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The burden of proof in discrimination cases: elements for a conceptualisation from a private law perspective

Working paper
by Matteo Bonini-Baraldi

Background

Law, as the main source of regulation of social relations in contemporary societies, often claims to be a practical science. While normally the rules of procedure appear to embody a bundle of knowledge reserved only to legal 'technicians', and as such rather detached from reality, it is sometimes the case that such rules offer a rather vivid opportunity for actually testing the practical nature of legal science. This seems to be the case in such a delicate area of law as non-discrimination law, something that lies at the crossroad of some of the most cherished and still unsettled cornerstones of our societies: labour, as a means of production and as fundamental way of building a decent and fulfilling life for oneself and one's family; the market, an entity where capital should be used to contribute to the wealth of oneself but also, through taxation, of society at large; and the person, understood as a centre of values and interests which - through the lens of human rights - should be protected in its dignity and its worth. Some emerging practical examples of the interconnections between these concepts can be seen in the current reflections concerning issues such as quality of life and of the workplace, the reconciliation between working and family life, participation, and corporate social responsibility.

Debating the issue of discrimination often results in determining which value(s) or interest(s) should take precedence where there seems to be an apparent clash between competing expectations as to what can and cannot be done when operating in the market. Thus, the practical nature of legal science is intensely provoked when it comes to cases of discrimination, and especially where the issue of proving discrimination is at stake.

The reflection which follows does not happen in a vacuum. Clearly, at the level of principles, the Community lawmaker has adopted legislation which recognises to the principle of equal treatment irrespective of a protected ground the fundamental place it has traditionally held according to the constitutional traditions of most Member States. The European Court of Justice has stated that combating discrimination is 'part of the social objectives of the Community'[1] and that the principle of equal treatment between men and women is a fundamental rule of Community law.[2] In addition, scholars with a varied scientific background have contributed to deepening our knowledge of such concepts as equal treatment, social inclusion, social cohesion, and discrimination.

Discrimination law, in particular, is witnessing renewed momentum. Through the circulation of normative prescriptions, of case law, of comparative analysis – principally favoured by EU action – in most member states a clearer vision as to what place non-discrimination ought to occupy is rapidly developing. Most national legal systems have been challenged by the need to accommodate the repercussions that equal treatment legislation has on traditional scientific taxonomies of legal concepts. This is especially true for those systems where non-discrimination law has historically been relegated to the margins of civil or

[1] Case 43/75 [1976] ECR 455 (*Defrenne II*).
[2] Case C-4/02, *Schönheit* [2003] ECR I-12575.

criminal law and seen as something somewhat of an upsetting nature. The main aim of this paper is to provide an initial analysis of the distribution of the burden of proof foreseen by the younger EC Directives on equal treatment by testing it against general rules on civil liability.

Developing a context-sensitive rule

One of the issues bound to impact significantly on the structure or the functioning of national legal systems is precisely that of the burden of proof in discrimination cases. It is not by chance that both the Race Equality Directive (RED) and the General Framework Directive (GFD) explicitly state in the preamble that 'the appreciation of the facts from which may be inferred that there has been direct or indirect discrimination is a matter for national judicial or other competent bodies, in accordance with rules of national law or practice' (see Recital no. 15 of both directives). However, it is also said very directly that 'the rules on the burden of proof must be adapted when there is a prima facie case of discrimination and, for the principle of equal treatment to be applied effectively, the burden of proof must shift back to the respondent when evidence of such discrimination is brought' (see Recital no. 21 of the RED and 31 of the GFD).

The tension created by the need to uphold such an important statement (justified by a decade of case law on gender discrimination) and the need to respect rules of national law or practice gives rise to the question as to the existing elements of 'national law and practice' capable of influencing the understanding and the construction of the rule on the burden of proof as laid out in the directives. In general terms, the comparison between the classical understanding of (civil) liability rules and the liability for discriminatory acts – seen through the lens of the rules on the burden of proof – calls into question broader issues, such as the nature of discrimination in its diverse articulations (direct discrimination, indirect discrimination, harassment, victimisation), the role of intent, causation, justification, and others. In this perspective, it is important to remark how legal scholars should continue refining their understanding of discrimination issues in order to fulfil the promise of a principled and rational categorisation of what appears to be emerging as an autonomous field of law and of legal science.

The law on the burden of proof is clearly stated by Articles 8 of the RED and 10 of the GFD, which read as follows: '1. Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.

2. Paragraph 1 shall not prevent Member States from introducing rules of evidence which are more favourable to plaintiffs.

3. Paragraph 1 shall not apply to criminal procedures.

4. Paragraphs 1, 2 and 3 shall also apply to any legal proceedings commenced in accordance with Article 9(2) [7(2) in the RED].

