INDIRECT DISCRIMINATION IN THE PRACTICE OF THE UNITED NATIONS HUMAN RIGHTS TREATY BODIES: TESTING ORIGINALITY AND COHERENCE

by

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A Thesis submitted to the

Graduate School of Social Sciences and Humanities

for the degree of

LL.M. in Public Law

Koç University

Spring 2016

Koc University

Graduate School of Social Sciences and Humanities

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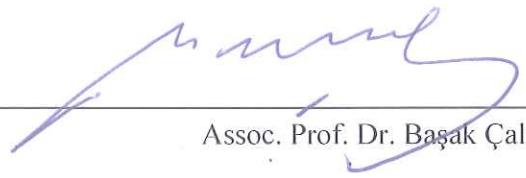

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Date: 25 Mayıs 2016

Abstract

The prohibition on indirect discrimination is a widely shared normative ideal but its application varies in different jurisdictions. The United Nations human rights treaty bodies have also applied indirect discrimination within the scope of the prohibition on discrimination and the right to equality. This thesis aims to analyze the approach of the United Nations human rights treaty bodies to indirect discrimination. It examines, firstly, how the approach of the UN treaty bodies locates in the broader jurisprudential context in which the doctrine of indirect discrimination has been developed. It aims to see whether UN treaty bodies adopt sui generis or original interpretation and application compared to other domestic and regional courts. Secondly, it focuses on converging and diverging points in the practice of each UN treaty body under examination. It asks whether there is a unified approach to indirect discrimination at the level of the UN human rights law. Based on a comprehensive examination of the texts of the UN human rights treaties, the views of the treaty bodies on individual communications, general comments or recommendations, and concluding observations, the thesis argues that treaty bodies do not have an original approach to the interpretation of indirect discrimination. However, in the application, they are able to extend the scope of indirect discrimination due to their quasi-judicial character. Further, the thesis shows that the UN treaty bodies do not provide a uniform approach to indirect discrimination. Diverging points in the application of indirect discrimination can be attributed to the differences in the rights and groups covered by each treaty body.

Keywords: Indirect discrimination, United Nations, treaty body, human rights, the right to equality

Öz

Dolaylı ayrımcılık yasağı yaygın biçimde kabul gören bir kural olmakla beraber uygulaması farklı yargı çevrelerinde çeşitlilik göstermektedir. Birleşmiş Milletler insan hakları sözleşme organları da ayrımcılık yasağı ve eşitlik hakkı kapsamında dolaylı ayrımcılığı uygulamaktadır. Bu tez, Birleşmiş Milletler insan hakları sözleşme organlarının dolaylı ayrımcılığa yaklaşımlarını analiz etmeyi amaçlamaktadır. Öncelikle, BM sözleşme organlarının yaklaşımının, dolaylı ayrımcılığın geliştiği daha genel yargısal bağlamda nerede durduğunu incelemektedir. BM sözleşme organlarının diğer ulusal veya bölgesel yargı çevrelerine kıyasla kendine özgü ya da özgün bir yorum ve uygulama geliştirip geliştirmediğini incelemektedir. İkinci olarak bu çalışma, incelenen her bir BM sözleşme organının uygulamasında ayrışan ve benzeşen noktalara odaklanmaktadır. BM insan hakları hukukunda dolaylı ayrımcılık konusunda yeknesak bir yaklaşımın bulunup bulunmadığını sorgulamaktadır. Bu tez, BM insan hakları sözleşme metinlerinin, sözleşme organlarının bireysel başvurular hakkındaki görüşlerinin, genel yorum veya tavsiyelerin ve nihai gözlemlerin kapsamlı bir incelemesine dayanarak, sözleşme organlarının dolaylı ayrımcılığa özgün bir yorum getirmediklerini savunmaktadır. Fakat yarı-yargısal niteliklerinin bir sonucu olarak uygulamada dolaylı ayrımcılığın kapsamını genişletebilmişlerdir. Bu tez ayrıca BM sözleşme organlarının dolaylı ayrımcılık konusunda yeknesak bir yaklaşımlarının olmadığını da göstermektedir. Dolaylı ayrımcılık uygulamasında ayrıştıkları noktalar, her bir sözleşme organının ilgilendiği hakların ve grupların farklı olmasına bağlanabilir.

Anahtar kelimeler: Dolaylı ayrımcılık, Birleşmiş Milletler, sözleşme organı, insan hakları, eşitlik hakkı

Acknowledgements

I would like to thank all those people who made this thesis possible for me.

First of all, I owe my special thanks to my thesis advisor Assoc. Prof. Başak Çalı for her great academic guidance, ongoing support and encouragement. I am grateful for her valuable feedback. I feel lucky to learn international human rights law from her and have the chance to work with her.

I would also like to thank Prof. Bertil Emrah Oder for her outstanding teaching, and Dr. Zeynep Oya Usal Kanzler and Zeynep Elibol Brönneke for their support and guidance throughout the LL.M. programme. My special thanks are also extended to Esra Özcan and Funda Mürekepçi who replied all my questions with great patience.

My interest in international human rights was first sparked during my undergraduate studies at Bilkent University and I would like to thank Assoc. Prof. Ece Göztepe for her great teaching and encouragement.

I am grateful to my dear friend Ekin Yıldıran who showed a great kindness to proofread entire thesis and provided me the funniest comments ever! I am also thankful to my dear friends Deniz Yıldız, Melike Yıldız, Irina Crivet, Ezgi Arık, and Aysu Bankoğlu for making this LL.M. journey enjoyable.

This thesis would not have been possible without great love and support from my family. First of all, I would like to thank my sister Hanife Alptekin and brother-in-law Murat Alptekin for their hospitality. My greatest gratitude is for my beloved parents Sülbiye Durmuş and Selahattin Durmuş who worked so hard for my education and well-being. This work is dedicated to my mother (*nanaşḱimi*).

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Introduction

This thesis provides an analysis of the approach of the United Nations human rights treaty bodies to indirect discrimination. It asks whether the UN treaty bodies have a sui generis interpretation and application of indirect discrimination compared to well-established canons of indirect discrimination, and whether the approach is coherent across the UN treaty bodies. It aims to answer these questions through a close reading of the United Nations human rights treaties, general recommendations or comments of the treaty bodies, views on individual communications and concluding observations. By this way, this thesis fulfils a two-fold objective. Firstly, it locates the paradigm of the United Nations human rights law in the broader jurisprudential context of indirect discrimination. Secondly, it reveals the converging and diverging points on indirect discrimination within the United Nations treaty-based human rights law.

Indirect discrimination is a judicially invented concept that originated in the United States employment discrimination law. It was used for the first time by the U.S. Supreme Court in Griggs v. Duke Power Company (hereinafter *Griggs*) in 1971 to outlaw the written test requirement for job transfers. The rationale behind the Court's decision was "tests or criteria for employment or promotion may not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox."[1] It established that identical treatment of people in different situations could constitute a breach of the principle of equality. Thus, indirect discrimination emerged as a concept challenging formal understanding of equality which is often associated with the Aristotelian maxim of equality, i.e. equal treatment of likes.[2] Indirect discrimination can be briefly formulated as referring to situations where a facially neutral measure results in an unjustified adverse effect upon a certain group or individual. This neutral measure can act as a barrier to the access to equal opportunities. The doctrine of indirect

[1] Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) [hereinafter Griggs].
[2] ARISTOTLE, NICOMACHEAN ETHICS 118 (Martin Ostwald trans., The Liberal Arts Press 1975)

discrimination represents a shift from the emphasis on overt forms of discrimination to more subtle forms that can be detected through focusing on effects.

Although originated in the United States and in the context of employment law, the concept of indirect discrimination has gained widespread use. It travelled to other domestic jurisdictions most notably the United Kingdom and Canada. It also has been employed by regional courts such as the Court of Justice of the European Union (CJEU) and European Court of Human Rights. (ECtHR)[3]. United Nations human rights law has not been immune from this concept importation. Indirect discrimination, as an ideal, has been employed in these jurisdictions, yet different approaches have emerged in its application. The interpretation of neutrality, adverse effect and barrier elements of indirect discrimination as well as the justification grounds for indirect discrimination varies considerably in each jurisdiction.

Indirect discrimination has also travelled to the United Nations human rights law and became a part of the general prohibition on discrimination. The right to equality and non-discrimination in the United Nations human rights treaty system has attracted scholarly attention. However, the focus on indirect discrimination is either lacking or very limited. Some of the existing studies are concerned with one or two of the UN treaty bodies and pay limited attention to indirect discrimination.[4] The only study

[3] See generally Rosemary C. Hunter & Elaine W. Shoben, *Disparate Impact Discrimination: American Oddity or Internationally Accepted Concept*, 19 Berkeley J. Emp. & Lab. L. 108, 152 (1998); RONALD L. CRAIG, SYSTEMIC DISCRIMINATION IN EMPLOYMENT AND THE PROMOTION OF ETHNIC EQUALITY 41-71 (2007); SANDRA FREDMAN, DISCRIMINATION LAW 177-190 (2011) [hereinafter FREDMAN, DISCRIMINATION LAW].

[4] See Simone Cusack & Lisa Pusey, *CEDAW and the Rights to Non-Discrimination and Equality*, 14 Melb. J. Int'l L. 54, 92 (2013); Rikki Holtmaat & Christa Tobler, *CEDAW and the European Union's Policy in the Field of Combating Gender Discrimination*, 12 Maastricht J. Eur. & Comp. L. 399, 426 (2005); Tufyal Choudhury, *Interpreting the Right to Equality under Article 26 of the International Covenant on Civil and Political Rights*, 8 Eur. Hum. Rts L. R. 24, 52 (2003); Patrick Thronberry, *Confronting Racial Discrimination: A CERD Perspective*, 5 Hum. Rts. L. Rev. 239, 270 (2005); Oddný Mjöll Arnardóttir, *A Future of Multidimensional Disadvantage Equality?* in THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: EUROPEAN AND SCANDINAVIAN PERSPECTIVES (Oddný Mjöll Arnardóttir and Gerard Quinn eds., 2009) [hereinafter Arnardóttir, *A Future of Multidimensional Disadvantage Equality?*]; Theodor Meron, *The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination*, 79 Am. J. Int'l L. 283, 318 (1985).

which takes a holistic approach by covering all the UN treaty bodies does not provide a detailed analysis of indirect discrimination.[5] This thesis contributes to the existing scholarly work with its specific focus on indirect discrimination and by locating the United Nations treaty body system in the wider jurisprudential context. It does not limit itself with one specific UN treaty body but takes a holistic approach through covering all the relevant UN treaty bodies.

The analysis of the interpretation and application of indirect discrimination at the United Nations level is an important task for various reasons. Firstly, there are two treaties at the UN level particularly designed to eliminate discrimination, namely the Convention on the Elimination of Racial Discrimination (ICERD)[6] and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)[7]. The analysis of the application of these two treaties can provide important insight into the contested issues around the concept of indirect discrimination. Secondly, focusing on the United Nations treaty bodies provides an opportunity to see whether and, if so, how treaty bodies diverge with respect to the interpretation and application of indirect discrimination. The rights and freedoms and right-holders covered by each treaty are not the same. For instance, the International Covenant on Civil and Political Rights (ICCPR)[8] and the International Covenant on Economic, Social and Cultural Rights (ICESCR)[9] differ on the nature of the rights and freedoms on which they focus. Regarding the right-holders, while CEDAW is concerned exclusively with the discrimination suffered by women, CERD focuses on the discrimination against racial groups. On the other hand, the Convention on the Rights of Persons with Disabilities

[5] See WOUTER VANDENHOLE, NON-DISCRIMINATION AND EQUALITY IN THE VIEW OF THE UN HUMAN RIGHTS TREATY BODIES (2005)

[6] International Convention on the Elimination of All Forms of Racial Discrimination, adopted Dec 211965, G.A. Res. 2106 (XX), U.N. GAOR, 20th Sess., 660 U.N.T.S. 195 (entered into force Jan 4, 1969) [hereinafter ICERD].

[7] Convention on the Elimination of All Forms of Discrimination Against Women, adopted Dec 18, 1979, 1249 U.N.T.S. 13 (entered into force Sep 3, 1981) [hereinafter CEDAW].

[8] International Covenant on Civil and Political Rights, opened for signature Dec 16, 1966, 999 U.N.T.S. 171, 172 (E), 187 (F) (entered into force 23 Mar 1976). [hereinafter ICCPR]

[9] International Covenant on Economic, Social and Cultural Rights, opened for signature 16 Dec 1966, 993 U.N.T.S. 3, 4 (E), 13 (F) (entered into force 3 Jan 1976). [hereinafter ICESCR]

(CRPD)[10] provides protection only for the disabled persons. Thereby, the focus of this study enables making a right-based and group-based comparison with regard to the application of indirect discrimination. Thirdly, the number of states parties to the United Nations human rights treaties is high[11] and their application is not limited to one continent or a certain region. This means the problems giving rise to indirect discrimination and groups who are the victims of indirect discrimination are more diverse compared to other jurisdictions. Lastly, the United Nations treaty bodies perform different functions during the review process of the individual communications and the constructive dialogue in which they deliver concluding observations for each state party.[12] The work of the treaty bodies "draw inspiration from both the political approaches of inter-governmental entities as well as the strictly legal approaches of the judicial institutions."[13] This quasi-judicial model makes the United Nations treaty body system an important forum for the discussion of indirect discrimination due to the broad coverage of the issues of inequality and discrimination.

The thesis argues that treaty bodies do not offer a sui generis interpretation of indirect discrimination, but rather they reflect the approaches prevalent in the broader jurisprudential context. In the application of the concept to the individual cases and certain issues, however, they are able to extend the scope of indirect discrimination. The flexibility on the scope can be attributed to the quasi-judicial model that they represent. The thesis further argues that treaty bodies do not present a uniform approach. Although they converge on the elements of neutrality and barrier, they diverge on the way they apply the adverse effect element and the justification phase. The divergence, at certain points, derives from the differences with regard to the rights and the groups covered.

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[10] Convention on the Right of Persons with Disabilities, opened for signature Mar 30, 2007, 2515 U.N.T.S. 3 (entered into force May 3, 2008) [hereinafter CRPD].

[11] By May 2015, the numbers of states parties to the ICCPR, ICESCR, CERD, CEDAW and CRPD are, respectively, 168, 164, 177, 189 and 154 (accessed via https://treaties.un.org/)

[12] See OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, THE UNITED NATIONS HUMAN RIGHTS TREATY SYSTEM FACT SHEET NO. 30/REV. 1, at 28 (2012).

[13] Michael K. Addo, *Practice of United Nations and Human Rights Treaty Bodies in the Reconciliation of Cultural Diversity with Universal Respect for Human Rights*, 32 Hum. Rts. Q. 601, 615 (2010).

Scope of the Thesis

There are currently ten treaty bodies which monitor the application of the United Nations human rights treaties. The scope of this thesis is limited to five of these treaty bodies, namely the Human Rights Committee (HRC), the Committee on Economic, Social and Cultural Rights (CESCR Committee), the Committee on the Elimination of Racial Discrimination (CERD Committee), and the Committee on the Elimination of Discrimination against Women (CEDAW Committee) and lastly the Committee on the Rights of Persons with Disabilities (CRPD Committee). The first reason for choosing these particular treaty bodies is the type of non-discrimination clause which they rely on. The ICERD, CEDAW and CRPD contain a comprehensive definition of discrimination which covers not only the purpose but also the effect of an unequal treatment.[14] This comprehensive definition opens a door for indirect discrimination. Although this type of definition is not available in the texts of the ICCPR and ICESCR, the HRC and CESCR Committee interpreted their discrimination clauses broadly as including the comprehensive definition.[15] The second reason is that, in the practice, these treaty bodies have applied indirect discrimination widely either in their views on individual communications or in the concluding observations.[16]

The remaining five treaty bodies, on the other hand, are not relevant for the aim and subject of this thesis. Firstly, the Convention against Torture and International Convention for the Protection of All Persons from Enforced Disappearance do not contain discrimination clauses. Therefore, the works of the Committee against Torture, the Sub-Committee on the Prevention of Torture, and the Committee on Enforced Disappearance which monitor these treaties are excluded. Secondly, the Convention on the Rights of the Child and the International Convention on the Rights of All Migrant

[14] ICERD, *supra* note 6, art.1; CEDAW, *supra* note 7, art.1; CRPD, *supra* note 10, art.2

[15] See *General Comment No. 18, Non-Discrimination*, Hum. Rts. Comm., 37th Sess., ¶ 7, U.N. Doc. CCPR/C/21/ Rev.1/Add.1 (10 Nov.1989); *General Comment No. 5, Persons with Disabilities*, Comm. on Econ., Soc. & Cult. Rts., 11th Sess., 38th mtg., ¶ 15, U.N. Doc. E/1 995/22 (25 Nov.1994).

[16] A complete list of documents in which these treaty bodies applied indirect discrimination can be found in the annexed tables at the end of the thesis.

Workers and Members of Their Families contain discrimination clauses.[17] These discrimination clauses are not as comprehensive as those of ICERD, CEDAW and CRPD. The Committee on the Rights of the Child (CRC Committee) did not adopt the term 'indirect discrimination' or a general definition of discrimination covering indirect discrimination in its general comments so far. Unlike the CRC Committee, the Committee on Migrant Workers (CMW Committee) adopted a definition of indirect discrimination.[18] Nevertheless, no application of indirect discrimination has been encountered in the concluding observations of the CMW Committee.[19] Due to an inadequate number of findings related to indirect discrimination, the CRC and CMW Committee are excluded from the scope of the thesis.

Research Methods

In order to fulfill the two-fold objective of the thesis, namely testing originality and coherence within the UN treaty bodies in their approaches to indirect discrimination, the research firstly sets out the lenses through which an internal and external comparison are made. It divides indirect discrimination into four elements, namely neutrality, adverse effect, barrier and justification. Each element is explained through references to existing literature and seminal cases and legal documents in different jurisdictions. Based on these elements, the research compares each treaty body with each other and with the established approaches in other domestic and regional jurisdictions.

[17] See International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, adopted Dec 18, 1990, 2220 U.N.T.S. 3 (entered into force July 1 2003); Convention on the Rights of the Child, adopted Nov 20, 1990, 1577 U.N.T.S. 3 (entered into force Sep 2, 1990).

[18] According to the *General Comment No. 2 on the Rights of Migrant Workers in an Irregular Situation and Members of Their Families*, Comm. on Migrant Workers, § B, U.N. Doc. CMW/C/GC/2 (28 Aug 2013), there is indirect discrimination against migrant workers "when a law, a seemingly neutral policy or practice has a disproportionate impact on their rights."

[19] The Optional Protocol to the Convention on the Rights of All Migrant Workers and Members of Their Families has not been entered into force yet. Therefore, the CMW Committee lacks the individual commmunication mechanism. Thus, the review of the application of indirect discrimination had been limited to the concluding observations for this Committee.

The research relies on three types of documents issued by each treaty body: (1) general comments or recommendations, (2) concluding observations, and (3) the views on individual communications. The general comments or recommendations are easily accessible through the website of each treaty body. The views on the individual communications are also accessible through the same websites but because of the high number of views, the relevant views have been accessed through the jurisprudence database of the United Nations by searching for the keywords 'indirect discrimination'.[20] Regarding the concluding observations, a time limit has been set due to the high number of documents and the lack of a database providing keyword-based research. Therefore, the research has been limited to the concluding observations adopted during the period after 2005 until May 2015. For this period, the concluding observations were accessed via the website of each treaty body. With regard to the concluding observations adopted before 2005, the study benefitted from secondary sources.[21] Due to the lack of uniformity in the terminology used, concluding observations have been closely read by focusing on not only the term 'indirect discrimination', but also terms such as 'discrimination in fact', 'covert discrimination', 'hidden discrimination', 'adverse effect', 'discriminatory effect', 'disparate impact' and 'disproportionate impact'.

The general comments or recommendations, views and concluding observations which were collected this way, have been analyzed with a specific focus on the four elements of indirect discrimination, namely neutrality, adverse effect, barrier, and justification. They have been classified according to each element and under each treaty body. This classification provides the opportunity to understand the approach of each treaty body to indirect discrimination based on these four elements and compare their approaches.

Structure of the Thesis

The thesis begins with a section on the development of the right to equality in constitutional law and international human rights law. This section provides a brief

[20] The database can be accessed via http://juris.ohchr.org/
[21] See VANDENHOLE, *supra* note 5.

overview of the different understandings of the right to equality and traces its evolution by looking at the leading international human rights treaties as well as seminal international and domestic court decisions. Thereby, it places indirect discrimination in the broader context of equality. Accordingly, indirect discrimination is a result of the shift from formal to substantive equality. It has come on the scene in the era of affirmation of differences and has a limited role in the understanding of equality as redistribution and reformation.

The second section aims to provide a conceptual analysis of indirect discrimination. It starts with distinguishing indirect discrimination from its opposite concept, direct discrimination. Then, it explains the relationship between indirect discrimination with other intersecting concepts; respectively, unintentional and covert discrimination, systemic, institutional and structural discrimination, reasonable accommodation, and positive action. Although indirect discrimination and direct discrimination are mutually exclusive, indirect discrimination and the latter similar concepts intersect at certain points. Therefore, certain cases can be identified by indirect discrimination and any of these intersecting concepts together.

The third section takes a comparative perspective on the application of indirect discrimination in different jurisdictions. The argument based on this comparative perspective is that there is not a uniform application and interpretation of indirect discrimination. The section follows the four elements of indirect discrimination, namely neutrality, adverse effect, barrier and justification. It evaluates and compares the application of indirect discrimination in different jurisdictions namely the United States, Canada, European Union and the European Court of Human Rights. With the help of this comparison, the section attains the contested issues under each element and identifies diverging points.

The last section presents the findings of the research conducted on the approaches of the UN human rights treaty bodies to indirect discrimination. The first aim of this section is to demonstrate how each element of indirect discrimination is applied by the UN human rights treaty bodies and on which points they diverge from other

jurisdictions. Second, this section aims to compare the UN treaty bodies with each other and test coherence among them.

A. Situating Indirect Discrimination in the Development of the Right to Equality

The right to equality and non-discrimination have been on the agenda of constitutional regimes and international human rights law for a very long time. The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution which was adopted in 1868 establishes that "No state shall deny to any person within its jurisdiction the equal protection of the laws."[22] The principle of non-discrimination has also been regarded as the core principle in international human rights law. The first article of the Charter of the United Nations states that one of the purposes of the United Nations is to achieve international co-operation in "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion." In 1948, the Universal Declaration of Human Rights (UDHR) recognized that "All human beings are born free and equal in dignity and rights."[23]

In both constitutional law and international human rights law, the right to equality has been expanded and transformed over time. Many scholars note the shift from a formal understanding of equality to a more substantive understanding.[24] This section argues that the doctrine of indirect discrimination is a corollary of this shift in the general development of the right to equality. This section narrates the general development by following these themes: (1) Equality as refraining from differential treatment, (2) Equality through accommodation and special measures, (3) Equality through fair distribution and reformation. While the first one represents the formal understanding of equality, the following two explain the substantive understanding of equality. This

[22] U.S. CONST. amend. XIV, § 1.
[23] Universal Declaration of Human Rights, G.A. Res. 217A. U.N. GAOR, 3d Sess., 1st plen. mtg., art. 1, U.N. Doc. A/810 (1948) [hereinafter UDHR]
[24] See Anja Seibert-Fohr, *The Rise of Equality in International Law and Its Pitfalls: Learning from Comparative Constitutional Law*, 35 Brook. J. Int'l L. 1, 40 (2010); Colm O'Cinneide, *The Right to Equality: A Substantive Legal Norm or Vacuous Rhetoric*, 1 UCL Hum. Rts. Rev. 80, 102 (2008) [hereinafter O'Cinneide, *The Right to Equality*] ; Sandra Fredman, *Equality: A New Generation*, 2001 Acta Juridica 214, 240 (2001) [hereinafter Fredman, *Equality: A New Generation*]; Arnardóttir, *A Future of Multidimensional Disadvantage Equality?*, *supra* note 4.

section aims to associate the doctrine of indirect discrimination with these themes. It will argue that indirect discrimination comes on the scene in the era of affirmation of differences, yet it also has a limited role in the third sense of equality.

