PROVING SEX DISCRIMINATION IN COMMUNITY LAW

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1. Initial developments in case law and starting position in national legislation

None of the Community Directives on gender equality adopted in the seventies and eighties contained rules on the burden of proof. As so often in the field of equality, the earliest formulations were prompted by the activism of the Court of Justice, inspired – not for the first time – by case-law in the United States[1]. And they came hand-in-hand with a new concept of indirect

[1] In Green vs. McDonnell Douglas, 411 US 792 (1973), the United States Supreme Court ruled that it was sufficient for the plaintiff to demonstrate a "prima facie case of discrimination" – in this case, the rejection of a qualified applicant who belonged to a minority where the job remained vacant or was given to somebody not from that minority – for the burden of evidence to shift to the employer because, as an employer acts rationally, he knows and can explain the reasons for his decision, and if he does not do so, discrimination is the most likely reason for rejecting the candidate. This doctrine was developed further in

discrimination, which shifted the centre of gravity for discriminatory behaviour from intention to an unjustified adverse impact on a subset of women: the ECJ's judgment of 31 January 1981 in Jenkins (C-96/80) was the first to allocate the parties to discrimination proceedings separate roles in the submission of evidence.

This involved a differentiation between those who were alleging indirect discrimination, who had to establish the adverse impact on a female collective of an apparently gender-neutral measure, and those who contest the allegation, who must establish a justification for the measure, in a way which has quickly come to be seen as a test of indirect sex discrimination frequently used in the area of part-time work – CJEU judgments of 13.5.1986, C-170/84, Bilka, 13.7.1989, C-171/88, Rinner-Kühn, 13.12.1989, C-102/88, Ruzius-Wilbrink, 27.6.1990, C-33/89, Kowalska, 7.12.1991, C-184/99, Nimz, and 4.6.1992, C-360/90, Bötel.

Questions of evidence were tackled head-on and in greater detail – without being specifically confined to indirect discrimination – in Danfoss, an authentic 'leading case', where the ECJ ruled in its judgment of 17 October 1989 (C-109/88) that "*where an undertaking applies a system of pay which is totally lacking in transparency, it is for the employer to prove that his practice in the matter of wages is not discriminatory, if a female worker establishes, in relation to a relatively large number of employees, that the average pay for women is less than that for men*".

Such reasoning in Community case law – insofar as it does not require conclusive evidence of discrimination to shift the burden of proof to the respondent, but rather entails admission of statistical evidence and the exclusion of evidence of the intention to discriminate – grated more in civil

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St. Mary's Honor Society vs. Hicks, 509 US 502 (1993), in the sense that, even if the employer offers an explanation which is not sufficiently convincing or the plaintiff shows to be inadequately justified, the court may conclude – depending on circumstances – that no discrimination occurred, and the plaintiff cannot derive an automatic right from anti-discrimination law to obtain a favourable ruling if he or she fails to persuade the court of the facts.

law systems than common law systems given the most significant distinctions between the two systems:

- In common law systems, it is sufficient for a plaintiff in civil proceedings to demonstrate the greater plausibility of his evidence compared with that of the respondent – the balance of probabilities – and there is an open system of evidence, which means than anything may be submitted with certain specific exceptions, whereas in civil law systems a plaintiff in civil proceedings must prove the truth of his allegations – judgment of veracity – and the evidence that can be submitted is subject to a system of regulations – a weighted evidence system.

- Another difference is that, while in common law systems the principle of fair trial allows the plaintiff access to evidence held by the respondent and the court can insist on its disclosure, in civil law systems, in accordance with the Roman tradition, the judge is under no compulsion to require the party holding the evidence to discover it, or to carry out any further investigation, be it ex oficio or at the request of a party.

In France[2] discriminatory behaviour was prosecuted as a criminal offence or punishable act and investigated ex oficio by a court, whose verdict started from a presumption of innocence and made any conviction difficult. When the door opened for civil proceedings – and of course industrial hearings – over alleged discrimination, the weight of tradition was such that applications were not admitted unless mismanagement on the part of the company could be established. Indeed, on the basis that neither party is obliged to disclose the evidence it holds to its opponent, it has been held a criminal offence for a worker to retain copies of company documents solely for evidentiary purposes.

[2] The references to French Law were taken from Sophie LATRAVERSE, "The challenge of evidence in implementing EU discrimination law in Civil Law Countries – The example of France" (ERA – Triers, April 2005), available at www.era-comm.eu (versions in German, Spanish, French, English and Italian).

Conversely, the developments in Community case law were more easily reconciled within common law systems. In the United Kingdom, at the beginning of the 1990s, the use of inferences gleaned from the main facts that are to be weighed up by the judicial body was already admissible in discrimination cases. However, the judicial body was not obliged to employ inferences to reach a conclusion of prohibited discrimination. In other words, there was no legal obligation on the employer to prove that no discrimination had occurred: the defendant was only obliged to meet the tactical or evidentiary burden of explaining the manner in which he or she treated the employee[3].

Under this initial situation in the 1980s, harmonisation regulations were necessary. First of all, the evidentiary constraints of the internal legislation seriously compromised the effectiveness of Community anti-discrimination legislation, making areas of impunity possible in order to prohibit discrimination on the grounds of sex. Secondly, the obvious consequence of that was a centrifugal drift in the legislation of the Member States. The requirements of the principles of subsidiarity and proportionality which, pursuant to the original Community law, justify the legislative intervention of the bodies of the European Union were thus established.

