

RESEARCH ARTICLE

Proving Unlawful Discrimination in Capital Cases: In Quest of an Adequate Standard of Proof

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In spite of some early judicial, political and scholarly discussions, as well as more recent scientific explorations of the topic, problems and concerns with proving discrimination in individual capital cases continue to be among the most debatable issues in human rights and criminal justice. In general, domestic courts (in particular US courts) seem to remain relatively perfunctory and hostile to individual discrimination challenges in capital trials. They normally require capital defendants alleging discrimination to prove something which is virtually impossible to prove. On the other hand, numerous capital defence attorneys, legal commentators and even some of the trial judges themselves lay strictures on the existing judicial approach which almost routinely rejects discrimination claims in capital cases. They contend that appropriate modifications in current legislative arrangements and mechanical adjudication policy and practice are urgent and indispensable for more equitable resolutions and for a truly even-handed criminal justice system. In particular, there are concerns regarding the adequate distribution of the burden of proof between the litigants. Moreover, no clear or uniform approach to this conundrum can be identified in the international jurisprudence. This article seeks to provide some definite answers to open and conceptual questions posed in an attempt to legally define 'the minimum core content' of the evidentiary standard – as implicitly contained in the relevant international human rights treaties' provisions – to be applied in capital sentencing discrimination cases. Additionally, part of this same standard of proof can also qualify as a general principle of international law, particularly in relation to impartial, unbiased and non-discriminatory approaches and decision-making by the judges and jurors involved in complex capital cases.

Keywords: capital cases; discrimination litigations; standard of proof; fair trial and equality protections; international law

I. Introduction

Discrimination in the administration of the death penalty constitutes a substantial segment of miscarriages of criminal justice in death penalty jurisdictions. Given the wide range of discretion assigned to decision-makers involved in capital cases, pervasive bias, prejudice and stereotypes related to race, national or ethnic origin, gender, religion or belief, socio-economic status, place of origin, sexual orientation, disability, level of education and similar characteristics (grounds of discrimination) of defendants/victims involved in capital crimes can play a role in decision-making processes in capital trials. Some of these decisions include a prosecutor's decision to file an indictment and seek a death penalty for an alleged perpetrator or offer a plea bargain, and the 'careful' selection of jury members, or the fact-finder's final decision concerning a capital defendant's culpability and punishment.

Obviously, it is extremely hard to prove such hidden and covert preconceptions and stereotypical attitudes which often lead to discriminatory decisions in capital cases, unless they are articulated in some way. In some instances, decision makers in capital cases may not even realise that they are applying stereotypes in their decisions or acting discriminatorily because the ideas are so deeply ingrained or institutionalised

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within a criminal justice system. Moreover, prosecutors, jurors and judges will always be astute enough to think of ingenious rejoinders to rebut claims of alleged disparities in the application of the death penalty and it will be impossible to elicit statements admitting or indicating when a discriminatory decision was adopted in a particular capital sentencing process. Hence, without tangible evidence of biased treatment in their particular case it is extremely difficult, if not impossible, for those claiming to have been subjected to discrimination during the capital sentencing process to substantiate their claims and to prevail upon the judge hearing their case.

Providing sufficient evidence of discrimination in the capital sentencing process is a central issue of civil procedure when it is claimed that the death penalty was sought and/or imposed on a defendant in a discriminatory manner. Against that backdrop, the question arises as to what and how much evidence must be provided by victims of discrimination in death penalty cases to establish a *prima facie* case of discrimination so as to successfully meet the requirement for shifting the burden of proof to the respondent (state). This article addresses these key questions in order to develop an adequate and contemporary standard of proof that courts and other competent adjudicative authorities should apply as far as the issue of proving discrimination in capital sentencing processes is concerned.

At the outset, it is fair to say that this article attempts to address the research problem primarily from international legal perspectives and thus complements and upgrades the existing body of American scholarly research and literature in this area which is, for the most part, concerned with domestic legal and judicial considerations. These predominantly federal- and states-oriented analyses and evaluations usually overlook a simple but very intriguing fact that there is an absence of a clear, uniform and well-defined approach to the issue that is currently witnessed at the international level and bespeaks a great unease towards identifying an appropriate standard of proof within domestic death penalty legal systems. While some specialised international human rights treaty bodies, such as the Committee for the Elimination of Racial Discrimination and the Committee on the Elimination of Discrimination Against Women, chose to espouse the modern standard of proof which is reminiscent of the concept codified in the advanced European Union (EU) non-discrimination law – according to which, the rule on shifting the burden of proof lies at the heart of evidentiary procedure in discrimination cases and aims at somewhat easing the claimant's burden of proof in civil proceedings – the Inter-American Commission on Human Rights seems to opt for a more conservative, reserved and prudent, if not retrograde, approach.¹ The Inter-American Commission's approach requires a significantly higher standard of proof which asks the claimant to present direct, abundant and clear-cut evidence of discrimination (as evident from the Commission's findings in *Celestine* and *Andrews*)² and is thus much closer to the US Supreme Court's reasoning in the famous *McCleskey* case demanding a discriminatory purpose on the part of decision makers in capital sentencing be proven,³ thereby calling into question its compliance with international non-discrimination standards as correctly observed by some authors and commentators.⁴

By adding an international legal dimension to the subject, it is argued in the present article that the standard of proof to be employed in civil procedures dealing with discrimination in capital sentencing cases constitutes, in part, a general principle of law recognized by (civilized) nations and therefore, at least in this respect, should be one and the same regardless of the jurisdiction or criminal justice system and irrespective of the form or type of discrimination alleged. Moreover, these same rules of proving discrimination in capital cases should provide for an equitable and balanced distribution of the burden of proof and also enable specific evidence – such as relevant statistics – to serve as a sufficient proof of discriminatory effect; they would thus constitute an instrument which can trigger a shift in the burden of proof. This position is primarily based on the extant international human rights jurisprudence evolved through the interpretation of relevant international human rights treaties' provisions by the Human Rights Committee, the Committee on the Elimination of Racial Discrimination, the Committee on the Elimination of Discrimination Against

¹ Committee on the Elimination of Racial Discrimination, Concluding Observations regarding the United States of America, 8 May 2008, CERD/C/USA/CO/6, para 35; Committee on the Elimination of Racial Discrimination, General Recommendation No 14: Definition of discrimination (Art. 1, par.1), 22 March 1993, A/48/18 at 114 (1994), para 2; *V. K. v Bulgaria* (20/2008), CEDAW/C/49/D/20/2008 (2011), para 9.9.

² Case 10.031, *Willie L. Celestine v United States* Resolution No. 23/89 (1989), para 45; Case 11.139, *William Andrews v United States* Report No. 57/96 para 165.

³ *McCleskey v Kemp*, 481 U.S. 279, 107 Supreme Court 1756 [1987].

⁴ Robin Gise, 'Rethinking *McCleskey v. Kemp*: How U.S. Ratification of the International Convention on the Elimination of All Forms of Racial Discrimination Provides a Remedy for Claims of Racial Disparity in Death Penalty Cases' (1998) 22 Fordham International Law Journal 5 2313–6.

Women, the European Court of Human Rights, the Court of Justice of the European Union and also the European Committee of Social Rights.

Furthermore, it is argued that, in view of contemporary insidious bias and discriminatory attitudes of the decision-makers involved in capital cases, such standard of proof should be much closer to the one applied in civil law cases of discrimination. This assertion can find its foothold in the existing legal scholarship, relevant international and domestic case law and jurisprudence, and current evolutionary trends in discrimination law. The central thesis is that especially the rule on the shared burden of proof – as defined and applied in the context of advanced EU anti-discrimination law – should serve as a good example of a minimal, decent and just standard of proof to be followed in proving discrimination in capital cases in order to amend the *status quo* and remedy the existing state of affairs. This underlying thesis elaborates on several relevant starting-points and criticisms and is predicated on some crucial international legal arguments and remarks which are outlined and discussed below.

Following a critical appraisal and in-depth analysis of relevant international and domestic (case) laws, it is argued that – against the backdrop of contemporary practices and forms of discrimination which normally are and remain subtle and insidious – the methods of proving discriminatory decision-making procedures in criminal trials in general, and in capital cases in particular, call for an appropriate transposition of the evidentiary machinery introduced and established by the EU non-discrimination directives if the international fair trial and equal treatment standards are to be utilised and enforced to their full potential. Subsequently this article attempts to formulate some critical remarks and give some reasoned arguments why the standard of proof worked out and pursued by some domestic courts – such as those from US death penalty jurisdictions – and international quasi-judicial bodies, such as Inter-American Commission on Human Rights, ought to be seen as old-fashioned and inadequate in light of contemporary discrimination claims.

II. International, European and Inter-American legal approaches to discrimination in death penalty cases

A. Establishing Direct Discrimination in Capital Cases

If, for example, a certain legislator enacts a law which sanctions homo- and bi-sexuality with the death penalty, whereas heterosexual relations are not punishable at all, this may result in many more homo- and bi-sexuals being sentenced to death and executed than those having preference for the opposite sex. However, nowadays, cases and situations where discrimination is manifested or expressed in such a direct and easily identifiable way are extremely rare. This holds true also for capital sentencing processes. Thus, discrimination in capital sentencing decision-making processes is in many cases subliminal and invidious. As a result, proving direct discrimination in capital cases is usually a very demanding task, although, by definition, the difference in treatment is 'overtly' based on one or more characteristics of the capital defendant and/or of the victim of a capital offence. The fact is that decision-makers in capital cases will not always declare their differential treatment between persons of various backgrounds, nor will they reveal their reason(s) for such treatment.

For example, an Afro-American capital defendant may be sentenced to death with a simple explanation that 'specific circumstances in which the capital crime was committed and the principle of justice' in their particular case call for the ultimate sentence and punishment. However, there are several precedents where white defendants were sentenced to life imprisonment for the same capital offence in similar circumstances and with a similar criminal history. In this situation, the capital defendant who would believe that the death penalty was imposed on them in a biased and discriminatory manner may find it difficult to prove that they were directly discriminated against because of their race or ethnic origin.

This section considers and analyses several issues which are of key importance to the interpretation, realisation and effectiveness of statutory provisions on proving direct discrimination in the context of the death penalty application. These include the question of causation and identifying a proper comparator in establishing direct discrimination, the relevance of stereotyped and prejudiced views as well as discriminatory intent and motive on the part of decision makers, and the meaning of the notion of less favourable treatment in the capital sentencing context.

B. Identifying a Suitable Comparator and Causation

One of the core conditions required by discrimination law (including relevant EU non-discrimination directives) is that the complainant claiming the existence of direct discrimination is able to show that they have been treated less favourably than another person is, has been or would be treated in a comparable

situation and that such difference in treatment was due to prohibited characteristic(s).⁵ This means that two persons or categories of persons who are in comparable situations and whose factual and legal circumstances uncover no essential difference should be treated in the same way without regard to personal traits, such as race, national or ethnic origin, gender or socio-economic status. At the same time, this general principle of equal treatment, enshrined in all core international human rights instruments, requires that such treatment is not identical in situations that are different. In the context of the death penalty application, this implies that prosecutors, jury members and judges as decision-makers must not take into consideration legally irrelevant characteristics when making decisions on whom to sentence to death or not. Their decisions must be fair and rational, based solely on legally relevant factors.

Indeed, locating an actual comparator in each and every case of direct discrimination can be problematic. For instance, in many death penalty jurisdictions there are well-documented patterns of gender segregation in the application of capital punishment. In situations where death row is dominated by persons of a particular gender, in practice it may be very difficult to identify an appropriate actual comparator. Here, the requirement for a comparator does not seem to be helpful in identifying direct discrimination. Some commentators therefore argue that in some instances of direct discrimination it is not necessary to find a comparator since in some situations direct discrimination will be particularly manifest and self-evident.⁶

The importance that is ascribed to the comparator identification in direct discrimination cases varies considerably from one legal system to another. While some domestic legislation places rather strong emphasis on identifying an appropriate comparator,⁷ others prefer enquiring into the question of causation, that is, whether the reason for less favourable treatment was discriminatory; although the identification of a comparator in circumstances similar to those of the complainant is not completely omitted, it becomes one of the possible ways to establish causation.⁸ Furthermore, the difference can be noticed in the order in which domestic courts and equality bodies apply the comparator requirement in direct discrimination cases.⁹

It will not always be possible to choose the 'correct' comparator. The difficulties with a comparator requirement may emerge especially in cases dealing with discrimination on grounds of sex, gender reassignment, sexual orientation and age. Let us assume that a person who underwent gender reassignment (from male to female) is sentenced to death because she is, in spite of changing her sex, still treated as a male in a certain legal system applying the death penalty. Indeed, if her new gender was recognised as legally relevant she would be able to escape the death penalty. The person claims that the capital punishment imposed on her was a result of gender discrimination in her capital sentencing process. The question which arises in such a case is what is an appropriate comparator in establishing less favourable treatment of the person who underwent gender reassignment. Here, the classic model of a straightforward comparison between men and women can hardly be applied, which is why more than one comparator could be 'correct'. One may suggest, for instance, that the treatment of the person claiming that the death penalty was imposed on her in a discriminatory manner should be compared with that of a man or a woman who did not undergo gender reassignment. The result of such a comparison is the same and shows that the claimant had been disadvantaged. But is a person who has not undergone gender reassignment really in a similar situation to the person claiming gender discrimination? Such an approach can also be understood as suggesting that the complainant herself, prior to undergoing gender reassignment, could serve as a comparator. Another option in this case is to assert that the comparator requirement can and should be dispensed with.

Similar problems in finding an appropriate comparator may arise in cases of discrimination on grounds of sexual orientation. Here again, it seems to be questionable in cases involving same-sex couples and whether

⁵ Article 2(2)(a) of Directive 2000/43/EC, [2000] OJ L 180/22; Article 2(2)(a) of Directive 2000/78/EC, [2000] OJ L 303/16; Article 2(a) of Directive 2004/113/EC, [2004] OJ L 373/37; and Article 2(1)(a) of Directive 2006/54/EC, [2006] OJ L 204/23.

⁶ See, for instance, Daniela Izzi, 'Discriminazione senza comparazione? Appunti sulle direttive comunitarie di seconda generazione' (2003) 99/100 Giornale di diritto del lavoro e di relazioni industriali, 423, 426; Nicholas Bamforth, 'The Changing Concept of Sex Discrimination' (1993) 56 The Modern Law Review 6 872, 880.

⁷ Consider, for example, a legal counsel who does not represent an Afro-American capital defendant duly and professionally before the court, which has a significant negative impact on the outcome of the capital sentencing process. In such a case, an appropriate comparator is a capital defendant who is not Afro-American and who is in the same or not materially different position with regard to the nature and circumstances of committed offence, level of their culpability and their previous criminal record.

⁸ Such an interesting approach is evident from French case law. See, for example, *CFDT Inter-Co v Fort*, Cour de Cassation, Chambre criminelle, du 14 juin 2000, N° de pourvoi: 99-81108 <<http://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007068988&>> accessed 16 June 2014; See also Dagmar Schiek, Lisa Waddington, Mark Bell (eds), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* (Hart Publishing 2007) 209.

⁹ *ibid* 208–210.

those couples are really in a comparable situation to either married or unmarried opposite-sex couples. The issue of preferential or disadvantaged treatment on the basis of the perpetrator's sexual orientation may also be invoked in capital cases involving defendants who are gay or lesbian.

Two methods have been employed by the European courts and equal treatment bodies to rectify the shortcomings of a comparator requirement in cases in which it is difficult to define the precise approach to be pursued when selecting an appropriate comparator, especially in situations where more than one comparator can be potentially 'correct' and when – as demonstrated by the above cases dealing with gender reassignment discrimination – it has turned out that actually no comparator will be completely appropriate. Mention has already been made of one of the possible techniques to overcome such difficulties in direct discrimination cases – that is, the complete departure from the comparator requirement. The other useful alternative is the possibility of invoking a hypothetical comparator.

The EU legislature accepted this reality and included the hypothetical comparator aspect in the standard definition of direct discrimination contained in the EU non-discrimination directives: 'direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation'.¹⁰ According to this definition, one needs to make a comparison between the treatment of the victim of discrimination on the one hand, and of a comparator on the other hand. The comparator may be actual as reflected in the wording 'is treated' and 'has been treated' or may be hypothetical as captured in the text 'would be treated', but the relevant circumstances in the one case must be comparable to those in the other. Most EU member states have incorporated such express reference to hypothetical comparators into their domestic non-discrimination legislation in the process of implementation and transposition of EU anti-discrimination directives into their national legal systems.

In a particular case, where an actual comparator capable of constituting the statutory comparator cannot be found, a hypothetical comparator can be used instead. Indeed, most challenging in applying a hypothetical comparator is the necessity to objectively assess a hypothetical situation, that is, a situation that did not actually exist. In this regard, the interpretation of 'how a hypothetical comparator would have been treated'¹¹ by taking into consideration the broader context of a given case may be of particular assistance. In other words, the actual treatment of persons who are not in a sufficiently similar situation to that of a complainant, and thus cannot serve as an actual comparator, may offer important evidence for considering how a hypothetical comparator would have been treated.

In addition, a court should pay due regard to any other existing evidence from which discrimination may be inferred, such as racially offensive statements, inscriptions, discriminatory questions, or sexist comments made during the course of a hearing or adopting the jury's decision on the defendant's culpability and application of capital punishment. Further, inferences of discrimination may also be drawn, for example, where a capital jury's function has not been exercised in compliance with the court's normal procedural rules and where there is some evidence of hostile attitudes towards minority group members that the capital defendant belongs or is perceived to belong to within the jury panel. Such pieces of evidence can be very relevant since they can replace the need for an actual comparator by comparing a person claiming discriminatory application of the death penalty with a hypothetical person with different personal characteristics. This will enable a court to consider whether such hypothetical comparators would have been treated differently from the capital defendant complaining of a discriminatory application of capital punishment in their case.