1. Equality as refraining from differential treatment

The negative duty to refrain from differential treatment represents the formal understanding of equality that derives from the Aristotelian maxim of equality. In this sense of equality, like cases should be treated as likes. Therefore, formal equality regards equality as consistency and focuses on how individuals in comparable situations are treated, regardless of the outcome.[25] The main concern of formal equality is "to prevent the formation of different categories of citizens with differing rights and status, and to guarantee the equality of all before the law."[26] Different characteristics of the individuals, whether they be immutable such as race, sex and disability, or legally created as marital status or nationality, have been regarded in a negative sense as being grounds for prohibition on discrimination. Colm O'Cinneide argues that the reason behind the negative formulation is that the protection from discrimination has resulted from the rejection of certain forms of discrimination, and therefore "acting 'equally' tends to be interpreted as not being racist, not being sexist and so on."[27]

International human rights documents with their clauses on non-discrimination demonstrate an understanding of equality as refraining from differential treatment. UDHR, for instance, prohibits the "distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[28] This was followed by the European Convention on Human Rights

[25] See Daniel Moeckli, *Equality and Non-discrimination* in INTERNATIONAL HUMAN RIGHTS LAW 192 (Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran eds., 2010); JANNEKE H. GERARDS, JUDICIAL REVIEW IN EQUAL TREATMENT CASES 230 (2005)
[26] O'Cinneide, *The Right to Equality*, *supra* note 24, at 85.
[27] Id., at 98.
[28] UDHR, *supra* note 23, Art. 2.

(ECHR)[29] in 1950, which prohibits discrimination in its Article 14. In 1966, the twin UN Covenants ICCPR and ICESCR contained the common Article 2 which imposes states to respect and to ensure the rights in the Covenants without any discrimination.[30] In 1969 the American Convention on Human Rights (ACHR) and in 1981 the African Charter on Human and People's Rights (ACHPR) also prohibited discrimination.[31] Lastly, the Revised European Social Charter introduced its provision on prohibition on discrimination.[32]

The common feature of these discrimination clauses is that all of them are open-ended clauses which means an allegation of discrimination can be based on any characteristic, even though it is not explicitly listed in the provision. In other words, the list of discrimination grounds is not exhaustive. Additionally, all clauses are accessory which can only be used with a reference to another substantive right enshrined in the document at stake. This means they cannot be raised alone. For instance, Article 14 of the ECHR can only be raised, if the claim is 'within the ambit' of any right protected in the Convention.[33] The accessory nature of these clauses might undermine the functioning of the right to equality as a substantive right, and limits its application.

The two clauses on the prohibition on discrimination diverge from these clauses on the basis of their non-accessory nature. The first one is Article 26 of the ICCPR which imposes an obligation to "prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." The second one is the general prohibition on discrimination

[29] European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 35(1), opened for signature Nov 4, 1950, 213 U.N.T.S. 221, Europ.T.S. No. 5 *(*entered into force Sep 3, 1953)

[30] Article 2 of ICCPR speaks of "without any distinction" while Article 2 of ICESCR mentions "discrimination".

[31] American Convention on Human Rights, signed Nov 22, 1969, art. 46(1)(1), O.A.S. Doc. OEA/Ser.L/V/I.23, doc. 21, rev. 6 (1979), O.A.S.T.S. No. 36, Art. 1 (1), 1144 U.N.TS. 143 (entered into force July 18, 1978) [hereinafter ACHR]; African Charter on Human and Peoples' Rights, concluded June 27, 1981, 1520, Art. 2, U.N.T.S. 217

[32] European Social Charter (Revised), opened for signature May 3, 1996 (entered into force July 1, 1999), Art. E, CETS No. 163

[33] See, e.g. Abdulaziz, Cabales and Balkandali v. United Kingdom, Apps. No. 9214/80; 9473/81; 9474/81, 94 Eur. Ct. H.R. (Ser. A) ¶ 71 (1985).

clause of the ECHR brought by Article 1 of Protocol no. 12.[34] This clause, differently from Article 14 of the ECHR, does not limit the application of non-discrimination to the rights set forth in the ECHR but states that "any right set forth by law" is secured without any discrimination.

The duty to refrain from differential treatment is also prescribed with the concepts of equality before the law and equal protection of the law. The UDHR, to begin with, states that "all are equal before the law and are entitled to without any discrimination to equal protection of the law."[35] Article 26 of the ICCPR and Article 3 of the ACHPR also contain a very similar wording. The ACHR, on the other hand, obliges the states to ensure equal treatment before the law by saying "all persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law."[36] The difference in this provision is that equal protection of the law is regarded as the consequence of equality before the law rather than distinct concepts.

The concepts of equality before the law and equal protection of the law require further explanation. According to Olivier de Schutter, equality before the law addresses law enforcement agents who belong to the executive or the judiciary. On the other hand, equal protection of the law requires that the law not create either by making unjustified distinctions or by failing to treat different situations differently.[37]

It has been suggested that indirect discrimination, if merely formulated as the failure to treat different cases differently, appears to be rooted in the formal understanding of equality.[38] As Peter Westen also argues, the Aristotelian maxim of equality means "persons who are alike should be treated alike" and "persons who are unalike should be treated unalike."[39] Although the general rationale behind the doctrine of indirect

[34] Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 4 Nov 2000, Europ. T.S. No. 177
[35] UDHR, *supra* note 23, Art. 7
[36] ACHR, *supra* note 31, Art. 24
[37] OLIVIER DE SCHUTTER, INTERNATIONAL HUMAN RIGHTS LAW: CASES, MATERIALS, COMMENTARY 577-596 (2010) [hereinafter DE SCHUTTER, INTERNATIONAL HUMAN RIGHTS LAW]
[38] Shelagh Day & Gwen Brodsky, *The Duty to Accommodate: Who Will Benefit?*, 75 Can. Bar Rev. 433, 462 (1996)
[39] Peter Westen, *The Empty Idea of Equality*, 95 Harv. L. Rev. 537, 557 (1982)

discrimination can be resulted from the flip side of the Aristotelian maxim, indirect discrimination cannot be interpreted as a part of the formal understanding of equality. Without a substantive look at what constitutes 'treatment', 'alike' and 'unalike', that formulation would not be able to reach the instances of indirect discrimination. As long as 'treatment' is understood as the formal classification of persons, indirect discrimination cannot be detected. This is because indirect discrimination appears where the formal classification is neutral and the effect of neutrality is the source of scrutiny. Therefore, indirect discrimination can only be detected through focusing on effects.

2. Equality through accommodation and special measures

In this understanding of equality, the duty is not merely a negative one as refraining from differential treatment on the basis of certain characteristics but expands to a positive one requiring the accommodation of differences and remedying disadvantage of structurally excluded groups through special measures. It takes social and economic aspects of the characteristics into account and accepts that individuals are not necessarily "likes". It, thereby, suggests that formal equality which treats everyone as likes is not sufficient and a substantive evaluation of the socio-economic conditions of inequality is needed. Through this way, it departs from the symmetry of formal equality and offers an asymmetrical protection. As Sandra Fredman rightly suggests, in substantive equality "it is not colour, gender or some other group characteristic per se which is in issue, but the attendant disadvantage both social and economic."[40]

The first indicator of the understanding of equality as accommodation and special measures has been the comprehensive discrimination clauses. In 1958, the ILO Discrimination Convention defined discrimination as "any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of

[40] Sandra Fredman, *Providing Equality: Substantive Equality and the Positive Duty to Provide*, 21 S. Afr. J. on Hum. Rts. 163, 166 (2005) [hereinafter Fredman, *Providing Equality*]

opportunity or treatment in employment or occupation."[41] Two years later, the UNESCO Convention against Discrimination in Education also adopted a comprehensive definition of discrimination by stating "the term `discrimination' includes any distinction, exclusion, limitation or preference which, being based on race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, has the purpose or effect of nullifying or impairing equality of treatment in education."[42] This comprehensive clause on discrimination gained widespread use later with the adoption of the ICERD, CEDAW and CRPD and the general comments of the HRC and CESCR Committee.[43]

The importance of these clauses on discrimination can be explained by two reasons. Firstly, they use words such as exclusion, limitation or restriction; therefore, they provide a clearer and broader meaning. Secondly, these clauses accept that the effect of a certain treatment may also give rise to discrimination. This represents a clear departure from the formal understanding of equality and enables the adjudicators to use the doctrine of indirect discrimination through challenging neutral-looking rule or measure.

The second indicator is the attention paid to discrimination on certain characteristics and the will to eliminate disadvantage suffered by certain groups. In 1965, the ICERD was adopted by acknowledging that "any doctrine of superiority based on racial differentiation is scientifically false, morally condemnable, socially unjust and dangerous, and that there is no justification for racial discrimination, in theory or in practice, anywhere."[44] The CEDAW was introduced to the human rights field in 1979 with a concern that extensive discrimination against women continues to exist.[45] Regarding the situation of disabled persons, the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities was

[41] International Labor Organization, Convention concerning discrimination in respect of employment and occupation, adopted June 25, 1958, art. 1, 362 U.N.T.S. 31
[42] UNESCO Convention Against Discrimination in Education, Dec. 14, 1960, art. 1, 429 U.N.T.S. 93 (entered into force May 22, 1962)
[43] ICERD, *supra* note 6, art.1; CEDAW, *supra* note 7, art.1; CRPD, *supra* note 10, art.2; HRC General comment no.18, *supra* note 15 ; CESCR General comment no 5, *supra* note 15.
[44] ICERD, *supra* note 6, The preamble.
[45] CEDAW, *supra* note 7, The preamble

adopted in 1999.[46] This was followed by the CRPD in 2006. Differently from the general open-ended discrimination and equality clauses, these human rights conventions take into account difference and disadvantage which existed in the past and continues to exist today. In that sense, a certain characteristic such as race or sex has reached a positive meaning instead of being grounds for prohibition on discrimination.[47] The affirmation of differences and realization of disadvantage facilitate the protection from indirect discrimination since it is generally the most disadvantaged and socio-economically inferior groups that are disproportionately or adversely affected or excluded as a result of neutral rules or practices. Therefore, indirect discrimination stands as a useful tool to signal to the disadvantage and demonstrate how neutral treatment can in fact increase social and economic barriers that those groups face.

The third indicator is the emergence of new concepts and the conceptual broadening in the scope of the right to equality.[48] Firstly, as already mentioned, indirect discrimination originated in the United States under the name of 'disparate impact' and then moved to the United Kingdom, Canada, European Union and international human rights systems. Secondly, positive action or affirmative action measures have gained a widespread use in both domestic jurisdictions and international human rights field.[49] The CEDAW and ICERD explicitly recognize adoption of special measures to promote equality between different groups.[50] These measures provide an asymmetrical protection to the groups that suffered collective disadvantage. Thirdly, although limited to certain grounds, denial of reasonable accommodation, harassment and victimization are regarded as distinct forms of discrimination.[51] The augmentation of the concepts

[46] Inter-American Convention on the Elimination of all Forms of Discrimination Against Persons with Disabilities, adopted July 8, 1998 (entered into force Sep 14, 2001) Organization of American States, AG/RES. 1608 (XXIX-O/99).
[47] FREDMAN, DISCRIMINATION LAW, *supra* note 3, at 30.
[48] Titia Loenen, *Towards a Common Standard of Achievement - Development in International Equality Law*, 2001 Acta Juridica 197, 210 (2001).
[49] See Colm O'Cinneide, *Comparative Study on Positive Action in Law and Practice* in TAKING EMPLOYMENT DISCRIMINATION SERIOUSLY: CHINESE AND EUROPEAN PERSPECTIVES 279 (Yuwen Li & Jenny Goldschmidt eds., 2009)
[50] ICERD, *supra* note 6, Art. 1(4); CEDAW, *supra* note 7, Art. 4.
[51] CESCR General Comment No. 5, *supra* note 15, ¶ 15; CRPD, *supra* note 10, Art.2; For the EU context See Susanne Burri, *EU Anti-Discrimination Law: Historical Development and*

may seem confusing, however it enables even the most complex and subtle forms of inequalities to be realized and remedied.

3. Equality through fair distribution and reformation

This part in the development of the right to equality concerns structural and systemic forms of inequality and discrimination. It focuses on the fair distribution of social and economic resources as well as reformation of institutions and social structures. It improves the substantive understanding of equality by imposing proactive positive measures and improving the relation of the right to equality with economic, social and cultural rights.

The first way to achieve equality in this sense is to protect individuals from being discriminated through regulating the acts of non-state actors, combatting stereotyping and raising awareness. Article 26 of the ICCPR mentions the duty to guarantee to all persons equal and effective protection against discrimination. Accordingly, states are not only responsible for acting in response to an individual act of discrimination but proactively take necessary measures for protection. This duty extends to structural or systemic discrimination.[52] The proactive duty with regard to equality is "a hybrid of policy and rights-based approaches."[53] The ICERD, CEDAW and CRPD contain provisions on the modification of cultural and social patterns and elimination of prejudice.[54]

The second aspect of the understanding of equality in this sense is the strong relation between economic, social and cultural rights, and the right to equality. Sandra Fredman argues that recognition and redistribution should be considered together. According to her, "constructing a concept of socio-economic equality without considering the

Main Concepts in TAKING EMPLOYMENT DISCRIMINATION SERIOUSLY: CHINESE AND EUROPEAN PERSPECTIVES 209-238 (Yuwen Li & Jenny Goldschmidt eds., 2009)

[52] DE SCHUTTER, INTERNATIONAL HUMAN RIGHTS LAW, *supra* note 37, at 623.

[53] Sandra Fredman, *Redistribution and Recognition: Reconciling Inequalities*, 23 S. Afr. J. on Hum. Rts. 214, 232 (2007) [hereinafter Fredman, *Redistribution and Recognition*].

[54] CEDAW, *supra* note 7, Art. 5; ICERD, *supra* note 6, Art.7; CRPD, *supra* note 10, Art 8 (1).

implications for status-based inequality can be damaging and ineffective. Conversely, status-based measures are limited by their inability to mobilise the redistributive measures necessary to make real equality of opportunity and genuine choice possible."[55]

The nature of non-discrimination clauses has a certain role in establishing this strong relation between ESC rights and the right to equality. The accessory non-discrimination clauses within the field of civil and political rights may have shortcomings in extending the protection of equality in other fields. Article 14 of the ECHR is a clear example of this problem. In that sense, self-standing non-discrimination clauses might have a creative effect in reconsidering the existing power structures and resource allocation.[56] The example for this can be the interpretation of Article 26 of the ICCPR by the Human Rights Committee. Concerning the right to social security, the HRC ruled as follows:

> Although Article 26 requires that legislation should prohibit discrimination, it does not of itself contain any obligation with respect to the matters that may be provided for by legislation. Thus it does not, for example, require any State to enact legislation to provide for social security. However, when such legislation is adopted in the exercise of a State's sovereign power, then such legislation must comply with Article 26 of the Covenant.[57]

A clearer and stronger relation between ESC rights and the right to equality can be observed in constitutional adjudication in South Africa. In *Grootboom* case, South African Constitutional Court expressed the interrelatedness of equality and ESC rights:

> There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in Chapter 2. The realisation

[55] Fredman, *Redistribution and Recognition*, *supra* note 53, at 215.
[56] MARC BOSSUYT, L'INTERDICTION DE LA DISCRIMINATION DANS LE DROIT INTERNATIONAL DES DROITS DE L'HOMME 219 (1976) originally cited in DE SCHUTTER, INTERNATIONAL HUMAN RIGHTS LAW, *supra* note 37.
[57] Broeks v. Netherlands, Comm. No. 172/1984, Hum. Rts. Comm., ¶ 12.4, U.N. Doc. A/42/40 (9 April 1987).

> of these rights is also key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential.[58]

The role of indirect discrimination in this understanding of equality is limited. Though indirect discrimination is results-oriented by looking at unjustified adverse effects of neutral treatment, it might fall short of addressing structural inequalities.[59] For instance, the doctrine of indirect discrimination can outlaw a neutral employment requirement which results in adverse effects upon women due to their responsibilities in the private sphere, but cannot increase the overall participation rate of women in the workforce. Besides the inadequacies of this doctrine, it might have a negative impact on the fight against structural inequalities. Hugh Collins argues that the protection from indirect discrimination may in fact tackle structural disadvantage.[60] By following the same example, he argues that women who want to benefit from this protection have to rely on the social norm that imposes the child-care responsibility to women. Accordingly, the social norm itself has not been challenged. Ina Sjerps, on the other hand, points out the potential role of indirect discrimination in challenging systemic or structural forms of inequality:

> Indirect discrimination cases are generally cases where there is not yet any widespread agreement in society, as to whether unequal treatment is acceptable or not; where a group of people no longer accept unequal treatment, but many others find it acceptable. Those are the cases *where legal battle is being fought most fervently, in accordance with the social and political fight*. At stake is fairness, justice, but not (yet) statistics, which are nothing more than a tool. And in such cases, the claim of indirect discrimination may be *a*

[58] *Government of the Republic of South Africa and Others v. Grootboom and Others* 2001 (1) SA 46 (CC) at 19 para 23.
[59] Fredman, *Equality: A New Generation*, *supra* note 24, at 234; Titia Loenen, *Indirect Discrimination: Oscillating Between Containment and Revolution* in NON-DISCRIMINATION LAW: COMPARATIVE PERSPECTIVES 204 (Titia Loenen and Paulo R. Rodrigues eds., 1999) [hereinafter Loenen, *Indirect Discrimination*].
[60] Hugh Collins, *Discrimination, Equality and Social Inclusion*, 66 Mod. L. Rev. 16, 30 (2003)

stepping-stone in the process of outlawing a type of unequal treatment.[61] (Emphasis added)

4. Conclusion

This section located indirect discrimination in the general development of the right to equality that has shifted from a formal understanding of equality to a more substantive one. This section showed the doctrine of indirect discrimination is a part of substantive equality due to its focus on effects of a neutral treatment and its affirmation of differences and collective disadvantage. Therefore it is placed under the understanding of equality as accommodation of differences and remedying disadvantage. However, it also has a potential role to improve the understanding of equality as fair distribution and reformation which is more concerned with structural and systemic forms of discrimination. This section further showed that the right to equality has also broadened conceptually. In addition to indirect discrimination, many other concepts have been invented to address different forms of inequality. Having set out the relationship between indirect discrimination and the general development of the right to equality, the thesis moves on to identifying distinctive features of indirect discrimination. The next chapter will compare indirect discrimination with other related concepts that are used in the general literature of equality and provide a conceptual analysis.

[61] Ina Sjerps, *Effects and Justifications or How to Establish a Prima Facie Case of Indirect Discrimination* in NON-DISCRIMINATION LAW: COMPARATIVE PERSPECTIVES 241 (Titia Loenen and Paulo R. Rodrigues eds., 1999).

B. Conceptual Analysis of Indirect Discrimination

The right to equality has broadened conceptually. Particularly in the era of substantive equality, new concepts corresponding to different forms of discrimination and inequality have emerged. Indirect discrimination is among them and this section aims to compare it with other fellow concepts in order to set its distinctive features and signal the intersecting areas between them. The first part of this section distinguishes indirect discrimination from its opposite concept, direct discrimination. The second part sets out the relationship between indirect discrimination and other intersecting concepts, respectively unintentional and covert discrimination, systemic, structural and institutional discrimination, reasonable accommodation, and positive action. This section argues that although direct and indirect discrimination are mutually exclusive concepts, other concepts can intersect with indirect discrimination and certain cases can be evaluated based on these intersections.

1. Mutually exclusive concepts: Direct and Indirect Discrimination

A better analysis of indirect discrimination can be achieved by comparing it with its opposite concept, direct discrimination. Direct discrimination is the less favorable treatment of the individual than an appropriate comparator on the basis of her protected characteristic. The comparator- real or hypothetical- "must possess all of the relevant circumstances which the putative discriminator had in mind when determining to treat the putative victim in the way in which that individual was treated, other than the relevant protected characteristic."[62] If it is established that the individual is treated less favorably, that treatment must be on the grounds of the protected characteristic.

[62] Simon Forshaw & Marcus Pilgerstorfer, *Direct Discrimination and Indirect Discrimination: Is There Something in between?*, 37 Indus. L.J. 347, 348 (2008).

Indirect discrimination, on the other hand, is the adverse effect of a neutral treatment on an individual or group with a protected characteristic. In the case of indirect discrimination, contrary to direct discrimination, the disputed treatment is neutral. It is not the form of the treatment but its effects are linked to the protected characteristic. Therefore, the comparison is made by looking at the effects of the treatment rather than its form.

The first distinction between direct and indirect discrimination lies in the form.[63]The link between the treatment and the protected characteristic is more visible in the case of direct discrimination since the treatment is suspect in the first place. Conversely, indirect discrimination requires further scrutiny to establish the link between the treatment and the protected characteristic by looking at the adverse effects.

The second distinction between these two forms of discrimination can be made on the underlying principles. Direct discrimination is grounded on the principles of state neutrality and individualism.[64] The principle of state neutrality has two aspects. Firstly it prohibits state preferences for one group or individual with a certain characteristic. Secondly, it requires consistency in treatment. The principle of individualism, on the other hand, refers to treatment of each person as an individual, according to her merits.

Indirect discrimination challenges the principles of state neutrality and individualism. First, neutrality is contested in both ways. Indirect discrimination is not against the state preferences for a certain characteristic; conversely, it enables differences to be taken into account when necessary. More importantly, indirect discrimination contests the consistency in treatment by putting a neutral treatment under scrutiny. The reason behind this contest is that "neutrality reinforces dominant values or existing distribution of power"[65] and by doing so, a neutral treatment can in fact be a source of further inequality. The second challenge of indirect discrimination is directed at the principle of individualism. In certain cases of indirect discrimination, neutral treatment is

[63] Christa Tobler, *Limits and Potential of the Concept of Indirect Discrimination,* EUR. COMM'N 48 (September 2008), http://ec.europa.eu/social/BlobServlet?docId=1663&langId=en.
[64] Fredman, *Equality: A New Generation?*, *supra* note 24, at 223.
[65] Id. at 225.

contested by demonstrating its adverse effects on a group. The individual victim of indirect discrimination is able to prove her victimhood through her association with the group. The characteristics claimed to be possessed by each member of the group and attributable to the group as a whole prevails individual traits and merit.

Direct and indirect discrimination also differ in terms of their functions. Although both forms of discrimination derive from the general prohibition of discrimination, their functions and the duties that they impose on the states are different. Direct discrimination, as being a harm-based notion, serves for corrective justice and imposes a reactive duty to correct the actual harm. While, in the case of indirect discrimination what is at stake is the relative advantage or disadvantage of the parties rather than harm.[66] Hence, indirect discrimination serves for redistributive justice and the original duty not to indirectly discriminate is a proactive one enabling "an alteration of the future value-structure of society."[67]

A reasonable question to raise when comparing direct and indirect discrimination is whether there is a chronological order between these two forms of discrimination. In other words, whether indirect discrimination is "the product of past direct discrimination."[68] This observation is partly justified, since there has been a rise of sensitivity towards direct discrimination and courts are more likely to find a violation of the right to equality when it is formed in a direct way. Therefore, recent forms of discrimination come on the scene in a veiled manner such as indirect discrimination.[69] This means that the groups who suffered direct discrimination in the past face the threat of indirect discrimination today. However, this is relevant only for the characteristics possessing "intergenerational identity"[70] such as race, ethnicity, nationality or religion. A chronological order can be the case if the social ill effects of previous direct discrimination can pass from one generation to the next.[71] The other characteristics

[66] John Gardner, *Discrimination as Injustice*, 16 Oxford J. Legal Stud. 353, 360 (1996).
[67] John Gardner, *Liberals and Unlawful Discrimination*, 9 Oxford J. Legal Stud. 1, 19 (1989).
[68] Oran Doyle, Direct Discrimination, Indirect Discrimination and Autonomy, 27 Oxford J. Legal Stud. 537, 548 (2007).
[69] GERARDS, *supra* note 25, at 413.
[70] Doyle, *supra* note 68, at 549.
[71] Id.

such as sexuality or disability do not have such an identity; therefore a chronological order between direct and indirect discrimination is not relevant for them.

