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ARTICLE

LAW OF THE EUROPEAN UNION ON INDIRECT SEX DISCRIMINATION AGAINST WOMEN IN WORKING LIFE: FROM A PERSPECTIVE OF IMPROVING THE LAW OF CHINA ON NON-SEX DISCRIMINATION AGAINST WOMEN IN WORKING LIFE

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Equal rights to work between men and women are recognized as fundamental human rights by many international conventions including the United Nations Convention on the Elimination of All Forms of Discrimination Against Women and the International Covenant on Economic, Social and Cultural Rights. Also, constitutions of many countries recognize equal rights to work as basic constitutional rights. But women all over the world still face numerous kinds of sex discrimination, including direct sex discrimination and indirect sex discrimination, especially in working life. Indirect sex discrimination against women in working life undermines women's equal rights to work in a covert way, which is just as harmful as direct sex discrimination and should be prohibited by law.

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INTRODUCTION

In this paper, "working life" is used as the counterpart to "family life" and includes women's life in access to employment, life in workplace and life in

retirement. Direct sex discrimination against women refers to "overt sex discrimination," "sex discrimination on face" or "sex discrimination in form" which is on grounds of sex or characteristics that are inalienable from sex.[1] Indirect sex discrimination against women, which can also be called "covert sex discrimination" or "discrimination in effect," exists where measures, criteria and practices, etc. are seemingly neutral and not related to sex but bring about disproportionate adverse results to women which are similar to direct sex discrimination.[2] Direct sex discrimination violates the principle of gender equality in form, while indirect sex discrimination, which tremendously undermines women's right to work in a covert way, is in breach of gender equality in effect of substantive gender equality.[3]

There are two models of indirect sex discrimination. One model concerns "discriminatory intention" in determining whether or not there is indirect sex discrimination, a typical example employing this model being the United States. The other model normally does not concern "discriminatory intention." Indirect sex discrimination of the European Union belongs to the latter model.[4]

Nearly all countries and regions forbid direct sex discrimination against women, but only a few countries and regions have anti-indirect sex discrimination laws. Canada,[5] Australia, the EU, and Hong Kong[6] are among those who have anti-indirect sex discrimination laws.

This paper focuses on anti-indirect sex discrimination laws of the European Union. It will include general principles, fundamental treaties, case law of the European Court of Justice and directives of the European Union which are

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[1] See Christa Tobler, *Indirect Discrimination: A Case Study into the Development of the Legal Concept of Indirect Discrimination under EC Law (Social Europe Series)*, Intersentia, at 311 (2005).

[2] Id.

[3] See Jingrong Chen, 间接歧视的悖论及其破解 (The Paradox of Indirect Discrimination and Solutions), (3) 法学家 (The Jurist) 124, 124 (2007).

[4] See Oran Doyle, *Direct Discrimination, Indirect Discrimination and Autonomy*, 27(3) Oxford J. Legal Stud. 537, 538 (2007).

[5] See Colleen Sheppard, *Case Comment of Forest Fires and Systemic Discrimination: A Review of British Columbia (Public Service Employee Relations Commission) V.B.C.G.S.E.U.*, 46 McGill L. J. 533, 548 (2001).

[6] See Carole J. Petersen, *Hong Kong's First Anti-discrimination Laws and Their Potential Impact on the Employment Market*, 324 Hong Kong L.J. 1, 1 (1997).

related to the law on anti-sex discrimination against women in working life. It will conclude with the improvements of the law of China on non-sex discrimination against women in working life at the background of EU law.

I. A HISTORICAL OVERVIEW OF LAW OF EU ON INDIRECT SEX DISCRIMINATION

A. The Concept of "Indirect Sex Discrimination"

1. The Definition of "Indirect Sex Discrimination." — There are no unified definitions of discrimination, indirect discrimination, or sex discrimination, which can be properly applied to all legal contexts either in academia or non-discrimination law of the European Union. *The Convention on the Elimination of All Forms of Discrimination Against Women* provides a quite good definition of "discrimination against women" (hereinafter referred to as "discrimination"), that is, discrimination means "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."[7]

Accordingly, direct sex discrimination against women means any distinction, exclusion or restriction made **overtly** on the basis of sex or characteristics inalienable from sex such as maternity and pregnancy, which has the **purpose** of impairing or nullifying the recognition, enjoyment or exercise by women.[8] The European Court of Justice has consistently recognized the legitimacy, in terms of the principle of equal treatment, of protecting a woman's biological condition during and after pregnancy.[9] Moreover, it has consistently ruled that any unfavorable treatment of women related to pregnancy or maternity constitutes direct sex discrimination.[10]

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[7] See the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEADW), art. 1.

[8] Id.

[9] Directive 2002/73/EC, OJ 2002 L 269/15.

[10] Id.

Take employee recruitment as an example, direct sex discrimination against women exists where both men and women candidates are qualified for a position, but the employer says **openly** in its employment advertisement that no women are needed.

Indirect sex discrimination against women means any distinction, exclusion or restriction made **covertly** on the basis of sex which has the **effect** of impairing or nullifying the recognition, enjoyment or exercise by women.[11] The distinction, exclusion or restriction is seemingly neutral to both men and women, while in effect more disadvantages would be caused disproportionately to women. For instance, indirect sex discrimination exists where an employer does not openly say women are excluded, but in fact no women or disproportionately fewer women are employed at last and the employer cannot justify this result by grounds other than sex. Though indirect sex discrimination against women exists in many places, this paper only focuses on indirect sex discrimination against women in working life which can be specified as sex discrimination in employee recruitment, employee training, payment, promotion, occupational insurance, holiday or leave, occupational pension and so on.

2. The History of "Indirect Sex Discrimination." — Concepts of equality and discrimination were not created by the EU, but originated in domestic law and international law.[12] Before the establishment of the European Community, there were anti-indirect discrimination theories and practices in international law and domestic law of some countries. The term "indirect discrimination" first appeared in public international law and later it was found in American law, specifically in case *Griggs v. Duke Power Co.*,[13] which was decided in 1971 and had a great impact on the formation of the concept of indirect discrimination in laws of the EU. In Europe, the concept was first introduced to domestic laws of the UK and Ireland, while other member states of the EU absorbed the concept of indirect discrimination from the law of the EU.[14]

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[11] See art.1 of CEADW.
[12] See Tobler, fn.1 at 89.
[13] *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).
[14] See Tobler, fn.1 at 95.

In fact, indirect discrimination can be divided into different types such as indirect discrimination against women which is focused on by this paper, indirect discrimination against disabled people, indirect discrimination against non-white people, indirect discrimination against people of different nationalities, etc. In the beginning, the concept of "indirect discrimination" was created in order to deal with discrimination on grounds of other issues rather than sex and later it was used to deal with sex discrimination issues.

Three foundational cases from the late 1960s and the early 1970s introduced the concept of indirect discrimination into the EC law, namely *Ugliola*[15] (concerning free movement of workers), *Stogiu*[16] (concerning discrimination on ground of nationality) and *Bertoni*[17] (concerning sex equality in staff law).[18] The first explicit reference by the Court of Justice to indirect discrimination occurred in *Geilting*,[19] a case decided in 1957. But the term as it was used in this case differs from today's understanding of indirect discrimination.[20] The *Jenkins*[21] case (decided in 1981) and the *Bilka*[22] *case* (decided in 1986) are two typical cases concerning sex equality, more specifically Article 119 of the *Treaty Establishing the European Economic Community* on equal payment for men and women.[23] Later the authors will introduce the two cases in detail. In the beginning, there was no explicit legal concept of indirect discrimination in statutory law or legislations of the European Union. But later the term "indirect discrimination" appeared in *Directive 97/80/EC*[24] (*Burden of Proof Directive*), *Directive 2000/78/EC*[25] (*General Framework Directive*), and *Directive 2002/73/EC*[26] (*Revised Second Equal Treatment Directive*). In

[15] Case 15/69, *Württembergische Milchverwertung-Südmilch AG v. Salvatore Ugliola* [1969] ECR 363.

[16] Case 152/73, *Giovanni Maria Sotgiu v. Deutsche Bundespost* [1974] ECR 153.

[17] Case 20/71, *Luisa Sabbatini, née Bertoni v. European Parliament* [1972] ECR 345.

[18] See Tobler, fn.1 at 102–03.

[19] Case 2/56, *Geitling Ruhrkohlen-Verkaufsgesellschaft mbH and Others v. High Authority* [1957/1958] ECR 3.

[20] See Tobler, fn.1 at 96, 97.

[21] Case 96/80, *J.P. Jenkins v. Kingsgate (Clothing Productions) Ltd.* [1981] ECR 911.

[22] Case 170/84, *Bilka — Kaufhaus GmbH v. Karin Weber von Hartz* [1986] ECR 1607

[23] See Tobler, fn.1 at 141.

[24] OJ 1998 L 14/6.

[25] OJ 2000 L 303/16.

[26] OJ 2002 L 269/15.

Burden of Proof Directive and *Revised Second Equal Treatment Directive*, there are legal concepts of "direct sex discrimination" and "indirect sex discrimination."

