Justifications for Sex Discrimination in Employment:

a comparative study of the law of the European Community, the United Kingdom, the United States of America and the Federal Republic of Germany.

Tamara Katherine Hervey

Thesis submitted for the degree of PhD

University of Sheffield, Faculty of Law

October 1992

Contents

I am grateful to many people who were helpful and encouraging while I was conducting the research for this thesis. A number of individuals deserve a special mention.

I am extremely grateful to my supervisor, Jo Steiner, for all the hard work she put into the supervision process. Her willingness to read countless drafts, and to spend time in discussion, her constructive criticism and her encouragement and enthusiasm for the research proved invaluable.

The comparative element of the research would have been impossible without the help of various 'insiders' in the legal professions and legal academia in the US and Germany. In this regard, I would particularly like to thank Judge Frank E. Schwelb and his staff, and Hans and Pascale Blunck.

The process of preparing and writing this thesis would have been far less pleasant without the encouragement provided by friends and colleagues in Sheffield, especially Mike and Debbie, and the distractions provided by friends in Derby, especially Paul and Alan.

Thanks also to the members of my family who helped with various tasks: to Sándor, to Becky for assistance with German translations and to Josie, whose patience with endnotes was extremely welcome.

Finally, a special thanks should go to Mark, who has lived with this research for three years, and for whose encouragement, help and advice, including in matters relating to computers, I am very grateful indeed.

Selected Abbreviations

AG	Advocate General
All ER	All England Law Reports
Am.J.Comp.L.	American Journal of Comparative Law
AZO	*Arbeitszeitordnung* of 1938 (Regulation on Working Hours)
BAG	*Bundesarbeitsgericht* (Federal Labour Court)
BB	*Betriebsberater* (German legal periodical)
BeschF	*Beschäftigungsförderungsgesetz* of 26 April 1985 (Act on Improvement of Employment Opportunities
BetrVG	*Betriebsverfassungsgesetz* of 15 January 1972 (Labour Management Relations Act)
BFOQ	Bona Fide Occupational Qualification (US law)
BGB	*Bürgerliches Gesetzbuch* of 18 January 1896 (Civil Code)
BGBl	*Bundesgesetzblatt* (official gazette of German law)
BVerfGE	*Bundesverfassungsgericht* (Federal Constitutional Court)
C.L.J.	Cambridge Law Journal
CFR	Code of Federal Relations (US)
CMLR	Common Market Law Reports
Comp.Lab.Law J.	Comparative Labour Law Journal
DB	*Der Betrieb* (German legal periodical)
E.L.Rev.	European Law Review
EAT	Employment Appeals Tribunal
ECJ	European Court of Justice
ECR	European Court Reports
EEOC	Equal Employment Opportunity Commission (US)
EG	*Europäische Gemeinschaft* (European Community)
EOC	Equal Opportunities Commission (UK)
F 2d	Federal Reporter (US)
F Supp	Federal Supplement (US)
FEP	Fair Employment Practice Cases (US)
FLSA	Fair Labour Standards Act 1938 (US)
GG	*Grundgesetz* of 23 May 1949 (Basic Law or Constitution)
GOQ	Genuine Occupational Qualification (UK law)
Harv.L.Rev.	Harvard Law Review
Human Rights L.J.	Human Rights Law Journal
I.C.L.Q.	International and Comparative Law Quarterly
I.L.J.	Industrial Law Journal
ICR	Industrial Cases Reports
IDS	Income Data Services (UK)
Int.J.Soc.L.	International Journal of Social Law
Iowa L.Rev.	Iowa Law Review
IRLR	Industrial Relations Law Reports
IT	Industrial Tribunal

J.L.S.	Journal of Law and Society
J.Soc. Welfare and Family L.	Journal of Social Welfare and Family Law
KSchG	*Kundigungsschutzgesetz* of 10th August 1951 (Protection Against Dismissal Act)
L Ed 2d	United States Supreme Court Reports - Lawyers Edition
L.Q.R.	Law Quarterly Review
LAG	*Landarbeitsgericht* (State Labour Court)
M.L.R.	Modern Law Review
MuSchG	*Mutterschutzgesetz* of 1969 (Mother Protection Act)
N.L.J.	New Law Journal
NJW	*Neue Juristische Wochenschrift* (German legal periodical)
Northwestern University L. Rev.	Northwestern University Law Review
OJ	Official Journal of the EC
Ox.J.L.S.	Oxford Journal of Legal Studies
P.L.	Public Law
RGBl	*Reichsgesetzblatt* (offical gazette of German law, 1871-1945)
S Ct	Supreme Court Reporter
San Diego L.Rev.	San Diego Law Review
Title VII	Civil Rights Act 1964, Title VII
Tul.L.Rev.	Tulane Law Review
U.Penn.L.Rev.	University of Pennsylvania Law Review
Uni. of California L.A. Law Rev.	University of California, Los Angeles Law Review
US	United States Reports
USCA	United States Code Annotated
WLR	Weekly Law Reports
ZfA	*Zeitung für Arbeitsrecht* (German legal periodical)

Table of Cases

Court of Justice of the European Communities.

United Kingdom Courts.

United States Courts.

Chapter 1

Introduction

The removal of discrimination between women and men in the workplace, in order to open up equality of opportunity in employment, is a measure of social policy regarded as desirable by makers of law and policy in Western liberal democracies, including the four legal systems examined in the present study. Legislative provisions with the specific purpose of removal of sex discrimination in employment have been in place in those legal systems for a number of years: since the 1960s, in the case of the United States of America (Civil Rights Act 1964), since the 1970s, in the case of the United Kingdom (Equal Pay Act 1970), since the 1980s, in the case of the Federal Republic of Germany (*EG-Anpassungsgesetz* 1980) and, in the case of the European Community, since its foundation in 1957 (Treaty of Rome, Article 119).

Now that comprehensive legislation with the purpose of removal of sex discrimination in employment is in place, in the four legal systems examined, attention should be focused on the effectiveness of the legislation and on proposals for its continued improvement. The effectiveness of a particular aspect of the general legislative provisions concerning sex discrimination in employment is the focus of the present study. The issue with which the study is concerned is that of exceptions to the rule of non-discrimination, or 'justifications' for discriminatory behaviour in the employment sphere. It is common ground that any statement of general principle (including the principle of non-discrimination on grounds of sex) will be subject to exceptions. The exceptions form the subject of the present study. Exceptions to a general principle should be applied in such a way as to avoid undermining the core principle. The study seeks to explore qualifications to the general principle of non-discrimination in employment, and to refine those qualifications, so as to protect the application of the general principle.

Exceptions to the principle of non-discrimination in employment may be found in the legislation itself. However, most of the elucidation of factors relevant to an inquiry into justification for discrimination is found in case law, in the reasoning of the judiciary and *amici curiae*, as legislative measures are interpreted and applied. Therefore the study is firmly focused on case law.

I chose to focus on justifications for sex discrimination in employment for two main reasons. The first is simply that the issue is one relatively new to the judiciary and therefore that the law is still very much in the process of development. This is particularly so in the case of the law of the European Community. The second reason is more specific: my particular concern is the development and application of rules governing justification for sex discrimination in employment in European Community law. The leading case in the jurisprudence of the European Court (*Bilka-Kaufhaus v Weber von Hartz*), which lays down general provisions concerning the standard of justification required to defend a claim of sex discrimination, leaves much open to further interpretation, and may not be appropriate for all cases in which the question of justification for discrimination arises.

With European Community law the focus of the study, I adopted a comparative methodology, on the grounds that this would at least give insights into possible approaches to the issue of justification, and at best might present a model solution. I chose to examine the law of the United States of America because legislative provisions concerned with non-discrimination in employment have been in place in that legal system for a relatively long time. The law of the United Kingdom was chosen partly because of ease of access, but also because many of the cases reaching the European Court on the issue of sex discrimination in employment originated in the UK. The latter reason was also the rationale behind the choice of the Federal Republic of Germany; indeed, the leading case on justification for discrimination in European Community law was referred to the European Court by the German *Bundesarbeitsgericht* (Federal Employment Court). German law also provided the contrast of a civil, as

opposed to common law, legal system. The methodology of the study is explored in more detail in Chapter 2.

The scope of the study includes all issues directly relevant to lawful justification for sex discrimination in employment. Relevant issues include not only identification and examination of the many different *substantive grounds* for justification, but also the *standard* by which justifications are tested. The scope of the study includes examination of justifications for 'direct' and 'indirect' discrimination, discrimination in pay and in treatment, and 'negative' and 'positive' discrimination. These concepts are explained in detail in Parts II and III.

While I recognise that other factors, such as remedies for breach of non-discrimination rules, the practical effect of the legislation, and the attitudes of employers to women employees (or male employees in traditionally 'female' employment), will affect the way the test for justification is applied, it should be made clear here that examination of such factors is beyond the scope of this study.

The aims of the study are two-fold. First, I propose to examine, compare and evaluate rules concerned with justifications for discrimination in four different legal systems, by reference to the 'functionality' of those rules. This means that the measures are evaluated in the light of the purpose or aim of sex discrimination law in general. It is sufficient to note here that my position is that the purpose of sex discrimination law in the employment sphere should be the promotion of 'equality of opportunity' for women and men. The concept of 'functionality' and my position on the aim of sex discrimination law are explained in detail in Chapters 2 and 3.

Second, I aim to utilise the exploration of the material in order to recommend specific ways in which the law of the European Community could be developed, to promote equality of opportunity in that legal system.

The study is divided into three parts. In Part I (Chapters 2 and 3) the methodology of the study and its theory basis are explained. In Part II (Chapters 4 - 7), for each legal system in turn, a detailed description of the relevant legislative measures, and their judicial interpretation, is undertaken. Part III (Chapters 8 and 9) is analytical; there I have sought to evaluate the detailed rules of each legal system by comparing the different approaches, with reference to the concept of equality of opportunity.

PART I

Methodology and Theory

Chapter 2

Methodology

1 Theories of Comparative law

This thesis uses comparative law as the basis of its methodology. As there is no universally accepted meaning of the term 'comparative law', it is pertinent to undertake at this stage an exploration of some of the salient theories concerning the nature of 'comparative law' and 'the comparative law method', and the claims made for comparative law by these theories.

Some theorists reject the term 'comparative' as a description of a study such as the present thesis. For example, Alan Watson[1] asserts that comparative law is the study of the relationship of one legal system and its rules to another. The proper task of the comparative lawyer is the examination of either the reception of legal rules by one legal system from another, or the imposition of legal rules on one legal system by another. The movement of Roman law or canon law through Europe or the imposition of the *Code Napoléon*, for example, are proper subjects of study. Here, comparative law is concerned with historical analysis; it seeks to elucidate something about the nature of law, or the nature of legal development. According to Watson, the comparison of individual rules or branches of law is not 'comparative law'.

Other writers recognise that the term 'comparative law' may be used to refer to various different types of study. Hugh Collins[2], for example, begins from this premise. Comparative law has various methods and aims: four of these are as follows.

Firstly, comparative law may be used and has been used to search for a natural law of contracts or obligations: or, more broadly, for the unification of private law. Secondly, comparative law may shed light on forces and mechanisms which cause changes in legal systems and societies. Thirdly, comparative law may be used to seek the best

solutions to legal problems; and may use 'legal transplants' to implement these solutions. Finally, comparative law may be used with the objective of better understanding one's own domestic legal system. Of these four, the third and fourth are of the most immediate relevance in this work[3].

Yet other writers on the nature of comparative law focus on the assertion that comparative law is a method. These writers include Rudolf B. Schlesinger[4], who suggests that the comparative method may be applied to problems of domestic law either by using a foreign system as a model, for example in judicial decisions, where arguments from other legal systems may be regarded as persuasive; or by using a foreign system as a basis of contrast, or to provide perspective; that is to say, in particular as a starting point for critical analysis of existing domestic rules, for example, to carry out statutory law reform.

H. C. Gutteridge[5], distinguishes between what is termed 'descriptive comparative law' and 'applied comparative law'. The former merely provides a description of variations between the laws of two or more countries, and does not aim to solve any problem, either abstract or practical. 'Applied comparative law' is,

> 'the use of the comparative method with a definite aim in view, other than that of obtaining information as to foreign law. The aim in question need not be of a practical nature: it may, for instance, take the form of a comparison carried out either to enable the legal philosopher to construct abstract theories of law, or in order to assist the historian in tracing the origins and evolutions of legal concepts and institutions.'[6]

Gutteridge goes on to say;

> 'The comparison must be based on a careful and accurate analysis of the foreign laws under investigation, but its most important aspect is the construction of a synthesis, founded on the results of the analytical process, which is intended to elucidate some problem either of an abstract or utilitarian character.'[7]

The comparative lawyer is required to create a 'synthesis' by which to contextualize the detailed analysis of the approaches of different legal systems to a particular legal problem. The creation of this 'synthesis' is a central part of the comparative law method. The method of creating

such a 'synthesis' is addressed in detail in the work of Konrad Zweigert and Hein Kötz[8].

Zweigert and Kötz, having asserted that comparative law is a process, give a detailed account of how this process may be carried out. It is this description of the comparative law method which has had the most formative influence on the present thesis. The method envisaged by Zweigert and Kötz will therefore be described in some detail in the following.

The comparative lawyer begins with an 'idea'; a question or hypothesis about how the law addresses or should address a particular social problem; and gathers the relevant material in terms of rules and legal principles. The 'idea' and the material may interact, leading to an increasingly precise formulation of the question which the comparative lawyer wishes to address.

The guiding principle when gathering material is that of 'functionality', that is to say, the determination of the function of the law or rule or other legal institution in question. This establishes which laws, rules or legal institutions will be the subject of comparison. According to Zweigert and Kötz, the problem that the law is trying to address must be stated in purely functional terms. Functionality is central to the theory of Zweigert and Kötz: it is, in fact, the 'synthesis' by which the comparative lawyer seeks to organise the material, and to address the original question posed by the comparative lawyer. Because functionality is so central to the present work, a detailed explanation of that concept as it relates to justification of sex discrimination in employment will be necessary: this exploration will be carried out in the following chapter.

The comparative lawyer's next step is to make a choice among legal systems, and to decide which of these will be compared.

The comparative lawyer reports on the material descriptively, by detailing the operation of laws, rules or legal institutions in the different legal systems chosen. Following this, the actual comparison is carried out; in

a way designed to bring out differences and similarities between the rules and their operation. The different solutions must be freed from their own context and set in the context of all the solutions. The tool for such a process is functionality: solutions are seen in light of their function, as an attempt to satisfy a particular legal need.

Zweigert and Kötz suggest that to do this a comparative lawyer needs to 'build a system'. The aim of the 'system' is to identify the demands that a particular 'slice of life' poses for the law in all systems where social and economic conditions are similar, and provide a realistic context within which to compare and contrast the various solutions. Such a system needs to be flexible, will give the impression of being a rather loose structure, and is bound to have 'large concepts' to embrace the legal institutions which are comparable.

Finally the comparative lawyer makes a critical evaluation of what has been discovered by the comparisons made. The evaluation may focus on the superiority of any one particular solution, or the equal validity of all solutions. The critical evaluation should be carried out explicitly.

2 The issue of transferability

If the 'critical evaluation' at the last stage of Zweigert and Kötz's method is to be of any practical use; in particular, if it could be used in the process of law reform, this entails certain presuppositions about the nature of legal rules, and their 'transferability'. Should the solution (to a social or legal problem under examination) of a foreign legal system be superior to one's own, one would hope to transfer or transplant the foreign solution into one's own legal system.

Zweigert and Kötz's theory presupposes that foreign legal solutions are transferable, at least in some situations, in particular where social and economic conditions are similar. Collins' theory that the comparative legal method may be used to seek the best solutions to legal problems, and use legal transplants to implement these solutions, rests on a similar assumption.

It is neither generally accepted, nor is it empirically demonstrable, that legal rules, norms or institutions are transferable in the way that the above cited comparative lawyers claim. The transferability of legal norms is a matter of controversy. This question is addressed in what is generally recognised as one of the classic pieces of writing on comparative law; Sir Otto Kahn-Freund's 'On Uses and Misuses of Comparative law'.[9] Kahn-Freund asks whether legal institutions are more like kidneys or like carburettors. Does it make sense to talk of the rejection of a transplanted norm, as one would in the case of a kidney transplant, or would the case of a transplanted legal norm be more analogous to the fitting of a new carburettor in a car? In fact, as is asserted by Kahn-Freund, it is obvious that legal norms, as a class, are comparable neither to kidneys nor to carburettors. However, it can be agreed that there are degrees of transferability. According to Kahn-Freund, the degree of transferability of a legal norm depends on factors present in the country concerned, which link the law closely to its environment, so that legal norms from elsewhere cannot be transplanted into the system. The factors may be geographical (climate, size or geographical position of the country), sociological, economic (wealth of the people, population density, main economic activities) or cultural (religion, customs), but, argues Kahn-Freund, political factors will be of the greatest importance.

> 'Anyone contemplating the use of foreign legislation for law making in his country must ask himself: how far does this rule or institution owe its existence or its continued existence to a distribution of power in the foreign country which we do not share?'

Watson[10] is critical of the idea that a successful legal transplant depends on a detailed knowledge of the foreign political context and power structure. Using the examples of reception of Roman law by Germanic tribes, with diverse political circumstances, in the 5th century, and of the reception of the French penal code and German law of contract and property by Japan, Watson argues that the link of the legal institution to its environment may not always be significant.

> 'When a law of general application is passed in a particular jurisdiction, eg England and Wales, it is meant to apply both to London and remote districts of Wales; to the very rich and the very poor. Hence it ought to cope with very different environmental factors. Within the range of its application, climatic conditions, fertility of the soil, the life led by the people, their wealth, density, trade and so on may vary greatly. Hence such a general statute may in many cases not be very closely tied to any one particular kind of environment, and thus will be transplantable with greater ease.'[11]

As Eric Stein[12] explains, the difference in approach between Kahn-Freund and Watson can be better understood by reference to their respective viewpoints. For Watson, whose view is historical and 'macrolegal', 'the transplanting of legal norms is socially easy ... even when the rules come from a very different kind of system'[13]. For Kahn-Freund, whose view is social-legal and 'microlegal', 'transferability stands in inverse relation to the closeness of the local institution to its habitat'[14]. As the present study is conducted at the 'microlegal' level, the reservations expressed by Kahn-Freund must be taken seriously.

According to Collins[15], criticisms of direct legal transplants fall into two categories. The first type of criticism is that direct legal transplants are inappropriate because of significantly different social and economic structures of two societies. As an example of this, Kahn-Freund uses the attempted transplantation of the Industrial Relations Act from the legal system of the USA to that of the UK. The attempt was unsuccessful on account of differences in social structure, historical development and prevailing social norms between the two countries, in spite of the fact that both are 'industrialised Western nations'. The second type of criticism focuses on the assertion that legal concepts fit into clusters of concepts that comprise a consistent set. One cannot transplant a single foreign concept into domestic law without undermining the conceptual coherence of the recipient legal system.

Collins is critical of these arguments on the grounds that they express extremes. 'These two criticisms of the positivist and utilitarian approach to comparative law can be exaggerated. Sensitive transplants of rules and techniques should be possible.'[16]

My study rests on an assumption that legal rules concerning discrimination in employment are, at least to some extent, transferable between those legal systems which are examined. All of these legal systems are termed Western democracies, with free market economies. All regulate the employment contract by legislation, and do not leave development of the employment relationship entirely up to market forces. All have some sort of commitment to anti-discrimination legislation in the employment sphere. The existence and influence of different power groups ('political factors' in Kahn-Freund's theory) - for example trade unions, women's groups, Commissions for Equal Opportunities - although, of course, varying to an extent between the different legal systems under analysis, are assumed to be sufficiently similar to make comparison realistic in the sense envisaged by Zweigert and Kötz.

3 The process of comparison

Use of the comparative method involves the comparison of selected aspects of two or more different legal systems. The material presented for comparison may cover a very broad area, for example law regulating property ownership, or may focus on a relatively narrow topic, as is the case in the present study. If critical evaluation is to lead to proposals for law reform or development of the law in a particular legal system in a certain way, the area of law examined must be transferable to the necessary extent.

3.1 Separate legal systems

The requirement that 'two or more legal systems' be compared raises a question as to what exactly constitutes a 'legal system'. While an ontological or metaphysical examination of legal systems is outwith the scope of the present study, some indication, at least in the form of a working definition, should be given of what is to be accepted as constituting a legal system.

A neat, all-embracing definition of 'a legal system' is not particularly helpful in this context: an indication of the factors which are common to

most legal systems is probably more useful. Legal systems are composed of legal norms, principles and concepts. In general, a legal system will be co-extensive with a political system, usually that of a nation. The legal systems of modern nation states have, in general, a body or bodies which make and enforce laws, and resolve legal disputes: these are known as the legislature, executive and judiciary respectively. The legal system will define autonomously the subjects to whom its laws are applicable.

The legal systems examined by the present study are the legal system of the United Kingdom (UK) (comprised of the law of England and Wales, and Scots law[17]; in the area of discrimination in employment the laws of these two legal systems are identical), the legal systems of the United States of America (US) and the Federal Republic of Germany (Germany), and European Community (EC) Law. There can be little difficulty with the recognition of the first three systems as 'legal systems'. There may, however, be some difficulty with the assertion that EC law exists as a legal system independent of and separate from the legal systems of the Member States of the European Community.

The EC is made up of twelve Member States, each with its own legal system. The subjects of Community law (individual European citizens, European companies) are also subjects of the law of the relevant individual Member State: it is not possible to identify them as subjects of Community law alone. Furthermore the EC legislature is characterised by a concentration of power in the European Council, which is made up of non-independent representatives of the governments of Member States.

The doctrine of direct effect provides that those provisions of EC law which are directly effective (that is, Treaty provisions and provisions of Regulations, and provisions of Directives in more restricted circumstances, provided they are sufficiently clear, precise and unconditional) become part of the law of the Member States; in the sense that those provisions are applicable by individual nationals of a Member State, before the national judiciaries. The doctrine of indirect effect, established in *von Colson*[18], provides that, in certain circumstances, where a provision of Community law is not directly effective, national courts have a duty to

construe national law in such a way as to give effect to EC law. The doctrine of indirect effect applies where a provision is not directly effective; because of this, it is particularly appropriate in the case of EC legislation brought into effect by Directive, which has been inadequately implemented in national law. The application of these two doctrines[19] means that Community law becomes, from the point of view of the individual seeking redress, part of the law of that individual's own legal system, in the sense that rights and duties originating in Community provisions are enforceable in national courts. Most enforcement and implementation of EC law is carried out by executive or judicial bodies of the Member States, in particular, by national courts.

However, it is not unreasonable to regard EC law as a separate system. Of particular significance here is the establishment by the Treaty of Rome (as amended) of institutions of the EC (Council and Commission, with Parliament) with power to pass legislation for the EC in matters of Community law. Various provisions of the Treaty of Rome empower these institutions to legislate for the Community, not least Article 235, which provides that if action by the Community should prove necessary to attain one of the objectives of the Community and there exist no relevant enabling measures elsewhere in the Treaty, the institutions shall take the appropriate measures. This body of legislation is identifiable as 'Community law', and the separate institutions and legislative process indicate separation from the legislation of the Member States.

Most EC law concerning sex discrimination in employment (with the notable exception of Article 119 of the Treaty of Rome) is enacted in the form of Directives. A Directive is binding upon the Member State as to the result to be achieved, but leaves Member States a choice in the form and method of implementation.[20] In the area with which the present study is concerned, most EC legislation is found in Directives. Therefore the EC law (embodied in a particular Directive, for example, the Equal Treatment Directive[21]) is separate, and may in fact be different in effect, from the national implementing measure. This is a further indication that it is appropriate to compare the Community provisions with the national provisions of Member States, such as the UK and Germany.

Furthermore the European Court of Justice has been created as a EC institution with judicial authority: judgments of the European Court have done much to develop EC law, and the existence of this body of case law further indicates the existence of a separate legal system. The Court has the final competence in matters of interpretation of EC law; a competence it has jealously guarded in order to ensure uniformity of application of EC law, which is regarded as central to the successful achievement of the aims of the Treaty of Rome. While the doctrines of direct and indirect effect suggest the interdependence of EC law and the national legal systems of the Member States, they do not preclude the separate existence of EC law. In fact, it could be argued that the doctrines of direct and indirect effect are evidence that EC law has a separate existence from the legal systems of Member States, since these doctrines govern situations where there is a clash in provisions of two different systems. Finally Article 210 provides that the Community shall have legal personality. This establishes the EC as a legal entity in international law separate from the Member States which make up the Community.

It may not be possible to establish that EC law is 'independent' from the laws and legal systems of the Member States. However one may posit that EC law is 'separate' - or at least that this separation is sufficient for the purpose of meaningful comparison of EC law with the laws of individual Member States. The laws of the Member States run alongside the EC provisions where EC law is enacted by Directive. Comparison is particularly applicable to an aspect of law such as sex discrimination in employment, for two reasons. The first of these is that the development of EC rules in the area of sex discrimination in employment is incomplete, so where there are lacunae in EC law, either through lack of legislation, or simply because the European Court has not ruled on a point of interpretation, national law applies. The second reason relates to the fact that EC law on sex discrimination is mainly found in Directives, which require implementation by the legislature of the Member States. The reception into national law of the provisions in those Directives may often be incomplete (evidenced by case law, in particular in those cases where the Commission challenges implementation of EC law by a Member State,

under Article 169 of the Treaty of Rome[22]), in which case the national law runs parallel to (but is not identical to) the Community provision.

3.2 Choice of topic for comparison

The topic chosen for comparison in the present study is the development of rules of employment law justifying non-application of the general principle of equal treatment of women and men in employment. This is a narrow topic; it could even be described as focusing on a single legal concept. To pursue a topic in comparative law on this scale is recognised by some comparative lawyers as a valid use of the comparative method.[23]

The legal norms regulating the comparative topic examined are legislative and judicial in nature. However, since the issue of justification for sex discrimination is largely a matter of judicial interpretation, the study is focused on case law. A comparison of case law can be a useful exercise in the utilisation of the comparative method for the purpose of suggesting improvements for a particular legal system. For example, Basil Markesinis[24] uses comparison of case law to show that this process can 'yield, at the very least, positive insights and, at best, a model solution.'

3.3 The 'transferability' of employment law

Gutteridge is among those who accept that the comparative method may be used to examine topics in the area of employment law. As he points out,

> 'Labour law is one of the fields in which the comparative process of research has been most frequently employed. In countries of a western type of civilisation, the problems which have presented themselves for solution are very similar in kind, and this had resulted in a movement on an international scale with the aim of removing certain injustices which were believed to be incidental to the development of modern industrial life.
>
> 'The necessity and value of such research depends on two considerations. In the first place a country cannot fail to benefit by the experience of other countries in dealing with labour problems; secondly, in the international sphere, it is essential that the same standard should, so far as is possible, be reached by

> legislation everywhere or, otherwise, the more advanced countries may be handicapped in competition for international trade.'[25]

For this type of research to have a practical value, it must be accepted that the results can be used, through the transplant of legal norms from one system to another, by individuals or institutions concerned with law reform.

4 Aims of the thesis

Comparative legal studies are, it has been argued, valid as an intellectual exercise without a particular utilitarian purpose or practical end. Rodolfo Sacco[26] is critical of those who seek to validate the exercise of the comparative method only by its practical results:

> 'Those who compare legal systems are always asked about the purpose of such comparisons. The idea seems to be that the study of foreign legal systems is a legitimate enterprise only if it results in proposals for the reform of domestic law.'[27]

> 'Comparative law is like other sciences in that its aim must be the acquisition of knowledge.'[28]

While this is not denied, it should not be forgotten that comparative law may also have practical aims.[29]

Comparative law may be used to seek the best solutions to specific legal problems; and may use 'legal transplants' to implement these solutions. Comparative law may be used with the objective of developing a better understanding of one's own domestic legal system.[30] The success of the former aim requires acceptance that the legal rules of the topic chosen for comparison are transferable, at least to some extent. Since this may be disputed, the use of the comparative method as a means of gaining insight into one's domestic system is an additional aim of the present study.

4.1 Improved understanding of one's domestic system

Even if it were shown that the legal rules for justification of sex discrimination developed, for example, in the US, are not transferable to the EC, this would not completely invalidate the present study. Although this is not my position, it would be possible to argue that the different roots of the anti-discrimination legislation in the legal systems compared, attributable to different influences ('political factors'), make transplantation of the rules impossible. Much of the anti-discrimination legislation in the US was born of the Civil Rights movement and originated in resistance to racial discrimination. Discrimination on the grounds of sex was added to the original Civil Rights Bill as an amendment while the Bill was passing through the legislative process. The presence of Article 119 (equal pay for equal work for women and men) in the Treaty of Rome is attributable largely to a desire, on the part of those Member States which had already developed rules on equal pay for women and men, to prevent unfair competition from those Member States which had not. It was feared that, by using cheap female labour, these Member States could gain a competitive advantage, which would be contrary to the aims of the Treaty. The principal legislative measure concerning discrimination between women and men in employment in Germany[31], the *EG-Anpassungsgesetz*, was passed, as its title suggests, to comply with Germany's obligations as a Member State of the European Community. The UK government's White Paper, *Equality for Women*[32], the precursor to the Sex Discrimination Act 1975, which draws parallels with racial discrimination[33], suggests that the roots of the British legislation are similar to those of the US legislation. However, the UK legislation is also similar to German legislation, in that it too is rooted in the international obligations of the UK, including the UK's obligations as a Member State of the European Community[34].

Even if transplantation of rules on sex discrimination in employment were to be considered unrealistic (a proposition with which I disagree), the present study could still be used in accordance with Collins' fourth idea of the nature of comparative law: that is to say, detailed analysis of the rules of foreign legal systems gives an insight which can be used to

develop a better understanding of one's own domestic system. Collins envisages the identification of an aspect of domestic law apparently meriting close examination, for example on the grounds that it seems confused or is in the process of development. Judicial interpretation of the justification for discrimination between women and men in employment in EC law is one such area. It is therefore important to examine and evaluate the legal doctrines by which other legal systems tackle this issue. By these means, the domestic legal system is re-evaluated in the light of the foreign experience. The insight into foreign law gives one a clearer perspective on one's own legal system. In the present study, that system is European Community law.

4.2 Evaluation using the functionality principle

The main aim of the thesis is to evaluate the rules and principles related to justification for sex discrimination in employment in the four legal systems studied. The principle of 'functionality' proposed by Zweigert and Kötz is adapted and used as the basis for this evaluation. 'Functionality' serves as a useful analytical tool, especially in an evolving system, such as that of the European Community.

Before evaluation can be undertaken, a theory of the purpose of anti-discrimination law in employment must be developed. The general theory will subsequently inform a functional evaluation of rules justifying unequal treatment of women and men in the employment sphere. Once a purpose is posited for anti-discrimination law in employment, the rules, principles and other legal institutions of the four legal systems may be compared, and evaluated with respect to their degree of success in contributing to the purpose stipulated. My view is that the provisions compared in the present study, that is, rules, principles and approaches to justifications for sex discrimination in employment, are transferable, at least to a sufficient degree, between the legal systems concerned. If it may be accepted that the 'successful' rules are transferable to the European Community, the results of the critical comparison may be accepted as forming the basis of a recommendation for the further development of EC law.

In chapters 4-7 below, the relevant provisions of law in the four legal systems which are the subject of the present study are explained and examined in some detail. Chapters 8 and 9 contain the comparison and evaluation envisaged by Zweigert and Kötz. But first the concept of 'functionality' is to be explored, in the specific context of the law regulating sex discrimination in the employment sphere. The exploration is undertaken in the following chapter.

Notes on chapter 2

1. Alan Watson, *Legal Transplants* (Edinburgh: Scottish Academic Press, 1974).

2. Hugh Collins, 'Methods and Aims of Comparative Contract Law' 11 Ox.J.L.S. 396 (1991).

3. see below, chapter 2, section 4.

4. Rudolf B. Schlesinger, *Comparative Law: Cases, Text, Materials* (Mineola: Foundation Press, 1970).

5. H.C. Gutteridge, *Comparative Law* (Cambridge: Cambridge University Press, 1949).

6. Gutteridge, p. 9.

7. Gutteridge, p. 9.

8. Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law* (Oxford: Clarendon Press, 1987).

9. Otto Kahn-Freund, 'On Uses and Misuses of Comparative Law' 37 M.L.R. 1 (1974).

10. Alan Watson, 'Legal Transplants and Law Reform' 92 L.Q.R. 79 (1976).

11. Watson, 'Legal Transplants and Law Reform'.

12. Eric Stein, 'On Uses, Misuses and Nonuses of Comparative Law' 72 Northwestern University L. Rev. 198 (1977).

13. Watson, *Legal Transplants*, p. 95.

14. Stein, p. 199.

15. Collins, p. 397-398.

16. Collins, p. 398.

17. Although the Equal Pay Act 1970 and the Sex Discrimination Act 1975 do not apply in Northern Ireland, the Sex Discrimination (Northern Ireland) Order 1976, SI no. 1042 (NI15) contains analogous provisions.

18. von Colson v Land Nordrhein-Westfalen, case 14/83, [1986] 2 CMLR 430; [1984] ECR 1891 (ECJ).

19. Provided, that is, that the doctrines are correctly applied by the national courts of the Member States. There have been some difficulties concerning the application of the doctrine of indirect effect; see, for example, *Duke v GEC Reliance* [1988] 1 All ER 626 (House of Lords).

20. Article 189, Treaty of Rome.

21. Directive 76/207, OJ 1976, L 39/40.

22. See, for example, Commission v Germany (Re Sex Discrimination Laws), case 248/83, [1986] 2 CMLR 588 (ECJ); Commission v United Kingdom (Re Equal Treatment for Men and Women), case 165/82, [1984] 1 CMLR 44; [1983] ECR 3431 (ECJ); Commission v United Kingdom (Re Equal Pay for Equal Work), case 61/81, [1982] 3 CMLR 284, [1982] ECR 2601 (ECJ).

23. eg Gutteridge; Basil Markesinis, 'Comparative Law, A Subject in search of an Audience' 53 M.L.R. 1 (1990).

24. Markesinis.

25. Gutteridge, p. 31.

26. Rodolfo Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law' 39 Am.J.Comp.L. 1 (1991).

27. Sacco, p. 1.

28. Sacco, p. 4.

29. see Zweigert and Kötz, p. 16-17.

30. Collins.

31. *EG-Anpassungsgesetz* (Employment Law to Comply with European Community Provisions) 13 August 1980; codified at *BGB*, Sections 611a, 611b, 612 (3), 612a.

32. Cmnd 5724 (1974).

33. Cmnd 5724 (1974), para. 24, 'the Government's ultimate aim is to harmonise the powers and procedures for dealing with sex and race discrimination so as to achieve genuine equality in both fields.'

34. see David Pannick, *Sex Discrimination Law* (Oxford: Clarendon Press, 1985), p. 12-13.

Chapter 3

Theoretical Position

1 The concept of 'functionality'

The key to the comparative law process, as described by Zweigert and Kötz, is use of the concept of 'functionality'. Functionality as a tool for the comparative lawyer comes into play at two stages of the comparative process; that of collection of the material for comparison and that of providing a 'synthesis' or context in which the approaches of different legal systems to the problem or issue concerned may be compared and evaluated. The use of the functionality principle in each of these stages is explored in the current chapter. The first part of the chapter is concerned with a fairly brief explanation of the choice of material included in the present study, and the second part of the chapter is concerned with a more lengthy examination of how an understanding of the aim or purpose of anti-discrimination law will be used to carry out the comparative part of the thesis, allowing evaluation of rules intended for justifying discrimination.

2 Materials compared in the study

Zweigert and Kötz envisage that the comparative lawyer begins with an 'idea', that is, a question or a hypothesis, and material: the idea and the material interact. The 'idea' with which the present study began was that the rules relating to justification for sex discrimination in employment and other areas of social policy, developing in European Community law, would merit some detailed scrutiny. The 'question' relates to the legal justification of sex discrimination in the employment sphere. If employers seek to justify discriminatory practices, given that not all behaviour of employers with discriminatory intent or effect will be considered unlawful, what does the law regard as an 'acceptable' justification for discriminatory behaviour?

The issue of justification for sex discrimination in employment becomes increasingly pertinent as the general principle of non-discrimination between women and men in the employment field becomes the accepted norm in Western societies, including the European Community. In certain circumstances, deviation from that principle is regarded as legally justified and acceptable. There are some occupational activities from which women (or men) can be legally excluded; in these circumstances 'direct discrimination' is justified. For example, a woman (or a man) actor may be required for reasons of authenticity to play a particular part in a play. Furthermore, some policies which have an effect of discriminating against women are lawful; in these circumstances, 'indirect discrimination', or, as it is termed in the US 'adverse impact' discrimination, may be justified. A recruitment policy of a building firm which requires the ability to lift a certain weight could have the effect of discriminating against women, as fewer women than men could fulfil the requirement. If the ability to lift heavy weights was an essential requirement for the duties of the job, the requirement would be lawful.

The problem to be addressed, stated in functional terms, to enable the collection of material, may be formulated as follows. How does a legal system, wishing to outlaw sex discrimination in the employment sphere, provide for instances where an allocative decision, while being discriminatory, is justified in the circumstances concerned?

Material has been gathered from the law of the EC, the UK, the US and Germany. The material is mostly case law, along with the relevant statutory provisions, although some attempt has been made to include constitutional provisions. The use of the functionality principle allowed examination of not only specific statutory rules delineating where direct sex discrimination is justifiable, for example, section 7 of the UK Sex Discrimination Act 1975, which contains a list of occupations for which sex is a 'genuine occupational qualification', but also to examine principles of law, such as the principle of proportionality, found in the Constitution of Germany and a 'general principle' of EC law, which may be used to determine justification in direct and indirect discrimination.

An extensive examination of the principles applied by courts in determining when indirect sex discrimination is justified has been carried out. As will be seen below, the European Court allows justification (for indirect discrimination) only where the discriminatory policy is based on a 'genuine need of the undertaking, is suitable for attaining the objective pursued by the undertaking and is necessary for that purpose'.[1] The early case law of the US required a 'manifest relationship' between the alleged need of the employer and the discriminatory policy or employment decision.[2] The UK courts allow justification where the employer acts 'reasonably'.[3] German commentators have suggested that justification may be established where the discrimination is '*zwingend geboten*', that is, compellingly required.[4]

3 Synthesis or context for comparison and evaluation

At the heart of the method of comparative law proposed by Zweigert and Kötz is the comparison and evaluation of the approaches of different legal systems to the problem or issue concerned. Meaningful comparison and evaluation may only be carried out in the context of a 'synthesis' or framework for comparison. This 'synthesis' cannot avoid being normative in nature. It poses, and answers questions such as: Towards what aim or purpose are the legal norms concerned being compared and evaluated? What should the solution be to the problem these rules are trying to address? Once again, the concept of functionality is brought into play, only this time with a normative slant; what should the function be of those rules which are coming under examination?

The problem to be addressed in this study, stated in functional terms, in order to enable the comparison of the approaches of different legal systems to the issue of justification of sex discrimination in employment and the evaluation of those approaches, may be formulated as follows. How *should* a legal system, wishing to outlaw sex discrimination in the employment sphere, provide for instances where an allocative decision, while being discriminatory, is justified in the circumstances concerned? In particular, since it is the aim of the study to provide proposals for

development of the law of the EC, how should these instances be dealt with in that particular legal system?

'Function' is the 'mode of action by which [a thing] fulfils its purpose'.[5] The function of an entity may be defined as its relevance to the purpose of the whole of which the entity is a part. The function of a cog in a watch is to move the mechanism, within the whole, that is, the watch, whose purpose is to tell the time. The effectiveness of the cog may be evaluated in the light of its contribution towards the purpose of time-telling; but not by how well it tells time. Transferring the analogy into the context of the present thesis, the whole is the set of statutory, judicial and other rules which make up 'the law on sex discrimination in employment' in a particular legal system. Each entity to be evaluated is a particular rule or court decision or principle which provides legal justification for an employment decision which is discriminatory on grounds of sex. The function of the entity (the rule justifying sex discrimination) may be evaluated in the light of its contribution towards the purpose of the whole, that is, the purpose of sex discrimination law in general.

3.1 Purpose of sex discrimination law

There is no common agreement or understanding as to the purpose of sex discrimination law; rather, different theories of what sex discrimination law is aiming to achieve, and how it should do so, have been put forward, either explicitly or by implication. For the purposes of the present study, a particular theory, or position on the aims and purpose of sex discrimination law, will be posited. The theory is that the purpose of sex discrimination law is to provide equality of opportunity for women and men in employment. This position may be regarded as axiomatic for the purposes of the thesis; it is naturally normative in nature. At this point it should be made clear that my position is not advanced as a 'grand theory' of sex discrimination, but as the basis for a useful framework for analysis of the existing rules on sex discrimination in a particular area, that is, employment.[6] It is not the aim of the thesis to examine and evaluate theories of sex discrimination, but rather to submit to detailed

scrutiny those particular rules of justification for sex discrimination which are to be singled out for analysis.[7]

The posited theory for the present study emanates from the various strands of sex discrimination theory, aiming to provide a synthesis between at least some of those strands. This chapter, therefore, is concerned with a brief exploration of some writings representing some main strands or 'theory bases' of thinking on sex discrimination, and some of the issues with which those who posit a purpose for law which disallows sex discrimination must grapple. The exploration is not meant to be exhaustive, nor does it aim to provide a complete overview of feminist theories of law; such a task is beyond the scope of the present study. The general theory examined is narrowed down to its application in the employment context; and further narrowed to the context of the EC, which remains the focus of the present study.

3.1.1 'Discrimination'

There are two senses of the word 'discrimination' in the English language. The first sense of 'to discriminate' is the neutral sense of 'to make a distinction between'. The second sense is the pejorative sense - 'to discriminate against' is 'to make unfair distinctions', or to act arbitrarily or unjustly. 'Arbitrary' actions or decisions are those performed or taken with no relevant reasons, for example, the exclusion of men from employment in an office, because the managing director prefers to be surrounded by women at work. An enquiry into the arbitrary nature of an action thus leads into an assessment of which reasons may be deemed 'relevant' in the making of distinctions.[8] In the context of the present study, the distinctions will be in the treatment of two employees differently from each other. The concept of 'unjust' actions or decisions is altogether wider: it may only be approached by means of an enquiry into the particular standard of justice to be applied. Unjust behaviour in the context of the present study may often relate to the balance of fairness between the employer and the employee. For example, where an employer is required to provide uniforms for prospective woman employees, it may be considered unjust to require the employer to bear

the burden of the extra cost this would entail, or the balance of 'justice' and 'fairness' may favour the woman applicant, who has been treated less favourably than a male applicant for whom a new uniform would not have to be bought.

In languages other than English, for example German (*diskriminieren*), the term 'to discriminate' is only used in the second, negative sense. It is the second sense of unfair actions with which the law on sex discrimination in employment is concerned. The unfairness or arbitrary nature of the actions lies in the unequal treatment of equals, or the equal treatment of unequals.[9] A general definition of 'discrimination' would be 'the different treatment of persons in an equal or comparable situation'. The concept of discrimination therefore has two component, but inter-related, parts; the 'treatment' component and the 'equality' component.

3.1.1.1 'Treatment' component

Discrimination by definition arises as a result of human choices, not by chance or accident. As Tom Campbell points out, 'To be born a dwarf is not to be discriminated against, but to be disqualified from voting on grounds of size, or to be allowed to vote only where ballot boxes are five feet above the ground, may be'.[10] For discrimination to exist, there must be a discriminator, and a person discriminated against. The person discriminated against is treated by the discriminator in a deprecatory manner; is disvalued, disfavoured or disadvantaged.

One approach to the 'treatment' component of discrimination is to suggest that discriminatory treatment may often be the failure to treat a person as an individual. It seems paradoxical that this approach focuses on the idea that discrimination is ultimately a group matter. Discrimination is not just a personal matter, although a person discriminated against will naturally bear the brunt of the discriminatory treatment as an individual, but is also a class or group concern. For a person discriminated against is treated in this way because of their membership of a group. Groups discriminated against are subject to political or social power; the discriminator holds the power.[11] The unfair treatment of an individual

may only be termed 'discrimination' if it is rooted in the individual's membership of a group; the stereotyped characteristics of the group are assumed to be the characteristics of the individual who experiences the discriminatory treatment. Thus the individual is not treated as an individual. An employer who refuses to employ a woman on the grounds that 'women have or will have small children, and are therefore unreliable at work' is acting in a discriminatory manner: the particular woman concerned may have no intention of having children, or may have grown up children, or have good childcare provisions available, and be highly reliable in the employment context. The discriminatory nature of the treatment is the failure to treat the woman concerned as an individual.