The role of intent in distinguishing indirect discrimination from direct discrimination is also a compelling issue. It is claimed that discriminatory intent inherently exists in direct discrimination.[72] However, this is not always the case. There may be some cases of direct discrimination in the absence of intent as there can be neutral rules or practices adopted with an intent to discriminate.[73] Therefore, intent cannot be grounds for distinction between direct and indirect discrimination. It must be stressed, however, that a requirement of proving the intent of the discriminator places a heavier burden on the claimants of indirect discrimination than those of direct discrimination, since it is much more difficult to prove intent behind a neutral treatment.[74] Thus, irrelevancy of intent becomes a more important issue for the cases of indirect discrimination.

2. Indirect Discrimination and Its Relation with Other Intersecting Concepts

a. Unintentional and Covert Discrimination

The first concept that needs to be compared with indirect discrimination is unintentional discrimination since there is a tendency to regard indirect discrimination as an unintentional form of discrimination.[75] Since both contain the element of neutrality, they are often equated. This can create confusion and result in extra burden on the victims of indirect discrimination by requiring them to prove the absence of

[72] See Andrew Altman, *Discrimination*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (last updated Aug. 30, 2015) http://plato.stanford.edu/entries/discrimination/; KASPER LIPPERT- RASMUSSEN, BORN FREE AND EQUAL?: A PHILOSOPHICAL INQUIRY INTO THE NATURE OF DISCRIMINATION (2013); NICHOLAS MARK SMITH, BASIC EQUALITY AND DISCRIMINATION : RECONCILING THEORY AND LAW (2011).
[73] Moeckli, *supra* note 25, at 200.
[74] See infra §C.1.
[75] Altman, *supra* note 72; LIPPERT-RASMUSSEN, *supra* note 72, at 59.

intent. However, neutrality in case of indirect discrimination does not necessarily refer to the absence of intent. In fact, neutral rules and practices can be adopted with an intent to discriminate.[76] To give an example, a neutral criterion such as a literacy test can be intentionally used to exclude certain ethnic groups.[77] Thus, indirect discrimination may serve "to unmask instances of intentional discrimination which seek to achieve indirectly what may not be done directly."[78]

There are also views suggesting that neutral treatment with intent to discriminate must be named as "covert discrimination" instead of indirect discrimination.[79] Bruce Abramson defines covert discrimination as follows:

> Covert means 'hidden', and covert discrimination occurs when lawmakers write a neutral-looking law with the aim to either give an advantage to a particular Group *A*, or impose a disadvantage on a particular Group *B*. Covert discrimination is therefore a double evil: there is the moral wrong of the race, etc. discrimination, and the moral wrong of the deception, of trying to hide one's wrongful intentions behind the facade of a 'facially-neutral' law.[80]

Thus, the moral wrongness distinguishes covert discrimination from unintentional form of indirect discrimination.[81] It can be argued that morally speaking these two forms imply different things, however in the legal sense it will not be wrong to place covert discrimination in the context of indirect discrimination. The central indicator of indirect discrimination is the adverse effect of neutral treatment and this is also possessed by covert discrimination. The moral wrongness of covert form, i.e. hiding the intent behind a neutral treatment can be an aggravating factor that the courts may take into account.

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[76] GERARDS, *supra* note 25, at 413; Doyle, *supra* note 68, at 538; Fredman, *Equality: A New Generation*, *supra* note 24, at 225.
[77] Moeckli, *supra* note 25, at 200.
[78] Olivier De Schutter, *Three Models of Equality and European Anti-Discrimination Law*, 57 N. Ir. Legal Q. 1, 9 (2006) [hereinafter De Schutter, *Three Models of Equality*].
[79] SMITH, *supra* note 72, at 144; Bruce Abramson, *Article 2: The Right of Non-Discrimination*, in A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD 50 (A. Alen, J. Vande Lanotte, E. Verhellen, F. Ang, E. Berghmans and M. Verheyde eds, 2008).
[80] Abramson, *supra* note 79, at 50.
[81] SMITH, *supra* note 72, at 145 (suggesting that intentional indirect discrimination is no different from direct discrimination.)

b. Systemic, Structural and Institutional Discrimination

Indirect discrimination can expose subtle forms of discrimination due to its focus on effects. Systemic, structural and institutional discrimination are also concerned with complex, unnoticed and subtle forms of disadvantage. From this perspective, indirect discrimination and these concepts can be intertwined. In order to avoid any misconceptions, it is important to set the distinctive features of each concept.

Systemic discrimination is a concept used to refer to patterned forms of discrimination with an aim to ensure that discrimination is not confined to marginalized individual acts.[82] The essential component of systemic discrimination is that the policies and practices must establish a pattern of organizational behavior which reaches a certain level.[83] Intent or lack of intent, however, is not regarded as a component of this concept.[84]

Systemic discrimination does not compete with the concepts of direct and indirect discrimination, and it can function directly as well as indirectly.[85] It has been described as a 'bridge concept'.[86] Systemic discrimination entails an "ongoing, macro-level and organization-wide perspective" rather than a micro-level and complaint-based perspective.[87] Resulting from its macro-level perspective, systemic discrimination cannot be overridden simply by ex-post facto measures, but it entails proactive remedial orders.[88]

[82] PAIVI GYNTHER, BEYOND SYSTEMIC DISCRIMINATION: EDUCATIONAL RIGHTS, SKILLS ACQUISITION AND THE CASE OF ROMA 23 (2007).
[83] CRAIG, *supra* note 3, at 94.
[84] GYNTHER, *supra* note 82, at 25.
[85] GYNTHER, *supra* note 82, at 24; CRAIG, *supra* note 3, at 93.
[86] CRAIG, *supra* note 3, at 93.
[87] Id. at 95.
[88] GYNTHER, *supra* note 82, at 26.

Institutional discrimination is direct or indirect discrimination performed by a collective agent such as a company or university.[89] In the race context, institutional discrimination is defined as follows:

> The collective failure of an organization to provide an appropriate and professional service to people because of their color, culture, or ethnic origin. It can be seen or detected in processes, attitudes and behavior which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness and racist stereotyping which disadvantage minority ethnic people.[90]

Hence it is a far-reaching concept also covering prejudice, ignorance and stereotyping which are difficult to explain thorough the dichotomy between direct and indirect discrimination.

Structural discrimination occurs when certain groups suffering from various forms of direct discrimination are disadvantaged by the social structures.[91] The term 'social structures' refers to "the rules that constitute and regulate the major sectors of life such as family relations, property ownership, and exchange, political powers and responsibilities."[92] In this form of discrimination, the actors and actions are innumerable and unidentified.[93] Although it is seen as a complex form of direct discrimination, there can be a causal connection between structural discrimination and indirect discrimination. For instance, structural discrimination that women suffer in family relations forces them to participate in the labor market as part-time workers rather than full-time workers. A neutral practice or measure with an adverse impact on part-time workers may lead to indirect discrimination on the grounds of gender.

The main factor that distinguishes indirect discrimination from systemic, institutional and structural discrimination is the identification of a certain neutral treatment. Indirect

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[89] LIPPERT- RASMUSSEN, *supra* note 72, at 77.
[90] SIR WILLIAM MACPHERSON, REPORT OF THE STEPHEN LAWRENCE INQUIRY https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/277111/4262.pdf (1999) ¶ 6.34; See also TIMO MAKKONEN, EQUAL IN LAW, UNEQUAL IN FACT : RACIAL AND ETHNIC DISCRIMINATION AND THE LEGAL RESPONSE THERETO IN EUROPE 36-37 (2012)
[91] LIPPERT- RASMUSSEN, *supra* note 72, at 77-78.
[92] Id. at. 78.
[93] Abramson, *supra* note 79, at 70.

discrimination is derived from the adverse effects of a neutral treatment. However, for the other three forms of discrimination, a certain neutral treatment may be difficult to identify due to the multitude of actors and complex patterns of disadvantage or exclusion. Only through a broad interpretation of the elements of neutral treatment and barrier can these concepts and indirect discrimination become closer to each other.

c. Reasonable accommodation

The duty to accommodate requires the states to incur special costs and actions in response to the distinctive needs of a particular and identifiable group.[94] This duty stems from "the occasions the interaction between the physical or social environment and an individual's inherent characteristics, such as impairment, sex, religion or belief, can result in the inability to perform a particular function or job in the conventional manner."[95] These inherent characteristics, if they are not accommodated fairly, can prevent the individual from the enjoyment of opportunities that are available to the individuals who do not possess these characteristics and amount to discrimination.

The common feature of indirect discrimination and reasonable accommodation is that both are not satisfied with consistent treatment but rather require acknowledgement of differences. Reasonable accommodation goes even further and imposes a positive duty to accommodate those differences. There can be a wide range of measures to satisfy this duty including active measures such as physical adjustments or rescheduling working hours and days, and more passive measures such as providing an exception to

[94] Christine Jolls, *Antidiscrimination and Accommodation*, 115 Harv. L. Rev. 642, 648 (2001).

[95] Lisa Waddington & Aart Hendriks, *The Expanding Concept of Employment Discrimination in Europe: From Direct and Indirect Discrimination to Reasonable Accommodation Discriminatio*n 18 Int. J. Comp. Labour Law Ind. Relations 403, 409 (2002); See also Emmanuelle Bribosia; Julie Ringelheim; Isabelle Rorive, *Reasonable Accommodation for Religious Minorities: A Promising Concept for European Antidiscrimination Law*, 17 Maastricht J. Eur. & Comp. L. 137, 138 (2010).

a generally applicable rule. Reasonable accommodation in the form of the passive measures can be regarded as a specific remedy to indirect discrimination.[96]

Differing from indirect discrimination, reasonable accommodation necessarily possesses an individualized character.[97] This has two dimensions. Firstly, a disadvantage is not necessarily experienced by the group but is experienced on the individual level.[98] In this regard, statistical imbalances between groups are not relevant, and the assignment of a comparator may be difficult.[99] Secondly, reasonable accommodation requires "a case-by-case adjustment of the individual and the job".[100] This second dimension, especially, is the dividing factor between indirect discrimination and reasonable accommodation. Indirect discrimination may be concerned with disadvantage experienced by a single individual; however it does not require adjustment except for providing exceptions to a generally applicable rule on some occasions. Therefore, reasonable accommodation is relatively broader considering the duty to adjust.

Reasonable accommodation involves a "relational behavior" contrary to "discrete preferences".[101] The former requires ongoing negotiations between the decision-maker and the individual, and imposes regular and ongoing expenditure.[102] For instance, the duty to accommodate may require providing personal assistantship to a visually disabled person which varies according to the degree of disability, whereas, the latter requires "once and for all" kind of measures such as the abolishment or adjustment of the neutral rule or compensation to the victim. Indirect discrimination imposes duties in this latter sense.

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[96] Olivier De Schutter, *The Prohibition of Discrimination under European Human Rights Law*, EUR. COMM'N, (May, 2011), http://ec.europa.eu/justice/discrimination/files/the_prohibition_of_discrimination_under_european_human_rights_law_update_2011__en.pdf ; Bribosia; Ringelheim & Rorive, *supra* note 95, at 139

[97] Waddington & Hendriks, *supra* note 95, at 410.

[98] Id.

[99] Id. at 425

[100] Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 Duke L.J. 1, 16 (1996-97)

[101] Id.

[102] Waddington & Hendriks, *supra* note 95, at 410.

d. Positive action

Indirect discrimination is seen as a "hybrid" form of discrimination combining some elements of direct discrimination and positive action (or affirmative action) measures.[103] Liability under indirect discrimination has "powerful incentives to adopt affirmative action plans to alleviate the adverse effects."[104]

Theoretically these two concepts overlap in certain parts.[105] Similar to indirect discrimination, positive action is a part of a substantive understanding of equality which departs from the principles of individualism, universality and the limited negative duty of the state.[106] Both of them emerged in the era of substantive equality and broadened the scope of the right to equality. They represent the shift from negative to positive duties and require the affirmation of group-based differences.

Although the underlying values and theoretical foundations of these two concepts are similar, they diverge at some practical points. In the cases of indirect discrimination, courts may ask the claimant side to rely on a particular neutral treatment with adverse effects imposed by a single state agent or a private actor, while positive action recognizes "societal discrimination extends well beyond individual acts."[107] The duty in positive action becomes restructuring institutions and the duty-bearer becomes the body in the best position to perform this duty.[108] Indirect discrimination ends with abolishing or adjusting the neutral rule or practice or compensating the victim. The duty bearer is the exact body or individual who adopt the neutral treatment. In this regard, indirect discrimination is concerned with micro-level examples of societal discrimination by staying within the field of law. Positive action is a broader concept including various types of measures and expands to the field of policy making. Thus,

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[103] Andrew J. Morris, *On the Normative Foundations of Indirect Discrimination Law: Understanding the Competing Models of Discrimination Law as Aristotelian Forms of Justice*, 15 Oxford J. Legal Stud. 199, 199 (1995).
[104] Karlan & Rutherglen, *Disabilities, Discrimination*, *supra* note 100, at 2329.
[105] SMITH, *supra* note 72, at 143; Hunter & Shoben, *supra* note 3, at 149-150.
[106] Hunter & Shoben, *supra* note 3, at 151.
[107] Fredman, *Equality: A New Generation*, *supra* note 24, at 235.
[108] Id.

proactive duties are more prevalent in positive action measures than indirect discrimination.

3. Conclusion

This section provided a conceptual analysis of indirect discrimination and described its distinctive features. First, as argued in this section, indirect discrimination and direct discrimination are mutually exclusive meaning that a certain case must be identified by either of these. The key features distinguishing indirect discrimination from direct discrimination is its focus on adverse effects and its challenge to the neutrality of a certain rule or practice. Second, indirect discrimination intersects with unintentional and covert discrimination since all these concepts have a neutrality element. However, they diverge on the role of intent. Neutrality as required in the doctrine of indirect discrimination does not mean the lack of intent. Third, indirect discrimination is related to systemic, structural and institutional discrimination. They have a common feature as addressing subtle forms of inequalities, yet indirect discrimination is a narrower concept that relies on identification of a single barrier imposed on certain group or individuals. Fourth, indirect discrimination intersects with reasonable accommodation on their attention to inherent differences. Indeed, the duty to reasonable accommodation can be a remedy to indirect discrimination in certain cases. However, they diverge on the positive duties since the duties that indirect discrimination imposed are different and relatively limited. Last, positive action and indirect discrimination are both used to address historically rooted inequalities and collective disadvantage. Positive action is also broader than indirect discrimination in terms of the duties imposed.

As a consequence, the comparison between indirect discrimination with all of these concepts reveal its distinctive elements, namely neutrality, adverse effect and barrier. Indirect discrimination is concerned with both inherent difference and collective disadvantage; therefore, the adverse effect element covers these two. This section confined itself to discuss these elements as necessary tools in comparison with the related concepts without a detailed examination. The task of presenting a detailed

examination of each element will be conducted in the next section through references to the judicial applications in different jurisdictions.

C. The Application of Indirect Discrimination by Courts: Comparative Perspectives

The journey of indirect discrimination from the United States to other domestic and international jurisdictions has resulted in different judicial applications. This section compares the differences in judicial application based on how courts have approached the neutrality, adverse effect, barrier and justification elements to establish indirect discrimination. For each element, the section examines the contested issues and different approaches by referring to leading cases and legal instruments. It gives detailed explanations of each element as well as shows that there is not a uniform application of indirect discrimination.

The section starts with the neutrality element and explores the role of intent in different jurisdictions. In the second part, it moves to the adverse effect element. This part is based on the dichotomy between the disadvantage and difference approaches to the adverse effect element.[109] The third part explains the barrier element and its implications for the scope of indirect discrimination. The last part is on the justification phase. It compares the criteria used for justification in different jurisdictions.

[109] This thesis does not delve into the general discussion on the relationship between equality and difference and disadvantage, but rather visits these notions in order to provide a better classification of the cases of indirect discrimination. The way they are defined and used in this thesis may not compatible with the common usage in the literature. *Cf.* Martha T. McCluskey, *Rethinking Equality and Difference: Disability Discrimination in Public Transportation*, 97 Yale L.J. 863, 880 (1988); David A. Strauss, *Biology, Difference, and Gender Discrimination*, 41 DePaul L. Rev. 1007, 1020 (1992); Richard A. Epstein, *Gender is for Nouns*, 41 DePaul L. Rev. 981, 1006 (1992); Christine A. Littleton, *Reconstructing Sexual Equality*, 75 Cal. L. Rev. 1279, 1338 (1987).

1. The Neutrality Element: The 'American Exceptionalism' on the Role of Intent

The first element of indirect discrimination is the existence of a neutral treatment. Neutrality requires the treatment not being directed at a certain category of persons. For example, a rule not allowing women access to some public institutions is not neutral on its face; therefore, this rule cannot be an issue of indirect discrimination. The contested point with regard to neutrality is whether facial neutrality is sufficient to meet this element or whether intent behind the neutral treatment also matters. A comparative perspective on the role of intent in the cases of indirect discrimination demonstrates that there is not an agreement on this issue. The approach which does not find the facial neutrality sufficient is inclined to equate indirect discrimination with unintentional or, in reverse, covert discrimination.

The U.S. Supreme Court in *Griggs*, which is the origin of indirect discrimination, recognized "procedures, tests, neutral on their face and even neutral in terms of intent" can result in discrimination.[110] By doing so, it freed the claimants from the burden of proving discriminatory intent. However, a few years later in Washington v. Davis (hereinafter '*Washington*'), the Court ruled that adverse effects without a discriminatory intent cannot be deemed as adequate to decide on discrimination by stating:

> [A] law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination.[111]

The main rationale of the Court in *Washington* seems to be the far reaching scope of the recognition of indirect discrimination without a discriminatory intent. Therefore, it

[110] Griggs, *supra* note 1, at 430.
[111] Washington v. Davis, 426 U.S. 229, 242 (1976).

stated its concerns that such a recognition would "perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white."[112] The supporters of this decision also suggest that indirect discrimination in the absence of intent obliges the innocent people to bear the costs of remedying the harm inflicted on the victim by others.[113] While the first argument represents a practical reasoning, the latter is based on a moral concern.

The opponent views of *Washington* also raise practical and moral arguments. The first practical argument is concerned with the heavy burden of proof placed on the victims of discrimination.[114] Indeed, it is difficult to prove the intent- if there is any- behind a neutral treatment. Second, intentional discrimination is not the fundamental problem to be addressed in today's world.[115] When various different forms of discrimination are considered, requiring intent makes it even harder to catch all of them. Dealing with institutional decision-making also becomes harder under this approach, given the complexity of processes and the multitude of actors.[116] In such situations, the actual intent may be unidentifiable.

The moral opposition stands as an answer to the blaming the innocent argument. First, this opposition starts with contesting the idea that people can be divided as innocents and others. Charles Lawrence suggests that the dichotomy between intentional and unintentional discrimination is false and argues "traditional notions of intent do not reflect the fact that decisions about racial matters are influenced in large part by factors that can be characterized as neither intentional- in the sense that certain outcomes are self-consciously sought nor unintentional-in the sense that the outcomes are random, fortuitous, and uninfluenced by the decision maker's beliefs, desires, and wishes."[117]

[112] Id. at 248.
[113] Charles R. III Lawrence, *Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, The*, 39 Stan. L. Rev. 317, 320 (1986-1987).
[114] Id. at 319.
[115] CRAIG, *supra* note 3, at 73.
[116] Loenen, *Indirect Discrimination*, *supra* note 59, at 201.
[117] Lawrence, *supra* note 113, at 322.

According to Lawrence, discriminatory attitudes are so embedded in society and people "unconsciously" discriminate against others. In this regard, requiring intent "ignores much of what we understand about how the human mind works."[118] Catharine MacKinnon also has a similar stance in explaining how intent actually fills a "psychological need."[119] Accordingly, the intent requirement maintains "the assumption that the social world is equal other than in a few exceptional situations in which bad apple individuals set out to make it otherwise on purpose."[120]

The second moral opposition to the intent requirement is victim-friendly as it argues that the injury of inequality experienced by the victim exists irrespective of the discriminatory intent.[121] The Supreme Court of Canada in Ontario Human Rights Commission v. Simpsons- Sears Ltd. (hereinafter '*O'Malley*') adopted this stance by stating:

> Its (of the Code) main approach, however, is not to punish the discriminator, but rather to provide relief for the victims of discrimination. It is the result or the effect of the action complained of which is significant. If it does, in fact, cause discrimination; if its effects is to impose on one person or group of persons obligations, penalties or restrictive conditions not imposed on other members of the community, it is discriminatory.[122]

Furthermore, the Supreme Court of Canada explains the necessity of distinguishing human rights law from other fields of law in this regard by expressing "the proof of intent a necessary requirement in our approach to criminal and punitive legislation, should not be a governing factor in construing human rights legislation aimed at the elimination of discrimination." Particularly this last argument made by the Supreme Court of Canada rightfully explains why the requirement of intent cannot be imposed on the applicants in the context of human rights law.

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[118] Id. at 323.
[119] Catharine A. MacKinnon, *Substantive Equality: A Perspective*, 96 Minn. L. Rev. 1, 8 (2011-2012).
[120] Id.
[121] Lawrence, *supra* note 113, at 355
[122] Ont. Human Rights Comm. v. Simpsons- Sears [1985] 2 S.C.R. 536 [hereinafter O'Malley].

The European Court of Human Rights (ECtHR) once stated that intent is not a necessary requirement for finding indirect discrimination. According to the ECtHR, "where a general policy or measure has disproportionately prejudicial effects on a particular group, it is not excluded that this may be considered as discriminatory notwithstanding that it is not specifically aimed or directed at that group."[123] However, in Nachova and others v. Bulgaria (hereinafter '*Nachova*'), the ECtHR makes a distinction between the role of intent in the cases related to violence and those related to employment and provision of services. For the former, it requires the existence of intent by stating:

> While in the legal systems of many countries proof of the discriminatory effect of a policy or decision will dispense with the need to prove intent in respect of alleged discrimination in employment or the provision of services, that approach is difficult to transpose to a case where it is alleged that an act of violence was racially motivated.[124]

However, the division between provision of services and violence seems to be loosened by Opuz v. Turkey (hereinafter '*Opuz*') since the ECtHR in that case concluded that "bearing in mind…that the general and discriminatory judicial passivity in Turkey, *albeit unintentional*, mainly affected women, the Court considers that the violence suffered by the applicant and her mother may be regarded as gender-based violence which is a form of discrimination against women."[125] In *Opuz*, the ECtHR did not focus the motivation behind the gender-based violence to establish discrimination, but addressed the judicial passivity disproportionately affecting women. Thus, it reached a different conclusion than that of *Nachova*. By this way, it confirmed the approach of the Supreme of Canada suggesting that human rights law should not be concerned with the proof of intent. It might increase the successful claims of indirect discrimination brought before the ECtHR even in relation to violence.

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[123] Shanaghan v. United Kingdom, App. No. 37715/97, Eur. Ct. H.R. (2001) ¶ 129 http://hudoc.echr.coe.int/eng?i=001-59452.

[124] Nachova and Others v. Bulgaria, Apps. Nos. 43577/98 & 43579/98, ¶ 157, 2005- VII Eur. Ct. H.R. 1; D.H. and others v. Czech Republic, App. No. 57325/00, ¶ 179, 2007-IV Eur. Ct. H.R. 243.

[125] Opuz v. Turkey, App. No. 34401/02, ¶ 200, 2009-III Eur. Ct. H.R. 107 (Emphasis added).

