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## The Expanding Concept of Employment Discrimination in Europe: From Direct and Indirect Discrimination to Reasonable Accommodation Discrimination

**Abstract:** The failure to reasonably accommodate workers who face obstacles in the labour market, for example because of a disability, is increasingly perceived as an unacceptable form of employment discrimination. In response, the scope of various non-discrimination instruments has recently been extended to include a right to be accommodated. The aim of this article is to describe and examine the concept of reasonable accommodation, analyze how this concept relates to the broader notion of equality. We attempt to classify the concept of reasonable accommodation, referring to the existing dual non-discrimination framework. It is asserted that the right to be accommodated, though far from new, is potentially a powerful tool to assist individuals in overcoming barriers in the labour market. At the same time, individual accommodations leave unchallenged and unaffected underlying discriminatory policies and practices.

### 1. INTRODUCTION

Legislation prohibiting discrimination is now regarded as an essential element of the response of national governments and international organiza-

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tions to employment discrimination.<sup>1</sup> These institutions generally recognize that deep-rooted patterns of employment discrimination cannot merely be addressed by information campaigns or by offering financial compensation through social security and social protection schemes to those who have been denied equal employment opportunities; instead a legislative response aimed at preventing and combating discrimination is also required. Not surprisingly, many countries already have long standing legislative prohibitions of (employment) discrimination on the grounds of sex and/or race, and national legislation addressing so-called 'newer' grounds of discrimination, such as disability, age or sexual orientation, is becoming more common.<sup>2</sup> In addition, numerous international organizations, including the United Nations, the European Community and the Council of Europe, have adopted (binding) instruments prohibiting employment discrimination on a wide variety of grounds. There nevertheless remain considerable variations between these non-discrimination provisions. Some confine themselves to requiring equal pay or offering protection against discriminatory dismissal, whilst others cover all aspects of the labour contract, or have an even more general nature.<sup>3</sup> There are also differences with respect to the prohibited grounds of discrimination: some provisions address only one ground;<sup>4</sup> some address a limited number of grounds;<sup>5</sup>

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1 See also the various contributions to *IJCLLR*, n. 2, 2002.

2 Recently, various calls have been made to recognize genetic constitution as the 'newest' prohibited ground for discrimination. See *Enquete-Kommission Recht und Ethik der modernen Medizin, Schlussbericht (Zur Sache 2/2002)*, Berlin, Deutscher Bundestag, 2002, p. 381 and Human Genetics Commission, *Inside information. Balancing interests in the use of personal genetic data*, London, Human Genetics Commission, May 2002, p. 116. See also A. C. Hendriks, 'Genetic Discrimination. How to Anticipate Predictable Problems', (Editorial), 9 *European Journal of Health Law*, 2002, 2, p. 86.

3 In the context of European Community law the following examples can be given: Article 141(1) EC (equal pay); Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, [2000] O.J. L303/16 (all aspects of the labour contract); Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, [2000] O.J. L180/22 (more general nature).

4 E.g. Articles 12 (nationality) and 141(sex) EC; Article 5(i) International Convention on the Elimination of All Forms of Racial Discrimination (race); Article 11 Convention on the Elimination of All Forms of Discrimination Against Women (sex) and Article 11 European Convention on Human Rights and Biomedicine (genetic heritage).

5 E.g. Article 13 EC (sex, race or ethnic origin, religion or belief, disability, age or sexual orientation) and Article 21 Charter of Fundamental Rights of the European Union (sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation).

whilst others have an open-ended character,<sup>6</sup> with or without a (seemingly) illustrative list of protected grounds.<sup>7</sup>

Our purpose in this article is to consider one aspect of the problem addressed by non-discrimination provisions, namely the formats which employment discrimination can take. Non-discrimination law commonly makes a distinction between direct and indirect discrimination; the latter is also sometimes referred to as disparate treatment and adverse impact. Some jurisdictions nowadays recognize that the failure to provide a reasonable or effective accommodation or adjustment also constitutes discrimination, unless implementing this accommodation would impose an unjustifiable hardship on the party otherwise obliged to make the accommodation. The aim of this article is to examine the concept of reasonable accommodation and analyze how this concept relates to the broader notion of equality. In doing so we will consider whether a refusal to make a reasonable accommodation can be regarded as a form of discrimination and, if so, how that discrimination should be classified (direct, indirect or as a separate form of discrimination).

In the European context the issue of reasonable accommodation seems particularly topical given that the European Community has recently adopted a Framework Employment Directive addressing equal treatment in employment and occupation which expressly requires employers to make a reasonable accommodation for persons with disabilities. According to the Directive, such an obligation is necessary 'in order to guarantee compliance with the principle of equal treatment'.<sup>8</sup> A similar sentiment can be found in General Comment No. 5 (1994), Persons with disabilities, of the UN Committee on Economic, Social and Cultural Rights.<sup>9</sup> According to this authoritative interpretation of the International Covenant on Economic, Social and Cultural Rights, the term 'disability based discrimination' includes 'any distinction, exclusion or preference, or denial of reasonable accommodation based on disabili-

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6 E.g. Article 26 International Covenant on Civil and Political Rights; Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and Protocol XII to the ECHR.

7 A. C. Hendriks, 'From social (in)security to equal employment opportunities. A report from the Netherlands', in M. Jones, and L.A. Basser Marks (eds.), *Disability, diversity & legal change*, The Hague/Boston/London, Martinus Nijhoff Publishers, 1999, pp. 153-170.

8 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Article 5, [2000] O. J. L303/16. Harassment and an instruction to discriminate are also considered forms of discrimination under this directive.

9 UN Doc. E/C.12/1994/13.

ty which has the effect of nullifying or impairing the recognition, enjoyment or exercise of economic, social or cultural rights'.<sup>10</sup> Moreover there are numerous instances of national non-discrimination law, in both Europe and elsewhere, which define a failure to make a reasonable accommodation as a form of discrimination. In many jurisdictions this obligation is not confined to people with disabilities, but also applies to members of (minority) religions or even to all individuals covered by broadly worded non-discrimination provisions. The issue of reasonable accommodation is therefore of increasing importance and requires further reflection.

## 2. NON-DISCRIMINATION AND EQUAL EMPLOYMENT OPPORTUNITIES

### 2.1. *The Equality Principle*

The principle of equality is grounded on the idea that all persons are of equal value and importance; or, as stated in Article 1 of the Universal Declaration of Human Rights (1948): 'All human beings are born free and *equal in dignity and rights*. ...' [emphasis added – LW/AH]. The latter implies that all persons should be provided with equal opportunities to participate in society, including the labour market. Pursuant to this interpretation of the principle of equality, each person is entitled to and should be afforded equal concern and respect.<sup>11</sup> This is not to say that differences should be ignored. On the contrary, according to the Greek philosopher Aristotle, 'those things that are alike should be treated alike, whereas things that are unlike should be treated unlike in proportion to their unlikeness'.<sup>12</sup> There is almost universal consensus about this basic meaning of equality. Despite this, national and international non-discrimination laws are grounded on different notions of equality. These differences reflect the various equality concepts described by legal commentators,<sup>13</sup> most of which centre around the distinction between formal equality and substantive equality.