2. Directive 97/80/EC and its subsequent recasting as Directive 2006/54/EC.

In the hope that harmonisation would make equality provisions more effective, and following several attempts of a more ambitious nature[4], the

[3] This was affirmed in the Case of Glasgow City Council versus Zafar [1998] ICR, House of Lords. With regards to the situation of English Law prior to Council Directive 97/80/EC, we cite Rachel CRASNOW, "Proving discrimination: the shift of the burden of proof and access to evidence" (ERA – Triers, September 2014), available at www.era-comm.eu (versions in German and English).

[4] On 27 May 1988 the Commission presented a Proposal for a Directive, which was discussed several times without obtaining Council support. Another failed attempt was undertaken by means of social dialogue under the Social Protocol of the Treaty of Maastricht. The last Proposal – which became the basis for

Council adopted its Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex which – in the words of its Article 1 – sought "to ensure that the measures taken by the Member States to implement the principle of equal treatment are made more effective, in order to enable all persons who consider themselves wronged because the principle of equal treatment has not been applied to them to have their rights asserted by judicial process after possible recourse to other competent bodies".

Another positive feature of this Directive – in Article 2 – was its definition of indirect discrimination, this being "where an apparently neutral provision, criterion or practice disadvantages a substantially higher proportion of the members of one sex unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex". Inserting the definition at this point reflects the role of evidence in cases about indirect discrimination. As Recital (19) of the Preamble points out, "it is all the more difficult to prove discrimination when it is indirect", which is why it is "therefore important to define (it)".

2.1. Scope of application

Where Directive 97/80/EC is most open to criticism is in Article 3, where it establishes a somewhat confused and limited scope of application. Issues addressed include *"the situations covered by Article 119 of the Treaty and by Directives 75/117/EEC, 76/207/EEC and, insofar as discrimination based on sex is concerned, 92/85/EEC and 96/34/EEC"*.

Directive 92/80/EC – was presented by the Commission on 20 September 1996. Generally speaking the provisions were more extensive than those in the final wording of Directive 97/80/EC: its scope included public social security; the shift in the burden of proof was expressly admitted if a respondent had applied a system of taken a decision lacking in transparency; the plaintiff did not have to prove fault on the part of the respondent; courts were able to direct effective investigation of any discrimination complaint; and there was a provision governing the plaintiff's right of access to documents held by the respondent.

In other words, Directive 97/80/CE applies to the situations covered by equal pay (Directive 75/117/EEC) and equal employment, training and professional promotion, and working conditions (Directive 76/207/EEC). The reference to situations covered by Directives 92/85/EEC on maternity, and 96/34/EEC – replaced by 2010/18/EU – on parental leave are potentially confusing since they might lead to the idea that the situations covered by other employment directives – such as those on occupational health, transfers of undertakings or guarantees for companies in difficulty should be excluded from the application of 97/80/CE, when the correct interpretation of the law is that these other directives should be included inasmuch as they are situations covered in the same manner in 75/117/EEC and 76/207/EEC[5].

Another confusing aspect is the non-mention of Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes. And while it is not expressly stated that this is a Directive that we should consider to fall within the scope of 97/80/EC, it is included inasmuch as this Directive is based on the principle of equal pay for work of equal value recognised in the Treaties and developed in Directive 75/117/EEC[6].

Directive 97/80/EC does not – perhaps fearing a flood of complaints which might plunge the finances into disarray – include Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security. Nor does it include Council Directive 86/613/EEC of 11 December 1986 on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity,

[5] The express reference to the application of the rules on the burden of proof in Directives 92/85/EEC, on pregnant workers and 96/34/EEC – superseded by 2010/18/EU – on parental leave, has disappeared without a trace in Directive 2006/54/EC (recast) as unnecessary in the context of these Directives and because of their confusing interpretation vis-à-vis the other directives on occupational matters, thus including the provisions of 75/117/EEC or 76/207/EEC.

[6] In accordance with the case law which has been reiterated on several occasions

and on the protection of self-employed women during pregnancy and motherhood – now replaced by European Parliament and Council Directive 2010/41/EU of 7 July 2010.

Does it include or exclude a social welfare benefit restricted by the worker's maternity? The CJEU judgment of 19.10.2017, C-531/15, in the Otero Ramos case (repeated in the CJEU judgment of 19.9. 2018, C-41/17, González Castro case), replies that the rule on the burden of proof of discrimination '*must be interpreted as applying to a situation such as that at issue in the main proceedings, in which a worker who is breastfeeding challenges before a national court or another competent body of the Member State concerned the assessment of the risks posed by her job on the ground that it was not carried out in accordance with Article 4(1) of Directive 92/85/EEC*'. The risk situation during breastfeeding is therefore a condition of occupational health -- and consequently of employment -- to which the rules on testing apply, even if national law covers it with social security benefits.

In this same Article 3, hardly has the Directive demarcated its scope when, from another perspective, it declares that it applies to "any civil or administrative procedure concerning the public or private sector which provides for means of redress under national law pursuant to the measures referred to", meaning both judicial and administrative procedures with the exception of "out-of-court procedures of a voluntary nature or provided for in national law" – notably, according to Recital (12) of the Preamble, mediation and conciliation procedures. Moreover, "*this Directive shall not apply to criminal procedures, unless otherwise provided by the Member States*".

2.2. Rules on the burden of proof

Article 4 on the distribution of the burden of proof, strictly speaking the substantive core of the Community instrument, establishes – in general terms with regard to the evidentiary responsibilities of both plaintiff and respondent – 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"* – Article 4 (1).

There are four points of clarification for the interpretation of rules on the burden of proof set out in Article 4(1) of the Directive that we will address here.