The EU has also disregarded the relevancy of intent in the cases of indirect discrimination. The Race Equality Directive and the Employment Equality Directive accept that indirect discrimination can result from an *apparently neutral* provision, criterion or practice.[126] In his opinion on the case of Coleman v. Attridge Law before the CJEU, the Advocate General Poiares Maduro explained that by its very nature intent cannot be required in indirect discrimination:

> In indirect discrimination cases the intentions of the employer and the reasons he has to act or not to act are irrelevant. In fact, this is the whole point of the prohibition of indirect discrimination: even neutral, innocent or good faith measures and policies adopted with no discriminatory intent whatsoever will be caught if their impact on persons who have a particular characteristic is greater than their impact on other persons.[127]

Hence, the role of intent is the main issue discussed as related to the neutrality element. The Supreme Court of Canada, CJEU and ECtHR have the tendency to disregard the role of intent in indirect discrimination cases. They tend to focus on the facial neutrality. The approach of the U.S. Supreme Court in *Washington* stands as the exception to the general tendency to find facial neutrality sufficient to establish indirect discrimination. The implication of such an approach is that either the claimants will be asked to prove the intent behind the neutral treatment or the respondents will be able to justify the adverse effect by arguing the lack of intent. In either of these scenarios, a chance of having a successful claim of indirect discrimination becomes more difficult.

[126] Council Directıve 2000/43/EC, art. 2(2)(b) , 2000 O.J. (L 180/22) [hereinafter Race Equality Directive]; Council Directive 2000/78/EC, art. 2(2)(b) , 2000 O.J. (L 303/16) [hereinafter Employment Equality Directive] (Emphasis added)

[127] Opinion of Advocate General Poiares Maduro delivered on 31 January 2008, Case C-303/06, S. Coleman v. Attridge Law and Steve Law, ¶ 19.

2. The Adverse Effect Element: On a Group or an Individual?

a. Adverse Effect on a Group: The Disadvantage Approach

The first type of indirect discrimination is concerned with adverse effects of a neutral treatment upon disadvantaged groups. The collective disadvantage suffered by the group as a whole or by most of its members is the starting point for scrutiny under this type. It may have been established through statistical evidence showing that a group is actually disproportionately affected or an inherently suspected measure which may cause a contingent disproportionate adverse effect. The adverse effect is linked to past or continuing forms of structural and systemic discrimination directed at certain groups. To exemplify, the adverse effect of a neutral aptitude test upon a certain group can be linked to the prior structural or systemic forms of discrimination directed at that group in the field of education. From this point of view, this type offers an asymmetrical protection[128], and it resembles positive action. The disadvantage approach to indirect discrimination is the area where indirect discrimination intersects with positive action, and structural and systemic discrimination.

Griggs case is the first example of the disadvantage approach to indirect discrimination. The claimants of this case were the black employees who were disproportionately affected by the criteria put for transfer within different departments of the workplace. The employer required a high school graduation and passing an aptitude test to be eligible for this transfer. A total of 12% of the black employees met the requirement of high school graduation while the proportion of successful white employees was 34%. Further, the proportions of the employees who passed the aptitude test were 58% to 6%. This statistical imbalance revealed that these two criteria disproportionately affected black employees, and prevented them to be eligible for the job transfer. The U.S. Supreme Court ruled that these two criteria constituted indirect discrimination on the basis of race by expressing that "procedures, tests, neutral on their face and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status

[128] Charles A. Sullivan, *World Turned Upside Down: Disparate Impact Claims by White Males, The*, 98 Nw. U. L. Rev. 1505, 1566 (2003-2004).

quo of prior discriminatory practices." The Court, by saying "prior discriminatory practices", referred to inequalities resulting from segregation in the educational facilities in the past. Thus, the Court connected the collective disadvantage suffered by one racial group in the field of education with the disproportionate and adverse effects of neutral criteria. Reva Siegel explains the connection of this approach of the Court with distributive justice by saying:

> Given the unequal distribution of educational opportunity to blacks and whites, employment criteria associated with educational attainment would predictably select among applicants in a race-salient way and so produce and perpetuate distributive inequities between blacks and whites. Griggs, in short, recognizes …"historical race", discussing race as a social field of distributive injustice.[129]

Another example of this type is Bilka - Kaufhaus GmbH v Karin Weber von Hartz (hereinafter '*Bilka-Kaufhaus'*) which is one of the old cases of the CJEU. In this case, a female employee challenged the pension scheme requiring 15 years of full-time work and claimed that this constituted a violation of the principle of equal pay between men and women. The reason behind the argument regarding it as a breach of equality was that part-time workers were mostly women and their exclusion resulted in discrimination on the basis of gender. The Court agreed on the arguments of the claimant by considering "the difficulties encountered by women workers in working full-time."[130] Disproportionate effects of a neutral requirement for pension was attributed to the difficulties that women- as a group- experience due to their family responsibilities assigned to their gender roles.

D.H. and others v. Czech Republic (hereinafter '*D.H.*') can be counted as another example under this type in which the ECtHR ruled that sending a disproportionate number of Roma children to the so-called special schools due to their low scores in psychological test was indirectly discriminatory. Having stated that "as a result of their turbulent history and constant uprooting the Roma have become a specific type of

[129] Reva B. Siegel, *Discrimination in the Eyes of the Law: How Color Blindness Discourse Disrupts and Rationalizes Social Stratification*, 88 Cal. L. Rev. 77, 95 (2000).
[130] Case 170/84, Bilka - Kaufhaus GmbH v. Karin Weber von Hartz, ¶ 29, 1986 E.C.R. 1607.

disadvantaged and vulnerable minority"[131], the Court was of the view that "the relevant legislation as applied in practice at the material time had a disproportionately prejudicial effect on the Roma community."[132]

The common feature of *Griggs*, *Bilka-Kaufhaus* and *D.H.* is that all three cases were based on a disproportionate effect on a certain group which is measured by statistical data. However, this is not the only way to address collective disadvantage in the cases of indirect discrimination. The European Court of Justice in O'Flynn v. Adjudication Officer (hereinafter '*O'Flynn*') introduced indirect discrimination based on a contingent effect rather than an actual disproportionate effect. In *O'Fylnn*, the claimant was an Irish migrant resident in the United Kingdom and challenged a legislation which provided that funeral expenses would be paid to the worker if the funeral took place within the borders of the United Kingdom. This geographical limitation was alleged to be indirectly discriminatory on the basis of nationality. The Court ruled in favor of the claimant by suggesting:

> Unless objectively justified and proportionate to its aim, a provision of national law must be regarded as indirectly discriminatory if it is *intrinsically liable to affect* migrant workers more than national workers and if there is a consequent risk that it will place the former at a particular disadvantage…It is not necessary in this respect to find that the provision in question does in practice affect a substantially higher proportion of migrant workers. It is sufficient that it is liable to have such an effect.[133] (Emphasis added)

According to this quote, statistical data is not required under this liability test. Later, this approach to collective disadvantage in the cases of indirect discrimination was adopted by the two directives of the European Union. The Race Equality Directive and the Employment Equality Directive accept that indirect discrimination can occur where an apparently neutral provision, criterion or practice *would* put *persons* having a particular protected characteristics at a particular disadvantage compared to other

[131] D.H. and others, *supra* note 124, ¶ 182.
[132] Id. ¶ 209.
[133] Case C- 237/94, O'Flynn v. Adjudication Officer, ¶ 20-21, 1996 E.C.R. I-2617 .

persons.[134] The difference between a disproportionality test and a liability test is on the use of statistics and reveals that the latter is more individualized compared to the former one. The liability test can foresee the overall collective disadvantage by looking at the effect on a single individual.

The use of statistical data is the first shortcoming of a disproportionality test. It poses a number of challenges.[135] The first among them is the difficulty of selecting the appropriate pool.[136] For instance, in the cases on the exclusion of part-time workers, are the courts required to look at the entire country and obtain gender-sensitive statistical data or be confined to the single workplace? If it is the latter, there may not be significant statistical data in the workplaces with a small number of employees.[137] The second challenge is that it is not certain how much disparity is needed between groups to conclude that it is 'disproportionate'.[138] The third challenge is that statistical data may not be always available.[139] On the occasions in which the state does not keep statistical data, the victims may face difficulties to prove indirect discrimination. The 'invisible' protected grounds such as religion or sexual orientation may be difficult to be tracked by statistical data.

The second shortcoming of a disproportionality test is the requirement of an appropriate comparator. Deciding on the disproportionality under this test requires a comparison between different groups possessing different protected characteristics. This poses significant problems for the cases of intersectional or multiple discrimination. Kimberle Crenshaw explains these cases on the basis of the experience of black women as follows:

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[134] Race Equality Directive, *supra* note 126, art. 2(2)(b); Employment Equality Directive, *supra* note 126, art. 2(2)(b) (Emphasis added).

[135] Sjerps, *supra* note 61, at 245; Tobler, *supra* note 63, at 40-42; Christopher McCrudden, *Institutional Discrimination*, 2 Oxford J. Legal Stud. 303, 349 (1982)

[136] Catherine Barnard & Bob Hepple, *Substantive Equality*, 59 Cambridge L.J. 562, 571 (2000); Sjerps, *supra* note 61, at 245

[137] Alexandra Wengdahl, *Indirect Discrimination and European Court of Justice: A comparative analysis of European Court of Justice case-law relating to discrimination on the grounds of, respectively, sex and nationality*, CFE WORKING PAPER SERIES 15 (2001) http://lup.lub.lu.se/record/529830; Sjerps, *supra* note 61, at 246.

[138] Mccrudden, *supra* note 135, at 349.

[139] Tobler, *supra* note 63, at 41.

> I am suggesting that Black women can experience discrimination in ways that are both similar to and different from those experienced by white women and Black men. Black women sometimes experience discrimination in ways similar to white women's experiences; sometimes they share very similar experiences with Black men. Yet often they experience double-discrimination-the combined effects of practices which discriminate on the basis of race, and on the basis of sex. And sometimes, they experience discrimination as Black women-not the sum of race and sex discrimination, but as Black women.[140]

The assumption that everyone with a common protected ground has identical or at least similar experience fails particularly in the use and comparison of statistical data. In the instance of black women, they cannot be expected to compare themselves with white women or black men because neither of these comparisons can provide fair results given the uniqueness of their victimhood.

The shortcomings of a liability test, on the other hand, are attributable to its individualized nature and narrow reach. Firstly, the disadvantage suffered by the individual is seen as adequate to address collective disadvantage and this is seen as assimilating the concepts of direct and indirect discrimination.[141] Secondly, a liability test is triggered by "inherently suspect" rules or practices which therefore requires prior knowledge about the average situation of the members of the disadvantaged group. Without such knowledge, it will be difficult to "suspect" from a neutral treatment and claim indirect discrimination.[142] For instance, in the *O'Flynn* case, suspecting from the geographical limitation of the legislation requires prior knowledge about the situation of migrant workers and that they may have relatives in their country of origin.[143] The link between a migrant and her country of origin is easy to be found but this may not

[140] Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. Chi. Legal F. 139, 149 (1989); See also Sarah Hannett, *Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple Discrimination*, 23 Oxford J. Legal Stud. 65 (2003)
[141] Bernard & Hepple, *supra* note 136, at 568.
[142] De Schutter, *Three Models of Equality*, *supra* note 78, at 13.
[143] Wengdahl, *supra* note 137, at 20-22

be always that simple. Therefore the requirement of prior knowledge in the liability test narrows its application.

b. Adverse Effect on an Individual: The Difference Approach

An adverse effect of a neutral treatment can be upon individuals and linked to their inherent differences. Under the difference approach to indirect discrimination, an adverse effect is not necessarily linked to the structural or systemic forms of discrimination. Conversely, it can be observed with one single individual without a further investigation into the conditions of the group or the link between the individual and the group. The adverse effect under this type is based on the failure to take into account or accommodate the differences. The biological or cultural differences can be evaluated within this approach. For instance, the biological differences between men and women or abled and disabled persons as well as cultural differences of the individuals belonging to linguistic or religious minorities can be the bases of the adverse effect. The major difference of this approach from the disadvantage approach is that the adverse effect does not need to be experienced by the group. Given its individualized nature and the emphasis on inherent differences, this approach is the intersecting area of indirect discrimination with reasonable accommodation.

Thlimmenos v. Greece (hereinafter '*Thlimmenos*') before the ECtHR is a leading example of the cases where the difference approach is employed. The applicant of this case was a Jehovah witness who was convicted because he had refused to wear military uniforms. After he served his prison sentence, he applied for an accounting job. Although he succeeded in the exam, he was not admitted to the job due to his prior conviction. He argued that he had been discriminated against by suggesting that "no distinction is made between persons convicted of offences committed exclusively because of their religious beliefs and persons convicted of other offences."[144] The Court ruled that "the right not to be discriminated against in the enjoyment of the rights

[144] Thlimmenos v. Greece, App. No. 34369/97, 2000- IV Eur. Ct. H.R. 263 ¶ 42.

guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different"[145] and found a violation of the right to non-discrimination.

The difference of *Thlimmenos* from *Griggs* or *D.H.* is that the complaint is not about the neutral rule excluding convicted persons from the profession per se, but rather its effect on him as a Jehovah witness.[146] The requirement of an aptitude test in *Griggs* and the application of a psychological test in *D.H.* were contested and the applicants requested equal opportunities. In *Thlimmenos*, the comparison is made between the people convicted because of their religion and those convicted of ordinary charges, and the request is different treatment. The failure to accommodate this difference through providing an exception is the source of inequality. However, the Court did not refer to "accommodation" anywhere in the judgment.

The decision of the Supreme Court of Canada in *O'Malley* is another example. The claimant was a member of the Seventh Day Adventist Church and did not want to work on Friday and Saturday in order to observe the Sabbath as required in her religion. When her request for the change in the working days was rejected, she alleged that constituted discrimination. The Court found a violation and referred to the duty to accommodation in an indirect discrimination case:

> [W]here adverse effect on the basis of creed is shown and offending rule is rationally connected to the performance of the job, as in the case at bar, the employer is not required to justify it but rather to show that he has taken such reasonable steps towards accommodation of the employee's position as are open to him without undue hardship.[147]

The Supreme Court of Canada seems to have departed from its previous analysis in *O'Malley*. In the British Columbia Government and Service Employee's Union v. the Government of the Province of British Columbia (hereinafter '*Meiorin*'), minimum

[145] Id., ¶ 44.
[146] Oddný Mjöll Arnardóttir, *Non-Discrimination under Article 14 ECHR: The Burden of Proof* 51 Scand. Stud. Law 13, 15 (2007) [hereinafter Arnardóttir, *Non-Discrimination under Article 14*]
[147] O'Malley, *supra* note 122.

physical fitness standards for firefighters which had adverse effects on female applicants was at stake. The Court criticized not questioning the legitimacy of the neutral treatment by explaining "although the Government may have a duty to accommodate an individual claimant, the practical result of the conventional analysis is that the complex web of seemingly neutral, systemic barriers to traditionally male-dominated occupations remains beyond the reach of the law."[148]

Meiorin took a step closer to the collective disadvantage approach by referring to systemic barriers and gender-based domination. Even though physical features of women could be counted as an inherent difference, it could also become a matter of collective disadvantage as well in a male-dominated profession as the Supreme Court of Canada stated. However, at the individual level it can still be a relevant example under the difference approach. This case reveals that two approaches to the adverse effect element can be associated depending on the context in question.

3. The Barrier Element: Reducing Indirect Discrimination to the Rights with Accessibility Component?

The word 'barrier' here represents a separating rule, requirement or measure which creates a winning group and a losing group and prevents the losing group from accessing equal opportunities.[149] The U.S. Supreme Court in *Griggs* recognizes the "barriers that have operated in the past to favor an identifiable group of white employees over other employees."[150] Therefore it requires a comparison between different individuals or groups and evaluation of the accessibility of a certain benefit.

There are two implications of the barrier element. Firstly, it determines the scope of indirect discrimination. The focus on accessibility can reduce indirect discrimination to economic and social rights or some civil and political rights such as the right to vote

[148] British Columbia (Public Service Employee Relations Commission) *v.* BCGSEU, [1999] 3 S.C.R. 3 [hereinafter Meiorin].
[149] See Morris, *supra* note 103, at 220; Forshaw & Pilgerstorfer, *Direct Discrimination and Indirect Discrimination*, *supra* note 62, at 347.
[150] Griggs, *supra* note 1, at 430.

or a fair trial. Secondly, it needs a single criteria, rule or practice which disadvantages certain individuals or groups compared to others. General policies or practices may be excluded from the scope of indirect discrimination since no single barrier is identified. Thereby, a narrow interpretation of the barrier element can minimize the intersection between indirect discrimination and systemic, institutional and structural forms of discrimination.

Regarding the first implication of the barrier element, a comparative look confirms that indirect discrimination applies mostly in relation to economic and social rights. In the United States, indirect discrimination has its origins in employment law. The starting case *Griggs* was on Title VII of the Civil Rights Act concerning racial discrimination in employment relations. *Washington* prevented the extension of indirect discrimination to the constitutional claims. Even under Title VII, the courts applied indirect discrimination to cases involving selection criteria for hiring, promoting and firing.[151] It has been argued that indirect discrimination, in fact, has produced no substantial change in the areas other than its original context, namely written employment tests.[152]

Similarly in the EU, the initial indirect discrimination cases on the basis of gender stemmed from employment law, specifically the equal pay for equal work clause of the EEC Treaty.[153] Later the directives defining indirect discrimination enhanced the scope of indirect discrimination. Although the Employment Equality Directive is confined to employment relations, the Race Equality Directive is applicable in the areas of employment, social security, education, health and housing.[154]

The ECtHR also applied the doctrine of indirect discrimination in relation to economic and social matters. In *Thlimmenos*, the complaint was on the refusal of the applicant's access to a job opportunity, whereas in *D.H.* Roma children were denied the access to

[151] Hunter & Shoben, *supra* note 3, at 128.
[152] Michael Selmi, *Was the Disparate Impact Theory a Mistake*, 53 UCLA L. Rev. 701, 705 (2005-2006).
[153] Treaty Establishing the European Economic Community, 25 March 1957, Art. 119, 298 U.N.T.S. 3, 4 Eur. Y.B. 412.
[154] Race Equality Directive, *supra* note 126, art 3; Employment Equality Directive, *supra* note 126, art 3.

a social benefit, i.e. education. The ECtHR refrained from finding indirect discrimination in relation to the right to life. In Hugh Jordan v. United Kingdom (hereinafter '*Hugh Jordan*'), it ruled that statistical imbalance regarding the victims of the killings by security forces does not suffice to find discrimination:

> Where a general policy or measure has disproportionately prejudicial effects on a particular group, it is not excluded that this may be considered as discriminatory notwithstanding that it is not specifically aimed or directed at that group. However, even though statistically it appears that the majority of people shot by the security forces were from the Catholic or nationalist community, the Court does not consider that statistics can in themselves disclose a practice which could be classified as discriminatory within the meaning of Article 14. [155]

A critical evaluation of the reasoning of the Court in *Hugh Jordan* shows that the seriousness of the human rights violation prevented the Court from finding a violation of non-discrimination.[156] When disproportionate effects are related to the right to life rather than the rights with economic and social dimensions, the Court is not willing to apply indirect discrimination. The reason behind such an approach can be the difference between the core civil rights such as the right to life and freedom from torture and the rights with accessibility component. In the former type of rights, a barrier cannot be identified.

The second implication of the barrier element is that it relies on a specific separating treatment (rule, criteria, practice etc.) which is formulated in a neutral way and cannot expand to the general policies and practices adversely affecting certain individuals or groups. It is named here the "single barrier test". In the United States, the claimants are required to demonstrate a specific practice that creates adverse effects. In Wards Cove Packing Co. v. Atonio (hereinafter '*Wards Cove*'), the U.S. Supreme Court stated that

[155] Hugh Jordan v. United Kingdom, App. No. 24746/94, ¶154, Eur. Ct. H.R. (2001) http://hudoc.echr.coe.int/eng?i=001-59450.
[156] Arnardóttir, *Non-Discrimination under Article 14*, *supra* note 146, at 39.

indirect discrimination could not be proven "simply by showing that 'at the bottom line' there is racial imbalance in the work force.[157]

Griggs, *D.H.*, *Bilka-Kaufhaus* and *O'Fylnn* comply with the single barrier test. There is a specific rule, criteria or practice that creates a winning group and a losing group in these cases. The disproportionate representation of one gender, race or ethnicity in the losing group calls for scrutiny. Enderby v Frenchay Health Authority (hereinafter '*Enderby*') represents an alternative to the single barrier test. The claimant argued that the profession of speech therapist which was predominantly practiced by women was paid less compared to the professions of equal value and which were predominantly practiced by men. She claimed that this was a discrimination based on sex and the CJEU agreed. The difference of *Enderby* from the cases with the barrier component is that a specific rule or practice that advantaged one group and disadvantaged another was not identified. While in other cases, for instance in *Griggs,* it was the separating rule that creates two distinct groups identifiable by a protected ground. In *Enderby* two groups already existed in the absence of a separating rule.[158] In other words, in *Griggs* an aptitude test separated the black from the white and advantaged the latter. In *Enderby* men and women were already separated on the basis of the profession; not a single rule or practice resulted in this separation.

The alternative created with *Enderby* to the single barrier test in the EU later vanished with the adoption of the Racial Equality and Employment Equality Directive in 2000. According to the definitions made by these Directives, "an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons" is required to speak of indirect discrimination.[159] This definition requires the victims to rely on a single apparently neutral provision, criterion or practice and excludes the possibility of challenging general policies or practices.

[157] Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 657 (1989).
[158] Forshaw & Pilgerstorfer, *supra* note 62, at 352.
[159] Racial Equality Directive, *supra* note 126, Art. 2(2)(b); Employment Equality Framework Directive, *supra* note 126, Art. 2(2)(b)

The single barrier test can also be the alternative explanation for the decision of the ECtHR in *Hugh Jordan* where the use of force by security officers was allegedly discriminatory. Although the ECHR did not discuss this issue in the judgment, an approach conceiving indirect discrimination as inherently including a single barrier will probably see this type of case out of its scope. When institutional discrimination by the security forces is at stake, it is difficult to identify a single barrier. Therefore, a narrow interpretation of the barrier element makes it difficult to evaluate such cases at the intersection between indirect and institutional discrimination.

4. The Justification Element of Indirect Discrimination: Lack of a Uniform Test

The neutrality, adverse effect and barrier elements of indirect discrimination are adequate to establish a prima facie indirect discrimination. However an important question arises as whether it would be sufficient for a court to decide on indirect discrimination relying merely on the existence of a prima facie claim or whether it would move to the justification phase. In a case where the court requires the respondent side to justify the reasons for adverse effects, what kind of criteria would be applied appears as another question.

Griggs, as the first case applying indirect discrimination, established the criteria to justify the adverse effect. According to the U.S. Supreme Court, "the touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."[160] According to these criteria, the US Supreme Court decided that neither the requirement of high school graduation nor the general intelligence test were in "a demonstrable relationship to successful performance of the jobs."[161] Although the US Supreme Court

[160] Griggs, *supra* note 1, at 431.
[161] Id.

held different interpretations of the justification in the following cases[162], the Civil Rights Act of 1991 confirmed the stance in *Griggs* and prescribed that,

> An unlawful employment practice based on disparate impact is established under this title only if: (i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is *job related* for the position in question *and* consistent with *business necessity*.[163] (Emphasis added)

The use of the 'and' conjunctive between job relatedness and business necessity shows that these two are not synonyms but describe different concepts.[164] Job relatedness is concerned with the relationship of the neutral element with the individual's job, while business necessity implies general factors which are not necessarily directly related to that specific job.[165] In that sense, the US Supreme Court takes into account both minor employment preferences and general business aims and policies.

In the European Union context, the CJEU seems to have a similar test of justification as the US system but does not use the exact terminology. In 1986 in *Bilka-Kaufhaus*, the CJEU decided that it is for the national court to decide to what extent the pay practice affecting more women than men may be regarded as "objectively justified economic grounds." According to the CJEU,

> If the national court finds that the measures chosen by Bilka correspond to a *real need* on the part of the undertaking, are *appropriate* with a view to achieving the objectives pursued and are *necessary* to that end, the fact that the measures affect a far greater number of women than men is not sufficient to show that they constitute an infringement of Article 119.[166] (Emphasis added)

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[162] Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 657 (1989).
[163] Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074.
[164] MICHEAL J. ZIMMER, CHARLES A. SULLIVAN, REBECCA HANER WHITE, CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION LAW 289 (2013)
[165] Id.
[166] Bilka, *supra* note 130, ¶ 36.