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10 Par. 15.

11 R. Dworkin, *Taking Rights Seriously*, Cambridge MA, Harvard University Press, 1978, p. 180.

12 Aristotle, *Ethica Nichomanea*, Book V, III, 113a-113b.

13 See e.g. B. Hepple, and C. Barnard, 'Substantive Equality', 59, *Cambridge Law Journal*, 2000, p. 562 at pp. 562-567 and C. McCrudden, 'Theorizing European Equality Law and the Role of Mainstreaming', Paper for Irish Centre for European Law/Equality Authority Conference on Equality Law, Dublin, 30 June 2001.

Formal equality is concerned with guaranteeing equality of treatment. Formal equality requires that people who are similarly situated are treated alike. Individual and societal differences, as a result of which people find themselves differently situated, are ignored. In an employment context, the application of this model implies that requiring job applicants to meet a number of workrelated qualification criteria, such as height, years of experience and educational background, would not raise questions of equality and discrimination. Substantive equality is concerned with the construction of social conditions needed to ensure that people are treated equally, in terms of equal opportunities or equality of results. This model of equality acknowledges the importance of differences and takes account of individual and environmental barriers which inhibit societal participation. Under this model of equality, requiring job applicants to meet criteria related to height, years of experience and educational background can raise questions of equality and discrimination, once it becomes clear that these criteria have an adverse impact on the employment opportunities of (members of) a particular group.

## 2.2. *Direct and Indirect Discrimination*

From the 1970s onwards courts started to distinguish between direct and indirect discrimination.<sup>14</sup> Direct discrimination occurs when a person is treated less favourable than another similarly situated person because of a particular characteristic, such as race or sex. Since race, sex and other protected characteristics are hardly ever considered a relevant criterion for treating persons differently, the utilization of these grounds for treating one person less favourable than another constitutes direct discrimination, unless there is an objective justification for the difference of treatment.

Indirect discrimination originates from a differentiation on the basis of an apparently neutral criterion, which has the effect that a group protected by non-discrimination law is disadvantaged compared to another group, and no objective justification can be shown to exist for the applied criterion. The recognition of indirect discrimination as a form of discrimination is generally considered to reflect a more substantive inter

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14 For the US (Supreme Court), see *Griggs v. Duke Power Company*, 401 US 424 (1971) (with respect to discrimination on grounds of race) and *Dothard v. Rawlinson*, 433 US 321 (1977) (with respect to discrimination on grounds of sex), for the EC (European Court of Justice), see case 152/73 *Sotgiu* [1974] ECR 153 (with respect to difference on grounds of nationality) and case 170/84 *Bilka Kaufhaus* [1986] ECR 1607 (with respect to difference on grounds of sex).

pretation of the notion of equality.<sup>15</sup> As with the concept of substantive equality, the notion of indirect discrimination is primarily concerned with the outcome of a form of treatment. Under this notion, when the treatment leads to unequal results, measured in terms of members of one group being placed at a particular disadvantage or being excluded from participation compared with others, where both groups are treated similarly, a closer look must be taken at the treatment and the differences between the groups. The prohibition of indirect discrimination thus allows for consideration of individual or environmental differences which, in a particular situation, due to the position in which people find themselves, result in denying equal employment opportunities to individuals pertaining to a protected group.

It should be noted however that national and international courts applying non-discrimination laws rarely refer to the notion of equality underlying such laws. A notable exception is the European Court of Justice which at times pays specific attention to the equality concept which corresponds with the aims of a non-discrimination law. In the case of *Thibault*, concerning the denial of an annual salary increase to a female worker who did not meet the condition of six months presence at work due to absence on account of sickness and maternity leave, the Court observed that the aim pursued by Directive 76/207/EEC on Equal Treatment<sup>16</sup> was substantive, not formal, equality. In this light, the unfavourable treatment which Ms Thibault received constituted discrimination on grounds of sex.<sup>17</sup> In cases concerning affirmative action, the Court has repeatedly held that measures aimed at removing existing inequalities which inadvertently excessively promote women's employment opportunities should not, although apparently discriminatory towards men, be considered sex discrimination, provided that a number of criteria are met.<sup>18</sup>

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- 15 T. Loenen, 'Indirect Discrimination: Oscillating Between Containment and Revolution', in T. Loenen, and P. R. Rodrigues (eds.), *Non-Discrimination Law: Comparative Perspectives*, The Hague/London/Boston, Kluwer Law International, 1999, pp. 195-211 at p. 199.
- 16 Council Directive of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, [1976] O. J. L39/40.
- 17 Case C-136/95 *Thibault* [1998] ECR I-2011, §26. See also case C-207/98 *Mahlburg* [2000] ECR I-549.
- 18 Case C-158/97 *Badeck* [2000] ECR I-1875 and Case C-476/99 *Lommers* [2002] ECR I-nyr.

### 3. THE DUTY TO MAKE A REASONABLE OR EFFECTIVE ACCOMMODATION

On 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. The characteristic is relevant in that it can lead to an individual being faced with a barrier that prevents him or her from benefiting from an employment opportunity that is open to others who do not share that characteristic. Non-discrimination law is, though, traditionally grounded on the idea that these personal characteristics are rarely relevant and only in exceptional situations allow for different treatment. Failing to accommodate these characteristics would, however, result in denying a person equal employment opportunities. Arguably such inaction amounts to discrimination, and this is expressly recognized in some, but not all, jurisdictions. A reasonable accommodation requirement therefore prohibits an employer from denying an individual with a disability or other relevant characteristic an employment opportunity by failing to take account of the characteristic, when taking account of it – in terms of changing the job or physical environment of the workplace – would enable the individual to do the work.<sup>19</sup> It can be argued that this duty flows from the very aim and purpose of equal and human rights law. Or, as stated by Cory J. of the Canadian Supreme Court, if there is to be true equality in the workplace, 'then it follows as the night the day that there must be a duty resting upon an employer to take reasonable steps to accommodate those employees that are adversely affected by the employment rules'.<sup>20</sup>

Reasonable accommodations however can also be perceived of in another light. Brian Doyle has argued that the duty to make a reasonable adjustment 'is an example of legally mandated positive action rather than a requirement of reverse or positive discrimination'.<sup>21</sup> Pamela Karlan and George Rutherglen, writing about the Americans with Disabilities Act of 1990 (ADA), have described the reasonable accommodation requirement as conferring a right to 'insist upon discrimination in their [persons with disabilities] favor'<sup>22</sup> and regard the obligation as a form of affirmative

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19 P. S. Karlan, and G. Rutherglen, 'Disabilities, Discrimination, and Reasonable Accommodation', 46, *Duke Law Journal*, 1996, pp. 1-41 at p. 9.