B. Background of the Enactment of EU Anti-indirect Sex Discrimination Law

1. Political and Economic Integration of Europe. — Anti-indirect sex discrimination law of the EU was enacted against the backgrounds of political and economic integration of Europe after World War II which originated in Western Europe and accelerated gradually. In April 1951, six countries including France and the Federal Republic of Germany signed *the European Coal and Steel Community Treaty* and decided to establish the Coal and Steel Community.[27] In 1957, they signed *the Treaty of Rome* which came into force in January 1958 and formally established the European Economic Community and the European Atomic Energy Community.[28] In April 1965, they signed the *Treaty of Brussels* and decided to integrate the European Coal and Steel Community, the European Economic Community and the European Atomic Energy Community into European Community.[29] The *Treaty of Brussels* came into force on July 1, 1967, which indicated that the European Community was officially born. In 1973, the United Kingdom, Ireland, and Denmark joined the European Community.[30] In December 1991, the 46th Summit of the European Community adopted the *Maastricht Treaty* and established the principle of justice and policy cooperation.[31] The *Maastricht Treaty* came into effect on November 1, 1993 and the European Community became the European Union formally. According to the *Maastricht Treaty*, principles, rules and regulations of the European Community would be essentially the same and issues such as human rights should be paid special attention to. In 2007, the EU expanded to 27 member states.[32] The

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[27] See Jingzhi Li & Su Lin, 当代世界经济与政治 (Contemporary World Economy and Politics), China Renmin University Press (Beijing), at 109–11 (2007).

[28] Id.

[29] Id.

[30] Id.

[31] Id.

[32] Id.

integration has greatly influenced the legal system of the EU, that is, there is a fusion of the common law system and the civil law system and sources of anti-indirect sex discrimination law of the EU include both legislations and cases of the Court of Justice of the European Union. Possible reasons for the fusion of legal systems are the three most influential countries in the European Union, namely the UK, France and German and they have different legal systems. While the UK has a legal system of common law, France and German are typical civil law countries. Their interests must be reflected in the legal system of the European Union.[33]

2. Anti-indirect Discrimination Law of the United States. — The case *Griggs v. Duke Power Co.*, decided in 1971, was very influential on European social law, because it resulted in the first legal definitions of indirect discrimination in the UK and Ireland. In the context of the EC law, it was relied on before the Court of Justice in the important sex equality law case, *Jenkins*.[34] *Griggs* was of great significance in the US law, because it began to forbid those practices that were fair in form, but discriminatory in operation and the touchstone was business necessity.[35] If an employment practice which operates to exclude black people cannot be proved to be related to job performance, the practice is prohibited.[36] The similarities between discriminatory "practices that are fair in form, but discriminatory in operation" here and "indirect discrimination" in the EU law are clear. Principles included in this case are called the doctrine of "disparate impact" by some scholars.

Returning to *Griggs*, plaintiffs in this case who were black people challenged the requirement for a high school diploma or passing intelligence tests as a condition of employment in or of transfer to jobs at the Duke Power Company.[37] The Supreme Court of the United States found the requirement illegal even though it was formally neutral in terms of race, because it was not directed at measuring the ability to perform the job. Chief Justice Burger explained that the purpose of *Title Ⅶ of the Civil Rights Act of 1964* was to

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[33] http://www.juriglobe.ca/chi/index.php (last visited Apr. 22, 2013).

[34] See Tobler, fn. 1 at 93, 94.

[35] See *Griggs v. Duke Power Co*., fn. 13.

[36] Id.

[37] Id.

achieve equality of employment opportunities and remove barriers that have operated in the past to favor white employees over other employees.[38] Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices.[39] He continued that the objective of the Congress by legislations is to provide equal employment opportunities to all eligible candidates rather than a specific group of them.[40]

3. Anti-indirect Sex Discrimination Law of UK and Ireland. — As was mentioned, *Griggs* greatly influenced the enactment of indirect discrimination law in the UK and Ireland. The first legal concept of indirect discrimination appeared in the UK *Sex Discrimination Act (SDA) of 1975*. Before that there was only prohibition of direct sex discrimination in the UK law. However, before the publication of *SDA*, Secretary of State Roy Jenkins visited the USA where he learned about *Griggs*.[41] This led to the inclusion of the concept of indirect sex discrimination in SDA, which was the first legal document including the concept of indirect sex discrimination in Europe. Besides the *Sex Discrimination Act* of the UK, the Irish *Employment Equality Act of 1977* is another early document which prohibited indirect sex discrimination.[42]

4. The Development of Feminism in Europe. — Anti-indirect sex discrimination law of the European Union was made against the background of feminist jurisprudence which was well developed after World War II and to some extent was the result of the efforts of feminist scholars. Many feminist scholars appealed to the authorities for an addition of female perspective to the law. Feminism believes gender oppression not only exists in capitalist society and in capitalist class, but also exists in all kinds of society and all social classes. In society where political rights, resources and benefits, and social values are unequally allocated in favor of men, the government in essence is patriarchal. Accordingly, law treats women in the way men treat women. As an integral part of a male-dominated society, the law justifies

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[38] Id.
[39] Id.
[40] Id.
[41] See Tobler, fn.1 at 95.
[42] See Tobler, fn.1 at 96.

patriarchy and makes it permanently legal. Although non- indirect sex discrimination law of the EU serves as an instrument of economic and social development of the EU Community, to some extent it reflects a female perspective in the law according to the physical and social particularity of women, as well as consistent disadvantages imposed on women due to historical, cultural and other factors.[43]

II. GENERAL PRINCIPLES AND FUNDAMENTAL TREATIES OF EU ON GENDER EQUALITY AND NON-SEX DISCRIMINATION AGAINST WOMEN

A. General Principles of EU on Gender Equality and Non-sex Discrimination Against Women

There are three general principles in non-sex discrimination law of EU, namely the principle of equal treatment between men and women, the principle of positive action and the principle of gender mainstreaming. The principles have played a very important role as guidance to legislations and enforcement of the EU law in eliminating indirect sex discrimination. The authors believe that learning the merits from the EU law on indirect sex discrimination in light of China's legislative, administrative and judicial experience is conducive not only to the realization of the rule of law in socialist China, but also to the obtainment of women's dignity.

1. The Principle of Equal Treatment Between Men and Women. — The principle of equal treatment is conformed to both in theories and in practices of non-sex discrimination law of the European Union. At the time of drafting the *Treaty Establishing the European Economic Community*, there were big differences in society, economic policies and laws among state candidates, which was unfavorable for the establishment of European Common Market. At that time, legislations and policies of France on equality between men and women were better established than in other countries. For instance, there were regulations on "equal pay for equal work" between men and women early in 1957 in France. This well-established labor law of France would probably make prices of French products higher than that of the other

[43] See Tongbiao Shi at School of Law, Renmin University of China: teaching materials of *the Lecture on Feminism Jurisprudence*, p. 13, May 18, 2011.

countries because of social cost. Therefore, it would probably put France into a disadvantageous situation in international trade, which made France think about how to deal with the issue of higher "social cost" of goods and the possible disadvantageous position in trade competition after the establishment of the European Common Market.

Therefore, in the process of drafting the treaty, France maintained that "social cost" of enterprises must be in the same level among all member states after the establishment of the community. Other countries represented by Germany, however, argued that countries should have little intervention in labor wages and commodity prices deployed by the market, and disagreed on making "social cost" of goods as one of the conditions for establishing the European Economic Community. Finally, all countries reached a compromise where each country's views and interests were partly embodied in social policy provisions of the *Treaty Establishing the European Economic Community*. To be specific, other countries accepted Article 141 and Article 142 of the *Treaty Establishing the European Economic Community (revised by the Treaty of Amsterdam)* put forward by French representatives, under which member states should ensure "equal pay for equal work" between men and women and consistent policies on issues such as paid leave among member states, so that the impact of "social cost" on member states can be the same and equal competitions and a unified European market can be achieved. Later, Article 141 of the *Treaty Establishing the European Economic Community* which prescribed the principle of "equal pay for equal work" between men and women was repeatedly referred to by the Court of Justice of the European Union, and gradually became a basic source of laws against sex discrimination. "Paid holiday" was embodied in Article 142 of the *Treaty Establishing the European Economic Community,* which reads that Member States shall endeavor to maintain the existing equivalence of paid holiday schemes.[44]

2. The Principle of Positive Action. — From the 1960s to 1970s, the European Community gradually developed from free market to social market where governments intervened moderately and hence paid more attention to

[44] Wei Zhou, Weiwei Li, Cong Yang & Xia He, 禁止就业歧视的法律制度与中国的现实 (Legal Systems of Anti-discrimination in Employment and China's Reality), Law Press (Beijing), at 104–05 (2008).

protecting the labor rights and interests of disadvantaged women. In fact, there was a peak of non-sex discrimination legislations in the European Community at this time. In mid and late 1970s, as a series of equal treatment laws were made, many employers no longer dared to have sex discrimination blatantly, but detoured to evade the non-sex discrimination law. This made policy makers of the European Community realize that the equality laws made before can just prohibit sex discrimination passively. There was not enough attention paid to the historical and traditional reasons why women were in a disadvantageous position in workplace. For a long time, the traditional division of gender roles had made most women confined to family life. So, in order to promote the substantive equality between men and women, it was not enough just to prohibit sex discrimination passively. Each member state should take more positive actions in legislation and policies to give specific help or assistance to women so as to gradually correct the structural disadvantages formed historically in the implementation of women's right to work, and better the balance of male and female labor forces in the labor market. In 1984 and 1988, the Council of Europe and the European Community Committee issued a proposal and a guidance scheme respectively which was to guide member states to face up to the influence of sex discrimination due to historical reasons, to guide them to introduce active social and economic policies and laws which should be made specifically for women's equal employment and development and to set up correspondingly specialized agencies. From the 1990s, positive actions sped up in implementation. The European Parliament adopted a series of action items, including the *Outstanding Female Educators for Children and Establishing the Network of Experts and Supporters for the Protection of Women's Rights*.[45]

