

business rules). A similar position is achieved in Austria and Germany; there a breach of conduct of business rules directly constitutes a breach of a private law duty, even though regulatory duties are not ordinarily considered to be of a private law nature.

The editors also discuss the potential for breach of MiFID rules to indirectly impact on a bank's private law liabilities. In Germany, there is increasing academic support for regulatory duties to influence the construction of the banks' contractual duties, and in the Netherlands the courts frequently specify a bank's duty of care by reference to regulatory duties imposed on the bank, particularly conduct of business rules. The authors also note the potential for a similar baseline in Spain, England and Wales and Ireland. Whether the law will develop in this direction remains to be seen, but this volume shows that there is a huge amount going on in this area, and much thinking that remains to be done. It is encouraging to see sustained comparative analysis of the topic that treats each system as its own and seeks, from this range of approaches, some common threads.

All in all, this book is a fascinating read and is recommended for generalists and specialists alike. Specialists should look forward, one hopes, to a further edition in due course.

HELEN MCGRATH

A SOLICITOR OF THE SENIOR COURTS OF ENGLAND AND WALES

*Foundations of Indirect Discrimination Law*. Edited by HUGH COLLINS and TARUNABH KHAITAN. [Oxford: Hart Publishing, 2018. x + 292 pp. Hardback £65.00. ISBN 978-15-09912-54-4.]

Indirect or disparate impact discrimination has become an integral part of discrimination law regimes in many jurisdictions. First established in the landmark case of *Griggs v Duke Power Co.*, 401 U.S. 424 (1971), the concept has since developed into a nuanced but often divergent collection of principles. These have become central to debates concerning the objectives and legitimacy of discrimination law. In its most basic form, indirect discrimination involves the prohibition of neutral rules (i.e. rules which are not directly discriminatory) which nevertheless put some members of a protected group at a particular disadvantage. From its inception the concept has been charged with normative and conceptual uncertainty. Commentators have challenged the legitimacy of holding someone accountable for applying rules that produce disparate outcomes in situations where there was no discriminatory intent. They have also questioned the compatibility of indirect discrimination with the original aims of the law of direct discrimination: Smith, *Basic Equality and Discrimination: Reconciling Theory and Law* (2011); Alexander, "What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies" (1992) 141 U.Pa.L.Rev. 149; Cavanagh, *Against Equality of Opportunity* (2002). Indirect discrimination remains controversial, particularly in the US and the UK.

This collection of essays, edited by Hugh Collins and Tarunabh Khaitan, examines foundational questions relating to the purpose, legitimacy and conceptual distinctiveness of the law of indirect discrimination. An edited collection focusing exclusively on indirect discrimination law is a welcome addition to scholarship which has primarily dealt with this topic as a part of a wider discussion of the law of discrimination. While the book as a whole does not present a unified

argument in response to any of the questions it addresses, the discussion within is rich and insightful.

In the opening chapter, Collins and Khaitan present an overview of the “controversies and critical questions” which surround indirect discrimination law. More than a mere introduction, this chapter seeks to synthesise the themes presented in the collection (perhaps more perspectives than can be handled elegantly). Collins and Khaitan characterise indirect discrimination as a “protean concept”, comprised of divergent moral principles and institutional structures. This verdict reflects the state of the field and gives the inexperienced reader a helpful introduction to a body of unstable law.