20 *Syndicat de l'Enseignement de Champlain et al v. Commission Scolaire Regionale de Chambly*, [1994] 2 S.C.R. 525.

21 Brian Doyle, 'Enabling Legislation or disassembling law? The Disability Discrimination Act 1995', 60, *Modern Law Review*, 1997, p. 64 at p. 74.

22 Karlan, and Rutherglen, *op. cit.* p. 3.

action, albeit an unusual and distinct form.<sup>23</sup> Authors who regard reasonable accommodations as a form of positive or affirmative action sometimes recognize that, unlike most forms of positive action which are aimed at members of a 'vulnerable' or 'under represented' group,<sup>24</sup> reasonable accommodations possess an individualized character. For this reason statistical data, revealing a numerical imbalance of a particular group of workers, such as women or ethnic minorities, in a particular employer's workforce, is largely irrelevant for decisions concerning reasonable accommodations. In addition, accommodations can involve regular and ongoing expenditure, such as the provision of personal assistants, rather than a once and for all decision to award a woman or a member of an ethnic minority a job or training.<sup>25</sup> For these reasons the reasonable accommodation obligation is not susceptible to the problems of under-inclusiveness or over-inclusiveness which can dog classical positive action measures. In addition, the failure, on the part of the employer or any other responsible party, to render the obstacle or barrier irrelevant by adapting the environment can actually be regarded as a form of discrimination where it is possible for the employer or any other responsible party to make such an accommodation. However, the obligation to accommodate is not absolute, and is subject to the requirement that the accommodation should not pose an excessive burden on the employer. In other words, an employer or any other responsible party is required to make an effective accommodation for individuals with particular inherent characteristics to ensure equal employment opportunities, unless the employer or other responsible party can demonstrate that it is unreasonable to expect him or her to provide such an accommodation.<sup>26</sup>

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23 *Ibid.*, pp. 14-22.

24 See e.g. the case law of the European Court of Justice discussing the various provisions of national law which were designed to advance the employment of women in sectors in which they were under represented – Case C-450/93 *Kalanke* [1995] ECJ I-3051; Case C-409/95 *Marschall* [1998] ECR I-6363; and Case C-158/97 *Badeck* [2000] ECR I-1875; and Article 141(4) EC which permits measures designed to make it 'easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers'.

25 Karlan, and Rutherglen, *op. cit.*, pp. 16-18.

26 The adjective 'reasonable' in 'reasonable accommodation', as laid down in the ADA, the Framework Employment Directive and many other legal instruments, misleadingly suggests that a reference is being made to what is expected from the employer or any other responsible party, rather than to the efficiency of the accommodation itself. In this respect reference should be made to a recent decision of the US Supreme Court in *US Airways v. Barnett* (29 April 2002) where the Court held that an accommodation is not 'reasonable' once an employer can show that the requested reasonable accommodation conflicts with – in this case – seniority rules. We therefore believe that the term 'effective accommodation' is more appropriate than 'reasonable accommodation.' See on this point L. Waddington, *Disability, Employment and the European Community*, Antwerp, Maklu, Blackstone *et al.*, 1995, p. 165.

The obligation to make a reasonable or effective accommodation – or, looked at from the other perspective, the right to be accommodated – is often found in modern disability non-discrimination law. The aforementioned ADA defines as discrimination a failure to make a ‘reasonable accommodation’, where the employer knows of the need for such an accommodation. An employer also discriminates if she/he fails to employ a qualified individual with a disability on the grounds that the individual requires a ‘reasonable accommodation’.<sup>27</sup> These provisions are modelled on an earlier statute and its accompanying regulations, which *inter alia* addresses disability discrimination in the public sector and amongst public contractors.<sup>28</sup> Other countries, including Australia,<sup>29</sup>

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- 27 Section 102(b), 5(A) and (B). The relevant provisions read ‘the term “discriminate” includes:
- 5(A) not making a reasonable accommodation to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or
  - (B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;’
- Section 101(9) reads ‘The term “reasonable accommodation” may include:
- (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
  - (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities’.
- 28 Section 504(A) of the Rehabilitation Act of 1973, as revised, reads ‘No otherwise qualified individual with a disability in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Development Disabilities Act of 1978. Copies of such proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committee.’ The regulations imposing a duty of reasonable accommodation appear in 29 C.F.R. §§ 32.13(a), 1613.704 (1995).
- 29 Article 5(2) Disability Discrimination Act of 1992 reads ‘For the purpose of subsection (1), circumstances in which a person treats or would treat another person with a disability are not materially different because the fact that different accommodation or services may be required by the person with a disability’.

New Zealand<sup>30</sup> and South Africa,<sup>31</sup> have legislation stipulating that the failure to provide a reasonable accommodation constitutes a form of discrimination, and these provisions have resulted in interesting case law.<sup>32</sup>

More recent European disability non-discrimination statutes also define a failure to make a reasonable accommodation as a form of discrimination. The British Disability Discrimination Act 1995, which does not expressly prohibit indirect discrimination, establishes a duty to make 'reasonable adjustments',<sup>33</sup> and defines a failure to comply with this duty as discrimination where the failure cannot be justified. The duty applies where arrangements made by or on behalf of an employer, or where any physical feature or the premises occupied by the employer, place a disabled individual at a 'substantial disadvantage' in comparison with persons who are not disabled.<sup>34</sup> In applying this test courts go through a number of sequential steps following the structure of the Act. These steps

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- 30 Article 29 Human Rights Act 1993 reads '(1) Nothing in section 22 of this Act shall prevent different treatment based on disability where:
- (a) the position is such that the person could perform the duties of the position satisfactorily only with the aid of special services or facilities and it is not reasonable to expect the employer to provide those services or facilities; or
  - (b) the environment in which the duties of the position are to be performed or the nature of those duties, or of some of them, is such that the person could perform those duties only with a risk of harm to that person or to others, including risk of infecting others with an illness, and it is not reasonable to take that risk.
- (2) Nothing in subsection (1)(b) of this section shall apply if the employer could, without unreasonable disruption, take reasonable measures to reduce the risk to a normal level'.
- 31 Article 9 of the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000 reads '... no person may unfairly discriminate against any person on the ground of disability, including:
- (a) denying or removing from any person who has a disability, any supporting or enabling facility necessary for their functioning in society;
  - (b) contravening the code of practice of the South African Bureau of Standards that govern environmental accessibility;
  - (c) failing to eliminate obstacles that unfairly limit or restrict persons with disabilities from enjoying equal opportunities or failing to take steps to reasonably accommodate the needs of such persons'.
- 32 E.g. the Australian Human Rights and Equal Opportunities Commission held in *Finney v. The Hills Grammar School* (1999) EOC 93-020, that a school which denied enrolment to a student with *spina bifida* discriminated against the student. The unjustifiable hardship defence failed because no opportunity had been taken to fully explore the range of accommodations that might be implemented in this case.
- 33 It is therefore sometimes argued that the duty to provide a reasonable accommodation entails the prohibition of indirect discrimination. R.J. Townsend-Smith, *Discrimination Law. Text and Materials*, London, Cavendish, 1998, p. 597 and N. Meager, B. Doyle *et al.*, *Monitoring the Disability Discrimination Act (DDA) 1995*, London, National Disability Council & Department for Education and Employment, 2000, p. 182.
- 34 Article 6(1).

