several further puzzles. Three need to be highlighted at this stage.

A. The Unity of the Law of Discrimination

In the light of the preceding suggestion that indirect discrimination may rest on different foundations to that of direct discrimination, does it make sense to describe both as comprising a unified field of law, namely the law of

⁸ For the relation of discrimination law to social inclusion: H Collins, 'Discrimination, Equality, and Social Inclusion' (2003) 66 *MLR* 16.

⁹ T Khaitan, *A Theory of Discrimination Law* (Oxford, Oxford University Press, 2015); S Moreau, 'In Defense of a Liberty-based Account of Discrimination' in D Hellman and S Moreau (eds), *Philosophical Foundations of Discrimination Law* (Oxford, Oxford University Press, 213) 71.

discrimination? Most people tend to think that the two branches of the law pursue the same or a similar aim, such as making our society more equal or fairer, which makes it possible to link them together. That view leads us to ask whether it really is the case that these two branches of the law of discrimination are founded on different moral and political principles? If they are based on different moral principles, as was suggested above, the question becomes how can it be coherent to speak of them as forming a unified category of the law? Surely, it may be asked, there must be more that unites these laws about direct and indirect discrimination than a similarity of name and that they both concern making differentiations between people?

One route that may permit the conclusion that the law of discrimination is unified is to question the standard view that the law of discrimination is founded on the moral and political principle that individuals should receive equal treatment or be treated as an equal, without demeaning adverse stereotypes being applied.¹⁰ If there is a common moral framework that justifies both parts of the law, but we conclude that indirect discrimination cannot be explained in any straightforward way as an example of the principle of equal treatment, we may begin to doubt the correctness of the conventional understanding of the moral underpinnings of direct discrimination law (or disparate treatment law). Our investigation of the moral and political foundations of the law of indirect discrimination may therefore result in the unexpected need for a reassessment of the foundations of direct discrimination law with a view to perceiving an underlying unity of the field.

A different kind of answer to this puzzle about the unity of the law accepts the logic of the argument that if the two branches of the law rest on different principles, they are not closely related. On this view, if the law of indirect discrimination is not really about treating people as equals but rests on some other principles, perhaps the law ought to classify it as a different category from discrimination. Indirect discrimination might more accurately be called, for instance, social mobility law or social inclusion law, where its purpose is to redistribute access to opportunities.¹¹ Although some legal categories and classifications may lack any clear moral justification and serve purely pragmatic purposes, this issue of whether indirect discrimination is properly classified as discrimination law at all does perplex lawyers and encourages reflections on the moral foundations of the law of indirect discrimination.

¹⁰ eg L Alexander, 'What makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies' (1992) 141 *University of Pennsylvania Law Review* 149; D Hellman, *When is Discrimination Wrong?* (Cambridge MA, Harvard University Press, 2008).

¹¹ B Eidelson, *Discrimination and Disrespect* (Oxford, Oxford University Press, 2015) Ch 2; C McCrudden, 'Institutional Discrimination' (1982) 2 *OJLS* 303.

There is a third way of confirming the unity of the law of discrimination. Instead of finding a different moral wrong embedded in the law of indirect discrimination, it is possible to regard it as merely a technical and pragmatic extension of the law of direct discrimination, without any independent moral value of its own. It might be argued, for instance, that the law of indirect discrimination helps to overcome problems of proving direct discrimination. Or it might be argued that it has been tacked on to the law of direct discrimination in order to enable the selective protection of other groups under the guise of discrimination law. For instance, the law of indirect discrimination was used extensively to protect part-time workers before specific legislation was introduced in Europe. Similarly, the law of indirect discrimination was used to challenge age discrimination at a time when it had not yet been made unlawful. These kinds of explanations of indirect discrimination solve the problem of explaining why it should be classified as part of discrimination law by treating it as a purely instrumental device that assists in the enforcement and expands the scope of the law of direct discrimination. Though solving the puzzle of the unity of the law of discrimination, these instrumental accounts of the law of indirect discrimination raise questions about the legitimacy of the use of this device for these ulterior purposes.

B. The Seriousness of the Moral Wrong of Indirect Discrimination

If it is correct that the paradox of indirect discrimination must be resolved by perceiving indirect discrimination to rest on a different moral principle from that of equality before the law or a requirement of being treated with respect or as an equal, we may then encounter the potential problem that the law of indirect discrimination will be regarded as having moved outside the moral consensus that supports a strong moral condemnation of direct discrimination. It may be asserted, for instance, that indirect discrimination does not amount to a moral wrong in the same way or to the same extent as direct discrimination. Some may doubt whether it amounts to a moral wrong at all. In either case, the legitimacy of the law of indirect discrimination may be called into question.

Indeed, many commentators are tempted to draw a sharp distinction between those found guilty of the wrong of prejudice or disrespect for others and those who simply follow a neutral rule or practice that may turn out to have some unintended, unforeseen, and perhaps unforeseeable disproportionate adverse effects on particular groups. Those who act from prejudice or bias are regarded as guilty of a moral wrong that deserves a legal sanction for discrimination, whereas the moral condemnation of the latter group who follow a neutral rule is probably weaker, if it exists at all. Consider, for instance, a case where a university sets a minimum admissions standard

in terms of test scores or results in public exams. It may turn out to be the case that disproportionately fewer men than women can comply with that admissions standard. Although the university may have no desire or intention to discriminate against men, if its rule about test scores or results in public examinations has that disproportionate adverse impact on men as a group when the statistics are examined, the university will be held in law to have indirectly discriminated against men unless it is able to justify the requirement of particular test scores as appropriate and necessary. There is a concern that persons who are innocent of any intention to discriminate might be swept up by the prohibition of indirect discrimination and as a consequence suffer from the application of an undeserved stigma. It is true, of course, that the university admissions standard might be demonstrated to be appropriate and necessary as a tool for selecting the best applicants, and therefore any preliminary finding of indirect discrimination would eventually be rebutted by the justification for the rule as necessary in the pursuit of a legitimate aim. Even so, some may feel tainted by the initial suggestion of discrimination and the need to rebut it. Given that the justification analysis employs a vague standard rather than a clear rule, alleged discriminators may also not be entirely confident that the courts will uphold their view that the justification for using the rule is adequate. These concerns about potentially unsustainable but nonetheless damaging allegations of discrimination often seem to lead to a hesitation to classify indirect discrimination in the same category as direct discrimination because the moral wrong, if there is one, is regarded as significantly different.

It may not seem convincing to equate in law the wrongfulness of a university that, for instance, deliberately excludes black applicants with the wrongfulness of a university that is liable for indirect discrimination because it uses a test score produced by public exams that disadvantages men, but is unable to demonstrate to the satisfaction of a court or tribunal that the exams are a good predictor of performance at university or are in some other way a necessary and appropriate standard for admissions. Those doubts about whether indirect discrimination amounts to the same kind of moral wrong as direct discrimination or whether it is the same wrong but to a lesser degree of wrongfulness raise some profound questions about the law of indirect discrimination that are addressed in many of the essays in this volume.