> 'This point is not always appreciated by those who write about discrimination, perhaps particularly by those writers who lack personal experience of discrimination. To them it is a puzzle that the remedy for discrimination is seen politically as a matter of groups rather than individuals, for in the traditional debates of liberalism, the wrongs of inequality of opportunity, for instance, are wrongs done to individuals and the remedies are equally atomistic. But discrimination has displaced simple injustice in the language of social and political oppression precisely where it transcends the individualism of traditional liberal values and acknowledges that group-related wrongs are in issue.
>
> 'The issues here are often obscured by the valid assertion that discrimination is what it is in virtue of treating someone as a member of a group rather than as an individual. In contrast, in allocative situations the proper thing to do is to allocate by the merit, ability, need, capacity of the individual concerned rather than on the basis of average (or stereotyped) properties of members of that group ... In this sense discrimination is the failure to individuate, that is to treat on an individual basis.'[12]

Ronald Dworkin distinguishes between equal treatment and treatment as an equal.[13] The right to 'equal treatment' is 'the right to an equal distribution of some opportunity or resource or burden', for example the right to an equal vote in a democracy. The right to equal treatment is the right to *the same* right in substance as others deemed in the same position; for example, adults not otherwise disqualified from voting. The right to 'treatment as an equal' is 'the right to be treated with the same respect and concern as everybody else'. This will not necessarily result in the same substantive right being accorded to each person, as it takes into account differences in position between the persons being treated

with the same respect and concern. Dworkin's example is the following: 'If I have two children, and one is dying from a disease that is making the other uncomfortable, I do not show equal concern if I flip a coin to decide which should have the remaining dose of a drug.'[14]

Dworkin's concept of 'treatment as an equal' is more appropriate than 'equal treatment' in the context of regulating sex discrimination in employment, as women are not in the same position as men with regard to a number of issues relevant to the employment sphere[15]. 'Treatment as an equal' does not assume that the persons so to be treated are, or may be deemed to be, in the same starting positions. The concept of 'treatment as an equal' therefore may include *more favourable* treatment of persons belonging to a group suffering a prior disadvantage as not only *permissible* within a general scheme of equality legislation, but also *necessary* for the achievement of 'equality'. That is to say, the concept of 'treatment as an equal' embraces 'positive discrimination'.

If '*equal* treatment' does not, then, necessarily mean '*the same* treatment', this leads to an enquiry as to what is meant by the concept of equality.

3.1.1.2 'Equality' component

The second component of the concept of discrimination is that of equality. Persons must not only be treated as individuals, they must also be treated equally. As we have just noted, the concept of equality may be difficult to substantiate. As Warwick McKean notes,

> 'Though the importance of the principle of equality as an ideal is obvious, the content of the principle is not nearly so apparent ... The essence of 'equality' as a component of 'justice' has been sought by many. Aristotle believed in a form of distributive or proportional justice where equal things should be given to equal persons and unequal things to unequal persons ... Obviously, the weakness of this doctrine is that it makes no attempt to answer the question, 'what differences are relevant and what are not in determining whether individuals are equals or unequals?' The fact is that 'equality' is a term which is used in a great many different ways, and this variety of usage has been a perpetual source of confusion. Does it mean simply 'sameness' or 'identity'? Is it a purely formal principle or does it have some content and if so, how is it to be discovered?'[16]

Equality in the sense of 'sameness' or 'identity' can only be said to exist in abstract notions, such as A=A in mathematics. Absolute identity is not relevant to equality between persons, as two persons can never be identical in all respects.[17] Equal treatment therefore depends on whether one wishes to stress the similarities between persons, or the differences. The decision whether to stress similarities or differences is a value judgment, a prescription. Legislation concerned with sex discrimination prescribes equal treatment for women and men, in those fields covered by the legislation, which include the sphere of employment, in the case of the legal systems examined by the present study. That is to say that sex is a 'forbidden ground' - a ground on which distinctions, in particular those concerned with allocative decisions, may not legally be made - and an act carried out on the ground of sex which disadvantages the person concerned may be termed 'discrimination'.

The assertion that women are to be given equal treatment with men in certain fields still does not address the question of what it is to be treated equally. This question cannot be answered by reference to the legislation itself, as the legislation to be examined does not make explicit its underlying conception of equality. Rather it is to be recognised that there exist a number of conceptions of equality. Some of these are now examined.

'Formal equality'

Women in the nineteenth century struggling for access to education and employment relied on the liberal ideology of 'formal equality'. John Stuart Mill's *The Subjection of Women*, published in 1869, for example, opens with the statement that the legal subordination of women to men is wrong in principle and ought to be replaced with perfect equality. Mill argued that women should not be restricted by their status as women in the choices they might make.[18] Formal equality requires that the law grant identical rights to women and men, both in the sense of equality before the law and in the sense of equal rights in the domains of employment, market transactions and education.[19]

Formal equality rests on the Aristotelian notion that like persons be treated alike and un-like persons unalike. The question then becomes whether a difference between two persons is recognised by the law as a relevant difference. This notion of equality was espoused by the US Supreme Court in *Reed v Reed*[20]: it was established that a classification 'must rest on some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike'.

The term used by the UK government to describe the notion of equality which informs the British Equal Pay Act 1970 and Sex Discrimination Act 1975 is that of 'equality of opportunity'. The White Paper, 'Equality for Women',[21] states that it is the aim of the legislation 'to introduce effective measures to discourage discriminatory conduct and to promote genuine equality of opportunity for both sexes'. The phrase 'equality of opportunity' is misleading in this context. In fact, the phrase 'equality of opportunity' (the terminology I have adopted for my position on equality, which goes further than formal equality[22]) describes, in this context, a version of formal equality, as Katherine O'Donovan and Erika Szyszczak note:

> 'Competition on merit is what equal opportunity is about. To overcome the question of the relationship between need and merit liberal writers advocate minimal state provision for need, after which all compete on merit. Thus intervention because of need or inequality is a justification for state action, regulation or legislation. Thereafter the role of the state is to hold the ring for free competition.'[23]

Formal equality is closely linked to free competition and market economics. The presence of the provisions of the Treaty of Rome regulating discrimination between women and men[24] may be attributed to a commitment on the part of the original six Member States to rationalisation of the market, and perfection of competition. In Weber's terms, the exclusion by law of preferences for one sex of persons as employees (and other categories of people) is rational; whereas unjustified prejudice towards men is irrational. The state may interfere in the labour market, in accordance with Weber's thesis, to limit the actions of employers (*inter*

alia), in order to prevent them from acting on their irrational preferences.[25]

However the notion of formal equality is limited, most notably in its failure to take account for differences between the groups of persons described as 'equal' and of the prevailing hegemony. A commitment to the concept of formal equality implies comparison between women and men, and is unable to deal adequately with those situations in which women are different from men. An issue in which this proves problematic is that of pregnancy of a woman employee. For example, the UK courts dealt with the problem by deeming a pregnant woman employee to be 'like' a male employee with an illness.[26] The likening of the state of healthy pregnancy to that of illness is inappropriate, misleading and undesirable in terms of women's interests, as it perpetuates the stereotype of women as weak and vulnerable. A woman's pregnancy is often the result of her own choice, whereas illness never occurs by the choice of the person concerned. Pregnancy is not 'the same as' or 'like' illness: pregnant women are not ill.

A deeper problem of the notion of comparability is that it sets a norm against which comparisons are made: the male norm is that with which behaviour is compared.[27] Critical of Mill's advocacy of formal equality, Katherine O'Donovan points out,

> 'Mill accepted a division of labour between the sexes and separate spheres. His object was to make women equal to men by the removal of juridical obstacles. He did not recognise that the maintenance of separate spheres would constitute a major problem. His notion of equality was limited to the lifting of *de iure* barriers to women's participation in the public sphere.'[28]

The problem with the liberal belief in formal equality is that it 'leaves untouched issues of power and privilege.'[29]; it takes no account of women's 'different position resulting from prior discrimination'.[30] The idea of formal equality presumes that if legal barriers are removed, women can compete equally in the market, for jobs and other goods. Catherine MacKinnon, a more 'radical' theorist, is particularly critical of the conception of formal equality:

> 'Equality is comparative in sex discrimination law. Sex in law is compared with sex in life, and women are compared with men. Relevant empirical similarity to men is the basis for the claim to equal treatment for women. For differential treatment to be discriminatory, the sexes must first be 'similarly situated' by legislation, qualifications, circumstance, or physical endowment ... To see if a woman was discriminated against on the basis of sex, ask whether a similarly situated man would be or was so treated. Relevant difference supports different treatment, no matter how categorical, disadvantageous or cumulative. Accurate reflections of situated disparities are thus rendered either noncomparable or rational, therefore differences not inequalities for legal purposes. In this view, normative equality derives from and refers to empirical equivalence. Situated differences produce differentiated outcomes without necessarily involving discrimination.'[31]

I agree with MacKinnon in her perception that 'situated differences' between men and women, in particular those arising from past disadvantages, cannot be ignored in a meaningful conceptualisation of equality. Rather, 'equality' should embrace different, more favourable treatment for those belonging to groups which have been disadvantaged by the *status quo*, in order to redress the very differences leading to inequality. Room should be made, in other words, for measures of positive discrimination.

An alternative position to the conception of equality which stresses women's 'sameness' with men is to stress women's difference from men. In the US, this is termed the 'special protection rule'. The special protection rule allows the law to take account of differences between women and men, in particular biological differences, relating to pregnancy and childbirth. It allows positive discrimination, or 'affirmative action', in favour of women. In the EC context, Article 2 (3) of Directive 76/207 (the Equal Treatment Directive), which allows special provisions concerning the protection of women, particularly as regards pregnancy and maternity, is an example of the special protection rule.

Wendy Williams rejects the 'special treatment' model on the grounds that 'it has great costs', for several reasons, including the following. First, as Williams points out, the special treatment model is not reliably beneficial to women; 'conceptualising pregnancy as a special case permits unfavorable as well as favorable treatment of pregnancy'. It also focuses

attention from the inadequacies of the employer's general policies, for example, for sick leave, onto the 'unfairness of protecting one class of worker and not others'. Special protection for women, furthermore, may operate in practice to encourage 'the employer who wants to avoid the inconveniences and costs of special protection [to] find reasons not to hire women of childbearing age in the first place'.[32]

MacKinnon goes further than Williams by rejection of the notion of comparability as a whole, on the grounds that to take either the approach that women are the same as men, and therefore should be granted the same rights as men, or the approach that women are different from men, and therefore should be granted special protection by law, is to submit to the concealed assumption that man is the norm, the measure or standard to which women are required to aspire.

> 'Missing in sex equality law is what Aristotle missed in his empiricist notion that equality means treating like alike and unlikes unlike. No one has seriously questioned it since. Why should one have to be the same as a man to get what a man gets simply because he is one? Why does maleness provide an original entitlement, unquestioned on the basis of its gender, while women who want to make a case of unequal treatment in a world men have made in their image (this is really the part Aristotle missed) have to show in effect that they are men in every relevant respect, unfortunately mistaken for women on the basis of an accident at birth.'[33]

Formal equality may be regarded as a useful starting point, but it cannot be regarded on its own as an adequate theory of equality for the purposes of the present thesis.

'Equality of outcome'

In contrast with the conception of formal equality, the focus of theorists who might be termed 'socialist feminists' is the rejection of formal equality as a conception of equality, as it is limited to the procedural, for the conception of 'equality of outcome', which addresses the substantive. 'Equality of outcome as a concept looks to the results of competition and then raises questions about the rules of entry.'[34]

A commitment to equality of outcome or results would require a major social revolution. Liberals argue that it would be attainable only at the cost of liberty; that is, it could only be achieved with widespread coercive intervention. It cannot be claimed that anti-discrimination legislation attempts this in any of the legal systems examined in the present study.

Assimilationist or pluralist?

Different conceptions of equality may also be informed by different conceptions of the ultimate aim of legislation which proscribes discrimination on ground of sex. The assimilationist and the pluralist models are posited as polar opposites in possible ultimate aims. The assimilationist ideal may be characterised by a passage in an early piece of feminist writing, Mary Wollstonecraft's 'A Vindication of the Rights of Women'.

> 'A wild wish has just flown from my heart to my head, and I will not stifle it, though it may excite a horse-laugh. I do earnestly wish to see the distinction of sex confounded in society, unless where love animates the behaviour. For this distinction is, I am firmly persuaded, the foundation of the weakness of character ascribed to women.'[35]

To take the assimilationist ideal to its extreme is to aim for a society in which the difference of sex is no different to that of, for example, eye colour.[36] The contrasting position is the pluralist ideal in which differences, including those related to sex and gender, are tolerated and no disadvantage is attached to them. An unresolved question of feminist theory is whether anti-discrimination legislation has an assimilationist goal or a pluralist goal.

In an attempt to avoid this dilemma, the introduction of the concept of androgyny has been suggested: a commitment to the concept of androgyny would operate to allow both 'men and women *alike* - and equally - to develop aspects of their nature repressed by the stereotypical exhortations and expectations of society'.[37] The concept of androgyny,

> 'has great appeal for liberal men. If perceived difference between the sexes is only the result of overly rigid sex roles, the men's liberty is at stake too. Ending this form of sexual inequality could free men to express their "feminine" side, just as it frees women to express their "masculine" side'.[38]

As Christine Littleton explains,

> 'Androgyny ... posits that women and men are, or at least could be, very much like each other [and] argues that equality requires institutions to pick some golden mean between the two and treat both sexes as androgynous persons would treated.'[39]

However, the practical considerations of a commitment to androgyny are extremely complex:-

> '... given that all of our institutions, work habits and pay scales were formulated without the benefit of substantial numbers of androgynous persons, androgynous symmetry is difficult to conceptualise ... Moreover the problems involved in determining such a norm for even one institution are staggering. At what height should a conveyor belt be set in order to satisfy an androgynous ideal?'[40]

It may, therefore, be questioned how far androgyny is, or could be, a goal of anti-discrimination legislation.

Focus on inequality

The position of a group of theorists who may be termed 'radical feminists' is that the focus (of formal equality) on equality of women with men is misconceived. The conceptualisation of sex discrimination as being about equal treatment for men and women does not fit with the feminist perspective of the social situation, which the legislation purports to address, as a situation which itself discriminates against and disadvantages women. As Lacey points out,

> 'By conceptualising the problem as *sex discrimination* rather than as *discrimination against women*, the legislation renders invisible the real social problem and deflects away a social ideal or goal which would identify and address it.'[41]

The 'real social problem' is concerned with the position of women in the prevailing male hegemony in the social hierarchy. From the 'radical' point

of view, discrimination is not so much a matter of differentiation or comparison between women and men, as a matter of men's dominance and women's subordination.

> 'Sex equality in law has not been meaningfully defined for women, but has been defined and limited from the male point of view to correspond with the existing social reality of sex inequality. An alternative approach to this mainstream view threads its way through existing law. It is the reason sex equality law exists at all. In this approach, inequality is a matter not of sameness and difference, but of dominance and subordination. Inequality is about power, its definition, and its maldistribution. Inequality at root is grasped as a question of hierarchy, which - as power succeeds in constructing social perception and social reality - derivatively becomes categorical distinctions, differences. Where mainstream equality law is abstract, this approach is concrete; where mainstream equality law is falsely universal, this approach remains specific. The goal is not to make legal categories that trace and trap the status quo, but to confront by law the inequalities in women's condition in order to change them.'[42]

The legal confrontation of the inequality of women is to be on the following terms, proposed by MacKinnon:

> 'the focus in equal protection law should not be on whether the sexes are similarly or dissimilarly situated; nor on "differences"; nor upon whether differences are "arbitrary" rather than "rational"; but upon "inequality". The courts should consider whether legal treatment results in systematic disadvantage because of membership of a particular group. In the area of sex discrimination the "only question for litigation is whether the policy or practice in question integrally contributes to the maintenance of an underclass or a deprived position because of gender status."'[43]

O'Donovan and Szyszczak doubt whether MacKinnon is successful in avoiding 'the difference approach'. MacKinnon's approach does go some way towards pluralism in its admission that not everyone is similarly situated, and it does avoid the limitation to comparison of treatment which the equal treatment conception of equality advocates. Women's difference from men would trigger a suspicion of the existing inequality in law, the application of law, or extraneous factors. This contradicts the assumption of other approaches to equal treatment which assume that women and men can be taken to be the same - social, economic and biological fact negates that assumption. However, the main difficulty with MacKinnon's position

relates to how the courts would apply MacKinnon's proposed standard in practice. As O'Donovan and Szyszczak explain,

> '[D]ifferences, where they exist in biology or socioeconomic structures, cannot be ignored. The problem remains that, just as courts have justified differential treatment on grounds that women and men are not similarly circumstanced, so too may they justify inequality.'[44]

'Case specific' conception

In the context of a critique of rights-based approaches to sex discrimination issues in law, Elizabeth Kingdom espouses the position that there is no one principle from which to derive feminist politics; rather issues must be resolved at a case-by-case level. Discussing Elizabeth Wolgast's 'Equality and the Rights of Women'[45], Kingdom states,

> 'The phrase "in some cases" is significant. Alert to the complex ways in which the biological sciences and current law are making the concept of parenthood problematic, feminists involved in legal studies and in legal struggles are increasingly taking the position that there is no single principle from which to derive feminist politics. Indeed, this is the main theme of this book.'[46]

Kingdom points out that we might expect moral philosophers to disagree with so unprincipled an approach, but that we find Wolgast (a moral philosopher) advocating exactly this.

> '... she grants that there are cases where men and women should have equal rights, such as those connected with jobs and promotions. What she also argues, however, is that there is no general principle of equality from which such cases can be derived, since their various justifications are not all the same. Quite consistently with this position, Wolgast goes on to make the point that there is no one rationale either for equal rights or for special rights. And in case the reader is in any doubt, she stresses that: 'For some issues the biological and reproductive differences of the sexes play a crucial part, but in others they have to be carefully ignored' (Wolgast 1980: 87). In other words, rights ought to be equal when they ought to be equal, and rights ought to be special when they ought to be special.'[47]

Kingdom's position may avoid the difficulties attendant on a commitment to rights-based discourse, but it does not present a position from which

the detailed provisions and application of sex discrimination legislation may be compared and evaluated. However, it is useful as a reminder that the context in which sex discrimination provisions operate is of fundamental importance. A focus on context is a necessary result of commitment to the stance termed by Katharine Bartlett as 'positionality'.[48] 'The positional stance acknowledges the existence of empirical truths, values and knowledge, and also their contingency.' Positionality rejects the concept of 'objectivity' in knowledge of 'the truth' and 'the right answer' to the problem of sex discrimination. Rather, 'knowledge arises within social contexts and in multiple forms.'[49] With this in mind, it must be stressed the focus of my position on the purpose of sex discrimination law is the context of employment, as it is currently organised in the systems examined. There is no claim that this position is applicable or useful in other arenas in which feminism takes issue with law.

'Equality of Opportunity'

My position is that the purpose of anti-discrimination law in the employment sphere is that of 'equality of opportunity' for women and men. This position recognises the shortcomings of the 'formal equality' conceptualisation, and builds from the critical stance of 'radical feminism'. It provides a realistic, pragmatic standpoint by which actual rules and the judicial interpretations of those rules may be evaluated. In the context of employment, the conceptualisation of equality is to be one which allows women the chance to compete equally with men for those jobs, with their attendant benefits, available in society.

Other writers share a similar position. Evelyn Ellis states her standpoint as follows:

> 'Men and women are both essential to the continuation of human life and society, and both must therefore be equally able to influence and determine the rules upon which that society operates. Instead of rigidly forcing gender roles on people irrespective of their desires, we must aim for a freer environment in which either sex can be expected to play a part in child-rearing, family nurture and outside employment. The law, a potent instrument for social change, plays an important part in achieving this dynamism. It must be so constructed so as to achieve this end'[50]

Ellis' position is essentially committed to a degree of pluralism, and to this extent coincides with my view. However, in the context of employment, commitment to pluralism must be coupled with a recognition[51] that the existing social structures[52] and the assumptions of those with power to make decisions (in this context, employers) operate to the disadvantage of women, in that, as a generalisation, it is still assumed that 'an employee' is a man. The law must recognise the prevailing conditions in the employment sphere, which are still based on the model of a male employee, who is the only or main breadwinner, with another person (his wife) as the primary carer for children.[53] Other types of employment, for example part-time work or job-sharing, which have proved particularly appealing to women, are not viewed as 'real employment' and consequently the limitation of rights for employees (for example to pay, access to pension schemes and other beneficial conditions of employment) in those circumstances may be legally justified. The contribution of legislation which purports to proscribe discrimination on grounds of sex will be at best limited if it does not operate to counter the general assumption of employers that an employee fits this concept of an employee, that is, that an employee is a man.

Christine Littleton's conception of equality, that of 'equality as acceptance'[54] and 'making difference costless'[55] is similar to that of 'equality of opportunity' as used in my study. 'Equality as acceptance', explains Littleton, is to be contrasted with 'equality as accommodation'. The latter conceives equality as accommodation of women's differences from men; a position which 'implicitly accepts the prevailing [male] norm as generally legitimate'.[56] Equality as acceptance, on the other hand, is to attempt to determine how to achieve equality despite 'real differences' (biological and cultural) between women and men. It rejects the focus on the male norm and the assertion that it is women who are different. 'Equality as acceptance does not prescribe the superiority of socially female categories, nor even the superiority of androgynous categories. It does, however, affirm the equal validity of men's and women's lives'.[57] 'Making difference costless' is a conception of equality which allows men or women the opportunity of taking on social roles which are currently

seen as 'masculine' or 'feminine', without facing disadvantage. For example,

> 'If it costs most men and women the same to stay home with the baby, parenting is more likely to be shared. (Currently, women have less to lose than men by foregoing paid employment for unpaid childcare, since both women's salaries *and* expectations are generally lower.)'[58]

Making difference costless would grant women and men the equal opportunity of enjoying parenthood and returning to employment.

In a similar vein, my position is in accordance with the proposal of O'Donovan and Szyszczak that, in order to give substance to the concept of equality in the context of anti-discrimination legislation, the concept of equality of opportunity be reworked to its full 'radical' extent: 'Equality of opportunity as a concept is more radical than its critics realise'.[59] The standard of equality of opportunity is merit; everyone may compete and achieve, therefore receive benefits, according to their merit. But this assumes that all competitors begin from an equal starting point; therefore prior inequalities cannot be ignored if equality of opportunity is to be achieved. O'Donovan and Szyszczak note:

> 'Equal opportunity contains the notion that a good or benefit will be allocated in such a way as not to exclude *a priori* any of those wishing to have it ... We are not talking of a mechanical, minimal equality, but of equality of life chances ... To equal up opportunity we must recognise the effects of history, background and social conditions.'[60]

Their focus then moves to the position of women in the employment sphere:

> 'Equality of opportunity in its full sense requires a fair, rational and appropriate competition for goods and benefits. This means that competitors must have an equal starting point, where possible. It goes further than lowering barriers to access to education, services and the labour market. For women to compete equally with men, both sexes must start equally. The question then becomes: do women have an equal starting point with men in marketplace competition?'[61]

State intervention in the market may be necessary to perfect competition; anti-discrimination legislation is justified by this. The state may limit the

free choices of some market actors (for example, employers who prefer not to employ women) in order to open up the market to competition from those groups targeted by the anti-discrimination legislation, that is, women. If women are not experiencing an equal starting point, the law may operate ostensibly to favour women, for example, in affirmative action programmes, or special measures in the case of pregnancy and childbirth. Measures of positive discrimination would therefore be regarded as justifiable in certain circumstances.

If a commitment to equality of opportunity means at least some reorganisation of the employment sphere and of the terms and conditions of all workers, in particular women workers, this begs the question of who is to bear the burden of the cost of equality of opportunity. This question is especially pertinent in the context of the EC, where the principal purpose of that supranational organisation, as stated in the Treaty of Rome[62], is the attaining of higher standards of economic efficiency, through the operation of the market. In the legal system of such an organisation, as in that of the states which are examined in the present study, any intervention with the free play of market forces may not be undertaken lightly. It should be stressed that a detailed analysis of the cost of equal treatment for women in employment in the EC is beyond the scope of the present study; only a few relevant points are noted here. It is arguable that the burden of social change of the nature of a commitment to equality of opportunity for women and men in all aspects of employment is best borne by the State. However, in many of those areas where discrimination laws have been used by women to claim equal opportunities with men in employment, for example the provision of sick pay and retirement benefits to part-time workers[63], the current trend is increasing reliance on private, rather than State provision. Private employers therefore will have to be called upon to bear the cost, but not without appropriate state support. Within the EC, the harmonisation of rules on sex discrimination in employment provides a level playing field: if all employers are required to carry the same burden, then none suffer from the unfair competitive advantage of others who do not carry a similar burden. Mechanisms such as insurance may be used to spread the burden, for example of payment of maternity pay

to working mothers, among all employers. Perhaps of most importance is the social aspect of employment. It has been accepted since the first protective employment legislation came into effect in the nineteenth century, that it is not appropriate, in a civilised society, to leave regulation of the employment relationship entirely to free market forces. A worker is not an 'economic unit', but a human being, with human rights. Commitment to equality of opportunity for women (and men) employees is a sufficiently important principle to require that, in some circumstances, the cost of that commitment is borne by employers.

In the present study, the justifiability of measures which allow discrimination between women and men in employment will be evaluated in terms of their contribution to the aim of provisions of employment law prescribing sex discrimination, that is, the rejection of the assumption that all employees fit the male norm, and a commitment to full equality of opportunity. If rules concerning justification of sex discrimination are to contribute to the goal of equality of opportunity, they will be required to fulfil a dual role. 'Functional' rules on justification will take into account the disadvantages of women in the employment sphere; this would allow 'protective legislation' and 'positive discrimination' or 'affirmative action' in those areas where the special position of women requires it. 'Functional' rules on justification will also deny the legality of unfair or arbitrary grounds proposed to justify discrimination.

3.2 The concept of equality in European Community law

It is submitted that my position on the purpose of legislation countering sex discrimination in the employment sphere is appropriate in the context of the European Community.[64] Although the EC as an organisation is, in general, committed to economic ends, the social policy of the EC, including Article 119 of the Treaty of Rome, which prescribes equal pay for equal work for men and women, is also to be taken into account. The European Court has been required to concretise the concept of equality in the area of sex discrimination in employment, and has done so in two ways. The first of these is in the interpretation of Article 119 of the Treaty of Rome and the relevant secondary legislation, especially Directives 75/117 and

76/207 . The second is in the development of equality as a 'general principle of EC law'.

The original measure of EC law concerning sex discrimination in employment, Article 119 of the Treaty of Rome, was motivated by economic ends. That non-discrimination on grounds of sex is desirable was recognized by the founders of the European Community. But there was concern that commitment to equal treatment could have led to unfair advantage for employers in those Member States which had already implemented the principle of equal treatment, which would be contrary to the principle of free competition. Article 119 owes its existence to the special relationship between the principle of which it is a specific instance (that, in employment, men (or women) should not enjoy more favourable conditions as a result of their sex alone) and the economic integration by competition which is the purpose of the EC.

The economic aim of Article 119 suggests that the EC conceptualisation of equality is one committed to competitive fairness between employers, rather than the equal opportunities of employees. However, it should be noted that Article 119 is found in the Social chapter of the Treaty of Rome, and forms part of EC social policy.

The social policy of the Treaty is essentially an employment policy. Social policy,

> '... was included in the Treaty for three main reasons. First because it was seen as necessary to take some action to cushion the effects on workers of the kind of economic restructuring envisaged in the formation of the common market; second because the objectives of greater labour mobility required at least the opening up of national welfare schemes to workers of other Member States; and third because national differences in levels of welfare and social provision were seen as one of the factors which might distort competition between the different countries.'[65]

There also existed, among the founder Member States, a desire to improve the living and working standards of the citizens of the Member States through economic integration.[66]

Article 119, which provides for equal pay as between women and men in the EC, as part of the Chapter on social policy, clearly has 'social' ends, as well as the 'economic ends' discussed above.

Interpretation by the European Court of Article 119 has elucidated the 'economic' and 'social' ends of the provision. The dual aim of Article 119 was explained in *Defrenne v Sabena (No 2)*[67]:

> 'Article 119 has a double aim: first to avoid a situation in which undertakings established in States which have actually implemented the principle of equal pay suffer a competitive disadvantage in intra-community competition as compared with undertakings established in States which have not yet eliminated discrimination against women workers as regards pay', and secondly Article 119,
>
> '... forms part of the social objectives of the Community, which is not merely an economic union, but is at the same time intended, by common action, to ensure social progress and seek the constant improvement of the living and working conditions of their peoples ...'[68]

As AG Trabbauchi pointed out, a worker who is a citizen of the EC is regarded, 'not as a mere source of labour, but as a human being'[69]. Coupled with the recognition that,

> 'respect for fundamental personal human rights is one of the general principles of Community law ... There can be no doubt that the elimination of discrimination based on sex forms part of the fundamental rights'[70],

this assertion of the Advocate General suggests that my position, namely that the purpose of anti-sex discrimination legislation should be the promotion of equal opportunities for women and men, is appropriate for the law of the EC.

The clarification by the European Court of the 'social aim' of Article 119 was followed by incorporation of a 'social' motive in the provisions of secondary legislation in the field of sex discrimination. For example, Directive 76/207, Article 2 (4) provides that measures to promote equal opportunities, in particular by removing existing inequalities which affect women, are compatible with EC law. A legislative measure allowing positive discrimination, such as this one, cannot be motivated by economic

ends alone. This is a further indication that equality of opportunity is an aim of European Community social law.

The European Court has continued to strengthen the 'social' nature of measures relating to equality for men and women in employment. One way in which the Court has effected this is by the recognition of equal treatment as a 'fundamental right'.

Equal treatment of women and men in employment is regarded in EC law as a 'fundamental personal human right'. It might be asserted that the protection of human rights belongs in the arena of politics, not economics, and that as the EC is primarily concerned with economic, social and technical development, and is not primarily a political body[71], it should play no part in the protection of human rights, including the right to equal treatment for women and men. However, there are many situations in which questions concerning human rights, particularly in a broad sense, might arise in EC law, for example freedom of trade, protection of property and social security. It is not possible to regard human rights as exclusively 'political' and therefore irrelevant in an 'economic' community, as politics and economics are intermingled in modern society.

As M. Dauses observes,

> 'The Communities' powers affect basic individual rights in numerous contexts: prohibitions against imports, exports and marketing, price regulation, the organisation of agricultural markets and competition laws all permit interference in the essential right to property and in the right to free exercise of a profession. Freedom of association and freedom to form a union may conflict with the power reserved under Community law to the Member States to take steps with reference to public policy. Finally freedom of religion and liberty of thought restrict the power of the institutions of the Communities in their organisation of the public service.'[72]

Furthermore, the EC has increased its political credibility greatly since its foundation. Transfer of sovereignty from Member States to the EC institutions is very real in many areas. This will be further enhanced after the completion of the Single European Market in 1992, with the new

procedures for decision-making.[73] Recognition of this has encouraged some commentators to call for the protection of rights on an EC level.

> '...[T]he EC deserves to be taken more seriously as a political arena. Economic interdependence has been increasing rapidly and governments are far more constrained than they used to be by developments in other countries and at the European level. It is already the case that some labour movements campaigns must be coordinated throughout Europe (and beyond) if they are to have any chance of success. The logic of this situation is that sooner or later the rights of workers, as well as those of citizens, will have to be fought for and secured at the level of the Community'[74]

In the *Defrenne* cases[75] it was suggested that the right to equal pay, whilst being enshrined in Article 119, was also a fundamental human right, and part of the general principles of EC law,

> '... respect for fundamental personal human rights is one of the general principles of Community law, the observance of which [the European Court] has a duty to ensure. There can be no doubt that the elimination of discrimination based on sex forms part of these fundamental rights.'[76]

If the EC is to be committed to equal treatment of women and men as a fundamental personal human right, recognising that an employee is a human being, then the conceptualisation of equality espoused by the EC must be appropriate to that commitment. The concept of 'equality of opportunity' will fulfil that role.

4 Conclusion: Equality of Opportunity for Women and Men in the EC

Article 119, it was explained by the European Court in *Defrenne v SABENA*[77], has a double aim, both economic and social. The economic aim is to avoid the situation where undertakings in those Member States which have implemented the principle of equal pay for women and men suffer a competitive disadvantage as against undertakings in other Member States. If this aim is accepted as the sole purpose of the EC provisions on sex discrimination in employment, then my proposal of 'equality of opportunity', as the standard by which the legislation is evaluated, may be considered to be inappropriate. However the 'social aim' of the provisions must also be taken into account. The social aim is linked to the general social policy of the EC: the EC is to ensure social

progress and to seek the constant improvement of the living and working conditions of its citizens. The implementation of the provisions of EC law providing first for equal pay for women and men, and subsequently for equal treatment for women and men in employment is part of the improvement of living and working standards for women workers.

Furthermore, it is accepted by the European Court that the principle of equal treatment for women and men is one of the 'fundamental personal human rights' which is a 'general principle' of EC law.[78] General principles of EC law do not, of themselves, give rights to individuals within the EC. However, the fact that the European Court has recognised that equal treatment for women and men is a fundamental human right indicates that the EC conception of equality cannot be related exclusively to the economic aim of the provisions regulating sex discrimination in employment. Women (and men) of the EC should be entitled to equality of opportunity in its full sense.

How far the EC provisions justifying sex discrimination fulfil their function, in the light of the purpose of sex discrimination legislation as legislation which provides equality of opportunity for women and men will be explored in Part III. In that part of the thesis, detailed comparison will be made with those provisions in the other legal systems examined. First the content of the provisions is set out in detail, in Part II.

Notes on chapter 3

1. Bilka-Kaufhaus GmbH v Weber von Hartz, case 170/84, [1986] 2 CMLR 701 (ECJ).

2. Griggs v Duke Power Co 401 US 424; 849; 28 L Ed 2d 158 (1971) (Supreme Court).

3. Ojutiku v Manpower Services Commission [1982] IRLR 418; [1982] ICR 661 (Court of Appeal).

4. Heide M. Pfarr and Klaus Bertelsmann, *Gleichbehandlungsgesetz - Zum Verbot der unmittelbaren und der mittelbaren Diskriminierung von Frauen im Erwerbsleben*, (Wiesbaden: Herkules Druck 1985), p. 63.

5. Shorter Oxford English Dictionary.

6. See Katharine Bartlett's discussion of 'positionality' as a 'feminist legal method'; Katharine T. Bartlett, 'Feminist Legal Methods' 103 Harv. L. Rev. 829 (1990).

7. see Nicola Lacey, 'Legislation Against Sex Discrimination: Questions from a Feminist Perspective' 14 Journal of Law and Society 411 (1987), p. 412.

8. see below, chapter 3, section 3.1.1.2, 'Formal equality'.

9. W. D. Ross, *The Works of Aristotle* (London: Oxford University Press, 1925), Vol. 9, Ethica Nicomachea, Book V.

10. Tom Campbell, 'Mistaking the Relevance of Gender', in Sheila McLean and Noreen Burrows, *The Legal Relevance of Gender* (London: Macmillan Press, 1988), p. 16.

11. Folke Schmidt, *Discrimination in Employment* (Stockholm: Almquist and Wiksell, 1978), p. 506.

12. Campbell, in McLean and Burrows, p. 18-19.

13. Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1978).

14. Dworkin, p. 227.

15. see below, chapter 3, section 3.1.1.2, 'Focus on Inequality' and 'Equality of Opportunity'.

16. Warwick McKean, *Equality and Discrimination under International Law* (Oxford: Clarendon Press, 1983), p. 2-3.

17. E. W. Vierdag, *The Concept of Discrimination in International Law* (The Hague: Martinus Nijhoff, 1973), p. 9-11.

18. Katherine O'Donovan, *Sexual Divisions in Law* (London: Weidenfeld and Nicholson, 1985), p. 163.

19. Lacey, p. 413.

20. 404 US 71; 92 S Ct 251, 30 L Ed 2d 225 (1971) (Supreme Court).

21. 'Equality for Women', Cmnd. 5724 (London, HMSO, 1974), para. 17.

22. see below, chapter 3, section 3.1.1.2, 'Equality of Opportunity'.

23. Katherine O'Donovan and Erika Szyszczak, *Equality and Sex Discrimination Law* (Oxford: Basil Blackwell, 1988), p. 3-4.

24. Article 119, Treaty of Rome.

25. see O'Donovan and Szyszczak, p. 13.

26. Hayes v Malleable Working Men's Club [1985] ICR 703 (EAT).

27. Lacey, p. 417.

28. O'Donovan, p. 163.

29. O'Donovan, p. 163.

30. Lacey, p. 413.

31. Catharine A. MacKinnon, *Toward a Feminist Theory of the State* (Cambridge, Mass: Harvard University Press, 1989), p. 217.

32. Wendy Williams, 'The Equality Crisis', in Katharine T. Bartlett and Rosanne Kennedy (eds), *Feminist Legal Theory* (Boulder, Colorado and Oxford: Westview Press, 1991), p. 26.

33. MacKinnon, p. 225.

34. O'Donovan and Szyszczak, p. 4.

35. Mary Wollstonecraft, *A Vindication of the Rights of Women* (London: Dent, 1929), p. 63, as cited in O'Donovan and Szyszczak, p. 2.

36. See Richard Wasserstrom, 'Racism, Sexism and Preferential Treatment' 24 Uni. of California L.A Law Review 581 (1977), p. 587, as cited in O'Donovan and Szyszczak, p. 3.

37. L. Code, 'Simple Equality is Not Enough' 64 Australian Journal of Philosophy 48 (1986), p. 53; cited O'Donovan and Szyszczak, p. 17-18.

38. Christine Littleton, 'Reconstructing Sexual Equality', in Bartlett and Kennedy, p. 36.

39. Littleton, p. 36.

40. Littleton, p. 36.

41. Lacey, p. 415-416.

42. MacKinnon, p. 242.

43. Catharine MacKinnon, 'Toward Feminist Jurisprudence' 34 Stanford Law Review 703 (1982), p. 731; see also O'Donovan and Szyszczak, p. 8.

44. O'Donovan and Szyszczak, p. 9.

45. Elizabeth Wolgast, *Equality and the Rights of Women* (London: Cornell University Press, 1980).

46. Elizabeth Kingdom, *What's Wrong with Rights?* (Edinburgh: Edinburgh University Press, 1991), p. 127.

47. Kingdom, p. 127-128.

48. Bartlett, 'Feminist Legal Methods', in Bartlett and Kennedy, p. 389.

49. Bartlett, 'Feminist Legal Methods', p. 390.

50. Evelyn Ellis, *Sex Discrimination Law* (Aldershot, Hants: Gower, 1988), p. 13.

51. for which see Ellis, p. 12.

52. for example, division of labour in the family and public provision for childcare and care of the elderly, see Peggy Kahn, 'Unequal Opportunities: Women, Employment and the Law', in Susan Edwards (ed), *Gender, Sex and the Law*, (Beckenham: Croom Helm, 1985), p. 79-80.

53. see Kahn, in Edwards (ed), p. 79.

54. Littleton, in Bartlett and Kennedy (eds), p. 44.

55. Littleton, in Bartlett and Kennedy (eds), p. 46.

56. Littleton, in Bartlett and Kennedy (eds), p. 45.

57. Littleton, in Bartlett and Kennedy (eds), p. 45.

58. Littleton, in Bartlett and Kennedy (eds), p. 51.

59. O'Donovan and Szyszczak, p. 4.

60. O'Donovan and Szyszczak, p. 4-5.

61. O'Donovan and Szyszczak, p. 5.

62. Preamble, Article 2, Treaty of Rome; see also Paolo Cecchini, *1992 - The European Challenge* (Aldershot, Hants: Wildwood, 1988).

63. see below, chapter 4, section 3.2.2.1, section 3.2.3.1.

64. Contrast Catherine Hoskyns, 'Women, European Law and Transnational Politics' (1986) Int. J. Soc. L 299, p. 304, who asserts that EC law is 'firmly rooted in the idea of formal equality'.

65. Hoskyns, p. 304.

66. Preamble, Article 2, Treaty of Rome.

67. Defrenne v Sabena No. 2, case 43/75, [1976], 2 CMLR 98; ECR 547, (ECJ), p. 103-104.

68. Defrenne No. 2, p. 103-104.

69. AG Trabbuchi in Mr & Mrs F v Belgian State, case 7/75 [1975] ECR 679 (ECJ).

70. Defrenne v Sabena No. 3, case 149/77, [1978], 3 CMLR 312, ECR 1365 (ECJ), p. 329; see below [p 28 discussion of human rights].

71. P. Pescatore, 'Fundamental Rights and Freedoms in EC Law' (1970) A.J.C.L. 343, p. 344.

72. M. Dauses, 'The Protection of Fundamental Rights in the Community Legal Order' 10 E.L.Rev. 398 (1985), p. 400.

73. see Article 100A, Treaty of Rome.

74. Hoskyns, p. 300.

75. Defrenne No. 2; Defrenne No. 3.

76. Defrenne No. 3, p. 329.

77. Defrenne No. 2.

78. Defrenne No. 3; see Sacha Prechal and Noreen Burrows, *Gender Discrimination Law of the European Community* (Aldershot, Hants: Dartmouth, 1990), p. 11.

PART II

The Legal Framework

The following four chapters set out the legal framework, in each of the four legal systems examined, for the prohibition of sex discrimination in employment, and show how the rules, principles and judicial interpretations relating to aspects of justification for discrimination fit into that general framework. Each chapter covers one legal system.

The chapters are divided into three sections. The first section describes briefly the sources and structure of law regulating discrimination in employment in the legal system concerned. It gives an overview of the legislative provisions, and the judicial bodies concerned with employment law. The second section sets out in more detail the legal provisions (mainly statutory in nature), along with their judicial interpretation, which govern the *standard* of justification for discrimination. This section seeks to describe the 'legal test' for justification. Part of the test is the issue of burden of proof in a case concerning justification for discrimination. The section is divided into a subsection discussing justification for direct discrimination and a subsection discussing justification for indirect discrimination. Each of the principal legislative measures is examined in turn; in the first subsection, as it relates to justification for direct discrimination (or 'disparate treatment', in the case of the US), in the second subsection, as it relates to justification for indirect discrimination (or 'adverse impact', in the case of the US).

The third section provides some examples of *types* of justification, or substantive *grounds* for justification. Again, the division between direct and indirect discrimination is used. Grounds for justification of indirect discrimination are divided into the sub-categories of 'job related justifications', 'enterprise related justifications' and 'public interest related justifications'. Job related justifications are those in which the ground for justification relates directly to the duties of the job. A requirement for a certain amount of muscular strength, where the job involves lifting and carrying of heavy weights, is a job related justification. Enterprise related justifications are those in which the ground for justification relates to the wider organisation of the enterprise of the employer. The exclusion of part-time employees from employee fringe benefits, on the grounds of economic efficiency of the enterprise,

is an enterprise related justification. Public interest related justifications usually apply to legislation or other State measures. The broad social benefit provided by indirectly discriminatory legislation is a public interest related justification. The precise location of a particular substantive ground for justification within these three categories may, in some cases, be a matter for debate, as the three categories are not divided by sharp lines, but in fact merge into one another. For the purposes of the thesis, it was necessary to allocate various grounds of justification to a particular category, in what may seem a rather arbitrary manner; for example, justifications related to grading and pay structures, although arguably job related, are discussed as 'enterprise related' justifications.

To facilitate comparison between the legal systems, an attempt has been made to keep the structure and headings of each chapter the same as the others. This approach resulted in some minor difficulties in the presentation of the material; however, the benefits of comparison easily outweigh those difficulties. In the discussion of the European Community measures, where the history of sex discrimination cases is relatively short, and, more significantly, the actual number of cases is small, it has been necessary to refer to the same cases in the discussion of the standard of justification and in that of the available types of justification. In the common law legal systems, the United Kingdom and the United States of America, the amount of case-law is much greater: this fact enabled a more eclectic approach to the available material. It should be stressed that the discussion of the case law of those systems is by no means exhaustive. The chapter on German law presented different concerns again. Case law is not binding in German law, and is only illustrative of the import of the legislative provisions. The opinions of commentators were therefore relied on in order to fill lacunae.

In this part of the thesis, neither detailed analysis of the material, nor evaluative comment on the judgments of the courts concerned, may be found. Comparison and evaluation of the approaches is undertaken in Part III. Part II is concerned with description of the legal provisions.