include establishing whether an employer is under a duty to make any adjustment; whether the employer has taken such steps as are reasonable to make any such adjustment; and whether any failure to comply with the reasonable adjustment requirement is justified.<sup>35</sup> In making this judgment the court must apply an objective test.

Meanwhile, the Swedish law (1999:132) prohibiting discrimination in working life of disabled persons,<sup>36</sup> which prohibits both direct and indirect discrimination, defines as discrimination a failure by the employer to implement support or adjustment measures which can create a situation for a person with a disability that is similar to that of persons without such a disability, where an employer can reasonably be required to take such measures.<sup>37</sup> More recently, on 4 July 2002, the Second Chamber of Dutch Parliament adopted the Equal Treatment Act on grounds of Disability or Chronic Disease (Bill).<sup>38</sup> This Bill, which now awaits approval by the First Chamber of Parliament, prohibits both direct and indirect 'differentiation'. According to Article 2 of the Bill 'the prohibition of differentiation', as defined in Article 1, entails that the addressee of this norm is bound to provide 'an effective accommodation', unless this would impose a disproportionate burden for the addressee.

As noted above, the right to be accommodated can also be relevant for groups other than people with disabilities, and in various countries accommodation requirements exist with regard to religious discrimination. In fact, in the United States – as in many other countries – the concept of reasonable accommodation first emerged in response to discrimination on grounds of religion. In 1967 the US Equal Employment Opportunities Commission (EEOC) issued guidelines implementing Section 703(a) of the 1964 Civil Rights Act. According to these guidelines, an employer was required to 'make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business'. A few years later, the Court of Appeals of the Sixth Circuit held, however, that the EEOC lacked the statutory

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35 *Morse v. Wiltshire County Council* [1998] ICR 1023, [1998] IRLR 352, 44 BMLR 58. See also A. McColgan, *Discrimination Law. Text, Cases and Materials*, Oxford, Hart, 2000, pp. 476-497.

36 Official title: *Lag (1999:132) om förbud mot diskriminering i arbetslivet av personer med funktionshinder*.

37 Article 6. Unofficial English translation. Text of law on file with the authors.

38 Official title: *Wet gelijke behandeling op grond van handicap of chronische ziekte*. Text of bill on file with authors.

authority to establish such a duty.<sup>39</sup> In response to this and other judgments, Congress decided to clarify this issue by amending, the Civil Rights Act in 1972. According to the amended Section 701(j) of the Civil Rights Act, an employer is required to demonstrate that 'he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business'.<sup>40</sup>

There are also jurisdictions where the duty to provide a reasonable accommodation is linked to open-ended non-discrimination provisions. Under the Canadian Human Rights Act 1997,<sup>41</sup> for example, the duty to accommodate exists with regard to all the protected grounds. The courts have applied this principle to cases of discrimination on grounds of religion,<sup>42</sup> age and sex,<sup>43</sup> as well as disability.<sup>44</sup>

#### 4. THE LIMITS TO REASONABLE ACCOMMODATION

The duty to accommodate in non-discrimination legislation is generally framed in terms of an individual right. This means that individuals, pertaining to a covered group, are entitled to require that an accommodation is made which takes account of their specific needs. Seen from a broader perspective of equality, this approach fails to guarantee equal employment opportunities for all. In most instances, an individual accommodation leaves unchallenged and unaffected the underlying discriminatory

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39 *Dewey v. Reynolds Metals Co.*, 429 F.2d 324 (6th Cir, 1971).

40 Different from the Civil Rights Act, the ADA contains a statutory standard defining an 'undue hardship'. It is generally believed that this offers a higher level of protection. Groups representing the religious communities are therefore seeking to establish a similar statutory standard for undue hardship through the proposed Workplace Religious Freedom Act.

41 The Act covers discrimination on grounds of race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted (Section 2). A 1998 amendment to Section 2 of the Human Rights Act specifically included a duty of accommodation ('to have their needs accommodated'), Bill S-5 (S.C. 1998, c.9).

42 *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536 and *Alberta Human Rights Commission v. Central Alberta Dairy Pool*, [1990] S.C.R. 489.

43 *Waplinton v. Maloney Steel Ltd.*, [1983] 4 CHRR D/1262 (Alb.). See also S. Price, 'Accommodating Women in Employment: The Limitations of a Traditional Approach', 1, *Canadian Labour Law Journal*, 1993, 1, pp. 140-165.

44 *Grismer v. The British Columbia Council of Human Rights*, [1999] 3 S.C.R. 868.

policy which resulted in the initial exclusion. For this reason some academics and judges have criticized the obligation to make individual accommodations for

‘not challeng[ing] the imbalances of power, or the discourses of dominance, such as racism, able-bodyism and sexism, which result in a society being designed well for some and not for others. It allows those who consider themselves “normal” to continue to construct institutions and relations in their image, as long as others, when they challenge this construction are “accommodated”’.<sup>45</sup>

McLachlin J. of the Canadian Supreme Court adopted this approach in the *Meiorin* Case and found that accommodation, conceived of in this way, does not address the need for the transformation of society and ‘does not challenge deep-seated beliefs about the intrinsic superiority of such characteristics as mobility and sightedness. In short, accommodation is assimilationist’,<sup>46</sup> so that this approach to dealing with discrimination might actually serve to legitimize systematic discrimination.