Some support for the idea that the moral wrong of indirect discrimination is less severe can be found in the difference that is commonly drawn by the law between the remedies for direct and indirect discrimination. If indirect discrimination is a lesser wrong, one might expect that it would attract less severe sanctions. It might be argued, for instance, that instead of an award of compensation, the remedy should merely be to enjoin the discriminator to refrain from the impugned conduct by, for instance, withdrawing its reliance on test scores. In most countries, the law of indirect discrimination

does have different (and less harsh) remedies from those applied to direct discrimination. That difference may be based on the acceptance that there is no moral wrong in cases of indirect discrimination or a lesser wrong. Alternatively, that difference might be explained by the point that the law of indirect discrimination rests upon different moral principles from those that underpin direct discrimination, so it is likely that the remedies will reflect those differences in some respects. The difference in the applicable remedies for direct and indirect discrimination tends to support the view that they rest on different moral foundations and that the foundations for indirect discrimination are weaker than those that justify a law of direct discrimination.

C. Interference with Liberty

This puzzle about whether indirect discrimination is based upon a lesser moral wrong or any moral wrong at all can be seized upon by the targets of claims about discrimination such as employers, who may argue that the law of indirect discrimination amounts to a wrong itself owing to its excessive interference with their autonomy and freedom. For instance, the law creates opportunities to challenge behaviour that many employers and other subjects of the law of discrimination regard as normal practice and their own private business. Disallowing and sanctioning the use of formally neutral rules may be viewed as interfering too much with business autonomy or freedom to run a business. Furthermore, it may also impose considerable costs on employers if they are required to justify their rules and practices and to demonstrate not only their effectiveness but also to prove that no other rule or practice would be equally effective. This combination of constraints on liberty and reduction of efficiency in business gives rise to criticisms of indirect discrimination laws and indeed any discrimination laws at all.¹²

In the name of liberty it might be argued that, if a private employer wants to require all its employees to be capable of achieving a good score in a particular test, in order to raise the general level of educational attainment of its workforce even though not all jobs may require such qualification, the state should not be entitled to prohibit that business practice of the employer.¹³ Once it is accepted that indirect discrimination, unlike direct discrimination, rests on a weak moral principle, those who resist the law can insist that it should give way to other more important values, or at least values that they

¹² Richard A Epstein, *Forbidden Grounds: The Case Against Employment Discrimination Laws* (Cambridge MA, Harvard University Press, 1992).

¹³ eg *Albemarle Paper Co v Moody* 422 US 405 (1975).

regard as more important, such as freedom to conduct their own affairs without interference by the government.

IV. LEGAL DISAGREEMENTS AND MORAL FOUNDATIONS

These puzzles about the foundations of the law of indirect discrimination or disparate impact constantly resurface throughout the contributions to this book. Whilst some authors try to tackle these broad issues head on, others focus on a particular feature of the current law of indirect discrimination and why it is contested or doubted. Nevertheless, these discrete topics are united in the sense that all of them seem to raise questions about the moral and political principles that underlie and shape the law of indirect discrimination. In this volume, the various authors all contribute to the endeavour of seeking to understand the moral and political principles that justify the scope and application of the law of indirect discrimination. They throw light on the foundations of the law of indirect discrimination.

In the remainder of this introduction, we will provide a brief overview of the contested aspects of the law of indirect discrimination and indicate how these issues can be linked to deeper principles of political philosophy. From the outset, it is important to note that in our view disagreements about these particular topics in the law always operate at two levels.

On one level there may be what looks like a purely legal disagreement. For instance, the interpretation of the meaning of the provisions in the legislation governing indirect discrimination may be contested in litigation. A defendant may argue that the law, when properly interpreted and understood, does not apply to the conduct in question. Such a defence may win the case. In the formal legal reasoning, it may succeed on some pernicky textual ground such as the meaning of a particular word used in the legislation. For example, it might be argued that a decision was made not ‘because of’ a person’s race but ‘on the ground of’ a person’s race (or vice versa) in order to circumvent the current statutory formula that defines discrimination. Or it might be argued that the provision, criterion or practice was not ‘applied’ to the protected group because frequently or sometimes exceptions were made. This casuistry has been a persistent feature of litigation in relation to UK discrimination law.

Debates about the meaning of words, however, often mask deeper disagreements about whether this kind of conduct should be prohibited or should be made vulnerable to critical assessment by the legal system. These deeper disagreements at a second level may be expressed by lawyers and judges in the courts by proposals for rival interpretations of the meaning of statutory provisions. The choice between these interpretations of the law is likely to reflect deeper understandings of the purposes of the law and constitutive elements of the moral wrong that underlies the law of indirect

discrimination. This second level of debates about philosophical principles, though not always explicitly acknowledged in the legal arguments, seems to provide the fuel that feeds the legal disagreement.

Our objective in this book is to bring to the fore the often-buried, deeper disagreements about the moral and political foundations of the law of indirect discrimination. This exploration of underlying principles should throw light on the essentials of the legal disagreements and in the long run help to resolve them.

V. THE SCOPE OF THE LAW OF INDIRECT DISCRIMINATION

It is clear from our brief description of the relevant statutes and cases above that the law of indirect discrimination or disparate impact does not require evidence of a malign discriminatory purpose, motive or intention. Of course, the law is likely to catch persons who seek to hide their discriminatory motives or purposes behind deceptive neutral rules. But proof of bias, a discriminatory state of mind or malign purpose is unnecessary to establish a claim for indirect discrimination. Nor is proof of the absence of such an intention some kind of defence or excuse for the conduct that amounts to indirect discrimination. The possibility of a judicial finding of indirect discrimination without there being any intention to discriminate at all often provokes considerable push-back against the law. Because in the lay view the concept of discrimination is normally associated with bias and prejudice, many people are unable to accept that the law may reach a finding of discrimination without proof of a discriminatory purpose or intention. Furthermore, the broad scope of the law of indirect discrimination can permit protected groups to challenge the validity of key elements in businesses' organisational structures and established labour market institutions. Taken-for-granted rules and practices may be criticised for their disparate impact, and if the claim is successful, organisations will have to rethink some of their basic operating procedures.