3. The Principle of Gender Mainstreaming. — In the late 1980s and early 1990s, the core of safeguarding civil rights was simply asking for compensation and relief in the existing economic, political and social system. But later, people were no longer satisfied with the way of protecting human rights. As a result, the thought of gender mainstreaming became popular. As a new and more comprehensive way of promoting gender equality, the

[45] Id. at 106, 107.

principle of gender mainstreaming, which was introduced into European laws by the *Treaty of Amsterdam* of 1997,[46] meant that special measures outside the framework of the whole systems were not enough for the protection of the rights of discriminated groups and the government should try to add a gender perspective into the making of all laws and policies comprehensively and systematically. In 2006, the European Union passed *A Road Map for Equality Between Women and Men* (2006–2010), affirming the role of gender mainstreaming principle and decided to apply it throughout the future policies and laws of the European Union on equality between women and men.[47] This principle is embodied in specific legislations of the EU by declaring that equality between women and men is a fundamental principle under Article 2 and Article 3(2) of the *EC Treaty* and the case-law of the Court of Justice. These treaty provisions regard equality between women and men as a "task" and an "aim" of the Community and impose a positive obligation on member states to "promote" gender equality in all social and legal activities.[48]

B. Fundamental Treaties of EU on Gender Equality and Non-sex Discrimination Against Women

1. A Framework of Fundamental Treaties of EU on Gender Equality and Non-discrimination Against Women. — Treaty of Lisbon (2009), *Charter of Fundamental Human Rights* (2007), *Treaty of Amsterdam* (1999), *Treaty on European Union — the Maastricht Treaty* (1992), *Treaties of Rome — the EEC (Treaty Establishing the European Economic Community) and the EURATOM Treaties* (1957) and *Treaty Establishing the European Coal and Steel Community* are fundamental treaties of the EU on gender equality and non-sex discrimination.[49] Anti-indirect sex discrimination laws were enacted, implemented, and applied according to them. In fact, they are the "constitutional law" for eliminating all kinds of discrimination against

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[46] Adam G. Panopoulos, *Barriers to Financing: Is European Union Indirect Discrimination Law the Answer for Female Entrepreneurs?*, 16 Cardozo J.L. & Gender 549, 549 (2010).

[47] See Zhou et al., fn. 44, at 107, 108.

[48] Directive 2002/73/EC.

[49] http://europa.eu/eu-law/treaties/index_en.htm (last visited Jul. 18, 2013).

women in working life.

2. Clauses of the Treaties on Gender Equality and Non-sex Discrimination Against Women. — Firstly, the principle of equal treatment between men and women is embodied in the Treaty of the EEC which provides:

> *Each Member State shall… ensure and subsequently maintain the application of the principle of equal remuneration for equal work as between men and women workers… remuneration shall mean the ordinary basic or minimum wage or salary and any additional emoluments whatsoever payable directly or indirectly, whether in cash or in kind, by the employer to the worker and arising out of the workers' employment. Equal remuneration without discrimination based on sex means: (a) That remuneration for the same work at piece-rates shall be calculated on the basis of the same unit of measurement; and (b) that remuneration for work at time-rates shall be the same for the same job.*[50]

Secondly, we can also find those clauses in the *Treaty of Amsterdam*. Comparing with the *Treaty Establishing the European Economic Community*, the Treaty of Amsterdam focuses more on the government's positive actions for eliminating sex discrimination by amending Article 119 of the EEC into Article 141, which provides:

> *1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied. […] 3. The Council… shall adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value. 4. …the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.*[51]

Thirdly, the clauses can be seen in the *Charter of Fundamental Human Rights* (2007). Although it is called "charter," it has the same legal status and

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[50] Article 119 of the *Treaty Establishing the European Economic Community* (1957).

[51] See the *Treaty of Amsterdam*.

validity with treaties. Article 20 of this document provides that everyone is equal before law. The principle of non-discrimination can be found in Article 21 which provides that any discrimination based on any ground such as sex shall be prohibited. In Article 23, it reads equality between women and men must be ensured in all areas, including employment, work and pay. The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favor of the under-represented sex.[52]

III. CASE LAW OF EU ON INDIRECT SEX DISCRIMINATION AGAINST WOMEN IN WORKING LIFE

In the EU economic and political integration, there is a fusion of the common law system and the civil law system. The principle of following precedents of the common law system, which is called *stare decisis* in Latin, applies to EU law as well.[53] In fact, non-discrimination case law under Article 6 and Article 119 of the EEC Treaty is of fundamental significance in EU law. Non-discrimination legal practices originated from case law as well. The case law plays its role in a way of preliminary rulings[54] of the Court of Justice. Preliminary rulings refer to preliminary decisions and suggestions of the Court of Justice of the EU according to which domestic courts of member states make their decisions when there are divergences in the interpretation of EU laws (conventions, treaties, directives, etc.) and appeal to the Court of Justice for clarification. From the 1970s, some cases made by means of preliminary rulings appeared in the Court of Justice which concerned indirect sex discrimination in recruitment of employees, retirement pay, promotion, insurance related to work, etc. These rulings served as general guidelines and suggestions for domestic courts of member states and it was the duty of domestic courts to give specific judgments. Preliminary rulings of the Court of Justice are well respected and observed by member states of the EU. If any member state does not comply with the rulings, it will be punished by means

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[52] See Articles 20–23 of the *Charter of Fundamental Human Rights*.

[53] See Chuanli Wang, 欧洲法院的司法独立性对欧洲一体化进程的贡献 (The Contribution of Judicial Independence of the European Court of Justice to Integration of Europe), 22(2) 当代法学 (Contemporary Law Review) 110, 111 (2008).

[54] http://europa.eu (last visited Apr. 12, 2013).

of fines or other financial penalties. Next, we will focus on two typical cases, *Jenkins* and *Bilka*, which are fundamental and typical in anti-indirect sex discrimination case law.

A. Anti-indirect Sex Discrimination Case of Equal Pay: Jenkins

The case *Jenkins v. Kingsgate*,[55] decided in 1981, came before the Court of Justice by way of a reference for a preliminary ruling by the Employment Appeal Tribunal of the United Kingdom in the action pending before that tribunal between J. P. Jenkins and Kingsgate (Clothing Productions) LTD. It raised questions of interpretation of Article 119 of the *Treaty Establishing the European Economic Community* in relation to the rights of part-time workers and questions of interpretation of *Council Directive 75/117/EEC*, the "Equal Pay Directive."[56]

1. Facts and Issues of Jenkins. — Kingsgate (Clothing Productions) Ltd. (hereinafter referred to as "Kingsgate"), manufacturers of ladies' clothing, had a factory. In the factory, there were six part-time workers, of whom five (including Mrs. Jenkins) were women and one was a man. Before November 1975, Kingsgate paid its male and female employees at different rates, but there was no difference in the hourly rates of pay of full-time and part-time workers, male or female.[57] The British legislation on equal treatment of male and female employees entered into force in December 1975. In that November, Kingsgate introduced new rates of pay, under which full-time workers of either sex were paid at the same hourly rate, as were part-time workers of either sex. Part-time workers — that is those working for fewer than 40 hours a week — were, however, paid under those rates, 10% less per hour than full-time workers. That lower hourly rate was also applicable to any employee who, although engaged as a full-time worker, persistently failed to work 40 hours a week.

Kingsgate considered that there was a "fundamental difference" between part-time work and full-time work, irrespective of the sex of the worker, which justified a difference in pay. That difference was not based on either

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[55] See *Jenkins v. Kingsgate*, fn. 21.
[56] Id.
[57] Id.

the characteristics of the worker or the quality of the work. The payment policy was motivated by the need: (a) to discourage absenteeism; (b) to ensure that the expensive machinery in the factory was used to its fullest extent; and (c) to encourage greater productivity.[58]

Jeanette Pauline Jenkins, an employee of Kingsgate, worked part-time, that is, more or less 30 hours per week. She took the view that she was unfairly prejudiced by the fact that although she was engaged to do the same work as that was done by one of her male colleagues employed full-time, her hourly rate of pay was lower than that of her colleague. Therefore she brought an action before an Industrial Tribunal and alleged that the difference in pay contravened the equality provisions of Section 1(2)(a) of *the Equal Pay Act*, according to which the principle of equal pay for men and women applies in every case where a woman is employed on "like work" with a man in the same employment.[59] The Industrial Tribunal rejected the complaint, holding that working for 75% of the full working hours (30 hours = 75% of 40 hours) constituted a "material difference, other than the difference of sex" and was sufficient to justify an hourly rate of pay 10% lower than that of her male colleague.[60]

Jenkins appealed against that decision to the Employment Appeal Tribunal. In trials she mentioned the famous US case *Griggs* and asserted she should get the same pay per hour. The tribunal referred the following questions to the Court for a preliminary ruling:

> *(1) Does the principle of equal pay, contained in Article 119 of the Treaty Establishing the European Economic Community and Article 1 of the Council Directive of 10 February 1975, require that pay for work at time rates shall be the same, irrespective: (a) of the number of hours worked each week; or (b) of whether it is of commercial benefit to the employer to encourage the doing of the maximum possible hours of work and consequently to pay a higher rate to workers doing 40 hours per week than to workers doing fewer than 40 hours per week?*
>
> *(2) If the answer to Question 1 (a) or (b) is in the negative, what criteria should be used in determining whether or not the principle of equal pay*

[58] Id.
[59] Id.
[60] Id.

applies where there is a difference in the time rates of pay related to the total number of hours worked each week?