5. Member States need not apply paragraph 1 to proceedings in which it is for the court or competent body to investigate the facts of the case'.

The same wording has also been adopted by subsequent directives dealing with gender equality (Article 19 of directive 2006/54/EC, Article 9 of directive 2004/113/EC). As we know, this formulation derives from, though it does not replicate, the one contained in the

1997 Burden of Proof Directive (BOP), which in turns codifies some of the *regulae iuris* crafted by the ECJ in such landmark cases as *Danfoss*[3] and *Enderby*[4].

The assumption from which this line of cases rightly proceeded was that employees normally do not have access to the data or information which form the basis of a particular decision or, more in general, of a particular arrangement. The basis for the famous statement of the ECJ in *Danfoss* that, in a situation which is completely lacking in transparency, it is for the employer to prove that 'his practice in the matter of wages is not in fact discriminatory' (para 13), was that 'the system of individual supplements applied to basic pay is implemented in such a way that a woman is unable to identify the reasons for a difference between her pay and that of a man doing the same work. Employees do not know what criteria in the matter of supplements are applied to them and how they are applied. They know only the amount of their supplemented pay without being able to determine the effect of the individual criteria' (para 10). Thus, the assumption that those claiming discriminatory differential treatment do not have access to sufficient data enabling them to 'identify the reasons' for a difference in treatment forms the rational basis for the legal provision on the burden of proof as it stands now in Community law. This rational basis serves a general objective, which is normally summarised by the axiom following which claimants should not be deprived of effective means of enforcing the principle of equal treatment before the national courts.

The rationale for the specific rule on the burden of proof as it stands now should explain why the general civil law rule on the burden of proof is not to be followed entirely in discrimination cases. Because it requires the claimant to prove the facts which form the basis for his or her claim, the general rule presupposes an abstract complainant and an abstract respondent and frames them as rational actors capable of putting together all of the procedural activities necessary to succeed at trial. By contrast, the current arrangement, which will be discussed in more detail below, acknowledges a difference in the initial concrete position which characterises the parties involved, and thus abandons its traditionally abstract approach in favour of a context-sensitive approach.

This conceptual shift, which is settled law now, has perhaps not been examined in all the implications which is bound to exert on other elements which normally form the basis of a judicial decision. To gain a clearer understanding of what it means to shift the burden of proof, one needs thus to observe the functioning of such rule not as an isolated monad, but as one among the many elements which concur to the formation of any judicial (or non-judicial) adjudication. It is all the more so since the provision on the burden of proof does not make any distinction between cases of direct and indirect discrimination, nor does it introduce any element useful for ascertaining the objective or subjective nature of the liability for discriminatory acts.

Type of test involved

The concrete functioning of the current distribution of the burden of proof has been explained by several authors, especially in light of ECJ and national case law. The functioning of the rule is normally depicted as involving a two-stage test. The two-stage test characterises cases of both direct and indirect discrimination. In direct discrimination cases, the first step requires the complainant to establish i) a difference in treatment, as well as ii) a difference in gender, racial or ethnic origin, age, sexual orientation, etc., with respect to a chosen comparator.

[3] Case 109/88, *Danfoss* [1989] ECR 3199

[4] Case C-127/92, *Enderby* [1993] ECR I-5535.

The second step requires the respondent to prove that there has been no breach of the principle of equal treatment. British law, for instance, stipulates that the respondent must provide a 'satisfactory explanation' for the difference in treatment. Failing this, the court should declare that there has been discrimination.
Generally speaking, in a landmark publication on non-discrimination law it has been highlighted that some elements of the test could be problematic. To begin with, there could be cases where establishing a correct comparator could be difficult, such as pregnancy, or gender reassignment. It has been written that 'the ECJ rejected the need for a comparator in cases of discrimination because of pregnancy'.[5] Furthermore, the requirement to show a 'comparable situation' could lead to arbitrary reasoning as to who is similarly situated with respect to whom. Some cases put the focus on disadvantage, rather than on the identification of a comparable situation, through an emphasis on the respect for human rights in general rather than on the specificity of anti-discrimination law.
In indirect discrimination cases, the claimant should show a provision, criterion or practice that puts persons of a certain gender, racial or ethnic origin, etc. at a particular disadvantage. Unless the respondent can provide an explanation for this disadvantage and unless there is an objective justification for it, the court should find for the existence of indirect discrimination.
As it normally happens, moving from the verbal explanation of a concept to its practical application is likely to raise questions and difficulties, which then call for a rather more elaborate theoretical framework. Some issues will be sketched below, first with respect to direct discrimination, second with regard to indirect discrimination.