- The first point is, as regards the burden of proof on the plaintiff, the need to "*present facts"*[7] in order to shift the burden of proof to the defendant, so a simple allegation of discrimination accompanied by the integration of the plaintiff in the sex discriminated against will not suffice, since a simple allegation is not a fact, and the integration of the plaintiff into the sex discriminated against is only the presumption for discrimination to exist, but not a fact from which it may be established. It may however be sufficient for the plaintiff to allege a fact without having to prove it, provided that the certainty of that fact results from other valid mechanisms of establishing the facts (for example, the fact is well known, uncontested or admitted to be true

[7] Not all language versions use expressions that can be translated literally into Spanish as "*presenter hechos* [present facts ", for example: the English version says "*establish facts*;" the French version says "*établit des faits*" [establish facts]; the Italian version says "*abbia prodotto elementi di fatto* [*produced elements of fact]*". The version closest to the Spanish one is in Portuguese: "*apresentar elementos de facto*" [present element of facts] . However, the same interpretative conclusions can be reached with the expressions establish facts (English and French versions), or produced elements of fact (Italian version), or present elements of fact (Portuguese version) as with the Spanish version '*present facts'.* In conclusion, a mere allegation of discrimination is never sufficient. The allegations have to be based on facts.

by the defendant). Such facts could also stem from the defendant's evidence (principle of acquisition of evidence).

The second point of clarification for the interpretation of the rule concerns the scope of the word "*presume.*"[8] Any interpretation that clings to the letter of the law would result in recognising circumstantial evidence in the classical sense. In other words, by applying a rational criterion to a proven underlying fact, a court would be able to deduce that sexist behaviour had occurred. We would have indirect, rather than direct, evidence of the sex discrimination. In both cases, of course, we would be founding our judgment on legal truth (juicio de veracidad), i.e. we would be requiring the plaintiff to produce absolute proof of either the discriminatory fact (direct evidence) or the underlying fact from which we can deduce the discriminatory fact (indirect evidence).

However, the word *"presume"* can be interpreted more broadly than that, enabling us to found our judgment on credibility (juicio de verosimilitud), in accordance with the principle of prima facie, preliminary or presumptive evidence, which rests on justifications or appearances rather than absolute proof[9]. The judicial history points in this direction with the admission of statistical evidence[10]. And Directive 2006/54/EC endorses this

[8] There is no difference in the use of this verb between the various language versions. For example: the same verb 'presumir' is used in the Spanish version as in the English ('*establish facts from which it may be presumed*'), French ('*établit des faits qui permettent de présumer* [establish facts from which it may be presumed'), Italian ('*abbia prodotto elementi di fatto in basi ai quali si possa presumere'* [produced elements of fact from which it may be presumed), and Portuguese ('*elementos de facto constitutivos da presunção de discriminação directa ou indirecta*' [elements of fact from which it may be presumed that there has been direct or indirect discrimination] versions; The German version uses a verb (*vermunten")* with a meaning similar to "*presumir*" in Spanish.

[9] Throughout this presentation we shall be referring to the principle of prima facie evidence or presumptive evidence or preliminary evidence, as well as to concepts just as justification and appearance, using these in the broadly equivalent sense of probative mechanisms which lead a court to suspect strongly that discrimination occurred. In so doing we shall be departing to some degree or other from the reference model which, in a civil law system, establishes a standard of direct or indirect proof. It should be said that there is no doctrinal consensus about the precise meaning of any of these terms. We have opted to standardise the terminology, aware of the risk that we may be sounding a little imprecise, given that the imprecisions do not seem relevant to the purposes of this presentation.

[10] There are also explicit references to statistical evidence in Recital (10) of Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to

when it states, in Recital (30) of its Preamble, that "provision should therefore be made to ensure that the burden of proof shifts to the respondent when there is a prima facie case of discrimination".

The third point of clarification for the interpretation of the rule is, as regards the burden of proof on the defendant, the need to prove that *'there has been no breach of the principle of equal treatment*'. Although the wording of the rule is excessively general, that general tenor must not be interpreted as imposing on the defendant the burden of proving a negative fact, such as the absence of sex discrimination, constituting a *probatio diabolica* [devil's proof] like all proofs of a negative fact. What the defendant has to prove is the positive fact of an objective justification for his or her action or conduct that is unrelated to sex discrimination.

- The fourth point of clarification for the interpretation of the rule is its minimal content, but which can at the same time be potentially expanded to a finalist interpretation. The Directive could actually establish presumptions of discrimination on the basis of certain objective facts such as the lack of transparency in the undertaking's system of pay; an express provision for statistical evidence specifying the conditions under which it may be proposed and taken; the requirement for public bodies to provide statistical evidence; the regulation of a right of access by the plaintiff to documents held by the defendant; or the extension of the powers of the judicial body, giving it the power to decide on evidence of its own motion.

But this minimal content of the rule of the burden of proof can at the same time be potentially expanded in terms of a finalist interpretation. Several of the contents just referred to, which in principle are not found in the verbatim wording of Article 4 (1) of the Directive, will be deduced by the Court of Justice of the European Union on the basis of a finalist

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employment, vocational training and promotion, and working conditions. These Directives were recast in Directive 2006/54/EC.

interpretation of the rule (for example, the rule has not regulated the plaintiff's right of access to documents held by the defendant, but the CJEU has induced it in certain terms, invoking the finalist interpretation, in the CJEU judgment of 21.7.2011, C-104/10, in the Kelly case, and the CJEU judgment of 19.4.2012, C-415/10, in the Meister case).

In any event, the Directive leaves room for national laws to institute rules more favourable to plaintiffs – Article 4 (2) – and, among the possible improvements in the level of protection in national law, there is an option of allowing for courts or other bodies to investigate the facts, in which case the shift in the burden of proof will not apply – Article 4 (3) – which is logical, as the victim will not be subject to the burden of proof in such proceedings.