(3) Would the answer to Question 1 (a) or (b) or 2 be different (and, if so, in what respects) if it were shown that a considerably smaller proportion of female workers than of male workers is able to perform the minimum number of hours each week required to qualify for the full hourly rate of pay?[61] *[...]*

2. Judgment and Grounds of Jenkins. — The court, in answer to the questions referred to it by the Employment Appeal Tribunal ruled:

"*A difference in pay between full-time workers and part-time workers does not amount to discrimination prohibited by Article 119 of the Treaty unless it is in reality merely an indirect way of reducing the pay of part-time workers on the ground that that group of workers is composed exclusively or predominantly of women.*"[62]

The grounds of the court are as follows:

"The purpose of Article 119 is to ensure the application of the principle of equal pay for men and women for the same work. The differences in pay prohibited by that provision are therefore exclusively those based on the difference of the sex of the workers.…the fact that work paid at time rates is remunerated at an hourly rate which varies according to the number of hours worked per week does not offend against the principle of equal pay laid down in Article 119 of the Treaty in so far as the difference in pay between part-time work and full-time work is attributable to factors which are objectively justified and are in no way related to any discrimination based on sex. Such may be the case, in particular, when… the employer is endeavoring, on economic grounds which may be objectively justified, to encourage full-time work irrespective of the sex of the worker.

By contrast, if a considerably smaller percentage of women than of men can work for the minimum number of weekly working hours required in order to be able to claim the full-time hourly rate of pay, the inequality in pay will be contrary to Article 119 of the Treaty, because usually women have more difficulties in arranging to work for that minimum number of hours per week due to family responsibilities…. Where the hourly rate of pay differs

[61] Id.
[62] Id.

> *according to whether the work is part time or full-time, it is for the national courts to decide in each individual case whether, regard being had to the facts of the case, its history and the employer's intention, a pay policy is or is not in reality discrimination based on the sex of the worker."*[63]

3. Comments on the Judgment of Jenkins. — Some comments were about "discriminatory intention." In the judgment, the court mentioned "the employer's intention."[64] That is, at that time, the court took "employer's intention" into consideration when it determined whether or not there was indirect sex discrimination. By doing this, to some degree, the court must have been influenced by the US case *Griggs v. Duke Power Co*., where the Supreme Court of the US took "intention" into consideration in determining whether or not there was indirect race discrimination by saying "we do not suggest that either the District Court or the Court of Appeals erred in examining the employer's intent; but good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability."[65] About the discriminatory intention referred to by the Court of Justice, many EU scholars have different opinions. Some people insisted that discriminatory intention was uncorrelated in determining whether or not there was indirect discrimination and should not even be mentioned. The Court of Justice was wrong in mentioning it. Other people did not know the purpose of the court by doing that. In fact, when the case was moved to the court of the UK, UK judges found the meaning of the judgment very vague and unclear and made its own interpretation. The domestic court made a judgment that, according to SDA of the UK, indirect sex discrimination was found in the payment policy of Kingsgate even no discriminatory intention was found.[66]

Other comments about the judgment of the Court of Justice included that the court did not describe the general characteristics or give a general definition of "indirect sex discrimination," or even definitely mention the

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[63] Id.

[64] Id.

[65] See *Griggs v. Duke Power Co*., fn. 13.

[66] See Tobler, fn. 1 at 144–46.

phrase "indirect discrimination." Instead, it just described a specific situation by saying "unless it is in reality merely an indirect way of reducing the pay of part-time workers on the ground that that group of workers is composed exclusively or predominantly of women."[67] In trials, Ms. Jenkins mentioned the US *Griggs* case, but the Court of Justice did not refer to it in the judgment maybe for the sake of sovereignty. Nor did the court mention the relationship between direct sex discrimination and indirect sex discrimination.[68]

B. Anti-indirect Sex Discrimination Case of Occupational Pension: Bilka

1. Facts and Issues of Bilka.[69] — This case is concerning to indirect sex discrmination in occupational pension. In 1984, German Federal Labor Court referred to the Court for a preliminary ruling under Article 177 of the *Treaty Establishing the European Economic Community* three questions on the interpretation of Article 119 of that Treaty. The questions arose in the course of proceedings between Bilka-Kaufhaus GmbH and its former employee Karin Weber von Hartz concerning the payment to Mrs. Weber von Hartz of an occupational pension from a supplementary pension scheme established by Bilka for its employees.

Bilka, a department store company, had a supplementary (occupational) pension scheme for its employees. This scheme, which was regarded as an integral part of the contracts of employment between Bilka and its employees, provided that part-time employees may obtain retirement pensions under the scheme only if they had worked full time for at least 15 years over a total period of 20 years.

Mrs. Weber was employed by Bilka as a sales assistant from 1961 to 1976. After initially working full time, she chose to work part time from 1972 until her employment came to an end. Since she had not worked full time for the minimum period of 15 years, Bilka refused to pay her the occupational pension under its scheme. Mrs. Weber brought proceedings before the German labor courts challenging the legality of Bilka's refusal to pay her a

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[67] See *Jenkins v. Kingsgate*, fn. 21.

[68] See Tobler, fn. 1 at 144–46.

[69] See *Bilka v. Weber*, fn. 22.

pension. She argued that the occupational pension scheme was contrary to the principle of equal pay for men and women laid down in Article 119 of the *Treaty Establishing the European Economic Community*. She asserted that the requirement of a minimum period of full-time employment for the payment of an occupational pension placed women workers at a disadvantage, since they were more likely than their male colleagues to take part-time work so as to be able to take care of their family and children.

Bilka, on the other hand, argued that it was not guilty of any breach of the principle of equal pay since there were objectively justified economic grounds for its decision to exclude part-time employees from the occupational pension scheme.[70] It emphasized that in comparison with the employment of part-time workers the employment of full-time workers entailed lower ancillary costs and permitted the use of staff throughout opening hours.[71]

On appeal the proceedings between Mrs. Weber and Bilka came before the German Federal Labor Court; that court decided to refer the following questions to the Court:

> *(1) May there be an infringement of Article 119 of the Treaty Establishing the European Economic Community in the form of 'indirect discrimination' where a department store which employs predominantly women excludes part-time employees from benefits under its occupational pension scheme although such exclusion affects disproportionately more women than men? (2) If so, (a) can the undertaking justify that disadvantage on the ground that its objective is to employ as few part-time workers as possible even though in the department store sector there are no reasons of commercial expediency which necessitate such a staff policy.*[72] *[...]*

2. Judgment and Grounds of Bilka. — The Court, in answer to the questions submitted to it by the German Federal Labor Court hereby ruled:

> *(1) Article 119 of the Treaty Establishing the European Economic Community is infringed by a department store company which excludes part-time employees from its occupational pension scheme, where that*

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[70] Id.
[71] Id.
[72] Id.

exclusion affects a far greater number of women than men, unless the undertaking shows that the exclusion is based on objectively justified factors unrelated to any discrimination on grounds of sex; and (2) under Article 119 a department store company may justify the adoption of a pay policy excluding part-time workers, irrespective of their sex, from its occupational pension scheme on the ground that it seeks to employ as few part-time workers as possible, where it is found that the means chosen for achieving that objective correspond to a real need on the part of the undertaking, are appropriate with a view to achieving the objective in question and are necessary to that end.[73] *[…]*

As an answer to the first question, the court believed that reference must be made to the judgment of *Jenkins v. Kingsgate* in which the Court considered the question whether the payment of a lower hourly rate for part-time work than for full-time work was compatible with Article 119. Such a practice is comparable to the issue in this case. Bilka did not pay different hourly rates to part-time and full-time workers,[74] but it grants only full-time workers an occupational pension. Hour for hour, the total remuneration paid by Bilka to full-time workers was higher than that paid to part-time workers. The conclusion reached by the Court in its judgment of *Jenkins v. Kingsgate* was therefore equally valid in the context of this case.