Proof in direct discrimination: circumstantial evidence and role of the respondent

Because, as a British Court put it, 'it is unusual to find direct evidence of racial discrimination (…) [and] in some cases the discrimination will not be ill-intentioned but merely based on an assumption "the or she would not have fitted in"',[6] the two-stage test has been applied and approved in several domestic cases.
In the UK, under the 1975 Sex Discrimination Act (section 63A) the claimant must prove facts from which the tribunal 'could' conclude, in the absence of an adequate explanation, that the employer has committed an act of discrimination against the claimant 'which is unlawful'. In February 2005 the UK Court of Appeal examined three joined cases[7] and issued its guidelines on the application of the burden of proof. The Court distinguished, interestingly, between *primary facts* and *secondary facts*. It underlined that at the first stage of analysis 'the outcome will usually depend on what inferences it is proper to draw from the primary facts found by the tribunal'. It also stated that at the first stage 'the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them'. Along similar lines, the Spanish Constitutional Court held in February 2006 that the employee had the burden of presenting to the court an 'indicio razonable', that is to say a 'principio de prueba' or 'prueba verosimil'. The approach of both Courts seems to be that circumstantial evidence (indizio, indicio, indiz in German) is sufficient at the first stage. That is, a *semiplena probatio* can and should be accepted as sufficient. The corollary is that if even a *semiplena probatio* cannot be shown, then the claim should fail.

[5] D. Schiek, L. Waddington, M. Bell, *Cases, Materials and Test on National, Supranational and International Non-Discrimination Law*, Hart Publishing, Oxford, Portland-Oregon, 2007, at 216.
[6] UK Court of Appeal, *King* v. *Great Britain-China Centre* [1992] ICR 516, 528, per Neill LJ.
[7] *Igen* v. *Wong*; *Chamberlin and Another* v. *Emokpae*; *Webster* v. *Brunel University* [2005] 3 All ER 812.

In this respect, the question arises as to what could be the role of the respondent in trying to make this 'semi-full' proof a 'semi-empty' proof. Some British authors have claimed that disregarding at this stage the employer's explanation could deprive the claimant 'once and for all of what may sometimes be an important part of the evidence in support of his or her case, namely the employer's inadequate or shifty explanation'.[8] The focus of British courts and literature on the 'adequate explanation' derives from the wording of British legislation. In continental terms it could be transposed, albeit reductively, into the concept of 'contrary proof' or *preuve contraire*. The specific British debate, which could emerge in other legal systems as well, is whether such contrary evidence can or should be admitted at the first stage, or only at the second stage and only in the restricted terms indicated by the Court of Appeal. As far as the second stage of analysis is concerned, the UK Court of Appeal stated that to discharge the burden the employer must prove 'on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex'. On this specific issue it added that this 'requires a tribunal to assess not merely whether the employer has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question'.

On the point of the contrary proof, the Swedish Supreme Court[9] has ruled that it would not be logical to admit evidence from both parties on the same facts, because this would lead to a single appreciation at the same time of all the evidence presented in the case. Rather, in favouring the two-step analysis, the Court ruled that the respondent's evidence does not play any role in the first stage and that, at the second stage, it should only concern facts different from those already established at the first stage, which are no longer refutable.

The question is thus open as to whether the new rule on the burden of proof has also modified the general principle following which the respondent can always offer a 'contrary proof' on any fact shown by the claimant. Given that at the first stage there is a limited, albeit serious, set of elements which should be shown by the claimant, it could be fair to speculate that the employer should at least be allowed to present facts pointing to the contrary on those specific aspects. This would not be an 'adequate explanation' yet, rather a contrary proof on certain facts, allowed by general principles of procedure.

The conclusion is that the respondent is allowed to present his or her evidence at the first stage in the form of a contrary proof; at the second stage, as we shall see, notwithstanding the apparent focus of the directives on a negative element ('that there has been no breach of…') he or she will have to show positive elements which point to an alternative causal connection between the distinction and the less favourable treatment.

Direct discrimination: inferences, presumptions, causation

It appears, thus, that all three main stakeholders in a trial are involved at the first stage: the claimant, who must show some (primary) facts as to the two elements recalled above; the respondent, who could show contrary facts as to the same elements in order to show a different scenario; and the court, who is entrusted the task of drawing inferences as to whether the (primary) facts shown by the claimant are capable of generating a presumption of unlawful differential treatment, which could substantiate a finding of discrimination. It will then be for the respondent to 'prove that there has been no breach of the principle of equal treatment', as stated by the directives. Thus understood, the test seems to become a three-step, rather than a two-step analysis.

[8] N. Cunningham, *Discrimination Through the Looking-Glass: Judicial Guidelines on the Burden of Proof*, (35) 3 *Industrial Law Journal*, 2006, 279-288, at 287.
[9] NJA 2006 s 170.