The EC Framework Employment Directive is also susceptible to such criticism. The Directive provides that a provision or practice which results in indirect discrimination against people with disabilities can, in addition to the standard ‘objectively justified’ test, be permitted if the employer or covered entity provides a reasonable accommodation to eliminate the disadvantages resulting from the provision or practice.<sup>47</sup> One can question whether such accommodations will, in all cases, actually remove the disadvantage experienced by people with a disability. For instance, the provision of suitable ramps at all entrances to a workplace would remove any disadvantage experienced by people who use wheelchairs or who are otherwise mobility restricted with regard to gaining access to the workplace. However, the provision of a ramp at only one entrance to a workplace which has multiple entries would not remove all the disadvantages, as it would limit the options available to users of wheelchairs. Therefore, depending on how this provision is interpreted by national legislatures, national courts and, eventually, the Court of Justice, it could actually allow

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45 S. Day, and G. Brodsky, ‘The Duty to Accommodate: Who Will Benefit?’, 75, *Canadian Bar Review*, 1996, p. 433 at p. 462, also cited by J. McLachlin, *British Columbia (Public Service Employee Relations Commission) v. BCGSEU* (usually referred to as the *Meiorin* case) of the Canadian Supreme Court.

46 At par. 41.

47 Article 2(b).

for the continuation of some instances of indirect discrimination against people with disabilities, particularly in the absence of employment, education, transportation, accessibility and other standards which take into account the needs of people with disabilities and demand comprehensive pro-active measures.

## 5. OLD WINE IN NEW BOTTLES?

In Section 3 we argued that the obligation to make a reasonable accommodation can apply to a wide variety of groups. In this section we will demonstrate that the accommodation requirement is by no means a recent phenomenon, but is part of a long-standing wider body of labour law which requires employers to make adaptations to the workplace which guarantee access to the labour market and equal employment opportunities for certain groups. As long ago as the 19th century, employers found themselves obliged to comply with legislation, which not only regulated working hours and restricted the employer's choice of personnel (including through dismissal), but also required compliance with certain health and safety standards at the workplace for specific groups.

In the United Kingdom restrictions were initially placed on child labour as early as 1788 through the Regulation of Chimney Sweepers Act, and 1802 through the Health and Morals of Apprentices Act. The Factories Act of 1844 placed women in a similar position to young workers by restricting their working hours and additionally required that dangerous parts of machinery be fenced and the powers of inspection strengthened. The 'Ten Hours Act' of 1847, which initially limited working time in textile factories, was gradually extended to cover factories and workshops over a wide range of manufacturing industries in the second half of the 19th century.<sup>48</sup>

In the Netherlands, the prohibition of child labour in 1874 was followed by an array of social security acts and health and safety acts. According to these laws – e.g. Article 3 paragraph 1(d) of the Employment Conditions Act (*Arbeidsomstandighedenwet 1998*) – employers are required to match the design of the workplace, the work methods and the used devices as well as the contents of the function to the personal capacities of workers.

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48 B. A. Hepple, and S. Fredman, *Labour Law and Industrial Relations in Great Britain*, Deventer/Boston, Kluwer Law and Taxation Publishers, 1986, paras. 55 and 56.

Such a duty to accommodate the capacities and needs of workers is not only laid down in explicit legal norms, but can also be derived from open norms, such as the duties of the good employer (*eis van het goed werkgeverschap*) as provided in Article 7:611 of the Dutch Civil Code.<sup>49</sup> The latter norm is analogous to the duty to care (*Fürsorgepflicht*) in German law. This duty entails – according to Article 618 of the Federal Law Book (*Bundesgesetzbuch*)<sup>50</sup> and case-law – similar obligations for the employer with respect to the health, safety and accessibility of the workplace and work environment.

Comparable developments can be identified in other industrialized economies, demonstrating the relatively long history of legislatively mandated adaptations to the workplace and working patterns, also in view of the, sometimes different, characteristics of individual workers.

These requirements have been reinforced by Community law over the past decade or through directives addressing, for example, health and safety at work,<sup>51</sup> working time<sup>52</sup> and consultation of workers.<sup>53</sup> The Framework Health and Safety Directive in particular requires employers to ensure that work is adapted to the individual, ‘especially as regards the design of workplaces, the choice of work equipment and the choice of working and production methods’.<sup>54</sup>

The Community measures noted above impose – directly or indirectly – obligations on employers in order to secure acceptable health and safety standards for all workers. However, there is also a history of obligations being imposed on employers in order to allow effective access to the labour market for specific groups, sometimes in combination with health and safety measures. For example, Article 15 of Directive 89/391/EEC specifies that ‘particularly sensitive risk groups must be

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49 M. A. C. de Wit, *Het goed werkgeverschap als intermediair van normen in het arbeidsrecht*, Deventer, Kluwer, 1999, p. 28 and G.J.J. Heerma van Voss, ‘Goed werkgeverschap als bron van vernieuwing van het arbeidsrecht’, *Reeks Vereniging voor Arbeidsrecht*, n. 29, Deventer, Kluwer, 1999, p. 119.

50 This duty has been elaborated upon in specific laws to meet the needs of specific groups, such as young persons (*Jugendarbeitsschutzgesetz*) and pregnant women/young mothers (*Mutterschutzgesetz*).

51 Directive 89/391/EEC on the Introduction of Measures to Encourage Improvements in the Safety and Health of Workers at Work, [1989] O. J. L183/1.

52 Directive 93/104 Concerning Certain Aspects of the Organization of Working Time, [1993] O. J. L307/18.

53 Directive 94/45/EC on the Establishment of a European Works Council or a Procedure in the Community-Scale Undertakings and Community-Scale Groups of Undertakings for the Purposes of Informing and Consulting Employees, [1994] O. J. L254/64, extended to the United Kingdom by Directive 97/74/EC, [1997] O. J. L10/20.

54 Article 6(2)(d).

protected against the dangers which specifically affect them'. A separate directive addresses the health and safety issues related to the employment of young people,<sup>55</sup> establishes higher health and safety standards for this group, and whether they are allowed to work at all. The directive obliges employers to 'guarantee young people working conditions appropriate to their age'.<sup>56</sup>

Perhaps the most relevant comparisons in Community law, and the areas where most parallels can be found to the reasonable or effective accommodation requirement, concern the protection of pregnant workers and workers who have recently given birth, and the right to parental leave. A specific Community directive<sup>57</sup> imposes a variety of obligations on employers with regard to the two former groups of workers. As with the case of the Young Workers Directive, the employer is obliged to carry out a risk assessment and, if necessary, to temporarily adjust the working conditions or working hours of pregnant workers and workers who are breast-feeding.<sup>58</sup> The Directive also provides three additional strands of protection. Firstly, pregnant workers are entitled to a continuous period of maternity leave of at least 14 weeks,<sup>59</sup> during which the workers' rights connected with the contract of employment, with the exception of pay, must be maintained.<sup>60</sup> Secondly, pregnant workers are entitled to take time off from work, without loss of pay, to attend antenatal examinations, if such examinations have to take place within working hours.<sup>61</sup> Thirdly, pregnant workers cannot be dismissed during the period from the beginning of their pregnancy to the end of their maternity leave, save in exceptional cases not connected to their condition which are permitted under national law or practice.<sup>62</sup> All of these provisions can be regarded as effective accommodations to ensure equal opportunities for female workers in the labour market. The obligation to provide time off from work for antenatal examinations can, in particular, be compared to similar accommodations provided for workers with disabilities, who may need to receive medical or rehabilitation treatment during working hours or

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55 Directive 94/33/EC on the Protection of Young People at Work, [1994] O. J. L216/12.