In the courts, this resistance to the broad scope of the law of indirect discrimination often appears as legal arguments that seek to cut down the potential reach of the law in order to remove from its scope defendants who deny any discriminatory motive. In this volume, Barbara Havelková considers how governments and judges have sought to resist the development of a law of indirect discrimination under article 14 of the European Convention on Human Rights (ECHR). Reading her study it is clear that some members of the ECtHR are unwilling to develop a law of indirect discrimination because it seems to be based on broad policies of social welfare and distributive justice between groups, which might be thought to be outside the scope of the court's mandate. In courts where a law of indirect discrimination is firmly established, to avoid the finding of indirect discrimination,

defendants or respondents often generate technical legal arguments in order to avoid liability. For example, the English Court of Appeal accepted in *Essop v Home Office* an argument from the respondent employer that proof of indirect discrimination required not only statistical evidence that a particular test put a protected group (in this instance defined both by age and race) at a disproportionate disadvantage, but also an explanation of the reason why the test had such an effect on these groups.¹⁴ The respondent argued successfully before the Court of Appeal that in the definition of indirect discrimination, the reference in the Equality Act 2010 section 19(2)(c) to ‘that disadvantage’ could only be understood if one could understand the reason for the disadvantage or why the apparently neutral test resulted in a particular disadvantage to a minority. On appeal, the Supreme Court rejected that argument on the basis of the statutory text that made no reference to the reason for the disadvantage, but instead provided simply for a particular disadvantage for the group that could be established by mere statistical (or even rule of thumb) evidence.¹⁵ The judicial resolution of these legal arguments about the meaning of phrases such as ‘that disadvantage’ is likely to involve taking positions with respect to views about the moral and political foundations of the law and its purpose as well as the literal meaning of the text. Indeed, the reasoning of the Supreme Court was framed within an explicit discussion of the aims of the law and how the Court of Appeal’s decision did not fit that purpose.

Indirect discrimination assumes equality of treatment—the PCP [provision, criterion or practice] is applied indiscriminately to all—but aims to achieve a level playing field, where people sharing a particular protected characteristic are not subjected to requirements which many of them cannot meet but which cannot be shown to be justified. The prohibition of indirect discrimination thus aims to achieve equality of results in the absence of such justification.¹⁶

In order to appreciate how far the law of indirect discrimination extends beyond a lay view of the meaning of discrimination and how it frequently provokes closely fought litigation by respondents who regard themselves as unjustly accused of discrimination, consider the following hypothetical instance of its application to a taken-for-granted business organisational structure. Suppose an employer advertises a job that is specified to be a full-time job. Should this advertisement be the subject of an investigation into its breach of the law of discrimination? A lay view might not spot any possible discrimination in such a commonplace advertisement. Nevertheless, it may be possible to bring it within the scope of the law. There must be a group of potential applicants for work of the kind offered by the employer who

¹⁴ *Home Office (UK Border Agency) v Essop* [2015] EWCA Civ 609, [2016] 3 All ER 137.

¹⁵ *Essop v Home Office (UK Border Agency)* [2017] UKSC 27, [2017] 1 WLR 1343.

¹⁶ *ibid*, per Baroness Hale for a unanimous court, [25].

are only searching for a part-time job. This group is therefore excluded in practice from applying for the job by this criterion of it being a full-time job. Once it is established further that women disproportionately make up the membership of that group of seekers for part-time work, the question is raised whether the requirement for a full-time position indirectly discriminates against women by putting them as a group at a disproportionate disadvantage in comparison with a cognate group such as men with respect to this particular job advertisement.

Although the issue of indirect discrimination would only be finally determined once the employer's justification for offering only a full-time position was assessed under the test of proportionality or business necessity, it is clear that the main elements of a typical claim for indirect discrimination are already in place for this commonplace activity of advertising a full-time job. Some judges and respondents object to such expansive realm for the law of indirect discrimination by contesting whether all the elements of the law have been satisfied.

A. Provision, Criterion or Practice

For instance, it may be questioned what should count as a relevant 'provision, criterion or practice' (or PCP) for the purpose of the law of indirect discrimination. A respondent might seek to distinguish, for instance, informal practices from hard and fast rules, with only the latter being subject to legal review. Or it might be contended that rules that constitute the job description such as a full-time work requirement for a vacancy for a job are not subject to legal regulation. On this latter view, the law of indirect discrimination should be targeted only at rules that control access to applications for the job such as rules about formal educational qualifications rather than rules that describe the core features of the job itself.

That contrast in views about the scope of the law of indirect discrimination indicates a deeper disagreement about the aims of the law. One view imagines the target of the law to be unnecessary and irrelevant formal tests and educational requirements that impede equality of opportunity; another view holds that the aim of the law is to question the structures of organisations in terms of their preferences for full-time jobs and hierarchies based on seniority and long hours of work in order to reduce these structural barriers against women in the labour market. The law of indirect discrimination permits women to challenge the male norm that jobs should be full-time in order to question whether this requirement is necessary for every kind of job or indeed any job.¹⁷

¹⁷ S Fredman, *Women and the Law* (Oxford, Oxford University Press, 1997) 287.

B. Choice of Comparator Group

Another ground for contesting the scope of the law is to challenge how it should be determined whether there is a legally significant comparative group disadvantage as a result of the application of the rule or practice. In the case of full-time work, for instance, should the comparator group be the working population as a whole or merely those who are qualified for the job and suitably geographically located to be in a position to apply for the job? Assuming that reliable statistics may be available, differences between the groups that are being compared may be accentuated or reduced according to the choice of comparator. For instance, though it is true that in the labour market as a whole women disproportionately constitute the group of part-time workers, that statistic may not hold true for a smaller comparator group, such as those who have the correct formal qualifications to apply for that particular vacancy or meet all the other requirements for the job. Narrowing down the comparator group will often diminish the apparent disproportionate disadvantage. In the United States, such a narrow approach to the identification of a comparator group was at the heart of the controversial decision of the Supreme Court in *Wards Cove Packing Co v Atonio*,¹⁸ an approach that was subsequently reversed by legislation.¹⁹

In practice, the relevant statistics about the composition of the actual local labour market will usually not be available, so the legal assessment of disproportionate disadvantage may have to rely on various kinds of proxies and inferences from known facts. As a consequence of the lack of precise statistics, the question becomes whether or not it is legitimate to infer from the known national level labour market statistics that are collected by the government something about the conditions in the local labour market applicable to that job. If the national statistics demonstrate that women are disproportionately found in part-time work, can we infer from that some relevant information about the composition of the group seeking part-time work who could satisfy all the other requirements for the job?

The choice between these comparator groups and views about the permissibility of inferences from proxy statistics are likely to reflect different ideas about the purpose of the law of indirect discrimination. For instance, some may think that the law should only be targeted at actual proven barriers to applications for a particular job, whereas others may want the law to try to shape the whole labour market, by, for instance, making part-time jobs or more flexible working hours a normal practice in all sectors of the economy and at all levels of organisations.

¹⁸ *Wards Cove Packing v Atonio* 490 US 642 (1989).

¹⁹ Civil Rights Act 1991.