2.3. Extension of the rule to other areas and recasting of Directive 97/80/EC in Directive 2006/74/EC

It only remains to highlight what an important influence Directive 97/80/EC turned out to have on later Directives protecting other forms of equality[11] and equality outside the workplace[12], and the recast Directive 2006/54/EC of 5 July 2006[13], in particular its Article 19. This has been methodically positioned within the Chapter on *"remedies and enforcement"*

[11] Article 8 of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, and Article 8 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, which includes within its scope discrimination on grounds of religion or belief, disability, age and sexual orientation.

[12] Article 9 of Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services

[13] Recital (30) of the Preamble to Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) states – and this is worth noting insofar as the Preamble to a Directive is a crucial factor in its interpretation – that *"the adoption of rules on the burden of proof plays a significant role in ensuring that the principle of equal treatment can be effectively enforced"*, that *"provision should therefore be made to ensure that the burden of proof shifts to the respondent when there is a prima facie case of discrimination"*, that *"the appreciation of the facts from which it may be presumed that there has been direct or indirect discrimination remains a matter for the relevant national body"* and that *"it is for the Member States to introduce (...) rules of evidence which are more favourable to plaintiffs"*.

along with the other clauses devoted to effective judicial protection, a sign that the rule on the burden of proof was seen in that light, and, moreover, within the Title devoted to *"horizontal provisions"*, making it applicable to the full scope of Directive 2006/54/EC.

The sole – but important – difference between the rules in Directive 97/80/EC and all these subsequent Directives is that the concept of indirect discrimination is not constructed on the basis that it affects "a substantially greater proportion of the members of a given sex", but on the existence of a "particular disadvantage [for persons of one sex] compared with persons of the other sex" – see article 2(1)b) of Directive 2006/54/EC. This change in drafting, which finds explanation in Community case law on discrimination on the grounds of nationality[14], leads us to conclude that statistical proof is not the only way of demonstrating indirect discrimination.

3. Impact of Community legislation on the burden of proof in national law.

What is the current position of national law since the adoption of all the Community measures cited? In general terms we can see an increased importance given to the legislation on the burden of proof of discrimination, in tandem with constant convergence between common law jurisdictions, where the respondent already bore the burden of showing the absence of discrimination – United Kingdom[15] – and civil law jurisdictions, where

[14] The new wording shows in effect the intention of applying the principle applied in the prohibition of discrimination on grounds of nationality in the CJEU judgment of 23.5.1996 in C-237/94, O'Flynn to other forms of discrimination. In the judgment, about a social protection provision in the United Kingdom, where coverage of burial costs for a worker was only granted if the burial or cremation took place within the UK, it was reasoned that "*a provision of national law must be regarded as indirectly discriminatory if it is intrinsically liable to affect migrant workers more than national workers and if there is a consequent risk that it will place the former at a particular disadvantage",* adding that *"It is not necessary in this respect to find that the provision in question does in practice affect a substantially higher proportion of migrant workers. It is sufficient that it is liable to have such an effect*".

[15] In the UK, section 136 of the Equality Act 2010 states: "*(1) This section applies to any proceedings relating to a contravention of this Act. (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred. (3) But subsection (2) does not apply if A shows that A did not*

legislation, case law and doctrine are coming to accept judgment of veracity in the application of rules on the shifting of the burden of proof of discrimination – Italy[16], Spain[17] and Belgium[18].

4. Community case law

While the Community legislators were doing their homework by approving Directives defining rules about sharing the burden of proof in sex

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contravene the provision." In this manner, the respondent is required to prove the absence of discrimination if there are facts from which the court could conclude a breach. Rachel Crasnow analyses the specific mechanisms set up to favour the plaintiff which seek information in order to commence court proceedings effectively, particularly statutory questionnaires, which were a set of questions drafted such that they must be contested by the respondent, as they could be considered in their own right against the negative to be disputed or evasive questions, "Proving …", op.cit. However, the statutory questionnaire system (which put UK law ahead of Community law in evidentiary terms) was recently abolished as part of a government policy of reducing the burden on enterprises. Before this abolition, Tom Brown noted, among other useful tools for proving discrimination in UK law (1) requests for additional information in ordinary court procedures, and (2) the use of the legislation on personal data protection since in British law it is possible to request a copy of all this data including any opinion about an individual and any indications of the intentions of any person, "The shift of the burden of proof and access to evidence", (ERA – Trier, November 2016), accessible on www.era-comm.eu (in English and French).

[16] In Italy, article 40 of D.Lgs. 198 of 11 April 2006, the Code of equal opportunities between men and women – which recasts article 4.6 of Law 125 of 10 April 1991 – sets out the shifting of the burden of proof when the plaintiff shows "*facts, including those derived from statistical data"* that establish "*in precise and consistent terms the presumption of the existence of acts, agreements or conduct that are discriminatory on the grounds of sex*". Under article 2729 of the Italian Civil Code, mere presumption will only be admitted by a judge if it is serious, precise and consistent, such that, in the absence of the severity in article 40 cited above, doctrine holds that a less demanding evidentiary mechanism should be established than that derived from circumstantial evidence and that it should be similar to a judgment on the balance of probabilities, "*id quod plerumque accidit*", assessing the compliance of the company's operations with typical corporate management criteria.