If a much lower proportion of women than of men work full time, the exclusion of part-time workers from the occupational pension scheme would be contrary to Article 119 of the Treaty where, taking into account the difficulties encountered by women workers in working full-time, that measure could not be explained by factors which exclude any discrimination on grounds of sex. However, if the undertaking is able to show that its pay practice may be explained by objectively justified factors unrelated to any discrimination on grounds of sex, there is no breach of Article 119.[75]

In the second question the national court seeks to know whether the reasons put forward by *Bilka* explaining its pay policy may be regarded as "objectively justified economic grounds" as referred to in the judgment of *Jenkins* where the interests of undertakings in the department store sector do

[73] Id.
[74] Id.
[75] Id.

not require such a policy. In its observations Bilka argues that the exclusion of part-time workers from the occupational pension scheme was intended solely to discourage part-time work, since in general part-time workers refuse to work in the late afternoon and on Saturdays. In order to ensure the presence of an adequate workforce during that time, an occupational pension scheme which is open only to full-time workers was made.[76] Bilka concluded that it cannot be accused of having infringed Article 119. In reply to the reasons put forward by Bilka to justify the exclusion of part-time workers, Mrs. Weber von Hartz pointed out that Bilka was in no way obliged to employ part-time workers and that if it decided to do so it may not subsequently restrict the pension rights of such workers, which are already reduced by reason of the fact that they work fewer hours. The court held that:

> "*It is necessary to ascertain whether the pay practice in question is necessary and in proportion to the objectives pursued by the employer…. It is for the national court, which has sole jurisdiction to make findings of fact, to determine whether and to what extent the grounds put forward by an employer may be regarded as objectively justified economic grounds. 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,*[77] *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.*"[78]

3. Comments on the Judgment of Bilka. — The court did not mention "discriminatory intention" at all. This reinforced the idea of some EU scholars that "discriminatory intention," either good or bad, should not be considered in determining whether there was indirect sex discrimination or not. In this way, *Bilka* made a clarification that there was no correlation between "discriminatory intention" and "indirect sex crimination." Therefore it is considered as the first milestone case in the history of EU anti-indirect sex discrimination law and is often cited by EU scholars who specialize in gender equality law. Also, the court set limits to "economic grounds which

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[76] Id.
[77] Id.
[78] Id.

may be objectively justified" in this case. This will be introduced in detail later.[79]

IV. DIRECTIVES OF EU ON INDIRECT SEX DISCRIMINATION AGAINST WOMEN IN WORKING LIFE

Directives are statutory laws which cover specific matters. There is a table of Directives of EU on Gender Equality and Non-sex Discrimination. Later we will focus on several of them which definitely prohibit indirect sex discrimination.

A. A Framework of Directives of EU on Non-sex Discrimination Against Women in Working Life

Table 1 Directives of EU on Non-sex Discrimination Against Women in Working Life

Names	Other Names	Contents[80]
Directive 75/117/EEC[81]	First Equal Treatment Directive, Equal Pay Directive	On the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women
Directive 76/207/EEC[82]	Second Equal Treatment Directive	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
Directive 79/7/EEC[83]	Third Equal Treatment Directive	On the progressive implementation of the principle of equal treatment for men and women in matters of social security
Directive 86/378/EEC[84]	Fourth Equal Treatment Directive	On the implementation of the principle of equal treatment for men and women in occupational social security schemes
Directive 86/613/EEC[85]	Fifth Equal Treatment Directive	On the application of the principle of equal treatment for men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood

(*To be continued*)

[79] See Tobler, fn. 1 at 148, 149.
[80] See Tobler, fn. 1 at 438–40.
[81] OJ 1975 L 45/19.
[82] OJ 1976 L 39/40.
[83] OJ 1979 L 6/24.
[84] OJ 1986 L 225/40.
[85] OJ 1986 L359/56.

(*Continued*)

Names	Other Names	Contents
Directive 92/85/EEC[86]	Maternity Directive	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 breastfeeding
Directive 96/34/EC[87]	Parental Leave Directive	On the framework agreement on parental leave
Directive 96/97/EC[88]		Amending Directive 86/378/EEC on the implementation of the principle of equal treatment for men and women in occupational social security schemes
Directive 97/80/EC[89]	Burden of Proof Directive	On the burden of proof in cases of discrimination based on sex
Directive 97/81/EC[90]	Part-time Work Directive	Concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC
Directive 2000/78/EC[91]	General Framework Directive	Establishing a general framework for equal treatment in employment and occupation
Directive 2002/73/EC[92]	Revised Second Equal Treatment Directive	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
Directive 2004/113/EC[93]		Implementing of the principle of equal treatment for men and women in the access to and supply of goods and services

B. Specific Directives of EU on Indirect Sex Discrimination Against Women in Working Life

Specific directives were made on grounds of the above-mentioned general principles, fundamental treaties, case law and related directives. For a long time, in statutory law of the European Union, there was no clear legal definition of "indirect sex discrimination." Usually, it is the job of the Court

[86] OJ 1992 L 348/1.

[87] OJ 1996 L 145/4.

[88] OJ 1997 L 46/20.

[89] OJ 1998 L 14/6.

[90] OJ 1998 L 14/9.

[91] OJ 2000 L 303/16.

[92] OJ 2002 L 269/15.

[93] OJ 2004 L 373/37.

of Justice of the European Union to interpret treaties and give suggestions on indirect sex discrimination cases. In doing this, the Court of Justice focused more on the purpose of the treaties, rather than technical aspects of the law.[94] Among the legislations, *Burden of Proof Directive* gave a first definition to "indirect sex discrimination."[95] Later, *Revised Second Equal Treatment Directive* also defined indirect sex discrimination.

1. Burden of Proof Directive. — Article 1 declares that the aim of this Directive shall be

> *"to ensure that the measures taken by Member States to implement the principle of equal treatment are made more effective, in order to enable all persons who consider themselves wronged because the principle of equal treatment has not been applied to them to have their rights asserted by judicial process after possible recourse to other competent bodies."*[96]

Article 2 gives definitions to "the principle of equal treatment" and "indirect discrimination," that is,

> *"The principle of equal treatment shall mean that there shall be no discrimination whatsoever based on sex, either directly or indirectly… indirect discrimination shall exist where an apparently neutral provision, criterion or practice disadvantages a substantial higher proportion of the members of one sex unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex."*[97]

According to Article 3, the scope of application of the Directive shall be:

> *"(a) the situations covered by Article 119 of the Treaty and by Directives75/117/EEC, 76/207/EEC and, insofar as discrimination based on sex is concerned, 92/85/EEC and 96/34/EC; (b) any civil or administrative procedure concerning the public or private sector which provides for means of redress under national law pursuant to the measures referred to in (a) with the exception of out-of-court procedures of a voluntary nature or provided*

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[94] See Tobler, fn. 1 at 279.

[95] See Tobler, fn. 1 at 280.

[96] See Directive 97/80/EC.

[97] Id.

> *for in national law. However, it shall not apply to criminal procedures, unless otherwise provided by the Member States."*[98]

Article 4 is about the reversion of burden of proof in sex discrimination (either direct or indirect) cases. According to this article, Member States shall take necessary measures to ensure that, when individuals consider themselves unequally treated, it shall be the "respondent" instead of the plaintiffs that should bear the burden of proof. Directive shall not prevent Member States from introducing rules of evidence which are more favorable to plaintiffs.[99] This is a good way to protect women's equal rights to work.

2. Revised Second Equal Treatment Directive.[100] — It was another legal document where a definite definition of indirect sex discrimination can be found. Article 2 of the Directive states that

> *"The principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status. Direct sex discrimination exists where one person is treated less favorably on grounds of sex than another is, has been or would be treated in a comparable situation; indirect sex discrimination exists where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary."*[101]

This definition of indirect sex discrimination here differs from that of *Burden of Proof Directive* in that there is "a legitimate aim" in *Revised Second Equal Treatment Directive*, while there is none in *Burden of Proof Directive*. The two documents give rise to two different definitions of indirect sex discrimination which are effective at the same time in the field of statutory law. Both of them are different from the definition in case law of the Court of Justice of the EU. Sometimes, they conflict with each other.[102]

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[98] Id.
[99] Id.
[100] Directive 2002/73/EC
[101] Id.
[102] See Tobler, fn. 1 at 296.

Also, *Revised Second Equal Treatment Directive* defines application of the principle of equal treatment, that is, there shall be no direct or indirect discrimination on the grounds of sex in the public or private sectors, including public bodies, in relation to:

> *"(a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion; (b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience; (c) employment and working conditions, including dismissals, as well as pay as provided for in Directive 75/117/EEC; and (d) membership of, and involvement in, an organization of workers or employers, or any organization whose members carry on a particular profession, including the benefits provided for by such organizations."*[103]

Still, the Directive believes that Member States shall actively take into account the objective of equality between men and women in formulating and implementing laws, regulations, administrative provisions, policies and activities in the above-mentioned areas, that Member States shall encourage dialogues with appropriate non-governmental organizations which have, in accordance with their national law and practice, a legitimate interest in contributing to the fight against discrimination on grounds of sex with a view to promoting the principle of equal treatment, and that Member States should promote dialogues between the social partners and, within the framework of national practice, with non-governmental organizations to address different forms of discrimination based on sex in the workplace and to combat them.[104]

3. A General Directive in the Future. — Anti-indirect sex discrimination laws of the European Union are too complicated even for legal professionals to comprehensively and clearly understand, let alone for ordinary people. Also, there are some problems in the application of different sources of law namely overlap of law, which must be tackled properly. Still, the definitions

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[103] Directive 2002/73/EC.

[104] Id.

either in case law or directives all have problems in precision, effectiveness and consistency.[105] In order to solve these problems, the European Union is busy processing the documents by way of codification and is making preparations for a new general directive which will be made to simplify the law concerning equal treatment and equal opportunity between men and women in workplace.