56 Preamble.

57 Directive 92/85/EEC on the Introduction of Measures to Encourage Improvements in the Safety and Health at Work of Pregnant Workers and Workers who have Recently Given Birth or are Breast-feeding, [1992] O. J. L348/1.

58 Articles 4, 5 and 6, and Annex I and II.

59 Article 8(1) and (2).

60 Article 11(2)(a). See also Case C-342/93 *Gillespie* [1996] ECR I-475.

61 Article 9.

62 Article 10. See also Case C-394/96 *Brown* [1998] ECR I-4225 and Case C-109/00 *Tele Danmark* [2001] ECR I-6993.

simply take regular rest breaks.<sup>63</sup> A similar comparison could be made to workers who wish to take time off from work in order to worship<sup>64</sup> or who, for religious reasons, are not able to work on Saturdays<sup>65</sup> or Sundays.<sup>66</sup> Indeed, in the case of religious worship and possibly disability-related treatment or rest, the accommodations in question might be less demanding for the employer, if the worker was willing to take either unpaid leave or make up for the time lost.

Employers are also obliged to accommodate workers who wish to take parental leave.<sup>67</sup> The Directive provides all workers who have an employment contract or employment relationship<sup>68</sup> with a non-transferable right to parental leave.<sup>69</sup> The Directive entitles men and women workers to parental leave on the birth or adoption of a child to enable them to take care of that child, for at least 3 months, until a given age up to 8 years, to be defined by the Member States or the social partners.<sup>70</sup> During this period the worker must be protected against dismissal on the grounds of applying for or taking parental leave.<sup>71</sup> At the end of the parental leave, workers have the right to return to the same job or, if that is not possible, to an equivalent or similar job consistent with the employment contract or employment relationship.<sup>72</sup> In addition, any rights acquired or in the process of being acquired by the worker on the date on which parental leave starts, shall be maintained as they stand until the end of the parental leave.<sup>73</sup> Secondly, the Directive provides that workers are entitled to time off on the grounds of *force majeure* for urgent family reasons in cases of sickness or accident making the immediate presence of the worker indispensable.<sup>74</sup>

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63 Section 6(3)(d) Disability Discrimination Act 1995. See also the Code of Practice on the employment provisions in the DDA issued by the British government.

64 See the Dutch Supreme Court (*Hoge Raad*) in *De Venhorst/Inan* 30 March 1984, *NJ* 1985, 350 and subsequent case-law. B.C. Labuschagne, 'Accommodating Religious Diversity in Employment', in T. Loenen, and P.R. Rodrigues (eds.), *Non-Discrimination Law: Comparative Perspectives*, The Hague/London/Boston, Kluwer Law International, 1999, pp. 133-142.

65 *Gohm v. Domtar* [1990] 12 CHRR D/161 (Ont.) confirmed [1992] 89 D.L.R. (4th) 305 (C.Div. Ont.).

66 *Ryder v. Cooper* [1991] 13 CHRR D/38 (Br.Col.).

67 Directive 96/34/EC on the Framework Agreement on Parental Leave, [1996] O. J. L145/9, as amended and extended to the United Kingdom by Directive 96/75/EC [1998] O. J. L10/24.

68 Clause 1 (1).

69 Clause 2 (2).

70 Clause 2 (1).

71 Clause 2 (4).

72 Clause 2 (5).

73 Clause 2 (6).

74 Clause 3 (1).

The rights granted by the Parental Leave Directive, involving an entitlement to unpaid leave combined with the retention of employment rights, can be regarded as a form of reasonable accommodation. To make comparisons with other groups, this form of accommodation could benefit people with disabilities who require extended medical treatment or time for recuperation; foreign nationals and members of ethnic minorities who wish to make extended trips overseas to visit family members; and members of certain religions who wish to go on a pilgrimage.

The rights provided for in the Pregnant Workers' Directive and the Parental Leave Directive can be regarded as effective accommodations for a further reason. Unlike 'classical' health and safety legislation, which typically does not confer individual rights and is enforced through a – mostly public – monitoring agency, the rights conferred in these two Directives are, through national implementation legislation, directly enforceable by individuals.

Seen in this light, the reasonable accommodation requirement found in the Framework Employment Directive can be regarded as a relatively new addition, in Europe at least, to an existing set of measures designed to secure access to the labour market and equal employment opportunities, through the making of adaptations to the workplace or work pattern, for particular groups.

## 6. FITTING A DUTY TO ACCOMMODATE INTO THE NON-DISCRIMINATION FRAMEWORK

As noted above, many jurisdictions make a distinction between direct and indirect discrimination. This is, for example, the case in the European Union where the provisions covering gender and race discrimination, as well as the Framework Employment Directive, make a clear distinction between these two forms of discrimination. This is not to say that jurisdictions that do not distinguish between direct and indirect discrimination<sup>75</sup> fail to pay attention to the effect of seemingly neutral classifications. This was explicitly acknowledged by the European Court of Human Rights in the case of *Thlimmenos*, involving a Jehova's Witness who was refused equal employment opportunities due to a previous

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<sup>75</sup> Such as the UN Human Rights Committee and the European Court of Human Rights, see T. Loenen, 'Rethinking sex equality as a human right', 12, *Netherlands Quarterly of Human Rights*, 1994, n. 3, pp. 253-270.

conviction (refusal to wear a military uniform). The Court expanded the scope of its own definition of discrimination in this case:

‘The right not to be discriminated against in the enjoyment of the rights 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’.<sup>76</sup>

The distinction between direct and indirect discrimination occupies a central place in the recently adopted Race Directive<sup>77</sup> and the already mentioned Framework Employment Directive. Both directives define direct discrimination as a situation ‘where one person is treated less favourably than another is, has been or would be treated in a comparable situation’ on a ground covered by the relevant legislation.<sup>78</sup> Crucial for the application of this definition is the identification of a ‘comparable situation’, and no legislative guidance is given on this matter. The identification of a suitably placed comparator has also proved vital, and at times problematic, under sex discrimination law.<sup>79</sup> The Court has therefore allowed comparisons to be made between a woman and a man who previously performed the same job,<sup>80</sup> but has rejected references to hypothetical comparators<sup>81</sup> outside the scope of discrimination on the grounds of pregnancy.<sup>82</sup> In contrast, the reference in the new legislative definition to one person being treated less favourably than ‘another ... would be’ arguably suggests that references to hypothetical comparators are allowed.<sup>83</sup> The established Sex Discrimi-

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76 ECtHR 6 April 2000 *Thlimmenos* Appl. No. 34369/97.