Chapter 4

European Community

1 EC law on employment: Sources, Structure, role of European Court of Justice

The primary source of European Community (EC) law is the Treaty of Rome[1]. This framework treaty establishes the EC[2], sets out its broad aims[3], and outlines its scope of activities[4]. The main aim of the EC is the establishment of a 'common market': that this will have repercussions in the sphere of employment is recognised in Article 3 (i). Inasmuch as this is necessitated by the aims of the EC, and provisions of the Treaty, the EC has jurisdiction to legislate in the employment sphere.[5] In the field of equal treatment of women and men, this legislative activity has perhaps been greater than was originally envisaged.

Title III of Part 3 of the Treaty contains provisions concerning the Social Policy of the EC. These are particularly directed towards the improvement of working conditions and standard of living of workers[6]. In other words, the Social Policy of the Treaty is concerned with the employment sphere; it is to operate to protect workers from suffering hardship under the economic restructuring envisaged by the Founders of the Treaty, to open up social security in host Member States for migrant workers in the EC, and to prevent the enjoyment of competitive advantage by those Member States whose provisions protecting employees were more developed than others.[7]

Included in this Title is Article 119, which establishes the principle of equal pay for equal work for women and men in the EC. Article 119 is in a special position in the Chapter of the Treaty on social policy, as it is the only provision in that Chapter which imposes definite obligations on the Member States of the EC. It is not merely a policy statement or a statement of intent, rather it is directly effective[8], that is, it gives the right, enforceable before a national court, to individuals within the Member States to equal pay as between women and men for equal work.

Article 119 contains a clear statement of principle, a definition of pay and a description of pay without discrimination based on sex.

Secondary legislation has made clear that the principle of equal treatment for women and men in employment is not limited to pay alone. The principle in Article 119 has been extended by provisions of EC legislation: in particular Directive 75/117 (Equal Pay)[9], Directive 76/207 (Equal Treatment)[10] and Directive 79/7 (social security)[11].

The European Court of Justice has played an important role in the development of the principle of equality for women and men in employment. Acting under its general duties to interpret and apply EC law, both in actions brought under Article 177 (preliminary rulings) and those brought under Article 169 (breach of Treaty obligations by a Member State), the European Court has provided much of the content and effect of the principle in specific situations. Examination of decisions of the Court will therefore form an essential part of this chapter.

2 Provisions of European Community law establishing the Equal Treatment of women and men in Employment, and justification for derogation from those provisions

The EC provisions concerning equal treatment of women and men in employment proscribe both 'direct' and 'indirect' discrimination[12]. The terms 'direct discrimination' and 'indirect discrimination' are not defined in any of the legislative provisions of EC law, although Directive 76/207, Article 2 (1) defines the principle of equal treatment as 'no discrimination whatsoever on grounds of sex either directly or indirectly'.

2.1 Direct discrimination

The European Court defined 'direct and overt discrimination', in *Defrenne v SABENA*[13], as that discrimination 'which may be identified solely with the aid of the criteria based on equal work and equal pay referred to by Article 119'. Direct discrimination is thus, in the area of equal pay, the failure to pay women at a rate equal to men (or *vice versa*), where the

women and men concerned carry out work that is equal. 'Equal work' may be the same work or work of equal value[14]. Similarly in an equal treatment claim, the failure to treat a woman equally to men engaged in equal work is direct discrimination. In a direct discrimination claim, the difference in pay or treatment is based directly on grounds of sex.

2.1.1 Article 119

The provisions of Article 119 read as follows:

> 'Each Member State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work.
>
> 'For the purpose of this Article, 'pay' means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives, directly or indirectly, in respect of his employment from his employer.
>
> 'Equal pay without discrimination based on sex means:
>
> (a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;
>
> (b) that pay for work at time rates shall be the same for the same job.'

There are no provisions in Article 119 justifying direct discrimination in pay between a woman and a man.

2.1.2 Equal Pay Directive 75/117

Directive 75/117 was introduced to implement and to some extent interpret Article 119. It provides a fuller definition of equal pay for women and men, which includes equal pay for work of equal value.

> 'The principle of equal pay for men and women outlined in Article 119 of the Treaty ... means, for the same work or for work to which equal value is attributed, the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration.
>
> 'In particular, where a job classification system is used for determining pay, it must be based on the same criteria for both

> men and women and so drawn up as to exclude any discrimination on grounds of sex.'[15]

The remaining provisions impose duties on the Member States to ensure that individuals are able to pursue claims for breach of the equal pay principle[16], that provisions of legislation, regulations or other administrative measures and provisions in employment contracts of all types are in conformity with the principle[17], that employees who complain of breach of the principle are protected from dismissal[18], that measures are taken to ensure that the principle is applied[19] and that the provisions of the Directive are brought to the attention of employees in the MS[20]. There is no provision allowing derogation from the principle of equal pay; in other words, there is no justification for direct discrimination in breach of the Equal Pay Directive.

2.1.3 Equal Treatment Directive 76/207

The Equal Treatment Directive establishes the principle of equal treatment for women and men as regards access to employment, including promotion, access to vocational training and as regards working conditions.[21] It prohibits discrimination in treatment of women and men both directly and indirectly, in particular by reference to marital or family status.[22] Discrimination between women and men is forbidden in the process of selection of employees, promotion,[23] access to all types and levels of vocational training[24] and all conditions of employment, including those governing dismissal.[25]

The Equal Treatment Directive contains in Article 2 (2), (3) and (4) a number of exclusion provisions. These justify direct discrimination in equal treatment in certain circumstances in EC law.

The Equal Treatment Directive 76/207, Article 2 (2), reads as follows:

> 'This directive shall be without prejudice to the right of Member States to exclude from its field of application those occupational activities and where appropriate, the training leading thereto, for which, by reason of their nature or the context in which they are carried out, the sex of the worker constitutes a determining factor.'

The exception provided by Article 2 (2) is narrow. A Member State or employer wishing to use it must show that, for the occupation concerned, sex is a determining factor, that is, a non-discriminatory policy in the occupation concerned would make it very difficult or impossible to carry out the activities of that occupation. In other words, it must be shown that it is necessary to employ a person of a particular sex.

The provision must be read alongside Article 9 (2) which requires Member States to assess periodically the activities in Article 2 (2) 'to decide, in the light of social developments, whether there is justification for maintaining the exclusions concerned' and to notify the Commission. The directive thus requires 'transparency'. The policy of the Member States must be sufficiently open for scrutiny by the Commission.

The case *Re Discrimination Laws: EC Commission v. Germany*[26] is indicative of the strict interpretation given by the European Court to the requirement for transparency. The German government, unlike the governments of other Member States, had failed to indicate those occupations which it considered were covered by Article 2 (2). It had not defined in national legislation the scope of the derogation. There was therefore no means by which the Commission could supervise this derogation, as it is required to do under the provisions of the Directive. There was no transparency.

The Advocate General submitted that the principle of non-discrimination was so important that Member States should be required to provide a list of activities excluded from the Directive, in order to ensure that Member States did not avoid their obligations in the exercise of their discretion.

> '... [T]he purpose of Article 2 (2) is not to authorise Member States to permit discriminatory treatment whenever it proves necessary to do so ... Its purpose is to prevent the prohibition of discrimination from making it difficult or impossible to carry on those and only those activities for which a person's sex is a prerequisite. From that point of view a precise indication of the activities that are included is ... necessary in order to prevent the rule that there is to be 'no discrimination whatsoever' from being circumvented by an unrestricted power to derogate from it.'[27]

The European Court indicated in its decision that the terms of Article 2 (2) are such that a general statement from a Member State that derogation would be desirable is not sufficient to establish an exclusion under Article 2 (2): certain specific activities only may be excluded, and only where specific reasons are given. Furthermore the Member States must keep under review the reasons for maintaining the exceptions, and must notify the Commission. This will ensure that existing derogations which no longer appear justified are progressively eliminated[28]. The Court did not, however, specifically require Member States to provide a list of excluded activities. It is important to note that the exception covers specific activities only, and not entire occupations.[29]

In general, the exclusion clause in Article 2 (2) is given a narrow scope in interpretations by the European Court. The Member State (or employer) must show a specific relationship: the relationship is between the actual duties of the job and the need for a worker of a particular sex. The Court will probably continue to narrow the confines of situations in which Article 2 (2) applies; a trend suggested by the fact that the decision in *EC Commission v France*[30] narrows the previous *Johnston*[31] decision[32]. Strict application of the requirement for transparency should operate to encourage this trend.

The standard of justification applicable under Article 2 (2) is as follows. It is for the national court to decide whether the activities concerned may be justifiably restricted to employees of one sex only, with due regard to the principle of proportionality, which requires that derogation remains within the limits of what is appropriate and necessary for achieving the aim in view.[33]

Article 2 (3) of the Equal Treatment Directive provides an even narrower ground for justification of discrimination. It states that,

> 'This Directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity.'

Article 2 (3), therefore, envisages that measures which treat women differently from men may, in certain circumstances where the special

protection of women is desirable, be consistent with the principle of equal treatment. Certain types of positive discrimination may be justifiable, in terms of the Directive. In *Johnston*[34], it was found by the European Court that Article 2 (3) was intended only to cover measures concerned with protection of women's biological condition. This interpretation of Article 2 (3) was upheld in *Hoffmann v Barmer Ersatzkasse*[35] where the Court held that special provision for maternity leave was covered by Article 2 (3), which provided protection for a) the biological condition of women during and after pregnancy; and b) the relationship between mother and child during the period following pregnancy and birth.

This construction was confirmed by the decision in *Re Protection of Women: EC Commission v France*[36], which concerned French legislation applying Directive 76/207. This legislation allowed the continuation, in collective agreements and employment contracts, of certain privileges for women, including extended maternity leave, time off for sick children, an extra day holiday per year per child, allowances for childminders and several others. The Court held that these privileges were far wider than those envisaged by Article 2 (3).[37]

Finally, Article 2 (4) provides that,

> 'This Directive shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities in the areas referred to in Article 1 (1).'

'Measures which promote equal opportunity for men and women', designed to remove existing disparities in employment, are termed measures of positive discrimination. Article 2 (4) is authority for the proposition that some measures of positive discrimination are justifiable in accordance with EC law.

However, Article 2 (4) has not yet been successfully relied upon to justify sex discrimination. The French Government attempted to plead this justification in *Re Protection of Women*[38], but it was held that the privileges were not justified by the precise objective in Article 2 (4) of eliminating *de facto* inequalities.

The provisions concerning justification of direct sex discrimination in EC law require a high standard of justification: this construction has been strengthened by the European Court's interpretation of the provisions. The construction can be regarded as appropriate because of the importance of equality as between men and women in employment as a part of the social policy of the EC and as a part of the provisions establishing a common market, with fair competition between all Member States.[39]

2.2 Indirect discrimination

Indirect discrimination arises where an employer's policy, although not differentiating on a forbidden ground (in this instance sex), has the effect of so doing. The plaintiff, in EC law, bears the initial burden of establishing the discriminatory effect of the policy or practice of the employer. The burden is then transfered to the employer to justify such a policy. In *Bilka-Kaufhaus v Weber von Hartz*[40], the European Court laid down guidelines, interpreting Article 119, indicating the standard for justification of indirect sex discrimination in pay. The Court expressed the method by which a national court is to determine, in applying EC law, whether an employer has discriminated indirectly against women, in the following way:

> 'It falls to the national court, which alone is competent to assess the facts, to decide whether ... the grounds put forward by an employer to explain the adoption of a pay practice which applies irrespective of the employee's sex, but which in fact affects more women than men, can be considered to be objectively justified ...'[41]

The question of justification is central to the concept of indirect discrimination. Any disproportionate effect in fact on women as compared to men may trigger an enquiry into indirect discrimination; if the employer can show justifiable reasons for the difference, then discrimination is not established.

2.2.1 Article 119 and the Equal Pay Directive 75/117

Article 119 and the Equal Pay Directive 75/117 have been held to cover not only direct discrimination, where the difference in pay is based directly or intentionally on the grounds of sex, but also indirect discrimination.[42]

As the Equal Pay Directive is an interpreting and implementing measure of Article 119, both provisions may be taken together in an examination of the decisions of the European Court concerning indirect sex discrimination contrary to EC law. In fact, cases are often argued using the provisions of the Article 119 and the Directive in tandem.

The case of *Jenkins v Kingsgate*[43] was a forerunner to the case law regarding justification for indirect discrimination in pay and treatment. The European Court, in its ruling, did not actually identify the discrimination concerned as 'indirect discrimination', and consequently did not discuss justification for indirect discrimination in those terms. Nevertheless, important issues concerning justification for discrimination were discussed in the proceedings.

Ms Jenkins worked part-time for Kingsgate. She claimed under the UK Equal Pay Act 1970 for the same hourly rate of pay as a man employed on like work. The UK industrial tribunal found that the difference in pay was motivated by the need to discourage absenteeism, the need to ensure that the expensive machinery in the factory was being used to its full extent, and the need to encourage greater productivity. The case was referred to the European Court, to determine whether in those circumstances, there was a breach of EC law (Article 119 or Directive 75/117).

Ms Jenkins argued that the principle of equal pay, enshrined in EC law, is violated not only where an employer intends to discriminate against a woman on grounds of sex (direct discrimination) but also where the effect of the employer's policy is to discriminate against her on such grounds (indirect discrimination). She conceded that,

> '... in certain situations the difference in hourly rates of pay between a female part-time worker and a male full-time worker may be objectively justified by the operation of factors which are unconnected with any discrimination on grounds of sex. It might be the case, for example, that the male worker has superior skill or qualifications or longer service,'

but submitted further that,

> '... the principle of equal pay is violated not only where an employer intends to discriminate but also where the effect of his policy on pay is to discriminate against her on such grounds. If a condition or requirement which must be met in order to obtain equal pay for equal work operates so as to exclude women and cannot be shown to have a manifest relationship to the services involved, the application of such a condition or requirement must be considered to be contrary to the principle of equal pay.'[44]

According to the plaintiff, the standard of justification for discrimination was to be in terms of a 'manifest relationship to the services involved'.

The Commission considered that it could be argued, in case of facts such as were before the European Court in the *Jenkins* case, that equal pay could not be excluded either a) on grounds that part-time or full-time workers are not engaged on the same job, or b) on grounds that, although it is in reality the same job, 'the fewer hours worked entail additional charges (principally financial) for the employer, which may be taken into consideration to give the female part-time employee a lower time rate.'[45] However, in answer to a) the Commission considered that the language versions other than English suggested it was the post or the nature of the services, and not the number of hours worked which determines whether it is the same job. As to b), the extra cost to the employer, the Commission referred to its policy that 'factors affecting the cost or yield of female labour shall not be taken into consideration in the case of work paid by time.'[46] Otherwise, this approach would enable employers to continue their discriminatory practices. The Commission concluded,

> 'of course, that does not exclude the possibility that a difference between two workers occupying the same post may be explained by the operation of factors which are unconnected with any discrimination on grounds of sex. Whether that is the case is a question of fact.'[47]

According to the Commission, the standard for justification was a showing that the factor was 'unconnected with sex'.

The Court held

> '... if it is established that a considerably smaller percentage of women than men perform the minimum number of weekly working hours required in order to be able to claim the full-time hourly rate of pay, the inequality in pay will be contrary to Article 119 of the Treaty where, regard being had to the difficulties encountered by women in arranging to work that minimum number of hours per week, the pay policy of the undertaking in question cannot be explained by factors other than discrimination based on sex.
>
> '... it is for the national courts to decide in each individual case whether, regard being had to the facts of the case, its history and the employer's intention, a pay policy such as that which is at issue in the main proceedings although represented as a difference based on weekly working hours is not in reality discrimination based on the sex of the worker.
>
> '... a difference in pay between full-time workers and part-time workers does not amount to discrimination ... unless it is in reality merely an indirect way of reducing the level of pay of part-time workers on the ground that that group of workers is composed exclusively or predominantly of women.'[48]

The judgment does not refer to the standard required for justification. However, having established in *Jenkins* that, in principle, indirect discrimination, *prima facie* contrary to the provisions of Article 119, could be justified in certain circumstances, the Court considered in more detail the question of the standard by which such justification could be established, in the case of *Bilka-Kaufhaus v Weber von Hartz*[49].

Full-time employees of Bilka were given a non-contributory pension on retirement. Part-time employees only qualified for the pension if they had been employed full-time for at least fifteen years. This was indirectly discriminatory against women, since the proportion of women workers who are able to undertake full-time employment, because of their family duties, is considerably smaller than that of men. Therefore the proportion of women able to qualify for the pension was considerably smaller than that of men.

Bilka contended that the exclusion of part-time workers from the pension scheme was to discourage part-time employment. This was necessary, as Bilka was obliged to employ some full-time workers to cover the evening and Saturday opening times which were unpopular among part-timers, and so had to make full-time work more attractive than part-time work. The policy was therefore justified by economic necessity, as referred to in *Jenkins*.

Ms Weber von Hartz argued that the objective of cutting down on part-time employment could not justify the discrimination in pay.

> 'An employer who wishes, as a matter of policy, to encourage full-time work is entitled to decide not to recruit part-time workers. He cannot, however, without infringing Article 119, worsen the situation of such workers, who are already at a disadvantage ... Any other solution would be discriminatory.'[50]

The Court held that,

> 'Article 119 is infringed by a department store company which excludes part-time employees from its occupational pension scheme where that exclusion affects a much greater number of women than men, unless the enterprise shows that the exclusion is based on objectively justified factors which are unrelated to any discrimination based on sex ...
>
> 'It falls to the national court, which alone is competent to assess the facts, to decide whether, and if so to what extent, the grounds put forward by an employer to explain the adoption of a pay practice which applies irrespective of the employee's sex, but which in fact affects more women than men, can be considered to be objectively justified for economic reasons. If the national court finds the reasons chosen by Bilka; a) meet a genuine need of the enterprise, b) are suitable for attaining the objective pursued by the enterprise, and c) are necessary for that purpose, the fact that the measures in question affect a much greater number of women than men is not sufficient to conclude that they involve a breach of Article 119.'[51]

The *Bilka* test for objective justification (that is, points a), b) and c) above) has been applied in subsequent case law[52]. It forms the basis of EC law on justification for sex discrimination. Subsequent applications of the *Bilka* test have clarified to a certain extent what is meant by the provisions.

Each of the three elements (or 'legs') of the *Bilka* test, an objective criterion, a genuine need and suitable and necessary for the purpose, is now considered in turn.

2.2.1.1 An objective criterion

It is not clear what (if anything) the requirement that a justification be 'objective' adds to the *Bilka* test. Objectivity in itself cannot be defined in legal terms, as the decision as to objectivity is left to the discretion of the court deciding the issue.[53] All the court in fact appears to do is decide whether the justification is 'acceptable'. The most obvious interpretation is that the criterion used by the employer must not be one that is itself based on discrimination on grounds of sex. It may not be a generalisation based on presuppositions regarding the characteristics of certain categories of worker, in this instance women.

This seems to be what the European Court is suggesting in *Rinner-Kühn*[54]. This case concerned the compatibility with Article 119 of a provision of German law excluding the obligation of employers to pay sick pay to employees who work less than 10 hours a week or 45 hours a month, the provision being indirectly discriminatory as most part-time workers are women. The question was whether the different policy for part-timers was justified. The Commission considered that it could not be economically defensible and socially necessary to grant the benefit of six weeks' payment of wages to full-time workers whilst part-timers, who are the socially weaker, should be denied the benefit. The German government's argument that the obligation of continued payment by the employer in the event of illness flowed from its duty of social care, for which there was no basis with regard to those who are minimally employed could not be regarded as convincing.[55]

The Court held that the Member State concerned was required to show that the legislation was justified by objective factors unrelated to any discrimination on grounds of sex, and that this was for the national court to determine.[56] It specifically rejected the argument of the German government that the legislation was justified because the part-time

workers were not integrated in or connected with the undertaking in a comparable way to other workers and therefore the conditions for recognition of a duty of care from the employer towards them, including an obligation to continue to pay wages, did not exist.[57]

> '... [T]hese considerations only represent generalised statements concerning certain categories of workers and do not therefore admit the conclusion of objective criteria unrelated to any discrimination on grounds of sex.'

This statement probably reveals no more than that the Court regarded the purported justification as unacceptable. In other words it was not based on a genuine objective, which operates to outweigh the right to equal treatment. This is a restatement of the other branches of the *Bilka* test, that justification must be based on a 'genuine need' and the measure in question must be 'suitable and necessary' to meet that need, that is, applied in accordance with the principle of proportionality[58].

In *Danfoss*[59], in the context of a pay grading agreement, the European Court interpreted the 'objective criterion' part of the test using a different approach. The Court held that the *application* of the criteria must be objective. The *Danfoss* decision concerned a collective agreement between Handles-Og Kontorfunktionaerernes Forbund i Danmark (a Danish staff union) and Dansk Arbejdsgiverforening (an employer's association) (acting for Danfoss). Under the agreement, the same basic rates of pay applied to all workers in the same grade. Grading was determined by job classification. However, a provision of the agreement allowed the payment of additional wages to individuals within a particular grade on the basis of 'flexibility', vocational training and seniority. The union pointed out that within a pay grade the average pay of women was less than that of men. The application of the criteria was contended to be discriminatory, contrary to the equal pay principle.

Concerning the 'flexibility' criterion, the Court distinguished between flexibility as referring to the quality of work carried out by the employee, and flexibility as the adaptability of the employee to variable work schedules and places of work. The former could not constitute justification, as it was totally neutral from the point of view of sex, and

so if it were shown that the use of the criterion led to systematic unfairness to women, that could only be because the employer had applied it in an abusive manner. The purported justification therefore failed, as it was shown not to be an objective factor unrelated to grounds of sex.

In a situation, such as that in *Danfoss*, the disparate results, as between male and female workers, from the application of the criterion could be regarded as evidence of direct discrimination. If this is accepted, then neither interpretation of the word 'objective' adds anything to the existing interpretation of the *Bilka* test for justification of indirect discrimination. What is meant by 'objectivity' is included in the second and third legs of the test, which are now examined in turn.

2.2.1.2 'Genuine need of the enterprise'

The second leg of *Bilka* is that the justification advanced by the employer as a defence must relate to a 'genuine need of the enterprise'. What exactly is meant by genuine need of the enterprise is not elaborated in the *Bilka* decision; all that the European Court pronounced was that it is for the national courts of the Member States to decide in each case. The types of need which are acceptable as justification are discussed below. The standard applied to the 'need' is that it must be 'genuine' and not spurious or merely convenient.

2.2.1.3 'Suitable for attaining the objective pursued and necessary for that purpose'

The third leg of *Bilka* is that the measure be 'suitable for attaining the objective pursued'. The requirement for 'suitability' could conceivably be narrowly construed to connote that if the discriminatory policy alleged to be serving the genuine need established by the enterprise could not possibly meet that need, then the policy is unacceptable.

A different interpretation of 'suitability' was used by the German court which applied for the ruling in *Bilka*[60]. It was decided that the alleged justification for giving superior pension conditions to full-time workers

was *inter alia* to enable the store to maintain its staffing levels on Saturdays, allegedly unpopular with part-timers. It was accepted by the court that the policy of the employer *would not necessarily* (rather than could not possibly) have the desired effect, and in particular that there had been no attempt by the employer to offer the superior pension rights to part-timers who *did* work on Saturdays, therefore that the requirement of suitability in *Bilka* had not been met.

The requirement that a justification be 'suitable for attaining the objective pursued and necessary for that purpose' presents a tight standard by which justifications are to be assessed for legality. Each requirement is useful separately, but it may also be considered that the two requirements together comprise a statement of the requirement for proportionality.

The principle of proportionality, which has its origins in German law, is well established in the law of the European Community. The principle requires that, in the exercise of powers, the means used by the person or body exercising the powers must be in proportion to the ultimate objective or ends, which the exerciser of the powers seeks to achieve. In the case of indirect discrimination on grounds of sex, the principle of proportionality requires that, for example, an employer seeking to justify an employment policy which discriminates in its impact against women (or men) must show that the method chosen to achieve the policy is proportionate to the effect or impact of the policy. In practice, this means that, since the principle of non-discrimination or equality is central to the law of the European Community, if there exists a non-discriminatory (or less discriminatory) means of achieving the policy, the principle of proportionality will not be satisfied. The measure must be no more than is necessary to meet its objective[61]. It follows that even if an employer succeeds in establishing a genuine business need, it may still fail to justify its policy, if the employee who has been discriminated against can show that the allegedly discriminatory measure is disproportionate to the achievement of the 'genuine business need'.

What is to be regarded as proportionate in terms of measures which discriminate against women (or men) has not been made explicit by the Court and could not be, given the multiplicity of possible situations in which such a question might arise. For guidance in this respect, one may look to other areas of European Community law in which the principle of proportionality has been applied.

The principle of proportionality permeates EC law. Recognised as a 'general principle' of EC law[62], it has been applied in numerous substantive areas, including agriculture, competition, free movement of persons and free movement of goods, as well as sex discrimination. As an illustration of the operation of the principle of proportionality in EC law, the principle of proportionality as applied to derogations to the principles of free movement of workers and of goods, in the context of non-discrimination on grounds of nationality is instructive. Here the principle of proportionality is very strictly interpreted by the European Court, when ruling on measures which discriminate on grounds of nationality, but which Member States seek to justify. In particular it is to be noted that the European Court will often suggest ways of achieving the purpose for which the Member State seeks to justify the derogation which will have a less discriminatory effect. If such an alternative is successfully shown, then the measure in question will fail the proportionality test.

For example, in *Watson and Belmann*[63] the attempt of the Belgian state authorities to expel a worker for failure to comply with certain registration requirements failed. The Court explained that the Belgian authorities could require registration formalities and could even impose penalties for failure to comply with such formalities, but the penalty of expulsion from the Member State was disproportionate to the end that the Belgian authorities wished to achieve. Member States 'are not justified in imposing a penalty so disproportionate to the gravity of the infringement that it becomes an obstacle to the free movement of persons.'[64] Other, less drastic, penalties could easily meet the required objective.

Where a fundamental right, enshrined in the Treaty, such as the right to non-discrimination on grounds of nationality, is derogated from in EC law, in order that the derogation be lawful, its effects must be proportionate to the reason for the derogation. The most important consideration here is that if there is any other way to achieve the desired end which justifies the derogation, then the requirement of proportionality has not been met. Where derogation is from Article 119, this is also a situation of derogation from a fundamental right, enshrined in the Treaty. There is no reason to suppose that the European Court will be any less strict in its application of the principle in such cases.

2.2.2 Equal Treatment Directive 76/207

The principles developed by the European Court for justification of indirect pay discrimination were assumed also to apply to indirect discrimination by unequal treatment of women and men.[65] This was confirmed in *Danfoss*[66], where the Court applied the same guidelines in a situation relating to unequal treatment. The discussion above applies to justification for indirect discrimination in treatment of women and men.

3 Substantive Grounds of Justification for Unequal Treatment

As shown above, in certain circumstances, unequal treatment of women and men in employment is justifiable in EC law. Various of these circumstances (as regards discrimination in pay and in treatment) are now discussed, by way of examples of types of justifications or grounds for justification accepted by the European Court. As the rules have not had a long period of time over which to develop, the number of relevant cases is still small.

3.1 Direct discrimination

3.1.1 Activities excluded from the principle of equal treatment

Article 2 (2) of the Equal Treatment Directive 76/207, allows Member States to exclude from the application of the Directive those occupational activities and where appropriate, the training leading thereto, for which the sex of the worker constitutes a determining factor.

The exception is applicable to individual activities only, and not to entire occupations or professions. It must be read alongside Article 9 (2) which requires Member States to assess periodically the activities in Article 2 (2) to decide whether it is necessary to maintain the exclusions and to notify the Commission of those activities which still remain excluded from the principle of equal treatment.

The UK succeeded in establishing an exception under Article 2 (2), on the ground that 'public safety' justified direct discrimination, in *Johnston v RUC*[67]. It is the policy of the Royal Ulster Constabulary (RUC) that women who are members of the force do not carry firearms, as it is thought that this increases the risk of their assassination. In 1980, the RUC began implementing a policy, the effect of which was that the contracts of women members were renewed only in those cases where the duties could only be undertaken by a woman member. This narrowed considerably the number of posts available to women members of the RUC. Ms Johnston's contract was not renewed. If she had been a man, it would have been, as she would have been trained in the use of firearms and therefore would have been able to undertake the same duties as a male member of the force. She claimed this was sex discrimination under UK law. However, this claim failed, as the Secretary of State had issued a certificate under the Sex Discrimination (Northern Ireland) Order 1986, stating that the reason for this policy was the safeguarding of national security and the protection of public safety and public order. This was a complete defence to the claim of unlawful discrimination under the Sex Discrimination (Northern Ireland) Order.

Having failed to establish a claim under UK law, Ms Johnston brought an alternative claim under EC law, relying on the Equal Treatment Directive. The UK government averred that Article 2 (2) of the Directive was an adequate defence; in particular that the nature and context of the duties of jobs concerned with policing Northern Ireland were such that the firearms policy was appropriate, and therefore that the exclusion of women from those duties in which it was necessary to carry firearms was within the remit of the exclusion clause. The Industrial Tribunal referred to the European Court for a preliminary ruling.

The Court held that in a situation such as that prevailing in Northern Ireland, the carrying of firearms by policewomen carrying out particular duties might create additional risks and might therefore be contrary to the requirements of public safety. The sex of the police officer may then constitute a determining factor for carrying out the specific duties. If that is established, a Member State may restrict such tasks to men (Directive 76/207, Article 2 (2)), provided that the principle of proportionality is met.[68]

The decision in *Re Sex Discrimination in the Civil Service: EC Commission v France*[69] narrowed the scope of the *Johnston* decision. The recruitment practices in France for 'head warders' (the governors of small prisons) and five categories in the national police force were based on a policy of separate recruitment competitions for women and men, with a percentage of posts to be allotted to women and men respectively in each competition.

The Court held that the quotas for the various grades of police officers were not sufficiently related to the specific activities concerned, therefore that a justification relating to 'public security' in general could not be applied to employment in all posts in the police force of a Member State. In assessing the justifiability of the requirement for the post of head warder, the Court first examined the post of warder, from which individuals are promoted to head warder. The Court ruled that the specific nature of the post of warder, in particular, the conditions in which warders carry out their duties, justifies the exclusion of women

from posts in male prisons and men from posts in female prisons. Because appointments of head warders are justifiably made from the pool of warders, in particular given that head warders should have had experience of the job of warder, this justified the discriminatory policy vis a vis the appointment of head warders.

That 'public security' may be a ground for justification for direct discrimination in certain specific policing and prison duties is accepted by the European Court.

3.1.2 Pregnancy and maternity

Article 2 (3) of the Equal Treatment Directive allows justification for direct discrimination on the grounds of 'special protection for women'. This ground of justification is confined to special protection in the specific case of pregnancy and maternity. Measures of positive discrimination which favour women may be justified under Article 2 (3); however, the provision may not be used to justify measures which operate to the disadvantage of women.

The arguments that the prohibition of night-work for women was consistent with the aims of protection of women, and 'special considerations of a social nature', such as the risk of assault, were not accepted by the Court, in *Ministère Public v Stoeckel*[70]. As regards protection of women employees, the risks incurred by women were not different in kind from those incurred by men, except in the specific case of pregnancy and maternity, for which derogation is allowed under the Directive[71]. As regards the risk of assault of women, the Court held that, even if this was greater at night than during the day, the exclusion of women from night-work was a disproportionate measure to deal with the problem.

In *Johnston v RUC*[72], the European Court found that Article 2 (3) was to be interpreted strictly, and that the provision was intended to protect the biological condition of women in their child-bearing role, in particular the special relationship between a mother and her child. A *general*

protective provision for women, such as the one concerned in *Johnston*, could not be justified under Article 2 (3).

This interpretation was upheld in *Hofmann v Barmer Ersatzkasse*[73]. In its ruling, the Court emphasised the special nature of Article 2 (3). The provision allows Member States to provide for protection for the biological condition of women during and after pregnancy, and the special relationship between mother and child during the period following pregnancy and birth. These are specific, delimited grounds for derogation, and may not be extended by liberal interpretation. In particular, Article 2 (3) may not to used to advantage men.

German law granted six months maternity leave to working mothers. Hofmann, the father of a child, asked to claim the maternity leave, so that he could care for the child while the mother returned to work. Hofmann claimed that the provision of German law was contrary to Directive 76/207. The European Court disagreed, holding that the maternity leave fell within the scope of Article 2 (3), as its purpose was the protection of a woman in connection with the effects of pregnancy and motherhood. As only the mother could undergo the pregnancy, the leave could legitimately be granted to the mother, and refused to the father[74]. The purpose of Article 2 (3) is to protect the 'special relationship between a woman and her child over the period which follows pregnancy and childbirth'.. Pressure on a mother to return to work could have a detrimental effect on this relationship.[75]

This narrow and literal construction of Article 2 (3) was confirmed by the decision in *Re Protection of Women: EC Commission v France*[76].

An argument based on the provision in Article 2 (4), which allows justification for discrimination in measures designed to promote equal opportunity for women and men, was advanced by the French Government in *Re Protection of Women.* However the argument was unsuccessful. The European Court held that the privileges for women granted by the legislation, such as an extra day's holiday per year for mothers, and special allowances to pay for childminders, were not justified by the

precise objective in Article 2 (4) of eliminating *de facto* inequalities. Since there has been no decision in which reliance on Article 2 (4) has been successful, one may only conjecture as to the types of provision which would be regarded as justifiable as promotive measures for women in EC law. Measures of positive discrimination which favour women (and therefore operate to men's disadvantage), for example measures applied in recruitment, might be justified. Inference from the decided cases on subsections (2) and (3) suggests that any provisions would have to be specifically designed and applied to meet a particular need of women, and, as always, subject to the proportionality principle.

Pregnancy and maternity are accepted grounds in European Community law for the justification of measures discriminating between women and men, but which *favour* women employees; that is, measures of positive discrimination. However, measures *detrimental* to women may not be justified on grounds of pregnancy, as the following two decisions of the European Court demonstrate.

The *Dekker*[77] case raised a number of questions focusing around whether the fact that an applicant for a job is pregnant can constitute a justification in EC law for refusing to employ the applicant. Ms Dekker was already pregnant when she applied for a post in a Youth Centre run by VJV. Although the appointments committee considered Ms Dekker to be the most suitable candidate for the post, the Board of VJV decided they could not take her on as an employee. The reason for this, according to the Board, was that their insurer would not reimburse them for sickness benefits which they would have to pay Ms Dekker while she was on maternity leave, on the grounds that this risk for the employer was foreseeable at the time of appointment, and thus excluded from cover under the insurance policy. The insurance policy treated maternity leave in the same way as sick leave. The exclusion of liability was lawful, according to the provisions of Dutch law which covered the insurers.

Ms Dekker claimed that the refusal to employ her was contrary to the provision of Dutch law implementing Directive 76/207. Lower Dutch courts

considered that there had been a *prima facie* breach, but that this was justified by the relevant provisions of Dutch law.

The Dutch Supreme Court applied to the European Court for a preliminary ruling, with the following question.

> 'Is an employer directly or indirectly in breach of the principle of equal treatment referred to in Articles 2 (1) and 3 (1) of the Directive if he refuses to enter into a contract of employment with an applicant found suitable by him, where such refusal is on the grounds of the possible adverse consequences for him arising from employing a woman who is pregnant at the time of the application, because of a Government Regulation concerning incapacity to work which treats inability to work because of pregnancy and confinement in the same way as inability to work because of illness?'

Ms Dekker's contention was that because the disadvantage arising out of a refusal of insurance cover for pregnancy and maternity leave is a disadvantage which can only affect female employees, it is a sex-based distinction. Such distinctions are not permitted by EC law, in particular the Equal Treatment Directive. Once the principle of equal treatment had been violated, Ms Dekker argued that the employer could not claim that it would be too detrimental financially for the employer to accord to her equal treatment.

VJV argued that the requisite discriminatory motive on the part of the employer was lacking. Discrimination in breach of the Directive could only be established if the rejection of the female applicant was based on the fact that the employer did not want the post to be offered to a woman. In this case, the reason why Ms Dekker was not offered the post was not because she was a women, or even because she was pregnant. It was merely because of the financial risk which VJV might incur in employing her, if it were not reimbursed in respect of the sickness payments it would be obliged to make to Ms Dekker during her maternity leave. The implication was that this financial risk was one which any employer would be justified in seeking to avoid.

The Court held:

> 'As employment can only be refused because of pregnancy to woman, such a refusal is direct discrimination on grounds of sex. A refusal to employ because of the financial consequences of absence connected with pregnancy must be deemed to be based principally on the fact of the pregnancy. Such discrimination cannot be justified by the financial detriment in the case of recruitment of a pregnant woman suffered by the employer during her maternity leave.'[78]

The Court also rejected the idea that grounds existing in national law could be accepted without further examination as grounds for justification in EC law.[79] Pregnancy and maternity could not be grounds justifying detrimental treatment of a woman employee.

The Court reasserted that discrimination on grounds of pregnancy of an employee constitutes unjustified direct sex discrimination in EC law in the case of *Hertz*[80], in the context of a dismissal.

> '[T]he dismissal of a female worker because of her pregnancy constitutes direct discrimination on grounds of sex, as does also the refusal to recruit a pregnant woman.'[81]

However, dismissal of a woman employee because of repeated absence due to illness which appears after the period of maternity leave provided under national law, even if this illness is attributable to the pregnancy, is not discrimination, as the woman is being dismissed for illness under the same conditions as a man[82].

3.2 Indirect discrimination

Indirect discrimination, in pay and in treatment, against women employees, may be justified on a number of grounds. The grounds of justification for indirect discrimination have been divided into three categories. Justification may be based on a 'genuine need' of the employer related to the particular duties of a job, or may be more general, relating to the employer's enterprise as a whole. These two categories have been termed 'job related justifications' and 'enterprise related justifications'. The third category is that in which the 'genuine need' is the need of the State to maintain a measure of social policy which is indirectly discriminatory, and which impacts on the position of women in employment.

This type of justification has been termed 'public interest related'. The European Court has ruled on justification in all three types of situation, but does not distinguish between them in these terms.

3.2.1 Job related justifications

An indirectly discriminatory provision or policy of an employer may be fairly readily accepted by the European Court as justified if the provision relates directly to the performance of the job. The employer must show that this is a real and not spurious relationship, and must, as for all justification claims, satisfy the proportionality test.

3.2.1.1 Flexibility

If the employer can show that the activities of a job carry with them a genuine need for 'flexibility', that is, the adaptability of the employee to variable work schedules and places of work, then it may establish a ground of justification in EC law.

This was accepted in the case of *Danfoss*[83], even though such a requirement could disadvantage women, who were less likely to be able to organise their working time in a flexible way because of their household and family duties.

> '[A]s in the case of *Bilka*, in which the Court held that there was no infringement of Article 119 where an undertaking establishes that a pay practice which affects a much higher number of women than men was determined by objectively justified factors unrelated to any discrimination based on sex, in the case of a pay practice which gives special rewards for the adaptability of workers, the employer may justify payment for such adaptability by showing that it is of importance in the performance of the specific duties entrusted to the worker concerned.'

It is noteworthy that the European Court insists that the requirement for flexibility must be related to the *specific activities* of the job if a job-related justification is to be established. A general requirement for a flexible workforce would not be a ground for justification.

3.2.1.2 Vocational training

Danfoss also established that in a pay system which discriminated against women, by using, *inter alia*, the criterion of vocational training as grounds for making additional payments to workers, the use of the criterion of vocational training could justify the discrimination.

> 'The Equal Pay Directive must be interpreted as meaning that where the worker's vocational training is used as a criterion for pay increments and this works systematically to the disadvantage of female workers, the employer may justify the use of the criterion of vocational training by demonstrating that such training is important for the performance of specific duties entrusted to the worker.'[84]

With both the criteria of flexibility and vocational training, the employer may only establish the justification if it satisfies the Court that the application of the criteria is within the principle of proportionality. This is effected by demonstrating a nexus between the qualities of the employee which are rewarded by greater pay, and the specific duties of the job undertaken by the employee. This factor in establishing justification was stressed by the judgment of the European Court in *Danfoss*.

3.2.1.3 Seniority

Paying a more senior worker at a higher level is a ground for justification of indirect discrimination in EC law; this was also established in *Danfoss*. The European Court also allowed the relaxation of the proportionality test in this instance, on the assumption that seniority always affects favourably an employee's ability to carry out the duties of the job.

> '... [T]he employer does not need to give any specific justification for using the worker's seniority as a criterion for pay increments.

> 'Even though the criterion of seniority ... may result in less favourable treatment of women workers than of male workers, seniority goes hand in hand with experience which generally places a worker in a better position to carry out his duties. Therefore it is permissible for the employer to reward it without the need to

> establish the importance which it takes on for the performance of the specific duties entrusted to the worker.'[85]

3.2.1.4 Physical ability to perform the job

As men, in general, have greater muscular strength than women, employment conditions which require, or reward, muscular strength may be indirectly discriminatory. The indirect discrimination is justified if the duties of the job require the use of muscular strength. Physical ability to perform a job provides a ground of justification. The higher payment of staff who carry out heavy physical work may also be justified.

In *Rummler v Dato Druck*[86], the European Court ruled on the question of whether a particular job classification system was compatible with provisions of EC law, in particular the Equal Pay Directive 75/117. The job classification system relied on such criteria as 'demand on the muscles', 'muscular effort' and 'heavy work': it is more difficult for women, in general, to carry out jobs which involve such muscular activity. Moreover, the system used male standards as a point of reference in evaluating muscular activity.

The Court, considering the provision in Article 1 of the Directive, which states that a job classification system 'must be based on the same criteria for both men and women and so drawn up as to exclude discrimination on grounds of sex', held that,

> '... the principle of equal pay requires essentially that the nature of the work to be carried out be considered objectively. ... Where a job classification system is used in determining remuneration, that system must be based on criteria which do not differ according to whether the work is carried out by a man or a woman and must not be organised, as a whole, in such a manner that it has the practical effect of discriminating generally against workers of one sex.'[87]

In order to determine whether or not a particular criterion applied in a job classification scheme is discriminatory, it must be considered in the context of the scheme in its entirety.[88] The use of a criterion such as muscular demand to determine pay, may be justified, according to the European Court, if the pay difference relates to a genuine need of the employer, in that it ensures a level of pay appropriate to the effort

required by the work[89], with the proviso that the job classification system as a whole must not be discriminatory.

With this guidance, the Court held that it is for the national court to determine, on a case by case basis, whether or not a job classification system, as a whole, is non-discriminatory.

3.2.2 Enterprise related justifications

This category relates to justifications which are not referable directly to the duties of the job to be carried out by the employee, but relate to the employer's enterprise as a whole. The Court, in the early judgment of *Bilka*, suggested that justification might be established 'for economic reasons'[90]. The European Court has not explained which economic reasons it is prepared to consider, nor whether reasons other than 'economic reasons' may be used by an employer to justify discrimination[91], nor what is the relationship between such economic reasons and the principle of non-discrimination between women and men on grounds of sex which is considered to be a central principle of the Treaty of Rome. To date there are only a few decisions of the European Court which address 'enterprise related' justifications.

3.2.2.1 Economic efficiency

In the leading case of *Bilka Kaufhaus v Weber von Hartz*[92], discussed above, the employer claimed that the provision which disadvantaged part-time employees was justified by the economic running of the business, in particular, the need to have staff available to cover all opening times of the enterprise.

Provisions *excluding* part-time workers from employment may be job related, if the employer can establish that the duties of the job are such that the job must be carried out by a full-time member of staff. However provisions which *disadvantage* part-time workers relate more generally to the employer's business, for example, the employer may treat full-time staff more favourably on the grounds that it must retain some full-time

staff for the proper operation of the business as a whole. This sort of claim must be evaluated as an 'enterprise related' justification.

Because the percentage of women who work part-time is considerably higher than that of men, and because women, due to family and child-care duties, are in general less able than men to undertake full-time employment, practices and policies which disadvantage part-time workers may fall foul of the provisions of EC law prohibiting indirect sex discrimination. This was accepted by the European Court in the *Bilka* case.[93]

On the question of justification for the policy excluding part-time workers from an occupational pension scheme, the European Court examined the arguments put forward by Bilka and by Ms Weber von Hartz.

> 'In its observations, Bilka contends that the exclusion of part-time employees from the occupational pension scheme aims solely to discourage part-time employment. In this connection it claims that part-time employees normally refuse to work late in the afternoons and on Saturdays. Consequently it was necessary for Bilka, in order to ensure the presence of a sufficient number of employees at these times, to make full-time work more attractive than part-time work, by limiting admission to the occupational pension scheme to full-time workers only. Bilka deduces from this that, on the basis of the judgment in *Jenkins*, it cannot be accused of having breached Article 119.
>
> 'With regard to the reasons invoked as justification for the exclusion in question, Mrs Weber points out that Bilka is not obliged to recruit part-time employees and that, if it decides to do so, it is not authorised subsequently to limit the pension rights of those employees, who already suffer a curtailment of their rights due to their shorter working hours.'[94]

The European Court ruled that the decision on justifiability was for the national court, which has the competence to assess the facts.