C. Sorting Out Stereotypes- and Prejudice-Based Decisions in Capital Cases

In order to better understand the crux of this appraisal we must first identify the role that stereotypes as collective social representations and social psychological constructs play in capital sentencing decision-making processes. Stereotypes and prejudice that members of different racial, ethnic and religious groups hold towards each other are the source of all the evil caused by discrimination. This is also true of discriminatory treatment in capital sentencing processes. Needless to say, stereotypes and prejudice that main legal actors involved in the death penalty cases (prosecutors, jurors, trial judges and defence counsel)¹² harbour may influence their decisions and acts. How strong this impact is depends, *inter alia*, on the nature, level

¹⁰ Articles 2(2)(a) Racial Equality Directive and Employment Equality Framework Directive.

¹¹ Such approach is suggested, among others, in Schiek, Waddington and Bell (n 8) 220, 221.

¹² For a credible account including some very interesting samples of intractable, unconscious and implicit race bias held by criminal defence attorneys representing Afro-American capital defendants see Andrea D Lyon, 'Race Bias and the Importance of Consciousness for Criminal Defense Attorneys' (2012) 35 Seattle University Law Review 755–768.

and amount of bias that the decision makers are infected with and on their (in)ability to overcome such stereotypes and prejudice when making decisions in the capital sentencing process.

Stereotypes often serve as explanations or justifications for direct discrimination. However, some of the stereotyped preferences that discriminators hold can be shrouded and thus will not necessarily be supported by firm contextual evidence. One should be aware of the fact that contemporary forms of stereotyping and prejudice have taken subtler and more intractable characteristics than in the past. With time, the incidents of intentional and blatant forms of discrimination became socially and legally unacceptable and thus less likely to occur; however, the domination of one (usually majority) group over another (usually minority) group has been maintained and justified, despite explicit egalitarian beliefs, through prejudiced and discriminatory conduct that can most frequently be justified as unintentional and which takes place in a way that appears to be justifiable. This reality is also reflected in the modern criminal justice system, including in capital sentencing cases.¹³

Several empirical studies and experimental works, including that carried out by Mona Lynch and Craig Haney,¹⁴ clearly suggest that racial bias often comes into play in death penalty decision-making processes, most probably to the greatest extent in discharging capital juries' tasks. The issue may arise already in the capital jury selection process which allows exclusively for 'death-qualified' jurors and excludes all other possible candidates (especially fervent death penalty opponents). This selection process almost always results in all-white or predominantly white, male, older and more conservative (in the religious and political sense) capital jury members who are more likely to hold wide-spread and persistent cultural stereotypes towards minority groups' members (for example, the stereotype that African-Americans are dangerous, aggressive and genetically predestined and inclined to commit serious criminal offences). Another interesting example of influencing the capital jury's decision-making process by making insinuations of certain most common stereotypes and prejudices in relation to capital defendant and/or victim of a capital crime occurs when the capital prosecutor refers or appeals to (either explicitly or implicitly), for example, racial or gender bias in their argument or other conduct. This is the case in many instances of capital trials as far as the US death penalty system is concerned.¹⁵

Indeed, negative stereotypes and prejudices against minority groups and their members, which are particularly subtle and resistant to change, may (and, at least in the US death penalty jurisdictions, in certain cases did) strongly influence the outcome of a capital sentencing process. Many empirical studies and experiments done by American scholars have confirmed that the circumstances in which laypersons acting as capital jurors make their decisions render it possible for them to rely on stereotypes and prejudice.¹⁶ However, in order to establish a *prima facie* case of discrimination in the application of the death penalty, a person affected by the arguably discriminatory death sentence will need to show some connection between prejudiced beliefs and stereotyped thinking of capital prosecutors, jury members and/or trial judges and their decision on the defendant's culpability, death-worthiness and ultimate punishment. This is certainly not an easy job, especially not for someone who is destitute and lacks legal expertise and other relevant resources. In addition, some existing domestic legal models of the non-discrimination clause, such as the Fifth and Fourteenth Amendments of the US Constitution,¹⁷ turned out to be old-fashioned and inadequate since they will hardly ever be applicable to the incidents of contemporary forms of insidious and sometimes also unconscious biased behaviours that are neither expressed in a clear and overt manner nor based on any apparent discriminatory motive.

¹³ Stereotypes and prejudicial attitudes become especially problematic where those responsible for key decisions have broad discretion, as in the decisions to seek or impose the death penalty. See also, in this regard, the Chief Justice Barkett's criticism concerning the problem of proving unconscious and invidious racism on the part of decision-makers in capital cases discussed in *Foster v State. Charles Kenneth Foster v State of Florida*, Supreme Court of Florida, 614 So.2d 455 (1992), (Barkett, C.J., concurring in part, dissenting in part).

¹⁴ Mona Lynch, 'Stereotypes, Prejudice, and Life-and-Death Decision Making, Lessons from Laypersons in an Experimental Setting', in Charles J Ogletree and Austin Sarat (eds.), *From Lynch Mobs to the Killing State: Race and the Death Penalty in America* (New York: New York University Press, 2006) 187–190.

¹⁵ Lyon maintains that in the US capital sentencing system there are many deplorable instances of improper direct or indirect prosecutorial appeals injecting impermissible references to prejudice into the jury's deliberations. According to her, 'courts must take the examination of the prosecution's proof seriously, and must recognize that even a single racially biased comment by a prosecutor may improperly influence the outcome of a trial'. Andrea D Lyon, 'Setting the Record Straight: A Proposal for Handling Pro Appeals to Racial, Ethnic or Gender Prejudice During Trial' (2001) 6 Michigan Journal of Race & Law 319–321.

¹⁶ See more about the factors and setting which allow for biased decisions of capital lay jurors in Lynch (n 14) 187–190.

¹⁷ These non-discrimination provisions require the plaintiff to prove the existence of discriminatory motive or intent (as a subjective state of mind) on the part of the respondent (alleged perpetrator) to successfully establish direct discrimination in their particular case.

As it is very unlikely that people will advertise their stereotypes and prejudices, and in fact they may not even be aware of them, proving discrimination must allow for inference rather than direct evidence, including in the death sentencing context.¹⁸ This entails that once the first three of the mentioned prerequisites (less favourable treatment of one person than that of a comparable person) are clearly shown by the victim of discrimination, the judges will have to ask the alleged discriminator for an adequate explanation which must be unrelated to personal trait(s) of the complainant. If the respondent is unable to provide a satisfactory explanation, it is quite legitimate to infer that the less favourable treatment was on the prohibited ground(s) of discrimination. And if the difference is on one or more such grounds, the reasons or motives behind it cannot be seen as relevant.¹⁹

Non-discrimination safeguards embedded in or relevant to criminal law procedures require prosecutors, jurors and judges to treat each person as an individual and not as a member of a particular group. Therefore, one may safely say that the capital defendant should not be assumed to hold the characteristics which the prosecutor, juror or trial judge associates with a group, whether or not most members of the group do have such characteristics. Even if, for example, it is still a widely held stereotype that most Afro-American men are lawless, more violent, dangerous and criminally inclined than white men, it must not be assumed that an Afro-American who has found himself in a death penalty criminal process is violent, dangerous and inclined to commit crimes and therefore must be punished and sentenced more severely than a white capital defendant who committed the same or a very similar kind of crime and has largely the same criminal record. Such application of a stereotype by a capital prosecutor, juror or trial judge which gives rise to a less favourable treatment of the members of minority groups must be deemed legally impermissible and unjustified. Legislation prohibiting discrimination in the criminal justice system requires that each and every capital defendant is treated as an individual and not assumed to be like other members of the group to which they belong.²⁰

Most commonly, the evidence of stereotyping and prejudice on the part of a capital prosecutor, jury member or trial judge will not be available, but where such evidence is present (as this was the case, for example, in *Andrews v United States*),²¹ this may certainly contribute to establishing the existence of direct discrimination in the capital sentencing process. On the other hand, if such evidence is absent, or there is proof of a non-prejudicial motive, this should not be considered an obstacle to a finding of direct discrimination in a death penalty case.²²

D. Identifying Bias and Prejudice on the Part of Decision-Makers in Capital Cases

Sometimes it will be possible to prevent the adoption of biased decision(s) in a given capital case by a timely finding that, in fact, one or more key decision-makers are partial or prejudiced against a capital defendant or victim of a capital crime or against both of them. However, to come to such a finding, a trial judge will need to seriously approach and carefully examine any potential danger or suspicion of bias on the part of the decision-maker(s) and if the existence of such a bias is established they will be expected to undertake all necessary steps to eliminate any peril of biased decision making and to ensure a fair, just and impartial criminal process throughout the capital trial.²³

International fair trial standards also include the requirement that the tribunal deciding in the death penalty case is impartial and affords a capital defendant equal protection of the law, without discrimination of any kind. In criminal justice systems that employ a jury system, these requirements apply to professional

¹⁸ In *McCleskey* Justice Blackmun criticised the analysis of the equal protection clause made by the majority of judges for not following its ordinary three-fold test for establishing a *prima facie* case of discrimination as defined in *Castaneda v Partida*, *Castaneda v Partida*, 430 U.S. 482 (1977). Under this test, a defendant needs to show that 1) he or she is a member of a distinct class; 2) there is a substantial degree of differential treatment; and 3) the allegedly discriminatory procedure is subject to abuse or is not racially neutral. When the defendant establishes a *prima facie* case of discrimination under *Castaneda* test, the burden of proof shifts from the defendant to the prosecution to rebut the allegation. Justice Blackmun was of opinion that McCleskey's claim fulfilled all three requirements so as to shift the burden of proof to the respondent. *McCleskey v Kemp*, 481 U.S. 279, 107 Supreme Court 1756 [1987], (Blackmun, J., dissenting) paras 353–364.

¹⁹ *R v Immigration Officer, Prague Airport, ex parte European Roma Rights Centre* [2004] UKHL 55; [2005] 2 AC 1 para 73.

²⁰ In this context, the following line of reasoning put forward by Lady Hale in the *Prague Airport* case seems to be of a particular relevance: 'The person may be acting on belief or assumptions about members of the sex or racial group involved which are often true and which if true would provide a good reason for the less favourable treatment in question. But "what may be true of a group may not be true of a significant number of individuals within that group".' *ibid* para 82.

²¹ *William Andrews v United States* (n 2). The case is discussed in more detail below.

²² See Schiek, Waddington and Bell (eds) (n 8) 233.

²³ For various techniques that can be pursued in order to detect prejudiced attitudes of jurors see Andrea D Lyon, 'Naming the Dragon: Litigating Race Issues During a Death Penalty Trial' (2004) 53 DePaul Law. Rev. 1647, 1663–70.

and lay judges as they do to jurors.²⁴ Under international and European human rights law both the subjective and objective test based on 'reasonableness and the appearance of impartiality' shall be employed when considering the issue of judge and juror impartiality in criminal cases, including in capital sentencing.²⁵ Such an approach can be inferred also from relevant case law developed by the international human rights treaty bodies. For instance, the Committee for the Elimination of Racial Discrimination held in *Narrainen v Norway* that a reasonable suspicion of bias is sufficient for juror disqualification by stating that 'it is incumbent upon national judicial authorities to investigate the issue and to disqualify the juror if there is a suspicion that the juror might be biased'.²⁶

The European human rights system strictly follows the objective test as well, complemented by the subjective test. In *Piersack v Belgium* the European Commission of Human Rights stated that:

Whilst impartiality normally denotes absence of prejudice or bias, its existence or otherwise can, notably under Article 6 § 1 (art. 6-1) of the Convention, be tested in various ways. A distinction can be drawn in this context between a subjective approach, that is endeavouring to ascertain the personal conviction of a given judge in a given case, and an objective approach, that is determining whether he offered guarantees sufficient to exclude any legitimate doubt in this respect.²⁷

Later, both standards were further elaborated in *Gregory v United Kingdom* where the European Commission of Human Rights expressed its view that:

If the possibility of bias on the part of the juror comes to the attention of the trial judge in the course of a trial, the trial judge should consider whether there is actual bias or not (a subjective test). If this has not been established, the trial judge or appeal court must then consider whether there is 'a real danger of bias affecting the mind of the relevant juror or jurors' (objective test).²⁸

Equally, in *Remli v France*, the European Court of Human Rights referred in this connection to the principles as developed in its case law regarding the independence and impartiality of tribunals.²⁹ The Court held in this case that, 'when it is being decided whether in a given case there is a legitimate reason to fear that a particular judge lacks impartiality, the standpoint of the accused is important but not decisive. What is decisive is whether this fear can be held to be objectively justified'.³⁰ The objective test of identifying impartiality of judges and jurors was also recognised by the Inter-American Commission on Human Rights which stated in *Ramos v United States* that the international standard on this issue requires the determination of 'whether there is a real danger of bias affecting the mind of the relevant juror or jurors. Where this bias may relate to a prohibited ground of discrimination, such as race, language, religion, or national or social origin, it may also implicate a violation of the principle of equality and non-discrimination'.³¹

E. The Question of 'Intent' and 'Motive'

Closely related to stereotypical considerations and prejudiced attitudes of capital sentencing decision makers is the question why the alleged discriminator acted in a discriminatory way. In other words, the crucial issue of concern which is considered in this section is whether, as suggested by the standard of proof worked out by the US Supreme Court in the *McCleskey* death penalty case, the complainant (person sentenced to death) needs to prove a discriminatory motive or, more precisely, intent on the part of the respondent (alleged discriminator) in order to be successful in establishing direct discrimination in a particular capital sentencing process.³² In some cases, a capital prosecutor, jury member or trial judge could argue, for instance, that there was no malice towards the complainant as an individual, but that their conduct was only the result of their wider generalisations about people with similar attributes (for example,

²⁴ The same principles were laid down by the European Court of Human Rights in *Holm v Sweden* A 279 A (1993), para 30.

²⁵ *Daktaras v Lithuania* App No 42095/98 (ECtHR, Chamber Judgment 10 October 2000) para. 30.

²⁶ *Narrainen v Norway* (3/1991), CERD/C/44/D/3/1991 (1994); 1–3 IHRR 128, para 9.3.

²⁷ *Piersack v Belgium* A/53 (1982) 5 EHRR 169, para 30.

²⁸ *Gregory v United Kingdom* (1997) 25 EHRR 577, para 32.

²⁹ *Remli v France* 1996-II 22 EHRR 253.

³⁰ *ibid* para 46.

³¹ Case 12,430, *Roberto Moreno Ramos v United States* Report No. 1/05 (2005), para 66.

³² In *Arlington Heights* the US Supreme Court made clear that 'proof of a racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause of the Fourteenth Amendment'. *Village of Arlington Heights et al. v Metropolitan Housing Development Corporation et al.* 429 U.S. 252 (1977) 266–268.

criminal stereotypes in the case of Afro-American defendants that they are inclined to commit grave crimes and that there is no real possibility for their correction).³³

It is necessary to clarify that the notions 'intent' and 'motive' in the context of discrimination law have different meanings and therefore should not be confused or used interchangeably as synonyms.³⁴ The intent can best be described as the goal of the discriminator's conduct and actions,³⁵ whereas the motive (which is the word that is usually conceived of in cases of direct discrimination) concerns the reason why the person perpetrated certain discriminatory action(s).³⁶ We can illustrate the role played by the motive in discrimination cases by the long-lasting trend in not applying the death penalty to women, which obviously favours female over male defendants. Such an inappropriate approach to the application of the death penalty appears to be present in almost all death penalty jurisdictions and reflects historical and widespread stereotypical attitudes towards vulnerability, moral inferiority and greater weakness of women (paternalistic approach). In spite of the particular severity and cruelty of this type of criminal sanction, it should be applied equally for men and women, regardless of sex and without relevance to the much greater number of men than women commit death-eligible crimes.

There is no legitimate reason – apart from a current state of pregnancy or maternity – that justifies the absolute exclusion of women from being sentenced to death.³⁷ In addition, this favourable treatment of female defendants in capital sentencing in comparison with male defendants is problematic also when it comes to proving direct discrimination in death penalty cases given that in most such cases the victim of discrimination (male capital defendant claiming discrimination on the grounds of gender) will have no direct access to evidence concerning the subjective motive of the discriminator; this makes it extremely difficult for the person sentenced to death to prove direct discrimination. What is of even greater concern is the possibility of influencing prosecutors', jurors' and judges' decisions in the capital sentencing process by various combinations and interactions of gender, race, age, socio-economic, employment and family status that perpetrators and/or victims of capital offences possess.³⁸ Accordingly, the discriminator's motive, which in fact reflects the subjective state of mind of the perpetrator, should not serve as a possible justification for direct discrimination in capital cases.

In some European states (including the UK and the Netherlands), it is now a general and established principle of law that motive cannot be relevant in proving direct discrimination. It follows from several domestic courts' decisions that unequal treatment cannot be justified by a discriminator's motive, intention, reason or purpose.³⁹

In light of these recent legal developments found in European countries, the US Supreme Court's reasoning in the *McCleskey* case, which is based on the Equal Protection Clause of the Fourteenth Amendment to the US Constitution, which places the discriminatory intent (as the state of mind) of jury members and judges at the centre of the concept of direct discrimination, appears to be faulty and outdated. These constitutional provisions impose on the capital defendant alleging a violation of equal treatment an excessive burden of

³³ It is beyond debate that such arguments convey strongly stereotyped and racist notions. And the fact is that the capital defendant of Afro-American origin has been treated less favourably by the capital prosecution, jury and/or judiciary due to ascribed group characteristics which are, more often than not, inaccurate.