A central issue addressed in the ensuing chapters is the conceptual distinctiveness of indirect discrimination. The greatest synergy between authors is here, even if the contributors seldom engage with each other’s arguments. The discussions by Fredman, Moreau, Collins and Khaitan and Steel use various methods, allowing the reader to grasp the doctrinal and philosophical subtleties of the conceptual distinctiveness question. Consensus forms around the conclusion that the apparently neat distinction between direct and indirect discrimination is neither neat nor certain. Fredman presents a clear and thorough account of the doctrinal developments of discrimination law in both the US and the UK, emphasising that jurisdictions “have found it difficult to draw a bright line distinction” due in part to an aversion to affirmative action and a continued emphasis on individual fault and harm. This account is supplemented by the book’s final chapter, where Collins sketches a comprehensive analysis of the legitimacy of justification in indirect discrimination law, comparing it to the approach in direct discrimination law. He blends doctrine with theory and offers a fine supplement to Fredman’s analysis of justification as a method of distinguishing between direct and indirect discrimination. The discussion by Moreau and Khaitan and Steel addresses the conceptual distinctiveness question more obliquely. However, it grounds the distinctiveness point within the wider theoretical arguments that they advance. The result is a collection of chapters which, when read together, represent a comprehensive and contemporaneous account of scholarship addressing this question.

The chapters by Hellman, Moreau, Lippert-Rasmussen and Khaitan and Steel are more philosophical. In debates concerning the theoretical foundations of indirect discrimination, a central concern is the precise nature of the harm of indirect discrimination and how and whether this may legitimate laws prohibiting such conduct. These chapters each present a different conceptualisation of the harm in question and ground a justification for the prohibition of such harm within that theoretical framework. They often diverge from one another in key respects, even though they share common premises and methods. Hellman argues that the harm of indirect discrimination accrues because it compounds the injustice of direct discrimination. In contrast, Moreau conceives of the harm as more akin to negligence. Khaitan and Steel account for two types of harm caused by indirect discrimination; particularised harm that is felt by individuals and which is contrasted with the harm felt by groups that those members are a part of. However, they are not entirely clear regarding the causal connection between these two kinds of harm. At one point they argue that indirect discrimination harms groups as a whole and that individuals are harmed because they are members of those groups. However, they later argue that indirect discrimination harms subsets of groups which consequently produces knock-on harms to groups as a whole. These claims are mutually incompatible. Harm either accrues top down or bottom up; it cannot do both. Each of these chapters contains a distinct theory of indirect discrimination, such that each chapter stands apart from chapters based on other theories. Although that may disorient some readers,

Bamforth's chapter presents a succinct but detailed overview of key theories which will provide a reader unfamiliar with indirect discrimination, or indeed discrimination in general, with a window into the many ways that concepts can be understood and the harms they wish to protect against can be identified.

Chapters focusing on the political background to the development of indirect discrimination law, particularly in Europe, reveal the potential obstacles facing the continued development of equality law. For example, Havelková analyses the case law of the European Court of Human Rights, focusing on arguments advanced by governments and certain judges in key cases. The chapter exposes some of the latent assumptions contained in these arguments as to the neutrality of social and legal structures, the necessity of bias as a component of discrimination and the role of the individual and the group within discrimination law. It highlights, perhaps unintentionally, some of the assumptions that discrimination law scholarship itself often makes, including many of the contributors to this book. It is understandable that legal frameworks make assumptions. However, scholarship which attempts to ground discrimination law in what disadvantage is really like in society would be improved by directing readers towards studies that establish the facts of that disadvantage: for example, studies which show that certain social or legal structures are not neutral with regards to race or gender. Havelková stresses that the recognition of context is "the core of the doctrine of indirect discrimination" yet does not provide an interested reader with evidence of this social context. This is not an issue unique to the authors within this volume but is important particularly when criticising judges for having failed to account for this social reality.

While one might consider McCrea's chapter to be an outlier in this collection because it deals with the particularised topic of freedom of religion and its compatibility with indirect discrimination law, it alerts the reader to the potential conflicts which might exist between indirect discrimination law and other areas of law. Similarly, Khaitan and Steel's chapter examines the potential conflict between indirect discrimination and the rule of law. These chapters hint at fruitful discussion that is to be had concerning the interaction between discrimination law and aspects of constitutional and human rights law, a topic which is of increasing relevance given recent controversies over the conflict between rights to non-discrimination and rights to freedom of expression and religion in the provision of services for same-sex weddings.