77 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, [2000] O. J. L180/22.

78 Article 2(2)(a) in both directives.

79 See e.g. Case C-132/92 *Bird Eye Walls* [1993] ECR I-5579.

80 Case 129/80 *MacCarthy Ltd. v. Smith* [1980] ECR 1275.

81 Case 129/80 *MacCarthy Ltd. v. Smith* [1980] ECR 1275 and Case C-200/91 *Coloroll v. Russel* [1994] ECR I-4389.

82 Case 177/88 *Dekker* [1990] ECR I-3941.

83 The Community has recently adopted a new Directive amending the established Equal Treatment Directive. That Directive copied the Race Directive and Framework Employment Directive by defining direct discrimination as involving less favourable treatment ‘on grounds of sex than another is, has been or would be treated in a comparable situation’. Directive of the European Parliament and the Council amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, Joint text approved by the Conciliation Committee provided for in Article 251(4) of the EC Treaty, 2000/0142 (COD), C5-0185/2002, 5 June 2002. The new directive should be published in the *Official Journal of the European Communities* in September 2002.

nation Directives as well as the new legislative instruments only provide for a limited and exhaustively listed number of justifications for direct differentiation. All justifications are specified in the relevant directives.<sup>84</sup>

In community sex discrimination law, indirect discrimination is currently defined as a situation

‘where an apparently neutral provision, criterion or practice disadvantages a substantially higher proportion of the members of one that sex unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex.’<sup>85</sup>

In order to fall foul of this definition, the challenged provision or practice must affect members of a group, and not simply an individual. Establishing this impact has at times required the production of statistical evidence, and has led to complicated and opaque decisions.<sup>86</sup>

The recently adopted Equality Directives contain a different definition of indirect discrimination. Article 2(2)(b) of the Race Directive therefore reads:

‘Indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is

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84 For example: ‘genuine and determining occupational requirements’ (Art. 4 Race Directive); ‘occupational requirements’ (Art. 4 Framework Employment Directive) and Art. 2(2) Equal Treatment Directive; Positive Action (Art. 5 Race Directive; Article 7 Framework Employment Directive; Art. 2(4) Equal Treatment Directive and Art. 141(4) EC. However, see also Case 222/84 *Johnston v. Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651 in which the Court read a proportionality test into the derogations provided for in the Equal Treatment Directive. However, the exceptions provided with regard to age discrimination in Article 6 of the Framework Employment directive are more open ended.

85 Art. 2(2) Burden of Proof Directive, [1998] O. J. L14/6. This definition is based on earlier case law of the European Court of Justice which elaborated the notion of indirect discrimination. See in particular Case 170/84 *Bilka-Kaufhaus v. Weber von Hartz* [1986] ECR 1607 in which the Court held that if proportionately more women than men work part-time, the exclusion of those part-time workers from access to higher rates of pay available to full-time workers, would be indirectly discriminatory and contrary to Article 119 EEC (now Article 141 EC) where that exclusion could not be justified by factors unrelated to any discrimination on grounds of sex (par. 36).

86 See Case C-167/97 *R. v. Secretary of Estate for Employment, ex parte Seymour-Smith* [1999] ECR I-623 and C. Barnard, and B. Hepple, ‘Indirect discrimination: interpreting Seymour-Smith’, 58, *Cambridge Law Journal*, 1999, pp. 399-412.

objectively justified by a legitimate aim and the means of achieving that they are appropriate and necessary.’

A similar definition is found in Article 2(2)(b) of the Framework Employment Directive. The key difference between the new definition and that found in the Burden of Proof Directive is that the latter requires that the ‘apparently neutral provision ... disadvantage[s] a substantially higher proportion of the members of one sex’ whilst the former requires that the provision places persons ‘at a particular disadvantage compared with other persons’. The test for establishing indirect discrimination contained in the new directives is arguably easier to satisfy because the burden of proof for establishing the necessary level of adverse treatment seems to be more readily met. However, the amended Equal Treatment Directive which should be adopted imminently will bring the definition of indirect discrimination on the grounds of sex into line with the definitions found in the Race and Framework Employment Directive, thus removing this disparity.<sup>87</sup> Indirect discrimination, under both the newer and older Directives, can be justified if an open-ended objective justification test is met.

The question now arises how to classify the concept of reasonable or effective accommodation and whether it fits into such a dual framework. Can the unjustified refusal to make an effective accommodation be regarded as a form of discrimination, and, if so, should it be regarded as direct or indirect discrimination, an aspect of both concepts or, alternatively, as a third and different form of discrimination?

Direct discrimination generally involves *intent* on the part of the discriminator, or at least the intention to make a distinction on a specific ground. In the case of the alleged failure to provide an effective accommodation, one could argue that such intent can be established where the employer has been made aware of the need for a job adaptation to assist a specific individual, which can be made without excessive effort or cost, and has refused to make that adaptation. Such an approach could be fitted into the European Community framework mentioned above by explicitly providing for the ‘disproportionate burden’ defence with regard to a directly discriminatory act involving a denial of a reasonable accommodation. However, in order to bring the failure to make a reasonable

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87 Directive of the European Parliament and the Council amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, Joint text approved by the Conciliation Committee provided for in Article 251(4) of the EC Treaty, 2000/0142 (COD), C5-0185/2002 5 June 2002.

accommodation within the definition of direct discrimination as laid down in the recent non-discrimination directives, one must establish that an individual requiring an accommodation is in 'a comparable situation' to those who do not require such an accommodation.<sup>88</sup> The latter is often difficult to demonstrate, given that an effective accommodation typically seeks to take away a barrier which impedes an individual from placing him/herself in 'a comparable situation'. Unless one is willing to extend the meaning of direct discrimination to include the failure to create equal employment opportunities, the notion of direct discrimination can only rarely be invoked to redress a failure to make a reasonable accommodation. Swedish law nevertheless adopts this approach with respect to disability,<sup>89</sup> and notably, EC law regards pregnancy discrimination in this light.<sup>90</sup> The European Court of Justice has therefore held that in determining whether a refusal of employment on the grounds of pregnancy could be regarded as direct sex discrimination: 'The answer depends on whether the fundamental reason for the refusal of employment is one which applies without distinction to workers of either sex or, conversely, whether it applies exclusively to one sex.'<sup>91</sup> Applying this test, the Court found that discrimination on the grounds of pregnancy was a form of direct sex discrimination, since only women could be refused employment for this reason. Whether the Court is willing to apply a similar test with respect to disability remains to be seen. It cannot be denied that disability is a more complex concept than pregnancy, not only with respect to the type of accommodations needed but also with respect to the nature and duration of an impairment. At the same time, the exclusion mechanisms are highly similar and, from an equal rights perspective, equally problematic.