³⁴ In the same vein, Gross distinguishes discriminatory 'intent' from motive or design and maintains that in most cases, such an intent 'must be inferred from circumstantial evidence, generally evidence that negates other possible explanations for a pattern or actions'. He also believes that 'judges can, if they wish, use an intent requirement to make a proof of discrimination difficult, or impossible'. Samuel R Gross, 'Race and Death: The Judicial Evaluation of Evidence of Discrimination in Capital Sentencing' (1985) 18 Davis L. Rev. 1284–5.

³⁵ In American jurisprudence the usual standard for proof of racially discriminatory intent requires 'a clear pattern, unexplainable on grounds other than race'; *ibid* 1295.

³⁶ Schiek, Waddington and Bell (n 8) 227.

³⁷ Interestingly, in accordance with Article 22 of Belarusian criminal code women are ineligible for capital punishment. Criminal Code of the Republic of Belarus, Article 22, 9 July 1999, amended on 17 July 2006, (Criminal Code).

³⁸ For instance, the results of studies on victim of capital crime's 'gender effect' in chosen US death penalty jurisdictions conducted by Demuth, Holcomb and Williams revealed pronounced disparities in the application of capital punishment when the victims' gender and race were at issue. The odds that the offenders convicted of murdering white females are sentenced to death are by far the highest in comparison with all other gender-race victim combinations. Marian Williams, Stephen Demuth and Jefferson E Holcomb, 'Understanding the Influence of Victim Gender in Death Penalty Cases: The Importance of Victim Race, Sex-Related Victimization, and Jury Decision Making' (2007) 45 Criminology 865–891; Jefferson E Holcomb, Marian Williams and Stephen Demuth, 'White Female Victims and Death Penalty Disparity Research' (2004) 21 Justice Quarterly 4 877–902.

³⁹ Schiek, Waddington and Bell (n 8) 229.

proving 'the existence of purposeful discrimination'⁴⁰ perpetrated by decision makers in their case and,⁴¹ as a corollary to this, that such purposeful discrimination had a discriminatory effect on them.⁴² Without some kind of admission on the part of the capital prosecutor, juror or judge it is well-nigh impossible for a capital defendant to obtain the evidence of intentional or deliberate and conscious bias.⁴³ Indeed, with the *McCleskey* judgment the US Supreme Court rendered the entire American criminal justice system immune from judicial and wider public scrutiny when it comes to the issue of racial disparities and discrimination.⁴⁴

F. Difference in Treatment

A distinctive feature of direct discrimination's legal definition as contained in the EU non-discrimination directives is the requirement of less favourable treatment of the complainant. Hence, the relevant question in the legal context is whether any difference in treatment, however minor, can be taken to satisfy this legal criterion or whether a certain magnitude must be reached in order to be able to speak about such a difference in legal terms. Both the relevant text of EU non-discrimination directives and provisions of other international instruments on the prohibition of discrimination are silent on this issue. The lack of such legal qualification thus allows for national lawyers and judges to have differing legal interpretations as to the sufficient level of differential treatment.⁴⁵ However, in each capital case where the difference in treatment is established, domestic courts should very carefully consider whether the complainant actually suffered any detriment or disadvantage as a result of unequal treatment (for example, the capital defendant's legal defence was poor because of their weak financial, economic or social status or because the legal counsel approached the capital case involving an Afro-American defendant less seriously and acted less professionally than in similar cases dealing with white capital defendants).

The following section examines and compares some relevant proposals of proving discrimination in capital sentencing cases elaborated on in American federal and states' laws and presented in jurisprudence and legal scholarship, by shedding light on their benefits and shortcomings.

III. Initial proposals and recent US legislation, jurisprudence and scholarship on discriminatory application of the death penalty that alters the dominant US approach – Kentucky, North Carolina and New Jersey

In the aftermath of the *McCleskey* decision, there have been some congressional attempts in the United States to address the problem of proving racial discrimination in the administration of the death penalty by statistical evidence at the federal level which, in fact, all failed.⁴⁶ Thus, the initial federal legislative proposals

⁴⁰ Blume, Eisenberg and Johnson believe that the requirement to prove – by direct evidence – the discriminatory intent (which is often invidious) on the part of decision-makers in capital cases under constitutional equal protection principles is not so much problematic itself but it is the perfunctory way the US courts treat available evidence and facts from which invidious discriminatory purpose may be inferred which is to blame for the reality that, in capital cases, racial discrimination claims have always failed. John H Blume, Theodore Eisenberg and Sheri Lynn Johnson, 'Post-McCleskey Racial Discrimination Claims in Capital Cases' (1998) 83 Cornell Law Review 1771, 1780–81.

⁴¹ In *Foster v State*, Chief Justice Bartlett disagreed with the *McCleskey* standard of proof which, according to her, 'requires showing something that is virtually impossible to show: purposeful discrimination'. She also considered the possibility to lower this standard by the US Supreme Court in its future decisions: 'The US Supreme Court may eventually recognize that the burden imposed by McCleskey is as insurmountable as that presented by Swain. In the meantime, defendants such as Foster have no chance of proving that application of the death penalty in a particular jurisdiction is racially discriminatory, no matter how convincing their evidence.' See *Foster v State of Florida* (n 13) 465, 466.

⁴² *McCleskey v Kemp* (n 3) para 293.

⁴³ In its Concluding observations addressed to the United States of America, the Committee on the Elimination of Racial Discrimination expressed its concerns regarding claims of racial discrimination under the Due Process Clause of the Fifth Amendment to the US Constitution and the Equal Protection Clause of the Fourteenth Amendment which must be accompanied by proof of intentional discrimination. Committee on the Elimination of Racial Discrimination, Concluding Observations regarding the United States of America, 8 May 2008, CERD/C/USA/CO/6, para 35.

⁴⁴ To date no capital defendant has been able to satisfy the insurmountable criterion of discriminatory purpose set by the US Supreme Court in the *McCleskey* case. See also Blume, Eisenberg and Johnson (n 40) 1809.

⁴⁵ See Schiek, Waddington and Bell (n 8) 237.

⁴⁶ For a more detailed historical report of the efforts made and critical review of solutions proposed by the US Congress to enact a federal death penalty law which would authorise the use of statistical methods of proof in proving discriminatory decision-making processes in capital cases, see David C Baldus, George Woodworth and Charles A Pulaski, 'Reflections on the "Inevitability" of Racial Discrimination in Capital Sentencing and the "Impossibility" of Its Prevention, Detection, and Correction' (1994) 51 Washington and Lee Law Review 377–89; see also Scott Vollum, Rolando V. del Carmen, Durant Frantzen, Claudia San Miguel and Kelly Cheeseman, *The Death Penalty: Constitutional Issues, Commentaries and Case Briefs* third edition (Routledge 2015) 45–46 and Rees Alexander, 'A Model State Racial Justice Act: Fighting Racial Bias Without Killing the Death Penalty' (Ohio State University, Michael E. Moritz College of Law, April 2013) <<https://doi.org/10.2139/ssrn.2249013>> accessed 4 April 2014, 7–9.

aiming to remedy the issue, commonly known as the federal Racial Justice Act and Fairness in Death Sentencing Act, have never been adopted or enacted as formal law. Both legislative proposals envisaged measures designed to provide those sentenced to death with the same right to challenge their individual sentences on the basis of racial discrimination as is afforded to individuals alleging racial discrimination in civil cases under federal employment and housing laws. The federal Racial Justice Act would enable a person sentenced to death to challenge their sentence if its imposition 'furthers a racially discriminatory pattern'⁴⁷ of death sentencing in the capital offender's jurisdiction.

The proposed federal Racial Justice Act is built on a risk-based model of proof allowing the use of 'ordinary methods of statistical proof'⁴⁸ similar to those applied in the cases of racial discrimination claims in the context of jury selection. It also explicitly provided that such statistical evidence showing a racially disproportionate pattern of death penalty application should suffice to establish a *prima facie* case of racial discrimination and that proving any discriminatory motive, intent, or purpose on the part of the alleged perpetrator (individual or institution) is unnecessary.⁴⁹ The proposed law would give a state or federal entity the opportunity to rebut such *prima facie* evidence of a racially discriminatory pattern by furnishing 'clear and convincing evidence that identifiable and pertinent non-racial factors persuasively explain the observable racial disparities comprising the pattern'.⁵⁰ This implies that in the absence of such a rebuttal by the state the convicted person would be entitled to relief from their death sentence if their case fell within a category of cases with racial disparities to their detriment. In addition, this legislative proposal would also impose an obligation on death penalty jurisdictions to collect and maintain pertinent and sufficient statistical data on all potential capital cases so as to enable capital defendants and responsible state or federal entities to take necessary actions in the cases of future discrimination litigation under the Act.⁵¹

The second proposal of US federal legislation, the so-called Fairness in Death Sentencing Act, was, in essence, very similar to the federal Racial Justice Act. It would also be predicated on a risk-based model of proof and thus allow an individual condemned to death to use statistics in order to prove a *prima facie* case of discrimination. The major differences between both proposals are that the Fairness in Death Sentencing Act contained more specific provisions on establishing a *prima facie* case by requiring that large and statistically significant racial disparities are presented by relevant evidence,⁵² and that it would not require the state to collect any relevant statistical data. However, it would provide potential litigants with the possibility to obtain and present valid and official statistics made by public officials.⁵³ If, by means of statistical data, an inference was established that race was a basis for the death sentence, the government could rebut such inference only by a preponderance of the evidence. In the absence of such a rebuttal by the respondent government, the capital defendant would be relieved from their death sentence. Additionally, explanations and justifications made by the government that 'it did not intend to discriminate' or that 'the cases in which death was imposed fit the statutory criteria for imposition of death penalty' would not suffice to discharge its burden of proof, unless the government could provide a clear demonstration.⁵⁴ It is noteworthy that the two legislative proposals encountered pretty strong opposition in both the US Congress and Senate.⁵⁵

To prevail under the proposed Fairness in Death Sentencing Act, the capital defendant claiming the existence of racial discrimination in their capital case would need to prove by a preponderance of evidence either that race was a motivating factor in their individual case or that the death penalty was being

⁴⁷ The relevant text of the proposed federal Racial Justice Act of 1989 is available as Appendix A to the article Baldus, Woodworth and Pulaski (n 46) 420–421. Racial Justice Act, § 2922 (a).

⁴⁸ *ibid* (n 46) 421; Racial Justice Act, § 2922 (b).

⁴⁹ *ibid* 421; Racial Justice Act, § 2922 (b)(2).

⁵⁰ *ibid* 421; Racial Justice Act, § 2922 (c)(2).

⁵¹ *ibid* 421–422; Racial Justice Act, § 2923.

⁵² The relevant text of the proposed federal Fairness in Death Sentencing Act of 1991 is available as Appendix B to the article Baldus, Woodworth and Pulaski (n 46) 424. Fairness in Death Sentencing Act, § 2921(d).

⁵³ *ibid* 425; Fairness in Death Sentencing Act, § 2922.

⁵⁴ *ibid* 425; Fairness in Death Sentencing Act, § 2921(e). See also, Hugo Adam Bedau (ed.), *The Death Penalty in America: Current Controversies* (Oxford University Press 1997) 253.

⁵⁵ The opponents and critics of such federal legislation allowing for statistical evidence of racial disparities brought forward several counter-arguments ranging from those of conceptual and methodological value to more technical and pragmatic ones. For an insightful account of such objections, see Baldus, Woodworth and Pulaski (n 46) 379–385. Some commentators claimed, for example, that the proposed Racial Justice Act 'changes the focus of the US criminal justice system from case-specific fairness to quota-based equivalence' and raises such issues as 'statistics shopping'. Daniel E. Lungren and Mark L. Krotoski, 'The Racial Justice Act of 1994 – Undermining Enforcement of the Death Penalty Without Promoting Racial Justice' (1994–1995) 20 U. Dayton L. Rev. 655, 661, 679. For some well thought-out responses to these criticisms, see Erwin Chemerinsky, 'Eliminating Discrimination in Administering the Death Penalty: The Need for the Racial Justice Act' (1995) 35 Santa Clara L. Rev. 529–533.

administered in a racially discriminatory manner in the jurisdiction in question. In principle, the Act would provide for the possibility to prove a *prima facie* case by direct evidence, such as racist remarks or admissions by key decision-makers in capital cases. However, the possibility of establishing a *prima facie* case of racial discrimination with statistical evidence is by far more important since it is very unlikely that direct evidence will be available and, therefore, it will be necessary for the court to draw inferences from circumstantial evidence showing racially discriminatory effects in certain death penalty jurisdictions. In addition, the proposed Act would require statistically significant evidence in substantiation of the claimant's allegations of discrimination.⁵⁶ Such substantial statistical disparity must account for the statutorily required aggravating factors appearing in all of the relevant capital cases. Hence, small or minor statistical or numerical disparities would fail to meet these requirements and would not be sufficient to support an inference of discrimination. As a result, in jurisdictions with a small death row population, statistical evidence alone, without further relevant evidence (either qualitative or quantitative), supporting the inference of discrimination would not be enough to establish a *prima facie* case.⁵⁷

Under the proposed Fairness in Death Sentencing Act, the respondent state could refute the plaintiff's claim of discrimination by several defences. First, it could demonstrate that the magnitude of statistical disparities presented by the claimant's evidence does not satisfy the legislative requirement of 'statistical significance'⁵⁸ to substantiate a *prima facie* case. Second, if the complainant succeeded in establishing a *prima facie* case, the respondent state would have the possibility of proving, by a preponderance of the evidence, that identifiable and non-racial factors persuasively explain the racial disparities. In doing so, the respondent state could use various reliable and generally accepted statistical procedures, methods and techniques taking into account statutory and non-statutory aggravating and mitigating factors that could ultimately clarify that the disparities, as shown by the claimant, are, in fact, based on objective and relevant non-racial or race-neutral factors and are not the product of unlawful discrimination.

In this sense, the statistical methods of proving discrimination, if employed correctly and appropriately, provide for more valid and just judicial evaluation of discrimination claims. Some congressional opponents contended that such a legislative proposal, if adopted, would require states to compile and maintain massive statistical databases. As suggested by some leading experts in the field,⁵⁹ information on relatively few factual circumstances – aside from data on the presence or absence of the statutory aggravating and mitigating factors – relating to each particular capital case is required in order to make the statistical analysis needed to support a claim of discrimination.

The need for the respondent state to employ the third defence available under the proposed legislation would arise only where the state could not disprove substantial statistical evidence showing that in a given category of death penalty cases, racial factors were affecting the sentences inflicted. If this was the case, the respondent state would still be able to prevail by demonstrating either that the complainant's case, due to factual differences, should not fall within the relevant category of capital cases affected by the observed pattern of discrimination or that the race of the capital defendant/victim is not captured by the demonstrated pattern of discrimination. The final possibility of the respondent state to successfully rebut the claim of discrimination supported by statistical evidence would be to show that, in fact, the state-wide evidence and the evidence from the complainant's own judicial district or circuit did not reflect a similar pattern of discrimination.⁶⁰

All things considered, one can readily conclude that the model of proof as contemplated in the proposed Fairness in Death Sentencing Act would provide adequate safeguards for the states as potential respondents from unjustified or indefensible discrimination claims provided that their death penalty systems are administered in an even-handed fashion.

In contrast to the legislative steps taken at the federal level, the project was successfully concluded by two state legislatures – Kentucky's and North Carolina's General Assemblies, where Racial Justice Acts allowing the use of statistical evidence in proving racial discrimination in the capital sentencing context were

⁵⁶ Baldus, Woodworth and Pulaski suggest that rigid application of a statistical significance requirement 'may be appropriately relaxed' in those capital sentencing cases where 'because of a small sample size a demonstrated substantial racial disparity fails to achieve statistical significance and there is other convincing (qualitative or quantitative) evidence to support the inference of discrimination'. *ibid* 391.

⁵⁷ See more on this issue in Baldus, Woodworth and Pulaski (n 46) 392.

⁵⁸ Baldus, Woodworth and Pulaski noted that 'the level of statistical significance of a disparity in the death sentencing context depends primarily on the size of the disparity and the number of cases (sample size) involved in the analysis'. *ibid* 409.

⁵⁹ *ibid* 397.

⁶⁰ See also Baldus, Woodworth and Pulaski (n 46) 398.

passed in 1998 and 2009 respectively. Under Kentucky's statute,⁶¹ a capital defendant's racial discrimination challenge is limited to prosecutorial charging decisions. Capital defendants cannot challenge prosecutorial strike decisions, capital jury's decisions, or trial judges' decisions by arguing that these decisions led to discrimination against the defendant. To establish a *prima facie* case of discrimination, the statute allows a capital defendant to use statistical evidence, other (qualitative) evidence, or both.⁶² Pursuant to the statute's provisions, the capital defendant has the burden of proving by 'clear and convincing' evidence that race was the basis of the prosecutor's decision to seek the death penalty.⁶³ Specifically, the capital defendant must state with particularity how their evidence supports a claim that race was a significant factor in the prosecutor's charging decision in their case. In other words, the capital defendant needs to show how a general pattern of racial discrimination in prosecutorial decisions to seek the death sentence affects their particular case. This requirement however, is somewhat ambiguous and allows for, at least, two different interpretations.