In the future general directive, there should be clear and unified concepts of sex discrimination, direct sex discrimination and indirect sex discrimination. Provisions of it should cover matters not only in the workplace, but also in the context of access to employment and vocational training, during employment and occupation, etc. It should not only apply to substantive matters, but also apply to procedural matters. Once the general directive enters into force, the previous specific instruments are to be abolished.[106] But, unfortunately, the proposal of the European Commission on this issue has not yet been adopted by the European Parliament and the European Council. Clearly before the birth of the general directive, there will be several rounds of interest games among all parties, including organizations of the European Union, the Member States and the public.

V. THE OBJECTIVELY JUSTIFIED FACTORS

Both in case law and directives, there are some exemptions from the duties in presumed indirect sex discrimination cases which are sometimes called "economic grounds which may be objectively justified unrelated to sex,"[107] "objectively justified factors unrelated to any discrimination on grounds of sex,"[108] or "appropriate and necessary objective factors unrelated to sex."[109] These exemptions hereafter are all called "objectively justified factors." If there are objectively justified factors, there is no indirect sex discrimination in employers' conducts.

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[105] See Tobler, fn. 1 at 301, 302.
[106] See Tobler, fn. 1 at 299, 300.
[107] See *Jenkins v. Kingsgate*, fn. 21.
[108] See *Bilka v. Weber*, fn. 22.
[109] See Directive 97/80/EC.

A. The Objectively Justified Factors in the Law of EU

1. The Objectively Justified Factors in Case Law of EU. — In *Jenkins*, the Court mentioned there can be economic grounds which may be objectively justified. The difference in pay between part-time work and full-time work attributable to factors which are objectively justified and are in no way related to any discrimination based on sex does not offend against the principle of equal pay laid down in Article 119 of the Treaty.[110] But the Court did not say what these grounds can be and what factors they should include. Should they only be the factors "directly" related to business or more factors? Should they include only short term economic factors or more? Should difficulties encountered by employers in employing part-time employees be taken into account? How can we balance interests of the government, employers and the disadvantaged women?

In *Bilka*, the Court set limits to "economic grounds which may be objectively justified" and which was not clear in *Jenkins* by pointing out that exclusion which affected a far greater number of women than men did not constitute indirect sex discrimination if there were objectively justified factors unrelated to any discrimination on grounds of sex.[111] But the means chosen for achieving that objective must correspond to a real need on the part of the undertaking, must be appropriate with a view to achieve the objective in question and must be necessary to that end.[112] Therefore, there are four constituent elements of objectively justified factors unrelated to any discrimination on grounds of sex. First, the factors should be unrelated to any discrimination on grounds of sex. Second, there is a real need. Third, the means should be appropriate. Fourth, the means should be necessary. The fourth element includes a principle of proportionality which is the general principle of the EU law and is applied throughout the EU law.

2. The Objectively Justified Factors in Directives of EU. — Objectively justified factors in directives can be found in the *Burden of Proof Directive* and the *Revised Second Equal Treatment Directive*. It is stated in Article 2 of

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[110] See *Jenkins v. Kingsgate*, fn. 21.
[111] See *Bilka v. Weber*, fn. 22.
[112] Id.

the *Burden of Proof Directive* that indirect sex discrimination shall exist… unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex. Objectively justified factors here focus on appropriate and necessary means.[113]

It can be seen in the *Revised Second Equal Treatment Directive* that indirect sex discrimination exists… unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.[114] "A legitimate aim" is mentioned here which is different from the above-mentioned objectively justified factors in the *Burden of Proof Directive*.

B. Different Attitudes Towards the Objectively Justified Factors

To some extent, objectively justified factors determine whether there is indirect sex discrimination or not. In other words, if there are objectively justified factors, there is no indirect sex discrimination. If there are more objectively justified factors, the possibility of the existence of indirect sex discrimination is smaller and vice versa. EU scholars hold different opinions on objectively justified factors. Some of them have optimistic points of views, while others have pessimistic ones.

Optimists hold the opinion that the existence of objectively justified factors is an advantage of the anti-indirect sex discrimination law which makes application of the law much more flexible. This is a kind of pragmatic point of view which focuses on the good social effect produced by the application of the law. While indirect sex discrimination laws with objectively justified factors attract people's attention to all kinds of different treatment which brings about adverse effect on vulnerable groups of people, they do not prohibit all different treatments and admit the existence of reasonable different treatments under certain conditions. If properly used, it will be a valuable tool to eradicate indirect sex discrimination, to promote gender equality and safeguard other interests and values besides equality.[115]

Pessimists believe that objectively justified factor will destroy the

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[113] Directive 97/80/EC.

[114] Directive 2002/73/EC.

[115] See Tobler, fn.1 at 254.

meaning of anti-indirect sex discrimination law and make it deceptive. The purpose of the law is not to eradicate sex discrimination but to satisfy the interests of the parties involved. In fact, it cannot satisfy all the parties. For those who are looking for gender equality and justice, it is undoubtedly a heavy blow.

In the author's opinion, justified factors themselves are neither good nor bad. It depends on how to interpret justified factors and how to apply the law by the judiciary. If properly interpreted and applied, the law will function well and protect women's equal rights effectively. Otherwise, the law will lose its meaning.

C. Implications of the Objectively Justified Factors

1. Who Should Be the Duty Holder and Cost Bearer? — In fact, objectively justified factors are closely related to one question: Who should be the duty holder and cost bearer of eliminating sex discrimination against women in working life. Equal right to work is an economic and social right which requires positive actions of the government. In this sense, governments should take on its responsibility of fighting against sex discrimination and promoting gender equality. But the government can possibly transfer some shares of responsibilities and costs to employers according to the theory of Corporate Social Responsibility by means of non-discrimination law. Whether or not the government accepts objectively justified factors affects how many shares the government will transfer to employers.

If the government is more individual-oriented, it accepts objectively justified factors (the exemptions) and gives more freedom and tolerance to the employers who are suspected of sex discrimination. Therefore, the share of the responsibility and cost tends to be smaller. It is based on two ideas: (1) The alleged requirements of the market are neutral and do not significantly reinforce stereotypes and prejudices that may lead to discrimination; (2) the fight against discrimination is a task belonging only to the government.[116]

If the government is more group-oriented, it does not accept that there can be any exemption. Instead, it gives less freedom and tolerance to employers

[116] See Tobler, fn. 1 at 250.

who are suspected of sex discrimination and tends to shift bigger shares of responsibilities and costs to the employers. This is also based on two ideas: (1) The alleged requirements of the market do not form a neutral context for the employer's actions, but on the contrary serve to reinforce stereotypes and prejudices that may lead to discrimination; (2) employers can be required to contribute individually to the collective task of progressively eliminating discrimination because such a goal is in the interest of society as a whole[117] and being the member of the community who enjoy the benefits, employers should take on their shares of obligations.

2. Different Answers. — There can be different answers to the question: who should be the duty holders and cost bearers of eliminating sex discrimination against women in working life

(1) The EU law. As we see, the European Union accepts objectively justified factors in both case law and directives but sets limits to them. The possible reason is that the EU law serves as an instrument for the European Common Market and must respect the freedom of the Member States and employers to make profits. There is an assumption for the possible reason that employers usually discriminate out of economic interests rather than irrational prejudices.[118]

Although the freedom to make profits is important, the fundamental principle equality must be respected and safeguarded as well. In many cases, freedom and equality clashes with each other. Also, there are interest clashes in labor markets of the European. Maybe the European Union wants to use objectively justified factors to balance interests of employers, the government and the disadvantaged employees. In the application and interpretation of objectively justified factors, the method of interests balancing is needed.

So the answer from the European Union to the above mentioned question is: both the government and the employers are duty holders and cost bearers in eliminating sex discrimination (including indirect sex discrimination) against women in working life. And the employers' shares are flexible which can be controlled by the Court.

(2) Categorical moral reasoning. Michael J. Sandel, a famous scholar of

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[117] Id.

[118] Id.

Harvard Law School, believes there are two modes of moral reasoning: consequential moral reasoning and categorical moral reasoning. Consequential moral reasoning believes the rightness and morality of one's action depends on the consequences.[119] Categorical moral reasoning, of which the most important philosopher is the 18th century German philosopher Immanuel Kant, locates morality in certain duties and rights (in an absolute way) regardless of the consequences.[120]

We may deduce from categorical moral reasoning that since the community recognize the value of equality, entitle women to have equal rights to work and forbid sex discrimination, it is morally wrong and unacceptable to sacrifice women's rights and well-being for the sake of the maximization of overall benefits even in exceptional cases. Therefore there should be no objectively "justified" economic factors.

If labor contracts prohibit sex discrimination, the employer should take on their shares of obligations and costs and there should be no exception. If the constitution and laws provide that the government is responsible for eliminating sex discrimination in working life, the government should not arbitrarily transfer any share of responsibilities and costs to employers even for the sake of great GDP growth.