This conclusion throws some light on the mechanism of presumptions and raises additional questions. To put it simply, a presumption is a mechanism, or a process, which allows the identification of an unknown fact on the basis of a known fact. The question is whether the directives really intended to put in place a simple presumptive mechanism or if they intended something different. Should this be the case, domestic law referring to the general rules on presumption could be incompatible with the directives because of insufficient transposition.

Some facts are a matter of general knowledge and need not be proved: for instance, that water freezes at 0° Celsius. Or that people hugging and kissing in a restaurant will not be asked to leave the premises. However, most facts in a trial will need to be proved by the parties. Some will be proved through documents, some through witness testimony. Some others facts will be proved through presumptions: the length of the marks left on the street by the tires after a sudden brake will tell at what speed the car was running.

By contrast discrimination, as a legal concept, is not quite a fact. Discrimination could be described rather more accurately as a normative narration of a certain set of facts. It could also be described as a conceptual labelling that we give of a certain reality, just like torts, fraud, or unconscionability. These are all normative concepts, not facts. A first and immediate meaning of the rules on the burden of proof is that such rules concern no so much this metadiscourse, but the facts which substantiate the various elements of which the normative concept is (deemed to be) made of. Thus, the problem of evidence is deeply intertwined with the substantive elements which the law – taking into account the manifestations of discrimination as a social practice – considers as pertaining to something that it describes (or prescribes) as being 'discrimination'.

The specificities of the legal construction of 'discrimination' require, however, further reasoning. Concluding that there has been discrimination from a legal point of view appears to be a human *elaboration* of a given set of facts. In a second sense, thus, the rules on the burden of proof concern also the exercise of elaborating on naturalistic facts established before the court or presumed by the judge. If the rule on the burden of proof set out by the directives were to be reduced to the first meaning (i.e. that certain naturalistic facts can be established through presumption), it would not add anything to the existing rules of procedure. By contrast, Community law as it stands rightly speaks of facts from which it can be presumed that 'discrimination' has occurred. Since 'discrimination' as a legal concept is made up of several elements, it becomes crucial to assess not *how much*, but *on what elements* should the claimant establish facts capable of transferring the burden on the other party.

On closer look, as far as direct discrimination is concerned, the elements which form part of the normative definition of discrimination are i) less favourable treatment, ii) comparison with another person, iii) in a comparable situation, iv) on grounds of a protected characteristic. To begin with, there is no mention, in EC law at least, of any subjective state of mind on the part of the discriminator, such as intent or fault. By way of illustration, the Dutch General Equal Treatment Act speaks more precisely of 'distinction' rather than discrimination, and it requires the respondent to 'prove that the contested act was not in contravention of this Act'. It has been explained that the use of the term discrimination 'would wrongly give the impression that the alleged discriminator had the intention to discriminate and cause disadvantage'.[10]

While it is impossible to indulge in a detailed analysis here, it appears fair to say that the general trend is, as a consequence, towards an objective notion of discrimination as a legal concept. In civil law systems objective liability means that the only elements which form part of the normative definition of any given tort are i) the act or fact, ii) the damage,

[10] M. Gijzen, *Report on measures to combat discrimination: Directive 2000/43/EC and 2000/78/EC. Country report Netherlands*, European Commission, 2005, 13-14.

and iii) the causal link between the two, regardless of intent, fault, or motive. The causal link between the act or fact and the damage suffered, for which a remedy is sought, normally allows the judge to establish whether the damage is actually a result of that particular act or fact. It also allows the judge to screen out all of those damages that should not be compensated because they are not an immediate consequence of the act or fact. It is, thus, a central element to any finding of tort liability. The parallel could be drawn with the producer's liability, or with the liability of those who engage in dangerous activities: it does not matter whether the producer did not want the toaster to blow in the face of a kid toasting his slice of bred, or if those running a fireworks factory which exploded were at fault or not. The law is satisfied that a causal link exists between the act or fact and the damage; consequently, the proof that the respondent should give to free himself from liability is a very strict one and always based on objective circumstances: for instance, *force majeure*, or accidental and unforeseeable natural events, or that he or she did all that was necessary to avoid the damage.

If one now compares the elements of 'discrimination' with the elements of an objective tort liability, one sees immediately that i) less favourable treatment is a concise expression which incorporates both the act or fact (normally the distinction), and the damage provoked by it (the resulting unfavourable consequences); and that ii) the three remaining elements (parallel with another person; in a comparable situation; on grounds of a protected characteristic) appear to be specific elements concerning the peculiarity of the causal link which characterises the legal concept of discrimination in most cases.