First, this statute's provisions may be construed broadly so as to require the capital defendant to merely demonstrate that their case falls within the category of cases embraced within the general pattern of racial disparities, for example that the prosecutor who sought the death sentence in their case was a part of a prosecutor's office that followed the state-wide pattern of discriminatory charging decisions (a risk-based approach). Second, in a stricter sense, the 'particularity' requirement could imply that the capital defendant must present the evidence of discrimination that is specific to their case (a causation-based approach). Indeed, such a strict interpretation would be counterproductive because it would largely frustrate the capital defendant's possibility to establish a *prima facie* case of discrimination by statistical evidence alone.⁶⁴ Therefore, the broader interpretation would be more reasonable.⁶⁵ If the capital defendant successfully demonstrates that the death sentence was sought because of race, the respondent state may offer its evidence to rebut the capital defendant's claims or evidence. The prosecutor is prohibited from seeking the capital sentence in a given case if the trial court finds that their charging decision was based on race.⁶⁶

Although Kentucky's Racial Justice Act provides some significant protections to capital defendants from potential racially discriminatory charging decisions, its model of proving discrimination contains some notable flaws. These include: 1) the impossibility to challenge jurors' and trial judges' decisions; 2) the temporal limitation of the possibility to challenge prosecutorial charging decisions to the pre-trial phase; and 3) the requirement that capital defendants need to present 'clear and convincing' evidence in support of their discrimination claims which is an unreasonably high burden of proof. Nevertheless, some observers note that the statute has had some limited impact on the prosecutorial charging decisions in death-eligible cases.⁶⁷

Another example of a state's legislation specifically addressing the issue of individual discrimination challenges in capital cases is North Carolina's recently repealed Racial Justice Act.⁶⁸ Under this statute, death row inmates who wished to raise discrimination claims were not required to produce evidence of purposeful discrimination in order to prevail in their individual case. North Carolina's law was very inclusive in its scope since it allowed capital defendants to challenge, by using statistical evidence, both the decision to seek and the decision to impose the death sentence. Thus, unlike Kentucky's Racial Justice Act, its provisions on discrimination claims applied to the entire capital sentencing process, including the capital jury's and trial judge's sentencing decisions. Its specificity was also that it entitled capital defendants to challenge prosecutorial peremptory strike decisions, including by using statistical evidence, if they considered that 'race was a significant factor in decisions to exercise peremptory challenges during jury selection'.⁶⁹

⁶¹ Alexander (n 46) 11.

⁶² The statute allows the capital defendant to use statistical evidence showing only state-wide disparities which means that statistics revealing disparities at the county, judicial district, or prosecutorial district level cannot be used in proving their discrimination claim. For a brief discussion on possible advantages and disadvantages of these provisions, see, Alexander (n 46) 11–13.

⁶³ The suspect categories under the statute are both the race of the defendant and the race of the victim of capital offence; Alexander (n 46) 12.

⁶⁴ See also, Alexander (n 46) 14.

⁶⁵ *ibid* 12–13.

⁶⁶ *ibid* 43.

⁶⁷ *ibid* 14–15.

⁶⁸ The statute originally provided strong and far-reaching protections to capital defendants from racially discriminatory capital sentencing decisions. However, in 2012 the act was revised in order to substantially weaken or limit some of the most capital defendant-friendly provisions; *ibid* 16.

⁶⁹ *ibid* 17–18.

Many statistical studies, including the most comprehensive, rigorous and sophisticated, have shown that in the United States, race is a significant factor in all crucial decision-making phases of capital proceedings, from the point of indictment and charging decisions to jury selection and final sentencing decisions.⁷⁰ In its recent decision in the case of *Robinson*, the North Carolina Superior Court relied on the Michigan State University's study on jury selection, stating that the study can serve as powerful statistical evidence of racial bias in the North Carolina State's,⁷¹ the former Second Judicial Division's and Cumberland County's capital sentencing systems, most notably in prosecutorial jury selection decisions at the time when Marcus Robinson was sentenced to death. Robinson's death sentence was consequently commuted to life imprisonment without possibility of parole.⁷² Central for the Superior Court's decision was a landmark law passed in 2009, North Carolina's Racial Justice Act, under which capital defendants were allowed to challenge their sentence by showing that racial bias was a significant factor in decisions to seek or impose the death penalty.⁷³

This act was based on a risk-based model of proof of the type contemplated in the proposed federal Racial Justice Act and Fairness in Death Sentencing Act and did not require the complainant to provide further evidence showing factual discrimination in their particular case; in order to transfer the burden of proof from the complainant to the respondent state it was sufficient to show statistical evidence of state-wide racial discrimination. However, efforts have been made lately to modify this unique act so as to change its relevant provisions on proving discrimination in capital cases and to require capital defendants to show discrimination in the county or prosecutorial district at the time the death penalty was sought or imposed.⁷⁴

Following these attempts, the North Carolina State House passed a new bill in June 2012 and a year later, in June 2013, but North Carolina's 2009 Racial Justice Act, was repealed by the Governor.⁷⁵ The main reason for this action was that 'nearly every person on death row, regardless of race, has appealed their death sentence under the Racial Justice Act' and that the act as such 'created a judicial loophole to avoid the death penalty and not a path to justice'.⁷⁶ Consequently, with the adoption of amended legislation concerning death penalty procedures, the provisions on proving racial discrimination in capital cases have been substantially weakened, to the prejudice of death row inmates. Thus, the current legal text provides that the burden to prove that race was a significant factor in decisions to seek or impose a death sentence rests on the capital defendant and that statistical evidence can be used as evidence relevant to establish a finding of a racially biased decision in the capital sentencing process;⁷⁷ however, the statistics alone are insufficient to establish a presumption or *prima facie* case that race played a significant role in prosecutorial or sentencing decisions.⁷⁸

Therefore, the act also allows for the use of other evidence of a qualitative nature, such as the sworn testimony of attorneys, prosecutors, law enforcement officers, judicial officials, jurors, or others involved in the criminal justice system. In addition, the capital defendant needs to clearly state, in particular, how the evidence provided supports their claim of racial discrimination.⁷⁹ In rebuttal of the claims or evidence

⁷⁰ Baldus, Woodworth and Pulaski (n 46) 386.

⁷¹ Barbara O'Brien and Catherine M Grosso, 'Report on Jury Selection Study' (Michigan State University, College of Law, 29 September 2011) <http://www.aclu.org/files/assets/jss_revised_report_with_appendix_29_sept_2011.pdf> accessed 22 November 2013.

⁷² Superior Court, Judge Gregory A. Weeks, *State of North Carolina v Marcus Reymond Robinson*, 22 April 2012, <<http://www.death-penaltyinfo.org/documents/RobinsonRJAOrder.pdf>> accessed 22 November 2013.

⁷³ Pursuant to the Racial Justice Act, N.C. Gen. Stat. § 15A-2012(a)(3), a capital defendant shall prevail in their case if there is evidence proving that 'race was a significant factor in decisions to seek or impose the sentence of death in the county, the prosecutorial district, the judicial division, or the Sates at the time the death sentence was sought or imposed'.

⁷⁴ 'The Death Penalty in the OSCE Area' (OSCE/ODIHR, Background Paper 2012) <<http://www.osce.org/odihr/94219>> accessed 22 November 2013 at 16.

⁷⁵ *ibid* 30.

⁷⁶ 'Racial Justice Act repealed in North Carolina' (CNN, 21 June 2013) <<http://edition.cnn.com/2013/06/20/justice/north-carolina-death-penalty>> accessed 22 November 2013.

⁷⁷ See *State v Golpin*, No. 97 CRS 47314-15, (N.C. Sup. Ct. Cumberland County Dec. 13, 2012) 12, <http://nccadp.org/wp-content/uploads/2013/08/rja_order_12-13-12.pdf> accessed 13 April 2014.

⁷⁸ *ibid* 12.

⁷⁹ The suspect categories of races that may be demonstrated as statistical disparities under the amended statute are the race of the capital defendant and the race of the selected capital jurors with regard to prosecutorial peremptory strikes decisions, but not the race of the victim of a capital offence which is certainly an important step backward in legislating an adequate protection from racially discriminatory capital sentencing. General Assembly of North Carolina, An act to amend death penalty procedures, Senate Bill 416 (Ratified Bill), G.S. 15A-2011(d), 21 June 2012, <<http://www.ncleg.net/Sessions/2011/Bills/Senate/PDF/S416v5.pdf>> accessed 22 November 2013.

submitted by the capital defendant, the respondent state may present to the court its evidence, not excepting statistical information.⁸⁰

Under this burden-sharing scheme, the burden of production falls upon the respondent state as soon as the capital defendant succeeds in establishing a *prima facie* case that race was a significant factor.⁸¹ The respondent state must then rebut the claimant's case and dispel the inference of discrimination. In doing so, its simple non-discriminatory explanation, such as the commissioner's protestation that racial considerations did not play any part in the decisions to exercise a peremptory strike or seek or impose the sentence of death, will not be enough. The respondent state can use statistical or other evidence in rebuttal of the capital defendant's claims and evidence of discrimination. The statute provides that the respondent state may also offer the evidence showing that the state had 'any program the purpose of which is to eliminate race as a factor in seeking or imposing a sentence of death'.⁸² The capital defendant bears the ultimate burden of persuasion and in considering whether they have met this burden the trial court will examine and weigh 'all of the admissible evidence and the totality of the circumstances'.⁸³ The Racial Justice Act provides for a single remedy: if the respondent state fails to rebut the capital defendant's *prima facie* evidence, the capital sentence must be vacated and the sentence of life imprisonment without the possibility of parole must be imposed.⁸⁴

It is important to note that not all US states' courts and judges chose to espouse the *McCleskey* approach in considering and evaluating detailed evidence (including statistics) presented when pursuing individual and structural capital sentencing discrimination challenges. For example, the New Jersey Supreme Court first addressed the issue of a structural challenge to the constitutional fairness of its death penalty system in *State v Marshall*, seeking to answer the operative question of whether the race of the defendant/victim 'played a significant part in capital-sentencing decisions in New Jersey'.⁸⁵ In its decision the Court eloquently rejected some crucial findings and arguments from the *McCleskey* ruling. It was particularly critical of the US Supreme Court's holding that 'apparent disparities in sentencing are an inevitable part of our criminal justice system' since such a statement indicates that 'absent purposeful discrimination, the Supreme Court apparently will not invalidate a death sentence on the basis of racial disparity, no matter how profound'.⁸⁶ It also specifically confronted the *McCleskey* Court's concerns and anticipation that, if the case was decided in favour of *McCleskey*, an unmanageable number of equal-protection claims would follow throughout the criminal justice system.⁸⁷ Although the New Jersey Supreme Court focused in *Marshall* mainly on structural challenges to the capital punishment system as a whole to find eventual evidence of unconstitutional discrimination (which was not found), it did not foreclose the possibility of recognising an individual claim of racial discrimination in a particular capital sentencing case.

Another such interesting example of a critical reaction towards the *McCleskey* decision comes from the Florida Supreme Court, where former Chief Justice Barkett in her dissenting opinion in *Foster v State* rejected the *McCleskey* ruling as inconsistent with the Florida Constitution and came up with an alternative approach to examining and proving racial discrimination with respect to prosecutorial decisions to seek the capital sentence.⁸⁸ Like the New Jersey Supreme Court, she emphasized that: 'Discrimination, whether conscious or unconscious, cannot be permitted in Florida courts. As important as it is to ensure a jury selection process free from racial discrimination, it is infinitely more important to ensure that the State is not imposing the ultimate penalty of death in a racially discriminatory manner'.⁸⁹

Obviously, it is possible to draw a parallel between the Barkett's model of proof and Justice Blackmun's approach to these issues put forward in his dissenting opinion in the *McCleskey* case, since both

⁸⁰ *ibid* (c)(d)(e)(f)(3).

⁸¹ *State v Golphin* (n 77) 28–30.

⁸² Alexander (n 46) 19.

⁸³ *State v Golphin* (n 77) 19.

⁸⁴ An act to amend death penalty procedures (n 79) (g)(3).

⁸⁵ *State of New Jersey v Robert O. Marshall*, 613 A.2d 1059 (N.J. 1992), 1110. It is noteworthy that New Jersey abolished the death penalty in 2007 so that this discussion of the New Jersey Supreme Court's approach only serves to show that there were other approaches to allowing statistical information to help prove racial discrimination in capital cases.

⁸⁶ *ibid* 1108.

⁸⁷ *ibid* 1110.

⁸⁸ In this case Chief Justice Barkett differed from the majority decision which applied the federal constitutional standard of 'purposeful discrimination'. She believed that for a capital defendant it is impossible to meet such a high standard of proof and, because of that, the Court should 'craft a state constitutional standard' which, according to her, should employ a burden-shifting approach resembling the one applied by non-discrimination laws in other contexts; *Foster v State of Florida* (n 13) 468.

⁸⁹ *ibid* 466.

proposals build on risk-based models and do not require evidence that the specific decision challenged by a discrimination claim was racially motivated. Thus, in order to establish a *prima facie* case according to Barkett's proposal,⁹⁰ it is sufficient for the claimant to prove that racial considerations affected relevant prosecutorial decision-making practices in a given state attorney's office.⁹¹ To successfully rebut such a presumption of discrimination, the respondent state would then need to demonstrate that 'the practices in question are not racially motivated'.⁹² If the respondent state fails to meet this burden of proof, it would not be permitted to seek the capital sentence in that case.⁹³ According to Chief Justice Barkett's belief, the evidence as applied in the context of proving discriminatory prosecutorial decisions to seek the death sentence should be construed as a broad concept including qualitative and, more importantly, quantitative evidence, such as statistical analysis,⁹⁴ or any other relevant information that might be suggestive of unlawful discrimination, such as 'the resources devoted to the prosecution of cases involving white victims as contrasted to those involving minority victims, and the general conduct of a state attorney's office, including hiring practices and the use of racial epithets and jokes'.⁹⁵

Barkett's proposal exhibits several virtues and is, in many respects, very close to the standard of proof entrenched in EU non-discrimination law.⁹⁶ First, it contemplates a burden-sharing approach as applied in discrimination claims in many other contexts and does not place an unreasonable burden of proof on the capital defendant. The second strength of this proposal is that it allows the trial court to evaluate all aspects of existing bias and to review all kinds of relevant evidence, including statistical data and analyses. The proposal's third advantage lies in the fact that it is possible to expect that such a model of proof would probably urge prosecutors' offices and other relevant state agencies to gather and maintain data on all death-eligible cases and make these data publicly accessible to enable their use in potential discrimination litigation. These records could also be applied for self-monitoring purposes, that is to scrutinise and eventually diminish/eliminate the involvement of conscious and unconscious racial bias in prosecutorial decision-making practices. Next, because it concentrates on discrimination challenges to prosecutorial decisions in a pre-trial phase, the model can be regarded as rather parsimonious. It would avoid the capital trials' and multiple post-conviction proceedings' expenses and harmful consequences for capital defendants and decrease the courts' workload. In addition, it would not require the state to establish and maintain impossibly large and expensive databases. Lastly, given its apparent focus on discrimination challenges to prosecutorial decisions to seek the death sentence, it would require only prosecutors to explain and defend their challenged decisions, whereas the same would not be asked from capital jurors and trial judges, who are normally less likely to be in a position to do this.

The major drawback of the standard of proof proposed by Chief Justice Barkett is that it seems to ignore a judicial and, in particular, capital jury's decision-making phase and is, therefore, too narrow in its possible application.⁹⁷ There are many veracious statistical and narrative sources, including depositions of those serving on capital juries,⁹⁸ as well as experimental studies which confirm that racial bias often plays a substantial role in the capital jury's decisions. Even more significantly, it was found in *Andrews v United States* by virtue of clear and convincing evidence that unlawful racial bias entered the capital jury's decision-making process in this particular case.⁹⁹ Therefore, the application of the same standard of proof should necessarily be extended to discrimination claims targeting biased capital juries' decisions.¹⁰⁰

Some interesting proposals for identifying an appropriate model of proof to be applied in individual capital sentencing discrimination claims have been presented in legal scholarship as well, mainly in response to the existing legislative and judicial models. These alternative models elaborate on previous experiences

⁹⁰ It is important to note that the Barkett's approach covers both the race of the capital defendant and the race of the victim; *ibid* 468.

⁹¹ *ibid* 467–68.

⁹² *ibid* 468.

⁹³ *ibid* 468.

⁹⁴ Statistical evidence in a more narrow sense could be, for example, a 'historical analysis of the disposition of first-degree murder cases in a particular jurisdiction'. *ibid* 467.

⁹⁵ *ibid* 467.

⁹⁶ On the benefits of the Chief Justice Barkett's model of proof, see Baldus, Woodworth and Pulaski (n 46) 416–417.

⁹⁷ Baldus, Woodworth and Pulaski anticipate that this model of proof could be applied also to challenge judicial capital sentencing decisions in those jurisdictions in which trial judges act as final decision-makers in capital trials; Baldus, Woodworth and Pulaski (n 46) 417.

⁹⁸ For such valuable sources providing various examples of racially biased capital juries' decision-making, see, Benjamin Fleury-Steiner, *Jurors' Stories of Death: How America's Death Penalty Invests in Inequality* (University of Michigan Press 2004); Jamie L Flexon, *Racial Disparities in Capital Sentencing: Prejudice and Discrimination in the Jury Room* (LFB Scholarly Publishing LLC 2012).