It is unfortunate that at several points in the book, various writers claim that indirect discrimination is concerned with harm that is done to social groups as a whole (Collins and Khaitan, p. 19; Fredman, p. 32; McCrea, p. 156; Khaitan and Steel, p. 201). The test for indirect discrimination does not require a claimant to prove harm to groups as a whole. Rather, the harm of indirect discrimination is felt by individuals. It is assessed based on the effect that conduct might have on persons who share a protected characteristic should they be subject to such treatment. It is never the case that a claimant must prove that a provision, criterion or practice actually affects the entirety of the group that those individuals belong to. The test is designed to identify circumstances where individuals are treated worse because of a protected characteristic, despite that treatment being facially neutral with regards to those characteristics. As such, if an employer indirectly discriminates against his or her female employees, all that must be proven is that the employer's actions put or would put female *employees* at a particular disadvantage relative to male *employees*. There is no requirement to prove that women as a group were harmed.

This collection simultaneously addresses the philosophical, doctrinal and political foundations, of indirect discrimination law and in so doing fails to comprehensively account for any of those types. A volume such as *Philosophical Foundations of*

*Discrimination Law* (2013), edited by Hellman and Moreau, largely avoids this problem by focusing solely on problems of one type. Nevertheless, this book excels in offering a snapshot into contemporary discrimination law scholarship and is a must-read for anyone working in this area. Several of the essays are sure to shape the contours of debates in this field for years.

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*The Duty of Care in Negligence*. By JAMES PLUNKETT. [Oxford: Hart Publishing, 2018. xxiv + 225 pp. Hardback £55. ISBN 978-15-09914-84-5.]

Few doctrines in the law of torts have received as much scholarly attention as the duty of care in negligence. It is legitimate to ask what new contribution a treatise on duty can make. James Plunkett's *The Duty of Care in Negligence* provides a useful consolidation of the historical and modern evolution of duty and a thoughtful critique of some current scholarly debates. Those who work in the field may find this material to be largely familiar: the historical terrain has already been well-charted by David Ibbetson and others; and the journey from *Donoghue v Stevenson* [1932] A.C. 562 to *Anns v Merton London Borough Council* [1978] A.C. 728 and *Caparo Industries v Dickman* [1990] 1 A.C. 605 is all too well known. Plunkett also provides a catalogue of the various methodologies for assessing novel duty situations, and a discussion of the appropriateness of using so-called "policy" reasoning in duty cases. The latter debate has become, to some scholars, detached from reality.

The meat of Plunkett's book is contained in chs. 4, 5 and 6, which assess the respective concepts of "factual duty" and "notional duty". Factual duty refers to the determination "whether harm to the plaintiff was a reasonably foreseeable consequence of the defendant's conduct", while notional duty refers to the question "whether the broad circumstances in which the plaintiff suffered the injury *ought* to be subject to the laws of negligence" (emphasis original). With respect to the first inquiry, Plunkett agrees with critics who find the duty question superfluous in negligence analyses, as it overlaps with the more clearly factual questions of whether the defendant breached the standard of care and whether the loss was too remote. All of these questions boil down to an assessment of whether the defendant's actions posed a foreseeable risk of the injury suffered by the plaintiff. Plunkett thus argues that the factual inquiry should be removed from duty analyses, which should instead focus exclusively on the notional question.

After reviewing the various duty "tests" that have been employed over the last century (and their respective flaws), Plunkett proposes that the quest for a single notional duty test be abandoned and replaced with five broad duty categories, each with its own principles of recovery and non-recovery. For cases involving physical injury, property damage or psychiatric harm, the principles would explain a general rule of recovery, subject to narrow exclusionary exceptions. Conversely, for cases involving omissions and purely economic loss, the principles would explain a general exclusionary rule, subject to narrow inclusionary exceptions. By employing these more discrete duty categories, Plunkett argues, we would be able more clearly to identify which principles were relevant to any given duty scenario, and avoid having to use concepts like "proximity" in such a broad way as to be vague and unhelpful.

Plunkett's proposal seems sensible, and reflects, to a large measure, the way that appellate courts already approach these situations in practice. Indeed, the UK