[17] In Spain, constitutional case law has accepted the principle of proof with adequate leverage, equivalent to circumstantial evidence, for the purposes of shifting the burden of proof, from judgments 90/97 of 6 May, 74/1998 of 31 March, and 87/1998 of 21 April, explaining – judgment 17/2003 of 30 January, and others subsequently – that, for these purposes, "*both facts clearly indicative of the probability of a breach of substantive law and those that, while not showing such a clear connection and thus being more readily overcome, are however major enough to make a breach of a fundamental right a reasonable hypothesis, shall have probatory value*". But, "*in bringing credible proof or prima facie evidence of the offence, a simple declaration of discrimination or breach of a fundamental right will not be have the same force as that declaration reflected in facts*" – judgment 41/2006, of 13 February.

[18] In Belgium, article 33 of the Law of 10 May 2007 on the fight against discrimination between women and men, after establishing a general rule on the burden of proof in section 1, sets out non-exhaustively in sections 2 and 3 various facts which are enough to presume direct discrimination, namely "(1) elements which show some recurrence of unfavourable treatment towards a given sex... or (2) elements that reveal a situation where the victim is treated worse compared with the situation of a comparable person", or indirect discrimination, namely "(1) general statistics concerning the situation of the group of which the victim is a member, or generally known facts; or (2) the application of an intrinsically suspicious criterion; or (3) basic statistical information revealing unfavourable treatment". It is immediately clear on reading that this exceeds the standards of proof characteristic of civil law systems.

discrimination cases, the Court of Justice, the catalytic force behind this normative process, continued applying those rules, and if we examine all its case-law, we can draw the following conclusions about the burden-of-proof rules in proceedings relating to gender discrimination which, with appropriate modifications, could be extended to other forms of discrimination, creating a genuine common right to the defence of equal treatment:

4.1. Burden of proof on the plaintiff: general approach

Even prior to Directive 97/89/EC, the Court reasoned that "the burden of proving the existence of sex discrimination may shift when that is necessary to avoid depriving workers who appear to be the victims of discrimination of any effective means of enforcing the principle of equal pay" – ECJ 27/10/1993, Enderby. Thus, when applying Directive 97/89/EC, "[w]here employees plead that the principle of equal treatment has been infringed to their detriment and establish 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 that principle." ECJ 10/3/2005, Nikoloudi.

A simple allegation of discrimination is not enough, however, nor is the integration of the plaintiff into the sex discriminated against, since that is the presumption of the existence of discrimination, but not a fact from which it may be established; in this sense, it has been said that '*neither the mere allegations, nor the pregnancy of the civil servant can give rise to a presumption of discrimination on the grounds of sex"* (CJEU judgment of 26.10.2017, T-706/16 P, HB vs Commission; CJEU judgment of 7.11.2019, T-431/18, VN vs Parliament). But this nuance requires another qualification, namely that although discrimination may not be established by the mere fact

that a worker is pregnant, at no time is it required to prove the intention to discriminate since "*the Directive does not make liability on the part of the person guilty of discrimination conditional in any way on proof of fault or on the absence of any ground discharging such liability* ." (CJEU judgment of 8.11.1990, C-177/88, in the Dekker case).

4.2. Lack of transparency in corporate decisions

According to the emblematic CJEU judgment of 17.10.1989, C-109/88, in the Danfoss case (a genuine "leading case" from which the case law on the burden of proof of discrimination originates and which was the impetus for the drafting of Community regulations), *"where an undertaking applies a system of pay which is totally lacking in transparency, it is for the employer to prove that his practice in the matter of wages is not discriminatory, if a female worker establishes, in relation to a relatively large number of employees, that the average pay for women is less than that for men."*
Although the Danfoss case concerns gender discrimination in pay, the discriminatory element consisting of a total lack of transparency in the corporate decision can be applied accordingly to the selection of staff in recruitment or in collective redundancy, or to internal promotion with the aim of challenging the glass ceiling and/or the sticky floor as regards women, or persons in a discriminating group in general.

4.3. Terms of comparison in disputes concerning pay discrimination

If discrimination in pay is alleged, it is up to the plaintiff to prove the facts from which it may be established that:

(1) "*whoever receives lower pay than that paid by the employer to a colleague of the other sex performing the same work or work of equal value*", where *"the fact that a female employee who claims to be the victim of discrimination on the grounds of sex and the male comparator are classified in the same job category under the collective agreement governing their employment"* (CJEU judgment of 26.6.2001, C-381/99, Brunnhofer case); or

(2) "*the average pay for women is less than for men…in relation to a relatively large number of employees"* when the undertaking's system of pay is characterised by "a total lack of transparency" (ECJ, 17.10.1989, C-109/88, Danfoss case), which is logical because, if the plaintiff were forced to compare jobs in these cases, such total lack of transparency make it impossible to prove the existence of discrimination, leaving women workers defenceless on the proof front.

Note that whereas in Danfoss the comparison is performed against a relatively large number of employees of whatever category, in Brunnhofer the comparison is between two jobs. It may also be performed between two different occupations, even if a different collective agreement applies to predominantly female speech therapists and predominantly male pharmacists – ECJ 27/10/1993, C-127/92, Enderby. The aim, then, is not to carve a comparative rule in stone, but to identify the discriminatory situation in each specific case, and that obliges us to use, again on a case-by-case basis, different indicators to reach the same end.

If discriminatory prejudices can find their way in pay elements that affect the entire workforce, an occupational category or a job, or even other areas (for example, taking into account the different workplaces or production units of the company), the choice of the scope of comparison cannot be a constant if discrimination is to be effectively brought to light. The visibility of discriminatory prejudices through evidence or the principle

of proof requires the use of different modules in each case in order to achieve this goal.