C. The Cause of Disadvantage

Another ground on which the legal framework of rules may be used to challenge the broad scope of the law of indirect discrimination is to deny that a particular individual suffered from the group disadvantage rather than some other piece of bad luck. An employer might argue, for instance, that a particular claimant was not excluded from the full-time job offer because she was a woman, but simply because she failed to satisfy some other criterion for the job such as a post-graduate qualification that the successful candidate possessed though it had not been mentioned as a requirement for the job. How important is it that this particular claimant should be able to prove that she suffered the disadvantage because of the operation of the rule rather than some particular contingent fact in her case? If it is thought that the law serves the goal of compensating those who have suffered disadvantage because of discrimination, this requirement of proof that a discriminatory rule in fact caused the harm is plainly essential (although it is worth noting that most jurisdictions tend not to allow compensation for the standard cases of indirect discrimination). In contrast, if the aim of the law is seen rather as one of dismantling unjustified rules that have a disproportionate adverse impact on a particular vulnerable group, proof that the particular claimant did or did not suffer a disadvantage caused by the rule in the same way as most of the group does not seem to be especially relevant, for the point is to eliminate the rule that has an adverse disproportionate impact, not to compensate the particular claimant. The latter view was endorsed by the Supreme Court in *Essop v Home Office*, overruling the contrary view that had been preferred by the Court of Appeal.²⁰

A similar ground on which to confine the scope of the law of indirect discrimination is to contest whether the provision or practice has caused the disadvantage. It may be argued that the disadvantage is the product of a choice made by the claimant that makes it impossible to comply with the rule or practice. In this case, the legal argument would be that it is not the provision that puts the claimant at a disadvantage, but rather the claimant's choice not to take steps to satisfy the criterion. For instance, an employer may refuse to permit job-shares in its organisation. Such a rule is likely to disproportionately adversely affect women in comparison to men, since women more frequently occupy part-time job-sharing positions as a way of reconciling work with child care. But has the employer's rule against job-shares caused the claimant's disadvantage or was it caused by the woman's choice to want to work part-time? Assuming that she could manage to arrange and pay for child care so that she could work full-time if she so desired, a court might decide that it was not the employer's rule or practice

²⁰ *Essop* (n 15).

that harmed her but her own choice about how to care for her child.²¹ That interpretation of the law might be challenged by various contrary moral arguments. One might be that an employer should respect and facilitate the choice of a mother to try to balance work and child care responsibilities as an exercise of her personal autonomy with respect to two extremely valuable parts of her life, namely her career and raising a family. Another contrary moral argument might be that the public policy designed to support family friendly measures on the ground of improving the quality of our lives and heightening the competitiveness of business should be buttressed by the law of indirect discrimination, which can be used to dismantle unnecessary barriers to flexible working presented by monolithic organisations.

D. Justification

Many of these challenges to the broad scope of the law of indirect discrimination are raised during litigation in an attempt to avoid letting a court consider the hardest and most complex legal issue of whether or not the rule or criterion is justifiable despite its discriminatory adverse effects on a particular group. Certainly, it is not straightforward to determine whether or not the rule or practice serves a legitimate aim in a proportionate way. An employer's objective in hiring only a full-time employee may serve a legitimate aim such as the provision of continuity of service throughout the week, but is this rule really necessary? Could there be a job share, for instance, where the continuous service is provided by two persons, each working part-time? To rebut any suggestion that the rule of full-time work was not necessary, an employer would have to demonstrate either that such a pairing of workers was ineffective in the performance of the job or not practicable on some ground such as a dearth of applicants. Employers often seek to avoid that heavy burden of proof by raising the various points described above about the proper scope of the law and the interpretation of its other provisions. But if the question of justification cannot be avoided, it raises deeper questions about the aims of the law of indirect discrimination.

In assessing the validity of a purported justification or claim of 'business necessity', we would need to consider, for instance, what kinds of aims can be regarded as legitimate aims that support a rule once it is known that a rule has disproportionate adverse effects on a protected group. Is the efficiency of the business a good enough reason to continue to use a rule with disparate adverse impact on a particular group such as women? If an employer could show that a job-share of two part-time workers was 30 per cent more expensive than the employment of a single, full-time employee, the

²¹ eg *Clymo v Wandsworth London Borough Council* [1989] IRLR 241 (EAT).

saving of costs might be a legitimate aim, but how would we determine whether it was disproportionate or strictly necessary? How should we balance an employer's interest in efficiency and profits against completely different values such as fair equality of opportunity for women, the benefit in the shattering of glass ceilings inside organisations, or the restructuring of labour markets? Is the avoidance of a rule that would have discriminatory impact against one protected group such as black workers a good justification to continue to use a rule that has an adverse impact on another group such as women? These are very difficult questions and their answers seem likely to appeal to moral principles that support the law of indirect discrimination. In particular, what will be required to resolve legal disputes is a refined understanding of the moral justification and function of the legal possibility for justifying indirect discrimination. Hugh Collins begins such an enquiry in his contribution by asking, in particular, whether the element of justification found in the law of indirect discrimination derives, on the one hand, from the moral principles that underpin the law of indirect discrimination as a whole, such as fair equality of opportunity or social inclusion, or, on the other hand, does this element of justification rest upon an independent moral principle, and if so, what principle?

In the courts and the legal system, the determination of such vexed issues will no doubt partly depend on pragmatic considerations about how the legal process functions, how cases might be proven in courts and tribunals, and how best to make the law effective. To answer those questions properly, however, in our view what is needed is a principled understanding of the aims of the law. These principles should also indicate who should be held responsible for implementing those aims and under what conditions. As part of determining those conditions, we need to ask how great a burden we should place on actors in the private sector such as employers, shopkeepers and landlords to give effect to the law and the benefits that it hopes to confer on society. Having established that many, perhaps all, legal disputes surrounding the law of indirect discrimination have identifiable roots in conflicting visions of the aims and moral justifications for the law, we should now turn to introduce more fully the debates about the content and identity of those aims and justifications.

VI. THE DISTINCTION BETWEEN DIRECT AND INDIRECT DISCRIMINATION

One way to examine the foundations of the law of indirect discrimination in terms of principles and philosophy is to return to a nagging concern mentioned earlier. This is the worry about whether the legal prohibition against indirect discrimination or disparate impact should even be included as part of the law of discrimination. Unless this classification is explicable on purely

pragmatic grounds, a principled basis for the distinction must depend on how one understands the wrong or purpose of the law of direct discrimination, how one understands the wrong or purpose of prohibitions against indirect discrimination, and how they are conceived to be related. In turn this raises the vexed question of what exactly the difference may be between direct and indirect discrimination. For instance, is the fable of the fox and the stork really about direct or indirect discrimination? There was certainly an apparently neutral practice such as serving soup in a flat plate to guests, which seems to fit the classification of indirect discrimination. Yet at the same time it might be described as a case of direct discrimination, because undoubtedly the fox in the tale was acting from malicious and disrespectful motives to poke fun at the stork. Developing more fully the contrast between direct and indirect discrimination may help us to sharpen our focus on the moral and political principles that justify the existence and application of the law of indirect discrimination.