⁹⁹ *William Andrews v United States* (n 2) para 165.

¹⁰⁰ In the same vein, see, Alexander (n 46) at 23–26, 46–47.

and developments and seek to remedy some major deficiencies and failures of the evidentiary approaches embraced in the proposed or existing legislation and in jurisprudential interpretations. Alexander's recent proposal,¹⁰¹ in particular, deserves a more detailed review and analysis.

This proposal places on the capital defendant the burden to prove 'clearly and convincingly' their claim that 'race was a significant factor in decisions to seek or impose the sentence of death in the county, prosecutorial district, or state at the time the death sentence was sought or imposed'.¹⁰² Here it must be pointed out that, in general, the standard of 'clear and convincing' evidence requires a clear-cut and direct proof of discrimination (for example, an admission on the part of an alleged discriminator). This type of proof is hardly ever available in discrimination cases, and to require the complainant to present this evidence thereby precludes the hearing court from drawing inferences of discrimination from available primary facts.¹⁰³ Therefore, this aspect of the proposed model's legal standard of proof is too onerous and somewhat unfair for the capital defendant. In addition, the author does not clarify or exemplify what proof is able to meet the 'clear and convincing' evidence requirement, although the proposed text does mention some examples which might be illustrative of what can be considered 'clear and convincing' for the purposes of the statute, such as statistical evidence (either alone or in combination with other available evidence), and sworn testimonies of attorneys, prosecutors, law enforcement officers, judicial officials, jurors, or others involved in the criminal justice system.¹⁰⁴

According to Alexander's model of proof, the defendant claiming racial discrimination in their capital case would need to provide powerful evidence in support of their claim in order to get the government before the court to conduct an evidentiary hearing.¹⁰⁵ The weakest and most unfounded claims of racial discrimination could be dismissed by the court without having to seek any response from the government, thereby decreasing unwarranted discrimination litigation costs.¹⁰⁶ In the case of the defendant's strong statistical evidence, however, the respondent government would have a legitimate possibility to rebut such evidence by showing that in the claimant's individual case statistical disparities in death sentencing can reasonably be explained by non-racial factors.¹⁰⁷ Accordingly, the claimant would carry the burden of establishing by a preponderance of the evidence a *prima facie* case of discrimination. If the claimant succeeded in establishing such a presumption of discrimination, an inference of discrimination would arise and trigger a shift in the burden of proof. Then the respondent government would be required to articulate a legitimate and non-discriminatory reason to rebut the established inference of discrimination. Once the government successfully showed a non-discriminatory reason for its decision, the burden of proof would shift back to the claimant to clearly demonstrate that the respondent government's articulated non-discriminatory reason for its action was a mere excuse for unlawful discrimination.¹⁰⁸

Risk-based models of proof, as described above in this section, clearly provide for a causal inference. This means that once an unrefuted *prima facie* case has been established by the claimant, the provided evidence sustains an inference that race, ethnicity, gender, sexual orientation and/or socio-economic status of the capital defendant and/or victim of a capital offence substantially influenced decisions on seeking or imposing the death sentence in some death-eligible cases implicated by the statistical analysis. The unrebutted statistical evidence of discrimination thus creates a presumption that prohibited ground(s) of discrimination adversely affected each case so implicated. This presumption is irrefutable under a risk-based model of proof. As a consequence, all cases implicated by such statistical evidence are potentially eligible for relief and, therefore, definitive proof of a causal connection between the prohibited discrimination ground(s) and the adverse decision in any specific case within the relevant group of cases is unnecessary.¹⁰⁹

¹⁰¹ Alexander (n 46) 23–41, 46–47.

¹⁰² Alexander (n 46) 27.

¹⁰³ See more on this point in section IV B below when discussing the applicability of the concept of shared burden of proof in the capital sentencing context.

¹⁰⁴ Alexander (n 46) 46.

¹⁰⁵ The suspect categories captured by the proposed model law are: 1) the race of members who are removed from capital juries through prosecutorial peremptory challenges; 2) the race of capital defendants; and 3) the race of victims of capital crimes; Alexander (n 46) 34–39.

¹⁰⁶ The proposed statute would allow capital defendants to raise their claims of racial discrimination in both the pre-trial phase and post-conviction proceedings; Alexander (n 46) 46.

¹⁰⁷ The proposed legislation would allow capital defendants to ground their discrimination claims on statistical evidence showing capital sentencing disparities in a particular county, state judicial appellate district, or state; Alexander (n 46) 30.

¹⁰⁸ Alexander (n 46) 27.

¹⁰⁹ Baldus, Woodworth and Pulaski (n 46) 398.

Causation-based models of proof, by contrast, attempt to identify those cases in which decisions to seek or impose the death penalty were actually adversely affected because of biased considerations. Causation-based models thus require an additional judicial examination of the specific facts present in the claimant's case. Under the causation-based model the respondent state is provided with an additional and final defence against unrebutted statistically-based evidence; that is, it can overcome the presumption of discrimination as it applies to the claimant's case if it is able to prove by objective evidence concerning similar cases that race, ethnic origin, gender, sexual orientation, socio-economic status and so on: 1) were not a but-for factor; or 2) that such characteristics did not play a substantial or significant role; or 3) that they played no role at all in the claimant's case. Indeed, the latter two approaches would impose a much more demanding burden of proof on the respondent state than the but-for model which is the most conservative model of proof.¹¹⁰ Moreover, the evidentiary approach based on the causation model of proof usually requires the respondent to shoulder a higher burden of proof, such as a requirement to disprove the authoritative unrefuted presumption of discrimination by clear and convincing evidence.¹¹¹

It is worth noting that while the causation-based models of proof seek, on the one hand, to compensate for one of the greatest deficiencies of the risk-based models, for instance, allowing some offenders to evade their execution even though personal characteristics in fact played no, or perhaps merely a minor, role in their specific capital cases, they are, on the other hand, simply incapable of doing away with a peril that some capital sentences are affected in part by discriminatory factors and that these considerations will not be identified and, subsequently, some persons wrongfully sentenced to death will be executed.¹¹² Accordingly, if one wants to diminish unlawful discrimination in certain capital sentencing systems or jurisdictions as much as possible and, in particular, to prevent executions arising from discriminatory capital sentences, risk-based models of proof should be by far the preferred legal alternative, although such methods of proof may eventually be criticised for providing too much protection to capital defendants and imposing too heavy an evidentiary burden upon the state.

IV. What Standard of Proof in the cases of discrimination in capital cases?

Perhaps the most challenging task for the capital defendant as a victim of discrimination is to provide sufficient evidence to prove that the death penalty was sought or inflicted on them because of their race, national or ethnic origin, gender, religion or belief, socio-economic status, sexual orientation and so on. For judges deciding such discrimination cases, it may be equally difficult to define the level of impact or extent to which the less favourable treatment was caused or influenced by one of the prohibited grounds of discrimination or their combination/intersection. Such unlawful discrimination may have played a certain, though not exclusive, role in giving rise to unequal treatment. Over time, as fewer and fewer cases involved overt discrimination, legal practitioners faced the challenge of unearthing and proving covert, hidden and subtle forms of discrimination, also in the context of the death penalty application. In light of such real-life developments it soon became self-evident that clever tactics would be necessary in order to 'smoke out' shrouded discriminatory attempts and provide the adequate evidence of direct discrimination.

One possible measure for collecting important evidence which could be applicable to the cases of discriminatory application of capital punishment could include, for example, a questionnaire prescribed by domestic legislation in which the complainant sets out the incidents, circumstances and situations in which they believe they experienced unlawful discrimination. The respondent is then requested to provide their explanation in response to complaints written in the questionnaire. If such an informal procedure is later followed by a tribunal or other formal proceedings, the litigants then have the possibility of invoking their statements and responses from the questionnaire. What is more, the respondent's failure to provide their response may result in negative inferences drawn by the court. But, naturally, prosecutors, jury members and judges acting in capital cases will be astute enough to evade any incriminating responses.

In many discrimination cases related to capital sentencing processes, national courts are faced with some evidence suggesting that discrimination may have taken place, but which is insufficient to definitively prove that unequal treatment was the real reason for the alleged discriminator's actions. Indeed, the approach

¹¹⁰ See *ibid* 399.

¹¹¹ See *ibid* 400–401.

¹¹² Baldus, Woodworth and Pulaski state that the risk of executions following some discriminatory death sentences exists even if one applies the most stringent test under the causation-based models of proof, ie the requirement for the respondent state to provide a convincing and clear proof that race, gender, sexual orientation, etc played no part whatsoever in the capital defendant's case; *ibid* 401–402.

of domestic courts as to whether to accept certain evidence as sufficient to establish a *prima facie* case of discrimination will depend on the legal area in which the complaint is grounded. Thus, the standard of proof in criminal law will typically be higher than in civil law. Likewise, the rule on the reversal or sharing the burden of proof as a measure to alleviate the problems of proof in discrimination litigation will normally be applicable in the civil law context but not in criminal law cases involving a discriminatory motive.¹¹³

In capital cases in particular, it is rare that the court is provided with evidence unequivocally showing discriminatory reasons for the respondent's decision, conduct or act. In most such cases, judges will need to draw inferences of discrimination taking into account the totality of the available evidence.¹¹⁴ This will enable the court to arrive at the conclusion regardless of whether such an interpretation can be accepted as the most probable explanation. To put it another way, in the absence of express evidence of discrimination in capital cases, courts should draw inferences based on the balance (that is, preponderance) of the evidence.¹¹⁵

This section first reflects on the international legal status of such a standard. Then it discusses to what degree the standard of proof contained in modern European non-discrimination law is appropriate or applicable to the context of capital proceedings.

A. International Legal Character of the Standard of Proof

For the purposes of further discussion, it is first of utmost importance to determine the international legal status of the standard of proof defended and detailed in this article. The standard according to which the evidentiary issues should be judged and assessed lies at the heart of discrimination law. To be in a position to clearly define the international legal nature of such a standard and, consequently, international legal obligations of death penalty jurisdictions as far as unlawful discrimination in death penalty cases is concerned, including the application of adequate evidentiary rules and procedures which must necessarily provide for procedural equality and fairness, one needs to carefully consider primary sources of international law as enumerated in Article 38 of the Statute of the International Court of Justice, relevant international customary and human rights treaties' provisions, and general principles of law recognised by civilised nations. States, as members of the international community, are obliged to abide not only by provisions of international conventions to which they are parties and by norms of customary international law but also by general and fundamental legal principles that are common to all major legal orders.

While it is hard to contend that the standard of proof as elaborated in this article fulfils the criteria which are required to identify and ascertain the norms of customary international law, it is more certain that such a standard enjoys – at least to a certain extent – the status of a general principle of international law within the meaning of Article 38(1)(c) of the Statute of the International Court of Justice. General principles of law recognised by civilised nations include some principles which are characteristic of every judicial proceeding and adjudication.¹¹⁶ For instance, the principle of independence and impartiality of an adjudicative body and its unbiased and non-discriminatory performance of the adjudicative function can be placed within this category, as can be the principle of equality and hearing of both parties participating in the proceeding. The same is true of the procedural principle according to which the judgment must always be reasoned and rest on good grounds.

Moreover, the standard of proof proposed herein can be said to be implicitly comprised in the relevant provisions of all core international human rights instruments adopted at both the universal and regional levels, such as the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women and the European Social Charter. The competent human rights bodies established by these international treaties have interpreted this standard of proof in much the same way, that is, pointing towards the modern standard of proof featured in the advanced EU non-discrimination law (including the relevant case law of the Court of Justice of the European Union and EU directives prohibiting

¹¹³ For example, the rule on sharing the burden of proof will not normally apply in criminal proceedings where the perpetrator is prosecuted for a certain crime which was motivated by race – or sexual orientation-related stereotypes and prejudice (hate crimes). This is partly because a higher standard of proof is needed to establish criminal liability, and partly because it would be difficult to require a perpetrator to prove that they did not hold a discriminatory motive, which is entirely subjective in its nature. European Union Agency for Fundamental Rights, *Handbook on European non-discrimination law* (Council of Europe 2010), 126.

¹¹⁴ See Schiek, Waddington and Bell (n 8) 238, 239.

¹¹⁵ Baldus, Woodworth and Pulaski opine that 'recognising claims of racial discrimination in individual cases and evaluating those claims under burdens of proof comparable to those applied in other areas of the law' could be seen as one of the alternatives to successfully remedy the issue of racial discrimination in capital sentencing; Baldus, Woodworth and Pulaski (n 46) 362.

¹¹⁶ Report of the Special Rapporteur Param Cumaraswamy, Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers, UN Doc. E/CN.4/1995/39, para 34.

discrimination) as well as in the domestic anti-discrimination legislation of all 28 EU Member States and beyond. Hence, it is reasonable to conclude that the standard of proof, as outlined in this article, is indeed part of international law.

B. The Shared Burden of Proof in Contemporary Discrimination Law and the Applicability of the Concept in the Capital Sentencing Context

Normally, it is for the claimant to convince the court or other adjudicative body that there has been a serious violation of human rights. Unlike other cases of human rights violations however, discrimination cases require a slightly different approach when it comes to evidentiary issues. The reason for this is, as discussed above, because the motive behind such unequal treatment is and remains hidden in the head of the discriminator and therefore, it may be particularly difficult for the claimant to prove that the less favourable treatment they suffered was really on the basis of a particular ground of discrimination protected by law. This is why in most cases the claim of discrimination consists mainly of 'objective inferences related to the rule or practice in question'.¹¹⁷ However, the judges deciding on the issue of the discriminatory application of the death penalty must be convinced that the only reasonable explanation for seeking or imposing the death penalty lies in the defendant's and/or victim's protected characteristic(s). The alleged discriminator will usually be in possession of information needed to prove or disprove a claim of discrimination before the tribunal, including in capital sentencing processes.

Therefore, the rules on providing evidence in discrimination cases should be adapted to this specific situation in the form of sharing the burden of proof with the respondent (alleged perpetrator). The purpose of the rules on alleviation of the burden of proof is to enhance the effectiveness of statutory provisions on protection against discrimination. The concept enables courts to deal with discrimination phenomena in the light of the discriminatory effects generated by a certain rule, act or practice.

Having in mind the aforementioned concerns and in order to somewhat ease the claimants' troubles with providing sufficient evidence of discrimination, national legislation on non-discrimination should allow the procedural possibility of proving discrimination through appropriate rules, evidence criteria and burdens of proof, derived from the understanding that the victims of discrimination are usually at a disadvantage and would not be able to defend their rights in the courts unless special care is taken as to their procedural rights. As a result of this understanding, some national legal systems introduced the rule on shifting the burden of proof from the claimant to the respondent once a *prima facie* case of discrimination has been established. This specific principle in the evidentiary procedure is a characteristic of EU non-discrimination law as well.¹¹⁸ Indeed, one of the key issues in shifting the burden of proof is to determine how much evidence needs to be presented by the complainant to trigger a shift of the burden to the respondent.¹¹⁹

Provisions on the burden of proof constitute one of the core elements of non-discrimination legislation. It is therefore very important for a legislator to strike the proper balance between the petitioner's and respondent's evidentiary onuses in order to provide for an effective non-discrimination law. In other words, non-discrimination legislation must not place too low a burden on the respondent or too high a burden on the claimant and vice versa. Only a meritorious claim of unlawful discrimination should form a legitimate basis for a petitioner's success and the respondent should be given a fair chance to rebut the petitioner's evidence.

The rule on the distribution of the burden of proof between the claimant and respondent in discrimination cases is part and parcel of the EU legal framework as the relevant provisions can now be found in all core EU non-discrimination directives. According to these provisions:

Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.¹²⁰

¹¹⁷ *Handbook on European non-discrimination law* (n 113) 124.

¹¹⁸ Introduced through the case law developed by the Court of Justice of the European Union (especially the cases *Danfoss* and *Enderby v Frenchay Health Authority*), the principle of shifting the burden of proof was later codified in the so-called Burden of Proof Directive (Council Directive 97/80/EC, [1998] OJ L 14/6).

¹¹⁹ Schiek, Waddington and Bell (eds) (n 8) 239.

¹²⁰ See Article 4(1) of Directive 97/80/EC, [1998] OJ L 14/6; Article 8(1) of Directive 2000/43/EC, [2000] OJ L 180/22; Article 10(1) of Directive 2000/78/EC, [2000] OJ L 303/16; Article 9(1) of Directive 2004/113/EC, [2004] OJ L 373/37; and Article 19(1) of Directive 2006/54/EC, [2006] OJ L 204/23.

In the context of the death penalty's application, such a definition would signify that where a capital defendant substantiates by *prima facie* evidence facts from which it may be presumed that they have been treated less favourably on any of the prohibited discriminatory grounds, it shall be for the respondent to prove that this treatment is justified by objective considerations other than the complainant's protected status. Accordingly, the claimant would need to carry the initial burden of presenting factual evidence that supports the assumption that direct discrimination has occurred. As soon as such factual evidence is produced, the respondent would have to prove that the controversial decision of a prosecutor, jury or judge was justified on the basis of objective reasons unrelated to the prohibited grounds of discrimination.¹²¹ Similarly, in their rather comprehensive and critical review of post-*McCleskey* racial discrimination claims focusing on prosecutorial decisions to seek the death penalty, Professors Blume, Eisenberg and Johnson arrived at the following conclusion:

[I]f the defendant establishes a *prima facie* case of discrimination, by which we mean a showing by statistical or other evidence that discrimination is more likely than not to have occurred, then the burden of production shifts to the prosecutor, who must then articulate some legitimate, non-discriminatory reason for seeking the death penalty. If the prosecutor fails to assert such a reason, the defendant prevails. If the prosecutor produces evidence creating a genuine issue of fact, then the defendant, retaking the burden of persuasion, must establish discrimination by a preponderance of the evidence.¹²²

Indeed, the point must be made that EU non-discrimination directives provide only basic minimal standards to be implemented and applied by the EU member states. Consequently, national legislation may introduce rules of evidence which are more favourable to claimants.¹²³ The EU non-discrimination law thus allows the burden of proof to be shared between the litigants. According to this approach, the claimant needs to submit sufficient evidence suggesting that differential treatment may have taken place. Such evidence will raise the presumption of unlawful discrimination, which the respondent then has to successfully refute in order to relieve himself of this burden. Consequently, once the complainant is able to present facts from which it can be presumed that discrimination may have occurred, the burden of proof shifts to the respondent (alleged perpetrator) to prove otherwise.