One specific problem is that of piece-work pay. According to the CJEU judgment of 31.5.1995, Royal Copenhagen Case, C-400/93, if piece-work pay is used, it is not possible to shift the burden of proof to the company by taking into account the average pay of two groups of workers, one being male and the other female. However, this difference in average pay is indicative when *"individual pay consists of a variable element depending on each worker's output and a fixed element differing according to the group of workers concerned (and) it is not possible to identify the factors which determined the rates or units of measurement used to calculate the variable element in the pay."*[19]

The Danfoss doctrine is being applied: the lack of transparency in the criteria for determining the fixed and variable elements of piece-work allows the difference in average wages between male and female workers to be used as an indication of discrimination.

Could a hypothetical abstract comparison be used? The definitions of direct discrimination used in all the equality directives, insofar as they pertain to the situation where one person might be treated less favourably than another in a comparable situation, make it possible to use hypothetical comparators, even though, except in cases of discrimination on the grounds of pregnancy, the case law remains unchanged. Therefore, if the petitioner proves that her male colleagues have advanced up the corporate ladder and in terms of pay more than she, or her fellow female workers, there is no reason to refuse to

[19] It is also made clear in the Royal Copenhagen case that, ' *For the purposes of the comparison to be made, with regard to the principle of equal pay for men and women, between the average pay of two groups of workers paid by the piece, the national court must satisfy itself (1) that the two groups each encompass all the workers who, taking account of a set of factors such as the nature of the work, the training requirements and the working conditions, can be considered to be in a comparable situation and (2)that they cover a relatively large number of workers ensuring that the differences are not due to purely fortuitous or short-term factors or to differences in the individual output of the workers concerned.*". This requirement reflects the criteria for the relevance of the statistical test, which were later enshrined in the Nicole Seymur-Smith and Laura Perez case.

use a hypothetical comparison without specifying a particular worker or group of workers as a third comparator, since there would be an indication or suspicion of discrimination.

4.4. Statistical evidence of adverse impact

The ECJ's judgment of 9/2/1999 in the matter of Nicole Seymour-Smith and Laura Pérez (C-167/97) – which is the case where statistical evidence was presented in its most technical contours – applies the following three criteria to evaluating statistical data for the purpose of establishing proof of discrimination: *"whether they cover enough individuals, whether they illustrate purely fortuitous or short-term phenomena, and whether, in general, they appear to be significant".* As to the time frame for testing the statistics, it is for the national court *"taking into account all the material legal and factual circumstances",* to determine the point in time at which the legality of a rule of the kind at issue is to be assessed[20].

The ECJ's judgment of 6/12/2007 in Ursula Voß (C-300/06) picks up the doctrine underlying the case of Nicole Seymour-Smith and Laura Pérez, arguing that *"the best approach to the comparison of statistics is to consider, on the one hand, the proportion of men in the workforce affected by the difference in treatment and, on the other, the proportion of women in the workforce who are so affected"*, and that *"(i)f the statistics available indicate that, of the workforce, the percentage of part-time workers who are women is considerably higher than the percentage of part-time workers who are men"*, this constitutes evidence of apparent sex discrimination.

[20] There are two theoretical approaches. One is to consider the entire period during which the instrument applied – the diachronic criterion – and the other is to examine a specific point in time – the synchronic criterion – begging the question of what point in time to choose, the point when the instrument was adopted, which would require the authorities to legislate with gender in mind, or the moment of application, which would mean considering any subsequent social changes. This question was relevant to the case of Nicole Seymour-Smith and Laura Pérez, because eight years had passed between the date of adoption and its application. The Court of Justice avoided providing a universal answer.

There are several disputes from Spain where the question has been raised as to whether social security regulations have an adverse impact on female groups, such as part-time workers in Spain. These disputes have revealed a number of developments in case law concerning the requirements for valid statistical evidence to constitute a presumption of discrimination.

- It has been considered discriminatory to require part-time workers, the overwhelming majority of whom are women, to contribute for a period which, compared with full-time workers, is proportionally longer in order to qualify, where appropriate, for a contributory retirement pension in an amount which is already reduced in proportion to the part-time nature of their work, thus projecting the part-time nature onto the requirement for a qualifying period and the amount of the pension, and thereby generating a double penalty (CJEU judgment of 22.11.2012, C-385/11, Elbal Moreno case).

- But in the Cachaldora case (CJEU judgment of 14.4.2015, C-527/13), the Court delivered a judgment in the General Chamber unusually contrary to the decision of the Advocate General, rejecting the existence of an adverse impact because it has not been statistically proven that the rule in question applies more to women than to men, that the general statistics that there are more women than men working part-time are valid (statistic which were considered valid without further consideration in the Elbal Moreno case, nonetheless), and, in the absence of such a finding, there is no adverse impact (which means the burden of providing detailed statistics that are difficult for the public to know lies with the plaintiff). Moreover, the rule is either randomly detrimental or beneficial depending on the circumstances of the part-time worker (that is to say, it is not a rule that is ipso facto detrimental to the part-time worker). A judgment in which, as the Court of Justice has held, it *"falls back into its deepest folds in order to establish indirect discrimination"*.

- More recently, in the Espadas Recio case (CJEU judgment of 9.11.2017, C-98/15) the CJEU returned to the Elbal Moreno doctrine and departed from the Cachaldora doctrine, arguing that, in the specific case, it has been statistically proven that there is a majority of women in vertical part-time work, which is the one affected by the rule, and that the rule does not appear to benefit part-time workers in any event.