Unfortunately, this distinction between direct and indirect discrimination is hard to draw on a conceptual level. Moreover, insofar as a similar distinction is drawn in different legal systems, the distinction is not always exactly the same, and therefore different jurisdictions may reach different results. The chapter in this volume by Sandy Fredman analyses the divergence in the case law between the USA, Europe and Canada in how the division between direct and indirect discrimination has evolved. In his contribution to this book, Nicholas Bamforth examines the use by leading theorists of discrimination of different blends of conceptual arguments, moral justifications and public policy arguments in order to explain the foundations of discrimination law in general and, in particular, how the distinction between direct and indirect discrimination can and should be drawn.

The fundamental reason why it is hard to draw a clear conceptual distinction between direct and indirect discrimination is that any differentiation will depend upon not one difference but at least two or more differences. This is less than ideal, as Lippert-Rasmussen observes in the course of criticising this feature of most definitions of direct and indirect discrimination.

First, ideally, one would like: (1) the distinction between direct and indirect discrimination to be clearly drawn along one dimension; (2) direct and indirect discrimination to be mutually exclusive—such that a case cannot amount to direct as well as indirect discrimination against the very same group, at least not when one's act as well as the discriminatee are identified under the same descriptions; and (3) that the distinction is exhaustive—such that there are no cases of discrimination that are neither direct, nor indirect, discrimination.²²

²² K Lippert-Rasmussen, *Born Free and Equal: A Philosophical Inquiry into the Nature of Discrimination* (Oxford, Oxford University Press, 2013) 65. This paper offers different suggestions as to the dimensions on which the distinction is drawn in law, following more closely T Khaitan, 'Indirect Discrimination' in K Lippert-Rasmussen (ed), *Routledge Handbook of Discrimination* (Abingdon, Routledge, 2017) ch 2.

With respect to legal definitions of the concepts of direct and indirect discrimination, none of these ideal conditions appear to be satisfied (except by resort to a technical closure rule that deems a case that could be characterised as either a case of direct or of indirect discrimination as one only involving direct discrimination). It is therefore not possible to provide a consistent and precise division between the legal categories of direct or indirect discrimination.

A. Individual or Group Complaint

One of those differences by which the distinction is drawn concerns the perspective on discrimination. Direct discrimination is normally (although not necessarily) concerned with a particular action of one individual against another individual, such as where an employer decides not to hire a woman for a job. In contrast, indirect discrimination is always about groups: the question is whether a protected group is disproportionately disadvantaged by an action (or rule or practice) in comparison with a cognate comparator group. Because the two branches of discrimination law are typically viewing the situation from different perspectives, it is possible that the facts in a particular case could be classified as either direct or indirect discrimination. On the facts of *Griggs v Duke Power*, for instance, there was probably enough evidence to support an inference of deliberate though covert discrimination on the part of the employer amounting to direct discrimination,²³ whilst at the same time to use the evidence of comparative group disadvantage to advance a claim for indirect discrimination. So, on the first criterion, the difference between direct and indirect discrimination can be just a matter of perspective and presentation. It depends whether the case is primarily built on an assertion of individual disadvantage or group disadvantage.

A further complexity arises in the case of religious discrimination, as discussed by Ronan McCrea in this volume. Indirect discrimination on the ground of religion concerns the disproportionate disadvantage imposed on a particular religious group. But the same conduct may be regarded as an unjustified interference with a person's right to manifest a religion, as protected in many constitutions and article 9 ECHR. It is possible that there may be no identifiable religious group that suffers a relative disadvantage as a result of an apparently neutral rule or practice, but nevertheless the conduct will be judged unlawful as an unjustified interference with the human right to manifest a religion.²⁴

²³ Michael Selmi, 'Indirect Discrimination and the Anti-discrimination Mandate' in Hellman and Moreau (n 9) 250, 252.

²⁴ eg *Eweida v United Kingdom* (App no 48420/10) (2013) 57 EHRR 8.

B. Intention or Effects?

The difference between direct and indirect discrimination also invariably turns on a second axis or criterion of differentiation, though legal systems differ as to the content of that criterion. In the United States, this second criterion is usually understood to be constituted by an intention to discriminate by the use of a protected characteristic such as sex or race as a stated ground for the decision, though intent can be proven without any necessity to prove a malevolent motive and or desire to denigrate the protected group.²⁵ In the absence of such clear evidence of intention to discriminate on the ground of membership of a protected group or a ‘suspect classification’, a legal claim must be presented as one of disparate impact on the group.

In contrast, the usual approach to the definition of direct discrimination adopted in the United Kingdom does not require proof of an intention to discriminate. Rather, direct discrimination is usually defined as the adoption of a ground for decision that will exclude 100 per cent of the protected group, but none of its cognate and comparative group. It follows that indirect discrimination applies where the exclusionary effect of the practice or rule is less than 100 per cent, but is disproportionate in comparison to cognate groups. That conception of direct discrimination permits the finding of direct discrimination when the ground for the decision makes no reference to the protected characteristic. In *Bull v Hall*, for instance, a majority of the court found that a rule of a hotel that denied the sharing of a double-bedded room to all guests except those who were married constituted direct discrimination against gays and lesbians because at that time those protected groups could not marry but only enter into ‘civil partnerships’, so the rule excluded 100 per cent of those in civil partnerships, all of whom were in the protected group. At the same time, the hotel’s rule constituted indirect discrimination against gays and lesbians because they were disproportionately adversely affected as a group in comparison with heterosexuals who had the opportunity to marry even if not all of them were married. This approach that looks at effects rather than intentions can produce results that seem to be surprising where, in the absence of any discriminatory intention or motive, a neutral rule happens to have the effect in practice of excluding 100 per cent of a protected group and therefore must be classified as direct discrimination.²⁶

²⁵ eg *Tax Deferred Annuity & Deferred Comp Plans v Norris* 463 U.S. 1073, 1084 (1983). This is the position under Title VII of the Civil Rights Act. Under the equal protection clause of the Constitution, not only is there no claim for indirect discrimination available, but disparate treatment appears to require proof of lack of equal regard or prejudice (*City of Cleburne v Cleburne Living Ctr* 473 US 432, 450 (1985)) though the grounds of discrimination are not confined to a particular list of protected characteristics.

²⁶ *James v Eastleigh Borough Council* [1990] 2 AC 751.

These legal definitions of the second criterion of differentiation between direct and indirect discrimination make it clear that neither ground requires proof of a hostile or disrespectful motive. The popular lay view that direct discrimination, unlike indirect discrimination, is concerned with deliberate prejudice is not strictly true. Whilst the law of direct discrimination undoubtedly prohibits deliberate prejudicial actions, it is broader in scope. In the USA, for disparate treatment it is sufficient that the rule or decision is made by reference to a suspect classification such as race or sex. In the UK, it is not even necessary for proof of direct discrimination that a ground for the decision is a protected characteristic such as sex and race. Provided the ground for the decision is 100 per cent correlated with an adverse effect on a protected group, direct discrimination is established.