It follows that the omnipresent tension between causality and the diehard search for a motive in discrimination cases should be resolved by dropping the question (concerning point ii) '*why* was this person treated less favourably?'. There is, in fact, a real danger that such an approach introduces an inquiry into the subjective state of mind of the perpetrator, which is not at all in the law. Since neither motive, nor fault, nor intent matter, the subjective reason for putting a person in a less favourable situation should be irrelevant. This is normally how cases involving *stereotyping* (even factually correct) or an *apparently reasonable claim* (e.g. third party pressure) are dealt with. As it has been stated, 'If the difference is on racial grounds, the reasons or motive behind it are irrelevant (…). The whole point of the law is to require suppliers to treat each person as an individual, not as a member of a group. The individual should not be assumed to hold the characteristics which the supplier associates with the group, whether or not most members of the group do indeed have such characteristics'.[11]

What are the repercussions of this reconstruction on the burden of proof in discrimination cases? In my opinion, it appears rather evident that the core question for any direct discrimination case involves the peculiarities which characterise the element of causation. In this respect, what needs to be made clear is that, from a 'naturalistic' point of view, the cause of the less favourable treatment is always an act, normally the conduct of someone. However, from a legal point of view, the 'cause' of discrimination is the use of the protected ground in combination with that act. A finding of discrimination is an elaboration as to whether a given set of naturalistic facts was indeed unlawful, i.e. against the legal principle of equal treatment. A finding of non discrimination entails that the act or fact performed by the respondent did not exist, or that if it existed it cannot be deemed to be unlawful. Normally, the most contended aspect is precisely the lawfulness or unlawfulness of a certain distinction.

[11] UK House of Lords, 9 December 2004, *R* v. *Immigration Officer at Prague Airport and another* [2005] 2 AC 1, per Baroness Hale. See also D. Schiek, L. Waddington, M. Bell, *Cases, Materials and Test on National, Supranational and International Non-Discrimination Law*, Hart Publishing, Oxford, Portland-Oregon, 2007, 233.

Albeit it might seem obvious, it should be emphasised that the legal antecedent of a finding of discrimination is precisely a 'discriminatory act', not any act which results in a distinction; after all, distinctions which cause unfavourable treatment constitute the regularity of ordinary life. The specific problematic element emerges, in terms of causation, when distinctions become discriminatory distinctions. The issue is precisely how to prove the discriminatory nature of that act of distinction.

What this adds to the reasoning here is a rather pronounced conceptual shift. While it is normally said that direct discrimination is the most overt and manifest form of discrimination, it is clear that from a procedural perspective the unknown element, until proved, is precisely the discriminatory nature of the respondent's act. The unknown element, thus, normally coincides with this particular form of 'legal causation': was the differential treatment a direct consequence of the employer's use of a protected ground as basis for his or her decision not to promote? The main tool that the law, as it stands, offers and requires in order to find an answer is to proceed through a comparison. This condition requires the claimant to adopt from the outset a 'relational' approach, with the aim of exposing the unfairness or unlawfulness of the treatment suffered through comparison with that suffered, or not suffered, by others in a similar situation. However, if one chooses an objective approach to liability for discrimination, 'comparators become one avenue to establish causation, but not the exclusive route'.[12]

When addressing presumptions, thus, it is important to clarify that they may concern both the existence of unknown naturalistic facts, and the unlawfulness of a particular act or conduct. In the first sense, they can work to the advantage or the disadvantage of both parties. In the second sense, presumptions will normally be able to assist the claimant in pointing to the existence of a credible causal link between the conduct of the respondent and the treatment suffered. It has been highlighted that some national approaches, for instance in the Netherlands and in the UK, it is not enough to show a difference in treatment and a difference in a protected characteristic in order to trigger the shift: it should also be shown, for instance, that the claimant fulfilled the minimum requirements set out by the job advertisement, and that he or she was at least as qualified as the person chosen for comparison. These elements should allow the court to suspect that such causal link exists to the extent that they point to the use of a protected ground in combination with an act of distinction. It is in this sense, I believe, that the UK Court of Appeal speaks of *secondary facts*.

The rule on the burden of proof offers us elements which should advise not to confine its reading to naturalistic facts. It is a rule designed to assist the claimant, and the court, in assessing the specific 'legal causation' of discrimination cases, not the naturalistic one. It is a rule that targets a normative connotation of facts, not the facts themselves. After all, a 'presumption of discrimination' could be seen as a concise formulation of a more elaborate construction, which could be expressed as a 'presumption that a certain act of distinction which produced a certain prejudicial effect was based on a protected ground'.

To conclude, it is important to underline that the *semiplena probatio* required from the claimant concerns primarily the first element of the fact situation (an act of distinction and a prejudicial consequence, i.e. the less favourable treatment) and *only parts* of the specific elements which account for causation in discrimination cases. If a full causation link was to be established at the first stage of analysis, the claimant would have indeed proved in full the existence of discrimination.