(3) Utilitarianism. Utilitarianism (a doctrine invented by Jeremy Bentham, the 18th century English political philosopher), which is a typical example of consequential moral reasoning, believes that human beings are dominated by pleasures which we like and pain which we dislike.[121] The right and just thing to do individually or collectively is to maximize utility which means the overall level of happiness.[122] The slogan of utilitarianism is "the greatest good for the greatest number."[123]

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[119] See Michael J. Sandel, *Justice: The Moral Side of Murder*, a production of WGBH Boston, from 世界名校公开课 (Open Classes of Famous Universities in the World) Database, Library of Renmin University of China, at http://10.22.1.53/school_play.php?sp=20 (last visited Jun. 20, 2013).

[120] Id.

[121] Id.

[122] Id.

[123] See Michael J. Sandel, *Justice: The Case for Cannibalism*, a production of WGBH Boston, from 世界名校公开课 (Open Classes of Famous Universities in the World) Database, Library of Renmin University of China, at http://10.22.1.53/school_play.php?sp=20 (last visited Jun. 20, 2013).

Utilitarianism does not distinguish between the majority and the minority, men and women, the strong and the weak, the wealthy and the poor, etc. It has the potential dangers of neglecting or even infringing on the rights of the minority, women, the weak, the poor and so on in the name of increasing the overall good of the community. Also some scholars believe that utilitarianism tends to equate "money" (dollars or CNY) with "utility" in cost-benefit analyses. In some cases, it is immoral.[124]

In the context of eliminating sex discrimination, the best answer of the utilitarianism may be the one which maximizes "utility" in labor market. It does not matter whether or not women are discriminated.

(4) Law and economic analyses with a moral perspective. Some people believe the law and economic analysis is very similar to utilitarianism in terms of maximizing profits. Given that the social and economic resources are limited, efficiency and utility considerations are necessary. Maximization of utility is often needed. But "utility" should not be interpreted solely as "money." "Values" of humans' dignity, justice and social harmony must be given high priority to.

Law and economic analyses with a moral perspective is needed in tackling sex discrimination in labor market. Women's dignity and human rights including equal rights to work must be respected and protected. Also, economic values (profits) produced by women labor force should not be underestimated. So the best answer to the question can be got when moral, social, and economic good is maximized.

VI. IMPROVEMENT OF THE LAW OF CHINA ON NON-SEX DISCRIMINATION AGAINST WOMEN IN WORKING LIFE

A. Roles of the EU Law on Indirect Sex Discrimination Against Women in Working Life

Anti-indirect sex discrimination law of the EU has its limitations. It is

[124] See Michael J. Sandel, *Justice: Putting a Price Tag on Life*, a production of WGBH Boston, from 世界名校公开课 (Open Classes of Famous Universities in the World) Database, Library of Renmin University of China, at http://10.22.1.53/school_play.php?sp=20 (last visited Jun. 19, 2013).

conditioned by the level of productivity and countries with lower level of productivity may not be able to withstand the implementation costs of the law. Whether it functions well or not is influenced by the strength of social members' legal consciousness and the awareness of human rights. Sometimes it may lead to a "reverse discrimination," that is, if women are over protected it is likely to cause discrimination against men, and so on. However, its major roles should not be ignored.[125]

Firstly, anti-indirect sex discrimination law of the EU is helpful to establish and develop the social relations of sex equality, and to restore, offset and remedy infringed equal rights to work for women. In making the law, it is beneficial to declare the value and principle of gender equality. In enforcing the law, it is helpful to guarantee that the principle of equality between men and women in social life is repeatedly practiced and to make people gradually recognize this principle and concept. To sum up, it can promote the realization of women's equal rights to work, safeguard the basic human rights of women, and maintain women's personal dignity as well as freedom of personality.

Secondly, it can deepen people's understanding of sex discrimination by prohibiting "indirect sex discrimination." It will make people realize that when we determine whether a measure is discriminatory, we should not only focus on the surface and form of the measure, but also pay more attention to the practical results or effects resulting from the measure.

Thirdly, it also reminds people to pay close attention to dealing with a variety of value conflicts, such as conflicts between efficiency and equality. We need to make an appropriate balance between economic development and social justice. Pregnancy, maternity and bringing up off-springs would probably make women at disadvantages in work. But human reproduction is beneficial to the society as a whole. So it is the whole society rather than women themselves who should bear the disadvantages and costs. In fact, anti-indirect sex discrimination laws, specifically objectively justified factors, serve as instruments to balance the interests of employers, the government and disadvantaged women.

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[125] Ayelet Lichtash, *Earning Dignity: Indirect Discrimination Against Women at Part-Time Jobs*, 26 Women's Rts. L. Rep. 13, 32 (2005).

Fourthly, the anti-indirect sex discrimination laws of the EU can provide some experience at the legislative and judicial level for China. This will be discussed later.

B. Sex Discrimination Against Women in Working Life and Related Law in China

1. Sex Discrimination Against Women in Working Life of China. — Current situations of sex discrimination in China and the causes will be introduced.

(1) Current situations. Sex discrimination in China has been greatly eliminated in many fields, especially in family life, with the efforts of Chinese people and the government. China has made great progress in gender equality with the rule of law. But there is still much room for improvements.

Sex discrimination against women in their working life includes direct sex discrimination and indirect sex discrimination in employee recruitment, payment, occupational training, promotion, etc. According to a survey, 70% of female college graduates think they encounter sex discrimination in seeking jobs.[126]

Because there is no explicit prohibition of "indirect" sex discrimination in non-sex discrimination law of China, many employers discriminate against women covertly.[127] For example, employers do not openly say women candidates are not needed, but in effect no women candidate or a considerably smaller proportion of women are employed compared with men candidates.

For women candidates who have high expectations of the job and have spent enormous money and energy on it, the result is really cruel, unfair and is against the principle of justice. Unfortunately, there is not enough relief for them who suffer greatly from emotional and economic losses. Also, this is harmful to the function of economy and society of China.

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[126] See Huimin Guo, 女性劳动权益研究：来自陕西的报告 (Study on the Protection of Women's Rights to Work: A Report from Shaanxi Province), China Social Sciences Press (Beijing), at 78 (2009).

[127] See Ying Li, 中国职场性别歧视调查 (A Study of Gender Discrimination in the Workplace in China), China Social Sciences Press (Beijing), at 19 (2010).

(2) Causes of sex discrimination in China. Accordingly to a survey on the public's attribution of sex discrimination conducted by Peking University Law School, five factors are related (in descending order):

a. Too many job seekers, two few job vacancies (50.1%);
b. Too much housework for women which influences their work (45.1%);
c. Higher costs of employing women because of maternity insurance which is only paid by the employers;
d. Lack of awareness of gender equality among employers;
e. Women's incompetence in work.[128]

We can see from the list incompetence in work ranks bottom. Among the above reasons, I think "higher costs of employing women" is a key factor. The government shifts its obligations in maternity insurance to employers, which means employers must buy maternity insurance themselves if they employ women.

In addition, there is only parental leave for women not for men. In the parental leave employers must pay basic salary to women workers and find new workers to do their work. After those women workers are back from home, the employers must find proper work for the above mentioned "new workers" or pay them money. All this makes employers unwilling to employ women, because maximizing profits are the nature of businesses. When supply far outweighs demand in China's labor market, employers tend to employ men in order to avoid higher costs of employing women.

2. Related Law in China. — Sources of law on gender equality and non-sex discrimination in China include *the Constitution of the People's Republic of China*, *the Law of the People's Republic of China on the Protection of Women's Rights and Interests*, *the Labor Law of the People's Republic of China*, and *the Law of the People's Republic of China on Employment Promotion*.[129] These laws are legislative fruits of China which, generally speaking, have played a very important part in promoting and implementing the principle of gender equality and safeguarding women's

[128] Id. at 66.

[129] *Law of the People's Republic of China on Employment Promotion*, at http://www.lawinfochina.com (last visited Apr. 22, 2013).

rights to work. But, there are some specific problems with them which need to be solved. For example, current Chinese law requires the applicants who allege they are discriminated to provide evidence that they are discriminated, which is very difficult for them to get and preserve, especially in the process of employee recruitment.[130]

(1) *Constitution of the People's Republic of China*. The general principle of equality is embodied in Article 5 and Article 33 of the Constitution.[131] It is the constitutional basis of citizens' equality rights. Paragraph 2 of Article 33 of the Constitution provides that all citizens of the People's Republic of China are equal before the law. Paragraph 5 of Article 5 of the Constitution provides that no organization or individual is privileged to be beyond the Constitution or other laws. The principle of gender equality is embodied in Article 48 which provides that "women in the People's Republic of China enjoy equal rights with men in all spheres of life, in political, economic, cultural, social and family life. The state protects the rights and interests of women, applies the principle of equal pay for equal work to men and women alike and trains and selects cadres from among women."[132] But in the Constitution, a "general" principle of "non-discrimination" like the general principle of "equality" cannot be found.[133]

(2) *Labor Law of the People's Republic of China*. The labor law[134] is another legal document on gender equality. The principle of gender equality can be seen in several articles. Article 12 of the Law provides that laborers (employees) shall not be discriminated against in employment due to their sex. Article 13 provides that "females shall have the equal right of employment as males. During recruitment, except for the work types or posts not suitable for females prescribed by the State, no employers may refuse to recruit females or raise the standards of female recruitment on the grounds of

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[130] http://news.ifeng.com/mainland/200804/0421_17_501212_1.shtml (last visited Jun. 20, 2013).

[131] *Constitution of the People's Republic of China*, at http://www.lawinfochina.com (last visited Apr. 22, 2013).