This approach to drawing the distinction between direct and indirect discrimination without reference to motive, but rather with a suspect ground for a decision, seems to make it easier to imagine that both branches of the law of discrimination share some common principles. In the United Kingdom, for instance, the law focusses on the adverse effects of a rule or practice for both direct and indirect discrimination. This emphasis on adverse effects may support an interpretation of the aims of the law that perceives a unity of purpose between the two branches of the law. That common aim may be discovered in the prevention and reversal of those adverse effects on the protected groups. On this view, both direct and indirect discrimination are promoting social goals such as fair equality of opportunity or social inclusion, though the law may also provide compensation for victims of prejudice. At the same time, of course, this line of argument has the potential to diminish the distinction between direct and indirect discrimination to vanishing point. If a crucial ground of differentiation is that direct discrimination is limited to rules or practices that have an adverse impact on 100 per cent of the protected group, whereas indirect discrimination must be used if the adverse impact is on 99 per cent or less of the protected group, there does not seem to be much of a principled distinction.²⁷

C. Justification as a Third Distinguishing Criterion?

Although it produces some clarity to adopt this analysis of the distinction between direct and indirect discrimination based upon the two criteria of group versus individual claims and another axis based on intention or effects, these may not be the only grounds for differentiation or even

²⁷ See, for example, *Rodriguez v Minister of Housing* [2009] UKPC 52, [2010] UKHRR 144 [19]: if all members of the disadvantaged group fail, but so do some members of its comparator group, the discrimination is still indirect, albeit 'a form of indirect discrimination which comes as close as it can to direct discrimination'.

the most important ones. For instance, it is often pointed out that one of the most significant differences in the legal framework between direct and indirect discrimination is that in general the opportunity for a defendant to rebut the charge by justifying its actions is only available in relation to indirect discrimination.

The main difference between them [ie direct and indirect discrimination] is that direct discrimination cannot be justified. Indirect discrimination can be justified if it is a proportionate means of achieving a legitimate aim. ...²⁸

The availability of a justification or business necessity defence therefore provides an apparently clear legal difference between the categories of discrimination. But that apparently sharp distinction can be questioned as a matter of fact: for instance, direct discrimination can be justified in relation to some protected characteristics such as age and disability. It can be argued, as is suggested by Sandy Fredman and Hugh Collins in their contributions to this volume, that the availability of the possibility of justification may be more a matter of degree than pointing to a difference in kind.

Nevertheless, it is correct that most legal systems also render it much harder to justify or find exceptions to instances of direct discrimination than instances of indirect discrimination. In particular, the ‘business necessity’ test or the proportionality test of justification will not generally apply to claims for direct discrimination. Justifications and exemptions from claims for direct discrimination are normally strictly confined or in some instances rejected altogether. This difference can be illustrated by cases where employers ban headscarves from the workplace. The ban might refer explicitly to headscarves, or more neutrally to any head-covering. If the employer’s rule is found to be direct discrimination on the ground of religion, the employer will have little chance of justifying the rule.²⁹ The main exception for direct discrimination concerns a genuine occupational requirement to perform the job. Leaving aside the possibility that scarves and caps might be a safety hazard, the more typical argument put forward by employers that customers of the employer’s business prefer to deal with people without headscarves is unlikely to count as a genuine occupational requirement.³⁰ In contrast, if the case is analysed as an instance of indirect discrimination because the rule against any kind of head covering does not directly target any religion, it will be open to the employer to argue that it has a legitimate aim such as projecting a neutral image and that its rule against caps and scarves is a

²⁸ *R (E) v Governing Body of JFS and another (United Synagogue and others intervening)* [2010] 2 AC 728, [57] (Baroness Hale).

²⁹ *EEOC v Abercrombie & Fitch Stores, Inc* 135 S Ct 2028 (2015). MC Harper, ‘Confusion on the Court: Distinguishing Disparate Treatment from Disparate Impact in *Young v UPS* and *EEOC v Abercrombie & Fitch, Inc*’ (2016) 96 *Boston University Law Review* 543.

³⁰ Case C-188/15 *Asma Bougnaoui and ADDH v Micropole* [2017] IRLR 447.

proportionate way of achieving that aim.³¹ The law of indirect discrimination typically provides defendants with greater opportunities to defend their business rules and practices.

This difference with regard to the availability of a justification for a rule or practice seems likely to reflect different views about the purpose of the law. The exceptional difficulty of justifying direct discrimination makes sense where direct discrimination is conceptually linked to prejudicial or disrespectful action, but seems harder to explain when direct discrimination is defined by reference to the effects of a rule rather than any malicious intention. Moreover, if it is argued that both parts of the law, despite any formal differences, serve the same goal or purpose, it becomes questionable why the ability to justify a practice or a rule is not the same in direct and indirect discrimination, for ultimately the question of compatibility with the purpose may be the same regardless of how the issue is framed. It may seem odd, for instance, that in the cases concerning headscarves, in the absence of health and safety concerns, there is no practical possibility for the employer to justify a ban within the framework of direct discrimination, but if an identical case is analysed as an instance of indirect discrimination the employer will be able to advance a wide range of business considerations in favour of its rule.

D. Remedies

There is a further notable difference between the law governing direct and indirect discrimination that may indicate another axis of differentiation. As we have already noted, the available legal remedies for the two kinds of discrimination often differ. Proof of direct discrimination normally results in an award of financial compensation, whereas the remedy for indirect discrimination might be merely an order to cease to use the apparently neutral rule or practice. For instance, under the UK's Equality Act 2010, section 124, a tribunal is required to consider making a declaration or a recommendation before examining the possibility of a compensatory remedy if the tribunal concludes that the indirect discrimination was unintentional. This difference in remedies might be regarded as a mere consequence of the distinction between direct and indirect discrimination or instead it might be presented as a ground for making the distinction.

The option of making an appropriate recommendation as a remedy applies particularly to cases of indirect discrimination. The tribunal can order an employer to cease to use a PCP that has a disproportionate adverse impact on a protected group. The tribunal might also suggest what alternative PCP

³¹ Case C-157/15 *Achbita v G4S Secure Solutions* [2017] IRLR 466.

would be more appropriate in view of the employer's legitimate aim and the need to satisfy a test of proportionality. Such a remedy comes close to an order for affirmative action in favour of a minority group by requiring the employer to establish a PCP that provides fair opportunities for a protected group. This link between affirmative action and indirect discrimination can be detected in discussions of whether PCPs can be justified in view of the alternatives available and in duties to take steps of reasonable accommodation for disabled persons. This fascinating linkage between remedies for indirect discrimination and affirmative action is explored by the chapter by Kaspar Lippert-Rasmussen in this volume.