The alternative reading of the rule on the shift of the burden of proof could point to a presumption of fault. Perhaps the British system encompasses some elements of such reading, where it requires the respondent to provide an 'adequate explanation', which

[12] D. Schiek, L. Waddington, M. Bell, *Cases, Materials and Test on National, Supranational and International Non-Discrimination Law*, Hart Publishing, Oxford, Portland-Oregon, 2007, 209.

could appear a sort of clearance in terms of guilt. A thesis which embraced the presumption of fault as the only viable reading of the rule on the burden of proof would, however, allow too much leeway to 'moral' views of liability. An approach in search for 'bad behaviour', 'guilt' or 'evil' as a basis for liability appears to entail a rather insufficiently 'secular' concept of liability itself. From a technical point of view, in order to be 'cleared' the respondent should only show that he respected the fundamental rules of due diligence (the regular test for establishing absence of fault or guilt). However, this is not at all the case in the law of discrimination.

In a majority of cases, the respondent will be asked to disprove the discriminatory nature of his or her act and in order to succeed, he or she will have to show positive (as opposed to negative), objective elements which can be concretely verified and measured, in order to show a *specific* link with an *alternative* non discriminatory cause or reason (the 'reason unrelated to sex' in gender discrimination cases). He or she will show that the lay off or the lack of promotion descend from criteria or grounds different from the forbidden or protected ones, e.g. better productivity, closing down of the branch, etc. Furthermore, he or she could show that the distinction on a certain personal ground exists, but it is not protected by law (e.g. civil status). This approach does not allow to support the view that the shift of the burden of proof should be understood as a presumption of fault.

The rule on the shift of the burden of proof appears therefore to be a rule on the different distribution of the risk of insufficient proof. While normally any uncertainty concerning a fact damages he or she who had the burden of proving it, through the shift of the burden the risk of not being able to provide full proof is transferred on the respondent, who bears the risk of doubtful cases.

Finally, it should be recalled that the law as it stands now does not seem to allow any justification for direct discrimination. It will not be possible for the respondent to claim general business needs or budgetary considerations as justifying factors for the unlawful distinction. However, he or she will be able to rely on the provision of the directives which allows for genuine occupational requirements to be taken into account. This is not formally a justification, but rather a limitation of the scope of the unlawfulness of a certain distinction. Therefore, Article 4 of both directives it is not a procedural, but a substantive law rule concerning material scope of the prohibition of discrimination. On the procedural level, however, the issue arises of assessing whether such occupational requirements are consistent with the criterion of proportionality. Clearly, the burden of demonstrating the proportionality of the measures adopted rests with the respondent according to the general rules.

Indirect discrimination: general issues

In indirect discrimination cases the emphasis falls on at least four elements, namely i) an apparently neutral provision, criterion or practice, ii) a particular disadvantage, iii) a comparison with other persons with a different personal characteristic, and iv) an objective justification. Although indirect discrimination poses several theoretical and practical challenges, from the point of view of the conceptualisation of the burden of proof it appears rather less troubling than direct discrimination. This derives normally, though not always, from the circumstance that the provision, criterion or practice used by the respondent is known, rather than unknown: it could be the proximity to pension, working part-time, health and safety rules (e.g. prohibiting headgear), etc. Furthermore, sometimes the disadvantage appears *in re ipsa*: attaching a benefit to marriage clearly screens out all of those who cannot marry on grounds of sexual orientation. It is also self evident that those who are closer to their pension are the older ones. In other cases, showing detrimental

effect requires more elaborate inquiries. For instance, a system of pay supplements may result in a disadvantage for part-time workers, but the discriminatory nature on grounds of gender of such system only emerges after rather complex analyses of its impact.
Normally, the claimant will prove particular disadvantage through statistics aimed at comparing the impact of a certain arrangement on the reference group and on a pool of comparators. Clearly, the main difficulty here is establishing that particular disadvantage has indeed occurred. Legal doctrine has produced some elaborate conceptualisations of the main issues at stake in indirect discrimination cases.[13] First, it has highlighted the necessity to ascertain to what the detrimental effect has to be attributed; second, that it is crucial to determine how to establish detrimental effect. Concerning the first point, it has been remarked that the use of the term 'practice' in the directives no longer requires the claimant to prove a specific requirement or condition with which he or she must comply. In the *Enderby* case, the Court of Justice had already accepted that it is possible to find indirect discrimination in the absence of any 'specific requirement' or 'particular sort of arrangement' (paras 15-16). This, in turn, accounts for a more 'collective reading' of the prohibition of indirect discrimination because it shifts the focus from an isolated condition to the potential discriminatory effects on a certain group of people.[14]
On the issue of establishing detrimental effect, two different approaches have been identified, the *statistical* one (which translates into the 'disparate impact' formula) and the *qualitative* one. While the possibility of relying on the statistical approach can sometimes offer a true advantage to claimants, who are thus able to expose hidden but pervasive instances of indirect discrimination, it is true that it can also prove to be an insurmountable hurdle. It is for this reason that both directives no longer speak of a 'substantially higher proportion', thus allowing for non-statistical approaches to indirect discrimination.