With regard to indirect discrimination, no such intention to differentiate between protected groups is commonly required. Instead, at least according to the Burden of Proof Directive, a particular provision, criterion or practice which disproportionately disadvantages the members of a protected group, and which cannot be objectively justified, is sufficient to establish indirect discrimination. The plaintiff generally has to demonstrate a difference in the effect of a seemingly neutral differentiation criterion resulting in a disadvantage for members of the group the plaintiff

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88 An alternative would be to make a comparison between two individuals who both require a (similar) accommodation, where one has received the accommodation and another has not. However, such a restrictive interpretation would limit the relevance of the direct discrimination test.

89 Article 6 Law (1999:132) prohibiting discrimination in working life of disabled persons.

90 Cf. Case C-177/88 *Dekker* [1990] ECR I-3941.

91 Case C-177/88 *Dekker* at par. 10.

pertains to compared with members of another – usually the ‘opposite’ – group. The Framework Employment Directive contains – analogous to the Race Directive – a slightly different definition of indirect discrimination, focusing on a comparison between persons with a particular named characteristic<sup>92</sup> and other persons, to identify if the former have been placed at a particular disadvantage. Seen in this way, the physical organization of the work or workplace could, for example, disadvantage certain groups, e.g. people with mobility impairments or followers of a particular minority religion, and therefore can be regarded as indirectly discriminatory. The Framework Employment Directive thus allows for a comparison of one individual with ‘other persons’, suggesting that the appropriate comparator depends on the given situation. This more individualistic and contextual approach is indeed needed given that the grounds covered by the Framework Employment Directive are more complex than the grounds traditionally protected by EC non-discrimination law, notably sex and nationality. Measures disproportionately disadvantaging people with a learning impairment or for instance Muslims do not necessarily (indirectly) discriminate against all people with disabilities or all believers and may sometimes be advantageous to persons with other impairments or followers of another religion. Given the complexity of grounds such as disability, age, religion and sexual orientation it should therefore be welcomed that the Framework Employment Directive seemingly allows for individuals to argue that if other persons (the comparator) were to find themselves in a similar position, they would be similarly disadvantaged.<sup>93</sup> But does this imply that the plaintiff is free to compare him/herself with any real or imaginary group of persons? This question is particularly relevant for people with disabilities in need of a job adaptation. The exclusionary effect of seemingly neutral job qualification requirements – e.g. fluency in foreign languages – and the availability of effective job accommodations is highly individualistic and dependent on environmental circumstances. In such cases, the assignment of an appropriate comparator may be particularly difficult and may give rise to specific legal questions. It remains to be seen how national courts and, eventually, the European Court of Justice will interpret and apply the ‘new’ indirect discrimination test, and to what extent the – implicit or explicit – refusal of job accommodations can be covered by this test.

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92 The characteristics or grounds covered by the Framework Employment Directive are: religion or belief, disability, age and sexual orientation. (Art. 1).

93 The European Court of Justice already embraced this view in Case C-237/94 *O’Flynn* [1996] ECR I-2617 which dealt with discrimination on the grounds of nationality.

In the light of the above and given the prevailing notions about direct and indirect discrimination, it seems indispensable to (also) perceive reasonable accommodation discrimination as a form of discrimination *sui generis*. Different from direct and indirect discrimination, reasonable accommodation discrimination typically emerges in response to the failure to make an adaptation to ensure equal opportunities and commonly does not follow from differentiation on a forbidden or seemingly neutral ground – a distinction which is sometimes difficult to apply with respect to groups in need of adaptations.<sup>94</sup>

Reasonable accommodation discrimination is also different from direct and indirect discrimination given that a disadvantage is not necessarily experienced by all or most members of a particular group, but is, as noted above, experienced on the individual level, depending on both individual and environmental factors. Reasonable accommodation discrimination therefore requires a different approach to do justice to the particularities of an individual in a given situation – or, as was held by the Canadian Supreme Court, ‘Accommodation ensures that each person is assessed according to his or her own personal abilities rather than presumed group characteristics’.<sup>95</sup>

## 7. CONCLUSION

The right to be accommodated when seeking to benefit from an employment opportunity is a crucially important right for those encountering barriers in the labour market. This right, commonly formulated as a duty to accommodate on the part of the employer or any other responsible party, is firmly rooted in European labour and social security (case)law. It was (and is) deeply felt that these measures are essential to guarantee fair employment opportunities to individuals pertaining to minority or otherwise vulnerable groups.

Against this background, there is nothing new about the codification of this right in the Framework Employment Directive and recently adopted disability non-discrimination laws in Europe. It is, however, a novelty that this right is now explicitly formulated as an enforceable entitlement, and not merely a (moral) obligation of the employer, and brought under the *aegis* of the notion of equality to enhance *equal* employment opportunities.

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94 E.g. excluding dogs, thus using the criterion ‘having a dog’, can both be considered to constitute direct discrimination (having a service dog is inherent to some blind persons) and indirect discrimination (disproportionately affecting blind persons).

95 *Grismer v. The British Columbia Council of Human Rights*, [1999] 3 S.C.R. 868.

Recognizing the inextricable link between the notion of equality and the right to an effective job accommodation for those who, due to individual or environmental factors, risk being denied equal employment opportunities, is an important step towards a more substantive interpretation of the notion of equality. The explicit recognition of the right to be accommodated should therefore be welcomed and be fully implemented in national law. At the same time, the right to an effective accommodation does not entirely fit within the prevailing distinction between direct and indirect discrimination, as commonly made in European non-discrimination law. We have therefore argued that reasonable accommodation discrimination should also be perceived as a form of discrimination *sui generis* with its own rules with respect to the burden of proof and justifiable defences.

This article also revealed that the prohibition of reasonable accommodation discrimination is not only of importance to people with disabilities, but to all individuals who, due to inherent characteristics such as sex, age, religion or belief, face obstacles in the labour market. Codifying the right to be accommodated can therefore be regarded as 'a critical weapon in the fight to secure equality rights for disadvantaged individuals and groups'.<sup>96</sup> At the same time, individual accommodations leave unchallenged and unaffected underlying discriminatory policies and practices. Therefore a need remains for comprehensive equal opportunities and non-discrimination policies and measures.

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96 M.D. Lepofsky, 'The Duty to Accommodate: A Purposive Approach', 1, *Canadian Labour Law Journal*, 1993, 1, pp. 1-22. See also M. D. Lepofsky, 'A Report Card on the Charter's Guarantee of Equality to Persons with Disabilities after 10 Years – What Progress? What Prospects?', 7 *National Journal of Constitutional Law*, n. 3, 1997, pp. 263-431.