> 'If the national court finds that the means chosen by Bilka meet a genuine need of the enterprise, that they are suitable for attaining the objective pursued by the enterprise and are necessary for that purpose, the fact that the measures in question affect a much greater number of women than men is not sufficient to conclude that they involve a breach of Article 119.'[95]

Applying the ruling from the European Court, the *BundesArbeitsGericht (BAG)* (Federal Labour Court) rejected the claims of the employer[96]. As regards organisational problems and higher costs to the employer in the employment of part-time workers, the *BAG* held that the impact of part-time workers on these could only be regarded as minimal, and in any case was offset by benefits to the employer in employing part-time workers. As for the necessity to encourage Saturday working, the *BAG* pointed out that, even if this was a 'genuine need of the enterprise', the pensions policy was not 'suitable for attaining the objective'. In particular there was no differentiation in the pension scheme between Saturday workers and part-time workers, neither was provision made in the scheme for part-time workers to qualify for the scheme by working on Saturdays.

Justification for provisions which discriminate against part-time workers, and therefore indirectly against women, has not proved easy so far to establish in EC law. As the law stands, the employer would have to show a specific need, more than a convenience, to treat part-time workers differently, and to satisfy the requirement of proportionality.

3.2.3 Public interest related justifications

Where indirect discrimination arises from provisions of legislation or other measures taken by the State which regulate the employment relationship, the State may argue that the discriminatory effect of the measures is justified by the benefit they provide to the public in general, or by 'social policy'. In the *Rinner-Kühn* judgment, the European Court suggested that an indirectly discriminatory legislative provision could be justified if it was 'necessary for social policy'[97], adding this, as a ground for justification, to the 'economic' ground put forward in *Bilka*. The Court has not distinguished its reasoning in *Bilka*, requiring employers to justify indirect discrimination, for job related or enterprise related reasons, from justification on grounds of 'public interest'. Nevertheless, the issues arising in a purported public interest justification may be different from those in the other types of justification. In particular, the issue of what should be the requirement on the State to justify the continued application of legislation which is

indirectly discriminatory, where the issue is most likely to be raised in a case between an employee, who disputes the compatibility of the legislation with the equal treatment principle, and an employer who relies on the legislation in its defence, must be dealt with.[98]

3.2.3.1 Social policy

In *Rinner-Kühn v FWW Spezial-Gebäudereinigung*[99], the question as to the compatibility with Article 119 of provisions of employment policy disadvantaging part-time workers was referred to the European Court for a preliminary ruling. As explained above[100], in this case, the provisions were contained in German legislation. The *Lohnfortzahlungsgesetz*[101] (Act on the Continued Payment of Wages) provided that the employer must continue to pay wages for six weeks to employees unable to work, because of illness: however, workers whose employment contract provides for a normal working week not exceeding 10 hours a week, or 45 hours a month are excluded from the provision.

Ms Rinner-Kühn normally worked for 10 hours per week. Her request for payment of sick pay, on her absence due to illness, was refused by the employer. The German Labour Court, faced with the problem of interpretation of the provisions of Article 119 and Directive 75/117, referred to the European Court the following question.

> 'Is a legislative provision excluding from the principle of continued payment of salary by the employer during illness those workers whose normal period of work does not exceed 10 hours a week or 45 hours a month compatible with Article 119 ... and Directive 75/117 ... - although the proportion of female workers suffering adverse effects from this exclusion is much higher than that of male workers?'[102]

The German government claimed that the exclusion of part-time workers from the provisions granting sick pay to employees was justified by the fact that part-time workers were not integrated in or connected with the undertaking in the same way as full-time workers. Therefore, the duty of care of the employer to its full-time workers, including an obligation to continue to pay wages in the event of illness of the employee, was not present in the case of part-time workers.

The Commission disagreed. The policy permitted by the legislation amounted to the unequal treatment of women and men, which was not objectively justifiable.

> 'It was hard to see why it should be economically defensible and socially necessary to grant the benefit of six weeks' payment of wages to full-time workers whilst those who are employed for minimal periods, who are the socially weaker, should be refused such payment. Social protection was being withdrawn exactly where in practice one was most reliant upon it. The reason given by the German Government - that the obligation of continued payment by the employer in the event of illness flowed from his duty of social care - could not be regarded as convincing. The legislature, in dealing with the question of recognition of the duty of social care, did not only have to be guided by the employer's willingness to give such care but equally by the need for such of the worker.'[103]

The Court held that the measure in question was in principle contrary to the provisions of Article 119.[104] The Court then turned to the issue of justification, holding that the assertion of the German government, that the lack of integration in or connection with an undertaking of part-time employees justified the legislation, could not be accepted.

The Commission's reasoning focuses on the vulnerability of part-time workers, most of whom are women, arguing that a policy such as the one in question which disadvantages the very group most in need of protection cannot be justified. The Court does not go this far. The Court instead adds 'necessity for social policy' to the business necessity test of *Bilka*. It is unclear whether the 'social policy' ground of justification is available to employers for justification of individual employment policies, or whether it will only apply to the justification of legislative measures. The judgment leaves open the question of which social policies might operate to outweigh the non-discrimination principle. It is important in this context to refer to the other part of the *Bilka* test, that requiring proportionality.[105]

3.2.3.2 Special social needs

As there is little case law in the area of employment concerning justification for indirect discrimination on 'public interest related' ground, a brief examination of decisions of the European Court in the area of social security is now undertaken. The decisions indicate that the answer to the question of whether 'social policy' can operate to outweigh the principle of non-discrimination turns on the purpose of the social security provisions concerned. If the indirectly discriminatory provision operates to alleviate a particular social need, then it may be justified. If the European Court were to apply similar reasoning to the employment sphere, then the purpose of the legislation in question would have to be assessed, and balanced against the anti-discrimination provisions in EC law, that is, equality of opportunity for women and men in employment.

Article 4 (1) of the Social Security Directive (79/7) provides that there is to be no discrimination on grounds of sex, either directly or indirectly, in regard to social security. If considerably more married men than married women carry on occupational activities, and therefore considerably fewer women have a dependent spouse, social security benefits linked to marital status or family responsibilities in such a way that dependents are only entitled to the benefit if the income of their spouse is below a certain level, have the effect of discriminating indirectly against women.. This was the case in *Teuling v Bedrijsvereiniging voor de Chemische Industrie*[106]. The Court held that

> 'In such circumstances a supplement linked to family responsibilities is contrary to Article 4 (1) of the directive if the grant thereof cannot be justified by reasons which exclude discrimination on grounds of sex.'[107]

In order to decide whether justification was established, regard must be had to the purpose of the social security benefit supplements concerned. The purpose of the supplements in this case was to provide a minimum subsistence income for individuals who had no income from work. The heavier burdens, or special 'social needs', borne by such individuals who also had a dependent spouse or children, or both, justified the policy under which the supplements were granted. The supplements were

necessary for the purpose of providing a minimum subsistence income.[108] The ground for justification was the social benefit of the provisions.

The European Court followed the ruling in *Teuling* in its decision in *Commission v Belgium*[109]. The Belgian system of social security benefits uses a classification of social security recipients which divides recipients into three categories: workers cohabiting with a partner, a parent or a child who has no income; workers living alone; and workers cohabiting with a person who has an income. The rates of benefit vary depending on the group to which an individual recipient belongs, and are calculated by reference to previous income. The system operated so as to grant the most benefit to those in the first group and least benefit to those in the third group.

The Commission considered that this was indirectly discriminatory on grounds of sex, since most of those who benefitted in the first (most favoured) group were men, and the third (least favoured) group consisted predominantly of women. The statistics provided by the Belgian government supported this view. The question therefore turned on the question of whether the policy was justified: the Commission argued that it could not be justified in a case where previous income, and not the needs of the recipients, was used in the calculations of benefits.

The Court noted that it was established that indirect discrimination in provision of social security benefits was outlawed by Article 4 (1) of the Social Security Directive.
The Court referred to its approach in the context of equal pay in the *Rinner-Kühn* case, holding that, if a Member State can show that,

> 'the means chosen are necessary to fulfil an aim of its social policy, and that they are indeed likely to achieve the objective sought by that policy and are necessary to do so, the fact alone that a system benefits a much higher number of men cannot be considered as a violation of the principle of equal treatment'.[110]

The Court also noted the argument of the Belgian government that its system was an integral part of its social policy, the purpose of which was to provide a minimum replacement income. In order to do so, it was

essential that the policy took account of the different needs of the persons receiving the benefits. The Court was convinced that the system fulfilled a legitimate objective of social policy and was necessary and proportionate.[111]

The characterisation by the European Court of the policy as having the aim of guaranteeing a minimum income to families, that is, similar to the system in *Teuling*, was crucial to the decision. The Court did not regard it as significant that, in this case, the amounts of benefit could vary according to the previous income of the breadwinner, and were not calculated solely according to need.

The case law on the Social Security Directive is still in its infancy: it remains to be seen how the Court will develop the rules, and therefore which social security measures are acceptable with regard to the principle of equal treatment of women and men in EC law. However, it seems likely that 'legitimate needs' of social policy will encompass a wider scope of needs than those of employers.

4 Conclusion

While the European Court has made a significant impact in developing rules of EC law relating to the justifiability of unequal treatment of women and men, it is fair to say that this development is still in its early stages.

This is perhaps not so much the case for justification for direct discrimination, particularly where the European Court is concerned with interpretation of provisions of secondary legislation, for, in these circumstances, clear and fairly tight rules, both on the standard for justification, and on the grounds of justification, exist in the legislation. The European Court has construed measures in secondary legislation with a view to protecting the central principle of equality for women and men in employment, which is enshrined in the Treaty. In particular, it is the application of the principle of proportionality by the European Court to situations in which employers (or Member States) seek to differentiate

between women and men in an employment situation which has made it difficult to establish justification for direct discrimination.

As regards justification for indirect discrimination, while the *Bilka* test makes some contribution to development of EC rules, this contribution is more directed towards establishing a framework for examination of complaints, rather than laying down concrete and practical rules of interpretation. The requirement that the discriminatory policy serve a 'genuine need of the enterprise' is a good example: while it forces the employer to show what the purported need is for the discriminatory policy, the European Court has not established clearly what type of needs of an enterprise will be entertained as fulfilling this *Bilka* criterion. The judgments in *Jenkins* and in *Bilka* itself suggest an examination of needs limited to 'economic' needs: the judgment in *Rinner-Kühn* examines 'social' policies. The link between the needs of an employer and the 'social policy' of a Member State has not yet been explored. Neither has the link between cases concerned with employment law, and those applying the *Bilka* test in social security law, such as *Teuling* and *Commission v Belgium*.

The most significant control introduced by the European Court in this area is the proportionality requirement. The framework of *Bilka*, which requires that employers show their justification in terms of the business need, allows examination of the relationship of the means to this end in accordance with the principle of proportionality.

The *Bilka* framework leaves much to the discretion of the courts of the MS, especially because the context in which claims of discrimination come before the European Court is usually Article 177 proceedings, where the Court merely interprets the relevant provisions of EC law and leaves application to the national court. This is usual in matters of EC law, and is necessitated by the nature of the EC legal order. However problems may arise where, as in some MS, especially the UK, the courts fail to appreciate the significance of the principle of proportionality.[112] The need for the development of more precise rules on the standard of

justification, and the grounds of justification acceptable in EC law, is evident.

Notes on chapter 4

1. Treaty Establishing the European Economic Community, Rome, 25 March, 1957.

2. Article 1, Treaty of Rome.

3. Article 2, Treaty of Rome.

4. Article 3, Treaty of Rome.

5. Article 235, Treaty of Rome.

6. Article 117, Treaty of Rome.

7. see Catherine Hoskyns, 'Women, European Law and Transnational Politics' (1986) Int. J. Soc. L. 299, p. 304.

8. Defrenne v SABENA No. 3, case 149/77, [1978] 3 CMLR 312; [1979] ECR 1365 (ECJ).

9. Directive 75/117/EEC, OJ 1975, L 45/19; (legal basis Article 100).

10. Directive 76/207/EEC, OJ 1976, L 39/40 (legal basis Article 235).

11. Directive 79/7/EEC, OJ 1979, L 6/24 (legal basis Article 235).

12. Defrenne v SABENA No.2, case 43/75, [1976] 2 CMLR 98, [1976] ECR 455 (ECJ), p. 123.

13. Defrenne No. 2.

14. Directive 75/117, Article 1.

15. Article 1.

16. Article 2.

17. Articles 3 and 4.

18. Article 5.

19. Article 6.

20. Article 7.

21. Directive 76/207, Article 1 (1).

22. Article 2 (1).

23. Article 3.

24. Article 4.

25. Article 5.

26. Re Sex Discrimination Laws: EC Commission v Germany, case 248/83, [1986] 2 CMLR 588 (ECJ).

27. Re Sex Discrimination Laws: Commission v Germany, p. 602.

28. Re Sex Discrimination Laws: Commission v Germany, p. 615-616.

29. This is consistent with Articles 48 (4) and 55.

30. Re Sex Discrimination in the Civil Service: EC Commission v France, case 318/86, [1989] 3 CMLR 66 (ECJ).

31. Johnston v Chief Constable of the Royal Ulster Constabulary, case 222/84, [1986], 3 CMLR 240, [1986] 3 All ER 135 (ECJ).

32. see below, chapter 4, section 3.1.1.

33. Johnston, p. 267; see also Re Sex Discrimination in the Civil Service: EC Commission v France.

34. Johnston, p. 267; see also Re Sex Discrimination in the Civil Service: Commission v France.

35. Hofmann v Barmer Ersatzkasse, case 184/83, [1986] 1 CMLR 242, [1984] ECR 3042 (ECJ).

36. Re Protection of Women: EC Commission v France, case 312/86, [1989] 1 CMLR 408 (ECJ).

37. Re Protection of Women: Commission v France, p. 418.

38. Re Protection of Women: EC Commission v France.

39. see above, chapter 3, section 3.2.

40. Bilka-Kaufhaus GmbH v Weber von Hartz, case 170/84, [1986] 2 CMLR 701; [1987] ICR 110 (ECJ).

41. Bilka, p. 721.

42. Jenkins v Kingsgate (Clothing Productions) Ltd, case 96/80, [1981] 2 CMLR 24, [1981] ECR 911 (ECJ).

43. case 96/80, [1981] 2 CMLR 24, [1981] ECR 911 (ECJ).

44. Jenkins, p. 231.

45. Jenkins, p. 232.

46. Recommendation of 20.7.60, Bulletin of EC, 1960, Vol 6/7, p. 46.

47. Jenkins, p. 233.

48. Jenkins, p. 234.

49. Jenkins, p. 234.

50. Bilka, p. 710.

51. Bilka, p. 725.

52. see below, chapter 4, section 3.2.

53. see Sacha Prechal and Noreen Burrows, *Gender Discrimination Law of the European Community* (Aldershot, Hants: Dartmouth, 1990) p. 3-4.

54. Rinner-Kühn v FWW Spezial Gebäudereinigung GmbH & Co KG, case 171/89, [1989] IRLR 493 (ECJ).

55. Rinner-Kühn, p. 493.

56. Rinner-Kühn, p. 493.

57. Rinner-Kühn, p. 493.

58. see below, chapter 4, section 3.2.

59. Handels-Og Kontorfunktionaerernes Forbund i Danmark v Dansk Arbejdsgiverforeining (acting for Danfoss), case 109/89, [1989] IRLR 532 (ECJ).

60. From Prechal and Burrows, p. 260-261, footnote 199 Judgement of 14 October 1986 (mimeographed version); a very short summary in DB (1987), p. 994, a more extensive version in BB 1987, p. 829.

61. Josephine Steiner, *Textbook on EEC Law* (London: Blackstone Press, 1990), p. 44.

62. and, as such, a judicial construct, rather than a product of legislation.

63. Criminal proceedings against Watson and Belmann, case 118/75, [1976] 2 CMLR 552, [1976] ECR 1185 (ECJ).

64. Watson and Belmann, p. 572.

65. see eg Prechal and Burrows, p. 106.

66. case 109/89, (1989) IRLR 532.

67. Johnston v RUC.

68. Johnston v RUC, p. 267.

69. Re Sex Discrimination in the Civil Service : EC Commission v France case 318/86 [1989] 3 CMLR 663 (ECJ).

70. case 345/89; proceedings of the ECJ 15 of 1991, p. 13.

71. see below.

72. Johnston v RUC.

73. Hofmann.

74. Hofmann, p. 264.

75. Hofmann, p. 261-262.

76. Re Protection of Women: EC Commission v France.

77. Dekker v Stichting Vormingscentrum voor Jonge Volwassen (VJV Centrum) Plus, case 177/88, [1991] IRLR 27 (ECJ).

78. Dekker, p. 27-28.

79. Dekker, p. 28.

80. Handels-Og Kontorfunktionaerernes Forbund i Danmark (acting for Hertz) v Dansk Arbejdsgiverforening (acting for Aldi Marked K/S), case 179/88, [1991] IRLR 32 (ECJ).

81. Hertz, p. 32.

82. Hertz, p. 32.

83. Handels-Og Kontorfunktionaerernes Forbund i Danmark v Dansk Arbejdsgiverforeining (acting for Danfoss), case 177/88, [1989] IRLR 532.

84. Danfoss, p. 534-535.

85. Danfoss, p. 535.

86. Rummler v Dato Druck, case 237/85, [1987] 3 CMLR 127 (ECJ).

87. Rummler, p. 139.

88. Rummler, p. 139-140.

89. Rummler, p. 141.

90. Bilka, p. 725.

91. But see below, chapter 4, section 3.2.2.1, on 'social policy' justifications, available to justify indirectly discriminatory legislation.

92. Bilka-Kaufhaus v Weber von Hartz, case 170/84, [1986] 2 CMLR 701; [1987] ICR 110 (ECJ).

93. see Bilka, p. 720.

94. Bilka, p. 720.

95. Bilka, p. 721.

96. Bilka judgement of 14.10.1986 BB 1987 p. 829; discussed in Prechal, p. 260-261; cited in Prechal, p. 273, note 199.

97. Rinner-Kühn, p. 493.

98. see below, chapter 9, section 2.3.

99. Rinner-Kühn.

100. see above, chapter 4, section 2.2.1.1.

101. of 27 July 1969.

102. Rinner-Kühn, p. 495.

103. Rinner-Kühn, p. 494.

104. Rinner-Kühn, p. 495.

105. see above, chapter 4, section 2.2.1.3.

106. case 30/85, [1987] ECR 2497, [1988] 3 CMLR 789 (ECJ).

107. Teuling, p. 803.

108. Teuling, p. 805-806.

109. Commission v Belgium, case 229/89, [1991] IRLR 393 (ECJ).

110. Commission v Belgium, p. 395.

111. Commission v Belgium, p. 396.

112. see T. K. Hervey, 'Justification for Indirect Sex Discrimination in Employment' 40 ICLQ 807 (1991)

Chapter 5

United Kingdom

1 UK law on employment: Sources and Structure

The main legislative sources of law relating to sex discrimination in employment in the UK are the Equal Pay Act 1970 and the Sex Discrimination Act 1975.

The Equal Pay Act 1970 provides that, in a woman's contract of employment, there shall be a term that she is to be 'given equal treatment with men in the same employment'[1]. If there is no such term, the Act provides that an 'equality clause' is implied in the woman's contract of employment.[2] The provisions apply when the woman is employed on 'like work' with men, that is if 'her work and theirs is of the same or a broadly similar nature'[3], when the woman is employed on 'work rated as equivalent' to that of men, if the relevant jobs have been ranked as equivalent in a job evaluation study[4], or when the woman is employed on work of 'equal value' to that of the man[5].

The Sex Discrimination Act 1975 operates to proscribe sex discrimination in a number of activities, including employment, which is covered in Part II of the Act. In the employment field, the Sex Discrimination Act 1975 operates as a supplement to the Equal Pay Act 1970. The provisions of the Sex Discrimination Act 1975 cover a wider range of activities than the Equal Pay Act 1970, which is mainly concerned with an existing employment relationship. Section 6 of the Sex Discrimination Act 1975 provides that it is unlawful for an employer to discriminate against a woman in offering employment, terms of employment, including access to opportunities for promotion, transfer or training, or any other benefits, facilities or services, and in dismissal.

The experience of the US in dealing with sex discrimination was drawn on for many provisions of the Sex Discrimination Act[6]. The British experience of the earlier Race Relations Act 1968, which deals with racial

discrimination, was also influential. This Race Relations Act was subsequently amended by the Race Relations Act 1976, with many provisions now identical to those of the Sex Discrimination Act 1975, but operating in the area of racial discrimination. This identity of the Sex Discrimination Act 1975 and the Race Relations Act 1976 has been exploited by judicial interpretation of both Acts: interpretation of provisions of one Act is regarded as binding in interpretation of equivalent provisions of the other Act.

Interpretation and enforcement of the legislative provisions relating to discrimination in the employment sphere is dealt with by industrial tribunal (IT).[7] Appeal on a point of law is to the Employment Appeals Tribunal (EAT)[8], and further to the civil courts. The effectiveness of the industrial tribunals in sex discrimination cases has been the subject of much research, the results of which have led to various criticisms of the work of the tribunals, in general that they are not suited to discrimination cases.[9] In particular, hindrances to the effective enforcement by industrial tribunals of claims to equal pay or equal treatment of women employees can be enumerated as follows:-

> '(1) lack of expertise in discrimination cases, (2) the inadequacies of the adversarial system in these cases, (3) the complexity of the law, (4) the complex and unworkable procedure in equal pay cases, and (5) the problems of proof of direct and indirect discrimination.'[10]

The first of these criticisms is perhaps the most serious: Alice Leonard's work shows detailed examples of misunderstanding or misapplication of the legislation, application of inappropriate legal standards and uncritical analysis of employers' explanations of allegedly discriminatory conduct.[11] Although such criticism may undoubtedly be levelled at the tribunals, it cannot be said that the ordinary courts are entirely free from similar misapplication or inappropriate analysis in sex discrimination cases. The problems of proof of direct and indirect discrimination are particularly relevant to the question of justification, that is, the question of which party is required to prove whether the discrimination is justified or not.

Interpretation of the legislative provisions by the tribunals and courts has filled out the 'bare bones' of the legislation, and, in effect, developed the law on sex discrimination in employment in the UK. The bulk of this chapter is, therefore, concerned with examination of these judicial decisions.

2 Provisions of UK law establishing Equal Treatment of women and men in Employment and justification for derogation from these provisions

The equal treatment of women and men in employment in the UK is governed by two principal legislative provisions: the Equal Pay Act 1970 and the Sex Discrimination Act 1975. These provisions now cover both 'direct' and 'indirect' discrimination, as they are part of 'one code' against sex discrimination[12], although the concept of 'indirect' discrimination was not introduced into UK legislation until the 1975 Act came into force.

2.1 Direct discrimination

The Sex Discrimination Act 1975, section 1 (1)(a) provides that,

> 'A person discriminates against a woman in any circumstances relevant for the purposes of any provision of this Act if on the ground of her sex he treats her less favourably than he treats or would treat a man.'

This provision defines direct discrimination in the UK.

It is established that intention to discriminate on the part of the employer is not an essential requirement of direct discrimination.[13] Neither is proof of lack of intention to discriminate a defence in a claim of direct discrimination.[14]

The less favourable treatment of the complainant in a claim of direct discrimination under the Sex Discrimination Act 1975 must be 'on the ground of' the sex of the complainant. In *R v Birmingham City Council*, it was held in the House of Lords that,

> 'there is discrimination under the statute if there is less favourable treatment on ground of sex, in other words if the relevant girl or girls would have received the same treatment as boys but for their sex ...'

This 'but for' test was rejected by the Court of Appeal in *James v Eastleigh Council*[15]. Counsel for the plaintiff submitted that the correct test to apply is 'what would the position have been but for the sex of the plaintiff?'.[16] Browne-Wilkinson VC disagreed, holding,

> 'What is relevant is the defendant's reason for doing an act, not the causative effect of the act done by the defendant. ... The relevant question is "did the defendant act on the ground of sex?", not "did the less favourable treatment result from the defendant's actions?"'[17]

The rejection of the 'but for' test in *James*, and the attempt to distinguish that case from *R v Birmingham City Council* with the argument that in the former case there was no 'overt' discrimination, have been criticised.[18] The 'but for' test is more consonant with the statutory formulation of 'on the ground of'.[19]

The discrimination must be on the ground of 'her sex'. Section 3 extends the application of the Act to discrimination on the ground of marital status, outlawing discrimination between a married person and an unmarried person of the same sex. This provision does not extend to 'family status': this leaves uncertain the question of discrimination against a woman on the grounds that she is pregnant, or has small children. There is no specific measure in the Sex Discrimination Act 1975 rendering unlawful discrimination on the grounds of pregnancy.[20]

When the discrimination is on the ground of sex and also on another ground, so the discrimination is against a sub-class of women, this is known as 'sex plus' criteria.[21] The courts have held that the provision of the Sex Discrimination Act 1975, that the discrimination must be 'on the ground of sex' includes the application of sex plus criteria.[22] By extension, discrimination against a woman employee on the ground of pregnancy could be direct discrimination under the Act. By the same token, discrimination in favour of a woman on the ground of pregnancy (positive discrimination) could also be covered by the Act.

However, discrimination on the ground of pregnancy was not held to be direct sex discrimination in *Turley v Alders Department Stores Ltd*[23], the reason being that, as a pregnant woman, the employee concerned could not be compared with a male comparator, as men cannot become pregnant.[24] The minority view in *Turley*, that the circumstances of a pregnant woman employee could reasonably be compared with those of a male employee who required time off work for medical reasons, for example a hernia operation, was accepted by the EAT in *Hayes v Malleable Working Men's Club*[25]. Distinguishing the ruling in *Turley* on the grounds that it applied only where the reason for the discriminatory dismissal was the actual pregnancy itself, and not a factor connected with pregnancy, the tribunal held that a male comparator could be found for a pregnant woman complainant. It seems now that a considerable bar to regarding sex plus criteria as direct discrimination in UK law has been removed.[26]

In the subsequent case of *Webb v EMO Air Cargo*[27], the Court of Appeal held that dismissal on grounds of pregnancy for a reason arising from or related to pregnancy (therefore not on point with *Turley*) 'could in law be, but was not necessarily, direct discrimination under section 1 (1)(a) of the 1975 Act'. If this decision is extended to other cases of sex plus criteria, it seems that the application of sex plus criteria does not always constitute direct discrimination.

2.1.1 Equal Pay Act 1970

Under the Equal Pay Act 1970, section 1, it is provided that the terms of employment of a woman, in particular those relating to remuneration, shall not be less favourable than the terms of the contract of a man employed on like work or work of equal value. If there is no such equality clause in a woman's contract, the contract is deemed to include one. The difference between the woman's contract and the man's will often be the result of direct discrimination.

In general, direct discrimination in pay between a woman and a man, in contravention of the Equal Pay Act 1970, may not be justified. If it is

established that the woman and the man are employed on equal work, or work of equal value, then the Equal Pay Act implies an equality clause in the contract of the woman, guaranteeing her pay equal to that of the male comparator.

While section 1 (3) provides that,

> 'An equality clause shall not operate in relation to a variation between the woman's contract and the man's contract if the employer proves that the variation is genuinely due to a material factor which is not the difference of sex...'[28],

this need not be viewed as operating to justify the discrimination. Rather, it is submitted, in a case of direct discrimination, establishment of a 'material factor' to which the difference between the woman's contract and the man's is referable, is best regarded as an indication that there is no direct discrimination. *Direct* discrimination between a woman and man employee in pay, which disadvantages the woman, can never be justified.

However, the Equal Pay Act 1970 does include a small number of exemption provisions, in which direct discrimination against women is justified, where the discrimination is to the woman's advantage. Special measures for women in connection with pregnancy and childbirth are exempted from the Equal Pay Act 1970 by virtue of section 6 (1). This section also provides an exemption in the case where the woman's employment is governed by legislation regulating the employment of women, in other words, protective legislation.

2.1.2 Sex Discrimination Act 1975

The Sex Discrimination Act 1975 provides that direct discrimination on ground of sex is outlawed in various circumstances, including employment. In general, direct discrimination which contravenes the Act may not be justified. However, the Act contains a number of exemption provisions.

2.1.2.1 Genuine Occupational Qualifications

Section 7 of the Sex Discrimination Act 1975 provides employers with a defence justifying discrimination in certain circumstances. It applies to discrimination in recruitment procedures[29], hiring[30], training and promotion[31] of employees. This defence is available in limited, pre-defined situations where being of a particular sex is a 'genuine occupational qualification' (GOQ) for the job concerned.

In some situations the employer may be expected to reallocate the duties for which sex is a GOQ pertaining to a particular job. Further, a GOQ is not a defence where the employer already has employees of the particular sex carrying out the duties concerned. In general the GOQ defence is a narrow one, confined to an exhaustive list of situations and strictly applied.[32]

2.2 Indirect discrimination

2.2.1 Sex Discrimination Act section 1 (1)(b)

The Sex Discrimination Act 1975 section 1 (1)(b) introduced into UK law the concept of 'indirect discrimination'. Section 1 (1)(b) provides that a person indirectly discriminates against a woman if,

> 'he applies to her a requirement or condition which he applies or would apply equally to a man but:
>
> (1) which is such that the proportion of women who can comply with it is considerably smaller than the proportion of men who can comply with it, and
>
> (2) which he cannot show to be justifiable irrespective of the sex of the person to whom it is applied, and
>
> (3) which is to her detriment because she cannot comply with it.'

In the terms of the section, a discriminator applying to a woman a requirement or condition which is or would be applied equally to a man, but which is such that fewer women than men can comply with it, must

show that the requirement or condition is, 'justifiable irrespective of the sex of the person to whom it is applied'[33].

The burden of proof in a claim of indirect discrimination is initially on the person alleging discrimination. The UK courts have been consistent in their rulings that the burden then transfers to the alleged discriminator; however, the standard by which this burden may be met has been a matter of controversy. Held originally to be a 'heavy burden', it is now only the burden of showing that the discriminatory action was taken for 'sound and tolerable reasons'.[34] In some cases, this burden is lightly discharged.[35]

The identification of a 'barrier, requirement or condition causing disparate impact' is essential to a successful claim of indirect discrimination. A mere factual difference in pay (or treatment) is not a sufficient foundation for a claim.[36] The requirement or condition must be one with which fewer women than men can comply. The 'pool' of persons examined to ascertain whether fewer women than men can comply is important, because the answer to the question of whether the number of women who are able to comply with the requirement is sufficiently smaller than the number of men who are able to do so, in order to trigger a *prima facie* case of indirect discrimination, may depend on the 'pool' of persons examined. As an illustration using perhaps an extreme example, in *Greater Manchester Police Authority v Lea*[37], 99.4% of women and 95.3% of men could comply with the requirement of not being in receipt of an occupational pension. The pool used was the economically active population. The EAT held that the IT had not erred in holding that the proportion of men who could comply with the condition was considerably smaller than the proportion of women who could comply. The determination of the 'pool' is a matter of fact for the IT, depending on the circumstances of each case[38]; it is not certain which pool will be used in a particular case. This is unsatisfactory, as a different pool could result in a different conclusion on the proportion of women and men who can comply with the condition.

The requirement or condition must be one with which fewer women than men 'can comply'. In *Price v Civil Service Commission*[39], in the context of a requirement that applicants for the post of executive officer in the Civil Service had to be under 28 years of age, this was construed as meaning 'can in practice comply'.

> 'It should not be said that a person 'can' do something merely because it is theoretically possible for him to do so: it is necessary to see whether he can do so in practice. ... Knowledge and experience suggest that a considerable number of women between the mid-twenties and mid-thirties are engaged in bearing children and in minding children, and that many ... find it impossible [to take up employment].'

This construction of the phrase 'can comply' was approved by the House of Lords in *Mandla v Lee*[40].

The word 'justifiable' was chosen and retained in the Act in preference to the word 'necessary'. It has been suggested that 'justifiable' implies a weaker standard than 'necessary'[41]. Such a distinction is best regarded as merely semantic[42], as application of either word involves a value judgment which cannot be defined for every case by statute. The way in which the standard is applied is what is important. However, the context in which the word 'justifiable' is used in the Acts can be regarded as an indication of the way the UK Parliament intended that the standard be applied. It can be inferred from the importance attached to the eradication of indirect (as well as direct) discrimination by those responsible for passing the Acts that the word 'justifiable' was not necessarily intended to imply a lower standard or a weak test[43].

The standard meant by the term 'justified' is, then, a matter for judicial construction. The development of UK case law pertaining to interpretation of 'justified' in the context of indirect sex discrimination in employment is now examined.

In this context, the interpretation of 'justification' which results in the strictest standard being applied to employers seeking to justify discriminatory requirements or conditions is a standard which equates 'justifiability' with something akin to 'necessity'. The EAT used a

'business necessity' test in *Steel v UPOW*[44]. Ms Steel had been employed as a post-woman since 1961. In 1975 she achieved 'permanent full-time status', when the rule disallowing women from such status was abolished. The status was important for Post Office employees for a number of reasons, including the allotment of rounds or 'walks'. When Ms Steel applied for a vacant walk, which was allotted to a postman, because he had received 'permanent full-time status' in 1963, she claimed indirect discrimination.

The EAT addressed itself to the issue of the relevant standard of justification with the following reasoning:

> 'There is a heavy onus of proof on the employer to satisfy the IT that the case is a genuine one where it can be said that the requirement or condition is necessary.
>
> 'A distinction must be made between a requirement or condition that is necessary and one which is merely convenient. A practice that would otherwise be discriminatory cannot be justifiable unless its discriminatory effect is justified by the need - not the convenience - of the business. For this purpose it is relevant to consider whether the employer can find some other non-discriminatory method of achieving his object ... Moreover, in deciding whether the employer has discharged the onus, the IT should take into account all the circumstances, including the discriminatory effect of the requirement or condition if it is permitted to continue, and weigh the need for the requirement against its discriminatory effect.'

The case was remitted to the IT for a decision on justification, where, applying the EAT's test, the IT found that the discrimination was not justified.

In the early 1980s, another line of reasoning appeared, which gradually became the dominant interpretation of 'justifiable'. Under this interpretation, it was easier for employers to show that an indirectly discriminatory requirement was justified. The new interpretation of justification was concerned with 'reasonable commercial necessity'[45]. The result of this was a move to what amounts in practice to no more than a 'reasonableness' test.

The *Singh*[46] and *Panesar*[47] cases (concerning racial discrimination) involved 'no beards' rules, which operated to discriminate against Sikhs

who are forbidden by their religion to shave their beards. It was decided that a no beards rule was justifiable. Justifiable, according to the EAT, did not mean necessary, in the sense that there was no other way of achieving the desired object of the condition. However, 'mere convenience' was not considered sufficient justification.

These cases represent a halfway house, which was a marked retreat from the original business necessity test. The need for a decision on the facts of each case was emphasised; the decision was to be as to whether the grounds put forward for justification (for example, grounds of hygiene) were 'right and proper in the circumstances'. The answer to the question this begs, that is, 'right and proper to whom?', can only be 'the reasonable (white, male) person'. The test had moved towards the standard of reasonableness and away from the more objective standard of necessity.

In *Ojutiku v Manpower Services Commission*[48], the Court of Appeal expressly disapproved of the *Steel* decision[49]. The facts of the *Ojutiku* case concern the policy of the Manpower Services Commission in allocation of grants for training. Mr Ojutiku came from West Africa, and had moved to England in the 1960s. He applied for enrolment on a Diploma in Management Studies, and to the Manpower Services Commission for a grant so that he could undertake his studies. The application for a grant was refused on the grounds that Mr Ojutiku lacked management expertise. Mr Ojutiku contended that this requirement was racially discriminatory.

The Court of Appeal held that in order to prove a requirement is 'justifiable', it is not necessary to prove that the requirement is 'necessary for the good of the business'. Because of its limited funds, the Manpower Services Commission must to some extent be selective, and the requirement of management expertise was justifiable, as it ensured that the funding would be likely to further the recipients' prospects of employment.

Considering the standard implied by the word 'justifiable', Kerr, LJ asserted that, 'justifiable implies a lower standard than the word

necessary'. Eveleigh, LJ's statement that, 'if a person produces reasons for doing something which would be acceptable to right-thinking people as sound and tolerable reasons for so doing, then he has justified his conduct', changed the standard of justification almost totally from the *Steel* interpretation of the provision. The courts and tribunals were now to decide the question of 'justifications' by reference to the standard of 'sound and tolerable reasons' for the indirectly discriminatory requirement.

For example, in *Raval*[50] a requirement of an English O Level as a condition of entry into clerical grades of the Civil Service was regarded as justifiable on the grounds of 'overall fairness'. The IT was to 'reflect the attitude of society as a whole regarding the degree of justification required to make distinctions of race or sex tolerable in an employment context.'
There was no consideration of whether in fact the O Level requirement was related to the job, or whether another means could be used to achieve the desired end. The 'business necessity' test was in fact reduced to scarcely more than justification by convenience.

The decision in *Kidd*[51], that redundancy of part-time workers first (a policy which is indirectly discriminatory against women because fewer women than men can meet the requirement to work full-time) was justifiable, represents the extent of the retreat from *Steel.* It was held that 'marginal advantages in cost and efficiency', including the shorter handling records, less frequent laundering of overalls, lack of 'a mild degree of disruption' caused by changeover in shifts, and decrease in administrative and personnel functions, to the employer in employing one shift of full-time workers rather than two shifts of part-time workers, represented 'sound and tolerable reasons acceptable to right-thinking people as realistic and sensible.' The statement that these marginal advantages, although appearing insignificant, may be crucial to the employer in attracting and maintaining orders under the competitive conditions of modern industry may represent the effect of 1980s philosophy on the judiciary. A 'right-thinking person' has regard to the

competitive market over and above the possibility of discrimination. The UK standard for justification of indirect discrimination is not stringent.

Since employers in the UK are required to comply with EC law, justification for indirect discrimination in the UK should be in compliance with the standard set by the *Bilka*[52] decision.[53] However, there appears to be a reluctance on the part of the UK courts to adhere to the standard of European Community law, with *Bilka* as its source.[54] The failure of UK courts to apply the EC standard is due to a misunderstanding of the difference between, on the one hand, an objective justification based on a genuine need and effected proportionately, and, on the other hand, a reasonable justification.

The House of Lords ostensibly applied the *Bilka* test in *Greater Glasgow Health Board v Carey*[55]. However, examination of the decision shows that the UK standard is not synonymous with that of the European Court. The case concerned discrimination against a part-time health visitor. The EAT focused on the need for efficiency in the service provided by health visitors. The needs of the Health Board in providing an efficient service to the community could only be met if the indirectly discriminatory requirement (that part-time workers be available for work on five days a week) was applied by the employer. However the EAT failed to take account of another health visitor employed by the Health Board, who was not constrained by the discriminatory requirement, as she only worked a two and a half day week. The existence of this second employee should have been evidence that there was no 'genuine need' for the requirement, therefore that the *Bilka* standard of justification had not been met.

Hampson v DES[56] concerned a Hong Kong Chinese national who had trained as a teacher in Hong Kong and subsequently applied for qualified teacher status to enable her to teach in British schools. Her application was refused on the grounds that her training was not of a sufficiently high standard, in particular that it was not of the duration of three years. She claimed that she had been discriminated against on the grounds of her race, contrary to the Race Relations Act, section 1 (1)(a) and (b). The EAT was called on to decide whether *inter alia* the

requirement for a three year course was a 'requirement or condition' within the meaning of section 1 (1)(b) and if so whether it was 'justifiable'. The complainant appealed.

The Court of Appeal deliberately addressed itself to the question,

> 'By what test should it be considered whether the requirement or condition was justifiable irrespective of the applicant's race?'

In providing an answer to this question, it would have been open to the court to affirm the direct applicability of the *Bilka* test to sex discrimination cases[57] in UK law, and to contrast this test with the existing previous standard in UK law, as found in *Ojutiku*[58]. Balcombe, LJ did neither. Instead he held that there was no difference between the two tests, and consequently affirmed the *Ojutiku* test[59]. Both Nourse LJ and Parke LJ[60] concurred.

In *Clymo v Wandsworth*[61] the court again stated (expressly following *Hampson*) that the European Community principles found in *Bilka* do not differ from the approach of the UK courts found in the line of case-law culminating in *Ojutiku*. The EAT held

> ' ... [the Tribunal] must carry out a broad and objective balancing exercise taking into account all circumstances of the case and giving due emphasis to the disadvantage caused by the condition or requirement against the achievement of the object sought.
>
> 'The well-known phrase comes to mind that there is no need to use a sledgehammer to crack a nut.
>
> 'This in our judgment is to express *in extenso* the process which a common lawyer in this jurisdiction is so often called on to follow when deciding an issue of reasonableness. The civil lawyer of Europe would no doubt describe it as applying the principle of proportionality'

To equate proportionality and reasonableness in this way is a misunderstanding of proportionality. In applying a reasonableness test, the courts will only overturn a decision if it is unreasonable, that is such that a reasonable person or administrative body could not have reached such a decision. Otherwise, regardless of possible alternatives, also reasonable and perhaps more appropriate, the courts will be reluctant to

overturn the decision. Proportionality puts the burden on the person making the decision. It requires that the means of achieving the aim for which the decision is taken are fitting to its end. This examination of the relationship between the means and the end necessitates account being taken of alternative measures which would also achieve the end. If these alternatives are less discriminatory in effect, the proportionality test is not satisfied. The court will disturb the decision. Proportionality is thus more rigorous than reasonableness[62]. In stating that the two doctrines are equivalent, the court in *Clymo* has compounded the confusion already apparent over the correct interpretation of *Bilka* and its application in UK law. The UK courts should apply the genuine need and proportional policy test of *Bilka* to cases involving indirect sex discrimination, and may not, if they comply with their duty to apply EC law, continue to use a standard of reasonableness.

Similar confusion between the UK *Ojutiku* standard and the EC *Bilka* standard is apparent in subsequent UK cases.[63] Unless the EC standard is applied stringently, it seems that, in spite of the *Bilka* decision, UK law on the interpretation of 'justifiable' in cases of indirect discrimination is still governed by the reasonableness standard of *Ojutiku*.

2.2.2 Equal Pay Act section 1 (3)

In equal pay issues, in addition to the section 1 (1)(b)(ii) justification for indirect discrimination[64], there is a second provision under which discrimination may be justified. The Equal Pay Act 1970, section 1 (3) provides that

> 'An equality clause shall not operate in relation to a variation between the woman's contract and the man's contract if the employer proves that the variation is genuinely due to a material factor which is not the difference of sex ...'

If the woman's and the man's work is 'like work' in terms of section 1 (2)(a) or 'work rated as equivalent' in terms of section 1 (2)(b), the factor must be a material difference between the woman's case and the man's. If the work is of equal value in terms of section 1 (2)(c), that is,

is not 'like work' or work rated as equivalent in a job evaluation scheme, the factor may be, but need not be, such a material difference.[65]

One way to regard this provision is to view the proof of a 'material factor' resulting in the difference between the woman's contract and the man's as proof that there is no discrimination. In view of the connection between this provision and the Sex Discrimination Act 1975 section 1 (1)(b)[66], which prohibits indirect discrimination unless justified, it is easier, it is submitted, *in cases of indirect discrimination*, to regard a satisfactory showing of a 'material factor' defence as a justification of the discrimination.

The Equal Pay Act 1970 and the Sex Discrimination Act 1975 form part of 'one code against sex discrimination'[67]. As far as possible they should be construed together to produce a harmonious result. As the Employment Appeal Tribunal (EAT) pointed out in *Jenkins*[68],

> 'Indirect discrimination ... is rendered unlawful by section 1 (1)(b) of the Sex Discrimination Act 1975 ... Where indirect discrimination is unintentional, to escape acting unlawfully the alleged discriminator has to show that the requirement which operates in a discriminatory fashion is justifiable, because viewed objectively, the requirement is necessary to achieve some other purpose. To make section 1 (3) Equal Pay Act 1970 accord harmoniously with section 1 (1)(b) of the Sex Discrimination Act 1975 requires that it should be construed as imposing on the employer the onus of proving that the variation in pay is in fact required to meet some other objective.'

There is an indisputable link between Sex Discrimination Act 1975 section 1 (1)(b) and Equal Pay Act 1970 section 1 (3), and this link requires that the standard, or 'legal test', for justification in one situation must also apply in the other; a general interpretation applies to both equal pay and equal treatment situations.