Disparate impact through statistical evidence and the qualitative approach

As it has been written, 'statistics serve to highlight the fact that the use of measures which are apparently neutral do, nevertheless, lead to a specific disadvantage for particular categories of people'.[15] The disadvantage is established through a comparison of proportions, not of absolute numbers. If the statistical approach is chosen or required, a specific methodology should be followed, consisting first in the identification of a reference group (group A) and of a pool of comparators (group B) and, second, in the division of the individuals falling in each group in two categories depending on whether they possess or not the protected characteristic or, as others say, 'corresponding to the dominant or majority category and the traditionally disadvantaged or minority category'.[16] It is then necessary to establish the proportion of the members of each category in each group: for instance, in group A the proportion between women and men is X, in group B the proportion between women and men is Y. It is generally acknowledged that the measure is *prima facie* discriminatory if the proportion of women in the reference group (X) is lower than that in the pool of comparators (Y).

[13] D. Schiek, L. Waddington, M. Bell, *Cases, Materials and Test on National, Supranational and International Non-Discrimination Law*, cit., 323 ff., in particular 372 ff.; C. Tobler, *Indirect Discrimination. A Case Study into the Development of the Legal Concept of Indirect Discrimination under EC Law*, Intersentia, Antwerp, 2005.
[14] D. Schiek, L. Waddington, M. Bell, *Cases, Materials and Test on National, Supranational and International Non-Discrimination Law*, cit., 397.
[15] O. De Schutter, *Methods of Proof in the Context of Combating Discrimination*, in *Proving Discrimination. The Dynamic Implementation of EU Anti-Discrimination Law: The Role of Specialised Bodies*, Report of the First Experts' Meeting, January 2003, 24.
[16] O. De Schutter, *Methods of Proof in the Context of Combating Discrimination*, cit., 27.

One concrete difficulty with this approach is that of choosing the appropriate pool of comparators. It has been highlighted that there are different possibilities in principle: people in the immediate workplace, all the employees employed or all the potential employees, or a sample of those affected by the measure. Clearly, 'choosing the pool of comparators carefully is decisive for success of an indirect discrimination claim where a strictly established disparate impact is required': the suggestion is to avoid overly large pools of comparators.[17] A second practical difficulty lies in deciding when the impact of a given measure is indeed 'disparate', and thus the meaning of the expression 'substantially higher'. In this respect, since the expression does not appear in the directives of 2000, suffice it recall that the ECJ has apparently opened up the possibility that less statistical difference be accepted, if it can be shown that the disparate impact increases over time, thus generating a negative trend.[18]

From the perspective of the burden of proof, what is important to highlight is that the submission of credible and scientifically sound statistical evidence is generally recognised to constitute sufficient data for transferring the burden to the respondent, which will then have a provide the court with specific and alternative explanations as to the differential impact of the provision, criterion or practice adopted.

The second approach to indirect discrimination is one which is not based on statistical evidence and on comparison between proportions of advantaged and disadvantaged categories of people, but on the 'intrinsic' ability of the measure to put people belonging to a protected category at a disadvantage. Other commentators have remarked that such an approach derives from the perspective adopted by the ECJ in cases dealing with the freedom of movement of workers and nationality discrimination, as in *O'Flynn*,[19] where, at para 20, the Court speaks precisely of 'particular disadvantage'. The 2000 directives, thus, have moved away from a strict 'disparate impact' notion of indirect discrimination; this, as some remarks have highlighted, could at the same time make it easier to find discrimination in cases where statistics are not particularly helpful, such as headscarf-related issues, and provide an incentive to less reliable factual bases, such as perhaps stereotypes or generalisations about group characteristics.

Justification

One of the rationales which underpins the prohibition of indirect discrimination, the need to steer the spontaneous distribution of socio-economic opportunities or resources towards a fairer participation of various social groups, is such that it makes it almost unavoidable to allow the possibility of justifying indirect discrimination. This is because sometimes private actors do not have the possibility of influencing the functioning of those variables which can be deemed responsible for the unequal participation or representation of the various groups. As it has been written, the notion of indirect discrimination law 'only require[s] the employer or any other economic actor to prove that it did not exploit the disadvantaged situation of persons who are subjected to socio-economic discrimination'.[20]

The 2000 directives allow for a justification of indirect discrimination if the provision, criterion or practice 'is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary'. From the perspective of the burden of proof, it is

[17] D. Schiek, L. Waddington, M. Bell, *Cases, Materials and Test on National, Supranational and International Non-Discrimination Law*, cit., 401, 407.
[18] Case C-167/97, *Seymour-Smith and Perez* [1999] ECR I-623, para 61.
[19] Case 237/94, *O'Flynn* [1996] ECR I-02617.
[20] D. Schiek, L. Waddington, M. Bell, *Cases, Materials and Test on National, Supranational and International Non-Discrimination Law*, cit., 330.