In 1999, the CJEU with its decision on the *Seymour Smith* case established that mere generalizations concerning the capacity of the disputed rule to achieve the general purpose is not enough to satisfy the justification test. In the same decision, the CJEU ruled that the margin of discretion of the member state over the social policy cannot undermine the principle of equal pay between men and women.[167]

The criteria set forth in the case-law of the CJEU is later prescribed in the Racial Equality Directive and Employment Equality Directive in 2000. Both Directives contain the identical definition of indirect discrimination and explain that the provision, criterion or practice which is allegedly discriminatory is objectively justified by a legitimate aim and when "the means of achieving that aim are appropriate and necessary."[168]

The Employment Equality Directive includes an exception for indirect discrimination on the basis of disability. This form of discrimination is subjected to another test of justification. According to Article 5 of this Directive, employers are under the obligation to take measures to reasonably accommodate the needs of disabled people "unless such measures would impose a disproportionate burden" on them. It means that for the disability related indirect discrimination or reasonable accommodation cases, the respondent side can justify her action or inaction by a disproportionate burden argument.

The approach of the Supreme Court of Canada is different from the U.S. and the EU systems. While it applied a justification phase to the cases of direct discrimination, it applied the "undue hardship" criteria to evaluate whether the respondent side took "such reasonable steps towards accommodation of the employee's position as are open to him without undue hardship."[169] Later with *Meoirin*, the Supreme Court of Canada abandoned this approach and introduced a three-step test where the tests for direct and indirect discrimination cases merged:

[167] Case C- 167/97, Seymour Smith and Perez, ¶ 75, 1999 E.C.R. I- 623.
[168] Racial Equality Directive, *supra* note 126, Art. 2(2)(b); Employment Equality Framework Directive, *supra* note 126, Art. 2(2)(b)
[169] O'Malley, *supra* note 122.

(1) that the employer adopted the standard for a ration purpose rationally connected to the performance of the job;

(2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of legitimate work-related purpose; and

(3) that the standard is reasonably necessary to the accomplishment of that legitimate work related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate impossible individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.[170]

As the only human rights court among these, the ECtHR applied the same justification test for direct and indirect discrimination cases. The ECtHR applied this test for the first time in the *Belgian Linguistics Case* by noting that the principle of equality was violated when the distinction had no objective and reasonable justification. According to the Court, this justification was based on the existence of a legitimate aim and a "reasonable relationship of proportionality between the means employed and the aim sought to be realised."[171] Later, this test was consistently applied in the cases of indirect discrimination.[172]

Only in the *Hoogendijk* case where a neutral rule affected a higher number of women compared to men, the ECtHR affirmed the problem of the burden of proof in indirect discrimination. Accordingly, the burden of proving that disproportionate effect was the result of objective factors unrelated to discrimination on the grounds of sex lay on the respondent side. As the Court stated, "if the onus of demonstrating that a difference in impact for men and women is not in practice discriminatory does not shift to the

[170] Meiorin, *supra* note 148, ¶ 54.
[171] Case "Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium" v. Belgium (No. 2), 6 Eur. Ct. H.R. (Ser. A) at 30-31 (1968).
[172] Hoogendijk v. the Netherlands, App. No. 58641/00, Eur. Ct. H.R. (2005) http://hudoc.echr.coe.int/eng?i=001-68064; S.A.S. v. France, App. No. 43835/11, ¶ 161, Eur. Ct. H.R. (2014) http://hudoc.echr.coe.int/eng?i=001-145466; Thlimmenos, *supra* note 144, ¶ 46; D.H. and others, *supra* note 124, ¶ 196.

respondent Government, it will be in practice extremely difficult for applicants to prove indirect discrimination."

This comparative analysis demonstrates that the jurisdictions analyzed here do not find prima facie indirect discrimination sufficient, but call for the justification phase. The formulation of justification, however, differs in each jurisdiction. The first difference that can be observed is that when the duty to accommodation is involved, the evaluation of disproportionate or undue burden replaces the justification element. Secondly, only the ECtHR assesses the disproportionality of the means chosen. This difference demonstrates that the human rights jurisdiction is more stringent than other jurisdictions in terms of justification since it adds one more criteria and increases the chances of finding indirect discrimination.

5. Conclusion

In this section each element of indirect discrimination was explained in detail by referring to the judicial applications in domestic and regional jurisdictions. The explanation revealed that there have been contested issues and different approaches under each element. Firstly, the role of intent is the contested issue in the interpretation and application of the neutrality element. Although there is a tendency in general to limit this element to facial neutrality, the U.S. approach in *Washington* is exceptional as it requires existence of intent behind a facially neutral rule or measure. Secondly, there have been two different approaches to the adverse effect element. The disadvantage approach to this element is concerned with the groups suffering historically rooted structural disadvantage. The disadvantage is observed either through statistical evidence or by scrutinizing inherently suspected treatment that may have a contingent effect. The difference approach, on the other hand, is concerned with inherent differences that can be visited at the individual level. Thirdly, the doctrine of indirect discrimination has been applied to the neutral rule or practice which creates a barrier to certain groups or individuals. While that barrier prevents those groups or individuals from accessing economic and social benefits and therefore disadvantages them, it works in favor of other groups or individuals in a comparable situation. As the

barrier element is concerned with accessibility, indirect discrimination is applied mostly in relation to economic and social rights. Therefore, the barrier element determines the scope of indirect discrimination.

The three elements of indirect discrimination, namely neutrality, adverse effect and barrier constitute indirect discrimination prima facie. Establishing these three elements is the first phase of an indirect discrimination case. The second phase corresponds to the justification element. The application of this element varies considerably as each jurisdiction applies different criteria to test justification. Each jurisdiction requires a relationship between the neutral treatment chosen and the aim sought with it. This relationship is linked to either the criteria of necessity and appropriateness or proportionality. What is striking is that the disproportionate or undue burden test used in reasonable accommodation can be applied in the justification element of indirect discrimination. This once again shows the thin line between these two concepts.

Having provided a comparative perspective to the judicial application of indirect discrimination and a detailed examination of each element of indirect discrimination, the thesis now moves to the approach of the UN treaty bodies to indirect discrimination. The next section will explain the practice of the UN treaty bodies by following the four elements of indirect discrimination. These elements will provide the lenses through which the UN treaty bodies can be compared to each other and with the broader jurisprudential context that was presented in this section.

D. The approach of UN Human Rights Treaty Bodies to Indirect Discrimination

Indirect discrimination has travelled to the United Nations human rights law. This section aims to discover how it is interpreted and applied by the UN human rights treaty bodies and whether they present an original and uniform approach. The first part provides a detailed map of equality provisions in each United Nations human rights treaty under examination, namely the ICCPR, CESCR, CERD, CEDAW and the CRPD. The following parts focus on how the UN treaty bodies applied the four elements of indirect discrimination. This section will argue that uniformity across the UN human rights treaty bodies with regard to indirect discrimination is attained in the neutrality and barrier elements. However, the application of adverse effect and justification elements vary in the practice of the UN treaty bodies. Differences result from the variety of rights and groups covered by each treaty body. This section will further show that the definitions of indirect discrimination reflect the established approaches in the broader jurisprudential context. With regard to the barrier element, however, the practice of the UN human rights treaty bodies offers indirect discrimination a wider scope compared to other jurisdictions.

1. The Right to Equality and Non-Discrimination in the Texts of the United Nations Human Rights Treaties

a. The ICCPR

Article 2 of the ICCPR obliges states to respect and ensure equal enjoyment of rights recognized in the ICCPR "without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." The right to non-discrimination under this Article is an accessory right linked with the enjoyment of other substantive rights in the Covenant. Article 3

provides another accessory right to equality which obliges states to ensure equal rights of men and women in the enjoyment of the rights set forth in the Covenant. Article 26, on the other hand, provides a self-standing right to non-discrimination by stating:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The phrase of 'other status' in both Article 2 and Article 26 indicates that discriminatory grounds are not exhaustive. However, discrimination based on one of the listed grounds require a higher threshold for justification.[173] Wouter Vandenhole discusses the 'triple content' of Article 26 which includes equality before the law, equal protection of the law and the duty to protect from discrimination.[174] Thus, the obligations derived from Article 26 are not limited to negative duties.

The ICCPR also protects equality before the courts and tribunals[175] and the equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution[176]. Additionally, it prohibits "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination."[177]

The ICCPR does not involve a definition of discrimination. The HRC provides a definition in its general comment on non-discrimination as such:

> "Discrimination" as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the

[173] Müler and Engelhard v. Namibia, Comm. No. 919/2000, Hum. Rts. Comm., U.N. Doc. No. A/57/40 (26 March 2002)
[174] VANDENHOLE, *supra* note 5, at 17.
[175] ICCPR, *supra* note 8, Art. 14.
[176] Id. Art. 23.
[177] Id. Art. 20.

purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.[178] (Emphasis added)

In the same general comment, the HRC states that it is concerned with "discrimination in fact, which may be practiced either by public authorities, by the community, or by private persons or bodies."[179] It is not clear what the Committee meant by 'discrimination in fact' but it can be interpreted as a term inherently covering indirect discrimination. This statement also demonstrates that the HRC recognizes private discrimination.

b. The CESCR

The ICESCR has a twin non-discrimination clause of Article 2 of the ICCPR, which obliges states parties "to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[180] It also imposes an obligation to ensure equal rights of men and women in the enjoyment of economic, social and cultural rights.[181]

The CESCR Committee emphasizes the right to non-discrimination in its right-specific general comments.[182] In the general comment on the right to adequate housing, the

[178] HRC General comment no 18, *supra* note 15, ¶ 7.
[179] Id., ¶ 9.
[180] ICESCR, *supra* note 9, Art. 2.
[181] Id., Art. 3.
[182] *General Comment No. 4, The Right to Adequate Housing (art. 11(1) of the Covenant)*, Comm. *on Econ.*, Soc. & Cult. Rts., 6th Sess., U.N. Doc. E/ 1992/23 (13 Dec. 1991); *General Comment No. 13: The Right to Education*, Comm. on Econ., *Soc.* & Cult. Rts., 21st Sess., U.N. Doc. *E/C.12/1999/10* (*8* Dec.1999), *General Comment No. 14, The Right to the Highest Attainable Standard of Health, Comm. on Econ., Soc.* & Cult. Rts., 22d Sess., U.N. Doc. E/C.1 2/2000/4 (11 May 2000); *General Comment No. 15: The Right to Water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*, Comm. on Econ., *Soc. &* Cult. Rts., 29th Sess., U.N. Doc. E/C.12/2002/11 (26 Nov. 2002); *General Comment No. 18: The Right to Work (Article 6 of the International Covenant on Economic, Social and Cultural Rights)*, Comm. on Econ., Soc. & Cult. Rts., 35th Sess., U.N. Doc E/C.12/GC/18 (*24* Nov. 2005); *General Comment No. 19: The Right to Social Security (Art. 9)*, Comm. on Econ. Soc. & Cult. Rts., 39th Sess., U.N. Doc. E/C.12/ GC/19 (23 Nov. 2007).

Committee states that the enjoyment of this right cannot be subjected to any form of discrimination and the "allegations of any form of discrimination in the allocation and availability of access to housing" must be included in the domestic legal systems.[183] The Committee also stresses in its general comment on the right to education that "education must be accessible to all, especially the most vulnerable groups, in law and fact, without discrimination on any of the prohibited grounds."[184]

According to the CESCR Committee, "the prohibition against discrimination enshrined in Article 2 (2) of the Covenant is subject to neither progressive realization nor the availability of resources" therefore the right to non-discrimination imposes an immediate obligation to states parties.[185]

With regard to temporary special measures, the CESCR Committee encourages states to adopt them to achieve equality and regards these measures as a requirement for elimination of systemic discrimination.[186] Temporary special measures in the context of education are not regarded as a violation of equality "so long as such measures do not lead to the maintenance of unequal or separate standards for different groups, and provided they are not continued after the objectives for which they were taken have been achieved."[187]

c. The ICERD

Article 1 of the ICERD defines racial discrimination as "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the

[183] CESCR General comment no 4, *supra* note 182, ¶ 6, ¶ 17.
[184] CESCR General comment no 13, *supra* note 182, ¶ 6(b)(i).
[185] CESCR General comment no 13, *supra* note 182, ¶ 31, *General Comment No. 16, The Equal Rights of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights*, Comm. *on Econ. Soc. &* Cult. Rts., 34th Sess., Agenda Item 5, U.N. Doc., E/C.12/2005/4 (2005), ¶ 16.
[186] *General Comment No. 20, Non-Discrimination in Economic, Social and Cultural Rights (art. 2, para. 2)*, Comm. on Econ., Soc. & Cult. Rts., 42d Sess., Agenda Item 3, U.N. Doc. E/C.12/GC/20 (1 June 2009), ¶ 38-39.
[187] CESCR General comment no 13, *supra* note 182, ¶ 32.

political, economic, social, cultural or any other field of public life." The CERD Committee reiterates its general recommendation that "a distinction is contrary to the Convention if it has either the purpose or the effect of impairing particular rights and freedoms."[188]

As can be expected from a convention designed to eliminate discrimination, the right to equality and non-discrimination is enshrined throughout the ICERD. Article 2 imposes a wide range of duties to states including taking "special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms."[189] Article 2 prohibits discrimination in the enjoyment of rights and freedoms enlisted in Article 5. The list provided by Article 5 is not exhaustive, and it covers civil, political, economic, social and cultural rights.

The ICERD has a social engineering function[190] prescribed in Article 7. As it reads,

> States Parties undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to *combating prejudices* which lead to racial discrimination and to *promoting understanding, tolerance and friendship* among nations and racial or ethnical groups, as well as to propagating the purposes and principles of the Charter of the United Nations, the Universal Declaration of Human Rights, the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, and this Convention. (Emphasis added)

Another important feature of the ICERD that needs to be mentioned is that it recognizes 'groups' together with individuals as the right-bearer.[191] The prohibition of discrimination, however, does not apply to "distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-

[188] *General recommendation XIV on article 1, paragraph 1*, Comm. on the Elim. of Racial Discrim., 46th Sess., U.N. Doc A/48/18 (1993).
[189] ICERD, *supra* note 6, Art. 1(4), 2(2).
[190] Tobler, *supra* note 63, at 15.
[191] ICERD, *supra* note 6, Art. 1(4), 2, 7.

citizens."[192] Although 'race' is understood in general sense covering national and ethnic origin, it does not extend to citizenship.

d. The CEDAW

Discrimination against women is defined by the CEDAW as "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."[193]

The main characteristic of the CEDAW is that it provides asymmetrical protection through the definition of discrimination. Further, this asymmetry results from recognizing only women as applicants to individual complaint mechanism.[194] Even this single characteristic demonstrates that the CEDAW means a significant departure from the formal understanding of equality.

Similar to the ICERD, the CEDAW is an instrument with a focus on discrimination and equality. Therefore, it obliges states not just to refrain from discriminating but also to take appropriate measures to eliminate all kinds of discrimination against women and ensure their advancement.[195] Article 4 of the CEDAW enables taking temporary special measures to accelerate de facto equality between men and women. The CEDAW also specifies the fields where the states are obliged to eliminate

[192] Id. Art. 1(2).
[193] CEDAW, *supra* note 7, Art.1.
[194] Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, U.N. GAOR, 54th Sess., Agenda Item 109, art. 2, U.N. Doc. A/Res/54/4 (1999).
[195] CRPD, *supra* note 10, Art.2 and 3.

discrimination, such as political and public life[196], education[197], employment[198] , health care[199] and marriage and family relations[200].

The social engineering function of the CEDAW, similar to that of the ICERD, appears in Article 5 which provides an obligation "to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women."

e. The CRPD

The CRPD has the purpose of promoting, protecting and ensuring the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities.[201] It defines 'discrimination on the basis of disability' as "any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."[202]

The denial of reasonable accommodation is accepted as a distinct form of discrimination by the CRPD and defined as "necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms."[203]

[196] Id., Art. 7.
[197] Id., Art. 10.
[198] Id., Art. 11.
[199] Id., Art. 12.
[200] Id., Art. 16.
[201] Id., Art. 1.
[202] Id., Art. 2.
[203] Id., Art. 2.

Non-discrimination, equality of opportunity and equality between men and women are counted among the general principles of the CRPD.[204] The obligations of the state parties are listed in Article 4 including modification or abolishment of existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities and elimination of discrimination on the basis of disability by any person, organization or private enterprise.

Reasonable accommodation is seen as a means to promote equality and eliminate discrimination.[205] Additionally, special measures necessary for de facto equality of persons with disabilities are not regarded as discrimination.[206] The CRPD is the only human rights treaty that explicitly refers to multiple discrimination by addressing the situation of women with disabilities.[207]

Like the ICERD and CEDAW, the CRPD also has a function of social engineering through awareness-raising and combatting stereotypes, prejudices and harmful practices directed at persons with disabilities.[208]

Equal recognition before the law particularly enjoying legal capacity on an equal footing is another issue addressed by CRPD. The principle of equality is enshrined throughout the Convention by imposing the obligation to ensure the enjoyment of substantive rights such as access to justice, liberty and security of the person and freedom from torture "on an equal basis with others."[209]

[204] Id., Art. 3.
[205] Id., Art. 5/3.
[206] Id., Art. 5/4.
[207] Id., Art. 6.
[208] Id., Art. 8/1 (a) and (b).
[209] Id., Art. 13, 14, 15.

2. The Neutrality Element: Convergence on the Dichotomy between Purpose and Effect

The wording of Article 2 of the ICERD and CEDAW and Article 1 of the CRPD clearly demonstrates that discrimination may occur by "purpose or effect" of any act. Accordingly, purpose or intent cannot be the sole decisive factor in the cases of discrimination. Although the phrase "purpose or effect" clearly demonstrates that intent is not a necessary element of discrimination, there has been a discussion on whether these two terms refer to direct discrimination and indirect discrimination respectively. Some argue that while the purpose refers to direct discrimination, the effect implies indirect discrimination.[210] Accordingly, they regard indirect discrimination as requiring neutrality in terms of the purpose. Nonetheless, this interpretation has not been accepted by all.[211] Indirect discrimination is not necessarily unintentional or without a purpose. However, an emphasis on effect will ease covering up the cases of indirect discrimination, since most of them can be identified through looking at adverse effects. Therefore, the effect part can be deemed as referring to indirect discrimination.

The HRC and CESCR Committee also take the view that intent is irrelevant by adopting the comprehensive definition of discrimination with the phrase 'effect'.[212] The HRC reiterated this in Simunek et al. v. Czech Republic by claiming that "the intent of the legislature is not alone dispositive in determining a breach of Article 26 of the Covenant."[213] While excluding the idea that indirect discrimination is equal to covert discrimination, the HRC in Cecelia Derksen v. Netherlands (hereinafter '*Cecelia Derksen*') equated indirect discrimination with unintentional discrimination. It formulated indirect discrimination as requiring neutrality both on face and in terms of intent:

[210] See e.g. Tobler, *supra* note 63, at 12.
[211] CRAIG, *supra* note 3, at 70-71; Abramson, *supra* note 78, at 19.
[212] HRC General comment no. 18, *supra* note 15, ¶ 7; CESCR General comment no. 5, supra note 15, ¶ 15.
[213] Simunek et al. v. Czech Republic (Comm. No. 516/1992), Hum. Rts. Comm., ¶ 11.7., U.N. Doc. A/50/40 (19 July 1995).

> Article 26 prohibits both direct and indirect discrimination, the latter notion being related to a rule or measure that may be neutral on its face *without any intent* to discriminate but which nevertheless results in discrimination because of its exclusive or disproportionate adverse effect on a certain category of persons.[214] (Emphasis added)

Previously in Althammer v. Australia (hereinafter '*Althammer*'), the HRC was of the view that "a violation of Article 26 can also result from the discriminatory effect of a rule or measure that is neutral at face value *or without intent* to discriminate."[215] The phrase of 'without intent' was used so as to imply that the absence of intent cannot be a justification ground in the cases of indirect discrimination. However, in *Cecilia Derksen* the same phrase was used as implying that indirect discrimination is necessarily unintentional.

The CEDAW Committee also accepted that discrimination against women can be unintentional as well by stating that "failure to achieve full and equal participation of women can be unintentional and the result of outmoded practices and procedures which inadvertently promote men."[216] Further, it cited indirect discrimination and unintentional discrimination as distinct concepts in one concluding observation by stating that discrimination is a "multifaceted phenomenon that entails indirect and unintentional as well as direct and intentional discrimination."[217]

The CERD Committee has a firm stance with regard to this discussion, which deems the term 'effect' as referring to indirect discrimination. As the CERD Committee stated, "in seeking to determine whether an action has an effect contrary to the Convention, it will look to see whether that action has an unjustifiable disparate impact upon a group

[214] Derksen v. the Netherlands, Comm. No. 976/2001, Hum. Rts. Comm., ¶ 9.3., U.N. Doc. CCPR/C/80/D/976/2001 (1 April 2004) [hereinafter Cecelia Derksen].
[215] Althammer et al. v. Austria, Comm. No. 998/2001, Hum. Rts. Comm., ¶ 10.2., U.N. Doc. CCPR/C/78/D/998/2001 (8 August 2003) [hereinafter Althammer].
[216] *General recommendation No. 23: Political and public life,* Comm. on Elim. of Discrim. Against Women, 16th Sess., ¶ 15, U.N. Doc. A/52/38 (1997).
[217] *Report of the Committee on the Elimination of Discrimination against Women,* 27th Sess., Comm. on Elim. of Discrim. Against Women ¶ 279, U.N. Doc. A/57/38(PARTII) (15 Sep 2002).

distinguished by race, colour, descent, or national or ethnic origin."[218] The CERD Committee relied on the dichotomy between purpose and effect in a number of concluding observations.[219] Additionally, particularly in the concluding observations to the United States, it emphasized that discrimination cannot be confined to the acts and legislation with discriminatory purpose.[220] In this way, the CERD Committee opposed the requirement of intent in *Washington*. Thus, it can be concluded that the CERD Committee is not concerned with the intent or purpose behind the neutral treatment, and distinguishes indirect discrimination from covert discrimination.

Consequently, the 'purpose or effect' phrase in the definition of discrimination has an important role in the approaches of the treaty bodies to the neutrality element. It leads to a convergence between them on the irrelevancy of intent. The CERD Committee stands out as the leading treaty body which strictly complies with the distinction between the purpose and the effect.

[218] *CERD General recommendation XIV*, *supra* note 188.

[219] *Concluding observations of the Committee on the Elimination of Racial Discrimination: United Kingdom of Great Britain and Northern Ireland,* Comm. on Elim. of Racial Discrim., 50th Sess., ¶ 18, U.N. Doc. CERD/C/304/Add.20 (23 Apr 1997); *Concluding observations of the Committee on the Elimination of Racial Discrimination: Australia,* Comm. on Elim. of Racial Discrim., ¶ 12, U.N. Doc. CERD/C/AUS/CO/15-17 (13 Sep 2010) [CERD Australia]; *Concluding observations of the Committee on the Elimination of Racial Discrimination: China,* Comm. on Elim. of Racial Discrim., U.N. Doc. CERD/C/CHN/CO/10-13 (15 Sep 2009) [hereinafter CERD China]; *Concluding observations of the Committee on the Elimination of Racial Discrimination: Czech Republic*, Comm. on Elim. of Racial Discrim., 70th Sess., ¶ 17, U.N. Doc. CERD/C/CZE/CO/7 (11 Apr 2007); *Concluding observations of the Committee on the Elimination of Racial Discrimination: Norway,* Comm. on Elim. of Racial Discrim., 69th Sess., ¶ 20, U.N. Doc. CERD/C/NOR/CO/18 (19 Oct 2006)

[220] *Concluding observations of the Committee on the Elimination of Racial Discrimination: United States of America,* Comm. on Elim. of Racial Discrim., U.N. Doc. A/56/18(SUPP) (1 Oct 2001); *Concluding observations of the Committee on the Elimination of Racial Discrimination: United States of America*, Comm. on Elim. of Racial Discrim., 72nd Sess., § C, U.N. Doc. CERD/C/USA/CO/6 (8 May 2008)[hereinafter CERD United States]; *Concluding observations on the combined seventh to ninth periodic reports of the United States of America*, Comm. on Elim. of Racial Discrim., § C, U.N. Doc. CERD/C/USA/CO/7-9 (24 Sep 2014).