The 'material factor' of the Equal Pay Act was at one point thought to be limited to what was termed the 'personal equation' of the woman, or of the man. The 'personal equation' was never defined, but understood to include factors intrinsic to an individual, such as qualifications, physical characteristics or experience. In *Shields v Coombes Holdings*[69], it was

held that the subsection applied where the two jobs concerned were the same or of equal value, but the man's personal equation meant that he could be paid more than the woman. *Fletcher v Clay Cross*[70] followed *Shields* in asserting that, in the application of section 1 (3), it is necessary to compare the personal equations of the woman and the man. Further, it was held that extrinsic forces, such as the intention of the employer and the employment market could not be relied upon by the Tribunal making the decision.

> 'An employer cannot avoid his obligations under the Act by saying: 'I paid him more because he asked for more' or 'I paid her less because she would come for less'. If any such excuse were permitted, the Act would be a dead letter. Those are the very reasons why there was unequal pay before the Statute. They are the very circumstances in which the statute was intended to operate.'[71]

In *Jenkins v Kingsgate*[72], it was averred (*inter alia*) that the difference between part-time employees and full-time employees was a material difference between the female (part-time) and male (full-time) employees within the meaning of section 1 (3). After reference to the European Court of Justice, the EAT held that, as the Equal Pay Act 1970 and the Sex Discrimination Act 1975 formed part of one code against sex discrimination, indirect discrimination, such as in this case, could only be justified under section 1 (3) if the difference of treatment between part-time and full-time workers could be shown to be necessary to achieve a need of the employer, which could be an economic need. It could not, however, be justified on the grounds that the employer obtained cheap female labour by giving less favourable conditions to part-time workers, most of whom are women.

The decision of the European Court in *Jenkins* was clarified in *Bilka*[73]. This latter decision was first applied in the UK in *Rainey v Greater Glasgow Health Board*[74]. The House of Lords was required to apply section 1 (3) of the Equal Pay Act 1970, and to decide whether there was a 'material difference' justifying the indirect discrimination between the male and female employees concerned. The court indicated that the test by which material difference was to be decided was as follows:

> 'In particular, where there is no question of intentional sex discrimination, whether direct or indirect (and there is none here) a difference which is connected with economic factors affecting the efficient carrying on of the employer's business or other activity may well be relevant.'[75]

The court was of the opinion that this view was supported by the rulings of the European Court in *Jenkins* and *Bilka*.[76]

The House of Lords, in *Rainey*, rejected the earlier UK interpretation of the legal test for justification established in *Fletcher*.[77] Justification in section 1 (3) cases has now been effectively merged with justification under the Sex Discrimination Act 1975 section 1 (1)(b). The standard for justification is the same in both, that of 'reasonableness'. In the following section of the chapter, there is no separation of cases brought under the Equal Pay Act 1970 from those brought under the Sex Discrimination Act 1975.

3 Substantive Grounds of Justification for Unequal Treatment

In UK law, in certain circumstances, unequal treatment of women and men in employment is justifiable. Various of these circumstances are now discussed, beginning with those circumstances in which direct discrimination is justified, then examining circumstances in which a condition or requirement of employment is indirectly discriminatory against women, but justified in UK law.

3.1 Direct discrimination

Direct discrimination on grounds of sex in employment is justified by various exemption provisions in the Equal Pay Act 1970 and the Sex Discrimination Act 1975.

3.1.1 Activities excluded from the equal treatment principle (GOQs)

The main exemption provision is section 7 of the Sex Discrimination Act 1975, which gives a list of certain employment situations in which the sex of the employee is a genuine occupational qualification (GOQ).

The first GOQ of section 7 applies in employment such that,

> 'the essential nature of the job calls for a man for reasons of physiology (excluding physical strength or stamina) or, in dramatic performances or other entertainment, for reasons of authenticity, so that the essential nature of the job would be materially different if carried out by a woman'[78].

The typical example of a GOQ falling within this section is the requirement of female actors for female roles and male actors for male roles.

The second GOQ is the need for a person of a particular sex in particular employment in order to 'preserve decency or privacy'[79]. The situations in which this may arise are those in which physical contact is involved in the job or in which employees are in a state of undress or using sanitary facilities such that an employee 'might reasonably object'[80] to members of the opposite sex being employed. For example, in *Sisley v Britannia Security Systems*[81], where employees rested on beds provided by the employer between shifts, removing their uniforms to prevent creasing, the limitation of employees to one sex only was justified.

A related GOQ was added by section 1 (2) of the Sex Discrimination Act 1986, where the employee works in a private home, and the degree of physical or social contact with, or knowledge of intimate details of a person living in the private home is such that 'objection might reasonably be taken' to a person of the opposite sex being employed.

Third, a GOQ may be established where

> 'the nature or location of the establishment makes it impracticable for the holder of the job to live elsewhere than in premises provided by the employer, and -

> i) the only such premises which are available for persons holding that kind of job are lived in or normally lived in by men and are not equipped with separate sleeping accommodation for women and sanitary facilities which could be used by women in privacy from men, and
>
> ii) it is not reasonable to expect the employer either to equip those premises with such accommodation and facilities or to provide other premises for women.'[82]

This covers GOQ covers employment on oil-rigs, lighthouses, ships and some remote construction sites. The provisions in ii), regarding whether it is reasonable to expect the employer to provide accommodation for female employees, is a question of fact to be decided by the IT in each case[83].

Sex is a GOQ where the establishment in which the work is done is a single sex 'hospital, prison or other establishment for persons requiring special care, supervision or attention'[84]. Sex is a GOQ where the job 'provides individuals with personal services promoting their welfare or education, or similar personal services, and those services can most effectively be provided by a man'[85]. The reason for this provision is said to be to permit discrimination in the probation service[86].

Where there are laws regulating the employment of women, such as coal mining, sex is a GOQ[87]. Sex is also a GOQ where the job involves 'the performance of duties outside the UK in a country whose laws or customs are such that the duties could not, or could not effectively, be performed by a woman'[88]. This covers a jobs involving travel to several Middle Eastern countries. Finally, sex is a GOQ where 'the job is one of two to be held by a married couple'[89].

3.1.2 Other grounds for exemption

Section 17 of the Sex Discrimination Act 1975 allows various exceptions to the general principles of the Act for employees of the police force, for example relating to height, uniform and equipment. Different height requirements for entry into the police force may be applied to women and

men respectively. Female police officers may be treated differently from male police officers in that they may be required to wear different uniform and carry different equipment. Section 17 also allows different treatment of women police officers 'so far as special treatment is accorded to women in connection with pregnancy or childbirth'.

Discrimination between female and male prison officers pertaining to height requirements is permitted under Sex Discrimination Act 1975 section 18.

Ministers of religion are exempted from the provisions of the Sex Discrimination Act 1975 by section 18 of that Act, where employment of ministers is limited to one sex as a matter of religious doctrine.

Although midwives are exempted from the Sex Discrimination Act 1975 by section 20, the Midwives Act 1951 is amended by this section to make it possible for men to qualify as midwives. In spite of this, it is still lawful to discriminate against male midwives.

Section 85 of the Sex Discrimination Act 1975 excludes service in the Armed Forces from the Act.

3.1.3 Pregnancy and maternity

Unequal treatment of women on grounds of pregnancy and maternity is justified by various provisions of UK law. We have already noted[90] that special treatment (in maternity pay) may be accorded to women in connection with pregnancy and childbirth without breach of the Equal Pay Act 1970.[91] Measures designed to protect women as regard pregnancy and maternity (and also other circumstances giving rise to risks specifically affecting women) are justifiable according to section 51 of the Sex Discrimination Act 1975[92].

There is no specific measure in the Sex Discrimination Act 1975 rendering unlawful discrimination on the grounds of pregnancy. 'Sex plus' arguments have not been entirely successful in UK law. It seems that, at least in certain circumstances, an employer may discriminate against a

woman on ground of pregnancy[93] or a factor relating to pregnancy[94] and avoid direct discrimination in the sense of section 1 (1)(a) of the 1975 Act.

This was the case in *Webb v EMO Air Cargo (UK) Ltd*[95] where Ms Webb was employed to replace an employee going on maternity leave. Ms Webb was to be trained for the first few months of employment, working alongside the other employee, then replace her, and it was envisaged that her employment could probably continue after the period of maternity leave was over. Two weeks after Ms Webb began her training, she discovered that she also was pregnant. She was dismissed.

The Court was willing to compare Ms Webb's situation with that of a hypothetical man, who, for medical reasons, discovered that he would require leave of absence from work for the very time he had been engaged to cover for another employee on maternity leave.

> 'Suppose that a man suffering from an arthritic hip, and who had been engaged by EMO to replace Mrs Stewart when she went on maternity leave, and in the meantime to train for the job, had learned in July that a hip replacement operation would be available to him in February 1988, and that he would then be absent from the job for several months. It was clear that in such circumstances the man also would have been dismissed.'

The Court held that dismissal for a reason arising out of pregnancy could be direct discrimination, but was not necessarily direct discrimination, and therefore that, on the facts, Ms Webb had not been discriminated against. There was no need for discussion of whether such discrimination was justified.

In response to the argument that the decision of the European Court, in *Dekker*[96], that refusal of employment to a woman on grounds of pregnancy was direct discrimination in EC law should be applied in this case, the Court of Appeal distinguished *Dekker*[97].

> '*Dekker* was not a case in which, by reason of her pregnancy, a woman was incapable of doing the job offered to her. ... Ms Webb's was such a case.'

Dismissal of some (but not all) pregnant women employees is rendered unlawful by the Employment Protection (Consolidation) Act 1978 section 60 which provides that a woman is unfairly dismissed if the whole or principal reason for her dismissal is her pregnancy or any other reason connected with her pregnancy[98]. The dismissal may be justified, in terms of the Act, where the woman is incapable of continuing to carry out the work adequately or where it would be unlawful for the woman to continue working. The burden is on the employer to show that one of these defences applies.[99] In order to succeed in the defence, the employer is under a duty first to offer the woman any other comparable or suitable job for which there is a vacancy.

Section 60 only applies in the case of dismissal of an employee by reason of pregnancy, and not if she is subjected to any other detriment, for example refusal of appointment or promotion. It seems, therefore, that in the case of discrimination against a woman on ground of pregnancy in cases other than dismissal, there will be no need for justification of such discrimination by the employer, as no case of discrimination may be established in terms of UK legislation.[100]

Dismissal may be justified on grounds of pregnancy if the marital status of the woman employee is such that she would provide an inappropriate example to young people with whom the employee comes into contact as part of her employment. In the case of *Berrisford v Woodard Schools (Midland Division) Ltd*[101], Ms Berrisford was employed as a matron at a Church of England girls' boarding school. She became pregnant and was dismissed, not because of the pregnancy itself, but because she had no intention of marrying the father of the child. The employer considered that the 'manifestation of extra-marital sex' was an inappropriate model for the girls in the school, with whom Ms Berrisford had a special relationship, and for whom she provided a role model, as a part of the job.

The majority of the EAT, rather than considering the question of justification, held that there was no *prima facie* discrimination, as Ms Berrisford had not been treated more favourably than a man in a similar

situation employed by the school. The male comparator was a teacher, who, on taking up employment in the school, had been told to 'regularize his relationship' with the woman with whom he was living at the time, by marrying her. Therefore, the EAT reasoned, where evidence of continuing extra-marital activity was present, a man would also have been dismissed.

Although the EAT reasoned in a different way, the effect of the judgment of the EAT was to justify the discrimination, on the grounds that Ms Berrisford's pregnancy was incompatible with the effective carrying out of her job.

3.2 Indirect discrimination

The same approach as taken in the preceding chapter on EC law to analysis of justification for indirect discrimination is taken in this chapter. Justification for indirect discrimination is categorized into those situations in which the 'genuine need' of the employer which results in the discriminatory policy is related to the particular job, and those in which the employer's need is not specifically job related, but pertains to the efficient running of the enterprise. These categories are termed 'job related justifications' and 'enterprise related justifications'. A further category is where the indirect discrimination is justified by its general 'public interest'. This may come into play if a particular piece of legislation has a discriminatory effect: public interest justifications may also apply if the State is the employer. Similarly to the European Court, the UK courts have ruled on justification in all three types of situation, but do not distinguish between them in these terms.

3.2.1 Job related justifications

3.2.1.1 Seniority

Seniority, and the greater responsibility which is attached to a more senior appointment will justify discrimination. In *Edmonds v Computer Services (South-West) Ltd*[102] the male comparator carried out work which was not significantly different from that carried out by Ms Edmonds, but

was paid more than she was. The employer argued that, as the comparator was older and more experienced than Ms Edmonds, he had been employed with the potential of carrying responsibility as the senior member of the department. The exercise of actual responsibility would be done as part of the work, and so would render the two jobs incomparable. As for the potential to exercise responsibility, the tribunal was willing to consider this a genuine material difference under section 1 (3) of the Equal Pay Act 1970.

3.2.2 Enterprise related justifications

Justification for an indirectly discriminatory requirement which is not related to the duties of the job, but to the running of the enterprise, may be established in certain circumstances, some of which are discussed below.

3.2.2.1 Grading and pay structures

If the woman and the man are placed at different points in a general grading or pay structure, then this may justify discrimination in pay. *Waddington v Leicester Council for Voluntary Services*[103] concerned a 'Community Leader', Ms Waddington, who claimed equal pay with a male 'Play Leader' over whom she had control and was responsible. The EAT held that, because the male comparator was paid on the scale for 'Youth Leaders', the difference in pay was due to a material difference other than sex, and so was justified under the Equal Pay Act 1970 section 1 (3). The EAT observed,

> 'Grading is not conclusive, but where widely used nationally negotiated scales are concerned, it seems unlikely that a problem caused by grading would give rise to a remedy under the Equal Pay Act.'[104]

This was confirmed in the Court of Appeal's decision in *Leverton v Clwyd County Council*[105] in which again the national applicability of the scales was emphasised, although the House of Lords focused its decision[106] on the different hours and holidays of the woman complainant and the male comparators. It may often be the case that a different grading of a

particular job, or the placing of a job in a particular point on a pay scale, at which pay is lower than that for another job is because the second job is not like work or work of equal value to the first, due to differences in duties, or terms and conditions.

3.2.2.2 Market forces operating on the enterprise

The operation of market forces as it concerns the availability of male or female workers for employment cannot justify discrimination on the part of the employer, as established in *Fletcher v Clay Cross*[107].

However the operation of market forces on a business may be used to justify discrimination if the employment of the two persons concerned is not contemporaneous. *Albion Shipping Agency v Arnold*[108] concerned Ms Albion, who was employed at the branch office in Hull. A Mr Larsen was the office manager. Due to economic circumstances, the company made Mr Larsen redundant. Ms Albion then agreed to run the Hull office. She did so at her previous rate of pay, £37 per week, whereas Mr Larsen had been paid £73 per week. Ms Albion took over virtually all of Mr Larsen's duties. She claimed equal pay with Mr Larsen.

The EAT held that a change in the employer's trading position leading to reduced profitability could justify the pay difference. If a difference in pay is shown to be due to a change in the economic circumstances of the business in which a man and a woman are employed successively, this will constitute a material difference under the Equal Pay Act section 1 (3).

In *Rainey v Greater Glasgow Health Board*[109], the higher payment of the initial recruits (who were all men) to the newly set up NHS prosthetic services was attributable to the operation of market forces, as the NHS was required to recruit from the higher paid private sector. When later recruits (who were women) were paid at the standard scale, a rate which was lower than that of the male prosthetists initially employed, they complained of indirect discrimination. The discrimination was held to be justifiable, partly because of the prevailing conditions of the market when the initial recruitment took place.

Similarly, in *Beneviste v University of Southampton*[110], it was held that financial constraints at the time of an employee's appointment may justify discrimination in wages. However, when the financial constraints are lifted, the justification ceases to be applicable, and there is no longer a material difference between the complainant and other employees doing like work who were appointed at a time when the financial constraints did not apply.

3.2.2.3 Consistency of management

In an early UK case concerning part-time employment, the EAT was required to consider whether the requirement that an employee work full-time was justified. *The Home Office v Holmes*[111] concerned a woman employee (executive officer) who took maternity leave and then wished to return to work as a part-time, rather than full-time, employee. When the employer refused, she claimed that this was unlawful discrimination. The IT agreed.

The EAT upheld the decision of the IT, but stressed that the decision was dependent on the particular facts of the case. The EAT even considered that there would be other cases, not 'strikingly different' from the case in hand, where a policy favouring full-time staff would be justifiable.

Justification was not discussed explicitly in the judgment, however it seems that it was implicit that at the particular grade concerned, a full-time employee was necessary for management purposes. The decision as to justifiability of discrimination against part-time workers was to be one entrusted to the individual tribunal, and would depend entirely on the particular facts of each case.

Clymo v Wandsworth[112] concerned *inter alia* the issue of whether refusal on the part of the employer to allow a job share was justified. Ms Clymo and her husband each held a job as a branch librarian. After having a baby, Ms Clymo asked to share her job with her husband. The local authority, as employer, did permit job sharing, but not at such a high

level, so it refused the request. Ms Clymo resigned, alleging indirect discrimination.

The employer argued that it could not allow job sharing in this circumstance because the post of branch librarian required absolute consistency of approach, especially in terms of supervision of junior staff, who needed an individual person to whom they would be answerable. Furthermore, the local authority required knowledge of where ultimate responsibility lay[113]. The duties of the job necessitated a full-time employee, therefore no job sharing was possible.

The EAT held that the tribunal must apply the *Bilka* test by looking at the object the employer sought to achieve, that is, consistency of management, and deciding whether this was 'more than a matter of convenience' with a 'proper purpose when viewed within the whole of the business or organization for which the employer is responsible'[114]. Carrying out a broad balancing exercise, the EAT held that on the facts, the discriminatory requirement was justified.

3.2.2.4 Efficiency in the administration of the enterprise

In a case concerning the discriminatory effect of grading systems, *National Vulcan Engineering Insurance Group v Wade*[115], Lord Denning observed,

> 'If it were to go forth that these grading systems ... operate against the Equal Pay Act 1970, it would, I think be disastrous for the *ordinary running of efficient business.* It seems to me that a grading system according to ability, skill and experience is an integral part of good business management; and, as long as it is fairly and genuinely applied irrespective of sex, there is nothing wrong with it at all.'[116]
>
> There is a relationship between 'efficiency' or 'good business management' and justification for indirect discrimination.

'Marginal advantages to the employers in cost and efficiency' were held to justify indirect discrimination against a woman part-time employee who was made redundant, under a 'part-time workers out first' redundancy policy in *Kidd v DRG (UK) Ltd*[117]. The marginal advantages to the

employer in operating one shift of full-time workers rather than two shifts of part-time workers included avoidance of extra record taking, laundering of overalls, and 'a mild degree of disruption' in changeover of shifts. These small gains in efficiency represented, 'sound and tolerable reasons acceptable to right-thinking people as realistic and sensible', in line with the *Ojutiku* decision.

In *Rainey v Greater Glasgow Health Board*[118], the decisions of the European Court of Justice[119] on justification for indirect discrimination were applied by the House of Lords, in the context of recruitment of prosthetists by the National Health Service.

In 1979, the Government established a prosthetic fitting service within the National Health Service and no longer relied on private contractors. In order to set up the service, the National Health Service recruited qualified prosthetists on their existing pay scales. Those scales were higher than the pay rates applied throughout the National Health Service on the Whiteney Council Scale. After the initial recruitment of higher paid prosthetists (who were all male), subsequent recruits were placed on the lower, standard National Health Service scale, whether they were male or female. Ms Rainey, one of the later recruits, claimed that her lower salary was discriminatory on the grounds of sex, contrary to the Equal Pay Act 1970 section 1. The House of Lords, in interpreting section 1 (3), recognized the duty of national courts of MS of the EC to interpret national law so as to be in conformity with EC law, and therefore applied the *Bilka* test:

> '... the new prosthetic service could never have been established within a reasonable time if [the earlier employees from the private sector] had not been offered a scale of remuneration no less favourable than that which they were enjoying. That was undoubtedly a good and objectively justified reason for offering [them] that scale of remuneration.'

The need to employ qualified prosthetists from the private sector was a genuine one, if the National Health Service was to set up its own prosthetic service. Offering higher salaries than those enjoyed by other National Health Service employees was necessary to attain this purpose. Once the prosthetic service was set up, these considerations no longer

applied, and the lower wages of those prosthetists later employed, including Ms Rainey, were justified by the fact that

> '... from the administrative point of view, it would have been highly anomalous and inconvenient if prosthetists alone ... were to have been subject to a different scale.'

A difference in pay connected with economic factors affecting the efficient carrying on of the employer's business may justify discrimination. Although in the *Bilka*[120] judgment, the European Court refers to 'economic' grounds for justification, it was held in the House of Lords that,

> '... read as a whole the ruling of the European Court would not exclude objectively justified grounds which are other than economic, such as administrative efficiency in a concern not engaged in commerce or business.'[121]

Administrative efficiency, according to the House of Lords, operates as a 'genuine need of the enterprise'. This sort of justification was particularly appropriate for a concern not engaged in commerce or business.

The decision in *Rainey* that administrative efficiency could constitute a genuine business need was upheld in the case of *Reed Packaging Ltd v Boozer and Everhurst*[122]. *Reed Packaging* concerned two women who claimed equal pay with a man employed on like work. The employers submitted that the variation in pay was due to separate pay structures and that this constituted a defence under the Equal Pay Act section 1 (3). The IT rejected this submission of the employer. The EAT, overturning the decision of the IT, held that there was no reason why separate pay structures could not constitute a 'material factor', and that the employer had shown an 'objectively justified administrative reason' for the difference in pay in accordance with *Rainey*.

From these decisions it seems clear that the ground of efficiency of the enterprise can be a 'genuine need of the enterprise', justifying indirect discrimination in UK law, and that, at least in the case of a 'non-

commercial' employer, such as a Health Authority, efficiency in this sense does not mean economic efficiency alone.

3.2.3 Public interest related justifications

Legislation or other measures taken by the State which regulate the employment relationship may have an indirectly discriminatory effect. These discriminatory measures may be justified if the purpose of the legislation, a general benefit to the public, or a particular group of members of the public, is judged to have greater importance than the principle of equal treatment for women and men in employment in the particular circumstance concerned.

3.2.3.1 Reduction of available employment opportunities

The UK courts were required to rule on the compatibility of UK legislation, which disadvantaged part-time employees, with the principle of equal treatment for women and men in employment in EC law, in a recent decision. The Court of Appeal held in *R v Secretary of State ex parte EOC*[123] that legislation discriminating between full-time and part-time workers was not in breach of the UK's obligations under EC law to accord equal treatment to women and men in employment.

The provisions of the Employment Protection (Consolidation) Act 1978 delimiting part-time employees from various rights on unfair dismissal were held to be justified on grounds of social policy. Evidence that amendments to the legislation would have adverse consequences for women seeking part-time employment, because if extra administrative and cost burdens were imposed on employers, 'employment opportunities in part-time work would be reduced'[124] was accepted by the court. In spite of counter evidence, the court assumed not only that the proposed amendment would lead to a reduction in the number of part-time jobs available, but also that 'any reduction in the number of employment opportunities would be socially undesirable'[125].

3.2.3.2 Special social needs

An example of a public interest related justification in UK law was found in measures, designed to alleviate long term unemployment, which targeted a particular group of unemployed people, which consisted mostly of men.

Cobb v Secretary of State for Employment[126] concerned the targeting of the 'Community Programme' to those in receipt of unemployment or supplementary benefit. It was conceded that as more men than women could comply with the condition of being in receipt of one of these benefits, the scheme was indirectly discriminatory, but the Secretary of State argued that this was justified as being the most economical use of available resources. It was held that the test was justified on these grounds, as it avoided the need to create a new administrative structure, which would have had to be funded by the already limited resources of the Community Programme fund. The need to target a particular sector of the unemployed was achieved by this use of resources. The special social needs of those who benefitted from the measures justified their discriminatory effect.

4 Conclusion

Since the 1970s, when the main provisions of UK legislation relating to equal treatment of women and men in employment were brought into force, the bare bones of these rules have been fleshed out by judicial interpretation, in particular through the work of the industrial tribunals. The issue of whether discrimination is justified is said to be a 'question of fact' for the tribunal of first instance to determine. However, the courts have developed a particular approach to the question of justification - both the standard required and the grounds available - which in practice amounts to a 'legal test' for justification.[127]

There exist a number of exemption provisions which justify direct discrimination between women and men in employment. Different standards of justification apply to these. Some justifications for direct discrimination, for example the GOQ relating to privacy and decency, are

subjected to some judicial scrutiny in that they must not be 'unreasonable' restrictions on women in the employment sphere. Others, for example the different treatment of women and men in the police force and prison service, apply, if the factual circumstances are those envisaged by the legislation, whether or not they are necessary or proportional to a justifiable purpose.

The issue of justification is central to the concept of indirect discrimination. The standard accepted by UK courts and tribunals for justification of indirect discrimination has developed over twenty years, yet it still cannot be said to be irrevocably fixed. The ruling of the European Court in *Bilka* is accepted in the UK, but is understood and applied in a different way to that of the European Court. The UK courts, in line with *Ojutiku*, focus on the standard of 'reasonableness', rather than 'proportionality'. Reliance on the former standard renders easier the burden on employers seeking to justify discriminatory practices.

The grounds available for justification in UK law encompass a number of situations, and may not be regarded as a fixed or closed class. Admission of 'efficiency' or 'administrative efficiency' as a ground of justification for a discriminatory policy allcws justification in a broad category of cases. The indications that efficiency in running the enterprise may be more appropriate for a non-profit making enterprise, such as the National Health Service (*Rainey*) or the Manpower Service Commission (*Cobb*), than for a private employer lack a logical basis. Recognition of the conceptual difference between enterprise related and public interest related justifications would clarify the distinction it seems that the UK courts may be approaching.

The influence (and direct effect) of EC law on UK social law is significant.. According to EC law, UK law must conform with provisions of EC law, and national law may not be interpreted or applied in such a way as to conflict with EC law. It is possible that the European Court may rule more clearly on the standard for justification, requiring the UK courts to apply correctly the proportionality test. The European Court may also develop an understanding of which substantive grounds justifying

discrimination are acceptable. Developments of this nature would affect fundamentally the current position of UK law.

Notes on chapter 5

1. Section 1 (2).

2. Section 1 (3).

3. Section 1 (4).

4. Section 1 (5).

5. Incorporated into the Equal Pay Act by the Equal Pay (Amendment) Regulations 1983 (SI 1983 No. 1794).

6. General note on the Sex Discrimination Act 1975, Historical background.

7. Sex Discrimination Act 1975, Section 63.

8. Employment Protection Act 1975, Section 88.

9. see Alice M. Leonard, *Judging Inequality* (London: Cobden Trust, 1987); Kumar, 'IT Applicants under the Race Relations Act 1976', cited in Hepple, 'The Judicial Process in the UK', in Christopher McCrudden (ed), *Women, Employment and European Equality Law* (London: Eclipse, 1987).

10. Hepple, in McCrudden, p. 144.

11. see for example, Leonard, p. 30 and 50ff.

12. see below, chapter 5, section 2.2.2.

13. R v Birmingham City Council, ex parte EOC, [1989] IRLR 173; [1989] 2 WLR 520 (House of Lords).

14. Fletcher v Clay Cross (Quarry Services) Ltd, [1978] IRLR 361 (Court of Appeal).

15. [1989] 3 WLR 123 (Court of Appeal).

16. James v Eastleigh Council, p. 128.

17. James, p. 128.

18. see eg Brian Napier, 'Note on James v Eastleigh Council', N.L.J. 1494 (1989); Jennifer Ross, 'Reason, Ground, Intention, Motive and Purpose', 53 M.L.R. 392 (1990).

19. Ross, p. 393.

20. But see Employment Protection (Consolidation) Act 1978, Section 60, which provides the a woman is unfairly dismissed if the reason for dismissal is her pregnancy.

21. Hurley v Mustoe [1981] IRLR 208 (EAT); Horsey v Dyfed District Council [1982] IRLR 395 (EAT).

22. see below, chapter 6, section 2.1.

23. [1980] IRLR 4 (EAT).

24. Sex Discrimination Act, Section 5 (3) provides that 'A comparison of the cases of persons of different sex or marital status under section 1 (1) or section 3 (1) must be such that the relevant circumstances in the one case are the same, or not materially different in the other'.

25. [1985] ICR 703 (EAT).

26. see Ellis, p. 91ff.

27. [1992] IRLR 117 (Court of Appeal).

28. Section 1 (3) substituted by S.I. 1983/1794, reg. 2 (2).

29. Sex Discrimination Act 1975, Section 6 (1)(a), Section 7 (1)(a).

30. Sex Discrimination Act 1975, Section 6 (1)(c), Section 7 (1)(a).

31. Sex Discrimination Act 1975, Section 6 (2)(a), Section 7 (1)(b).

32. see below, chapter 5, section 3.1.1.

33. Sex Discrimination Act 1975, Section 1 (1)(b)(ii).

34. see below.

35. for example, see below, section 3.2.3.1.

36. Enderby v Frenchay Health Authority and Secretary of State for Health [1991] IRLR 44 (EAT), p. 56-58.

37. [1990] IRLR 372 (EAT).

38. Kidd v DRG (UK) Ltd [1985] IRLR 190 (EAT); but cf Clarke and Powell v Eley (IMI) Kynoch Ltd [1982] IRLR 482 (EAT) in which the tribunal came to a different conclusion on similar facts.

39. [1977] IRLR 291; [1978] 1 All ER 1228 (EAT).

40. [1983] IRLR 209 (House of Lords).

41. Note on Sex Discrimination Act 1975 : 'the burden on the alleged discriminator is not that great if justification only has to be shown'.

42. see L. Lustgarten, 'The New Meaning of Discrimination'(1977) P.L. 178.

43. see P. Davies and M. Freedland, *Labour Law*, (London: Weidenfield and Nicholson, 1984) p. 41, note 75.

44. Steel v Union of Post Office Workers [1977] IRLR 288 (EAT).

45. Singh v Rowntree Mackintosh [1979] ICR 554 (EAT).

46. Singh v Rowntree Mackintosh.

47. Panesar v The Nestle Co [1980] IRLR 60 (EAT).

48. Ojutiku v Manpower Services Commission [1982] IRLR 418 (Court of Appeal).

49. Ojutiku, per Stephenson, LJ, p.423.

50. Raval v DHSS & Civil Service Commission [1985] IRLR 370 (EAT).

51. Kidd v DRG (UK) Ltd [1985] IRLR 190 (EAT).

52. Bilka Kaufhaus v Weber von Hartz [1986] 2 CMLR 701 (ECJ).

53. For duty of national courts to apply EC law, see Van Gend en Loos v Nederlandse Administratie der Belastigen, case 26/62, [1963] CMLR 105, [1963] ECR 1 (ECJ); Bulmer v Bollinger [1974] Ch 401 (Court of Appeal).

54. see below.

55. Greater Glasgow Health Board v Carey [1987] IRLR 484 (EAT).

56. Hampson v Department of Education and Science [1989] ICR 179 (Court of Appeal).

57. It is not suggested that there exists an obligation on the part of the UK courts to apply the *Bilka* criteria in cases of indirect racial discrimination, as European Community law has no jurisdiction in the area of racial discrimination. The approach of the UK courts has hitherto been to use sex and race discrimination cases interchangeably, as the principles in one area were regarded as being the same for the other. It may be that the *Bilka* decision requires a change in this approach. Without such a change, the effect of the principles of *Bilka* on race discrimination law in the UK is unavoidable.

58. the 'acceptable to right-thinking people' test.

59. Hampson, per Balcombe LJ, p. 191-192.

60. Hampson, p. 207.

61. Clymo v Wandsworth LBC [1989] 2 CMLR 577 (EAT).

62. Josephine Steiner, *Textbook in EEC Law* (London: Blackstone Press, 1988), p. 43; T. C. Hartley, *The Foundations of European Community Law* (Oxford: Clarendon Press, 1986), p. 137.

63. eg Briggs v North Eastern Education & Library Board [1990] IRLR 180 (Court of Appeal); Greater Manchester Police Authority v Lea [1990] IRLR 372 (EAT); Jones v Chief Adjudication Officer [1990] IRLR 533 (Court of Appeal).

64. if the requirement or condition is 'justifiable irrespective of the sex of the person to whom it is applied'.

65. Section 1 (3)(a) and (b).

66. see below.

67. E Coombes Holdings v Shields [1978] IRLR 263 (Court of Appeal).

68. Jenkins v Kingsgate (Clothing Productions) Ltd (No 2)[1981] IRLR 388 (EAT). The link was also pointed out by the Court of Appeal in Leverton v Clwyd County Council [1988] 2CMLR 811 (Court of Appeal).

69. [1978] ICR 1159 (Court of Appeal).

70. [1978] IRLR 361 (Court of Appeal).

71. Fletcher v Clay Cross, per Lord Denning, MR, p. 363.

72. [1981] IRLR 388 (EAT).

73. see above, chapter 4, section 2.2.1, section 3.2.2.1.

74. [1987] 2 CMLR 11; [1986] 3 WLR 1017 (House of Lords).

75. Rainey, p. 17.

76. Rainey, p. 17.

77. see Sacha Prechal and Noreen Burrows, *Gender Discrimination Law of the European Community* (Aldershot: Dartmouth, 1990), p. 215.

78. Sex Discrimination Act 1975, Section 7 (2)(a).

79. Sex Discrimination Act 1975, Section 7 (2)(b).

80. eg Snell & Crompton v Exclusive Cleaning and Maintenance (Northern) Ltd 1982 COIT 1298/123, cited in IDS Employment Law Handbook 29 *Sex Discrimination and Equal Pay* (London: IDS, 1984), p. 36, where cleaning the men's lavatories on a plant with 24 hour shifts was held to be a job for which being male was a GOQ.

81. [1983] ICR 628 (EAT).

82. Sex Discrimination Act 1975, Section 7 (2)(c).

83. eg Hermolle v Government Communications HQ 1979 COIT 962/107 (IT); Wallace v Peninsular & Oriental Steam Navigation Co 1980 COIT 1029/118 (IT); cited in IDS Employment Law Handbook 29, p. 37.

84. Sex Discrimination Act 1975, Section 7 (2)(d).

85. Sex Discrimination Act 1975, Section 7 (2)(e).

86. D. J. Walker *Sex Discrimination* (London: Shaw & Sons Ltd, 1975) p. 38.

87. Sex Discrimination Act 1975, Section 7 (2)(f).

88. Sex Discrimination Act 1975, Section 7 (2)(g).

89. Sex Discrimination Act 1975, Section 7 (2)(h).

90. see above, chapter 5, section 2.1.1.

91. Equal Pay Act 1970, Section 6 (1).

92. as amended by Employment Act 1989, Section 3.

93. Turley v Alders Department Stores Ltd [1980] IRLR 4 (EAT).

94. Webb v EMO Air Cargo (UK) Ltd 20th Dec 91 [1992] IRLR 117 (Court of Appeal).

95. Webb.

96. Dekker v Stichting Vormingscentrum voor Jonge Volwassen (VJV Centrum) Plus [1991] IRLR 27 (ECJ).

97. Dekker.

98. for example high blood pressure, see Elegbede v The Wellcome Foundation [1977] IRLR 383 (IT).

99. Brear v Wright Hudson Ltd [1977] IRLR 287 (IT).

100. The effect of EC law has not been discussed here.

101. [1991] IRLR 24 (EAT).

102. [1977] IRLR 359 (EAT).

103. [1977] IRLR 32 (EAT).

104. Waddington, p. 33.

105. [1988] 2 CMLR 811 (Court of Appeal).

106. [1989] 1 CMLR 574 (House of Lords).

107. [1978] IRLR 361 (Court of Appeal): see above, chapter 5, section 2.2.2.

108. [1981] IRLR 525 (EAT).

109. [1987] 2 CMLR 11 (House of Lords). See below, chapter 5, section 3.2.2.4.

110. [1989] IRLR 122 (Court of Appeal).

111. [1984] IRLR 299 (EAT).

112. Clymo v Wandsworth LBC [1989] 2 CMLR 577; [1989] ICR 250 (EAT).

113. Clymo, p. 583-585.

114. Clymo, p. 595.

115. [1978] IRLR 225 (Court of Appeal).

116. National Vulcan, my emphasis.

117. [1985] IRLR 190 (EAT).

118. Rainey.

119. Jenkins v Kingsgate [1981] IRLR 313 (ECJ) and Bilka Kaufhaus v Weber von Hartz [1986] 2 CMLR 701 (ECJ).

120. Bilka.

121. Bilka, p. 718.

122. [1988] IRLR 333 (EAT).

123. [1992] 1 All ER 545 (Court of Appeal). The decision will be appealed to the House of Lords.

124. R v Secretary of State, ex p EOC, p. 564.

125. R v Secretary of State, ex p EOC, p. 565.

126. [1989] ICR 506 (EAT).

127. The difference between questions of fact and questions of law is an area in which 'two rival doctrines are still contending for supremacy'. (Wade, p 938) As Wade explains, the 'simpler and more logical doctrine' is that 'matters of fact are the primary facts of the case which have to be established before the law can be applied ... Whether these facts, once established, satisfy some legal definition or requirement must be a question of law, for the question is then how to interpret and apply the law to those established facts'. (Wade, p 939) In accordance with this doctrine, the question of justification is, it would seem, a question of law. The rival doctrine is, according to Wade, 'in effect, that the application of a legal definition or principle to established facts is erroneous in point of law only if the conclusion reached by the tribunal is unreasonable.' (Wade, p 940) The decision of the Court of Appeal in *Ojutiku*, that the standard for justification is a reasonableness test, fits this doctrine.

Wade, "Administrative Law", (Clarendon Press, 1988, Oxford).

Chapter 6

United States of America

1 Federal Employment Law of the US: Sources and Structure

This section provides a brief overview of the provisions of federal law of the United States of America (US) which are pertinent to the issue of sex discrimination in employment. Sources of this federal law include federal statutes (the most significant of which is the Civil Rights Act of 1964), the Constitution and the decisions of federal courts.

Title VII of the Civil Rights Act of 1964 (Title VII) is the most wide-reaching and comprehensive provision of US federal legislation on discrimination in the employment sphere. Sex is one of the 'forbidden grounds' for discrimination proscribed by Title VII; the others are race, colour, religion and national origin. Originally sex was not included in the provisions of the Bill, but was added as a 'wrecking' amendment while the Bill was passing through the legislative process.[1] Title VII covers all aspects of the employment relationship from the advertisement of posts, to promotion and discharge of employees. It applies to virtually all employers, with only a few exceptions. Defences provided in Title VII are expressed narrowly and have been given a narrow interpretation: the employer must show that sex is a 'bona fide occupational qualification' for the activity concerned.

Other legislative measures include the Equal Pay Act 1963 and the Pregnancy Discrimination Act 1978, which amends Title VII.

The Fourteenth Amendment to the Constitution (1868) was enacted after the end of the Civil War and was designed to protect the rights of newly freed black slaves. Section 1 of the Amendment provides that,

> 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.'

Although this provision was intended to provide full equality for men of all races, originally it was not interpreted to extend to sex discrimination. Nevertheless, the provisions of the Amendment have since been applied to legislation and other 'state action' which discriminates against women. Claims that a state measure breaches the Equal Treatment clause may be successful before the courts. Although the courts will not normally substitute their opinions, regarding which policies should be effected by legislation, for the opinions of elected legislatures, legislation may be challenged as unconstitutional if it denies equal protection of the law (provided for by the Fifth and Fourteenth Amendments) to a category of persons in a way which is arbitrary and has no legitimate purpose.[2]

The US system can be characterised as a common law system, in the sense that courts are 'law-makers' in their role of developing the common law. Of course, the interpretive function of courts is also highly significant, particularly in an area such as discrimination law where most legal provisions are found in statutes.

Each State has its own separate system of courts; discussion of their jurisprudence is beyond the scope of this work, the focus of which is Federal law. At the apex of the Federal system is the Supreme Court of the United States. The jurisdiction of the Supreme Court is spelled out by Art III (2) of the Constitution: the Court has jurisdiction in a *bona fide* controversy between two opposing litigants with a genuine conflict of interest where the subject matter involves the Constitution, a Federal law or a treaty[3]. The decisions handed down by the Supreme Court have played a crucial part in the development of sex discrimination law in employment[4]. Decisions of the Supreme Court are binding as precedent for lower courts. The Supreme Court regards its own previous decisions as binding under a version of *stare decisis*; they may only be overturned in certain narrow circumstances.

Appeal to the Supreme Court is not as of right, but is open to the Court's discretion. The Supreme Court may decline to hear any case presented to it. If the Court decides to hear an appeal, because it

considers the case to be of particular importance or interest, a writ of *certiorari* (to make more certain) will be granted.

Due to the broad scope of its jurisdiction, the Supreme Court does not hand down many decisions in any one area of law. Because of this, and also because there is no appeal as of right from the appelate level of the federal courts, the decisions of the courts immediately below the Supreme Court in the federal system are extremely important. At this appelate level are the Courts of Appeals (Circuit Courts). These are arranged in eleven numbered 'Circuits' on a geographical basis, plus two others. In the present study, discussion of decisions of the Circuit Courts will be central in providing examples of the attitudes of federal courts to justification of sex discrimination. The role of the Court of Appeals has been described as that of 'a mini Supreme Court in the vast majority of cases'[5]

At the trial court level in the federal court system is the District Court. Decisions of District Courts will be discussed if they are of particular interest.

Litigation in the US on sex discrimination in employment is voluminous. The amount of available material, in terms of case reports, and literature, is enormous, and no attempt to provide an exhaustive view of sex discrimination law in the US is made here. Rather, discussion of justification for sex discrimination is informed by a selection of material, which aims to be representative. First, the main legislative provisions, and their operation, in providing the standard of justification for sex discrimination, are discussed in some detail.

2 Provisions of US law establishing the Equal Treatment of Women and Men in Employment, and justification for derogation from those provisions

The equal treatment of women and men in employment in the US is governed principally by legislative provisions, in particular, the Equal Pay Act 1963 and the Civil Rights Act 1964, Title VII, as amended by the Pregnancy Discrimination Act 1978. These provisions together cover

discrimination on ground of sex by 'disparate treatment'[6] (similar to the European concept of 'direct discrimination') and by 'adverse impact' (similar to the European concept of 'indirect discrimination'). The terms 'disparate treatment' and 'adverse impact' are not statutory in source; they are judicial constructs.

2.1 Disparate treatment

Discrimination by disparate treatment under the Civil Rights Act 1964, Title VII, is intentional different (detrimental) treatment of an individual by reason of their race, colour, sex or religion. In employment, disparate treatment is analogous to the concept of direct discrimination in pay and treatment of EC law. To establish disparate treatment, the employer's motive must be examined. *McDonnell Douglas Corporation v Green*[7] sets out the order of proof by which, in a situation concerning alleged disparate treatment in an employment situation, the motive or intention of the employer is shown. The plaintiff must first establish a *prima facie* case. This is effected by showing that the plaintiff is a member of a protected class, applied for a job for which the employer was seeking applicants, had the required qualifications for the job, was denied the job and the employer continued to seek applicants for the job. The defendant employer may then 'articulate legitimate and non-discriminatory reasons for the plaintiff's rejection'. The plaintiff, in order to succeed, then has the burden of establishing that these reasons are in fact a pretext to mask an illegal motive.

The decision in *McDonnell Douglas* has been extended to circumstances other than refusal to appoint a prospective employee in the protected class. In *Flowers v Crouch-Walker Corporation*[8], the approach in *McDonnell Douglas* was applied to the discharge of a person in a category protected by Title VII. The plaintiff must show that, although still satisfying the normal requirements of the job, the employer discharged him or her, and that a person not in the protected category was given the work. The employer then has the burden of production to show that there were legitimate non-discriminatory reasons for the discharge. The

definition of disparate treatment applies in all circumstances where there is discrimination on ground of sex in an employment situation.

Section 703 of the Civil Rights Act, Title VII provides that it is unlawful for an employer 'to discriminate ... because of ... sex'. The discrimination must be because of the plaintiff's sex. Title VII does not define this provision: judicial interpretation has developed a definition.