The phrase 'may be presumed' in the above concept of shifting the burden of proof is of paramount importance in the process of establishing discrimination. These words imply that it is for the claimant who complains of race, sex, religious and sexual orientation discrimination to prove on the balance of probabilities facts from which the court or tribunal may conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of relevant legal provisions. If the claimant fails to produce the evidence proving such facts, their complaint will be unsuccessful. Obviously, it will be almost impossible to find and submit direct evidence of unlawful discrimination in capital cases.¹²⁴ The fact is that very few, if any, prosecutors, jury members or judges would be prepared to admit such discrimination, even to themselves. In this respect, the guidance

¹²¹ Interestingly enough, in *Foster v State*, Chief Justice Barkett proposed rather analogous standard for proving racial discrimination in the death penalty decision-making context: 'A party asserting racial discrimination in the State's decision to seek the death penalty should make a timely objection and demonstrate on the record that the discrimination exists and that there is a strong likelihood it has influenced the State to seek the death penalty. Such discrimination conceivably could be based on the race of the victim or on the race of the defendant. Once the trial court determines that the initial burden has been met by the defendant, the burden then shifts to the State to show that the practices in question are not racially motivated. If the trial court determines that the State does not meet that burden, the State then is prohibited from seeking the death penalty in that case.' *Foster v State of Florida* (n 13) 468.

¹²² Blume, Eisenberg and Johnson (n 40) 1807.

¹²³ See Article 4(2) of Directive 97/80/EC, Article 8(2) of Directive 2000/43/EC, Article 10(2) of Directive 2000/78/EC, Article 9(2) of Directive 2004/113/EC and Article 19(2) of Directive 2006/54/EC. However, the provisions on the burden of proof contained in the EU anti-discrimination Directives need not to be applied by the EU member states to national legal proceedings 'in which it is for the court or competent body to investigate the facts of the case'. See Article 4(3) of Directive 97/80/EC, Article 8(5) of Directive 2000/43/EC, Article 10(5) of Directive 2000/78/EC, Article 9(5) of Directive 2004/113/EC and Article 19(3) of Directive 2006/54/EC. They also 'shall not apply to criminal procedures, unless otherwise provided by the Member States'. See Article 3(2) of Directive 97/80/EC, Article 8(3) of Directive 2000/43/EC, Article 10(3) of Directive 2000/78/EC, Article 9(3) of Directive 2004/113/EC and Article 19(5) of Directive 2006/54/EC.

¹²⁴ Baldus, Woodworth and Pulaski believe that the standard of proof set by the US Supreme Court in *McCleskey* surpasses 'the capacity of virtually all capital defendants' as far as proving racial discrimination in capital cases is concerned. According to them, the only two remaining options available to the capital defendants are the proof of racial discrimination by direct evidence, ie admissions by capital sentencing decision-makers, and statistic racial disparities 'of a magnitude unlikely to be seen in this country'; Baldus, Woodworth and Pulaski (n 46) 370.

contained in the UK Court of Appeal's judgment delivered in *IGEN Ltd & Ors v Wong*, saying that 'in some cases the discrimination will not be an intention but merely based on the assumption', can be of particular relevance.¹²⁵ Thus, in order to come to a proper outcome, a court or tribunal will usually need to analyse such primary facts and draw inferences therefrom.

The above wording 'may be presumed' indicates that at this stage of the evidentiary procedure, the court or tribunal does not have to come up with the 'definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination', but rather that it should look at the primary facts presented to it to see 'what inferences of secondary fact could be drawn from them'.¹²⁶ This requires that the court or tribunal, when it considers what inferences or conclusions can be drawn from the primary facts, assumes that 'there is no adequate explanation for those facts'.¹²⁷ Hence, the court or tribunal should appropriately examine 'any inferences that it is just and equitable to draw' in a particular case.¹²⁸

Such inferences may include, for instance, the respondent's evasive or equivocal responses to a questionnaire (as described earlier in this section) or their failure to comply with any existing and relevant code of practice.¹²⁹ In this context, Bangalore Principles of Judicial Conduct adopted in 2002 which lay down fundamental, though non-obligatory, standards on the proper administration of justice, can surely be of great help and relevance. These Principles provide that ensuring impartiality of the courts and equality of treatment to all before the courts is essential to the proper discharge of the judicial office. This applies 'not only to the decision itself but also to the process by which the decision is made' and therefore 'a judge shall perform his or her judicial duties without favour, bias or prejudice'.¹³⁰

Where the claimant has been successful in proving the facts from which conclusions could be drawn that any ground of unlawful discrimination gave rise to less favourable or disadvantageous decisions made by the capital prosecutor, jury members or trial judge and which, subsequently, adversely influenced the outcome of the capital sentencing process in question, the burden of proof moves to the respondent. It is then for the respondent to prove that they did not commit the act of unlawful discrimination by adopting the controversial decision. To successfully discharge this onus the respondent must prove, on the balance of probabilities,¹³¹ that the decision impugned by the capital defendant was not made on the grounds of a discriminatory factor. This means that the court or tribunal will have to assess not only 'whether the respondent has proved an explanation for the facts from which such inferences can be drawn',¹³² but also whether 'it is adequate to discharge the burden of proof on the balance of probabilities'¹³³ that the decision at issue was not by any means affected by the capital defendant's and/or capital crime victim's race, national or ethnic origin, or other legal protected characteristic. Normally, the facts and information necessary to prove an explanation will be in the hands of the respondent. Therefore, it is reasonable for the court to require cogent evidence to discharge the respondent's onus of proof.¹³⁴

In the cases where a claimant argues and succeeds in furnishing sufficient evidence of facts suggesting the needed probability of discrimination in the capital sentencing decision-making process, the major inquiry to be made by the court will be to establish if the capital defendant's and/or victim's personal characteristics played any role whatsoever in the capital prosecutor's, jury members' and/or trial judge's decision-making

¹²⁵ *IGEN Ltd & Ors v Wong* [2005] EWCA; [2005] 3 All ER 812, para 76(3), Annex.

¹²⁶ *ibid* para 76(5).

¹²⁷ *ibid* para 76(6).

¹²⁸ *ibid* para 76(7).

¹²⁹ *ibid* para 76(8).

¹³⁰ All these principles shall be strictly applied, particularly in death sentencing processes; *Bangalore Principles of Judicial Conduct*, E/CN.4/2003/65, annex 3, 4, 6, 7.

¹³¹ By way of contrast, Lyon suggests that the respondent (ie prosecution) must demonstrate, 'beyond reasonable doubt', that an 'impermissible appeal to bias did not affect the fairness of the defendant's trial'. Lyon (n 15) 320. Indeed, one should not forget that discrimination litigation, even in the criminal sentencing context, are civil cases in their nature and therefore requiring the litigants to meet such a high evidentiary threshold as is standard 'beyond reasonable doubt' and which is normally pursued in criminal trials would be at least unreasonable, if not illegitimate. Against that backdrop, the standard of proof which is based on the preponderance of the evidence seems to be a far more appropriate and just solution. In the same vein, the Committee on the Elimination of Discrimination Against Women pointed out in *V. K. v Bulgaria* that in civil proceedings relating to domestic violence complaints the requirement that the act of domestic violence must be proven 'beyond reasonable doubt' constitutes an 'excessively high' standard of proof which is 'not in line with the Convention on the Elimination of All Forms of Discrimination against Women, nor with current anti-discrimination standards which ease the burden of proof of the victim'; *V. K. v Bulgaria* (20/2008), CEDAW/C/49/D/20/2008 (2011) para 9.9.

¹³² *IGEN Ltd & Ors v Wong* (n 123) para 76(12).

¹³³ *ibid*.

¹³⁴ For example, the tribunal will have to carefully consider the respondent's explanations for not adequately dealing with 'the questionnaire procedure and/or code of practice' if these should have been applied in a given case; *ibid* para 76(13).

activities and, in particular, in the outcome of the criminal process. Indeed, serious, exact and consistent factual elements (for example, statistical data) should provide for a clear establishment of the presumption of the existence of direct discrimination. But somewhat less compelling features like a lack of adequate transparency in terms of the possibility to identify non-discriminatory capital sentencing decision-making or the respondent's behaviour or conduct that seems objectively unreasonable should also shift the burden of proof to the respondent. As a result of such an approach, a finding of discrimination can be made even where this was not the exclusive reason for the capital prosecutor's, jury members' and/or trial judge's decision or motion. A direct distinction is also present where the grounds of discrimination were only part of the reason for the impugned decision or action.¹³⁵

Consequently, if it is not proven, in a particular case, that the discrimination does not exist and/or that the respondent did not act in contravention with the legal prohibition of discrimination, then they must be held responsible for direct discrimination based on the relevant ground(s) of discrimination. Put another way, the respondent can disprove the presumption of discrimination if they succeed in proving either that the claimant is not actually in the same, similar or comparable situation to their comparator or that disparate treatment is not based on the protected characteristic but other objective differences.¹³⁶

The following example may serve as an illustration of how, pursuant to EU non-discrimination law, the burden of proof should be distributed between the litigants in cases dealing with discrimination in the application of the death penalty. First, the claimant alleging that they were sentenced to death because of their and/or the capital crime victim's race, national or ethnic origin, gender or such other characteristics will need to prove that they were subjected to capital punishment, whereas capital defendants of another race, ethnicity and so on were not.

Secondly, they will need to show that their relevant comparator is in a similar or comparable situation as regards the nature of a capital crime committed, their criminal record and the degree of their culpability, amongst other factors. If the claimant is able to adequately present such circumstances and characteristics this suffices for the presumption being raised that the difference in the final conviction and punishment could only be explained by discrimination against the claimant's personal characteristics. At this point the onus of proof falls on the respondent's shoulders and it is for them to rebut the presumption of discrimination, for example by showing that white and non-white capital defendants were not actually in a comparable situation because the circumstances and characteristics of both cases are substantially different in their nature. Moreover, the respondent can discharge themselves of the burden of proof also by demonstrating that the difference in the outcome of both capital cases can be explained by objective factors, unrelated to a personal characteristic of the capital defendant and/or the victim of a capital crime.

As for the core international and regional legal instruments explicitly prohibiting discrimination on various grounds, such as the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Political Rights (both adopted in 1966), the 1965 International Convention on the Elimination of All Forms of Racial Discrimination, the 1979 Convention on the Elimination of All Forms of Discrimination Against Women, the 2006 Convention on the Rights of Persons with Disabilities, the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms, the 1969 American Convention on Human Rights, the 1981 African Charter on Human and Peoples Rights, and the 2004 Arab Charter on Human Rights, they do not contain any specific provisions on the burden of proof or, more precisely, on its shifting from the complainant to the respondent in discrimination litigation. However, global and regional mechanisms for the protection of human rights established by these international treaties have adopted the rule on the sharing of the burden of proof in proving claims of human rights violations in a more general context.

The European Court of Human Rights, in particular, has considered the issue of shifting the burden of proof in a complaint of discrimination under Article 14 of the Convention for the protection of Human Rights and Fundamental Freedoms in several notable cases, including *Nachova and others v Bulgaria*,¹³⁷ *Bekos and*

¹³⁵ Similar conclusions have been put forward by the Dutch Equal Treatment Commission in cases related to direct discrimination on the grounds of race (Opinion 2003-41) and disability (Opinion 2004-67). See more about these two cases in Schiek, Waddington and Bell (n 8) 246, 247.

¹³⁶ Examples of objective differences can include (for example, severity and other details of the crime, degree of the capital offender's culpability, their prior criminal record and probability of recidivism, the presence of aggravating and mitigating circumstances, the relation between the capital defendant and the victim, and so on).

¹³⁷ *Nachova and Others v Bulgaria* (2005) 42 EHRR 933, paras 147–158.

*Koutropoulos v Greece*¹³⁸ and *Timishev v Russia*.¹³⁹ In the cases before it, the Court will generally look at the available evidence as a whole, bearing in mind that in most similar cases much of the information which is really relevant to prove the claim of discrimination will be in the hands of the respondent government. If, in its view, the facts presented by the applicant are sufficiently credible, veracious, reliable and consistent with the available evidence, the Court will normally accept them as proven, unless the respondent government provides a cogent alternative explanation.¹⁴⁰ In its case law the Court has also made express reference to the rule on shifting the burden of proof as provided in the EU non-discrimination directives. Yet, it has approached the possibility of applying the same principle within the context of the Convention in a more prudent and conservative manner. It seems that the Court has been unwilling to espouse and stick to the firm rule that the burden of proof shifts from the applicant to the respondent once a *prima facie* case of discrimination is established by the applicant, but rather has chosen more discretionary steps allowing for inferences of discrimination to be drawn from the specific facts and the particular part of the Convention to be applied in each individual case.¹⁴¹

Considerations of the Inter-American Commission on Human Rights are even more interesting since they concern – albeit more indirectly than directly – evidentiary issues exactly in the cases dealing with discrimination in the death sentencing context. In *Celestine v United States*, both the US courts and the Inter-American Commission on Human Rights emphasized that proving a certain pattern of (racial) bias and discrimination as such is insufficient to establish a *prima facie* case of discrimination in a particular case such as to shift the burden of proof to the respondent government.¹⁴² The cases such as *Andrews v United States*,¹⁴³ *Roach and Pinkerton v United States*,¹⁴⁴ *Ramos v United States* and *Landrigan v United States*,¹⁴⁵ however, demonstrate examples of situations where the Inter-American Commission was willing to draw an inference of discrimination.

In *Andrews v United States*, the Inter-American Commission accepted the petitioner's evidence of racial bias as sufficient to substantiate a *prima facie* case of racial discrimination in the capital sentencing process and trigger a shift in the burden of proof.¹⁴⁶ Since the US government was unable to discharge this burden, the Inter-American Commission found that the United States violated Article II of the American Declaration of the Rights and Duties of Man which guarantees the right of everyone to equal treatment at law without discrimination as to various grounds, including race.¹⁴⁷ For the Inter-American Commission the napkin (note) with flagrant racist content (there were words written in black stating 'hang the nigger's' and a figure drawn in black hanging therefrom)¹⁴⁸ found among the jurors as well as other factors indicating racist views of jury members (for example, the jury in this case was all-white and it contained several Mormons whose religious faith was based on the racist ideology and tenets believing that black people are inferior beings), and the fact that all this was known to the trial judge, who did not question the jury members about the incident but only admonished the jurors to ignore it and proceeded to trial with the same members of the jury, reflected 'ample evidence' of 'racial bias'.¹⁴⁹ In addition, the United States did not dispute these facts before the Inter-American Commission.

The case of *Roach and Pinkerton v United States* concerned the issue of the disparity in the application of the death penalty to juveniles in the United States among various states. The Inter-American Commission held that the US federal government's leaving to state legislators the determination of whether a juvenile

¹³⁸ *Bekos and Koutropoulos v Greece* (2005) 43 EHRR 2, para 65.

¹³⁹ *Timishev v Russia* (2005) 44 EHRR 37, paras 40–44.

¹⁴⁰ See more on this issue in Handbook on European non-discrimination law (n 113) 125.

¹⁴¹ The Court has reiterated on several occasions that it will accept as proven facts the assertions that are 'supported by the free evaluation of all evidence, including such inferences as may flow from the facts and the parties' submissions ...' Proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. Moreover, the level of persuasion necessary for reaching a particular conclusion and, in this connection, the distribution of the burden of proof, are intrinsically linked to the specificity of the facts, the nature of the allegation made and the right at stake. See the following cases: *Nachova and Others v Bulgaria*, (n 137), para 147; *Timishev v Russia*, (n 139), para 39; *D.H. and Others v the Czech Republic* (2008) 47 EHRR 3, para 178.

¹⁴² *Willie L. Celestine v United States* (n 2) para 45.

¹⁴³ *William Andrews v United States* (n 2).

¹⁴⁴ Case 9647, *James Terry Roach and Jay Pinkerton v United States* Report No. 3/87 (1987).

¹⁴⁵ *Roberto Moreno Ramos v United States* (n 31).

¹⁴⁶ *William Andrews v United States* (n 2) para 146.

¹⁴⁷ *ibid* para 174.

¹⁴⁸ *ibid* para 164.

¹⁴⁹ *ibid* para 165.

may be executed resulted in 'a pattern of legislative arbitrariness throughout the United States'.¹⁵⁰ As a result of such a legislative scheme, the severity of punishment was not based on the nature of the crime committed but on the location where it was committed. The Inter-American Commission pointed out that states should not be granted any discretion when it comes to the possibility of the imposition of the death penalty upon juveniles and their execution.¹⁵¹ Such a legal situation is, in the view of the Inter-American Commission, contrary to Article II of the American Declaration of the Rights and Duties of Man, which provides for the right to equality before the law.