3. The Approach of the United Nations Treaty Bodies to the Adverse Effect Element

a. The Human Rights Committee:

The HRC encountered an indirect discrimination claim for the first time in 1989 in Karnel Singh Bhinder v. Canada (hereinafter '*Karnel Singh'*) in which the applicant, a Sikh, refused to wear safety headgears because of his turban. The Committee stated that "in the case under consideration legislation which, on the face of it, is neutral in that it applies to all persons without distinction, is said to operate in fact in a way which discriminates against persons of the Sikh religion."[221] By stating so, the HRC brought its first definition of indirect discrimination without spelling it out. In 2003 in *Althammer*, it adopted a parallel definition by claiming that "a violation of Article 26 can also result from the discriminatory effect of a rule or measure that is neutral at face value or without intent to discriminate."[222] The HRC did not name the case as indirect discrimination at that time either. However, these cases are important as being the first cases in which the HRC regarded indirect discrimination within the scope of Article 26 of the ICCPR.

The definitions brought in *Karnel Singh* and *Althammer* explain indirect discrimination simply as "discrimination in fact", but do not provide a concrete basis on the relevant notion at stake, namely difference or disadvantage. However, considering the facts of the cases, it can be argued that the HRC did not make a difference between those two notions. *Karnel Singh* case was concerned with religious belief of one individual correspondingly called for difference approach, while *Althammer* was related to the disadvantage caused by the pension scheme to the group of retired persons. Accordingly, the HRC accepted that discriminatory effects can be upon an individual or a group and regarded both approaches within the scope of the ICCPR.

[221] Karnel Singh Bhinder v. Canada, Comm. No. 208/1986, Hum. Rts. Comm., ¶ 6.1., U.N. Doc. CCPR/C/37/D/208/1986 (9 November 1989).
[222] Althammer, *supra* note 215, ¶ 10.2.

In 2004 with Pohl et al. v. Australia (hereinafter '*Pohl et al.*'), the HRC adopted another definition by explicitly naming it as 'indirect discrimination'. Accordingly, "an indirect discrimination may result from a failure to treat different situations differently, if the negative results of such failure exclusively or disproportionately affect persons of a particular race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[223] With this definition, the HRC used both disadvantage and difference approaches. It used a difference approach by stating that adverse effect can be derived from the failure to treat different situations differently. The disadvantage approach, on the other hand, appeared with the emphasis on the exclusiveness or disproportionality of the adverse effect.

At the same year, the HRC adopted the disadvantage approach by using the disproportionality test alone in *Cecelia Derksen* by stating:

> Article 26 prohibits both direct and indirect discrimination, the latter notion being related to a rule or measure that may be neutral on its face without any intent to discriminate but which nevertheless results in discrimination because of its exclusive or disproportionate adverse effect on a certain category of persons.[224]

In light of these definitions, it can be observed that the HRC did not confine indirect discrimination to only one of the approaches. It shows that the HRC did not regard the prohibition on indirect discrimination merely as an asymmetrical protection to those who suffered pre-existing structural discrimination. It also formulated indirect discrimination as the failure to treat people in different situations differently.

I. The justiciability problem of indirect discrimination in disadvantage based cases

[223] Pohl et al. v. Austria, Comm. No. 1160/2003, Hum. Rts. Comm., ¶ 9.4., U.N. Doc. CCPR/C/81/D/1160/2003 (9 July 2004).
[224] Cecelia Derksen, *supra* note 214, ¶ 9.3.

In principle, the HRC accepts the self-standing nature of Article 26 as it stated in Vos v. the Netherlands (hereinafter *Vos*):

> The Committee has already expressed the view in its case law b/that the International Covenant on Civil and Political Rights would still apply even if a particular subject-matter is referred to or covered in other international instruments, e.g. the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women or, as in the present case, the International Covenant on Economic, Social and Cultural Rights. Notwithstanding the interrelated drafting history of the two covenants, it remains necessary for the Committee to apply fully the terms of the International Covenant on Civil and Political Rights. The Committee observes in this connection that the provisions of Article 2 of the International Covenant on Economic, Social and Cultural Rights do not detract from the full application of Article 26 of the International Covenant on Civil and Political Rights.[225]

However, it also concluded that "differences in result of the uniform application of laws do not per se constitute prohibited discrimination."[226] Later it reiterated this conclusion in P.P.C. v. the Netherlands (hereinafter *P.P.C.*) by noting that "the scope of Article 26 does not extend to differences of results in the application of common rules in the allocation of benefits."[227] These conclusions as Anne Bayefsky rightly points out, "would render Article 26 impotent in the context of many modern forms of discrimination" and would directly contradict other statements of the HRC suggesting that identical treatment of unequals is also discrimination.[228] Later, the views of the HRC in the cases of indirect discrimination regarding social security benefits confirmed these concerns.

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[225] Vos v. Netherlands, Comm. No. 786/1997, Hum. Rts. Comm., ¶ 11.2., U.N. Doc. A/54/40 (29 March 1989).
[226] Id. ¶ 11.3.
[227] P.P.C. v. the Netherlands, Comm. No. 212/1986, Hum. Rts. Comm., ¶ 6.2., U.N. Doc. A/43/40 (24 March 1988).
[228] Anne F. Bayefsky, *The Principle of Equality or Non- Discrimination in International Law* 11 Hum Rts. L. J. 1, 10 (1990).

Firstly, in Oulajin & Kaiss v. Netherlands (hereinafter *Oulajin & Kaiss*) where the applicant claimed the distinction between foster children and own children in the allocation of child benefits affected more migrant workers than nationals and resulted in indirect discrimination. The HRC echoed its conclusion in *P.P.C.* and *Vos*, and concluded that Article 26 does not apply to equal application of common rules in the allocation of benefits.[229] Some members of the CCPR supported this conclusion in their individual opinions:

> With regard to the application of Article 26 of the Covenant in the field of economic and social rights, it is evident that social security legislation, which is intended to achieve aims of social justice, necessarily must make distinctions. It is for the legislature of each country, which best knows the socio-economic needs of the society concerned, to try to achieve social justice in the concrete context. Unless the distinctions made are *manifestly discriminatory or arbitrary*, it is not for the Committee to reevaluate the complex socio-economic data and substitute its judgment for that of the legislatures of States parties.[230] (Emphasis added)

Although it is not clear what the members meant by saying "manifestly discriminatory and arbitrary", this seems to refer to direct discrimination rather than indirect discrimination considering the word 'manifest'. It refers to the form of the treatment rather than the effect, and seems to exclude the latter from the scope of Article 26.

Secondly, the failure of the HRC in addressing indirect discrimination with regard to social security had become visible in its views in the communications concerning the "breadwinner" requirement in the Unemployment Benefit Act of the Netherlands, and later in the retroactive application. According to the act, married women could be granted unemployment benefits if they proved that they were "breadwinners". That requirement, however, was not applied to married men. Direct gender discrimination of that requirement was addressed by the HRC in Zwaan-de Vries v. Netherlands and

[229] Oulajin & Kaiss v. Netherlands, Comm. No. 406/1990 and 426/1990, Hum Rts. Comm., ¶ 7.5., U.N. Doc. CCPR/C/46/D/406/1990 and 426/1990 (23 October 1992).
[230] Id. Individual opinion of Messrs. Kurt Herndl, Rein Müllerson, Birame N'Diaye and Waleed Sadi.

Broeks. The Committee was of the view that the Convention did not "require any State to enact legislation to provide for social security. However, when such legislation is adopted in the exercise of a State's sovereign power, then such legislation must comply with Article 26 of the Covenant."[231]

That breadwinner requirement was later abolished by a new law which provided access to unemployment benefits retroactively. Those who were not eligible for the benefits under the previous law might have received them due to the retroactive application of the new law. However, the new law required being unemployed at the time of application. Thus, three communications before the HRC, namely Araujo-Jongen v. Netherlands (hereinafter *Araujo-Jongen)*, APL-vdM v Netherlands (hereinafter *APL-vdM)*, JAMB-R v. Netherlands (hereinafter *JAMB-R)* concerned with indirect discrimination resulted from the requirement of being unemployed. The HRC, firstly in *Araujo-Jongen*, concluded that the requirement of being unemployed was reasonable and objective as providing assistance to persons who are unemployed.[232] Later, in *APL-vdM*, it reiterated that "the scope of Article 26 did not extend to differences of results in the application of common rules in the allocation of benefits." and found the case inadmissible due to the lack of victim status.[233] Finally, *JAMB-R* was also found inadmissible for the same reason and the HRC did not examine the compliance of the legislation with Article 26.[234] These communications are clear examples of the collective disadvantage basis of indirect discrimination, since the disadvantage at stake was a consequence of previous direct discrimination against women as a group.

Thirdly, in *Althammer* where the applicant claimed that the abolishment of household benefits and increase in the children's entitlements affected mostly retired persons. The HRC this time accepted that indirect discrimination was within the scope of Article 26,

[231] Broeks, *supra* note 57, ¶ 12.4.; Zwaan-de Vries v. Netherlands, Comm. No. 182/1984), Hum. Rts. Comm., ¶ 12.4., U.N. Doc. A/42/40 (9 April 1987).
[232] Araujo-Jongen v. Netherlands, Comm. No. 418/1990, Hum. Rts. Comm., ¶ 7.4., U.N. Doc. CCPR/C/49/D/418/1990 (16 August 1990).
[233] APL-vdM v Netherlands, Comm. No. 478/1991, Hum. Rts. Comm., ¶ 6.4.,U.N. Doc. CCPR/C/48/D/478/1991 (26 July 1993).
[234] JAMB-R v. Netherlands, Comm. No. 477/1991, Hum. Rts. Comm., ¶ 5.5., U.N. Doc. CCPR/C/50/D/477/1991 (7 April 1994).

but concluded that the amendment had reasonable and objective grounds.[235] Thus, up until 2003, the HRC did not recognize indirect discrimination with regard to social security benefits. The negative results taken in the previous communication regarding indirect discrimination against women seems derived from the justiciability problem of economic and social rights rather than the failure of the HRC in addressing collective disadvantage suffered by women. Hence, not the group but the rights in question had a role in the strict application of indirect discrimination by the HRC.

II. The omission of the indirect discrimination aspect in difference based cases

The first time the HRC encountered a claim of indirect discrimination was in *Karnel Bhinder* where a Sikh person opposed the requirement of wearing headgear. The HRC in this communication regarded the case as an issue of indirect discrimination but ruled that the requirement of wearing headgear had objective purposes.[236] There have been more recent cases before the HRC concerning the objections of the Sikh individuals to the requirement of being bareheaded. In both Ranjit Singh v. France (hereinafter *Ranjit Singh*) and Shingara Mann Singh v. France (hereinafter *Shingara Mann*'), the applicants challenged the law requiring their photographs to be "face on and bareheaded". Although the Committee was of the view that this law constituted a breach of freedom of religion, it did not find it necessary to examine the claims of discrimination in both cases.[237]

The second time, in Toonen v. Australia (hereinafter *Toonen*) the applicant claimed that the phrase of "unnatural sexual intercourse" in the wording of the criminal law had been mostly used against homosexuals and criminalized sexual acts which were most commonly practiced by homosexuals. For these reasons although its wording seemed

[235] Althammer, *supra* note 215, ¶ 10.2.
[236] Karnel Singh Bhinder, *supra* note 221, ¶ 6.2.
[237] Ranjit Singh v. France, Comm. No. 1876/2000, Hum. Rts. Comm., ¶ 8.5., U.N. Doc. CCPR/C/102/D/1876/2009 (22 July 2011); Shingara Mann Singh v. France, Comm. No. 1928/2010, Hum. Rts. Comm., ¶ 9.5- 9.6., U.N. Doc. CCPR/C/108/D/1928/2010 (15 December 2008).

neutral, the law indirectly discriminated against homosexuals. The Committee found a violation of the right to privacy and did not examine the discrimination aspect.[238]

The third case with regard to inherent difference of the individual was Prince v. South Africa (hereinafter *Prince*). The applicant was a Rastafarian who was convicted for possessing cannabis. He was refused to register for community service, which was a requirement to become an attorney, due to this conviction. He claimed that the lack of exemption for Rastafarians constituted discrimination. Although the Committee accepted that Article 26 also covered indirect discrimination, it was of the view that the prohibition of cannabis had objective and reasonable grounds and the lack of exemption did not constitute a violation.[239]

The last case was Raihman v. Latvia (hereinafter *Raihman*) in which the applicant was a Latvian national belonging to a Jewish and Russian speaking minority. His name was changed by Latvian authorities to a non-Jewish form. He claimed that the requirement of Latvian spelling constituted discrimination. The Committee saw a violation of the right to privacy but did not find it necessary to examine Article 26.[240]

The crucial point in all these communications with regard to inherent difference as the basis of indirect discrimination is that none of them succeeded in being concluded as discrimination. Although the HRC found violations of other rights in *Raihman*, *Toonen*, *Ranjit Singh* and *Shingara Mann*, it failed to see their indirect discrimination aspect. The reason behind this strict application can be the individualized nature of these cases. The Committee might have considered that it was not necessary to discuss discrimination simply because they were linked with other individual substantive rights of the Covenant. However, this contradicts the self-standing nature of Article 26 as well as its definition of indirect discrimination which is concerned with the failure to treat different situations differently.

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[238] Toonen v. Australia, Comm. No. 488/1992, Hum. Rts. Comm, ¶ 11, U.N. Doc. A/49/40 (31 March 1994).
[239] Prince v. South Africa, Comm. No. 1474/2006, Hum. Rts. Comm., ¶ 7.5., U.N. Doc. CCPR/C/91/D/1474/2006 (31 October 2007).
[240] Raihman v. Latvia, Comm. No. 1621/2007, Hum. Rts. Comm., ¶ 8.4., U.N. Doc. CCPR/C/100/D/1621/2007 (28 October 2010).

III. Indirect Discrimination in Concluding Observations of the HRC

In the concluding observations, the HRC signaled to the situation of groups suffering collective disadvantage. Regarding the racial groups, it stressed the racial disparity in the number of homeless people in the United States by showing "some 50% of homeless people are African American although they constitute only 12% of the United States population."[241] The HRC also raised its concerns about the disproportionate impact of felon disenfranchisement laws and fatal shootings by police forces on minority groups in the United States. [242] With these observations, the HRC applied the disproportionality test through benefitting from statistical information.

With regard to migrants, the HRC stated that the legal provision of Germany which permits landlords to refuse to rent apartments to certain people with an aim of "creating and maintaining socially stable residential structures and balanced housing estates and also balanced economic, social and cultural conditions" may discriminate against people with an immigrant background.[243]

It seems that the HRC is more flexible in adopting concluding observations related to collective disadvantage rather than the views. The judicial character of the views might have resulted in the strict application of indirect discrimination.

[241] *Concluding Observations of the Human Rights Committee: United States of America*, Hum. Rts. Comm., 87th Sess., U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (18 Dec 2006).
[242] *Concluding Observations on the fourth periodic report of the United States of America*, Hum. Rts. Comm., U.N. Doc. CCPR/C/USA/CO/4 (23 Apr 2014) [hereinafter HRC United States].
[243] *Concluding observations on the sixth periodic report of Germany*, Hum. Rts. Comm., 106 th Sess. ¶ 7, U.N. Doc. CCPR/C/DEU/CO/6 (12 Nov 2012).

b. The CESCR Committee

The CESCR Committee used the term 'indirect discrimination' for the first time in its general comment on the equal rights of men and women to the enjoyment of economic, social and cultural rights in 2005. According to the first definition in this document, the Committee took a disadvantage approach to indirect discrimination. This definition reads as follows:

> Indirect discrimination occurs when a law, policy or programme does not appear to be discriminatory, but has a discriminatory effect when implemented. This can occur, for example, when women are disadvantaged compared to men with respect to the enjoyment of a particular opportunity or benefit due to pre-existing inequalities. Applying a gender-neutral law may leave the existing inequality in place, or exacerbate it.[244]

The Committee explicitly acknowledged the disadvantage that women suffer and linked this to pre-existing inequalities. By stating so, it adopted a disadvantage approach to indirect discrimination as in the *Griggs* case of the U.S. Supreme Court. However, the wording of the definition reveals that this is just one example of indirect discrimination. Implicitly, it accepted that indirect discrimination can occur in other situations, maybe without any history of past discrimination.

Later in 2009, the CESCR Committee used indirect discrimination for the second time in its general comment on non-discrimination in economic, social and cultural rights. This general comment defined indirect discrimination as referring to "laws, policies or practices which appear neutral at face value, but have a disproportionate impact on the exercise of Covenant rights as distinguished by prohibited grounds of discrimination."[245]As the example of indirect discrimination, it explained that the requirement of birth certification for school enrollment may discriminate against migrants and non-nationals who do not possess one.[246] This definition and example

[244] CESCR General comment no 16, *supra* note 185, ¶ 13
[245] CESCR General comment no 20, *supra* note 186, ¶ 10 (b).
[246] Id.

demonstrate that indirect discrimination is not regarded merely as the product of past discrimination. However, it still has a disadvantage approach to indirect discrimination by requiring 'disproportionate impact'. Considering the example with the definition, indirect discrimination as perceived in this general comment resembles the *O'Flynn* case of the CJEU.

As the two definitions of indirect discrimination show, the CESCR Committee adopted a disadvantage approach to indirect discrimination. In general comments and concluding observations, it addressed neutral looking rules and practices which may be indirectly discriminatory against women, migrants, ethnic groups and indigenous people due to the collective disadvantage that they suffer in the enjoyment of economic, social and cultural rights. The terminology used by the Committee for the examples of indirect discrimination varies. It used the terms 'discriminatory effect' and 'disproportionate effect' as implying indirect discrimination.

Regarding the situation of women, the Committee warned the state parties that gender-neutral laws "may fail to address or even perpetuate existing inequality between men and women since they do not take into account economic and social inequalities experienced by women."[247] It reiterated this concern by asserting that discontinuation of unemployment benefits may have a particular impact on women who receive these benefits as twice as high as men.[248] It also stated that austerity measures may have a disproportionate effect on women since they are at greater risk of poverty and unemployment.[249]

The CESCR Committee is not only concerned with the economic disadvantage of women but also acknowledges that this disadvantage due to their social roles can be a basis for indirect discrimination. It pointed out in one concluding observation that

[247] CESCR General comment no 16, *supra* note 185, ¶ 8.
[248] *Concluding observations on the combined second and third periodic reports of Armenia*, Comm. on Econ., Soc. & Cult. Rts, U.N. Doc. E/C.12/ARM/CO/2-3 (15 July 2014).
[249] *Concluding observations on the second periodic report of Slovenia*, Comm. on Econ., Soc. & Cult. Rts, U.N. Doc. E/C.12/SVN/CO/2 (14 Dec 2014) [hereinafter CESCR Slovenia].

public decency laws may have discriminatory effects on women.[250] It also raised concerns that some personal laws on marriage, adoption, divorce, burial or devolution of property, which particularly affect women were exempted from anti-discrimination laws of some countries.[251]

Regarding migrants, the CESCR Committee pointed out the disparate impact of the compulsory residence registration system.[252] It also stated that the requirement of the long period of affiliation in order to receive public pensions is discriminatory against migrants.[253] Regarding indigenous people, it asks states to ensure that indigenous people are not excluded from the social security system through indirect discrimination, especially through an imposition of unreasonable eligibility conditions and lack of access to information.[254] Additionally, the CESCR Committee acknowledged that the measures against illegal settlements and some development projects may have a discriminatory effect on certain ethnic groups.[255]

Although the CESCR Committee did not adopt a difference approach to indirect discrimination in its definitions, it addressed inherent differences as the basis of

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[250] *Concluding observations of the Committee on Economic, Social and Cultural Rights: Uruguay*, Comm. on Econ., Soc. & Cult. Rts, ¶ 16, U.N. Doc. E/C.12/URY/CO/3-4 (1 Dec 2010).

[251] *Concluding observations of the Committee on Economic, Social and Cultural Rights: Mauritius*, Comm. on Econ., Soc. & Cult. Rts, ¶ 14, U.N. Doc. E/C.12/MUS/CO/4 (8 June 2010); *Concluding observations of the Committee on Economic, Social and Cultural Rights: Kenya*, Comm. on Econ., Soc. & Cult. Rts, 41st Sess., § D, U.N. Doc E/C.12/KEN/CO/1 (1 Dec 2008)

[252] *Concluding observations on the second to fourth periodic reports of Viet Nam*, Comm. on Econ., Soc. & Cult. Rts, § C, U.N. Doc. E/C.12/VNM/CO/2-4 (14 Dec 2014); *Concluding observations of the Committee on Economic, Social and Cultural Rights: Turkmenistan*, Comm. on Econ., Soc. & Cult. Rts, ¶ 9, U.N. Doc. E/C.12/TKM/CO/1 (13 Dec 2011); *Concluding observations of the Committee on Economic, Social and Cultural Rights: China*, Comm. on Econ., Soc. & Cult. Rts, ¶ 15, U.N. Doc. E/C.12/1/Add.107 (13 May 2005); *Concluding observations on the second periodic report of China, including Hong Kong, China, and Macao, China*, Comm. on Econ., Soc. & Cult. Rts, § C, U.N. Doc. E/C.12/CHN/CO/2 (12 Jun 2014)

[253] *Concluding observations of the Committee on Economic, Social and Cultural Rights: The Kingdom of Netherlands*, Comm. on Econ., Soc. & Cult. Rts, ¶ 20, U.N. Doc. E/C.12/NLD/CO/4-5 (9 Dec 2010)

[254] CESCR General comment no 19, *supra* note 182, ¶ 35.

[255] *Concluding observations on the second periodic report of the Islamic Republic of Iran*, Comm. on Econ., Soc. & Cult. Rts, ¶ 24, U.N. Doc. E/C.12/IRN/CO/2 (10 Jun 2013) [hereinafter CESCR Iran]

discrimination a number of times in the concluding observations. Regarding Estonia, it raised concerns about language requirements related to employment and called the State party to ensure that these requirements are based on objective and reasonable criteria and linked to the needs of performance of each individual job.[256] It acknowledged that language laws may have a discriminatory effect on linguistic minorities.[257] The Committee was also concerned with the biological differences between men and women; therefore it stated that differences in life expectancy may lead to indirect discrimination against women in the field of social security.[258] Further, in the concluding observations to the United Kingdom, it addressed the discriminatory effect of age limits in family reunification laws on ethnic minorities.[259]

Thus, these findings show that, in the application of indirect discrimination, the CESCR Committee paid more attention to the groups facing collective disadvantage than to inherent differences. However, it did not confine itself to the historically discriminated groups but also addressed the situation of migrants. Furthermore, it did not omit inherent differences such as language and sex from the scope of indirect discrimination. By covering various groups and protection grounds, it presented a comprehensive protection from indirect discrimination.

c. The CERD Committee

The CERD Committee used the term 'indirect discrimination' for the first time in 2005 in its view on L.R. et al. v. Slovak Republic (hereinafter *L.R. et al.*). In this case, a municipality adopted a plan to build low-cost residences for Roma people. However,

[256] *Concluding observations of the Committee on Economic, Social and Cultural Rights: Estonia*, Comm. on Econ., Soc. & Cult. Rts, ¶ 9, U.N. Doc. E/C.12/EST/CO/2 (16 Dec 2011)
[257] *Concluding observations of the Committee on Economic, Social and Cultural Rights: Latvia*, Comm. on Econ., Soc. & Cult. Rts, § D, U.N. Doc. E/C.12/LVA/CO/1 (7 Jan 2008)
[258] CESCR General comment no 19, *supra* note 182, ¶ 32.
[259] *Concluding observations of the Committee on Economic, Social and Cultural Rights: United Kingdom of Great Britain and Northern Ireland, the Crown Dependencies and the Overseas Dependent Territories***,** Comm. on Econ., Soc. & Cult. Rts, § D, U.N. Doc E/C.12/GBR/CO/5 (12 June 2009) [hereinafter CESCR United Kingdom].