The Supreme Court first tackled the issue in *Phillips v Martin Marietta Corp*[9]. The employer in this case argued that its decision not to employ women with pre-school age children (there was no equivalent provision for men) was not in breach of Title VII, since the decision was not only because of the plaintiffs' sex, but also because of a sex-neutral factor (pre-school age children). The Court of Appeals accepted that, since it was not sex alone that motivated the employer's hiring criteria, but sex plus another neutral factor, there was no breach of title VII. The Supreme Court did not agree, holding that,

> 'section 703(a) ... requires that persons of like qualifications be given employment opportunities irrespective of their sex. The Court of Appeals therefore erred in ... permitting one hiring policy for women and another for men.'[10]

In contrast, similar reasoning was used successfully in *General Electric Co v Gilbert*[11]. The Supreme Court was called upon to examine, for breach of Title VII, a health insurance plan which provided for all disabilities, including coverage for circumcisions, vasectomies, and prostatectomies for men, but did not provide cover for pregnancy of women employees. In a difficult judgment, Justice Rehnquist, writing for the majority, viewed the health insurance plan as dividing employees into pregnant and non-pregnant persons. The health insurance plan did not discriminate against pregnant persons, as it gave them exactly the same benefits as it gave to non-pregnant persons. There was no breach of Title VII by the failure to compensate pregnant women with additional benefits.

As Gerald McGinley points out,

> 'Implicit in the reasoning of *Gilbert* is that the group disfavoured by a particular classification must be completely co-extensive with the class protected. Discrimination on the basis of pregnancy is not sex discrimination because not all women are or will become pregnant.'[12]

Congress reversed the effect of the *Gilbert* judgment by passing the Pregnancy Discrimination Act 1978, which adds section 701(k) to Title VII[13]. The provision reads as follows:

> 'The terms 'because of sex' or 'on the basis of sex' include ... because of or on the basis of pregnancy, childbirth or other related medical conditions ...'

Although unsuccessful in other areas, 'sex plus' arguments have been successful in cases where an employer seeks to impose different grooming standards on the sexes, for example, men are not permitted to have long hair. The employer's refusal to employ a male applicant with long hair was upheld in *Willingham v Macon Telegraph Pub. Co*[14]. The Court of Appeal distinguished the decision in *Phillips v Martin Marietta*, as pertaining to a rule concerning a fundamental right, such as the right to marry or found a family. Hair length is neither a fundamental right, nor is it an immutable characteristic. The grooming code did not discriminate against men; rather it discriminated against men with long hair.

If the criteria by which the employer discriminates is sex plus another criterion, this is not always regarded as disparate treatment by the US courts. It seems that whether it is disparate treatment or not depends on whether the second criterion can be characterised as a 'fundamental right' or 'immutable characteristic'.

2.1.1 Equal Pay Act 1963

The Equal Pay Act amends the Fair Labour Standards Act 1938, which regulates minimum wages, overtime and child labour. The scope of the FLSA is extremely complex[15]. Put simply, the Equal Pay Act covers state, local and federal government, and private employees. It requires equal pay for women and men undertaking 'equal work', in the same 'establishment', by prohibiting an employer from discriminating,

> 'between employees on the basis of sex by paying wages to employees in such establishments at a rate less than the rate at which he pays wages to employees of the opposite sex ... for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex.'[16]

The Equal Pay Act applies where the duties of the jobs concerned are 'substantially equal' in 'skill, effort and responsibility' and working conditions[17]. The terms of the original Bill sought to prescribe 'equal pay for comparable work'; however Congress, fearing that this choice of wording would be too wide, changed the word 'comparable' to 'equal'. The courts interpreted 'equal work' as indicating not identical work, but work that is 'substantially equal'. In *Shultz v Wheatson Glass Co.*[18], the court was of the opinion that the few insignificant extra tasks undertaken by male packer-inspectors in a warehouse did not render their work different from that of female packer-inspectors and therefore that the ten per cent pay differential between women and men was in breach of the equal pay legislation. The titles, classifications or descriptions of jobs are irrelevant in determining whether two jobs are 'substantially equal': it is to duties and activities of the employee that the courts look[19].

> 'Application of the equal work standard is necessarily a case-by-case, largely factual evaluation. The degree of 'equality' that is greater than 'comparability,' but less than 'identity,' is not susceptible to a precise formula. Consequently, trial courts are given a measure of fact finding discretion which will be reviewed by the appellate courts upon a standard of 'clearly erroneous'.'[20]

The lack of provision in the Equal Pay Act 1963 for equal pay for work of equal value is noteworthy.

2.1.2 Civil Rights Act 1964, Title VII

The Civil Rights Act of 1964 is a comprehensive measure of federal legislation. Title VII of the Civil Rights Act[21] covers discrimination in employment. It proscribes discrimination only in certain specific situations delimited by the provisions. Title VII covers discrimination on the part of an 'employer'[22], 'employment agency'[23] or 'labor organization'[24]. The federal government is exempted from the general provisions; however section 717 covers non-discrimination in federal employment. A '*bona fide* private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of the Internal Revenue Code' is also exempted. This provision has been narrowly construed[25].

The discrimination must be on a 'ground' recognized by Title VII. The grounds are race, colour, religion, sex, and national origin[26]. Title VII protects all 'individuals' from these types of discrimination. Judicial interpretation of the provisions has established the same standards and burdens of proof for establishing justification of discrimination on any of the grounds. Therefore, although the focus of this chapter is sex discrimination, decisions involving discrimination on other grounds will be relevant to issues relating to sex discrimination.

The discrimination must occur in an 'issue' recognized by Title VII. The issues are hire, discharge, compensation, terms, conditions or privileges of employment[27]; limitation, segregation or classification of membership or applicants for employment[28]; failure to refer[29]; exclusion or expulsion from membership[30]; limitation, segregation or classification of membership or applicants for membership[31]; causing an employer to discriminate[32]; retaliation[33]; and printing or publishing a discriminatory employment notice of advertisement[34].

The provisions relating to sex discrimination in compensation, or pay, are complicated by a clause of section 703(h), linking Title VII to the Equal Pay Act, known as the Bennett Amendment. The clause provides,

> 'It shall not be an unlawful employment practice under the title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid to employees ... if such differentiation is authorized by the provisions of [the Equal Pay Act]'

The purpose of this Amendment is to fill loopholes and to avoid inconsistencies between the Civil Rights Act and the Equal Pay Act.

There are two analyses of the Bennett Amendment which have received judicial support by the Courts of Appeals. The first, and most obvious, interpretation is that the Bennett Amendment incorporates the 'equal pay for equal work' formula of the Equal Pay Act into Title VII; if the work carried out by women is not 'equal' to that carried out by men, there can be no claim for discrimination in pay based on Title VII[35]. This first interpretation results in no inconsistency between the two Acts. As it was the prime purpose of the Amendment to avoid inconsistency[36], for this reason alone, it seems reasonable to regard this interpretation favourably.

The alternative analysis, which is more problematic, in that it produces the very inconsistency the Bennett Amendment sought to avoid, is that the Bennett Amendment only protects that which is specifically sanctioned by the Equal Pay Act. It will only apply in the case of discriminatory activities of the employer which fall within the defences provided by the Equal Pay Act; seniority, merit, quality or quantity of work or 'other factors other than sex'. If an employer intentionally discriminates between women and men in granting salaries, this will violate Title VII even if the duties of the jobs are not 'equal' in the sense of the Equal Pay Act. This was the interpretation applied in *Gunther v County of Washington*[37] in which, although the duties of a jail matron were held to be substantially different from the duties of jail guards, sex based salary distinctions were held to be cognisable, as disparate treatment, under Title VII. In effect, this allowed an 'equal value' claim, which is not admissible under the Equal Pay Act 1963.

The relationship of the Bennett Amendment to Title VII remains unclear; it seems reasonable, however, to regard with some reservation the latter

interpretation, given the legislative intent of removing inconsistencies between the Equal Pay Act 1963 and Title VII.

It should also be noted that Title VII can be used to challenge segregation of the workforce into unequal jobs, and can also reach unequal pay of women and men in different 'establishments' of one employer[38]. In these matters, Title VII is wider in its application than the Equal Pay Act.

In general, Title VII operates as an extensive measure to proscribe discrimination, including discrimination on ground of sex, by disparate treatment. However, in certain circumstances, disparate treatment may be justified.

2.1.2.1 Bona Fide Occupational Qualification

Disparate treatment in breach of Title VII may be justified is if the forbidden ground (in this case, sex) is a bona fide occupational qualification (BFOQ) for the job. Title VII, section 703(e) provides,

> 'Notwithstanding any other provision of this title, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees ... on the basis of religion, sex or national origin in those certain instances where religion, sex or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise...'

This provision is the major statutory defence incorporated in Title VII. Only religion, sex and national origin are listed as possible BFOQs in section 703. Race and colour are not available[39]. Furthermore, BFOQs are only available as a defence in situations of hiring or referral.

The exception is intended to be a narrow one; as the Committee Report to the Bill reveals,

> '[I]t provides for a very limited exception to the provisions of the title. Notwithstanding any other provisions, it shall not be an unlawful employment practice for an employer to employ persons of a particular religious or national origin in those rare situations where religion or national origin is a bona fide occupational qualification'[40].

In *Rosenfeld v Southern Pacific Co*[41], the employer attempted to use the BFOQ defence to exclude women from a job requiring the lifting of heavy weights. The Court held that, since the capacity to lift heavy weights was not a trait confined to members of one sex, each prospective employee for the job must be evaluated separately, and the employer could not lawfully apply a blanket prohibition to all prospective employees who were women.

> 'BFOQ [is] limited to those instances where the generic sexual characteristics of the employee - as distinguished from characteristics which correlate with a particular sex - were crucial to the performance of the job. Where there was simply a high degree of correlation between a particular sex and the ability to perform a particular job, there had to be an individual evaluation of the employee's ability to perform.'

This has been characterised as the 'narrow view' of the BFOQ defence[42]; it requires a very high standard of justification. The broader view is found in the case of *Weeks v Southern Bell Telephone Co*[43], where it was, in fact, again held that BFOQ could not apply in a situation where the employer prevented women from holding jobs which required the lifting of weights over thirty pounds. However, the *Weeks* ruling would have permitted a finding of BFOQ where 'all or substantially all women would not be able to perform safely the duties of the job involved'. This application of BFOQ,

> '... would appear to permit some utilization of the BFOQ defence short of direct proof disqualifying 100% of a given sex. But even this use of BFOQ may be illusory since the 'all or substantially all' test is qualified by footnote 5 [p 235] indicating that where it is possible to evaluate individual capacities to perform the job in question, then the employer must do so, and cannot exclude women as a class.'[44]

The 'all or substantially all' *standard, coupled with the requirement to* individuate if possible, is also a fairly high standard of justification. The two interpretations of the standard of justification required by the BFOQ defence seem to share the common thread that it is the inability of *a particular sex* to carry out a particular job which justifies their exclusion.[45]

2.1.2.2 Testing or seniority

The other two principal statutory defences[46], available to employers to justify disparate treatment, are found in section 703(h), which reads as follows:

> '[I]t shall not be an unlawful employment practice for an employer to apply different ... terms, conditions or privileges of employment pursuant to a bona fide seniority or merit system ... nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed test, provided that such test ... is not designed, intended or used to discriminate because of race, colour, religion, sex or national origin.'

The standard of justification here is limited to whether the testing or seniority system is 'bona fide', that is, operated without discriminatory intent, and applied in a non-gender specific way.[47]

2.1.2.3 'Legitimate non-discriminatory reasons'

Different treatment of an employee or employees in a protected category is justified if the employer shows 'legitimate non-discriminatory reasons' for the difference[48]. The plaintiff will not succeed, unless the plaintiff can prove that the justification advanced is merely a pretext for the discriminatory motive of the employer. This justification is not provided for in Title VII, but has developed as a result of judicial interpretation of its provisions. Legitimate non-discriminatory reasons for failure to hire an individual would include 'comparison of relative qualifications, past experience, seniority, performance on an objective ability test, past work record and letters of recommendation'[49]. Reasons for laying off or discharging an individual include 'breach of work rules, insubordination, absenteeism, poor work performance or lack of work'[50].

The reason put forward need only be related to a *bona fide*, legitimate interest of the employer. The requirement need not be related directly to performance of the tasks of the job. The standard for justification is therefore less stringent than that for justification in the case of a BFOQ. In *McDonnell Douglas*[51] the employee concerned had taken part in an illegal 'stall in' at the premises of the employer. The Court of Appeals

held that the refusal of the employer to rehire the plaintiff was 'subjective' and not related to performance of the job. The Supreme Court disagreed, holding that,

> 'Nothing in Title VII compels an employer to absolve and rehire one who has engaged in such deliberate, unlawful activity against it'.

Where the skills required for the job are minimal, or where they can be objectively tested, the courts do not accept subjective evaluations, such as 'employee potential', as bona fide[52]. But where the skills required for a job are such that the suitability of candidates is a matter for subjective evaluation, the courts allow more latitude. For example, in *Powell v Syracuse University*[53], tenure was held to be lawfully denied to a professor whose teaching performance was given a poor evaluation by peers.

The fact that the employer could have used an alternative, less discriminatory technique for employee selection does not *prima facie* render a legitimate non-discriminatory business reason illegitimate.[54] Neither are legitimate, non-discriminatory reasons balanced against their discriminatory effect on the plaintiff or others in the class of which the plaintiff is a member, in order to evaluate their legitimacy.[55]

Purported 'legitimate, non-discriminatory reasons' will be rejected if the plaintiff shows that they are merely a disguise, or 'pretext', for a discriminatory motive. A common means of proving pretext is to show that the criteria concerned were not applied in the same way to all applicants in the case of hiring or all employees in the case of discharge. It is irrelevant how legitimate the action of the employer was, if it is not applied uniformly to all employees concerned. *Corley v Jackson Police Dept* concerned the dismissal of black police officers who had accepted bribes; a legitimate reason indeed for dismissal. However it was shown that white officers also named by the same informant had not been investigated as carefully as the black officers, and as a result, were not discharged. Pretext was established.

> 'When evidence of pretext is presented the court must then examine all of the evidence and the competing inferences to make the

> determination of whether the action was motivated by improper class-based animus or was based on the legitimate reasons presented. This finding is one of fact and will be subject to review under the 'clearly erroneous' standard.'[56]

2.1.3 Pregnancy Discrimination Act 1978

The Pregnancy Discrimination Act 1978 adds section 701(k) to Title VII. The provision reads as follows:

> 'The terms 'because of sex' or 'on the basis of sex' include ... because of or on the basis of pregnancy, childbirth or other related medical conditions; and women affected by pregnancy, childbirth or related medical conditions shall be treated the same for all employment-related purposes ... as other persons not so affected but similar in their ability or inability to work ...'

Before the Pregnancy Discrimination Act came into existence, the Supreme Court had distinguished 'discrimination on the grounds of pregnancy' from 'sex discrimination'. In a constitutional context, *Geduldig v Aiello*[57] established that pregnancy was not, of itself, a sex-based classification. Rather, pregnancy was viewed as an,

> '... objectively identifiable physical condition with unique characteristics ... There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not.'

The Supreme Court followed this reasoning in *General Electric Co v Gilbert*[58] where the Court held that protection against all disabilities except pregnancy in a health insurance plan provided by the employer (a 'fringe benefit') was not sex based discrimination. The majority judgment characterised such insurance plans as dividing potential beneficiaries into pregnant and non-pregnant persons. The plan gave the same benefits to pregnant persons as it gave to persons who were not pregnant; therefore it did not discriminate against the former group.

The Pregnancy Discrimination Act had the effect of reversing the decision in *Gilbert*. Section 701(k) defines sex to include pregnancy and childbirth. Disabilities affecting the ability to work arising out of the pregnancy of an employee are to be treated the same as other similar disabilities. Therefore, discharging women who become pregnant because

of the pregnancy, where a 'similarly situated' man would not have been discharged, is a form of sex discrimination, subject to the provisions of Title VII.

The Pregnancy Discrimination Act specifically states that if employers provide medical or disability insurance schemes for their employees, these schemes must treat pregnancy and childbirth in the same way as other similar disabilities.

The effect of the Pregnancy Discrimination Act is to equate discrimination on grounds of pregnancy with discrimination on grounds of sex. This means that the normal standards for justification of discrimination against pregnant women, as discussed above, will apply in pregnancy discrimination cases.[59]

2.1.4 Constitutional Provisions concerning Equal Treatment in Employment

The equal treatment of women was not included in the Constitution of the United States. The Fourteenth Amendment to the Constitution, including the 'Equal Protection' clause, was not originally intended to apply to women. It was generally believed that the Equal Protection clause had little or no application other than to racial discrimination[60].

A particular problem for women seeking to claim equality in the sphere of employment in the early part of the twentieth century was the existence of state protective legislation, prohibiting women from working in certain trades, at certain times or for longer than certain periods of time per day or per week. Although the Supreme Court, in *Lochner v New York*[61], struck down a New York regulation prohibiting bakeries from permitting employees to work for more than ten hours a day or sixty hours a week, on the grounds that the restriction was unnecessary, unreasonable and arbitrary interference with the freedom of contract, and was thus a violation of the Fifth and Fourteenth Amendments, a similar regulation prohibiting the employment of women in mechanical establishments, factories and laundries for more than ten hours per day escaped such treatment. In *Muller v Oregon*[62], the Supreme Court held

that the differential treatment of women in the area of employment by state legislation was justifiable and constitutionally sound. The opinion of the Court focused on the 'obvious' differences between women and men.

> 'That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity, continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and, as healthy mothers are essential to vigorous offspring, the physical well-being of the mother becomes an object of public interest and care in order to preserve the strength and vigour of the race.'

Such sex-based classifications by legislative and other governmental regulations were regularly upheld by the courts until the 1960s[63], using reasoning similar to that in *Muller*, on the grounds that women's physical differences from men are obvious, and justify all sorts of different treatment, and also on the grounds that the societal roles of women differ from men[64]. This type of reasoning is no longer acceptable.

As noted above[65], claims that a state measure breaches the Equal Treatment clause can be sucessful before the courts if the measure denies equal protection of the law (provided for by the Fifth and Fourteenth Amendments) to a category of persons in a way which is arbitrary and has no legitimate purpose.

Application of the Equal Protection Clause depends on labelling of an official classification, for the purpose of differentiation between different people or groups, as 'suspect' or 'non-suspect'. Most classifications used by legislatures are not challengeable as unconstitutional, unless they fail the 'rational relationship test'. In order to meet this test, the challenged classification must merely meet the standard of bearing a possible or conceivable relationship to a legitimate, valid legislative goal. These are the 'non-suspect' classifications. 'Suspect' classifications (which include race, religion and national origin) cover those classifications which isolate for special or different treatment persons belonging to groups which have been historically disadvantaged[66].

> 'The practical result of labelling a class 'suspect' is that, any time a law is passed that discriminates in its language or has a discriminatory effect on a suspect class of persons, the state must not simply show that the law is rational, but instead it must prove that the law serves a compelling governmental interest and that no non-discriminatory law could accomplish the same purpose'.[67]

The standard of jutification for 'suspect' classifications is high.

The 'suspect' label was never applied to sex discrimination by the majority of the Supreme Court[68]. Instead, by way of compromise, the Court settled for an 'intermediate' classification for sexually discriminatory state action. This special standard, which only applies to sex discrimination, requires the government to demonstrate that sex classifications have a 'fair and substantial relationship to the object of the legislation'[69]. This standard requires a demonstration of the relationship between the rule and its purpose.

The 'intermediate' classification was used to challenge successfully a broad statutory prohibition of women from working on vessels in the U.S. Navy, in *Owens v Brown*[70]. It was held that the provision was too broad to serve the state purpose. However, it is clear that the intermediate standard does not require a justification for discriminatory state action as strict as that required if the classification is 'suspect'. Given the existence of a generally acceptable purpose for the legislation, measures of state action which discriminate on rounds of sex are unlikely to be found unconstitutional.

In fact, most exclusions of members of one sex relating to employment (such as prohibiting women from being prison guards in male prisons) will be covered by the provisions of Title VII. Section 717 prohibits discrimination by the federal government based on, *inter alia*, sex, including discrimination in employment, although the section provides different procedures for enforcement from those in the rest of the Act. State and local governments are included in the definition of 'employer' and are subject to the general provisions of Title VII. The provisions of the Constitution relating to equal treatment of women in employment are thus not central to the discussion in this chapter.

2.2 Adverse or disparate impact

Discrimination by adverse impact (or disparate impact; either term is acceptable) occurs when a criterion, neutral on its face, is applied such that a significantly lower proportion of those in the group discriminated against (for example, members of a particular racial group or women) can comply, the criterion is not otherwise justified, and the purpose for which the criterion is applied could not be achieved in a less discriminatory way. The concept of adverse impact is analogous to the concept of indirect discrimination in EC law. The three steps required to show adverse impact were established by the Supreme Court in two decisions (*Griggs v Duke Power Co*[71] and *Albemarle Paper Co v Moody*[72]) which are discussed below.[73]

2.2.1 Equal Pay Act 1963

The Equal Pay Act contains four defences which justify pay differences: these are (i) seniority; (ii) merit; (iii) quantity or quality of production; or (iv) a differential based on any other factor other than sex. The three specific exemptions are examples of 'factors other than sex'. In establishing justification by one of these defences, the onus is on the employer to prove that one of the defences applies, and moreover that the discrimination was motivated by a factor other than sex. Thus a seniority, merit or production evaluation system must be applied in a non-gender specific way[74].

Although not concerned with sex discrimination, the case of *International Brotherhood of Teamsters v U.S.*[75] sets out the standard by which seniority systems (and by inference, other provisions of adverse impact) will be judged as to whether they are bona fide, and therefore justifiable. The seniority system must not operate with discriminatory intent, and must be applied equally to all employees[76].

Judicial attitudes to defences advanced as 'other factors other than sex' justifying pay differentials are fairly clear. Defences focusing around the 'willingness of women to work for a lower wage' and those based on

stereotypical views of women as a class are rejected. To allow these as justification for unequal pay of women and men would completely undermine the purpose of the Equal Pay Act[77].

2.2.2 Civil Rights Act 1964, Title VII

The leading case of *Griggs v Duke Power Co*[78] established that Title VII 'proscribes not only overt discrimination, but also practices that are fair in form but discriminatory in operation'[79]. *Griggs* concerned black workers who were excluded from employment with a power company on the grounds that they did not possess high school diplomas or that they did not score a pass rate on two professionally recognised intelligence tests. The workers complained that there had been a breach of the provisions of Title VII. The Supreme Court reasoned that Title VII was directed against 'the consequences of employment practices, not simply motivation'[80]. The use of the criteria by the employer had a disproportionate impact on black applicants, as 34% of white males, as against 12% of black males, in the state, had completed high school education. Given this disproportionate impact on a group protected by the legislation, the Supreme Court held that,

> 'Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question ... The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.[81]'

The defendant in *Griggs* claimed that the tests used were lawful under the express provision of Title VII (section 703(h)) that,

> 'it shall not be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate ...'.

On examining the legislative history of this provision, the Court held that the provision meant that scored tests were subject to the requirement of job relatedness[82]. 'Any tests must measure the person for the job, and not the person in the abstract.'[83]

The *Griggs* test was applied in the case of *Albemarle Paper Co v Moody*[84] where the Supreme Court, referring to *McDonnell Douglas Corp v Green*[85], added the third step to the test.

> 'If an employer does then meet the burden of proving that its tests are 'job-related', it remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship'. (footnote omitted) Such a showing would be evidence that the employer was using its tests merely as a 'pretext' for discrimination.'[86]

Thus the burden of proof in an adverse impact case is initially on the employee who alleges discrimination, then transfers to the employer to show justification, and finally may transfer back to the employee to show that the justification is mere 'pretext'. These three steps for establishing discrimination by adverse impact are now discussed in detail.

2.2.2.1 Adverse effect on those in the protected group

To establish adverse impact, it must first be shown that the disadvantageous effect of the provisions or requirements imposed by the employer is greater on the protected group than on the group used for comparison. In the case of sex discrimination, the provisions or requirements will usually be more difficult for women to meet than for men. The Supreme Court has given no definite arithmetical rule as to what constitutes a sufficiently adverse impact, rather the Court refers to a 'significantly different'[87] selection rate or a 'substantially disproportionate'[88] disqualification rate.

The Uniform Guidelines on Employee Selection Procedures[89] propose a rule that a procedure which produces a rate of selection for a protected group which is less than 80% of the rate for the group with the highest rate of selection will be regarded as having an adverse impact[90]. This is known as the 'four-fifths rule'.

The Uniform Guidelines were adopted in 1978 by the Equal Employment Opportunity Commission (EEOC), the Civil Service Commission, the Department of Labor and the Department of Justice. They are a

consolidation of previous guidelines. They provide a 'framework for determining the proper use of tests and other selection procedures'[91] to assist employers in complying with the law on discrimination in employment. Courts differ as to the weight to be accorded to the Uniform Guidelines. The Guidelines do not have the force of legislation: however, in both *Griggs* and *Albemarle* the Supreme Court treated them with 'great deference'. The Circuit Courts differ in their attitudes; for example the 8th Circuit regards adherence to the Uniform Guidelines as 'mandatory', whereas the 5th Circuit regards this as 'directory only', but 'should be followed absent showing that some cogent reason exists for non-compliance'[92].

Further to the question of the proportion required to trigger the adverse impact of a particular hiring or firing policy, is the problem of which group is to be used for comparison. Is the group for comparison those who apply for the job, those in the population, those in the applicant pool, or those in the population pool? The results may differ widely, depending on which group is used. The Uniform Guidelines, with reference to 'a selection rate', suggest the first option; the selection rate is determined by comparing the percentage of successful applicants in the non-minority group to the percentage of successful applicants in the minority group. As the courts defer, in general, to the Uniform Guidelines, this is the pool most often used.

In a few cases, a different pool is used. The comparison has also been made between the percentage of those in the minority group hired and the percentage of the minority group in the population of the area. If 25% of the people hired by the employer are black and the population of the area is 26% black, this tends to indicate no adverse impact[93]. The Supreme Court accepted this approach in *Hazelwood School Dist v U.S.*[94].

In *Griggs*, the Court accepted an argument based on the potential applicant pool. The requirement for high school education could be met by 34% of whites in the area, contrasted with 12% of blacks. The height and weight requirements for prison guards in *Dothard v Rawlinson*[95] were tested on the basis of national statistics as to the comparative

height and weight of women and men. It was found that the standards set would exclude over 40% of women but only 1% of men, and that therefore a *prima facie* case of discrimination was established.

Use of the population pool for comparison compares the percentage of the company employees who are in the minority group with the percentage of the minority group in the population (either local population or general population may be used for comparison). section 703(j) of Title VII states that,

> 'Nothing contained in this Title shall be interpreted to require any employer ... to grant preferential treatment to any individual or group ... on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex or national origin employed by any employer ... in comparison with the total number of persons of such race, color, religion, sex or national origin in any ... area.'

This means that a mere disparity in the proportion of minority employees as compared to the population as a whole is insufficient evidence to establish a breach of Title VII[96]. However, as *International Brotherhood of Teamsters v U.S*[97] establishes, such a disparity, in conjunction with evidence of individual acts of discrimination, indicates a *prima facie* showing of a 'pattern or practice' of discrimination.

The sample used to show adverse impact must be 'statistically significant', that is, taken from a group large enough to show the adverse impact[98].

There is dispute over whether the hiring or promotion procedure as a whole must not have an adverse impact, or whether each part of the procedure must pass the adverse impact test.

> 'Thus, an employer who had a two-step procedure under which a disproportionate number of minorities were screened out by step one, but the discrepancy was wiped out by step two, could argue that, at the end of the selection procedure, there was no discriminatory impact, an argument often referred to as the bottom line approach.'[99]

The Uniform Guidelines do not address the question of whether the reasoning behind the bottom line approach is correct. However, the

Guidelines indicate that if the total selection process for a job does not have an adverse impact, individual components having such an impact need not 'in usual circumstances' be specially validated[100]. *Connecticut v Teal*[101] concerned a test selection process with many components, the first of which was a pass/fail barrier with adverse impact. The Supreme Court rejected the bottom line approach in these circumstances. There are Court of Appeals decisions supporting both views[102].

2.2.2.2 Business necessity

Once the plaintiff has established, in one way or another, the adverse impact of the policy of the employer concerned, the burden shifts to the defendant employer to show that this policy is justified. The nature and standard of proof required to establish such justification is uncertain.

Griggs, although it established the standard as 'business necessity', actually did little to define it.

> 'The touchstone is *business necessity*. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited... Congress has placed on the employer the burden of showing that any given requirement must have a *manifest relationship* to the employment in question.'[103]

The Courts of Appeal (Circuit Courts) applied the *Griggs* standard in such a way as to emphasise the 'necessity' aspect of the standard. According to the Court of Appeal in *Robinson v Lorillard Corp*[104], there are three aspects to business necessity:

> 'The business purpose must be sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose ...; and there must be available no acceptable alternative policies or practices which would better accomplish the business purposes advanced...'

On this analysis, all these aspects of business necessity, including the lack of availability of less discriminatory alternatives, are part of the employer's burden of proof. The cumulative effect of these requirements is the imposition of a strict standard for justification on the employer.

However, this postion is in contrast to more recent developments of the standard.

The *Griggs* standard has been placed in doubt by the more recent decisions of the Supreme Court in *Watson v Fort Worth Bank and Trust*[105] and *Wards Cove Packing v Atonio*[106]. These decisions warrant a more detailed examination.

The plaintiff in *Watson* was a female black bank teller who was passed over four times for promotion to a supervisory position. A white male was successful in each case. The bank had no formal system or criteria for evaluating candidates for supervisory posts, but instead relied on the subjective judgement of supervisors who were acquainted with the candidates and with the nature of the jobs to be filled. All the supervisors involved in denying Ms Watson promotion were white.

At the Court of Appeal level, Ms Watson argued that the District Court, in its ruling on her case, had erred in failing to apply a disparate impact analysis. Previous Supreme Court decisions, subsequent to *Griggs*, in common with that decision, had all involved standardized employment tests or criteria[107]. There was a divergence among the various Circuits as to whether a disparate impact analysis could properly be applied to a hiring or promotion system which involved the use of 'discretionary' or 'subjective' criteria. The Supreme Court granted *certiorari* in order to resolve the conflict.

The Supreme Court accepted that *Griggs* could apply to subjective tests.

> 'We are persuaded that our decisions in *Griggs* and succeeding cases could largely be nullified if disparate impact analysis were applied only to standardized selection practices. However one might distinguish 'subjective' from 'objective' criteria, it is apparent that selection systems that combine both types would generally have to be considered subjective in nature. Thus, for example, if the employer in *Griggs* had consistently preferred applicants who had a high school diploma and who passed the company's general aptitude test, its selection system could nonetheless have been considered 'subjective' if it also included brief interviews with the candidates. So long as an employer refrained from making standardized criteria absolutely determinative, it would remain free to give such tests almost as much weight as it chose without

> risking a disparate impact challenge. If we announced a rule that allowed employers so easily to insulate themselves from liability under *Griggs*, disparate impact analysis might effectively be abolished.'[108]

The Supreme Court then turned to the evidentiary standards of justification to be applied in adverse impact cases. Ms Watson contended that once adverse impact was established, the defendant should only be able to rebut this showing by justifying the challenged practice in terms of 'business necessity'[109] or 'job relatedness'[110]. The bank warned that subjective criteria could not, in practice, be 'validated' in the same way as objective tests, to show whether they give an accurate prediction of how a candidate will perform on the job. To apply the disparate impact analysis of *Griggs* to subjective hiring or promotion decisions would be tantamount to imposing quotas, as employers would find it expensive and difficult to validate such decisions in litigation, therefore would adopt quota systems to ensure that no employee could establish a *prima facie* case. Such a result would be in violation of both Title VII, which prohibits preferential treatment on the forbidden grounds[111], and the Constitution[112].

The Supreme Court took this reasoning seriously and proceeded to show why disparate impact theory need not necessarily result in the use of quotas and preferential treatment. First the court explained that 'the plaintiff's burden in establishing a *prima facie* case goes beyond the need to show that there are statistical disparities in the employer's workforce'. Second, the court examined the nature of the business necessity or job relatedness defence.

> 'Although we have said that an employer has 'the burden of showing that any given requirement must have a manifest relationship to the employment in question', *Griggs*, *401 U.S., at 432*, such a formulation should not be interpreted as implying that the ultimate burden of proof can be shifted to the defendant. On the contrary, the ultimate burden of proving that discrimination against a protected group has been caused by a specific employment practice remains with the plaintiff at all times. Thus, when a plaintiff has made out a *prima facie* case of disparate impact, and when the defendant has met its burden of producing evidence that its employment practices are based on legitimate business reasons, the plaintiff must 'show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the

> employer's legitimate interest in effective and trustworthy workmanship.' *Ablemarle Paper Co*, 422 U.S., at 425. Factors such as the cost or other burdens of proposed alternative selection devices are relevant in determining whether they would be equally as effective as the challenged practice in serving the employer's legitimate business goals.'[113]

In fact, this demonstrates that the court used a version of disparate treatment theory, requiring the plaintiff to show other non-discriminatory tests or selection devices available to the employer - in short, more or less to establish pretext. In other words, the extension of adverse impact analysis to situations where the 'subjective' selection criteria, in contrast to the 'objective' selection criteria of a high school diploma and intelligence test of *Griggs*, was acheived at the cost of the addition to adverse impact analysis of the 'pretext' part of 'business necessity'. This part of the employer's burden of proof was shifted to the employee. If the employee does bring forward evidence of less discriminatory alternatives, the court may then balance the costs, or other burdens, of the proposed alternatives, in determining whether they would indeed by equally as effective in achieving the employer's aim.

The second case which puts to test the currency of the *Griggs* standards for justification in adverse impact analysis is *Wards Cove Packing v Atonio*, which concerns a class action brought by employees at two salmon canneries in Alaska. Jobs at the canneries fell into two general types, 'cannery jobs', on the cannery line and regarded as non-skilled, and 'non-cannery jobs', a variety of positions, generally regarded as skilled. Non-cannery positions were remunerated at a higher rate than cannery positions. The cannery jobs were filled predominantly by non-whites, Filipinos and Alaskan Natives; the non-cannery jobs were filled with predominantly white workers, who were recruited from the companies' offices in Washington and Oregon. The plaintiffs in the original action complained that a variety of the employers' promotion or hiring practices, or both, were responsible for the racial division of the categories of employees. The practices of the employers challenged included a lack of objective hiring criteria, separate hiring channels, and a practice of not promoting from within the company. The plaintiffs advanced both disparate treatment and disparate impact claims.

The Court of Appeals agreed to hear the case *en banc*[114], with reference to the question of whether subjective hiring practices could be subject to the *Griggs* model of adverse impact discrimination. This question was answered in the affirmative[115].

The Supreme Court granted *certiorari*, as some of the issues were those on which the members of the Court were divided in *Watson v Fort Worth*, in order to address those disputed questions relating to the proper application of the disparate impact theory[116].

On the issue of justification for hiring and promotion practices with a *prima facie* disparate impact, the Court ruled as follows:

> 'Though we have phrased the query differently in different cases, it is generally well-established that at the justification stage of such a disparate impact case, the dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer (footnotes omitted). The touchstone of this inquiry is a reasoned review of the employer's justification for his use of the challenged practice. A mere insubstantial justification in this regard will not suffice, because such a low standard of review would permit discrimination to be practised through the use of spurious, seemingly neutral employment practices. At the same time, though, there is no requirement that the challenged practice be 'essential' or 'indispensable' to the employer for it to pass muster: this degree of scrutiny would be almost impossible for most employers to meet, and would result in a host of evils ...'[117]

Acknowledging that some earlier decisions of the Supreme Court suggest otherwise, the Court in *Wards Cove* reiterated its ruling in *Watson* that the burden on the employer in justifying a practice (whether concerning application of 'objective' or 'subjective' criteria), which is discriminatory in effect, is one of production, not of persuasion[118]. Whereas originally the employer had the final burden of proof in adverse impact analysis, now in both disparate treatment and adverse impact analysis, it seems the employee has the final burden.

The standard of justification, while not being so low as to allow any purported justification to be acceptable, is based on 'a reasoned review' of the employer's justification. The standard is not so high that the

requirement with adverse impact must be essential or indispensible to the employer.

2.2.2.3 Pretext

As explained above, discrimination by adverse impact occurs when a criterion, neutral on its face, is applied such that a significantly lower proportion of those in the group discriminated against can comply. The employer may rebut this inference by establishing justification, with a showing of necessity, for the criterion with adverse impact. However, even if the employer is successful in so doing, the plaintiff may still prevail by showing that the rule has been applied in a discriminatory way, and in fact is 'pretext' for the discrimination. One way to indicate this is to show that the purpose for which the criterion was applied could have been achieved in a less discriminatory way[119]. Because the establishment of 'pretext' is deemed to indicate the employer's intention, at this stage, the discriminatory motive or intent of the employer becomes relevant. The confusion of disparate treatment and disparate analysis in some judgments owes much to the relationship of pretext to both types of analysis.

What may be considered as evidence at this stage was indicated by the Court of Appeal in *Chrisner v Complete Auto Transit Co Inc*[120] to include,

> 'any subsequent practices adopted by the company ... The hiring practices of comparable business might also shed some light on what constitutes a feasible alternative. Of course, the marginal cost of another hiring policy and its implications for public safety are factors which should not be omitted from consideration.'[121]

2.2.2.4 Bona Fide Occupational Qualification

It should be noted that the BFOQ defence may also apply as a defence in adverse impact claims. The same standards of justification as for justification of disparate treatment apply.

3 Substantive Grounds of Justification for unequal treatment

In the federal law of the US, certain substantive grounds of justification are available to defend the unequal treatment of women and men in employment. Various of these grounds are now discussed in some detail. Circumstances in which disparate treatment of women and men is justified are examined first: this is followed by a discussion of various situations in which adverse impact discrimination is justified. However, as it is usual for both disparate treatment and adverse impact analysis to be applied alongside one another in Title VII claims, absolute separation of the types of justification is an unrealistic task if the case law is to be examined. Moreover, a conceptual confusion between justification for legitimate business reasons (disparate treatment analysis), and justification by business necessity (adverse impact analysis), compounded by the relationship of 'pretext' to both concepts, is evident from some court decisions. Analysis of the BFOQ exception is also informed by those concepts[122].

3.1 Disparate treatment

3.1.1 Exclusion of activities from the equal treatment principle

Certain activities are excluded from the principle of equal treatment of women and men in employment, on various grounds.

3.1.1.1 Religious organisations

Although religious and educational organisations are within the definition of employers in section 701, by an amendment of 1972, section 702 and section 703 (d)(2) allow religious organisations to discriminate in their hiring policy on the basis of religion. Religious organisations and educational establishments owned, supported, controlled or managed by a particular religious organisation, where the curriculum is directed towards the propagation of a particular religion, may hire and employ employees of that religion. This exemption does not however reach discrimination on other bases, including sex.

In spite of this provision in Title VII, the Constitutional guarantee of 'free exercise' of religion, provided for in the First Amendment, has been relied on, as a ground of justification for discrimination, to preclude interference with all matters concerning the appointment or ordination and pay of ministers of religion.[123] Thus, religious organisations may continue to discriminate against women in denying them the opportunity, open to men with a vocation, of becoming ministers or priests.

3.1.1.2 Employment of women in the Armed Forces

The application of Title VII to the uniformed military has caused some controversy[124]. The District Court in *Hill v Berkman*[125] decided that Title VII did apply to the 'uniformed services', but then proceeded to hold that the Army had a BFOQ defence to the discrimination claimed. The plaintiff had joined the army to become a 'Nuclear Biologist and Chemical Scientist', a job that was subsequently reclassified to a 'combat support role', resulting in her exclusion from the post. The Court concluded that the military,

> 'may exclude women from combat and combat support positions, because being male is a bona fide occupational qualification for a job that is by federal law and present national policy restricted to men'[126].

3.1.1.3 Privacy

If the duties of a job entail invasion into the privacy of a third party, for example in the instance of strip searchers, nurses, or toilet attendants, it may be a BFOQ that the employee is the same sex as the person whose privacy may be invaded. In *Carey v New York State Human Rights App. Bd.*[127], it was held that the intimate care being provided to patients by nurses meant that sex could be a BFOQ for the performance of those duties.

3.1.1.4 Security

If the threat to security is sufficiently severe, such as in the case of employment of prison officers in an all-male peneteniary, then it may be a BFOQ to employ a man to perform the job. This was held to be the case in *Dothard v Rawlinson*[128]. Stressing that the case in point concerned an unusual factual situation, the court held, that, in general, the exclusion of women from a particular job because the job is deemed to be dangerous, is not justifiable. It is for the individual woman to decide whether she wishes to accept the risk, and take on the job. *Dothard*[129] was different, however, because the threat to security in a male, maximum-security, unclassified penitentiary, if a woman were to be employed in the job of 'correctional counsellor', was significant.

The Court held that it was 'the employee's very womanhood' that would 'directly undermine her capacity to provide the security that is the essence of a correctional counselor's responsibility.'[130]

In subsequent cases concerned with law enforcement and public safety, *Dothard* has been construed narrowly. In particular, courts have been unwilling to extend the ruling in *Dothard* to prisons of other types or to exclude women from all jobs as prison guards. For example, in *Gunther v Iowa State Men's Reformatory*[131], the District Court did not apply *Dothard* in the case of a medium security prison, holding that,

> 'The Supreme Court painstakingly limited its decision in upholding the male BFOQ in the Alabama penitentiaries to that 'particularly inhospitable' environment. Anamosa [the prison concerned] is no rose garden; neither is it the stygian spectre which faced the Supreme Court in *Dothard*.'[132]

The Court of Appeal agreed with this analysis, explaining that, in the balancing test between equal treatment for women and public safety, in a normal prison situation, the balance favours equal treatment and evaluation of individual capabilities.[133] The ground of public security is available only in narrow situations.

3.1.2 Pregnancy and maternity

As we have already noted, after woman plaintiffs had been unsuccessful in countering sex plus arguments in cases where the discrimination was on grounds of pregnancy, the Pregnancy Discrimination Act 1978 came into effect. This Act operates to include discrimination on grounds of 'pregnancy, childbirth or other related medical conditions' in the terms 'because of sex' or 'on the basis of sex' of Title VII. The relevant provision reads,

> '... [W]omen affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes ... as other persons not so affected but similar in their ability or inability to work ...'

Discrimination on ground of pregnancy is to be treated as the equivalent of direct discrimination on ground of sex. Nevertheless, there are situations in which such discrimination is justified. The purported justification may not be the pregnancy itself; it must be another reason. Treatment of a pregnant woman employee in a disadvantageous manner may be justified if there exist grounds for similar treatment of a 'similarly situated' man. For example, to treat unfavourably a woman who could not carry out the duties of her employment due to pregnancy-related absence from the workplace would not be unlawful, if a man who suffered an illness-related absence from work would be treated in the same way.

Chambers v Omaha Girls Club[134] saw application of justifiable discrimination against a pregnant woman on moral grounds. It was held that the club's rule of excluding from employment single women who became pregnant and men who caused pregnancy outside marriage did not violate Title VII. Under disparate treatment analysis, the court held that the employer had established a legitimate non-discriminatory reason for the rule; the club had as a specific aim the provision of role models to discourage teenagers from becoming pregnant.

> 'Under the disparate impact theory the court said that the defendants could rely on either business necessity or a BFOQ to rebut the plaintiff's case, and that the burden was essentially the

> same under either defence: either to demonstrate "a close *nexus* between the policy ... and 'a substantial end goal' of the employer" or to show that the BFOQ was "related and necessary to the operation of the defendant's business" [at 949 - 50]. Here, because the purpose of the Club was to foster growth and maturity in young girls by exposing them to "the greatest number of available positive options in life", and because the policy was based on the belief "that teenage pregnancies severely limit the available opportunties for teenage girls," the court concluded that "a manifest relationship exists between the Girls Club's fundamental purpose and its single pregnancy policy." [at 950] Because the finding of business necessity was dispositive of the case, the court observed that it was "not necessary to determine whether the evidence would satisfy a bona fide occupational qualification, although presumably it would." [at 951, n 51]'[135]

It was essential to the defence that the rules of the club applied equally to women (who became pregnant) and men (who caused pregnancy).

Positive discrimination on grounds of pregnancy may be justifiable in US law. Section 701(k), which provides that sex discrimination is to include discrimination on the ground of pregnancy, operates to require employers to treat pregnant employees in the same way as other employees with a similar disability or condition, in the provision of health plans and paid leave. This 'special treatment' of women is justified.[136]

3.2 Justification for adverse impact

Justification for criteria, imposed by employers on employees, which have an adverse impact on women may also be established if the employer meets the 'business necessity' test of *Griggs*, or the revised standard put forward in the *Watson* and *Wards Cove* decisions. It is then open to the employee to show that the purported justification is 'pretext' for a discriminatory intent. Adverse impact in situations concerning the pay of employees may be justified by the specific defences provided by the Equal Pay Act 1963.

The Supreme Court did not indicate, in *Griggs, Watson,* or *Wards Cove, which* aims of employers would be regarded as an acceptable grounds for justification of adverse impact discrimination. In *Watson*, the Supreme Court suggested that employers should, in most cases, be given the

benefit of the doubt, that the ground for justification was acceptable: 'courts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress, they should not attempt it'[137].