critical to determine if the justification of indirect discrimination coincides with the possibility of the respondent to refute a *prima facie* case of discrimination – normally by showing absence of a causal link – or if it implies the duty to show additional elements capable of rendering acceptable an instance of discrimination which has already been established in all its constitutive elements. The point is discussed by several authors such as Tobler and Schiek and it appears to be a still magmatic and vital area of discrimination law.
In any case, it is clear that the justification must bear an *objective nature*: this makes it insufficient to rely on general statements or data relevant only from the point of view of an individual. Such justification must be instrumental in serving a legitimate aim, and the means used must be proportionate, i.e. appropriate and necessary for achieving that aim.
In most cases the crucial element of objective justification will be the test applied for assessing the acceptability of an element of justification. Following some commentators, the case law of the ECJ allows to conclude that the standard of scrutiny diverges in relation to the type of measure at stake. Barnard has highlighted that at least three tests could be identified: strict, as in *Bilka*[21] and *Hill*,[22] for measures put in place by businesses or employers; weak, as in *Seymour-Smith*, for legislation dealing with labour law; and very weak, as in *Nolte*[23] and *Megner*,[24] for legislation on social security.[25]
Practical examples of objective justification can be found in ECJ case law dealing with gender discrimination. According to the ECJ, *budgetary considerations* are suspect or insufficient reasons for justifying indirect discrimination. In several cases it held that

> although budgetary considerations may underlie a Member State's choice of social policy and influence the nature or scope of the social protection measures which it wishes to adopt, they do not in themselves constitute an aim pursued by that policy and cannot therefore justify discrimination against one of the sexes… to concede that budgetary considerations may justify a difference in treatment between men and women which would otherwise constitute indirect discrimination on grounds of sex would mean that the application and scope of a rule of Community law as fundamental as that of equal treatment between men and women might vary in time and place according to the state of the public finances of Member States.[26]

Furthermore, concerning the need to reward *adaptability* of workers to variable hours and places of work, it should be recalled that the Court held in *Danfoss* that 'the employer may justify recourse to the criterion of mobility (…) by showing that such adaptability is of importance for the performance of the specific tasks which are entrusted to the employee, but not if that criterion is understood as covering the quality of the work done by the employee'.[27]
A further suspect criterion is *length of service*, which traditionally impacts negatively on part-time workers. The ECJ held that 'although experience goes hand in hand with length of service, and experience enables the worker in principle to improve performance of the tasks allotted to him, the objectivity of such a criterion depends on all the circumstances in a particular case, and in particular on the relationship between the nature of the work performed and the experience gained from the performance of that work upon completion of a certain number of working hours'.[28] Finally, in *Enderby* the Court held that 'the state of the employment market, which may lead an employer to increase the pay of a particular

[21] Case 170/84, *Bilka-Kaufhaus GmbH* [1986] ECR 1607.
[22] Case C-243/95, *Hill and Stapleton* [1998] ECR I-3739.
[23] Case C-317/93, *Nolte* [1995] ECR I-4625.
[24] Case C 444/93, *Megner and Scheffel* [1995] I-4741.
[25] C. Barnard, *EC Employment Law*, OUP, Oxford, 2000, 218 (new edition 2006).
[26] Case C-187/00, *Kutz-Bauer* [2003] ECR I-2741, paras 59-60. See also Case C-343/92, *De Weerd and Others* [1994] ECR I-571, paras 35 and 36; Case C-226/98, *Jørgensen* [2000] ECR I-2447, para 39; Case C-4/02, *Schönheit* [2003] ECR I-12575, paras 84 and 85.
[27] Case 109/88, *Danfoss*, cit., para 25.
[28] Case C-184/89, *Nimz* [1991] ECR I-297, para 14; Case C-1/95, *Gerster* [1997] ECR I-5253, para 39.

job in order to attract candidates, may constitute an objectively justified economic ground'.[29] However, the national court must 'determine precisely what proportion of the increase in pay is attributable to market forces' (para 27).
Notwithstanding these guidelines, and keeping in mind that it is for the national judge to assess whether the conditions for transferring the burden of proof on the respondent were fulfilled, it has been rightly pointed out that 'case law on objective justification will (…) remain a scattered area, especially at national level, until the field of non-discrimination law has settled down and established itself across the Member States'.[30]

[29] Case C-127/92, *Enderby*, cit., [1993] ECR I-5535, para 26.
[30] D. Schiek, L. Waddington, M. Bell, *Cases, Materials and Test on National, Supranational and International Non-Discrimination Law*, cit., 452.