2,700 inhabitants signed a petition requesting the withdrawal of this plan on the basis that "it will lead to an influx of inadaptable citizens of Gypsy origin."[260] The municipal council accepted this petition and withdrew the plan. The CERD Committee decided that this second decision of the municipal council on the withdrawal of the plan constituted indirect discrimination against Roma. It defined indirect discrimination in this case as follows:

> [T]he definition of racial discrimination in Article 1 expressly extends beyond measures which are explicitly discriminatory, to encompass measures which are not discriminatory at face value but are discriminatory in fact and effect, that is, if they amount to indirect discrimination. In assessing such indirect discrimination, the Committee must take full account of the particular context and circumstances of the petition, as by definition indirect discrimination can only be demonstrated circumstantially.[261]

Accordingly, the CERD Committee defined indirect discrimination simply as 'discrimination in fact and effect'. In addition, it regarded indirect discrimination as a form of discrimination which is not explicit and can only be proved circumstantially. This means the measures causing indirect discrimination may not be suspect in the first place. Such an understanding of indirect discrimination is close to those of *Griggs* and *Bilka* where the neutral criteria raised no suspicion, and the adverse effect was established only through statistical evidence. Although the definition in *L.R. et al.* does not include a disproportionality test, it resembles *Griggs* and *Bilka* on the basis that neutral treatment is not suspected in the first look.

The CERD Committee equated indirect discrimination with discrimination in effect; however, it had inconsistent definitions of the latter concept. For the first time in 1993, it stated that discriminatory effect is understood by looking at "an unjustifiable disparate impact upon a group distinguished by race, colour, descent, or national or ethnic origin."[262] This was a clear sign of the group-based disadvantage approach to

[260] L.R. et al. v. Slovak Republic, Comm. No. 31/2003, Comm. on Elim. Of Racial Discrim., ¶ 2.2., U.N. Doc. CERD/C/66/D/31/2003 (7 March 2005).
[261] Id., ¶ 10.4.
[262] CERD *General recommendation XIV*, *supra* note 188.

indirect discrimination. Later in 2009, with the general recommendation on the meaning and the scope of special measures, the CERD Committee stated "to treat in an equal manner persons or groups whose situations are objectively different will constitute discrimination in effect, as will the unequal treatment of persons whose situations are objectively the same."[263] It also added that "the principle of non-discrimination requires that the characteristics of groups be taken into consideration."[264] The CERD Committee created confusion in this second definition of the term 'discrimination in effect' by using both a negative and positive formulation of the Aristotelian understanding of equality. If it had limited the definition to the negative formulation, i.e. equal treatment of people in different situations, it could have been evaluated as the difference approach to indirect discrimination.

In the general recommendations and concluding observations concerning indirect discrimination, the CERD Committee generally used the terms 'discrimination in effect', 'adverse effect' and 'disparate impact'. It addressed indirect discrimination directed at disadvantaged groups such as ethnic and racial minorities, migrants, non-citizens, and indigenous people.

The CERD Committee paid particular attention to the situation of the Roma in its concluding observations. For instance, it raised concerns about discriminatory effects of the decisions to demolish illegal settlements on Roma families [265] and on the disproportionate number of Roma children that were sent to "special schools".[266]

The CERD Committee was also concerned with the situation of people with African descent. In its general recommendation on racial discrimination against people of African descent, it urged states to take measures to eliminate discrimination against

[263] *General Recommendation XXXII on The Meaning and Scope of Special Measures in the International Convention on the Elimination of Racial Discrimination,* Comm. on the Elim. of Racial Discrim., 75th Sess., ¶ 8, U.N. Doc CERD/C/GC/32 (24 Sept. 2009).
[264] Id.
[265] *Concluding observations of the Committee on the Elimination of Racial Discrimination: Russian Federation*, Comm. on Elim. of Racial Discrim., 73rd Sess., ¶ 25, U.N. Doc. CERD/C/RUS/CO/19 (22 Sep 2008) [hereinafter CERD Russia].
[266] *Concluding observations of the Committee on the Elimination of Racial Discrimination: Czech Republic*, Comm. on Elim. of Racial Discrim., 70th Sess., § C, U.N. Doc. CERD/C/CZE/CO/7 (11 Apr 2007)

them in relation to working conditions and requirements including employment rules and practices that may have discriminatory purposes or effects.[267] It emphasized the disparate impact of Hurricane Katrina on low-income African-American residents[268] and the disparate impact of disenfranchisement laws on particularly African American persons, who are disproportionately represented at every stage of the criminal justice system.[269]

Regarding the migrants and non-citizens, in its general recommendations, the CERD Committee highlighted that fighting against terrorism and working conditions and requirements may "in purpose or effect" discriminate against non-citizens.[270] It also recommended including nationality and immigration status to the definition of indirect discrimination.[271] It raised concerns about requesting migrants and refugees to show valid identity documents, which may have an adverse effect on stateless persons and asylum-seekers from countries in which particular conditions make it difficult to obtain identity documents.[272] In many concluding observations, it addressed the disparate impact of the compulsory residence registration system on non-citizens.[273] According to the Committee, indirect discrimination can result from family reunification laws especially when the financial capacity of the applicant is assessed.[274]

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[267] *General Recommendation No 34: Racial Discrimination against people of African Descent*, Comm. on the Elim. of Racial Discrim., 79th Sess., ¶ 53, U.N. Doc. CERD/C/GC/34 (30 Sep 2011).
[268] CERD United States, *supra* note 220, § C.
[269] Id.
[270] *General Recommendation XXX on Discrimination Against Non Citizens,* Comm. on Elim. of Racial Discrim., 65th Sess., ¶ 38, U.N. Doc. CERD/C/GC/30, (1 Oct. 2004).
[271] CERD China, *supra* note 219.
[272] *Concluding Observations of Committee on the Elimination of Racial Discrimination: Canada*, Comm. on Elim. of Racial Discrim., 70th Sess., ¶ 18, U.N. Doc. CERD/C/CAN/CO/18 (25 May 2007) [hereinafter CERD Canada].
[273] *Concluding Observations of Committee on the Elimination of Racial Discrimination: Uzbekistan,* Comm. on Elim. of Racial Discrim., 77th Sess., U.N. Doc. CERD/C/UZB/CO/6-7 (15 Sep 2010); CERD China, *supra* note 219.
[274] *Concluding Observations of Committee on the Elimination of Racial Discrimination: Liechtenstein,* Comm. on Elim. of Racial Discrim., 70th Sess., ¶ 13, U.N. Doc. CERD/C/LIE/CO/3 (7 May 2007); *Concluding observations of the Committee on the Elimination of Racial Discrimination: Denmark*, Comm. on Elim. of Racial Discrim., 69th Sess., § C, U.N. Doc. CERD/C/DEN/CO/17 (19 Oct 2006)

The CERD Committee also investigated indirect discrimination against indigenous people, in particular, examining the discriminatory effects of the criminal justice system and adverse effects of economic activities connected with the exploitation of natural resources by transnational corporations.[275]

As an example of indirect discrimination on the basis of inherent difference, the CERD Committee was concerned with the language proficiency requirement for employment and its discriminatory effect on linguistic minorities.[276] Such a linguistic requirement was brought before the Committee in Emir Sefic v. Denmark (hereinafter *Sefic*). An insurance company rejected a contract with the applicant on the grounds that he did not know the Danish language. The CERD Committee concluded that "the ability to communicate with the customer, the lack of resources for a small company to employ persons speaking different languages, and the fact that it is a company operating primarily through telephone contact were reasonable and objective grounds for the requirement."[277] Thereby, the Committee reviewed the duty of the company to accommodate the linguistic difference of the individual, and decided that it would be a disproportionate burden on a small company. However, it did not use the terms 'indirect discrimination' or 'reasonable accommodation'.

In the context of race, the CERD Committee covered various groups including Roma, people with African descent, indigenous people, migrants and linguistic minorities. Similar to the HRC and the CESCR Committee, it did not confine indirect discrimination to the salient groups who suffered past discrimination. It addressed indirect discrimination directed at migrants and non-citizens as well. Nonetheless, the CERD Committee failed to provide a clear and consistent definition of indirect discrimination.

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[275] *Concluding observations of the Committee on the Elimination of Racial Discrimination: Australia*, Comm. on Elim. of Racial Discrim., 66th Sess., ¶ 19-21, U.N. Doc. CERD/C/AUS/CO/14 (14 Apr 2005) [hereinafter CERD Australia]; CERD Canada, *supra* note 272.

[276] *Concluding observations of the Committee on the Elimination of Racial Discrimination: Estonia*, Comm. on Elim. of Racial Discrim., 69th Sess., § C, U.N. Doc CERD/C/EST/CO/7 (19 Oct 2006).

[277] Emir Sefic v. Denmark, Comm. No. 32/2003, Comm. on Elim. Of Racial Discrim., ¶ 7, U.N. Doc. CERD/C/66/D/32/2003 (7 March 2005).

d. The CEDAW Committee

The CEDAW Committee defined the concept of indirect discrimination for the first time in 2005 with its general recommendation on temporary special measures. It took both difference and disadvantage approaches to indirect discrimination by referring to the history of discrimination and subordination of women as well as biological differences between men and women:

> Indirect discrimination against women may occur when laws, policies and programmes are based on seemingly gender-neutral criteria which in their actual effect have a detrimental impact on women. Gender-neutral laws, policies and programmes unintentionally may perpetuate the consequences of past discrimination. They may be inadvertently modelled on male lifestyles and thus fail to take into account aspects of women's life experiences which may differ from those of men. These differences may exist because of stereotypical expectations, attitudes and behaviour directed towards women which are based on the biological differences between women and men. They may also exist because of the generally existing subordination of women by men.[278]

In its next definition, the CEDAW Committee moved closer to the disadvantage approach by stating "identical or neutral treatment of women and men might constitute discrimination against women if such treatment resulted in or had the effect of women being denied the exercise of a right because there was no recognition of the pre-existing gender-based disadvantage and inequality that women face."[279] At that time, it did not explicitly name it 'indirect discrimination'. The disadvantage approach is visible in the

[278] *General recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures*, ¶ 7, Comm. on Elim. of Discrim. Against Women, 30th Sess.

[279] *General recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, Comm. on Elim. of Discrim. Against Women, 47th Sess., ¶ 5,U.N. Doc. CEDAW/C/GC/28 (16 Dec 2010)

link that the Committee found between discrimination and pre-existing gender based disadvantage.

Besides these definitions, in the application, the CEDAW Committee highlighted indirect discrimination against women in the fields of employment, social security, naturalization, health care, the right to vote and violence. It used the terms 'disproportionate impact' and 'disparate impact' along with 'indirect discrimination' in the general recommendations and concluding observations.

The Committee listed reasons behind indirect discrimination against women in the field of employment in one of its concluding observations. According to the Committee, discrimination is linked with the gender division of labor and restraining women from stepping out of the private sphere:

> There are many instances of indirect and hidden discrimination against women, as evidenced by the fact that women do not choose to take on management positions because they have no time and are unwilling to participate in public and social life owing to ascribed duties in the family. The Committee is also concerned about the prevailing perception that the public and social spheres are "men's spheres".[280]

The CEDAW Committee received a complaint related to the right to social security in the Nguyen v. the Netherlands. The applicant claimed that as a self-employed woman, she could not receive full compensation in her maternity leave and this constituted direct discrimination. The Committee, however, was of the view that this was a distinction between salaried employees and the self-employed, not a distinction based on sex.[281] Therefore it did not find a violation. Dissenting members to this conclusion suggested that this was a case of indirect discrimination:

> We are of the view that the so-called anti-accumulation clause in Article 59WAZ may constitute a form of indirect discrimination based on sex. This

[280] *Concluding Comments: Democratic People's Republic of Korea*, Comm. on Elim. of Discrim. Against Women, 33rd Sess., ¶ 20, U.N. Doc. CEDAW/C/PRK/CO/1 (3 Aug 2005)
[281] Nguyen v. the Netherlands, Comm. No. 3/2004, Comm. On Elim. Of Discrim. Against Women, ¶ 10.2, U.N. Doc. CEDAW/C/36/D/3/2004 (2006).

> view is based on the assumption that an employment situation in which salaried part-time work and self-employment is combined, as described by the complainant, is one which mainly women experience in the Netherlands, since, in general, it is mainly women who work part-time as salaried workers in addition to working as family helpers in their husbands' enterprises.[282]

On indirect discrimination against women in relation to health care, the CEDAW Committee contended that the failure to ensure the confidentiality of health services may have a disparate impact on women since women may be less willing to apply to health services in this case especially for contraception, abortion and sexual violence.[283]

According to the CEDAW Committee, limiting the right to vote to persons who have a specified level of education, who possess a minimum property qualification or who are literate is likely to have a disproportionate impact on women and breach the right to equality.[284]

The CEDAW Committee, as being the only one among the treaty bodies, addressed the intersectional indirect discrimination suffered by women. Firstly, it pointed out that "migration is not a gender-neutral phenomenon" and recommended that the visa schemes do not indirectly discriminate against migrant women "by restricting permission to women migrant workers to be employed in certain job categories where men predominate, or by excluding certain female-dominated occupations from visa schemes."[285] Secondly, it highlighted that naturalization requirements which are more

[282] Id. Individual opinion of Committee members, Naela Mohamed Gabr, Hanna Beate Schöpp-Schilling and Heisoo Shin (dissenting), ¶ 10.5

[283] *General recommendation No. 24: Article 12 of the Convention (women and health),* Comm. on Elim. of Discrim. Against Women, 20th Sess., ¶ 12 (d), U.N. Doc. A/54/38/Rev.1 (1999).

[284] *General recommendation No. 23: Political and public life,* Comm. on Elim. of Discrim. Against Women, 16th Sess., ¶ 23, U.N. Doc. A/52/38 (1997).

[285] *General recommendation No. 26 on women migrant workers,* Comm. on Elim. of Discrim. Against Women, 42nd Sess., ¶ 5, U.N. Doc. CEDAW/C/2009/WP.1/R (5 Dec 2008).

difficult for women to meet such as language proficiency or property ownership can constitute indirect discrimination.[286]

The CEDAW Committee defined gender-based violence as "violence that is directed against a woman because she is a woman or that affects women disproportionately"[287]. The second dimension of this definition especially overlaps with the disproportionality test applied in some cases of indirect discrimination. It also described important issues that may increase violence against women and are counted as indirect discrimination. Firstly, according to the Committee, "the proliferation of conventional arms, especially small arms, including diverted arms from the legal trade, can have a direct or indirect effect on women as victims of conflict-related gender-based violence, as victims of domestic violence and also as protesters or actors in resistance movements."[288] Secondly, the Committee highlighted how the laws on gender-based violence may indeed result in indirect discrimination in a concluding observation:

> The Committee welcomes the Bill on prevention and punishment of gender-based violence approved by the Parliament and awaiting promulgation, but expresses concern that some of its provisions, such as those criminalizing adultery, concubinage and punishing a person found guilty of intentionally transmitting a terminal disease by life imprisonment may generate direct or indirect discrimination against women.[289]

All these issues that the CEDAW Committee addressed with regard to indirect discrimination are based on the collective disadvantage of women rather than the biological differences between men and women. Although by definition it recognized the second basis as well, it exclusively applied the first one in the concluding

[286] *General recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women,* Comm. on Elim. of Discrim. Against Women, ¶ 55, U.N. Doc. CEDAW/C/GC/32 (14 Nov 2014).
[287] *General Recommendation No. 19: Violence Against Women*, Comm. on Elim. of Discrim. Against Women, 11th Sess., ¶ 6, U.N. Doc. A/47/38 (1993).
[288] *General recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations*, Comm. on Elim. of Discrim. Against Women, 47th Session, ¶ 32, U.N. Doc. CEDAW/C/GC/30 (1 Nov 2013).
[289] *Draft concluding observations of the Committee on the Elimination of Discrimination against Women: Rwanda*, Comm. on Elim. of Discrim. Against Women, 43rd Sess., ¶ 25, U.N. Doc. CEDAW/C/RWA/CO/6 (12 Feb 2009).

observations and general recommendations. However, it had a comprehensive understanding of indirect discrimination by addressing the situation of migrants and intersectional discrimination.

e. The CRPD Committee

The CRPD Committee referred to indirect discrimination for the first time in H.M. v. Sweden (hereinafter *H.M.*). In this case, the author's health condition required a hydrotherapy pool which could be constructed in her home. However this meant a departure from the development plan. Therefore, the applicant applied to domestic authorities to amend this plan so as to build the pool. The authorities rejected her application on the basis that the place was not classified as land which is open to any construction.

The CRPD Committee defined indirect discrimination by stating that "a law which is applied in a neutral manner may have a discriminatory effect when the particular circumstances of the individuals to whom it is applied are not taken into consideration. The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention can be violated when States, without objective and reasonable justification, fail to treat differently persons whose situations are significantly different."[290] The emphasis on the different circumstances of the individual and the use of the Aristotelian formula indicates that the CRPD Committee took a difference approach to indirect discrimination.

In this case, the CRPD Committee also regarded the case as an issue of reasonable accommodation. It stated that an "appropriate modification and adjustments would thus require a departure from the development plan, in order to allow the building of a hydrotherapy pool."[291] According to the Committee, it had not been proven that this departure would have imposed a disproportionate and undue burden on the state

[290] H.M. v. Sweden, Comm. No. 003/2011, Comm. on the Right of Persons with Dis., ¶ 8.3.,U.N. Doc. CRPD/C/7/D/3/2011 (2012).
[291] Id. ¶ 8.5.

party.[292] Having evaluated the case as an intersection between indirect discrimination and reasonable accommodation, it reached the following conclusion:

> The State party, when rejecting the author's application for a building permit, did not address the specific circumstances of her case and her particular disability-related needs. The Committee therefore considers that the decisions of the domestic authorities to refuse a departure from the development plan in order to allow the building of the hydrotherapy pool were disproportionate and produced a discriminatory effect that adversely affected the author's access, as a person with disability, to the health care and rehabilitation required for her specific health condition.[293]

Thus, *H.M.* stands as a clear example of how the concepts of indirect discrimination and reasonable accommodation can intersect. The failure of the state party to provide an exception is regarded as both a matter of indirect discrimination and reasonable accommodation.

The CRPD Committee used the term 'indirect discrimination' again in another individual communication named Liliane Gröninger et al. v. Germany (hereinafter *Gröninger*) which represents a collective disadvantage approach to indirect discrimination against disabled people. The authors challenged the integration subsidy scheme of the state party which was initially designed to promote participation of disabled people in the workforce. The Committee decided that the existing model of integration subsidies did not effectively promote employment of persons with disabilities, and the administrative complexities put them in a disadvantageous position and might in turn constitute indirect discrimination.[294] With this decision, the Committee acknowledged that a positive action measure adopted to promote equality between disabled and abled persons might in fact result in discrimination against the protected group. Additionally, it addressed a systemic problem that disadvantages disabled persons as a group. This means particular conditions or needs of one single

[292] Id.
[293] Id. ¶ 8.8.
[294] Liliane Gröninger et al. v. Germany, Comm. No. 002/2010, Comm. on the Right of Persons with Dis., ¶ 6.2., U.N. Doc. CRPD/C/D/2/2010 (2014).

individual were not at stake in that occasion. Although it did not provide a detailed explanation how indirect discrimination occurred, it started to see indirect discrimination as connected to the issues of systemic and collective disadvantage as well.

The CRPD Committee, as a newly established treaty body, does not have adequate concluding observations and recommendations in which the concept of indirect discrimination or other similar terms were used. Only in one concluding observation to China, it recommended including indirect discrimination to the general definition of discrimination against persons with disabilities.[295] With the future individual communications and concluding observations, the CRPD Committee can be a convenient body to discuss intersectionality of indirect discrimination, reasonable accommodation and positive action.

4. The Scope of Indirect Discrimination in the United Nations Treaty Body System: Moving Beyond the Barrier Element?

Treaty bodies mostly apply indirect discrimination in the cases where a specific rule or condition disproportionately or adversely affects persons or groups with a protected characteristic. This kind of application of indirect discrimination is compatible with the barrier element. However, treaty bodies also apply indirect discrimination without identifying a barrier, thereby extend its scope by moving beyond the barrier element.

The communications related to social security such as *Oulajin & Kaiss*, *Araujo-Jongen*, *JAMB-R* before the HRC, or the recommendations of the CERD Committee or the CESCR Committee about adverse effect of linguistic requirement in employment are examples where treaty bodies applied indirect discrimination in relation to economic and social rights with the barrier element. The statement of the CEDAW Committee suggesting that requiring education or property for voting may have disproportionate

[295] *Concluding observations on the initial report of China,* Comm. on the Right of Persons with Dis., § B, U.N. Doc. CRPD/C/CHN/CO/1 (15 Oct 2012).

effect on women demonstrates that indirect discrimination with a barrier element is also applied to civil and political rights.

Treaty bodies also demonstrate that the barrier element can be loosened in applying indirect discrimination in relation to both economic and social rights, and civil and political rights. The CEDAW Committee, for instance, mentioned "systemic indirect discrimination" in employment by referring to general policies and practices rather than a single barrier:

> The Committee is concerned about systemic indirect discrimination against women in employment, which is pervasive in the public and private sectors and the informal sector, and is characterized by: horizontal and vertical job segregation, with women predominating in lower paid jobs in the public sector; a significant pay gap; higher unemployment rates of women, including older women, refugees, first-time job seekers and minority women; a larger number of women working as unpaid family helpers; limited access to the military for women; older women with lower incomes than older men; and some protective legislation being applied to women, including outdated notions of women's capabilities resulting in comprehensive protective legislation being applied to women.[296]

L.R. et al. is another example of the move beyond the barrier element in relation to the right to housing. In that case, the withdrawal of a plan affirmatively affecting Roma people was regarded as indirect discrimination. Therefore, what was at stake it was not a barrier advantaging one group while disadvantaging another. Additionally, in the context of the right to housing, the CERD Committee and the CESCR Committee clarified that the abolishment of illegal settlements or anti-ghettoization laws may have discriminatory effects on certain ethnic groups.[297] This practice cannot be deemed as a

[296] *Concluding comments of the Committee on the Elimination of Discrimination against Women: Serbia*, Comm. on Elim. of Discrim. Against Women, 38th Sess., ¶ 31, U.N. Doc. CEDAW/C/SCG/CO/1 (11 Jun 2007)

[297] CERD Russia, *supra* note 265, ¶ 26; *Concluding observations of the Committee on the Elimination of Racial Discrimination: Denmark*, Comm. on Elim. of Racial Discrim., 77th Sess., ¶ 15, U.N. Doc CERD/C/DNK/CO/18-19 (20 Sep 2010); CESCR United Kingdom, *supra* note 259; CESCR Iran, *supra* note 255, ¶ 24.

barrier as creating a winning group and a losing group but rather it disadvantages a certain group in a way that does not touch upon another comparable group.

The move of the treaty bodies beyond the barrier element appears in their concluding observations concerning economic growth, austerity measures, violence, criminal justice system and counter-terrorism measures. The CERD Committee addressed inequality between regions in terms of economic growth and highlighted that this inequality can lead to indirect discrimination when ethnic profile of the regions is taken into account.[298] The CESCR Committee referred to the possible disproportionate impact of austerity measures upon women who are at greater risk of poverty and unemployment.[299]

The CEDAW Committee also reviewed claims of violence, pointing out the indirect effect of the proliferation of conventional arms on women.[300] The HRC established that permitting use of guns in self-defense may result in a disparate effect on women, minorities and children.[301] The disparate impact of fatal shootings by police forces upon African Americans in the United States is highlighted by the HRC.[302] Thereby, overrepresentation of women or minorities as the victims of violence attracted the attention of the treaty bodies. These claims are also not compatible with the single barrier test.