The different types or grounds of justification for discrimination by adverse impact have, as in the previous chapters, been divided into those where the justification is related to the duties of the job concerned, those where it is a broader justification, relating to the enterprise as a whole, and those where the justification relates to a 'public interest'.

3.2.1 Job related justifications

3.2.1.1 Height and weight requirements

Absolute height or weight requirements applied in a hiring policy are certain to have an adverse impact on women, who, as a class, are shorter in height and weigh less than men. Minimum height requirements are subjected to fairly strict scrutiny by the courts: even where it is recognised that some standard is justifiable, the courts may attempt to ensure that the impact of its application excludes as few women as possible. In *Boyd v Orzak Airlines*[138], the court accepted that the constraints of cockpit design necessitated employment of pilots whose heights were within certain limits, but held that the height requirement should be lowered to comply with the equal treatment legislation.

> 'The cockpit can only accommodate a range of heights. Defendant has chosen to draw the line at 5'7'. The evidence established, however, that a requirement of 5'5' which would lessen the impact for women, would be sufficient to ensure the requisite mobility and vision. Accordingly, the Court will order defendant to lower its height requirements.'[139]

Some federal courts have regarded more favourably the imposition of minimum weight requirements, even where these have adverse impact on women. The reasoning behind this is that weight is more subject to individual control than height, therefore the requirements are more akin to personal appearance and grooming than physical qualifications.

> 'Defendant maintains weight standards for its female flight attendants which differ from the standards which defendant maintains for its male flight attendants. However, such a difference in weight standards does not constitute sex discrimination violative of Title VII, because how much one weighs: a) is an aspect of one's personal appearance that is generally subject to one's own control; and b) is not a fundamental aspect of life in the sense that, eg marriage, pregnancy and child-rearing are fundamental aspects of life.'[140]

Other courts reject this reasoning and do not regard the subjection of women and men to different weight requirements as justifiable. This was the case in *Gerdom v Continental Airlines*[141] where the employer enforced a policy requiring employees classified as 'flight hostess' (a position held only by women) to comply with strict weight requirements as a condition of their employment. No similar requirements were imposed for any job classifications which included men, even men working side by side with and carrying out the same tasks as the women concerned. The plaintiff's employment contract was terminated because her weight exceeded that specified in the employer's policy. She brought a claim under Title VII. The court held that the case could not fall within the area covered by the 'grooming' cases[142], and therefore outside the purview of Title VII, since in those cases different grooming standards (eg permitting long hair on women, but not on men) placed no greater burden on one sex than the other, which was not so in the present situation. On the contrary, in the present situation the weight requirements were not imposed on male employees, and therefore constituted a prima facie breach of Title VII. The employer argued that the policy was justified by its view that female hostesses were central to its business image. The court applied disparate treatment analysis and held that the employer would have to rebut the inference of discriminatory intent which arose from the different treatment of female employees, by raising a genuine issue of fact as to the existence of a legitimate non-discriminatory reason for the policy.

> 'In this case that would entail a showing that persons of either sex who exceed the weight limits imposed on these flight hostesses would be less able to perform their duties. Continental, however, has never attempted to assert such a justification. It concedes that the weight program did not improve the ability of attendants to perform their duties.'[143]

The purported justification that the weight requirements were motivated by Continental's desire to compete with other airlines by featuring attractive flight attendants was rejected. 'The difficulty with the justification is that it is not neutral.'[144] Sex discrimination cannot be upheld on the ground of customer preference unrelated to the ability to perform the job.[145]

The Supreme Court addressed the issue of height and weight requirements in *Dothard v Rawlinson*[146] in which an applicant for a post as a 'correctional counsellor' (prison guard) in a male prison was refused because she failed to meet the minimum weight requirement for such 'contact' positions (positions the duties of which involve close contact with inmates). The employer averred that this weight requirement, and a minimum height requirement, were job related, in that they had a relationship to strength, a 'sufficient but unspecified amount of which is essential to effective job performance'[147]. The Court held that this did not justify the policy, as the employer had provided no evidence showing a direct correlation between the height and weight requirements and the amount of strength necessary for effective performance of the duties of the job.

> 'If the job-related quality that the appellants identify is *bona fide*, their purpose could be achieved by adopting and validating a test for applicants that measures strength directly. Such a test, fairly administered, would fully satisfy the standards of Title VII because it would be one that 'measure[s] the person for the job and not the person in the abstract.' *Griggs v Duke Power Co.*, 401 US, at 436'[148]

3.2.1.2 Physical ability to perform the job

An employer may justify policies with an adverse impact against women if the job entails performance of a task which fewer women than men can carry out. The BFOQ defence has been interpreted in different ways in terms of ability to perform. *Rosenfeld v Southern Pacific Co*[149] focuses on sex specific abilities. Since the capacity to lift heavy weights was not a trait confined to members of one sex, the employer could not lawfully apply a blanket prohibition for all women who applied.

However, the 'all or substantially all' test of *Weeks v Southern Bell Telephone Co*[150] allows application of the BFOQ defence in a situation where 'all or substantially all women would be able to perform safely the duties of the job involved'. Here it was the policy of the employer to exclude women from jobs which required the lifting of weights over thirty pounds. Even with this broad construction of the BFOQ defence, a blanket exclusion may not be justifiable if it is reasonable to expect the employer to evaluate each potential employee's ability individually.

Ability to perform the job safely may be particularly applicable in the case of a pregnant employee. As provided in section 701(k), sex discrimination includes discrimination on the grounds of pregnancy: to dismiss an employee because she becomes pregnant is unlawful. However, where ability of a pregnant employee to perform the job is put into question, especially where the safety of others is concerned, the courts will allow use of the BFOQ defence, or business necessity, to justify this discrimination. Several courts have applied the BFOQ defence in the case of flight attendants, employees of airlines, who become pregnant, allowing the employer to require leave of absence at the start of the pregnancy. An example of such a decision is *Condit v United Airlines*[151], in which the court was particularly concerned by the ability of a pregnant flight attendant to carry out her duties in an emergency situation. Other courts, applying the same principles, have held that the inability to perform the job of a flight attendant arises at a later stage in the pregnancy[152].

Courts will uphold mandatory leave policies for pregnant employees as justifiable if the pregnancy seriously affects the employee's ability to perform the job, such that the safety of third parties might be at risk.

3.2.2 Enterprise related justifications

3.2.2.1 Grading and pay structures

As explained above[153], discriminatory pay differences may be challenged under either the Equal Pay Act or Title VII, or both. The Bennett Amendment of section 703(h), which provides that it shall not be unlawful under Title VII for any employer to differentiate upon the basis of sex in determining pay if such differentiation is authorized by the provisions of the Equal Pay Act, is relevant here.

The employer may justify pay differences using, as grounds for justification, one of the four statutory defences in the Equal Pay Act, (i) seniority; (ii) merit; (iii) quantity or quality of production; or (iv) a differential based on any other factor other than sex.

According to the provisions of section 703(h),

> 'It shall not be an unlawful employment practice for an employer to apply different standards of compensation ... pursuant to a bona fide seniority or merit system ... provided that such differences are not the result of intention to discriminate because of ... sex ...'

A seniority or merit system will operate to promote the effective running of the enterprise; its use is an 'enterprise related' justification.

Other employment practices pertaining to the effective running of the employer's enterprise may also be justified, in spite of adverse impact on women, if they are '*bona fide*'. For example, premiums paid to workers on particular shifts are justifiable, but not if women are denied the opportunity of working on the better paid shifts. In this case, the shift differential cannot be described as a 'factor other than sex', as it is, at least in part, not sex neutral[154]. Similarly, the payment of a 'red circle' rate to an employee assigned to a job which is normally paid at a lower rate than the employee's usual job, will not breach the provisions of the Equal Pay Act, even if employees of the other sex are employed on the same job and paid at the lower rate. But 'if the employer 'red circles' a discriminatory wage rate, the effect is to perpetuate prior equal pay

violations, and thus necessarily is based on the sex of the employee. As such it will not be a valid defence'[155]. This would apply if the wage rate which is red circled is already discriminatory, for example if a man moves from a higher paid job, from which women are excluded, to a job mostly done by women.

A more problematic 'factor other than sex' is the use of different profitability of products handled by employees as justification for different pay. This different pay is justified by the need of the enterprise as a whole to run efficiently. In *Hodgson v Robert Hall Clothes, Inc.*[156], a saleswoman in the women's department of a clothes shop claimed equal pay with the salesmen who worked in the men's department. Although the court found that the work carried out was 'equal' in terms of the Equal Pay Act, the Court allowed the pay differential on the grounds that the men's department was more profitable.

The pay differential was considered justifiable in spite of the fact that the women were given no opportunity to work in the men's department, therefore the application of the profitability system was to some degree sex based. Moreover, the court did not deal with the fact that 'profitability' was based on group statistics, and that some individual women may have made sales with greater profit than those made by some individual men.

3.2.2.2 Customer preference

Customer preference is not a ground of justification for sex discrimination; it is exactly this sort of attitude which Title VII aims to combat. In *Diaz v Pan American Airways*[157], the employer attempted to argue that being female was a *bona fide* occupational qualification for the job of flight cabin attendant. The finding of the trial court that Pan American's clients overwhelmingly preferred to be served by female flight attendants was held on appeal to be irrelevant. The employer also argued, with expert testimony, in its defence that 'an airplane cabin represents a unique environment in which an air carrier is required to

take account of the special psychological needs of its passengers. These psychological needs are better attended to by females.'[158] The Court of Appeals was not convinced:

> 'The primary function of an airline is to transport passengers safely from one point to another. While a pleasant environment, enhanced by the obvious cosmetic effect that female stewardesses provide as well as, according to the finding of the trial court, their apparent ability to perform the non-mechanical functions of the job in a more effective manner than most men, may all be important, they are tangential to the essence of the business involved.'[159]

Sex stereotyped preferences of customers or clients may not form a ground of justification.

3.2.3 Public benefit related justifications

3.2.3.1 Special social needs

It is not uncommon for employers to provide in their terms and conditions that certain benefits, including contributions to pension plans, are only given to employees who are 'head of the household'. The purpose of these plans is to provide benefit to the person in the household who was previously the main breadwinner (and is usually a man), so that the whole household does not suffer if that person retires or is made redundant.

The EEOC regards such provisions as a *prima facie* violation of Title VII as they tend to exclude women[160]. In *Wabheim v JC Penny and Co*[161], the court held that disparate impact analysis may be applied to such provisions, and that a *prima facie* case is made out. The court distinguished *City of Los Angeles, Dept of Water and Power v Manhart*[162], which concerned the different contributions payable by women and men respectively to an employer's pension plan, where it was held that as the pension programme did not treat the women concerned as individuals, but rather as members of a class, this was unjustified discrimination. Rather, the court ruled that, as the head of household rule was intended to benefit the largest number of employees and those with the greatest need, and to keep the costs to employees participating in the medical insurance

concerned low, there were therefore 'legitimate and over-riding justifications for the head of household rule'[163]. The special social needs of those who benefitted from the pension plan was a ground of justification.

4 Conclusion

In spite of the fact that the ground of sex was added to the Civil Rights Bill as an attempt to stall the progress of the Bill, Title VII has become the most significant piece of legislation concerning sex discrimination in the US. The whole employment relationship, including pay and conditions, is covered by the Act, from advertisement of vacant posts to provision of references to departing employees. The inclusion of pregnancy in the terms of the Act may, on balance, be considered to be at least in some way beneficial to employees, although many issues relating to pregnancy and employment are regulated at state, rather than federal level.

Justification for discrimination by disparate treatment of women and men is by statutory exceptions, in particular where sex is a *bona fide* occupational qualification, and also by judicial interpretation of the general measures, for example, if the employer meets the test of 'legitimate business reason'. The BFOQ defence will only be successful if the employer can show a *bona fide* reason, that is a reason which is, 'objective', in the sense of related to the job, and not 'subjective', in the sense of related to the employer's preferences, for the discrimination. Although the test for 'legitimate business reason' is potentially broader, the concept of pretext, whereby the employee may produce evidence which shows that the justification advanced by the employer hides a discriminatory motive, to a certain extent narrows the standard for justification in the employee's favour.

The development of adverse impact analysis in discrimination cases has aided plaintiffs seeking to challenge discriminatory practices, previously only challengeable if evidence of a discriminatory motive could be shown. This is a significant judicial development of the US federal law on sex discrimination. However, it seems that the standard by which employers

may justify a practice or policy with adverse impact, once narrowly drawn and focused on 'necessity', is now of a wider nature. For adverse impact cases, a reasonable justification, similar to the 'legitimate business reason' of disparate treatment analysis, is, it seems, becoming the accepted standard. The role of the concept of pretext is important in this respect, as it is in the establishment of pretext that the employee may ultimately succeed in the action. If evidence of alternative non-discriminatory action is recognised as evidence of pretext, then the broadening of the *Griggs* standard may not prove too disadvantageous for employees.

Substantive grounds for justification are provided by statute, and also by judicial interpretation of 'legitimate business reason' and 'adverse impact discrimination'. The widening of adverse impact analysis to apply to 'subjective' requirements or conditions which have the effect of discriminating against a protected class will, it is expected, entail a parallel widening of available grounds for justification. So long as it remains open to employees to show that the 'genuine needs' of employers are unjustified, by a showing of pretext, this need not represent an unwelcome development.

Notes on chapter 6

1. 110 Cong. Rec. 2577 (1964) (remarks of Rep. Smith), and 2581-82 (remarks of Rep. Green); see Hannah Furnish, 'Prenatal Exposure to Fetally Toxic Work Environments' 66 Iowa L. Rev. 63, p. 74 ftn. 54.

2. see below, chapter 6, section 2.1.4.

3. Henry J. Abrahams, *The Judicial Process* (New York and Oxford: Oxford University Press, 1986), p. 159.

4. eg Griggs v Duke Power Co. 401 US 424, 91 S Ct 849, 28 L Ed 2d 158 (1971) (Supreme Court), which saw the introduction of adverse impact discrimination, see below, chapter 6, section 2.2.2.

5. J. Woodford Howard, Jr, 'Courts of Appeal in the Federal Judicial System' Princeton N.J. (1981), p. 58; cited Abraham, p. 169, note 76.

6. It should be noted that the concept of 'disparate treatment' includes discrimination in pay as well as in treatment.

7. 411 US 792, 93 S Ct 1817, 36 L Ed 2d 668, (1973) (Supreme Court).

8. 552 F 2d 1277 (7th Cir 1977) (Court of Appeals).

9. 400 US 542, 91 S Ct 496, 27 L Ed 2d 613, (1971) (Supreme Court).

10. cited in Mack A. Player, *Federal Law of Employment Discrimination* (St. Paul, Minn., USA: West, 1981), p. 138.

11. 429 US 125; 97 S Ct 401; 50 L Ed 2d 343 (1976) (Supreme Court).

12. Gerald P. McGinley 'Sex Discrimination - A Comparative Study' 49 M.L.R. 413 (1986), p. 416.

13. see below, chapter 6, section 2.1.3.

14. 507 F 2d 1084 (5th Cir 1975) (Court of Appeals).

15. Player, p. 82.

16. 29 USCA, Section 206(d)(1).

17. Rachel Eisenberg Braun, 'Equal Opportunity and the Law in the United States', in Gunther Schmid and Renate Weitzel, eds, *Sex Discrimination and Equal Opportunity - The Labour Market and Employment Policy* (Aldershot: Gower, 1984), p. 92-106.

18. 421 F 2d 259 (3rd Cir 1970) (Court of Appeals).

19. 29 CFR 800.121., cited in Player, p. 90.

20. Player, p. 90.

21. 42 USCA, Section 2000e et seq ('Title VII'). In converting sections of the Act to the statutory citations, Section 701 is 42 USCA Section 2000e, Section 702 is 42 USCA Section 2000e-1, Section 703 is Section 2000e-2, etc.

22. defined in Title VII, Section 701(b).

23. defined in Title VII, Section 701(c).

24. defined in Title VII, Section 701(d) and (e).

25. Quijano v University Federal Credit Union 617 F 2d 129 (5th Cir 1980) (Court of Appeals).

26. Title VII, Sections 703 and 704(a).

27. Title VII, Section 703(a)(1).

28. Title VII, Section 703(a)(2).

29. Title VII, Section 703(b).

30. Title VII, Section 703(c)(1).

31. Title VII, Section 703(c)(2).

32. Title VII, Section 703(c)(3).

33. Title VII, Section 704(a).

34. Title VII, Section 704(b).

35. Christensen v State of Iowa 563 F 2d 353 (8th Cir 1977) (Court of Appeals); Lemons v City and County of Denver 620 F 2d 228 (10th Cir 1980) (Court of Appeals).

36. Player, p. 211.

37. 623 F 2d 1303 (9th Cir 1979) (Court of Appeals).

38. Wetzel v Liberty Mut. Ins. Co. 449 F Suoo 397 (W.D.Pa. 1978).

39. Knight v Nassau County Civil Service Commission 649 F 2d 157 (2nd Cir) (Court of Appeals); but see below, chapter 6, section 2.1.2.3, concerning the business necessity defence in cases of intentional racial discrimination.

40. H.R. Rep. No 914, 88th Cong, 1st Sess., p. 27.

41. 444 F 2d 1219 (9th Cir 1971) (Court of Appeals).

42. Barbara Lindeman Schlei and Paul Grossman, *Employment Discrimination Law* (New York: American Bar Association, 1983), p. 348.

43. 408 F 2d 228 (5th Cir 1969) (Court of Appeals).

44. Schlei and Grossman, p. 348.

45. See eg Dothard v Rawlinson 433 US 321, 97 S Ct 2720, 53 L Ed 2d 786 (1977) (Supreme Court): the very *femaleness* of the employees justified their exclusion from an all-male, maximum security prison.

46. There are a number of other minor defences scattered throughout Title VII, for example Section 702 which allows religious organisations to discriminate on grounds of religion in making initial employment decisions.

47. see below, chapter 6, section 2.2.1.

48. McDonnell Douglas Corp v Green, 411 US 792, 93 S Ct 1817, 36 L Ed 2d 668 (1973) (Supreme Court).

49. Player, p. 154.

50. Player, p. 154.

51. 411 US 792, 93 S Ct 1817, 36 L Ed 2d 668, (1973) (Supreme Court).

52. Abrams v Johnson 534 F 2d 1226 (6th Cir 1976) (Court of Appeals).

53. 580 F 2d 1150 (2nd Cir 1978) (Court of Appeals).

54. but see below, chapter 6, section 2.2.3, where this may be relevant in establishing 'pretext'.

55. Furnco Construction Corp. v Waters 438 US 567, 98 S Ct 2943, 57 L Ed 2d 957 (1973) (Supreme Court).

56. Player, p. 159-160.

57. 417 US 484, 94 S Ct 2485, 41 L Ed 2d 256 (1974) (Supreme Court).

58. 429 US 125, 97 S Ct 401, 50 L Ed 2d 343 (1976) (Supreme Court).

59. see below, chapter 6, section 3.1.2.

60. Slaughterhouse cases (1873) 83 US (16 Wall) 394, cited in Kathleen Willert Peratis and Eve Cary, *Women and the Law* (Illinois: National Textbook Co., 1977), p. 21.

61. 198 US 45 (1905) (Supreme Court).

62. 208 US 412 (1908) (Supreme Court).

63. Player, p. 49.

64. eg Goesaert v Cleary 335 US 464, 69 S Ct 198, 93 L Ed 1963 (1948) (Supreme Court), women may be prohibited from working in pubs.

65. see above, chapter 6, section 1.

66. Player, p. 48.

67. Peratis and Cary, p. 28.

68. The plurality (though not majority) decision of the Supreme Court in Frontiero v Richardson (1973) labelled sex as a suspect classification.

69. Reed v Reed 401 US 71, 92 S Ct 251, 30 L Ed 2d 225 (1971) Supreme Court); Kahn v Shevin 416 US 351, 94 S Ct 1734 40 L Ed 2d 189 (1974) (Supreme Court).

70. 445 F Supp 291 (DDC 1978) (Court of Appeal).

71. 401 US 424, 91 S Ct 849, 28 L Ed 2d 158 (1971) (Supreme Court).

72. 422 US 405, 95 S Ct 2362, 45 L Ed 280 (1975) (Supreme Court).

73. see below, chapter 6, section 2.2.2.

74. Player, p. 100.

75. 431 US 324, 97 S Ct 1843, 52 L Ed 2d 396 (1977) (Supreme Court).

76. Teamsters, p. 355-356.

77. Hodgson v Brookhaven General Hospital 436 F 2d 719 (5th Cir 1972) (Court of Appeals).

78. 401 US 424, 91 S Ct 849, 28 L Ed 2d 158 (1971) (Supreme Court).

79. Griggs, p. 431.

80. Griggs, p. 431.

81. Griggs, p. 432.

82. Griggs, p. 436.

83. Griggs, p. 436.

84. 422 US 405, 95 S Ct 2362, 45 L Ed 280 (1975) (Supreme Court).

85. see above, chapter 6, section 2.1.2.3.

86. Albemarle Paper Co. v Moody 422 US 405, 95 S Ct 2362, 45 L Ed 2d 280 (1975) (Supreme Court), p. 425.

87. Griggs, p. 436.

88. Albemarle, p. 425.

89. 29 CFR Section 1607.

90. 29 CFR Section 1607.4D.

91. 29 CFR Section 1607.1C.

92. U.S. v Georgia Power Co 474 F 2d 906 (5th Cir 1973) (Court of Appeals).

93. Robinson v Union Carbide Co 538 F 2d 652 (5th Cir 1986) (Court of Appeals).

94. 433 US 299, 97 S Ct 2736, 53 L Ed 2d 768 (1977) (Supreme Court).

95. 433 US 321, 97 S Ct 2720, 53 L Ed 2d 786 (1977) (Supreme Court).

96. Lewis v Tobacco Workers Int'l Union 577 F 2d 1135 (4th Cir 1978) (Court of Appeals).

97. 431 US 324, 97 S Ct 1843, 52 L Ed 2d 396 (1977) (Supreme Court).

98. New York City Transit Authority v Beazer 440 US 568, 99 S Ct 1355, 59 L Ed 2d 587, (1979) (Supreme Court).

99. William L. Diedrich and William Gaus, *Defense of Equal Employment Claims* (New York: McGraw Hill, 1982), p. 51.

100. 29 CFR Section 1607.4 (c) (1981); cited Schlei and Grossman p. 100.

101. 457 U.S. -, 29 FEP 1 (1982) (Supreme Court).

102. eg Friend v Leidinger 588 F 2d 61, 18 FEP Cases 1052, (4th Cir 1978) (Court of Appeals) (entire selection procedure, not just one segment, must be considered); EEOC v Trailways Inc 27 FEP Cases 801 (D Colo 1981) (no beard rule had disparate impact on blacks with race-related skin problem;. employer's overall statistics no defence) cited in Diedrich & Gaus, p. 51-52, ftn. 90.

103. my italics.

104. 444 F 2d 791 (4th Cir 1971) (Court of Appeals).

105. 487 US 977, 108 SCt 2777, 101 L Ed 2d 827 (1988) (Supreme Court).

106. 490 US 642, 104 L Ed 2d, 733, 109 S Ct 2115 (1989) (Supreme Court).

107. Albemarle Paper Co v Moody 422 US 405 (written aptitude tests); Washington v Davis 426 US 229 (written test of verbal skills); Dothard v Rawlinson 433 US 321 (height and weight requirements); New York City Transit v Beazer 440 US 568 (rule against employing drug addicts); Connecticut v Teal 457 US 440 (written examination). List in Watson, p. 988.

108. Watson, p. 989-990.

109. Griggs, p. 431.

110. Ablemarle, p. 426.

111. Section 703(j) see above.

112. see eg Wygant v Jackson Bd of Education 476 US 267 (1986) (Supreme Court); cited in Watson, p. 993.

113. Watson, p. 997-998.

114. 787 F 2d 462 (9th Cir 1985) (Court of Appeals).

115. 810 F 2d 1477 (9th Cir 1987) (Court of Appeals), p. 1482.

116. 487 US -, 108 S Ct 2777, 101 L Ed 2d 827 (1988) (Supreme Court).

117. Wards Cove, p. 2125-2126.

118. Wards Cove, p. 2126.

119. Albemarle Paper Co v Moody, p. 425.

120. 645 F 2d 1251 (6th Cir 1981) (Court of Appeals).

121. Chrisner, p. 1263.

122. Schlei and Grossman, p. 359 'Despite the conceptual distinction between the two definitions [BFOQ and business necessity], courts have had difficulty in deciding which analysis to apply in given situations. The ... attempts of the Fourth and Ninth circuits to deal with the validity of mandatory pregnancy leaves for flight attendants illustrate the problems the courts have had.'

123. McClure v Salvation Army 460 F 2d 553 (5th Cir 1972) (Court of Appeals).

124. Schlei and Grossman, Supplement, p. 127.

125. 635 F Supp 1228 (EDNY 1986) (District Court).

126. Hill v Berkman, p. 1243.

127. 61 AD 2d 804, 402 NYS 207 (1978) (District Court).

128. 433 US 321, 97 S Ct 2720, 53 L Ed 2d 786 (1977) (Supreme Court).

129. Dothard.

130. Dothard, p. 335-336.

131. 462 F Supp 952 (N D Iowa 1979) (District Court).

132. Gunther, p. 955.

133. see Schlei and Grossman, p. 355.

134. 629 F Supp 925 (D Neb 1986) (District Court).

135. Schlei and Grossman, p. 131.

136. see Californian Savings and Loan Association v Guerra 479 US 272, 107 S Ct 683, 93 L Ed 2d 613 (Supreme Court).

137. Watson, p. 999.

138. 419 F Supp 1061 (E D Mo 1976) (District Court).

139. Boyd v Orzak Airlines, p. 1064, cited in Schlei and Grossman, p. 420.

140. Air Line Pilots Association v Western Airlines 23 FEP 1042 (N D Cal 1979) (District Court), p. 1045.

141. 692 F 2d 602 (9th Cir 1982) (Court of Appeals).

142. eg Baker v California Land Title Co 507 F 2d 895 (9th Cir 1974) (Court of Appeals); Fountain v Safeway Stores 555 F 2d 753 (9th Cir 1977) (Court of Appeals); for other examples see list on p. 606 of Gerdom v Continental Airlines.

143. Gerdom, p. 608-609.

144. Gerdom, p. 609.

145. see below, chapter 6, section 3.2.2.2.

146. 433 US 321, 97 S Ct 2720, 53 L Ed 2d 786 (1977) (Supreme Court).

147. Dothard, p. 331.

148. Dothard, p. 332.

149. 444 F 2d 1219 (9th Cir 1971) (Court of Appeals).

150. 408 F 2d 228 (5th Cir 1969) (Court of Appeals).

151. 558 F 2d 1176 (4th Cir 1977) (Court of Appeals); Harriss v Pan American Airways 24 FEP (9th Cir 1980) (Court of Appeals) is another example.

152. eg Burwell v Eastern Air Lines 633 F 2d 361 (4th Cir 1980) (Court of Appeals).

153. see above, chapter 6, sections 2.1.1, 2.1.2, 2.2.1, 2.2.2.

154. Corning Glass Works v Brennan 417 US 188, 94 S Ct 2223, 41 L Ed 2d 1 (1974) (Supreme Court).

155. Player, p. 102; Corning Glass Works v Brennan.

156. 473 F 2d 589 (3rd Cir 1973) (Court of Appeals).

157. 442 F 2d 385 (5th Cir 1971) (Court of Appeals).

158. Diaz v Pan Am, p. 387.

159. Diaz v Pan Am, p. 388.

160. 29 CFR Section 1604.9(c); cited in Diedrich and Gaus, p. 50, ftn. 86.

161. 705 F 2d 1492 (9th Cir 1983) (Court of Appeals).

162. 435 US 702, 98 S Ct 1370, 55 L Ed 2d 657 (1978) (Supreme Court).

163. Manhart, p. 1495.

Chapter 7

Federal Republic of Germany

1 Employment Law of Germany: Sources and Structure

Before examining the provisions of German law relating to discrimination between women and men in employment, a brief overview of the sources and structure of employment law in the *Bundesrepublik* is necessary. The structure of German employment law seems complicated not least because it has many sources at different levels[1]; constitutional, statutory, contractual and case law.

At the top of the legal hierarchy, some provisions of the *Grundgesetz (GG)*[2] (Basic Law or constitution) are relevant to employment law. At the level of statute law, the most significant legislative provision regulating equal treatment of women and men in employment is the *Bürgerliches Gesetzbuch (BGB)*[3] (Civil Code), which is an all-embracing instrument governing contractual and other private law relationships. The provisions apply only to those employment contracts which are governed by the *BGB*; the greatest impact is on private sector wage earners. Civil servants (*Beamte*[4]) and the self employed are excluded. The *EG-Anpassungsgesetz*[5], which is the amendment to the *BGB* containing the provisions on equal treatment of women and men in employment, does however apply to employees in the public sector other than *Beamte*[6].

> 'The prohibition of discrimination in the *BGB* is valid only for the area of employment covered by the *BGB*. In situations not covered by the *BGB*, the prohibition of discrimination is based on Article 3 II *GG* only ... The rules of the *BGB* do not apply to officials in public service. In the view of the legislature, the rules in Article 33 II [*GG*] are sufficient for this group of persons.'[7]

There are also a number of more specific statutes which contain provisions relevant to the principle of equal treatment of women and men in employment.[8]

Employment contracts in German law fall into two distinct categories; the individually negotiated employment contract and the *Tarifvertrag* (collective bargaining agreement). These are, of course, subject to provisions of the *GG* and statute law. *Tarifverträge* are agreed by industrial relations bargaining between employers' organisations and trade unions. Most cover a whole section of an industry or trade and are mandatorily applicable to all employees in the industry[9], even those who are not members of the union. In fact, it is often stated in individual contracts that the relevant *Tarifvertrag* will apply. The *Tarifvertrag* regulates the 'content, formation and termination of employment relationships'[10].

An important feature of German employment law is the *Betriebsrat* (Works Council). This body has the role of participation and co-determination in decision-making on social, personnel or economic matters at the level of the factory or business (as opposed to the company or corporate level). The *Betriebsrat* is elected by all employees in a particular factory. The *Betriebsrat* may have an influence in management decisions where such decisions affect an employee at the factory, either directly or indirectly[11]. The rights and duties of the employer, employees and *Betriebsrat* are regulated by the *Betriebsverfassungsgesetz (BetrVG)* (Labour Management Relations Act) 1972. According to section 75 of the *BetrVG*,

> 'The employer and the *Betriebsrat* shall take care that all persons working in the firm are treated in accordance with the principles of law and justice, and in particular that they are not subjected to discrimination based on ... sex'.

Another significant right is the right of the *Betriebsrat* to be consulted where the employer intends to terminate the contract of employment of one employee. The *Betriebsrat* may challenge the termination on the grounds set out in *BetrVG* section 102 and the *Kundigungsschutzgesetz* (Termination Protection Act) whereby, 'the employer is obliged, where dismissals are necessary for compelling business reasons, to select the employee who would be harmed least by the proposed termination...'

It should be noted, however, that the rights of a *Betriebsrat* to take action against discrimination on the grounds of sex in general is a matter of contention.[12]

Employment law in Germany is regulated by specialized employment courts (*Arbeitsgerichte*), rather than by the general courts. The highest court of appeal is the *Bundesarbeitsgericht* (*BAG*) (Federal Labour Court).

German law is a civil as opposed to a common law system, in the sense that the law is found in the legislative texts (*GG*, codes, statutes) while decisions of courts interpret and apply the law, rather than 'make' or develop it. Decisions of even the highest courts in the *Bundesrepublik* are in no way binding as precedent. The fact that there is no reliance on courts for definitive interpretations of legislative measures means that the interpretations by commentators of primary texts, such as the *GG* and codes, have special significance in German law.

The assertion, that German law is 'civil law' in nature, is valid in theory in the field of employment law as in any other field of law; in practice court decisions play such an important role in employment law that they have been described as 'virtually legislative'[13]. So important is the role of courts in the employment law field that the *Bundesarbeitsgericht* has become at least as significant as the legislature in developing the law. This is largely because existing legislative measures are patchy or unclear[14] or in some cases even totally absent. Therefore the *BAG* must fill in the *lacunae*[15]. The characterisation of German law as 'systematic', although valid in other fields, is not apt in the employment law field, which is better described as tending to be more akin to 'case law' in approach.

2 Provisions of German law establishing Equal Treatment of Women and Men in Employment, and justification for derogation from those provisions

The equal treatment of women and men in employment in the Bundesrepublik of Germany is governed by various legislative provisions, the most significant of which is the *BGB*, as amended by the *EG-Anpassungsgesetz* of 1980. Since the amendment was introduced into German law with the express purpose of compliance with EC law, it seems reasonable to assume that these provisions cover both direct and indirect discrimination, as developed and defined by the European Court[16].

2.1 Direct discrimination

As the law presently stands, according to section 611a of the *BGB*, an employer may not discriminate against an employee, on the grounds of sex, in any agreement or measure pertaining to the employment relationship. Women and men employees must be treated equally. Section 612 (3) prohibits discrimination in pay on grounds of sex. To establish *prima facie* discrimination, the employee need only show that the facts lead one to suspect a discrimination on the grounds of sex. The employer then has the burden of proof to justify the discrimination either by showing that material reasons, not referring to sex, justify the different treatment, or by showing that sex is an indispensable requirement for the activity concerned. The burden of proof transfers to the employer as a matter of statute law.

2.1.1 *Bürgerliches Gesetzbuch (BGB)* Civil Code

Until 1980, *GG* Article 3 (2)[17] was the only federally applicable general provision on the equal treatment of women and men in employment. This was in spite of the fact that the *Bundesrepublik*, as a Member State of the EC, was under a duty to adopt provisions implementing the Equal Pay and Equal Treatment Directives[18]. Initially it was thought (and claimed by the German government) that the provisions of the *Grundgesetz* were adequate to implement these obligations and no new law was needed.[19] There was also debate over whether employers could be required to treat

women and men employees or prospective employees equally in view of the principle of freedom of contract.[20] The European Commission initiated an infringement procedure on 10th May 1979, whereby the *Bundesrepublik* was given notice requiring specific measures to be taken to implement the Equal Treatment Directive. The infringement procedure was halted in August 1980 when Germany adopted the *Arbeitsrechtliches EG-Anpassungsgesetz*[21] (Employment Law to Comply with European Community Provisions), adding to the *BGB* (until then, practically unchanged since its establishment in 1896[22]) provisions on equal treatment of women and men.

The *EG-Anpassungsgesetz* was seen as a 'piecemeal compliance' with the obligations of the Directive[23]. Even the title of the Act suggests that the government was reluctant to introduce the legislation[24]. The Act was criticised as being insufficient fulfilment of the Directive[25], in particular because it failed to provide adequate sanctions for breach of its provisions[26]. In fact, some unions were of the opinion that no statute at all would have been better than this statute.[27]

Since for a reader in English, the provisions of the amended *Bürgerliches Gesetzbuch (BGB)*, section 611a, 612, 612a, are likely to prove inaccessible, they are translated in full below.

'Section 611a Equal Treatment for Men and Women

(1) The employer must not, in the context of an agreement or a measure, particularly in the establishment of an employer-employee relationship, in promotion, in a directive or dismissal, discriminate against an employee on grounds of sex. However, differential treatment on the grounds of sex is permissible, as long as an agreement or a measure is concerned with the type of activity to be performed by the employee, and being of a specific sex is an indisputable [or indispensible] requirement (*unverzichtbare Voraussetzung*) for this activity. If, in the event of a dispute, the employee produces evidence suggestive of discrimination on grounds of sex, the onus is on the employer to prove that differential

treatment is justified by practical grounds unrelated to sex, or that sex is an indisputable requirement for the activity to be performed.

(2) If the employer-employee relationship is not established due to an offence against the laws regarding discrimination (as set out in subsection 1) requiring to be justified by the employer, then it is the duty of the employer to compensate for the damage which the employee suffers through his expectation that the establishing of the employer-employee relationship would not be hindered by such an offence. Subsection 1 is equally applicable to promotion, if the promotion is discretionary.

(3) The right to compensation for an offence against the laws regarding discrimination comes under the statute of limitation in two years. Section 201 applies.

'Section 611b Job description

The employer must not advertise a post, either explicitly or implicitly, solely for men or women, as this would violate section 611a subsection 1, sentence 3.

'Section 612 Salaries and Wages

[(1) Salary/wages are deemed implicitly agreed, if the provision of a service under the given circumstances cannot be expected without due remuneration.

(2) If the level of remuneration has not been determined, then either the established salary/wage level, where such an established salary/wage scale exists, or in the absence of any such scale, the normal rate of salary/wage is to be regarded as the agreed salary/wage.]

(3) In an employer-employee relationship, remuneration for identical or equivalent work must not be agreed at a lower rate on the basis of the sex of the employee. The agreement of a lower remuneration is not justified by the existence of special protective regulations applicable as

a result of the sexual differentiation between employees. Section 611a subs 1 sentence 3 is equally applicable.

'Section 612a Prohibition of disciplinary actions

The employer may not disadvantage an employee by an agreement or measure because the employee has exercised his rights in a permissible way.'[28]

Sections 611a, b, 612 (3) and 612a *BGB* contain a general principle of equal treatment in all individual employment relations. The rules cover both contractual arrangements between employer and employee (for example, pay) and unilateral measures of the employer (for example, conditions of work, directives, notice to quit). It would cover the allocation of less valuable work to women, preference of male workers for certain activities, discrimination against women in the payment of bonuses and in redundancies.[29]

The provisions require equal pay for work of equal value[30], although no criteria are set out for determining whether jobs are of equal value.

2.1.1.1 *Unverzichtbare Voraussetzung*

Section 611a (1) allows a justification for direct discrimination on the part of the employer if sex is an 'indisputable [or indispensable] requirement' (*unverzichtbare Voraussetzung*) for the activity to be practised. Naturally the term 'indisputable' is open to debate, and has even provoked one writer to state, 'Indisputable is actually more or less nothing at all'[31]. Strictly speaking there are almost no examples of activities (with the exception of a wet-nurse or sperm donor) which are feasible only for women or men. However, legally speaking, other exceptions may be made to the principle of equal treatment. The standard implied by the word 'indisputable' is discussed by commentators as follows. The examples cited by the Kommentar von Palandt suggest that it is a strict standard, applicable only in narrow circumstances: for example, 'A woman to sell corsets, or as a model for a women's clothing

firm. A man as a tenor or bass in a choir.'[32] According to the Munchener Kommentar, the word '*unverzichtbar*' does not follow the general terminology of the *BGB*; the assessment of the standard it applies is therefore problematic. The example of a man to sell male clothing and woman for women's clothing is cited here also; it is further suggested that for a sales job in the Middle East it may be an indisputable requirement to appoint a man[33]. Pfarr and Bertelsmann suggest that the provision applies to examples which would take the equal treatment rules to absurd lengths, such as employing a woman to play 'Hamlet'[34]. All of these examples suggest that the 'indisputable requirement' is a strict standard of justification.

A different treatment of women may also be permissible under this provision if, because of the activity to be carried out, the application of protective employment laws prevents the employment of a woman. Measures such as those prohibiting the employment of women to work in underground (coalface) work, in the transportation of various raw materials, and the general prohibition of night work for female employees (albeit with considerable exceptions)[35] will be covered by the justification. However, the legislative aims must always be taken into consideration. Some of these 'protective' legislative measures may be themselves outdated and discriminatory[36]. Klaus Adomeit refutes the argument of the conductor of an orchestra that he cannot employ a woman, because if she were to become pregnant, she could not carry out the job, as concerts run after the time (20:00) at which work for pregnant women is forbidden as night work[37].

In the case of direct discrimination, it seems the *BGB* provides for justification in accordance with a fairly tight standard. This interpretation is consonant with the legislative intent, which is to implement equal treatment for women and men in employment in line with EC law.

2.1.2 *Grundgesetz* Article 3

The *Grundgesetz* contains a general equal treatment clause in Article 3, which includes the ground of sex among its forbidden grounds for arbitrary differential treatment.

> '(1) All persons shall be equal before the law. (2) Men and women shall have equal rights. (3) No one may be prejudiced or favoured because of his sex, his parentage, his race, his language, his homeland and origin, his faith or his religious or political opinions.'[38]

Where there is no applicable statutory duty of equal treatment, in particular if the provisions of the *BGB* do not apply, then the general principle of equal treatment in the constitution may be relevant in the employment law field. In fact, since the *EG-Anpassungsgestz* came into effect, the provisions of the *GG* have become less important in equal treatment claims.

In view of its terse expression, it is evident that *GG* Article 3 requires will acquire meaning and context through legal rulings of the courts. Article 3 (1) is the general equality clause, setting out the equal treatment principle. It has been established that the equal treatment principle does not require that all persons be treated equally regardless of the circumstances[39].

> 'It merely forbids that persons or facts which are substantially equal are treated differently, but not that persons or facts which are substantially unequal shall be treated differently in relation to the existing inequality'[40].

In a later judgment this judicial formulation was amended to the obligation 'to treat equal things equally and unequal things differently according to their special features'[41]. The equality clause is violated when the provision in question is 'arbitrary', that is, when no reasonable ground, arising from the nature of the object or from otherwise objective circumstances, can be advanced for legislative differentiation or non-differentiation[42]. This arbitrariness theory had already been developed by the *BundesVerfassungsgericht (BVerfG)* (Constitutional Court) under the Weimar Constitution. 'Arbitrariness was present when a reasonable,

objectively obvious ground for the differentiation or non-differentiation in question could not be found'[43].

The constitutional principle of equal treatment does not proscribe all forms of different treatment. The principle prohibits arbitrary distinctions but permits those differences which can be shown to be specially justified. However, the tendency is to raise the standard for the establishment of such a justification[44], by making it more difficult to establish that a *prima facie* arbitrary distinction is acceptable.

Articles 3 (2) and (3) are more specific expressions of the general equality principle. Court decisions generally consider the two provisions together.[45] Article 3 (2) is a statement of a legally enforceable right, not a mere statement of policy to be later effected by legislation.[46] Difference of sex may not provide a *prima facie* objective ground for legal differentiation. Article 3 (2) is more concrete than Article 3 (1) in the sense that it leaves less of a margin of discretion for the legislature[47].

> 'The different legal treatment of men and women is only allowed when the biological or functional distinctions of sex are so decisive in the circumstances to be regulated, that common elements can no longer be perceived at all, or at any rate are fading'[48].

The primary function of provisions in the *GG* is to enshrine rights of citizens against the state. In general, provisions of the *GG* do not provide adequate remedies as between private individuals[49]. A much debated problem with regard to basic rights is whether and how they may apply in legal relationships of citizens among themselves. The problem is known in German jurisprudence as the *Drittwirkung* (third party effect) of rights. This problem arises *inter alia* in the employment law field[50].

It is a matter of controversy whether an individual employer is directly bound by *GG* Article 3 (2), since, in general, constitutional rights give citizens rights against the state, but not against other citizens. According to Pfarr and Bertelsmann, this jurisprudential debate is futile in any case, since constitutional rights, including *GG* Article 3 (2), become

operative indirectly in relationships between individuals in that they have an effect on implementable general clauses (for example in employment law, in provisions of *Tarifverträge*) or are made concrete by rules set out in the civil law.[51]

Although all legislation in the Bundesrepublik must comply with the principle of equality of *GG* Article 3, equality between women and men has not been effected through application of this constitutional provision in most situations between individuals in the area of employment law[52]. The *Drittwirkung* of the general equality principle has only been accepted as regards equal pay for women and men. Part of the reason for this is that *GG* Article 3 could only be brought into play in the case of existing employer-employee relationships, and not in those areas where there is as yet no contract of employment[53]. Thus it could not, for example, apply to advertisements for jobs or to the questions asked by employers in interviews.

The *BAG* applied *GG* Article 3 to equal pay questions as early as 1955[54]. Where an employer *generally* increases the remuneration of its employees (either subject to a *Tarifvertrag* or not), it may not exempt one or several employees from the pay increase without justifiable grounds, such as performance below the average[55]. The employer may differentiate for social reasons between various groups of employees, for instance by granting a higher percentage increase to lower paid groups of employees[56]. Employees may not be excluded from voluntary benefits such as company pension schemes or bonuses[57], unless there are facts justifying the unequal treatment of an individual employee or group of employees[58].