In another case, *Roberto Moreno Ramos v United States*, the Inter-American Commission took the view that consideration of the nationality of the accused, when irrelevant, in sentencing death penalty cases amounts to a violation of the right to equality before the law.¹⁵² The petitioner, who was a national of Mexico, claimed that criminal proceedings against him were unfair due to serious trial deficiencies, including the fact that during the punishment phase of his trial the prosecution made discriminatory comments related to his nationality, thereby depriving him of the right to equality before the law.¹⁵³ Based on the facts of the case and the evidence provided, the Inter-American Commission concluded that 'viewed objectively and in the context of the circumstances of Mr. Moreno Ramos' crime and the purpose of the sentencing hearing more broadly, there is a real danger that Mr. Moreno Ramos' nationality was considered by the jurors in determining his punishment'.¹⁵⁴

The Inter-American Commission was of the opinion that numerous aspects of the petitioner's punishment hearing, including the discriminatory manner in which the prosecutor referred to the petitioner's status as a foreign national, suggested such a conclusion. According to the Inter-American Commission, in the present case the nationality of the accused is a factor which was completely 'irrelevant to and unconnected with the issues under consideration at the punishment phase of his trial, raising a particular danger that this evidence would be relied upon as a consideration in determining an appropriate sentence'.¹⁵⁵ Since no steps were taken, by the trial judge or otherwise, to clarify that the jurors were not to consider the petitioner's nationality as an element in deciding upon his punishment, there existed 'a real possibility' that the petitioner's nationality had been taken into consideration by the jury members in determining whether he should be executed for his crime.¹⁵⁶ The Inter-American Commission thus decided that the domestic criminal justice system failed to afford the petitioner 'his right to be tried by an impartial tribunal as well as his right to equal protection of the law without discrimination'.¹⁵⁷

More recently, in 2011, the Inter-American Commission considered the question of whether a procedural distinction in a capital sentencing case which resulted in the petitioner not having his sentence reviewed constituted discrimination in violation of Article II of the American Declaration of the Rights and Duties of Man.¹⁵⁸ This case is particularly interesting since the alleged differential treatment was based on grounds other than race, nationality, sex, language or creed. The American Declaration contains in Article II a non-discrimination clause which comprises an open-ended list of grounds of discrimination. Thus, the discriminatory treatment related to the possibility of obtaining judicial review can be placed within the formulation of 'any other factor'. The petitioner was 'part of the group of persons that was denied access to the benefit of review of a sentence that resulted from an unconstitutional procedure, on the sole basis of the procedural stage of his case'.¹⁵⁹ The Inter-American Commission rejected the US government's arguments for differential treatment, namely those of judicial economy, certainty, and legal security and underlined that such justifications need to be 'balanced against the nature of the individual rights at issue – which may involve the protection of life, liberty and physical integrity'.¹⁶⁰ Finally, the Inter-American Commission concluded that the distinction applied to the petitioner's case was not reasonable and legitimate, and that the differential

¹⁵⁰ *James Terry Roach and Jay Pinkerton v United States* (n 144) para 63.

¹⁵¹ *ibid*.

¹⁵² *La pena de muerte en el sistema interamericano de derechos humanos: De restricciones a abolición = The death penalty in the Inter-American System of Human Rights: From restrictions to abolition*, Inter-American Commission on Human Rights (OEA/Ser.L/V/II, Doc. 68, 2011) 161.

¹⁵³ *Roberto Moreno Ramos v United States* (n 31) para 2.

¹⁵⁴ *ibid* para 68.

¹⁵⁵ *ibid* para 69.

¹⁵⁶ *ibid*.

¹⁵⁷ *ibid*.

¹⁵⁸ Case 12.776, *Jeffrey Timothy Landrigan v United States* Report No. 81/11 (2011).

¹⁵⁹ *ibid* para 50.

¹⁶⁰ *ibid* para 52. The relevant wording is borrowed from its previous report, see *Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System* (OEA/Ser.L/V/II.106, 2000), para 101.

legal treatment received from the courts amounted to inadmissible discrimination. The Inter-American Commission therefore found the US government responsible for violating the petitioner's right to equal treatment before the law by denying him, in an unjustified and discriminatory fashion, the determination of his basic rights including, possibly, the right to life itself.¹⁶¹

In addition to regional human rights courts and commissions, other international human rights treaty bodies have also developed some relevant guidelines concerning the burden of proof in discrimination cases and its distribution between litigants, including in the criminal justice administration context. For instance, in relation to discrimination against non-citizens, the Committee on the Elimination of Racial Discrimination recommended that the States Parties to the International Convention on the Elimination of All Forms of Racial Discrimination:

Regulate the burden of proof in civil proceedings involving discrimination based on race, colour, descent, and national or ethnic origin so that once a non-citizen has established a *prima facie* case that he or she has been a victim of such discrimination, it shall be for the respondent to provide evidence of an objective and reasonable justification for the differential treatment.¹⁶²

The same approach encouraging a more balanced sharing of the burden of proof between the claimant and the defendant in civil proceedings involving racial discrimination was taken by the Committee in its concluding observations addressed to particular States Parties.¹⁶³

The issue of a proper distribution of the burden of proof in proving discrimination has also been addressed by the European Committee of Social Rights, an expert body established to monitor the implementation of the European Social Charter (revised) in States Parties. For instance, in its decision on a collective complaint in *Mental Disability Advocacy Center (MDAC) v Bulgaria* the Committee pointed out that:

The burden of proof should not rest entirely on the complainant, but should be the subject of an appropriate adjustment. It also applies to the collective complaints procedure. The Committee therefore relies on the specific data sent to it by the complainant organisation, such as its statistics which show unexplained differences. It is then for the Government to demonstrate that there is no ground for this allegation of discrimination.¹⁶⁴

C. Recognising Statistics and Other Relevant Information as an Instrument to Trigger a Shift in the Burden of Proof in Proving Discrimination in Death Penalty Cases

For the individual complainant in discrimination cases it is, of course, very important to know how much evidence they need to provide to shift the burden of proof to the respondent. Is it simply enough to demonstrate that they have been treated less favourably than a person of a different race, sex, religion, sexual orientation, age or other legally protected category? Naturally, the required level of proof will, at least to some extent, be dependent on the facts of the specific case.¹⁶⁵ Some national case law, such as those developed by the British and Irish courts, have not recognised the mere difference in treatment and/or difference between the comparators as sufficient to trigger a shift in the burden of proof.¹⁶⁶ This poses the question whether there are some other instruments that might help a court indicate the possibility of discrimination and persuade

¹⁶¹ *Jeffrey Timothy Landrigan v United States* (n 158) para 54.

¹⁶² Committee on the Elimination of Racial Discrimination, General Recommendation No 30: Discrimination Against Non Citizens, 1 October 2004, CERD/C/64/Misc.11/rev.3, para 24.

¹⁶³ See, for example, Committee on the Elimination of Racial Discrimination, Concluding Observations regarding United States of America, 8 May 2008, CERD/C/USA/CO/6, para 35; Committee on the Elimination of Racial Discrimination, Concluding Observations regarding Australia, 27 August 2010, CERD/C/AUS/CO/15-17, para 25; Committee on the Elimination of Racial Discrimination, Concluding Observations regarding Malta, 1 September 2011, CERD/C/MLT/CO/15-20, para 5(d); Committee on the Elimination of Racial Discrimination, Concluding Observations regarding Italy, 9 March 2012, CERD/C/ITA/CO/16-18, para 5; Committee on the Elimination of Racial Discrimination, Concluding Observations regarding Cyprus, 23 September 2013, CERD/C/CYP/CO/17-22, para 9.

¹⁶⁴ European Committee of Social Rights, *Mental Disability Advocacy Centre (MDAC) v Bulgaria* (Complaint No. 41/2007), 3 June 2008, para 52.

¹⁶⁵ As noted by Alexander, showing that a particular capital prosecutor has sought the death sentence in a racially discriminatory manner will indeed provide for a more probative and persuasive claim of racial discrimination than producing the statistical evidence of state-wide significance; Alexander (n 46) 23.

¹⁶⁶ Schiek, Waddington and Bell (n 8) 253.

judges that the required criteria for shifting the burden of proof on the respondent are met. Indeed, one such instrument that could be used to trigger a shift in the burden of proof and has been accepted by domestic and international judicial and quasi-judicial bodies is the use of relevant statistics. The further question is, however, to what extent statistical data can help a claimant give rise to a presumption of discrimination, including in capital cases.¹⁶⁷

The collection of statistical data can be particularly relevant for various aspects of non-discrimination law, especially in the context of indirect discrimination claims where statistics can help establish disparate impact. Where a capital defendant has been treated less favourably than other persons with a different personal characteristic and statistics show that defendants with the same characteristics are systematically disadvantaged in capital cases, this can be sufficient to shift the burden of proof to the respondent to show that the less favourable treatment was unrelated to any discriminatory reasons. It is certainly very disturbing that in almost all death penalty jurisdictions the available statistics show clear gender disparities in death penalty impositions and executions.¹⁶⁸ Although, only on the basis of that data, one cannot speak about overt sexist prejudice, these figures in themselves may suggest a clear possibility of a widespread sexist culture in capital sentencing. Such a culture can have a potent impact on individual decision-makers in capital cases of which they themselves may be aware only faintly or not at all.

Usually, to justify an inference, a tribunal will first need to make findings of primary facts from which it will be legitimate to draw. If there are no such findings, then it is, of course, impossible to draw an inference. However, the sharp gender imbalance in the application of the death penalty displayed by relevant statistical information precludes the want of primary facts and suffices to entitle the tribunal to require the respondent to provide convincing evidence of non-sexist grounds.¹⁶⁹

In cases of indirect discrimination where the rules or practices at issue are neutral on the surface but disproportionately and unfavourably affect specific groups of persons by comparison to others in the same or similar situation, the statistical data can be particularly useful. Reference has already been made to a possible example of such indirect discrimination in capital sentencing processes, that is, if domestic legal provisions on death penalty procedures permit jurors or trial judges to take a capital defendant's employment status into consideration when deliberating whether to deliver a death sentence in a particular case. These legal rules are neutrally formulated but their even-handed application may result in far more Afro-Americans being sentenced to death due to the fact that Afro-Americans constitute a particularly high proportion of the unemployed population. Thus, the final outcome of such a judicial practice involves discriminatory implications of a racial nature. Production of statistical data showing that Afro-American people are a particularly disadvantaged group when it comes to the application of the death penalty because of the implementation of certain rules or practices can be sufficient to require the respondent state to provide a convincing alternative explanation for the existent figures.

Indeed, in the civil law context statistics showing persistent and striking racial or gender disparities would create a *prima facie* case necessary to shift the burden of proof from the claimant to the respondent. In the

¹⁶⁷ In American pre-*McCleskey* jurisprudence it is possible to notice some judicial positions acknowledging the relevant role of social science research, including statistical analyses, in judicial decision-making processes in certain situations, such as that 'the inferences to be drawn from the statistics are for the factfinder, but the statistics are accepted to show the circumstances'; Gross (n 34) 1294. In discrimination cases, in particular, valid and reliable statistics can serve as important circumstantial evidence of discrimination.

¹⁶⁸ Alexander also observes that men are sentenced to death disproportionately more than women in most states. He gives an example of Ohio where over 450 convicted killers have been executed since 1972, but only four have been women. However, he believes that unlike the Racial Justice Act, the enactment of a Gender Justice Act which would allow for showing sentencing disparities by statistical evidence would indirectly lead to abolition of the capital punishment in practice and therefore it is very unlikely that such legislation would be adopted by a certain legislator or that gender-based claims of discrimination in capital cases would be accepted by the courts; Alexander (n 46) 38.

¹⁶⁹ Many of the arguments and critiques levelled against the use of statistical evidence in individual capital sentencing discrimination claims can be seen as over-generalised, implausible, misleading and far-fetched, including, for instance, poorly substantiated claims that statistical proof of discrimination is inherently inaccurate, unreliable and untrustworthy, and that recognising statistics as evidence sufficient to establish a *prima facie* case of discrimination would impose a burden on the respondent state that is too onerous and would render death penalty legislation ineffective and thus eventually lead to de facto abolition of the death penalty, or that such measure would result in significantly greater expenses imposed on taxpayers. Particularly misleading, if not absurd, are the arguments that the legal authorisation of the possibility to use statistical evaluations in individual capital cases would lead to racial or gender quotas (ie specified racial or gender proportions relating to offenders) in a given capital sentencing system. According to Baldus, Woodworth and Pulaski, statistical tests are only instrumental in determining whether differences in treatment of capital defendants/victims with different protected characteristics are, as a matter of fact, a product of unlawful discrimination between different groups and they have nothing to do with achieving certain quotas; Baldus, Woodworth and Pulaski (n 46) 402–403.

criminal justice context, including in discrimination litigation relating to capital cases, however, most US death penalty jurisdictions, including the federal death penalty legal system, tend to apply a substantially higher – in effect, nearly impossibly high, if not insurmountable – standard of proof, as observed by some authors.¹⁷⁰ The US constitutional provisions of the equal protection clause, for instance, require that a criminal defendant who complains of discriminatory decisions made during a criminal trial must show some evidence of both discriminatory effect and discriminatory intent. This implies that pertinent statistics credibly demonstrating individuals of a different race or gender from that of the complainant but who are otherwise similarly situated and were not prosecuted or selected for capital prosecution or sentenced to death will normally not suffice to establish a *prima facie* case of discrimination. Instead, such evidence of discriminatory effect must be combined with further evidence of discriminatory intent in order to shift the evidentiary burden from the claimant to the respondent. This cumulative approach constitutes an extremely high standard which, on its face, contradicts the standard of proof originating from both the International Convention on the Elimination of All Forms of Racial Discrimination and the EU non-discrimination directives, according to which it is enough to prove the discriminatory effect of a certain policy, provision or practice in order to trigger a shift in the burden of proof.¹⁷¹

While domestic courts do not seem to require any strict threshold for statistical evidence,¹⁷² both the European Court of Human Rights and the Court of Justice of the European Union pointed out that a clear, substantial and remarkable difference (in numbers or percentages) between disadvantaged groups and other groups must figure in undisputed official statistics in order to establish a *prima facie* indication or presumption that a certain rule, practice or measure is discriminatory in effect.¹⁷³ Where this is the case, it is then for the respondent government to show that such disproportion is the result of objective factors unrelated to any discrimination on the prohibited grounds. More interestingly, in the *Seymour-Smith* case, the Court of Justice of the European Union suggested that a lower level of disproportion could still prove indirect discrimination 'if it revealed a persistent and relatively constant disparity over a long period' between groups of different sexes.¹⁷⁴

As for other possible grounds of discrimination – aside from racial or ethnic origin and sex – there is very limited data collection in relation to capital cases in many death penalty jurisdictions. This implies that in cases of disparities related to religion or belief, sexual orientation, age and socio-economic status, capital defendants will be much less likely to invoke statistical evidence in order to trigger a shift in the burden of proof. However, it will not always be necessary to present statistical evidence in proving (indirect) discrimination in capital cases. On the whole, the need to support and prove a claim of discrimination with statistical data will be dependent on the facts of a particular case. Sometimes other available and reliable sources (such as reports, studies and assessments elaborated by reputable NGOs or the UN's treaty bodies monitoring human rights violations in states' parties) that support certain analyses will suffice to prove that a protected group is disproportionately affected.¹⁷⁵

The Inter-American Commission on Human Rights took a more reserved and cautious approach to the issue of statistical evidence in proving the discriminatory application of the death penalty, similar to that of the US Supreme Court elaborated in the famous *McCleskey* case.¹⁷⁶ In *Celestine v United States* the

¹⁷⁰ Lyon discusses this issue in her article dealing with the problem of selective selection for capital prosecution in the US federal death penalty system; Lyon (n 23) 1655. In more general terms, see also the comments made in Alexander (n 46) 6.

¹⁷¹ Generally, one may find the argument that statistical methods of proof may be capable of proving discriminatory effect in civil law cases of discrimination (eg employment, housing, etc) but not when it comes to capital sentencing and other criminal cases completely unconvincing.

¹⁷² *Handbook on European non-discrimination law* (n 113) 129.

¹⁷³ *Hoogendijk v the Netherlands* (2005) 40 EHRR SE 22; *D.H. and Others v the Czech Republic* (2008) 47 EHRR 3 at paras 18, 196–201; C-171/88, *Rinner-Kühn v FWW Spezial-Gebäudereinigung* [1989] ECR 2743, para 16; C-184/89, *Nimz v Freie und Hansestadt Hamburg* [1991] ECR I-297, para 15; C-33/89, *Kowalska v Freie und Hansestadt Hamburg* [1990] ECR I-2591, paras 7–15; C-343/92, *De Weerd, née Roks, and Others v Bestuur van de Bedrijfsvereniging voor de Gezondheid, Geestelijke en Maatschappelijke Belangen and Others* [1994] ECR I-571, paras 31–38. See also, in this respect, the Opinion of Advocate General Léger in the *Nolte* case. Opinion of Advocate General Léger of 31 May 1995, paras 57–58, C-317/93, *Nolte v Landesversicherungsanstalt Hannover* [1995] ECR I-4625.

¹⁷⁴ C-167/97, *R v Secretary of State for Employment, ex parte Seymour-Smith and Perez* [1999] ECR I-623, para 61.