This more flexible (and, from the perspective of the right to defence, more reasonable) trend in terms of providing statistical evidence to accredit an adverse impact constituting indirect sex discrimination for the prosecution of regulatory provisions, which is manifested in the Espadas Recio case, is consolidated, we hope, in an already definitive manner, in the CJEU judgment of 3.10. 2019, C-274/18, Minoo Schuch-Ghannadan case, according to which Article 19 of Directive 2006/54/EC '*must be interpreted as not requiring a party who considers itself wronged by such discrimination to produce statistics or facts on the workers concerned by the national legislation in question in order to establish a presumption of discrimination, if that party does not have access to such statistics or facts or has access to them only with great difficulty*'.

The Cachaldora doctrine should therefore be assessed, as an exception which is difficult to reapply, in the face of the general tendency to relax the burden of providing statistics expressed in the Elbal Moreno/Espadas Recio/Minoo Schuch-Ghannadan doctrine.

4.5. Employer's refusal to provide information

According the Court's judgment of 21 July 2011 in the Kelly case (C-104/10), the provision on the burden of proof in cases of discrimination does not entitle an applicant for vocational training who believes that his

application was not accepted because of an infringement of the principle of equal treatment to information held by the course provider on the qualifications of the other applicants, although the Court then makes the point that access to this information cannot be refused if, in the context of establishing such facts, the Community provision would be deprived of its effectiveness. In this event, the course provider will supply the information, while respecting the right of the other applicants to confidentiality.

The doctrine of the Kelly case has been reiterated and completed with interesting nuances in the CJEU judgment of 19.4.2012, C-415/10, in the Meister case, where the applicant claimed she was refused employment on the basis of cumulative multiple discrimination arising from her sex, mature age her ethnic origin.

The Court begins by reiterating the initial premise established as a general rule in the Kelly case (where it referred only to the directives on sex discrimination and now extends it to the directives on age and ethnic origin): the rules on the burden of proof in the directives concerned *'must be interpreted as not entitling a worker who claims plausibly that he meets the requirements listed in a job advertisement and whose application was rejected to have access to information indicating whether the employer engaged another applicant at the end of the recruitment process.'*.

However, ‘ *it cannot be ruled out that a defendant’s refusal to grant any access to information may be one of the factors to take into account in the context of establishing facts from which it may be presumed that there has been direct or indirect discrimination.* It is nonetheless *for the referring court to determine whether that is the case in the main proceedings, taking into account all the circumstances of the case before it*,' even though several circumstances to be taken into consideration (in the legal argument, which undoubtedly lead to a suspicion of discrimination) are indicated (with the obvious aim of providing a useful response to the national court) that:

- *"unlike in* Kelly*, the employer in question in the main proceedings seems to have refused Ms Meister any access to the information that she seeks to have disclosed" (*paragraph 44*);*

- "*Speech Design (the defendant company) does not dispute that Ms Meister's level of expertise matches that referred to in the job advertisement, as well as the facts that, notwithstanding this, the employer did not invite her to a job interview and she was not invited to interview under the new procedure to select applicants for the post in question"* (paragraph 45).

4.6. Burden of proof on the defendant

In the light of the plaintiff's evidence, the respondent can either (1) "dispute the fact that the conditions for the application of the principle of equal pay for men and women are met in the case", which would be counter-evidence designed to invalidate the indications of discrimination, or (2) "put forward objective grounds, unrelated to any discrimination based on sex, to justify the difference in pay", which would conclusively disprove any link between those indications, in themselves undisputed, and the conclusion that they were discriminatory – ECJ 26/6/2001, C-381/99, Brunnhofer.

5. Statistical evidence

There is a close theoretical and practical relationship between indirect discrimination and statistical evidence, although the intensity of this relationship varies, depending whether the strict model or the tempered

variation apply. The strict model is characteristic of the United States, where statistical evidence is managed from a technical perspective using fairly well defined criteria to quantify the adverse impact, the most common indicators being adverse impact on selection[21] and deviation analysis[22]. But defining the elements for comparison poses problems, whether within the company[23] or, the other element of comparison, the number of applicants[24] or the qualified population within the local labour market[25].

These problems, of which what we just heard was only a sample, have doubtless attenuated the role of statistical evidence of adverse impact in Europe, and in the United Kingdom courts have placed more trust in common sense and in general experience and knowledge than in statistical insights, given that in any case an employer cannot be expected to disclose the gender composition of the company. In the United States, too, critical views have been expressed, the wittiest by a judge who reckoned that *"Too*

[21] The Equal Employment Opportunities Commission has published Uniform Guidelines on Employee Selection Procedures, which show how to calculate an adverse impact on the rate of selection using a rule of thumb known as the "4/5ths" or "80%" rule, which is obtained in four steps: (1) Calculate the rate of selection for each group – for example, if 100 whites apply and 52 are taken on, the rate is 52%, and if 14 people are recruited from 50 black applicants, the rate is 28%. (2) Observe which group has the highest selection rate – in this example the whites. (3) Calculate the impact ratios by comparing the selection rate for each group with that of the highest group – in this example, divide 28 by 52. (4) If the result is less than 4/5 or 0.80, an adverse impact is indicated – in the example, the result is 0.538, which indicates an adverse impact. Source: Adoption of questions and answers to clarify and provide a common interpretation of the Uniform Guidelines on Employee Selection Procedures, Federal Register 44, no. 43, 2.3.1979, page 11998.