[132] Id.

[133] See Jinguang Hu, 宪法学原理与案例教程 (Constitutional Principles and Cases), China Renmin University Press (Beijing), at 298 (2006).

[134] *Labor Law of the People's Republic of China*, at http://www.lawinfochina.com (last visited Apr. 22, 2013).

gender.[135] Article 95 provides that the employer that encroaches upon the legitimate rights and interests of women in violation of the stipulations of this Law on their protection shall be ordered by labor administrative departments to make corrections and fined.[136] The employers who cause harms to women shall assume the responsibility for making compensations.[137]

But there are some problems with the Labor Law:

Firstly, there is no definition or general description of discrimination, let alone direct sex discrimination or indirect sex discrimination, which makes it difficult for judges to determine whether there is discrimination or not.

Secondly, as is said in the Labor Law, it only applies to "employers and laborers" who form a labor relationship. But what about the issues closely related to the labor relationship before its formation, namely, issues that happen in access to employment or recruitment of employees? Although Article 13 of the Law provides that women shall enjoy equal rights as men in employment and sex shall not be used as a pretext for excluding women from employment during recruitment of workers and the standards of recruitment shall not be raised when it comes to women, there is a lack of clause which specifically provides for the legal responsibilities for illegal actions of employers before the formation of labor relationship.

Thirdly, the Labor Law is not fully implemented and observed due to some reasons.

(3) *Law on Protection of Women's Rights and Interests of the People's Republic of China*. This law[138] was specially made for women. It has played an important role in protecting women's lawful rights and interests, in promoting the equality between men and women and in ensuring full participation of women in socialist modernization. The Law comprehensively provides for all kinds of women's rights including labor rights or the rights to work.

Article 2 of the Law provides that women shall enjoy equal rights with

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[135] Id.

[136] Id.

[137] Id.

[138] *Law on Protection of Women's Rights and Interests of the People's Republic of China*, at http://www.lawinfochina.com (last visited Apr. 22, 2013).

men in all aspects of political, economic, cultural, social and family life.[139] It is a basic state policy to recognize equality between men and women.[140] The State takes necessary measures to gradually improve the systems for protecting the rights and interests of women in order to eliminate all forms of discrimination against women.[141] The State protects the special rights and interests enjoyed by women according to law. Maltreating, abandoning, and physically abusing women are prohibited.[142] Chapter IV of the Law specifically provides for women's rights and interests of labor and social security including equal pay for equal work. Although the Law was well made, it is not implemented and observed well enough.

C. Improvement of the Law of China on Non-sex Discrimination Against Women in Working Life

1. The Experience of the EU. — The Anti-indirect Sex Discrimination Law of the EU can provide some experience for China to improve its non-sex Discrimination Law. Firstly, indirect sex discrimination will possibly appear if the law only prohibits direct or overt sex discrimination. So there should be laws that distinguish different kinds of sex discrimination and prohibit both direct sex discrimination and indirect sex discrimination. Secondly, there should be multilevel non-sex discrimination laws including basic laws and specific laws so that the legal system of non- sex discrimination can function better. Thirdly, the existence of conflicts of laws in legal practices of EU reminds that China should pay attention to the coordination and unity of the laws on non-sex discrimination. Fourth, the government should cooperate with non-government organizations so that the law on non-sex discrimination law can be better implemented.

2. General Suggestions. — China should improve its law on non-sex discrimination concerning labor issues in the following aspects:

Firstly, there should be an article which definitely provides a general principle of "non-discrimination" in Constitution of China. Both the general

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[139] Id.
[140] Id.
[141] Id.
[142] Id.

principle of "equality" and "non-discrimination" should be definitely provided for in this fundamental law so that every member of the country can behave in accordance with the constitutional principles.

Secondly, some legislations and regulations should be made or amended to effectively deal with sex discrimination "before" the formation of the labor relationship, namely, sex discrimination in recruitment of employees or access to employment. Specific liability and punishment clauses should be included. Otherwise the law will be only "soft law" which would probably not observed by people. And courts should effectively perform their duties in such cases.

Thirdly, general descriptions or definitions should be given to discrimination, sex discrimination, direct sex discrimination, and indirect sex discrimination. Otherwise, judges would have difficulty in determining whether those kinds of sex discrimination exist or not. In China, judges have narrower discretion compared with their counterparts in common law countries. The courts of China except the Supreme People's Court of China only have the power to apply legislations and cannot "make" any law by interpretation. If there is no indirect sex discrimination in legislation, it is not possible that "indirect sex discrimination" would be prohibited by court decisions.

Fourthly, "objectively justified factors" (the exemptions) in indirect sex discrimination laws of the EU and arguments on it make us consider the following question-should the employers or the government bear the duty and costs of fighting against sex discrimination? Or neither of them should be the cost bearer and duty holder and women should continue to be the victims? The enforcement of law costs money. If the government wants to better protect women's equal rights to work, it can possibly give tax preference or financial subsidies to enterprises which employ more women workers. Without the sacrifice of the government and the whole society, non-sex discrimination law cannot be implemented and observed well enough.

Fifthly, the case guiding system of China which is very creative will help eliminate sex discrimination including indirect sex discrimination if it functions well. In the European Union, there is a fusion of the common law system and the civil law system. The cases of the European Court of Justice (ECJ) have played a great part in legal practices of eliminating indirect sex

discrimination. In fact, there is no clear distinction between the two legal systems. They should learn from each other. But at present, the implementation of the case guiding system of China is not as good as what people think it would be. Some scholar holds the opinion that the Supreme People's Court of China and other courts of China should share the power of selecting and compiling guiding cases.[143] Whatever change to the system, we hope the creative system will function better in eliminating sex discrimination in working life.

Finally, the government should encourage enterprises and non-government organizations to eliminate all kinds of sex discrimination. Social autonomy is important these days and the government should interact with the civil society in order to reach the goal of "good governance."[144]

3. Tentative Law and Economic Analyses. — The development of economy and rule of law are both important in eliminating sex discrimination. Tentative law and economic analyses can be made (as below):

(1) The government should take on some shares in maternity insurance. This will reduce the costs of employers in employing women and may make it more likely for women to be employed. Maternity is beneficial for the whole society and the disadvantages should not be imposed only on women. If the government takes on more shares, it is not necessarily the overall benefits will be reduced. Some women have certain job qualifications which men do not have. Given fair treatment, women will be greatly encouraged to do beneficial contributions to the country.

(2) The same parental leave should be given to men as well. If men are also given parental leave, employing men also need the extra costs that are produced in employing women. This will narrow the cost gap between employing men and employing women, which will likely to reduce sex discrimination.

(3) The government should adopt a quota system for employing women and give financial subsidies to employers who employ certain number of

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[143] See Zhiming Zhang, *A Lecture on Judicial Case Guiding the System of China*, at School of Law, Renmin University of China (Beijing), Apr. 22, 2013.

[144] See Jingwen Zhu, *A Lecture on Good Governance*, at School of Law, Renmin University of China (Beijing), Apr. 12, 2011.

women. It is true that part of women's time and energy is consumed in taking care of children and doing housework. But that benefits the whole society, not women themselves. If women who sacrifice themselves for the family and society are discriminated in workplace, it is unfair and is against basic values of the community. So the government, which means all the taxation payers, should take on the obligations together. Women should not be the victims of the development of economy.

(4) Heavier punishment to the employers who discriminate against women in workplace will reduce sex discrimination to some degree.

(5) The reversion of burden of proof in proceedings should be provided for by law so as to add the costs of employers and reduce the litigation costs of disadvantaged women workers.

CONCLUSION

The anti-indirect sex discrimination law of the EU in forms of principles, treaties, case law and statutory laws has played an active and important role in eliminating all forms of sex discrimination and protecting women's equal rights to work in the EU. It reminds China of eliminating an indirect or covert form of sex discrimination which is not familiar to many Chinese and provides some experience for China to improve its non-sex discrimination law. Although enacting non-sex discrimination law is important, implementation and observance of it are of vital significance. Even in the EU, situations of the implementation and observance of the anti-indirect sex discrimination law are different among different Member States. Generally speaking, in countries that have higher level of economic and social productivity and higher degree of rule of law, such as the Netherlands and the UK, non-sex discrimination law has been better implemented and observed. But in countries that have lower level of economic and social productivity and lower degree of rule of law, such as some southern European countries, the law has not been so well implemented and observed. For China, although making new legislations or amending existing legislations and regulations are needed for protecting women's equal rights to work and related fundamental human rights, the enforcement of the existing and future non-sex discrimination law is more crucial. By emphasizing the role of the non-sex

discrimination law, the authors never mean that the elimination of direct sex discrimination, indirect sex discrimination and any other forms of sex discrimination is a pure matter of law. In fact, sex discrimination is caused by many economic, political, social, cultural, historical and traditional factors. In order to eliminate sex discrimination and reach a high level of gender equality, mechanisms which include economic, political, social, cultural, legal measures, etc. are comprehensively needed.[145] Not only the government, but also every member of the community should have the consciousness of gender equality and non-sex discrimination so that a higher level of gender equality can be achieved.

[145] See Jingwen Zhu, 法理学 (Jurisprudence), China Renmin University Press (Beijing), at 401, 402 (2008).