¹⁷⁵ For instance, no reliable statistical data were presented to the European Court of Human Rights in *Opuz v Turkey*, but the Court was willing to accept the assessment of Amnesty International and UN Committee on the Elimination of Discrimination Against Women that violence against women was a significant problem in Turkey as sufficient evidence to establish a *prima facie* case of sex discrimination; *Opuz v Turkey* (2010) 50 EHRR 28.

¹⁷⁶ Although the US Supreme Court in its precedent case law accepted statistical disparities as proof of an equal protection violation in the selection of the jury panel in a particular district, it held in the case of *McCleskey* that the same approach cannot be taken in capital sentencing decision-making processes, for 'the nature of the capital sentencing decision, and the relationship of the

Inter-American Commission rejected the arguments put forward by the petitioner, namely that 'the results of statistical studies alone are evidence of invidious racial discrimination in the capital sentencing context'.¹⁷⁷ In the words of the Inter-American Commission, unlike in other decision-making processes, statistical evidence alone cannot be taken in capital sentencing as sufficient to establish 'a *prima facie* case to prove the allegations of racial discrimination and partiality in the imposition of the death penalty such as to shift the burden of proof to the United States Government'.¹⁷⁸ This line of reasoning suggests that a death-sentenced claimant arguing discrimination in the capital sentencing process and the imposition of the death penalty will need to provide further evidence of the involvement of unequal treatment in their specific case in order to convince a reviewing judge (or other competent authority) that requirements for shifting the burden of proof onto the government respondent are met. This is to say that the first step for the claimant will be to submit statistical evidence that justifies and upholds the prevalence of the death penalty being applied more frequently to members of one (minority) group than to those of another.

The second requirement will be much more difficult to fulfil since it requires the claimant to establish the facts from which it may be presumed that there has been direct or indirect discrimination in applying capital punishment in their particular case. This additional factor in proving discrimination in capital sentencing cases, which must be clearly demonstrated in order to shift the burden of proof from complainant to respondent, almost always employs either direct evidence, such as testimony or admissions, or circumstantial evidence, such as qualitative or statistical data, showing a *prima facie* case. Prof Streib is absolutely right in saying that it will be 'extremely hard'¹⁷⁹ to obtain admissions of racial, gender, religious and other such stereotypes and prejudice on the part of prosecutors, judges and jury members which implies that courts will be required to rely on the available circumstantial evidence. This is also why the decision-making process in capital cases should not be judged according to the heightened standard of proof which, in fact, is much stricter than the ordinary equal protection standards when it comes to claims of discriminatory decisions. Too often such an ample discretion on the part of decision-makers in capital cases opens the entire criminal process to the possibility of delivering arbitrary and biased decisions.¹⁸⁰

V. Conclusions and recommendations

The foregoing has shown that some death penalty jurisdictions, most notably, the majority of US capital sentencing legal systems, pursue inappropriate standards of proof when it comes to proving discrimination in capital cases since an individual capital defendant challenging discrimination is faced with an undue burden (both in terms of scope and resources) to prove the discriminatory intent on the part of the decision-maker(s) in order to prevail in their case; this is a particularly high burden of proof which is practically impossible to meet. With these considerations and findings as a backdrop, the concept of shared burden of proof – as stipulated in the EU non-discrimination directives – which recognises discriminatory effect *per se* (especially in the case of indirect discrimination) as a sufficient element to establish a *prima facie* case of discrimination can be said to correspond much more closely to the contemporary patterns of pervasive, mostly hidden, unintentional, unconscious, but still harmful bias among decision-makers as potential discriminators, including in capital cases.

The EU anti-discrimination directives spell out that, in proving direct or indirect discrimination in discrimination litigation, the burden of proof shall be transferred from the claimant to the respondent once the presumption of unequal treatment on the grounds of protected characteristic(s) is successfully established before a court or other competent authority. Yet, the Inter-American Commission on Human Rights appears to prefer a much stricter standard of proof according to which the applicant/petitioner needs to provide overt, clear-cut and ample evidence showing discriminatory bias on the part of decision-makers in a particular capital case to recognise a *prima facie* case of discrimination. Such an approach which is most evident from the Commission's decisions in *Celestine* and *Andrews* can be criticised for several reasons.

¹⁷⁷ statistics to that decision, are fundamentally different from the corresponding elements in the venire-selection'; *McCleskey v Kemp* (n 3) paras 293–297.

¹⁷⁸ *Willie L. Celestine v United States* (n 2) para 41.

¹⁷⁹ *ibid* para 45.

¹⁸⁰ Streib, *Death Penalty in a Nutshell* (Thomson/West 2008) 257.

¹⁸⁰ It is of palpitating interest that the US Supreme Court while refusing to overturn an entire US capital sentencing system due to statistics indicating a 'discrepancy that appears to correlate with race' in *McCleskey*, it acknowledged in *Turner v Murray* a reasonable likelihood that racial prejudice might infect the criminal trial by stating that 'because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate, but remain undetected'; *Turner v Murray*, 476 U.S. 28 [1986], para 35.

First, one needs to be fully aware of the fact that each death penalty proceeding is an extremely demanding decision making and governance process ultimately resulting in a decision on someone's life or death. Deciding criminal cases, particularly capital cases where the defendant's life is at stake, should therefore meet much higher non-discrimination standards than, say, deciding on who is offered a job at a certain company or who is promoted or degraded in the workplace, or who gets social housing, or who becomes a member of a given organisation, association or club. Since capital punishment is irrevocable by its nature, it requires a greater degree of scrutiny than other punishments.

Therefore, as far as the allocation of the burden of proof between the capital criminal defendant and the respondent government in discrimination litigation is concerned the legal standard should draw its guidelines from European non-discrimination law, in particular from the basic minimum requirements contained in the core EU anti-discrimination directives, pursuant to which the initial burden would rest with the claimant (capital defendant) to present evidence that suggests, on the balance of probabilities, that the death sentence in their particular case resulted from a discriminatory decision making process. Accordingly, where the claimant has been successful in proving the facts from which conclusions could be drawn that one or more grounds of unlawful discrimination gave rise to a less favorable or disadvantageous decision influencing the outcome of a capital sentencing process, the burden of proof should move to the respondent. Put another way, the capital defendant alleging an impermissible discriminatory prosecutorial and/or judicial approach in their capital case should be asked merely to establish a presumption of discrimination and not be expected to carry the ultimate burden of persuasion concerning the existence of discrimination.

Second, the legal standard of proof to be applied in discrimination litigation in the capital sentencing context should take into consideration the real-life situations, challenges and obstacles confronted by claimants. Given that in everyday life the most overt and straightforward cases of discrimination can hardly ever be found, mainly because the decision-makers will seek to remove all traces and conceal relevant evidence of direct discrimination, the relevant standard of proof should definitely take into account the fact that discrimination in death penalty cases goes beyond obvious, intentional and purposeful examples of bias and prejudice. Therefore, the claimant should not be required to prove the existence of stereotypes/prejudice or discriminatory motive/intent on the part of decision-makers in capital cases.

In some states applying the death penalty – with the US at the forefront – it is thus imperative to amend their old-fashioned constitutional and legal provisions that require clear and convincing evidence of willful discrimination to be presented by the complainant in the capital sentencing context,¹⁸¹ not least, because such a specific touchstone contravenes relevant international legal provisions, namely Article 1(1) of the International Convention on the Elimination of All Forms of Racial Discrimination, as well as Article 1 of the Convention on the Elimination of All Forms of Discrimination Against Women. Both Conventions provide for a broad definition of racial and gender discrimination, which make clear that States Parties to the convention must protect against conduct which produces a discriminatory effect, not merely against conduct that reveals a discriminatory intent.¹⁸² In the same vein, the advanced and sophisticated European non-discrimination law predicated on Article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol No. 12 to the Convention and, in particular, the EU non-discrimination directives and further explored and interpreted by two important judicial institutions, the European Court of Human Rights and the Court of Justice of the European Union, suggests that the (discriminatory) motive behind less favourable treatment is irrelevant, for it is the impact that is really important.

Third, capital punishment may be imposed only when the guilt of the person charged is based upon clear and convincing evidence leaving no room for a biased explanation of facts. Indeed, in reviewing various issues related to death penalty cases, including the allegations of the discriminatory decision-making process, a heightened level of judicial scrutiny shall be employed. Relevant human rights treaty bodies and institutions, such as the UN Human Rights Committee, the Inter-American Commission on Human

¹⁸¹ See also, in regard to necessary legislative and judicial reform, the proposition advanced by Ronald J Tabak that legislative bodies should be the first to address the problem of constitutional claims of discrimination in death sentencing and thereby eventually compel the courts to do so as well. Ronald J Tabak, 'Is racism irrelevant? Or should the fairness in death sentencing act be enacted to substantially diminish racial discrimination in capital sentencing?' (1990–1991) 18 New York University Review of Law and Social Change 777.

¹⁸² Although the International Covenant on Civil and Political Rights neither defines the term 'discrimination' nor indicates what amounts to discrimination for the Covenant's purposes, the Human Rights Committee interpreted the term as including 'discriminatory purpose' or 'discriminatory effect', analogous with the International Convention on the Elimination of All Forms of Racial Discrimination's and the Convention on the Elimination of All Forms of Discrimination against Women's definitions of racial and sex discrimination respectively. Human Rights Committee, General Comment No 18: Non-discrimination, 10 November 1989, HRI/GEN/1/Rev.1 (1989b), 26, paras 6, 7.

Rights, and the UN Special Rapporteur on extrajudicial, summary, or arbitrary executions, reiterated on several occasions that all safeguards and guarantees for a fair trial enshrined in pertinent international legal instruments must be fully respected and ensured when it comes to criminal cases possibly leading to the imposition of capital punishment.

Death penalty jurisdictions have an enhanced obligation to ensure that any deprivation of life which may occur through the application of the death penalty complies strictly with the requirements of the applicable international human rights instruments. Such a restrictive approach, which requires a 'heightened scrutiny test', was developed by international human rights authorities, including the Inter-American Commission on Human Rights. This means that capital cases must always meet the highest and exacting standards of independence, competence, objectivity and impartiality of judges and jurors. Those accused of capital crimes are, in accordance with international human rights law, entitled to a special and enhanced protection with regard to their due process rights, the protection of which is above and beyond that afforded in non-capital cases. If there is, for example, a serious doubt or presumption that a capital sentencing process was tainted with biased and prejudiced treatment of a defendant and/or a discriminatory decision, the death sentence must be quashed and a fair retrial shall be provided. The new sentencing hearing must be conducted in accordance with the equality, due process and fair trial protections and must include also competent legal representation.

Finally, and perhaps more fundamentally, the petitioner argued in *Celestine* that 'the present US rule of law requiring the defendant to prove racial discrimination in his trial is an unrealistic standard of review because no capital defendant has ever met that burden' and that 'subtle, system-wide racial discrimination is most often evident only through large statistical studies'.¹⁸³ He also maintained that 'if reliable statistical studies demonstrate the likelihood of racial discrimination within the criminal justice system, the burden must shift to the Government to prove that the capital hearing was free of racial discrimination'.¹⁸⁴ Moreover, in the same case the petitioner also correctly pointed out that a prohibition on racial discrimination constitutes a peremptory norm of general international law (*jus cogens*) which 'places "a heavy burden of justification upon the United States for the continuation of existing legal doctrines and policies that have permitted this state of affairs"'.¹⁸⁵ Regrettably, the Inter-American Commission on Human Rights dismissed these rather cogent arguments as not persuasive enough and held that the statistics provided were not sufficient to make a *prima facie* case that the death sentence was the result of racial discrimination so as to shift the burden of proof to the US government. Here it is necessary to indicate that, as the foregoing has demonstrated, comprehensive statistical evaluations of racial, ethnic, sexual, religious and other disparities, especially those made in the form of multiple-regression analysis and by virtue of official statistics, or other such relevant sources of information, when showing an outstanding and clear pattern of less favourable or disadvantageous effects towards specific group(s) of criminal defendants/victims of a capital crime and where there is no legitimate justification for such disparities, should carry the same evidentiary value and probative force as in other spheres of an individual's life and work. Consequently such statistical evaluation should normally be *per se* sufficient to establish the presumption of discrimination in the capital sentencing context, where a higher level of judicial scrutiny is required.¹⁸⁶

In any event, veracious statistical evidence showing a discriminatory effect can serve as additional corroborative evidence to shift the burden of proof to the respondent.¹⁸⁷ The court will then need to evaluate whether the complainant has demonstrated discrimination in light of the government's evidence.¹⁸⁸ The state must be given an opportunity to rebut the discrimination claim by explaining that legitimate and discriminatory ground-neutral criteria produced a disproportionate and discriminatory result. In order to discharge its burden, the alleged perpetrator must provide evidence that shows, on the balance of

¹⁸³ *Willie L. Celestine v United States* (n 2) para 17.

¹⁸⁴ *ibid.*

¹⁸⁵ *ibid* para 18.

¹⁸⁶ In the view of the Committee on the Elimination of Racial Discrimination, the relevant provisions of the International Convention on the Elimination of All Forms of Racial Discrimination prohibit – in terms of unlawful discriminatory effect – those race-neutral laws, actions and practices that have an 'unjustifiable disparate impact' on a particular racial or ethnic group. Committee on the Elimination of Racial Discrimination, General Recommendation No 14: Definition of discrimination (Art. 1, par. 1), 22 March 1993, A/48/18 at 114 (1994), para 2.

¹⁸⁷ Thus, the use of statistics represents a tool to 'link individual direct discrimination cases to broader patterns of inequality'; Schiek, Waddington and Bell (n 8) 322.

¹⁸⁸ For instance, Alexander also maintains that, despite the fact that statistics are imperfect, they should be accepted as a possible tool to help prove a *prima facie* case of discrimination, especially because of the extremely serious nature of capital punishment reflected in its complete finality and irreversibility; Alexander (n 46) 26.

probabilities, that the prohibited grounds of discrimination did not play any role in the given capital sentencing decision-making process and that all decisions leading to the death sentence were made in an absolutely fair, impartial and unbiased manner. In the absence of such evidence, the statistical evidence can be accepted as sufficient to demonstrate that personal factors entered into the decision that resulted in the defendant's death sentence.¹⁸⁹

In time, death penalty jurisdictions will need to pay heed to international human rights jurisprudence and case law elaborated by the human rights treaty bodies concerned if they do not want to find themselves in a vicious cycle of repeated international criticism for their responsibility for human rights violations and in order to get rid of increasing international community pressure to conform their death penalty systems to international standards. According to these standards, a great responsibility rests with the national judges in discharging their duties in capital trials. They are required to ensure a fair, impartial and non-biased sentencing process as well as a non-discriminatory decision on punishment in each particular capital case. This means, first of all, that they themselves must be of high principles and morality who permit no exceptions from international rules on fair and impartial trials and equal treatment before courts and tribunals. By the same token, they should also require the same criteria to be fulfilled by other prosecutorial and judicial staff and jury members involved in the capital sentencing cases. As soon as the reasonable suspicion of bias on the part of one or more jurors arises, the trial judge must carry out all necessary measures to ensure that the continuation of the criminal process is conducted in an equitable and just manner. This may include a disqualification of biased and prejudiced jurors if necessary.

At the appellate level, the role of the reviewing judge will remain equally important as they will need to establish whether the capital sentencing process and the conviction in particular, including the imposition of the death penalty, were influenced by certain stereotypes and prejudice on the part of the particular decision-maker(s) who decided the case in the first instance. Moreover, the Inter-American Commission on Human Rights emphasized in *Andrews v United States* and *Ramos v United States* that a great responsibility in capital cases lies with the trial judges to ensure that the whole trial process is conducted in an impartial, fair and non-discriminatory manner.¹⁹⁰ Whenever there is a reasonable suspicion that a jury made a biased and discriminatory decision about the capital defendant's criminal liability and/or punishment, trial judges must take all necessary steps, including adequate examination and verification of serious allegations and supportive evidence submitted by the legal defence, and questioning and replacing jury members if necessary,¹⁹¹ with a view to satisfy the requirements of equality before the law as guaranteed by Article II of the American Declaration of the Rights and Duties of Man and other relevant international human rights instruments.

Competing Interests

The author has no competing interests to declare.

¹⁸⁹ Baldus, Woodworth and Pulaski indirectly suggest that the model or standard of proof in capital sentencing discrimination litigation may vary from one death penalty jurisdiction to another and that domestic legislators and judges are more or less free to determine or set the precise level of legal protection enjoyed by capital defendants challenging decisions to seek or impose the death sentence that were possibly infected with racial bias; Baldus, Woodworth and Pulaski (n 46) 418–419. It is, however, imperative to insist on the position that the same minimal standard of proof should be widely accepted and applied in every death penalty jurisdiction, regardless of its criminal justice system, majority political and public opinion on the issue, or relevant traditions, if the international human rights standards on non-discrimination and fair trial are to be fully met. This does not imply, however, that the states applying the death penalty may not introduce rules of evidence which are more protective or more favourable to capital defendants who consider themselves wronged because the principle of equal treatment has not been rightly applied to them when making crucial decisions in their capital cases. The main reason for applying such a unified and universal legal standard of proof in death penalty jurisdictions is to minimise to the greatest extent possible the risk of executions based on discriminatory death sentences.

¹⁹⁰ *William Andrews v United States* (n 2) para 168; *Roberto Moreno Ramos v United States* (n 31) para 69.

¹⁹¹ Similarly, the European Court of Human Rights held in *Remli v France* that where there is a real possibility that a racist remark related to defendant's race or national or ethnic origin was uttered by a jury member before hearing the court to which such incident was reported must appropriately react and verify the alleged facts; *Remli v France* (n 29) paras 47, 48.

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