Treaty bodies are also concerned with discrimination resulting from the criminal justice system. The CERD Committee pointed out indirect discriminatory effects of the criminal justice system on indigenous people in Australia.[303] The HRC, in a concluding observation related to the United States, raised its concerns about overrepresentation of persons belonging to ethnic and racial minorities in prisons, and therefore concluded that the death penalty had a disproportionate effect on these groups.[304] The HRC also

[298] *Concluding observations of the Committee on the Elimination of Racial Discrimination: Russian Federation*, Comm. on Elim. of Racial Discrim., 65th Sess., § C, U.N. Doc. CERD/C/65/CO/4 (10 Dec 2004)
[299] CESCR Slovenia, *supra* note 249.
[300] CEDAW General Recommendation No 30, *supra* note 288.
[301] HRC United States, *supra* note 242.
[302] Id.
[303] CERD Australia, *supra* note 219.
[304] HRC United States, *supra* note 242.

pointed out that in Australia the proportion of Māori among persons accused of a crime as well as among victims of a crime is substantially higher than their proportion within the general population. It added that this communicates the possibility of discrimination in the administration of criminal justice system.[305] The HRC also stated that corporal punishment given by sharia law disproportionately affects women in Indonesia.[306]

Counter-terrorism and security measures are also deemed as suspect by treaty bodies. The CERD Committee raised concerns about policies responding to riots may have a disproportionate effect on persons with poor and ethnic minority backgrounds.[307] The CERD Committee also recommended that Australia should ensure that measures taken in the struggle against terrorism do not discriminate in purpose or effect on the grounds of race, colour, descent, or national or ethnic origin. It also raised concerns about the collection of biometric data about the persons applying for visas.[308] The CESCR Committee is also concerned about the discriminatory impact of some counter-terrorism measures on the enjoyment of economic, social and cultural rights of certain groups, in particular ethnic and religious minorities.[309]

In light of these findings, it appears that indirect discrimination as applied in the United Nations treaty body system is not confined to the rights with accessibility component but extends to civil and political rights as well. Treaty bodies do not strictly apply the barrier element when speaking of indirect discrimination. This broad application actually demonstrates the intersection between indirect discrimination and systemic or structural forms of discrimination. Accordingly, treaty bodies acknowledge that indirect discrimination is not limited to individual acts where a certain barrier can be

[305] Id.
[306] *Concluding observations on the initial report of Indonesia,* Hum. Rts. Comm., ¶ 15, U.N. Doc. CCPR/C/IDN/CO/1 (21 August 2013).
[307] *Concluding observations of the Committee on the Elimination of Racial Discrimination: United Kingdom of Great Britain and Northern Ireland,* Comm. on Elim. of Racial Discrim., 79th Sess., ¶ 9, U.N. Doc. CERD/C/GBR/CO/18-20 (14 Sep 2011).
[308] *Concluding observations of the Committee on the Elimination of Racial Discrimination: Australia,* Comm. on Elim. of Racial Discrim., 77th Sess., ¶ 12, U.N. Doc. CERD/C/AUS/CO/15-17 (13 Sep 2010).
[309] CESCR United Kingdom, *supra* note 259.

identified. The non-judicial character of concluding observations enables the treaty bodies to adopt such a flexible approach to the barrier element.

5. The United Nations Treaty Bodies and the Justification Element of Indirect Discrimination

The comprehensive definition of discrimination which is presented in the ICERD, CEDAW and CRPD and also adopted by the HRC and CESCR Committee does not entail a justification test. However, in its General Comment no. 18 on discrimination, the HRC accepted that "not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant."[310] Thereby, the HRC based the justification element on three criteria: reasonableness, objectivity and legitimacy. The criteria of necessity and proportionality which are used in other jurisdictions are not mentioned in the general comment.

In a number of individual communications related to indirect discrimination, the HRC reiterated that the treatment in question must have reasonable and objective grounds to be compatible with Article 26 of the ICCPR. However, it failed to give a clear and consistent interpretation of these criteria in assessing the justification for indirect discrimination.

As can be observed in individual communications, the HRC was generally satisfied with the general aim of the treatment at stake. It does not scrutinize the necessity of the means chosen to achieve that aim nor the proportionality between the means and the aim. Additionally, it does not provide a concrete basis on what the criteria of reasonableness and objectivity mean in particular cases. For instance, in *Karnel Singh Bhinder*, the HRC referred to the aim of the legislation that brought the requirement of wearing safety headgear. According to the HRC, the aim to protect workers from injury and electric shock was regarded as "reasonable and directed towards objective purposes

[310] HRC General comment no 18, *supra* note 15, ¶ 13.

that are compatible with the Covenant."[311] Later, in *Araujo- Jongen* case the issue was the requirement of being unemployed and being eligible for retroactive payment of social security benefits. The HRC concluded that this requirement was reasonable and objective considering that the aim of the legislation was providing assistance to persons unemployed.[312] In *Cecelia Derksen*, the HRC reached a conclusion in favor of the author and provided a short explanation of the criteria of reasonableness. The question before the Committee was whether the refusal of benefits to the author's daughter because she was born out of wedlock and after the time set forth by the legislation in question constituted discrimination. The HRC reached the following conclusion:

> The Committee considers that the distinction between children born, on the one hand, either in wedlock or after 1 July 1996 out of wedlock, and, on the other hand, out of wedlock prior to 1 July 1996, is not based on reasonable grounds. In making this conclusion the Committee emphasizes that the authorities were well aware of the discriminatory effect of the AWW when they decided to enact the new law aimed at remedying the situation, and that they could have easily terminated the discrimination in respect of children born out of wedlock prior to 1 July 1996 by extending the application of the new law to them. The termination of ongoing discrimination in respect of children who had had no say in whether their parents chose to marry or not, could have taken place with or without retroactive effect.[313]

Thus, the HRC ruled on the absence of reasonable grounds due to two reasons. The first one is that the authorities were aware of the discriminatory effect so they could proactively take measures to prevent it. The second, after the adoption of the legislation, they could easily terminate its adverse effects. This reasoning demonstrates the HRC did not only evaluate the reason or the aim behind the legislation in question but assessed what the authorities were supposed to do before and after the adoption of this legislation. Thereby, it provided an explanation of the criteria of reasonableness, however, it did not mention the criteria of objectivity in that case.

[311] Karnel Singh Bhinder, *supra* note 221, ¶ 6.2.
[312] Araujo-Jongen, *supra* note 232, ¶7.4.
[313] Cecelia Derksen, *supra* note 214, ¶ 9.3.

In some communications, the HRC used "equal application" as the explanation of the treatment being based on objective and reasonable grounds. For instance, in the *Prince* case where the adverse effect of the prohibition on the use of cannabis was on the basis of the author's religious belief, the HRC made the following evaluation:

> In the circumstances of the present case, the Committee notes that the prohibition of the possession and use of cannabis affects all individuals equally, including members of other religious movements who may also believe in the beneficial nature of drugs. Accordingly, it considers that the prohibition is based on objective and reasonable grounds.[314]

Later in the *Raihman* case, the authors alleged that the requirement of the Latvian spelling of his name discriminated himself on the basis of his religion and ethnicity. The HRC decided that the requirement in question applied to "all individuals equally, be it ethnic Latvians or members of minorities such as the Jewish and Russian-speaking minority."[315] Accordingly as the HRC stated, this was based on objective and reasonable grounds. However, this "equal application" argument cannot be an explanation for justification in indirect discrimination cases, since all the cases of this nature, equally applied rules or requirements are challenged. With such an understanding, no claim of indirect discrimination will be able to pass the justification test.

In addition to the lack of clarity in the use of criteria for the justification test, the HRC seems to be confused about two phases of indirect discrimination, namely the prima facie phase when the claimants are supposed to prove and the justification phase where the respondent bears the burden of justification. In *P.P.C.*, the HRC, when it rejected the author's allegation related to the application of the uniform rule on the allocation of benefits, stated that the legislation in question was not prima facie discriminatory. Therefore, it concluded that the authors had no claim and declared the communication inadmissible.[316] In *Althammer*, the HRC decided that the authors did not prove disproportionate impact of the neutral treatment. At that point, the HRC could have

[314] Prince, *supra* note 239, ¶ 7.5.
[315] Raihman, *supra* note 240, ¶ 8.4.
[316] P.P.C., *supra* note 227, ¶ 6.2.

used the reasoning of the *P.P.C.* case and declared the communication inadmissible. Rather, it stated that "even assuming, for the sake of argument, that such impact could be shown" the treatment was based on reasonable and objective grounds.[317] Another confusion with the phases of indirect discrimination occurred in *Pohl et al*. In that case, the HRC reversed the burden of proof in the justification phase by stating that "the authors have failed to demonstrate that their different treatment was not based on objective and reasonable criteria."[318]

The CERD Committee does not provide a consistent view on the justification test either. In *Emir Sefic*, it applied the same justification grounds as of the HRC that is reasonable and objective grounds. What distinguished this case from the communications before the HRC was that the CERD Committee evaluated the situation of the private company by stating that "the ability to communicate with the customer, the lack of resources for a small company to employ persons speaking different languages, and the fact that it is a company operating primarily through telephone contact were reasonable and objective grounds for the requirement."[319] The justification brought by the CERD Committee is similar to the evaluation of undue or disproportionate burden in the reasonable accommodation cases as in the EU or Canada. However, the CERD Committee referred to none of these concepts.

Although the CERD Committee applied the justification element in *Emir Sefic*, there was no such evaluation in *L.R. et al*. In that case, the CERD Committee focused on whether an act of racial discrimination within the meaning of Article 1 of ICERD occurred and whether this act was attributable to the state.[320] After an affirmative answer to these two questions, it concluded that a violation existed without applying a justification test.

The CRPD Committee also used the same justification grounds of the HRC in *H.M.* case by stating that "the right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention can be violated when States, without objective

[317] Althammer, *supra* note 215, ¶ 10.2.
[318] Pohl et al., *supra* note 223, ¶ 9.4.
[319] Sefic, *supra* note 277, ¶ 7.2.
[320] L. R. et al., *supra* note 260, ¶ 10.8.

and reasonable justification, fail to treat differently persons whose situations are significantly different."[321] The CRPD Committee accepted that the departure from the development plan was within the scope of the concept of reasonable accommodation and decided that this departure would not have imposed a disproportionate or undue burden for it to provide this accommodation.[322] Thereby, the CRPD Committee referred to both the justification test and the disproportionate or undue burden test at the same time in one case.

There have been no individual communications yet before the CEDAW Committee and CESCR Committee, which demonstrates how these two treaty bodies evaluated the justification phase. Both treaty bodies made no referrals to the justification phase in their definitions of indirect discrimination.[323] However, the CESCR Committee, in its general comment on non-discrimination referenced the "permissible scope of differential treatment" which may also cover indirect discrimination cases. As stated in this general comment,

> Differential treatment based on prohibited grounds will be viewed as discriminatory unless the justification for differentiation is reasonable and objective. This will include an assessment as to whether the aim and effects of the measures or omissions are legitimate, compatible with the nature of the Covenant rights and solely for the purpose of promoting the general welfare in a democratic society. In addition, there must be a clear and reasonable relationship of proportionality between the aim sought to be realized and the measures or omissions and their effects. A failure to remove differential treatment on the basis of a lack of available resources is not an objective and reasonable justification unless every effort has been made to use all resources that are at the State party's disposition in an effort to address and eliminate the discrimination, as a matter of priority. [324]

[321] H.M., *supra* note 290, ¶ 8.3.
[322] Id., ¶ 8.5.
[323] CESCR General comment no 20, *supra* note 186, ¶ 10 (b); CEDAW General Recommendation no 28, *supra* note 279, ¶ 16.
[324] CESCR General comment no 20, *supra* note 186, ¶ 13.

Firstly, the CESCR Committee referred to the criteria of reasonableness, objectivity and legitimacy as used by the HRC. However, differently from the HRC, the CESCR Committee used the criteria of proportionality as well. Secondly, it is important that the CESCR Committee established that the lack of available resources cannot be regarded as objective and reasonable justification.

Consequently, all treaty bodies except the CEDAW Committee use reasonableness and objectivity as the justification grounds in indirect discrimination cases. As an additional criteria, the CESCR Committee refers to proportionality. The CRPD Committee, on the other hand, refers to both the justification test and disproportionate or undue burden test. Although there is a general tendency of the treaty bodies to regard indirect discrimination as composed of two phases, particularly the HRC and the CERD Committee have inconsistent and unclear views in the individual communications on how to identify these phases as well as on the interpretation of the criteria for the justification.

6. Conclusion

This section presented indirect discrimination in the practice of the UN treaty bodies. It followed the four elements of indirect discrimination that are explained in previous sections. Each element was used in this section to see whether the UN treaty bodies are coherent in their approaches to indirect discrimination and whether these approaches are original compared to the broader jurisprudential context of indirect discrimination.

The findings of this section are summarized as follows:

- The treaty bodies converge on the irrelevancy of intent in neutrality. This is mainly because of the comprehensive definition of discrimination that includes the dichotomy between purpose and effect. The CERD Committee is the leading body which strictly follows this dichotomy in its concluding observations.

- Both difference and disadvantage approaches with an adverse effect element can be observed in the interpretation and application of indirect discrimination.
    - The HRC took both difference and disadvantage approaches to indirect discrimination in the definitions made in *Karnel Singh* and *Althammer*. However, in the application of this concept to the individual communications, it adopted a strict approach in both disadvantage and difference related cases. First, the views on individual communications such as *Oulajin & Kaiss*, *Araujo-Jongen*, and *JAMB-R* show that the HRC excluded indirect discrimination in relation to the right to social security. Second, in the cases related to religious and linguistic differences, the HRC did not examine the claims of indirect discrimination and evaluated the cases in the ambit of other substantive rights. The practice of the HRC makes it clear that the right, which is in relation to the claim of indirect discrimination, plays an important role in the approach of the treaty body.
    - The CESCR adopted a disadvantage approach to indirect discrimination in its definitions. It followed this approach also in the concluding observations, except for a few observations related to linguistic differences.
    - Although the definitions of the CERD Committee were vague, it can be argued that it took both difference and disadvantage approaches to indirect discrimination. In its view on *L.R. et al.* and in the concluding observations, it gave more weight on collective disadvantage than on inherent difference.
    - The CEDAW Committee did not base a single approach in the definitions; however, it gave more attention to collective disadvantage suffered by women as a group.
    - The CRPD Committee began with the difference approach in *H.M.*, but later recognized collective disadvantage in *Gröninger*.

- The barrier element is the area where the treaty bodies show a certain level of flexibility and extend the scope of indirect discrimination.
    - Firstly, they did not confine indirect discrimination to the rights with accessibility component. They applied indirect discrimination to civil and political matters such as violence, criminal justice system and counter-terrorism measures.
    - Secondly, they did not always require a single barrier on the economic and social matters. Within the context of the right to housing, the decision of the CERD Committee in *L.R. et al.* is a clear example.
- The approaches of the treaty bodies are vague and inconsistent in the justification element of indirect discrimination.
    - In a number of indirect discrimination cases, the HRC stated that the treatment must be based on reasonable and objective grounds. Nevertheless, it did not provide a clear explanation.
    - The same criterion was also used by the CRPD and CERD Committees in *H.M.* and *L.R. et al*. The lack of adequate interpretation of this criterion by either treaty bodies made it difficult to compare their approaches.
    - The CRPD adopted both justification and undue burden tests in *H.M.* like the *Meiorin* decision of the Supreme Court of Canada. This represents an intersection of reasonable accommodation and indirect discrimination.

Based on these findings, an internal comparison reveals the diverging and converging areas within the UN treaty-body system. Treaty bodies converge on the neutrality element as relying on the dichotomy between 'effect or purpose' and on the barrier element by extending the scope of indirect discrimination. The treaty bodies converge in the adverse effect element, considering the fact that neither of them excludes a certain approach or confined the adverse effect to a group or individual base. However, from a different angle, a substantive look at the practice of the treaty body may find a divergence. This is because the CESCR, CERD and CEDAW Committees give more attention to disadvantage compared to the HRC and the CRPD Committee. This

divergence can be explained through a right and group-based comparison. Firstly, the CESCR focuses on ESC rights and is particularly concerned with socio-economically inferior groups. Therefore, it is not unexpected that it mostly applies a disadvantage approach. Secondly, the CERD and CEDAW Committees are particularly designed to eliminate discrimination against racial groups and women. They have an asymmetrical perspective to protect these groups from inequality. Correspondingly, their focus on collective disadvantage is attributable to this perspective. On the other hand, the disability context might have prevented the CRPD Committee from having an exclusive focus on collective disadvantage, since disability also requires an individual-based approach. The divergence is also observed in their application of the justification element. However, due to the lack of sufficient explanation from either of the treaty bodies, this divergence cannot be explained through differences in rights and groups covered. The justification element in *H.M.* before the CRPD can be an exception. The application of disproportionate or undue burden test together with justification results from the focus of the CRPD on the rights of disabled persons.

An external comparison between the UN treaty bodies and other domestic and regional jurisdictions reveals that the UN treaty bodies are not original in their interpretation of indirect discrimination. The definitions made by each treaty body show that they adopt the prevalent approaches in the broader jurisprudential context. However, in the application particularly in the concluding observations, the UN treaty bodies have extended the scope of indirect discrimination. This is because they apply indirect discrimination to the situations in which no single barrier can be identified and where accessibility to economic and social benefits are not at stake. The more flexible application of the barrier element is due to the quasi-judicial character of the UN treaty bodies. They can address systemic and structural forms of discrimination more easily compared to conventional judicial organs.

Conclusion

This study evaluated the approach of the United Nations human rights treaty bodies to indirect discrimination. Based on the text of the treaties, the views of the treaty bodies on the individual communications, general recommendations or comments, and concluding observations, the study provided an analysis of the interpretation and application of indirect discrimination at the United Nations level. It argued that treaty bodies do not have a sui generis approach that is distinct from the broader jurisprudential context of indirect discrimination. Furthermore, there is not uniformity across the UN treaty body as they diverge on the applications of some of the elements of indirect discrimination.

Considering the development of the right to equality in international human rights law, indirect discrimination came on the scene relatively late, in the era of substantive equality. Ideally, it requires affirmation of differences and realization of collective disadvantage. It also has a limited role in the understanding of equality as fair distribution and reformation. The doctrine of indirect discrimination originated in the United States, but later was adopted by several domestic and international jurisdictions. The journey of indirect discrimination in different jurisdictions has resulted in different approaches and applications. For a better understanding, the thesis analyzed indirect discrimination both conceptually and practically.

The conceptual analysis of indirect discrimination required firstly a division between direct and indirect discrimination. These two concepts are mutually exclusive, and differ in terms of their form, underlying principles and functions. As argued in the thesis, indirect discrimination is not always a product of past direct discrimination. Further, intent is not necessarily a distinctive factor between these two. Secondly, indirect discrimination intersects with similar concepts, namely unintentional discrimination, systemic, institutional and structural discrimination, reasonable accommodation, and positive action. Depending on the facts, a case can be evaluated as the intersection of indirect discrimination and either of these concepts.

At the practical level, the doctrine of indirect discrimination contains contested issues and different approaches. The comparative perspective on the application of indirect discrimination in this study followed the four elements of indirect discrimination: neutrality, adverse effect, barrier and justification. Firstly, in order to speak of indirect discrimination, a neutral treatment needs to exist. The contested issue is whether facial neutrality is sufficient or intent behind neutral treatment is also decisive. This element is the intersecting area between indirect discrimination and unintentional and covert discrimination. Secondly, the neutral treatment must result in adverse effects, either on a group or on an individual possessing certain characteristic. When the adverse effect was experienced by the group, the courts take a disadvantage approach to indirect discrimination. The disadvantage is observed either through statistical evidence or by scrutinizing inherently suspected treatment. In this thesis, the former was called the disproportionality test while the latter was called the liability test. When the adverse effect is experienced by the individual, the relevant notion is difference.

Thirdly, adverse effect must constitute a barrier for the group or the individual. This means it must separate them from a comparable group or individual and prevent them from accessing social and economic benefits. The barrier element determines the scope of indirect discrimination. Due to the accessibility component, indirect discrimination is mostly applied in relation to economic and social rights. Furthermore, when the barrier element is regarded as a single rule, measure or criteria, it confines indirect discrimination to individual cases. This means it excludes the intersection between indirect discrimination and systemic and structural forms of discrimination.

Lastly, adverse effect must remain unjustified. There are different criteria applied in different jurisdictions for justification. While the U.S. system uses job relatedness and business necessity, the EU system follows the criteria of appropriateness and necessity. The ECtHR, on the other hand, requires the existence of a reasonable relationship between the aim sought by the neutral treatment and the adverse effects. The Canadian approach is quite different from the rest, since it merges direct and indirect discrimination cases, and applies the undue burden test together with the justification test. The undue burden test has also been used in the EU with regard to reasonable accommodation.

The thesis followed this four-step analysis in the evaluation of the approach of the United Nations treaty bodies. It observed convergence on the neutrality and barrier elements, while divergence on the adverse effect and justification elements. The UN treaty bodies do not require proving that discrimination occurs with a purpose to discriminate. They accept that effects can be sufficient to find discrimination. The barrier element is also applied in a similar way across the UN treaty bodies. All the five treaty bodies apply indirect discrimination also to situations where no single barrier is identified and accessibility to economic and social benefits are not at stake.

The divergence between the UN treaty bodies on the adverse effect element can be attributed to different rights and groups covered by each treaty body. In the way they define indirect discrimination, they adopt both disadvantage and difference approaches to indirect discrimination. However, in the application of the concept to individual communications, the HRC has a strict approach to indirect discrimination in relation to the right to social security. The HRC is reluctant to apply indirect discrimination where the allocation of resources are at stake though certain groups have been disadvantaged. This is because the HRC is concerned with civil and political rights. The application of indirect discrimination at the UN treaty body system further reveals that the CESCR, CERD and CEDAW Committees pay more attention to collective disadvantage. This finding can also be explained by the functions of each treaty body. The CESCR Committee is concerned with the enjoyment of economic and social rights and the CERD and CEDAW Committees are designed to eliminate discrimination against historically disadvantaged groups, namely women and racial minorities. The CRPD Committee is also concerned with a specific vulnerable group. However the context of disability may require an individual based difference approach. This can be the reason behind the practice of the CRPD Committee which does not show a dominant disadvantage approach.

Having located the United Nations human rights treaty body system in the broader jurisprudential context, the thesis argued that treaty bodies do not adopt a sui generis or original approach. This is particularly visible in the definitions that they made and the terminology that they used. The only area where they show a certain level of authenticity is their flexible approach on the barrier element. This is attributable to the

non-judicial character of concluding observations. Except for *L.R. et al.*, that flexible approach is mostly observed in the concluding observations. During the constructive dialogue, treaty bodies do not have a judicial function but can act as inter-governmental bodies. This aspect seems to provide flexibility to the treaty bodies in their approaches to the barrier element.

The move of the treaty bodies beyond the barrier element has implications regarding the place of indirect discrimination in the general development of the right to equality. Since the flexible application of the barrier element can increase the intersection between indirect discrimination and structural and systemic forms of discrimination, the role of indirect discrimination in the understanding of equality as fair distribution and reformation can be improved. Thus, the potential role of indirect discrimination in the understanding of equality in this sense is better realized at the United Nations level.

As expected at the beginning of the research, the groups that are deemed as the victims of indirect discrimination were diverse. Besides the focus groups of the treaty bodies, namely women, racial groups and persons with disabilities, there had been important concluding observations regarding indirect discrimination suffered by indigenous people, linguistic minorities, migrants and non-citizens. In this sense, the United Nations treaty body system provides comprehensive protection against indirect discrimination.

The approach of the treaty bodies to indirect discrimination is open to further challenges as well as opportunities for improvement. The practice of the HRC has been relatively settled, since it received many individual communications containing both disadvantage and difference bases. The CERD and CEDAW Committees, on the other hand, received a few communications concerning indirect discrimination. Their approach to indirect discrimination can become clearer with new communications. The CESCR Committee has been active in addressing various issues related to indirect discrimination through its concluding observations. The individual complaint procedure to the CESCR Committee has recently entered into force and can be an important opportunity for the Committee. Considering the relationship between ESC rights and indirect discrimination, the CESCR Committee can have leading decisions

that can also affect the discussions in the broader context of indirect discrimination. The CRPD Committee is the newest body among these treaty bodies. Nevertheless, it provided an important decision on the intersectionality of indirect discrimination with reasonable accommodation. The CRPD Committee may become a leading body on this particular issue.

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