E. Instrumentalism

As well as encountering these difficulties in developing a clear conception of the difference between direct and indirect discrimination, which might help us to understand the foundations of the law, it has also to be conceded that the categories of the law of discrimination, even if reasonably clearly defined, are frequently liable to be manipulated in different ways by the courts. In EU law, for instance, it seems that a court may infer from the existence of a disproportionate group disadvantage that an apparently neutral rule or practice was probably in fact an example of concealed intentional discrimination, and if so, it will be described as direct discrimination as well as indirect discrimination. Surprisingly, on this approach that regards substantial and persistent group disadvantage as a way of proving direct discrimination, the inference of intention can provide a basis for a claim for direct discrimination even for a person who is not in fact a member of the protected group, but who has suffered also from the particular disadvantage that is disproportionately encountered by the protected group.³² EU law also accepts, however, the role of indirect discrimination as a completely independent form of discrimination law that can apply regardless of a harmful intention. Indeed, to diminish indirect discrimination to a device for proving direct discrimination would certainly hamper the ambition of many of its advocates, who see in the law of indirect discrimination a legal mechanism that can be used for the purpose of tackling structural inequalities and invisible barriers to fair opportunities for all.

The possibility of blurring the conceptual distinctions between direct and indirect discrimination in the way that it has been done in EU law and other jurisdictions perhaps demonstrates that it is unstable but not necessarily without foundation in distinct moral principles. Nevertheless, the ability to

³² Case C-83/14 *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia* [2016] 1 CMLR 14.

manipulate the distinction and apply either category to many fact situations in order to gain procedural, substantive or remedial advantages has led the Canadian courts to conclude that the distinction between direct and indirect discrimination should be abandoned and replaced by a unified law against discrimination.³³ In most legal systems, however, the distinction between direct and indirect discrimination still plays an important role and usually has significant legal consequences. Unfortunately, because the two kinds of discrimination are typically differentiated by reference to two or more criteria, it is hard to draw more than some tentative conclusions about their moral and political foundations and in particular to find strong clues to the foundations of the law of indirect discrimination.

VII. THREE APPROACHES TOWARDS THE FOUNDATIONS OF INDIRECT DISCRIMINATION LAW

Having acknowledged above the uncertainties and difficulties regarding the concept of indirect discrimination and its difference (if any) from direct discrimination, we may be able to draw this general examination to a close by proposing an intellectual framework which suggests that broadly speaking there are three approaches towards understanding the place and purpose of indirect discrimination or disparate impact in a system of discrimination law.

A. The Instrumental Account

The first perspective argues that a law of indirect discrimination is needed for various possible instrumental reasons in support of the law of direct discrimination.³⁴ Prohibitions against indirect discrimination may overcome a perennial difficulty in establishing a discriminatory intent or purpose. Defendants rarely concede that they were prejudiced and indeed their bias may have been completely unconscious. This instrumental use of indirect discrimination relies upon the disproportionate adverse effects of a rule or practice to infer proof of or at least a presumption of a discriminatory intention or purpose.³⁵ Another instrumental purpose of the law of indirect discrimination could be to block an easy route around a finding of direct discrimination. Indirect discrimination on this view is not a moral wrong in

³³ *British Columbia (Public Service Employee Relations Commission) v British Columbia Government Service Employees' Union* [1999] 3 SCR 3.

³⁴ eg J Gardner, 'On the Ground of Her Sex(uality)' (1998) 18 *OJLS* 167.

³⁵ This is the only permitted use of disparate impact evidence in cases solely involving the equal protection clause of the US Constitution: *Washington v Davis* 426 US 229 (1976).

itself, but rather is a necessary ingredient in an effective law against deliberate discrimination, which constitutes serious wrongdoing. For instance, employers who might want to exclude older workers from their workforce could introduce a requirement or practice that tested physical fitness, with the effect that older workers and workers with some kinds of disabilities would be excluded. By applying this apparently neutral rule about fitness, an employer could avoid the appearance of discrimination and so it would be hard to prove any kind of intention to discriminate on grounds of age. On this view, the law of indirect discrimination is necessary for the instrumental reason of preventing a huge loophole emerging in the law's prohibition against direct discrimination by the calculated use of apparently neutral rules that achieved the desired discriminatory outcome.

That reasoning can be extended to cover accidental or unthinking use of rules and practices that have a disproportionate adverse effect on a protected group, for if such rules were permitted to continue, because they function as proxies for the prohibited grounds of discrimination, they could substantially weaken the beneficial effects of the law of discrimination. On this view, indirect discrimination is regarded as parasitic upon the wrong of deliberate discrimination and serves to buttress the effectiveness of the law of direct discrimination, even though it may sometimes sanction actors who are wholly innocent of either conscious or unconscious bias. This instrumental account of the law of indirect discrimination seems to be supported by the further point that the protected groups are invariably identified by a belief that they have in the past suffered from direct discrimination that resulted in disadvantage, so that the law of indirect discrimination can be regarded instrumentally as a mechanism for weeding out the persistent effects of direct discrimination.

This instrumental account removes the need to discover separate moral and political principles that support a law of indirect discrimination. Instead what is required is a theory of the moral foundations of direct discrimination plus an explanation of why it is necessary on pragmatic grounds to prohibit indirect discrimination in the pursuit of the goal of eradication of the moral wrong of direct discrimination. The framework for such an argument is likely to stress the great harm that direct discrimination has caused in the past and how strong measures are needed to eradicate its presence today and the lingering effects of past discrimination. On that approach it might follow that strong measures that control private business decisions would be warranted in pursuit of the vital goal of the eradication of the moral wrong and its effects. Such strong measures could include permitting claims for indirect discrimination and they could go further to permit or encourage various affirmative action programmes, positive discrimination in favour of disadvantaged groups, and duties to accommodate disabled persons.

Although these views have been described as explaining the extension of the law of direct discrimination into indirect discrimination as pragmatic

measures designed to ensure the effectiveness of the former law, it seems possible to argue such measures to ensure the effectiveness of the law of direct discrimination have an independent value on top of their instrumental effects. In this volume, Deborah Hellman presents an account of indirect discrimination that resembles this pragmatic justification, but argues powerfully that in fact there is in addition a moral principle that can justify this extension of the law of direct discrimination. She argues that, at least in some cases of indirect discrimination or disparate impact, the moral wrong that is being addressed by the law is the continuation of the effects of past direct discriminatory acts. She claims that such conduct is morally wrong because it compounds the injustice of earlier intentional discrimination. For instance, if in the past minorities were excluded from good jobs on career ladders, employers who use apparently neutral seniority rules to determine pay or access to promotions will compound the effect of past discrimination that prevented the minorities from access to such jobs from the outset.