[22] In the case of Hazelwood School District vs. United States, 433 US 299 (1977), deviation analysis was accepted as a method, and figures more than double or triple were significant. Let us take a closer look: From 1972 to 1974 Hazelwood hired 15 black teachers out of 405 new recruits. The court upheld the government's plea that in the area of employment – including the city of Saint Louis – 15.4% of those qualified were black, so that it might have been expected that 62 black teachers would be taken on, so the deviation – from 15 to 62 – was more than fourfold, prima facie evidence of an adverse impact. However, if the city of Saint Louis was excluded, the percentage of qualified black teachers fell to 5.7%, and so the District could have been expected to recruit 23 black teachers, and the deviation, from 15 to 23, was less than twofold: no indication of adverse impact. The Supreme Court – which does not resolve these matters directly – establishes criteria for evaluating these statistics and refers the matters back to the court of instance.

[23] It is one thing to assess the sexual structure of the entire company workforce, which would rule out demonstrating an adverse impact in companies with a high percentage of unskilled female labour, and another to assess the sexual structure of a higher occupational category or of the workers hired as a result of a particular job offer, which are far more demanding criteria.

[24] Known as "flow statistics". The trouble with this criterion is that focusing on applicants may exclude qualified individuals if the job offer has been configured in a discriminatory way.

[25] Known as "stock statistics". The trouble with this criterion – adopted in the EEOC Guidelines – is that it is not always easy to delineate the area where the company is active.

many use statistics as a drunk man uses a lamppost – for support and not for illumination"[26].

What is the model used in Community law? Given that the concept of indirect discrimination in Directives 2000/43/EC, 2000/78/EC, 2004/113/EC and 2006/54/EC is constructed upon a particular disadvantage, and not on the adverse impact – as in Directive 97/80/EC – we are inclined to believe that this should not be applied in strict terms, at least when there are other inferences or corroboration. However, the CJEU has been more demanding in the technical aspects of the statistics in certain cases where perhaps some weight was given to the fact that they were questioning national laws and not just corporate decisions (in practice in Nicole Seymour-Smith and Laura Pérez, and in Cachaldora, cited above).

One way or the other, statistical evidence has been a departure point for applying the doctrine of more flexible burden-of-proof rules to cases of indirect sex discrimination. But submitting such data is not a demand that must be rigorously implemented on pain of losing the proceedings. Every case will require the court to determine whether the statistics submitted, by themselves or in conjunction with other evidence and with the court's own knowledge of social realities, enable us to constitute a body of evidence that triggers a shift in the burden of proof. Any rigorous rules on the value of statistics can thus only be relative, and it is impossible to devise universally valid rules that will apply in every instance.

6. Public assistance for discrimination victims

Article 13 (2) of Directive 2000/43/EC, which has no match in Directive 2000/78/EC, Article 12 (2) (a) of Directive 2004/113/EEC and Article 20 (2) (a) of Directive 2006/54/EC bestow upon the equality bodies

[26] To quote Keely versus Westinghouse Electric Corporation, 404 FSupp. 573 (E.D.Mo. 1975).

a responsibility for providing "independent assistance to victims of discrimination in pursuing their complaints about discrimination". And assistance to victims must include matters of evidence, which are particularly relevant where there is a suspicion of indirect discrimination, because individuals may not have access to the evidence they are called upon to submit, whether for technical reasons or due to the cost.

Article 4 of the Proposal for a Directive on the burden of proof in cases of discrimination based on sex, of 24/5/1988, already obliged Member States to establish measures to ensure that *"courts or other competent authorities should have all the powers they require to consider complaints effectively".* The fact that this regulation was not incorporated into the definitive text of97/80/EC, and does not appear in 2000/43/EC, 2000/78/EC or 2006/54/EC, does not justify national legislations that fail to offer evidentiary support to the victims of discrimination when such Directives, on a general level, require public support for the victims of discrimination.

An example of public assistance for the victims of discrimination can be found in Spanish Law, in article 13 of the Organic Law on Effective Equality for Men and Women (2007), which stipulates that, in terms of the application of the rules on the assignment of burden of proof, "the judicial body, at the behest of a party, may call for a report or opinion to be provided by the competent public bodies, where deemed useful or relevant" – which can refer to any body with competencies corresponding with the usefulness of the evidence, rather than solely bodies focused on equality. The Law Regulating Social Jurisdiction (2011) enables the judicial body to request the aforementioned report or opinion in any proceedings relating to discrimination.

7. Brief concluding remarks

Conventional rules on the burden of proof as expressed in the classical aphorisms *"ei incumbit probatio qui dicit, non qui negat"* and "da mihi factum, dabo tibi ius" are too rigid when it comes to proving discriminatory sexist conduct because conduct of this kind is always changing shape, displays many subtleties and is usually concealed beneath a mantle of legitimacy. Consequently, as evidence is an essential factor in protecting people from such conduct, a need has arisen to make the rules on the burden of proof more flexible by opening up evidentiary methods. Otherwise there is a risk that gender equality laws will be confined to a limbo of statements of good intent.

This is not – either in Community legislation and case-law or in the legislation and case-law of Member States – a genuine reversal of the burden of proof in the strict technical sense, because the plaintiff has the duty to submit evidence of presumptive discrimination on the grounds of sex. The burden of proof is shared, so that once the plaintiff has met this requirement, the focus shifts to the respondent, who must prove that his motives had nothing to do with gender discrimination, and if he has acted rationally, as a good employer can be expected to do, this should not turn out to be difficult.

Sharing the burden of proof between the parties is designed to lighten, alleviate, attenuate, correct, facilitate, flexibilise or modulate (some of the most frequent expressions used) the burden on the plaintiff, while adding to the burden of the respondent, although the criteria for sharing this load are open rather than rigid, and can be adjusted to each specific case. Hence the distribution of the burden of proof with regard to sex discrimination cannot be compressed into an open formula geared to encouraging judges to be receptive so as to make it possible to apply evidence rules more flexibly in light of the circumstances of the case.