B. An Independent Moral Wrong

A second perspective on the aims or purposes of the law of indirect discrimination argues that there is a moral wrong in cases of indirect discrimination, though the wrong differs significantly from the reason for the wrongfulness of direct discrimination. Whereas the latter would normally be regarded as closely linked to the wrong of not treating others with respect and dignity or as an equal, indirect discrimination will be described on this perspective as concerning a different value. That independent value might be described as one of equal opportunity or fair opportunity (taking into account various kinds of handicaps such as poor educational opportunities). Or it might be characterised as the need for reasons of social justice to break down structural barriers of various kinds to valuable opportunities such as jobs, housing and education. On this view, indirect discrimination may serve such goals as maximising general welfare by supporting merit-based criteria for allocating benefits and opportunities, or social inclusion for everyone, or a more equal society.

On these accounts of indirect discrimination as founded on an independent moral wrong, in the pursuit of one or more of these goals concerning equal welfare, fair opportunities, or righting the wrongs of the past, the law places duties on key actors such as employers and university admissions officers who control access to valuable opportunities. These key actors are required to consider whether all their rules and practices avoid disproportionate adverse effects for disadvantaged groups, and if they do not, whether those rules are justifiable as necessary and appropriate.

On this second response to the question of the foundation of the law of indirect discrimination, its underlying moral justification is significantly

different from the moral grounds for the law of direct discrimination. Its moral justification is not grounded in ideas of equal respect or equality before the law, but rather by reference to social welfare goals such as a fair distribution of wealth, or the opening of valuable opportunities for everyone, or even the goal of a more egalitarian society in general. Using this second response, we should expect to be able to draw some sharp distinctions between the concepts of direct and indirect discrimination. It is even possible that the two parts of the law of discrimination could in some instances point in opposite directions.

C. A Common Moral Foundation

A third perspective argues that both direct and indirect discrimination share a common moral foundation and that they are closely related. This perspective can take two forms.

One form argues that it is possible to discover the moral wrong that characterises direct discrimination in the category of indirect discrimination, though probably in a slightly weakened or attenuated form. A person found to have applied a rule or practice that is indirectly discriminatory may not have deliberately treated a person with disrespect or in a demeaning way, but the adoption of such a rule is not a wholly innocent act either, because the adverse effect may well be foreseeable or should have been foreseen and the actor may have done nothing to check on the justifications for the rule. In this volume Sophia Moreau develops the argument that there is fault in the sense of a failure to take care to avoid the imposition of a disadvantage on members of a protected group. In our moral thinking, we usually condemn intentional wrongdoing more forcefully than we reproach negligent or careless conduct. In law, following that moral pattern, criminal law is often confined to intentional conduct or conduct that is almost intentional, relegating instances of negligently caused harm either to be classified as minor offences or merely offering a civil remedy in tort. The fault involved in careless discrimination may be less than that involved in the wrong of deliberate discrimination, but that does not mean that a civil remedy for indirect discrimination should not be available. On this view, the moral wrong of treating persons unequally applies to both kinds of discrimination, but the degree of fault is diminished in instances of indirect discrimination.

An alternative form of finding a common moral foundation for both direct and indirect discrimination is to suggest that the moral purpose behind the law of indirect discrimination also justifies the law of direct discrimination. This purpose is likely to be conceived in terms of the purposes mentioned above such as social welfare goals or making valuable opportunities available for everyone for the sake of enhancing personal autonomy. The different legal treatment of direct and indirect discrimination only arises, on this

view, as an additional response to the presence of deliberate or intentional discrimination, which deserves a further mark of censure. For instance, if (as Khaitan and others suggest)³⁶ the justification for indirect discrimination is to make valuable opportunities available to a greater number of people by the removal of unnecessary and inappropriate barriers, that principle can be extended without difficulty to instances of direct discrimination as well. The difference in the way the law handles direct discrimination can be accounted for by the fact that the denial of valuable opportunities to a protected group is flagrant or intentional and so deserves even greater castigation or expressions of disapproval of wrongdoing.³⁷

In this volume, the essay by Tarunabh Khaitan and Sandy Steel explores the possibility of combining these two forms of finding a common moral foundation for both branches of the law of discrimination. They argue that indirect discrimination is doubly wrongful because it both tends to exacerbate existing relative disadvantage between groups and it also imposes a particular disadvantage on a victim of indirect discrimination. There is both a failure to promote a desirable social goal such as reducing the relative disadvantage of protected groups and a wrong of imposing a particular disadvantage on an individual victim, albeit not intentionally.

VIII. CONCLUSION

On close examination, indirect discrimination is a protean concept. The various explanations given above of the aims of indirect discrimination and its fundamental moral principles all seem to be valid in some instances, though not in every instance. At times the law of indirect discrimination serves as a tool to reveal and to eliminate disguised intentional discrimination. At other times it may help to overcome difficulties in satisfying the burden of proof for establishing a claim for direct discrimination. It can also provide a tool to challenge institutional structures that consolidate prior unfair distributions of advantages and disadvantages between various groups in society. Yet what seems most distinctive about the law of indirect discrimination is the manner in which it provides a legal mechanism for challenging unfairness in the distribution of benefits in a society between various groups.

In an important respect, the real world is not like the fable of the fox and the stork. Victims of indirect discrimination come from disadvantaged groups in society. As a consequence, they are rarely in a position to engage in the kind of retaliatory action performed by the stork when he served dinner from a bottle with a long neck. In a more realistic fable, the stork would

³⁶ Khaitan (n 9); Moreau (n 9) 71.

³⁷ Khaitan (n 9).

remain hungry, unable to access the preferred benefit of a meal. That is why indirect discrimination is so important as a legal mechanism. It permits an interrogation of our practices, conventions and rules to see whether they meet high standards of fairness in the distribution of opportunities and benefits between various groups. We can ask, for instance, whether the decision of a public authority to close a public lending library disproportionately adversely affects certain groups such as the elderly or schoolchildren, and if so, the public authority will be forced by the law of indirect discrimination to justify its decision as a necessary measure to meet a legitimate aim such as the need to balance its budget.³⁸ Or we can ask whether high fees charged by the Ministry of Justice for bringing discrimination claims before employment tribunals place women at a particular disadvantage compared to men, and if so whether the fees are a proportionate means of carrying out a legitimate aim such as deterred vexatious claims or, as was decided, a disproportionate measure because the level of fees effectively deterred nearly all claims including meritorious ones.³⁹ Similarly, in the private sector, an employer who insists that all positions should be full-time contracts can be challenged using the law of indirect discrimination to justify this rule that is likely to have a disproportionate adverse impact on women. The law of indirect discrimination can be one of the most powerful legal measures available to disadvantaged groups in society to assert their claims to justice.

³⁸ eg in combination with the public sector equality duty: *R (Green and others) v Gloucestershire County Council & Somerset County Council* [2011] EWHC 2687 (Admin).

³⁹ *R (on the application of UNISON) v Lord Chancellor* [2017] UKSC 51.