Since, according to the accepted judicial views on the *Drittwirkung* of the general equality principle, its application as between an individual employer and employee is limited to questions of equal pay and does not cover the wider question of equal treatment, the most useful application of Article 3 is to test the constitutionality of legislation which differentiates between women and men[59]. An example of this is the legislation, previously in effect in three German *Länder* (States), on

'housework days'. Now held unconstitutional[60], this legislation allowed working women to take one day's absence a month to do housework. The purpose of this was to ease the burden on women who worked full-time and who also had to do housework. The *BVerfG* concluded, on examining the provisions, that the differences between men and women could not justify the legislation[61].

The other useful application of Article 3 is to test the constitutionality of *Tarifverträge*. In 1955 the *BAG* ruled that the provisions on equality in the *GG* were binding on parties to *Tarifverträge*, that is, trade unions and employers' associations. If the provisions of such agreements set different rates of pay for women and men, the provisions would be in breach of the *GG*[62].

2.1.3 *Grundgesetz* Article 33 (2)

As far as employment in the public service is concerned, there is a second provision of the *GG* which could be used by women or men claiming equal treatment. Article 33 (2) provides,

> 'Each German has equal opportunity of access to employment and promotion in the public service in view of his [or her] suitability, aptitude and professional achievements.'

This is a directly binding legal norm, giving all Germans an equal right to apply for entry into public service and to be considered on the grounds set out, to the exclusion of other grounds including sex[63]. As this provision of the *GG* relates to employment in the 'public sector' (with the state as employer), the problem of *Drittwirkung* does not arise. The relevant relationship is always between state and individual citizen.

Article 33 provides that civil servants must be selected according to merit. It must be appreciated that, although the merit principle lays down specific grounds of 'personal aptitude, qualifications and skill' of the applicant as the only legally acceptable grounds on which the decision as to which of the applicants to employ may be made, these grounds themselves are widely drawn and are open to varying interpretations. It is very rare that Article 33 (2) will actually give rise to a right to

employment; in fact, this can only be when the applicant is the only one fulfilling the criteria[64].

2.2 Indirect discrimination

2.2.1 *Burgerliches Gesetzbuch (BGB)* Civil Code

Although there is no explicit mention of indirect discrimination, it is agreed by commentators that section 611a subs 1 sentence 1 *BGB* on equal treatment of women and men covers both direct and indirect discrimination[65]. The work of Pfarr and Bertelsmann provides the first detailed definition of indirect discrimination[66] in German law: their definition is adopted for the following section of this chapter. In a claim of indirect discrimination, the requirement or measure complained of must be formulated without reference to sex. The proportion of women who can comply with the requirement must be much smaller than that of men. There must be no explanation other than sex or gender roles for the different treatment. There must be an actual disadvantage to an employee because of his or her sex. If the employee can establish these four points, then this establishes a *prima facie* case of indirect discrimination. The burden then passes to the employer to justify the discrimination. If the employer can establish a justification for the requirement or measure, then the claim fails.

2.2.1.1 *Prima facie* case

The measure or requirement concerned is imposed by the employer without reference to sex. It will be able to be fulfilled by some women as well as men, but may still be indirectly discriminatory. The phrase 'requirement or measure' is broadly formulated and includes individual agreements and measures in *Tarifverträge*.

The issue in establishing that the proportion of women who can comply with the requirement is much smaller than that of men is one of proof. What methods are open under German law to an employee to show that the proportion of members of the sex which is or could be disadvantaged is

much larger than the proportion of members of the other sex? In some cases the effect on women of a measure may be so self evident that accomplished statistical analysis is unnecessary to convince the court. For example, jobs for research assistants in German Universities, which enable the writing of a thesis, lapse after a certain number of years. There is no extension in the case of maternity leave being taken in the course of the job.[67] This clearly has a more detrimental effect on women than on men.

Other cases are not so clear. It may be that the different effect on the sexes is not made evident with consideration of generally known data. Here the only way to establish *prima facie* indirect discrimination is by statistical analysis. This process is relatively new to courts in Germany, but is possible.[68]

The necessary data may often not be readily available to the employee bringing the claim, or the relevant *Betriebsrat*. This should not be an insurmountable problem, as the employee is only required to show facts which suggest a discrimination. The burden of proof is then transferred to the employer.[69]

The third requirement for the establishment of indirect discrimination in German law is that this discriminatory effect of the arrangement or measure cannot be explained other than by sex or gender roles. This should not be problematic for the complainant employee, for if the data show real difference in treatment between the sexes, it is unlikely that these differences have nothing to do with sex.

Finally there must be an actual disadvantage to the employee claiming the breach.

2.2.1.2 Justification

If the employee succeeds this far, and shows that a requirement or measure imposed by the employer is *prima facie* indirectly discriminatory, the burden of proof is transferred to the employer to show that there is justification for the discrimination. Not every rule which in fact disadvantages one sex is automatically impermissible. According to Pfarr and Bertelsmann, there are two ways in which a provision may be justified: if it is required for the activity to be carried out by the employee, or if it pursues an objectively justified goal, which cannot be achieved without the discriminatory effect.

2.2.1.2.1 Required for the activity

This is a further application of the concept of sex as an 'indisputable requirement' already discussed. The *BGB* allows an exception to the general rule of equal treatment if the measure is required for the activity to be carried out. The measure is then justified, in spite of its discriminatory effect on members of one sex. For example, the ability to fly aeroplanes is a requirement for a pilot's job. The employer may require applicants to hold a pilot's licence; even though fewer women than men can meet this requirement, the measure is justified as absolutely necessary for the activity to be carried out[70]. Pfarr characterises this form of justification as '*zwingend geboten*' (compellingly required), which is to say, restrictively formulated and restrictively applied.

An example of a measure or requirement which is *zwingend geboten* is that of specific qualifications, if the activity cannot be carried out without those qualifications. A general requirement for 'knowledge and experience' would not be covered, but may be justifiable as an 'objectively justified goal'[71]. The arrangement of the work place, or indeed the duties of particular jobs, would not necessarily compel the employer to exclude women or a substantial proportion of women. For example, a requirement to lift and carry heavy goods may not be *zwingend geboten* if the employer could incorporate mechanical lifting and carrying into the work system.[72] Similarly, hours of work which

disadvantage women (for example, requiring employees to begin work before school and nursery hours) could not be described as *zwingend geboten* unless the work could not be carried out at any other time. These examples, it should be noted, are suggested by commentators, and not tested before the courts. The standard of *zwingend geboten* is a high standard for justification.

2.2.1.2.2 Pursues an objectively justified goal

If the measure or requirement concerned pursues an objectively justified goal, and the discriminatory effect cannot be eliminated or alleviated through reasonable changes or additions, it may be justified in spite of its discriminatory effect. This aspect of justification recognises that there are measures or requirements which disadvantage one sex, which are not required by the actual activity to be carried out, but which nevertheless pursue an objectively justified goal. It allows the weighing up of the objective of a measure against its discriminatory effect. The standard is therefore lower than for justifications which are *zwingend geboten.* The application of the justification is problematic in that, as it allows the balancing of different claims, different values may be brought into play, which may be in direct opposition to the principle of equal treatment of women and men in employment. It is accepted that 'any' factual reason will not be sufficient for justification, but that rather a more detailed examination of the objective of the *discriminatory measure* is required. This detailed examination is to be in accordance with the principle of proportionality.[73] The principal of proportionality is a central constitutional principle of German law.

What may be advanced as justification for an indirectly discriminatory situation must still be regarded as unsettled.[74] Whether a particular agreement or measure of an employment contract is regarded as justified may depend on which other legal rights come into play. It may also depend on how widespread and evident the discriminatory effect of the measure concerned is. 'The stronger the disadvantage and effect on one sex by an indirectly discriminatory rule, the weightier must be the reasons justifying this rule.'[75]

3 Substantive Grounds of Justification for unequal treatment

As noted above, there are circumstances in which, according to the law of the Federal Republic of Germany, unequal treatment of women and men in the employment sphere may be justified: some examples of substantive grounds of justification are now discussed. Justification for direct discrimination is examined first; this is followed by discussion of grounds of justification for indirect discrimination. The law relating to equal treatment of women and men in employment, as developed by the European Court, is directly effective in Germany. Although the influence of EC law is evident, an attempt has been made, for the purposes of this chapter, to separate the interpretation by the German *Arbeitsgerichte* of the relevant provisions of German law, especially interpretation of the *EG-Anpassungsgesetz*, from the provisions of EC law.

3.1 Justification for direct discrimination

Direct discrimination against women (or men) in employment may be lawful in the case of justifiable exclusions of women (or men) from employment in particular activities. Direct discrimination against women for reasons relating to pregnancy and maternity may also be lawful in certain circumstances.

3.1.1 Exclusion of activities from the principle of equal treatment

Various employment activities may be excluded from the principle of equal treatment of women and men in employment. The most significant examples are discussed below.

Under section 611a ff *BGB*,

> 'A differential treatment on the grounds of sex is ... permitted, in so far as an agreement or measure is of a type the object of which is a worker carrying out a particular activity and being a certain sex is an indisputable requirement for this activity.'

Discrimination may be justified if it relates to the activity to be carried out by the employee, and being of a certain sex is an indisputable

requirement (*unverzichtbare Voraussetzung*) for this activity. Being of a certain sex is an indisputable requirement for an activity if for factual or legal reasons it can be carried out only by women or only by men[76].

3.1.1.1 The 'Catalogue of Exceptions'

The Equal Treatment Directive (76/207), Article 2 (2) allows Member States to exclude certain occupational activities from the field of application of the Directive. It was established in 1986 that the Federal Republic was in breach of the Directive by failing to compile a complete list of excluded activities and notify the Commission[77]. However the European Court did not define which occupations could be exempted from the principle of equal treatment. Pursuant to this judgment, the Federal Government of Germany issued a 'Catalogue of Exceptions'[78], in which were enumerated the activities which the Government considered could be excluded from the implementing measure of the Equal Treatment Directive, namely section 611a I 2 *BGB*. The list of activities reads as follows[79],

> '1. Jobs for which a specific sex is required for the authentic fulfilment of a role or exercise, eg
>
> - actor/actress, male/female singer or dancer, and such other performing artists who have a male or female role to play;
>
> - models for painters, sculptors and photographers;
>
> - male/female fashion models.
>
> 2. Jobs in the religious sphere, when the preaching of the church is affected (Article 140 GG, Article 137 Weimar Constitution, eg
>
> - priests in the Catholic church;
>
> - teachers in faculties of theology (as arranged in church agreements).
>
> 3. Jobs in countries outside the EC where only one sex will be accepted because of basic legal regulations, religious beliefs or culturally specific features.
>
> 4. Jobs in a women's refuge, provided that the sponsor's concept of care requires that the work be done exclusively by women.
>
> 5. Jobs in the area of internal or external security:

- In the armed forces of the Bundesrepublik, women can only pursue careers as officers of the Medical Corps in a service relationship with professional soldiers, or a soldiers serving for a set time on the basis of a voluntary duty (Article 12a *GG*, section 1 subs 3 Law on Soldiers); women may not in any circumstances serve with weapons;

- In the police force protecting the Federal border (Article 12a *GG*, section 64 Law on Protection of the Federal Border)

5. Jobs in the administration of justice:

- In the penal system, the general service tasks (especially the supervision and care of prisoners) and the service of care in institutions and sections for men should be carried out by men and in institutions and sections for women they should be carried out be women. Exceptions are permissible. Other service tasks in those institutions and sections for men can be carried out be women, and in those for women they can be carried out be men (Nr 14, Abs 1 and 2 of the *Dienst und Sicherheitsvorschriften* for the *Strafvollzug*; Service and Safety Regulations for the penal system).

- as a matter of principle women can only be detained under female supervision (Nr 12 Abs 2 Satz 1 *Untersuchungshaftvollzugsordnung*; Custody Service Orders)

- in the arrests of young people, men should supervise young men, and women, young women. This can be deviated from if there is no fear of undesirable events (section 3 Abs 2 of the *Verordnung über den Vollzug des Jugendarrestes*; Law on Arrests of young people).[80]

The 'Catalogue of Exceptions' is not binding, as such, on the courts, on whom alone the duty to interpret the provisions of section 611a *BGB* is incumbent. This was stressed by the Federal Government in a statement attached to the catalogue. The non-binding nature of the catalogue spawned fears that it would not satisfy the duties of Germany as set out by the European Court in its ruling in case 248/83. However, although the courts have the final say in interpretation of '*unverzichtbare Voraussetzung*', it seemed likely that, in the application of the equal treatment principle, the list of exceptions would become accepted as grounds of justification in Germany, and for this reason, the Commission initiated no further action[81].

3.1.1.2 Privacy and decency

The opinion of Rolf-Achim Eich[82] that a manager may not be forced to work with a male instead of a female secretary must be regarded cautiously. However, the preservation of privacy or decency in respect of other employees or third parties, such as customers or clients, would be grounds for justification of discrimination between women and men, who in the carrying out the activities of employment might come into close contact with the persons concerned.

However, an 'indisputable requirement' must be viewed in terms of the activity to be carried out[83]. This excludes grounds not relating to the activity itself, such as the frequently advanced ground of lack of sanitary facilities for women, as justification for not employing women.

> 'The provision of separate sanitary facilities is a condition with regard to the organisation of the working environment, not a protective provision established by the activity carried out. The duty to provide separate sanitary facilities comes *after* the employment of men and women, and is not a prerequisite therefor. It is forbidden for an employer to rely on the lack of provision of appropriate sanitary facilities as grounds for disadvantaging women.'[84]

3.1.1.3 Military service

Exclusion of women from employment in various activities in the armed forces is provided for in the 'Catalogue of Exceptions' as discussed above. This difference in treatment is enshrined by German constitutional law in Article 12a of the *GG* which imposes a liability on men over 18 to undertake military or some other substitute service. According to subsection 4, women 'may on no account render service involving the use of arms'.

3.1.1.4 Night work prohibition

The *Arbeitszeitordnung*[85] (*AZO*) (Regulation on Working Hours) section 19 (1) prohibits female *Arbeiterinnen* (blue collar workers) from working between 20:00 and 06:00. Men are not subject to the provisions. This legislation has been challenged as unconstitutional, but has been consistently upheld by the *BVerfG* (Federal Constitutional Court) and other courts on the grounds that biological differences between women and men justify the prohibition[86]. This is in spite of the fact that there is no attempt to explain which biological differences make the prohibition necessary, nor why sex neutral legislation could not achieve the same result[87]. It is not surprising that the night work prohibition has been strongly criticised, for example by von Münch: 'The night work prohibition violates the Grundgesetz'[88].

An attempt by an employer to use the night work prohibition in conjunction with the provisions of *BGB* section 611a ff, in order to justify exclusion of women from jobs requiring work within the prohibited hours by a category of worker covered by the *AZO*, by arguing that employing a man is an '*unverzichtbare Voraussetzung*', is unlikely to meet with the strict requirements of the provision. For example, in a case[89] in which the female applicant was refused employment in a zoo, on the grounds that she would be required to work late and on Sundays, the *BAG* upheld the ruling of the *LAG* (*Land* (State) Employment Court), that the employer had failed to show that being male was an 'indispensable requirement' for the activity, this being the case only in exceptional situations[90]. It would be possible, for example, to rearrange the shifts, should a problem occur.

The decision of the European Court in *Stoeckel*[91] that a general prohibition of night work for women is contrary to the provisions of the EC Equal Treatment Directive (Directive 76/207) should strengthen this position, as the provisions of the Directive are directly effective in German law.

3.1.1.5 Weight restrictions for women lifting and carrying goods

Legislative provisions set out limits to the weight that women may lift or carry in the course of their employment[92]. Section 11 of the *Verordnung über Beschäftigung von Frauen auf Fahrzeugen* (Ordinance on Employment of Women in Vehicles) of 1971 lays down a maximum weight (no more than 10kg, as far as this only happens occasionally) for goods to be lifted and carried by female drivers and co-workers. Similar weight limits are found in section 67 I a of the *Binnenschifffahrtsuntersuchungsordnung* (Ordinance on Investigation within Ship Journeys) of 1956.

3.1.2 Pregnancy and maternity

It may be an indisputable requirement to employ a person of a particular sex if the activity to be carried out is regulated by protective legislation. Such legislation invariably operates to exclude women, rather than men, from certain activities. It has as its *raison d'être* the biological differences between women and men, in particular those pertaining to pregnancy and childbirth. Germany has various provisions of such legislation, some of which are discussed below.

The *Mutterschutzgesetz* (*MuSchG*) (Mother Protection Act)[93] imposes various duties on the employer of pregnant or nursing women, for example the duty to provide for short breaks (section 2). A range of restrictions on the type of work which pregnant women may undertake is imposed by the Act (section 4). Pregnant or nursing women may not undertake overtime, night work (between 20:00 and 06:00) and work on Sundays, with some exceptions (section 7). These special provisions, which *prima facie* are in breach of the principle of equal treatment of women and men, are justifiable as protective measures.

A differential treatment on grounds of an existing pregnancy is permitted if, for example, a position is to be filled in which there are existing nightshifts (prohibited for pregnant women under section 8 I *MuSchG*) or heavy physical work (in the sense of the prohibitions in section 4 I and II *MuSchG*) must be undertaken. In cases in which an employer may not

employ a pregnant woman because of statutory prohibitions, the employment of a woman is made dependent on the fact that the applicant is not pregnant. The criterion 'non pregnant' is in these cases an 'indispensable requirement' in the sense of section 611a I 2 *BGB*.[94] Pregnancy therefore may be a ground for justification of discrimination.

Pursuant to International Labour Organisation agreements, the restriction of women from employment in various activities which involve contact with dangerous materials or radiation is effected by legislation in Germany[95]. Especially notable is the prohibition of employment of childbearing women in jobs requiring use of materials containing lead and mercury, in section 26 VII *GefahrstoffVO* (Dangerous Materials Ordinance) of 1986[96]. Maximum limits of exposure (in some cases a zero limit) to radiation are also laid down for childbearing women, young women and pregnant women[97]. Discrimination is justified on the grounds of protection of the woman concerned, and also of the foetus.

3.2 Justification for indirect discrimination

A discriminatory agreement or measure, which is indirectly discriminatory in that it affects members of one sex in a higher proportion than those of the other sex to their disadvantage, is justified if it is *zwingend geboten* (compellingly required)[98] in view of the job. The *BGB* allows an exception to the general rule of equal treatment if the measure is required for the activity to be carried out. The measure is then justified in spite of its discriminatory effect on members of one sex. The requirement that the measure be *zwingend geboten* is restrictively formulated and restrictively applied.

In addition to this, indirect (but not direct) discrimination may be objectively justified in pursuit of certain goals, which may not be attained without some disadvantage to women or to men. This aspect of justification recognises that there are measures or requirements which disadvantage one sex, which are not necessitated by the actual activity to be carried out, but which nevertheless pursue an objectively justified goal. A detailed examination of the objective of the discriminatory

measure, in accordance with the principle of proportionality[99], is required before justification can be established. Because the balancing of the claim to equal treatment with other claims which may come into play will yield different results in different situations, what may be advanced as grounds for justification for an indirectly discriminatory situation must still be regarded as unsettled in German law[100].

The following section discusses various grounds for justification of indirectly discriminatory requirements or measures, and the approach taken to these in German law. As in previous chapters, these types of justification are divided into 'job related justifications', 'enterprise related justifications' and 'public benefit related justifications'.

3.2.1 Job related justifications

3.2.1.1 Physical ability to perform the job

In many employment situations, the duties of the job include the execution of activities, such as lifting and carrying heavy goods, or operating heavy machinery, which require a certain amount of muscular strength. Physical strength may therefore be a job related justification for indirect discrimination in hiring policies.

In pay policies, the employer may seek to reward employees who carry out jobs which require use of physical strength with a higher level of pay than employees who carry out lighter tasks. This is a matter of job evaluation. However, indirect discrimination may occur in the process of job evaluation if factors, which men can fulfil more easily than women, for example physical or muscular strength, are used, *without justification*, in the evaluation.

Until the ruling of the *BAG* in 1955 that such provisions were incompatible with Article 3 *GG*, many *Tarifverträge* provided for lower pay for women for equal work, for example 'women receive 78% of men's pay'[101]. However, although it outlawed this direct discrimination of women, the *BAG*, in this judgment, created a potentially indirectly discriminatory

situation, as it provided for the creation in *Tarifverträge* of pay grades, corresponding to the 'heaviness' of the work. The result of this is that women employees are grouped in grades of work requiring '*geringere körperliche Belastung*' (lower physical effort), and these grades (known as '*Leichtlohngruppen*') are evaluated as lower than other groups, therefore employees in those groups receive less pay than those in others.

In *Rummler v Dato-Druck*[102], the European Court was asked, by Article 177 reference from the *Arbeitsgericht* of Oldenburg, to rule on the compatibility of the *Tarifvertrag* for the printing and paper industry with provisions of EC law, in particular the Equal Pay Directive 75/117. In this *Tarifvertrag*, as in many others, different pay grades were differentiated by criteria including 'demand on the muscles', 'muscular effort' and 'heavy work', criteria which it is more difficult for women to fulfil than men. Moreover, in evaluating muscular effort, it was common practice to refer to male standards.

The European Court held that job classification systems must be based on criteria 'which do not differ according to whether the work is carried out by a man or a woman'[103]. The system as a whole must not be so organised that it has the practical effect of discriminating generally against women (or men) employees.

The effect of the judgment of the European Court is that *Tarifverträge* which contain provisions relating to *Leichtlohngruppen*, if they are not to breach the requirements of EC law, must include, alongside those criteria which men can fulfil more easily than women, balancing criteria which women can fulfil more easily than men.[104]

The judgment of the European Court also suggests that, as a starting point for evaluation, neither a position based on the average male employee nor one based on the average female employee is appropriate: rather a non-sex based position should be adopted.[105]

The judgment of the *BAG* in *Rummler* may be described as 'disappointing'[106]. Although the court repeated the operative part of the judgment of the European Court, it did not evaluate the scheme concerned in the light of this judgment. Rather, it merely considered the work of the plaintiff, decided that it fell within group III of the scheme, not group IV, as she claimed, and therefore dismissed her case.

As for the question of which criteria are to be used to determine the 'heaviness' of work, in particular, whether a male or female standard is to be used, a decision of the *BAG* in 1988[107] is interesting. In evaluating whether an activity required a '*geringere körperliche Belastung*', the *BAG* relied on the decision in *Rummler* to support the contention that evaluation should be done, not in accordance with muscular effort alone, but in accordance with the '*Verkehrsanschauung*', that is by focusing on 'all circumstances which affect the human body; standing work, inconvenient position, noise, stress and repetitive work'[108]. This broader point of reference, as the circumstances affected women and men more equally than focus on muscular strength alone, was more in line with EC law as expressed in *Rummler*.

3.2.2 Enterprise related justifications

3.2.2.1 Length of service

Indirect discrimination may occur if positive consequences for employees are attached to seniority or lengthy service. For example, entitlement to social security and other benefits may be graded, or even dependent, on a certain length of time belonging to the company. Women, because of pregnancy, childbirth, and their childcare and family responsibilities, are less able to accumulate length of service. As justification for the discriminatory effect of such provisions, the objective of 'rewarding faithful service to the company' is advanced. For the employer, the retention of a stable workforce, the reduction of turnover of employees, the avoidance of the cost of recruitment and induction of new employees and the retention of skilled workers are all advanced as goals. These are all 'enterprise related' justifications. However, the benefits for the

employer of a changing workforce for an employer, especially in times of rapid technological progress, must be set against the validity and relative importance of these goals. The strictly formulated requirements for justification, that is, pursuing objectively justified goals and being suitable and necessary for this purpose, are by no means always met in a situation of advantaging certain employees, and therefore discriminating against others, by attaching benefits to lengthy service.[109]

3.2.2.2 Grading and pay structures

Indirect discrimination in pay may occur where an employer either grants higher pay to employees who fulfil certain criteria with which more men than women can comply, or evaluates jobs in such a way that women are discriminated against, as discussed above[110].

Grading and pay structures in Germany depend on the categorization of a particular employee. *Arbeiter* and *Angestellte* are special categories of employees in German employment law, corresponding approximately to the blue collar/white collar divide. *Gehobener Angestellte* (managerial employees) are a further subcategory, more highly paid than the *Angestellte*.

Differential treatment of *Arbeiter* and *Angestellte* may breach the equal treatment principle of the *GG* and therefore is subject to the arbitrariness principle[111]. A different treatment of *Arbeiter* and *Angestellte* in the granting of Christmas bonuses was not, as a general rule, justifiable in accordance with this principle[112]; that is to say, it is an arbitrary difference in treatment. The *BAG* held that an employer may pursue different goals by granting bonuses and similar special payments. It may delimit the requirements for such payments in order to achieve these goals. An unequal treatment of different groups of employees is only compatible with the equal treatment principle if the purpose or goal justifies it. The purpose of a Christmas bonus was assumed by the court to be to contribute to the special expenditure of employees occasioned by the Christmas period and to show appreciation for the work done in the past year. *Arbeiter* and *Angestellte* are affected in the same way by

extra spending over Christmas and employees in both groups have carried out work deserving of appreciation over the past year. The differential treatment was not justified.

If it can be established that the proportion of women in the *gehobener Angestellte* category is significantly lower than that of men, then if *gehobener Angestellte* are treated more favourably, this may be indirect discrimination. Peter Hanau and Ulrich Preis[113] suggest that it is conceivable that all company rules favouring *gehobener Angestellte* are indirectly discriminatory because only a minute number of women reach *gehobener* positions. The third Senate of the *BAG* did not go this far in its decision of 11.11.1986[114]. The *BAG* was of the opinion that the rule favouring *gehobener Angestellte* could not be a matter for complaint under the equal treatment provisions, because the discriminatory effect was merely the result of a possibly discriminatory promotion practice, not a result of the rule itself. According to Hanau and Preis, special rules for *gehobener Angestellte* are justified by the necessity of applying different rules to this group of employees which is especially valuable to the company. The *prima facie* discriminatory effect of such provisions will gradually fade as more women are promoted to *gehobener* positions.[115]

3.2.2.3 Economic efficiency

Measures with a discriminatory impact on part-time workers may be indirectly discriminatory against women as more women than men work part-time[116] and are unable to undertake full-time employment due to their family and household duties. Various arguments have been advanced by employers attempting to justify measures with a disadvantageous impact on part-time employees; these arguments usually focus around the assertion that the employer is striving for a full-time workforce, in order to achieve the goal of lower cost burdens. The averred cost burdens of part-time employees include higher level of personnel costs, additional costs in equipment and maintenance of the workplace and economic disadvantages to the company caused by the

working hours of part-timers.[117] Such arguments are treated with caution by the courts.

A measure excluding part-time workers from a company pension was accepted as indirectly discriminatory in the *Bilka*[118] case, which was referred to the European Court by the *BAG*. The European Court ruled that the measure could be justified if 'the exclusion is based on objectively justified factors which are unrelated to any discrimination based on sex'[119]. This would be so if the policy met a genuine need of the enterprise, was suitable for attaining the objective set and was necessary for that purpose. The burden was on the employer to establish this, according to the principle of proportionality. The application of the principle of proportionality was to be left to the national courts in each instance.

The employer in *Bilka* argued that the scheme which excluded part-time employees from the occupational pension unless they had worked full-time for at least fifteen years was not intended to discriminate against women. Rather, the aim of the provision was to encourage full-time employment. Part-time workers caused organisational problems and involved higher costs. Full-time employees were needed for certain shifts, in particular Saturdays, which were unpopular among part-time workers. This, the employer maintained, was an objective justification, based on economic grounds, for the discrimination.

The *BAG* rejected the claim of the employer.[120] The *BAG* considered current management theory and concluded that the impact of part-time workers on organisational problems and higher costs entailed by reorganisation, could only be regarded as minimal. In any case, any such disadvantage to the employer was offset by benefits to the employer in employing part-time workers. Furthermore, the *BAG* pointed out that, even if the necessity to encourage Saturday working, was a 'genuine need of the enterprise', the pensions policy was not 'suitable for attaining the objective'. There was no differentiation in the pension scheme between Saturday workers and part-time workers, neither was provision made in

the scheme for part-time workers to qualify for the scheme by working on Saturdays.

The strict application of the ruling of the European Court in *Bilka*, concerning justification for indirect discrimination, has been applied by the *BAG* in other decisions regarding indirect discrimination against women by the application of different measures to part-time workers to those applied to full-time workers. For example, the granting of a *Versorgungsordnung* (benefit) by an employer only to full-time workers was held to be indirectly discriminatory and not justified.[121] The employer maintained that, due to its sales strategy, it would prefer to employ only full-time staff, otherwise the technical and organisational requirements of the business could not always be fulfilled by part-time staff in the shop. Part-time workers would not be prepared to work at unfavoured times. As the burden of proof is on the employer, the *BAG* was able to reject these assertions, because the personnel statistics supplied by the employer did not bear out the assertions; on the contrary, they indicated that there was no difference in the contributions of full and part-time workers. The employer also failed to show that the employment of part-time workers would create higher costs than that of full-time workers, who were at the employer's disposal for the whole working day. It limited itself to listing the cost factors of part-time employment, without placing the cost factors of full-time employment alongside, for comparison. The *BAG* ruled that in a cost benefit analysis, all the cost factors must be compared with one another. The employer had failed to produce adequate evidence to justify the discrimination.

The oft advanced ground for justification of disadvantaging of part-time workers, that part-time work is more costly for the employer, is in no way decisive of a case in German law. On the contrary, the employer must advance specific proof that in the circumstances shown, the discrimination is related to economic necessity, that is, it pursues objectively justified goals and is suitable and necessary for this purpose. Only if the employer succeeds in showing[122] that, in its particular undertaking and for this particular job, the cost benefit relationship is such that full-time workers must be treated more favourably, and that the

more favourable treatment actually operates to the employer's economic advantage, and that it is necessary to do so, that is there is no other, less discriminatory way of dealing with the problem, is justification established.

The provisions of the *Beschäftigungsförderungsgesetz* (*BeschFG*) (Act on Improvement of Employment Opportunities) of 26.4.1985 proscribe discrimination against part-time employees on the grounds that they only work part-time. *BeschFG* section 2 I contains a prohibition of discrimination against part-time workers 'unless factual reasons justify a different treatment'. It would be logical if justification under this provision were effected in the same way as under the provisions concerning equal treatment of women and men in *BGB* section 611a ff; that is, in accordance with the principle of proportionality.

3.2.3 Public interest related justifications

3.2.3.1 Special social needs

One example in which a measure of German employment law with the effect of discriminating against women is justified on the grounds of the special needs of the persons concerned is discussed here. Section 1 of the *Kundigungschutzgesetz* (*KSchG*) (Act on Protection Against Dismissal) provides that, in general, the dismissal of an employee is 'socially unjustified' and therefore illegal. Three reasons are available to an employer to refute this general presumption and justify the dismissal. These are reasons relating to the personality of the employee (where the employee is unable to fulfil the job requirements), reasons concerning the behaviour of the employee (misconduct) and 'economic reasons'.

Under the third reason, a dismissal is justified if, due to the economic situation (whether external recession, or internal measures of rationalisation or implementation of new technology) the employer can no longer retain the employee. If a selection is to be made among several employees, the *KSchG* requires that this selection must be made taking into account the 'social aspects' of the dismissal. Applying this

requirement means that the employee who will suffer least from the dismissal is the one who will be chosen. In order to make this decision, a whole range of factors relating to the situation of the employee (age, duration of employment, marital status, number of children), or the employee's 'social needs', will be taken into account. This rule, intending to apply a rule of social justice to each individual case[123], may operate to the disadvantage of women employees, especially if they are married and have husbands who also work (the so-called *Doppelverdienste* or 'double earners'). The reasoning is that a married working woman with a working husband is regarded as the person least likely to suffer from being made redundant, as it is assumed that her husband will provide for her.

This is an example of a legislative provision which may often indirectly discriminate against women. It is applied in a sex neutral manner, but affects a higher proportion of women than men, as almost all working married women have a working husband, but over half of married working men do not have a working wife[124]. The application of the '*Doppelverdienste*' criterion is a measure of social legislation designed to protect certain employees, and therefore is not '*zwingend geboten*', being an instrument of legislative choice. Therefore justification may only be established in pursuit of an objectively justifiable goal, and the measure must be proportionate. Pfarr and Bertelsmann consider that, in a redundancy situation, the person who is worst affected is the one for whom it will be most difficult to find another job[125]. The detrimental effect of a long period of unemployment, they argue, is no less if dependency on a partner, instead of self-sufficiency, has to be endured. They suggest that other factors, relating to the likelihood of the employee finding another job, such as qualifications, experience and mobility, are more important. Thus women workers, especially married women with children, as they are likely to encounter special difficulties in securing other employment, should be protected by this legislation, rather than being seen as the 'obvious' choice for redundancy. 'The criterion 'double earner', in the social choice of an company redundancy, is therefore only objectively justified when all the data, especially the ability to get another job ... are considered.'[126]

4 Conclusion

Justification for direct sex discrimination in German law is limited to statutory exceptions; however, the number of exclusion provisions, in particular 'protective legislation', which remain in force is significant. The effect of these provisions is to undermine the principle of equal treatment for women and men in employment. Furthermore, job advertisements in Germany persist in using sex-specific language[127], which discourages women from applying for 'male' jobs, thus perpetuating division between women and men in the employment sphere.

Principles regarding the standard of lawful justification for indirect sex discrimination are in the process of development. Commentators consider that the justification advanced for discriminatory practices must be proportionate to the discriminatory effect. This could be of great benefit to the individual employee who is required to prove indirect discrimination, as, if the *prima facie* burden is met, then the burden will transfer thereafter to prove that the justification was necessary and consistent with the principle of proportionality. The principle of proportionality, a general principle of German constitutional law, has a significant role to play in this area, if equal treatment for women and men in employment is to be secured.

The substantive grounds for justification of discrimination in German law are not fixed, although the Catalogue of Exceptions provides an indication of applicable grounds in the case of direct discrimination. The number of exclusions allowed by the Catalogue of Exceptions is fairly wide, and is augmented by measures of protective legislation which remain in force in spite of the existence of section 611a *BGB*. Grounds of justification for indirect discrimination, regarded as compatible with the provisions of German law, are likely to emerge from litigation; it may be the case that since the European Court has now made it easier for employees to achieve an appropriate remedy in sex discrimination cases[128] that the number of decisions of the German *Arbeitsgerichte* in the area of sex discrimination in employment will expand greatly.

Notes on chapter 7

1. Norbert Horn, Hein Kötz and Hans Leser, *German Private and Commercial Law* (Oxford: Clarendon Press, 1982), p. 311.

2. Grundgesetz of 1949.

3. Bürgerliches Gesetzbuch, as amended by the EG-Anpassungsgesetz of 1980.

4. '*Beamte*, a special form of public servants, have a special status in the law of the Federal Republic and are exempt from the legislation.' Ruth A Harvey, 'Equal Treatment of Men and Women in the Workplace: The Implementation of the European Community's Equal Treatment Legislation in the Federal Republic of Germany' (1990) Am.J.Comp.L. (38) 31, p. 55, note 147.

5. See below, chapter 7, section 2.1.1.

6. Söllner in Dr Harm Peter Westermann (ed), *Munchener Kommentar zum Bürgerlichen Gesetzbuch* Vol III (Schuldrecht - Besonderer Teil, 1988), p. 1384: 'The provisions apply to all employees, therefore also to those in public service'.

7. Heide M. Pfarr and Klaus Bertelsmann, *Gleichbehandlungsgesetz - Zum Verbot der unmittelbaren und der mittelbaren Diskriminierung von Frauen im Erwerbsleben* (Wiesbaden: Herkules Druck 1985), p. 31-32.

8. eg *Mutterschutzgesetz* (Mother Protection Act) 19669 BGBl 315.

9. Joachim Gres and Harald Jung, *Handbook of German Employment Law* (Deventer: Kluwer Alfred Metzner, 1983), p. 22.

10. Tarifvertragsgesetz (Collective Agreements Act) 1949, Section 1.

11. Gres and Jung, p. 20.

12. see Klaus Bertelsmann and Ursula Rust, 'Equal Opportunity Regulations for Employed Women and Men in the Federal Republic of Germany', in Michel Verwilghen (ed), *Equality in Law Between Men and Women in the European Community* (Louvain-La-Neuve: Presses Universitaires de Louvain, 1986), p. 85.

13. Horn, Kötz and Leser, p. 320.

14. Horn, Kötz and Leser, p. 320.

15. Manfred Weiss, *Labour Law and Industrial Relations in the Federal Republic of Germany* (Deventer: Kluwer, 1987) p. 34.

16. See above, chapter 4 , section 2.1, section 2.2, for definitions.

17. see below, chapter 7, section 2.1.2.

18. Directive 75/117; Directive 76/207.

19. Hortense Hörburger and Fritz Rath-Hörburger, *Europas Frauen Gleichberechtigt?* p. 26-27 (1984) cited in Ruth A. Harvey, 'Equal Treatment of Men and Women in the Workplace' 38 Am. J. Comp. L. 31 (1990), p. 54, note 142.

20. Harvey, p. 54, note 142; Catherine Hoskyns, '"Give Us Equal Pay and We'll Open Our Doors" - A Study of the Impact in the Federal Republic of Germany and the Republic of Ireland of the European Community's Policy on Women's Rights', in Mary Buckley and Malcolm Anderson (eds), *Women, Equality and Europe*, (Basingstoke and London: Macmillan,1986), p. 39-40.

21. *EG-Anpassungsgesetz* vom 13 August 1980, 1980 BGBl 1308 codified at *BGB* Sections 611a, 611b, 612(3), 612a.

22. Pfarr and Bertelsmann (1985), p. 27.

23. Hoskyns, p. 42.

24. Hoskyns, p. 42.

25. see Bertelsmann and Rust, p. 84.

26. Now see von Colson v Land Nordrhein-Westfalen, case 14/83, [1986] 2 CMLR 430; [1984] ECR 1891 (ECJ) and Harz v Deutsche Tradax GmbH, case 79/83, [1986] 2 CMLR 430, [1984] ECR 1921 (ECJ).

27. Pfarr and Bertelsmann (1985), p. 29.

28. Thanks to Rebecca Hervey for assistance with translation.

29. Hans Brox, *Arbeitsrecht* (Stuttgart: Kohlhammer-Studienbücher, 1989), p. 71, Section 135 a) (2).

30. BGB, Section 612 (3).

31. Cited in Pfarr and Bertelsmann, p. 43.

32. Kommentar von Palandt - Putzo on the BGB, 50th ed (1991), p. 659.

33. Söllner in Westermann, p. 1386.

34. Pfarr and Bertelsman (1985), p. 43.

35. Söllner in Westermann, p. 1386; Pfarr and Bertelsmann (1985), p. 44. Now see the decision of the European Court in Ministère Public v Stoeckel, case 345/89, proceedings of the ECJ 15 of 1991, p. 13; see below, chapter 7, section 3.1.1.4.

36. Pfarr and Bertelsmann (1985), p. 44.

37. Klaus Adomeit, 1980 DB 2388.

38. Translation from Carl-Christoph Schweitzer, *Politics and Government in the Federal Republic of Germany: Basic documents* (Leamington Spa: Berg, 1984), p. 116.

39. BVerfGE 1, 14 (52), Decision of 23.10.1951.

40. BVerfGE 1, 14 (52), Decision of 23.10.1951.

41. BVerfGE 3, 58 (135).

42. BVerfGE 1, 14 (52).

43. Eckart Klein, 'The principle of Equality and its Protection in the Federal Republic of Germany', in T. Koopmans (ed) *Constitutional Protection of Equality* (Leiden: A.W. Sijthoff, 1975), p. 75.

44. Weiss, p. 65.

45. Harvey, p. 40, note 53.

46. BVerfGE 3, 225 et seq (239).

47. Klein, p. 85.

48. BVerfGE 3, 225 (242); 21, 329 (343); 31, 1 (4 et seq). On the other hand, BVerfGE 15, 337 et seq. also considered the aim the legislature had when regulating the position. This position seems to have been abandoned. Klein, p. 115, note 132.

49. See Josephine Shaw, 'European Community Judicial Method: Its Application to Sex Discrimination Law' 19 I.L.J. 228 (1990), p. 232.

50. Klein, p. 91.

51. Pfarr and Bertelsmann (1985), p. 20; Bertelsmann and Rust, p. 84.

52. Harvey, p. 41.

53. Pfarr and Bertelsmann (1985), p. 20; Bertelsmann and Rust, p. 84.

54. eg Judgment of 15.1.1955, 1 BAG 258, 1 AZR 305/54; Judgment of 6.4.1955, 1 BAG 348, 1 AZR 365/54; cited in Harvey p. 41 note 56.

55. BAG 28, 14, 18ff; cited in Brox, p. 71.

56. Gres and Jung, p. 60.

57. BAG NJW 1980, 2374; 1985, 165 and 168; cited in Brox p. 72.

58. Gres and Jung, p. 60.

59. Harvey, p. 41.

60. Judgment of 13.11.1979, 52 BVerfG 369, 370; DB 1980, p. 404.

61. discussed in Harvey, p. 44-45.

62. Judgment of BAG 15.1.1955; BB 1955 449; cited in Hoskyns, p. 38.

63. Bonner Kommentar on the *Grundgesetz*, Art. 33, p. 4.

64. Weiss, p. 56.

65. Weiss, p. 49.

66. Westermann, p. 1384, Section 5; cited in Harvey, p. 55, note 146.

67. Pfarr and Bertelsmann (1985), p. 38.

68. Pfarr and Bertelsmann (1985), p. 67.

69. Pfarr and Bertelsmann (1985), p. 104.

70. *BGB*, Section 611a (1).

71. Pfarr and Bertelsmann (1985), p. 76.

72. Pfarr and Bertelsmann (1985), p. 114.

73. Peter Hanau and Ulrich Preis, 'Zur mittelbare Diskriminierung wegen des Geschlechts', (1988) Z. f. A. 19, Jg. 3, p. 191.

74. Hanau and Preis, p. 192.

75. Hanau and Preis, p. 192.

76. Heide M. Pfarr and Klaus Bertelsmann, *Diskriminierung im Erwerbsleben - Ungleichbehandlungen von Frauen und Männern in der Bundesrepublic Deutschland* (Baden-Baden: Nomos, 1989), p. 68.

77. Re Sex Discrimination Laws: EC Commission v Germany, case 248/83, [1986] 2 CMLR 588 (ECJ).

78. Bundesarbeitsblatt 11/1987, p. 40.

79. List cited in Pfarr and Bertelsmann (1989), p. 71.

80. Thanks to Rebecca Hervey for assistance with translation.
1 Pfarr and Bertelsmann (1989), p. 72.

81. Pfarr and Bertelsmann (1989), p. 72.

82. Rolf-Achim Eich, 1980 N.J.W. 2329, p. 2331.

83. Section 611a '... being a certain sex is an indispensable requirement *for this activity* ...' (emphasis added).

84. Pfarr and Bertelsmann (1985), p. 44.

85. AZO 1938 RGBl I 447, revised BGBl I 685.

86. Harvey, p. 42, note 62.

87. Harvey, p. 43.

88. von Münch, 'Grundgesetz Kommentar', p. 221, cited in Harvey, p. 42, note 62.

89. reported in DB Heft 45, 10. 11. 1989, 2279.

90. DB Heft 45, 10. 11. 1989, 2279, point 2.b).

91. case 345/89, proceedings of the ECJ 15 of 1991, p. 13.

92. See Pfarr and Bertelsmann (1989), Section 7.1.1.2.

93. Mutterschutzgesetz 1968 BGBl I 315.

94. Pfarr and Bertelsmann (1985), p. 51.

95. See Pfarr and Bertelsmann (1989), Section 7.1.1.4.

96. GefahrstoffVO of 26.8.1986 (BGBl I 1470).

97. Strahlenschutzverordnung 1976, Section 49 III, Section 56 I; Röntgenverordnung 1973, Section 18 IX, Section 32 V.

98. Definition in Pfarr and Bertelsmann (1985), see above.

99. Hanau and Preis, p. 191.

100. Hanau and Preis, p. 192.

101. cited in Pfarr and Bertelsmann (1989), p. 314.

102. Rummler v Dato Druck, case 237/85, [1987] 3 CMLR 127 (ECJ).

103. Rummler v Dato Druck, p. 139.

104. see Sacha Prechal and Noreen Burrows, *Gender Discrimination Law of the European Community* (Aldershot: Dartmouth, 1990), p. 262 and note 207; Hanau and Preis, p. 199.

105. Rummler v Dato Druck, p. 141.

106. Prechal and Burrows, p. 261.

107. Judgment of 27.4.1988, BB (1988) p. 1606; cited in Prechal, p. 263, note 211.

108. Prechal and Burrows, p. 263.

109. Pfarr and Bertelsmann (1985), p. 139ff.

110. see above, chapter 7, section 3.2.1.

111. see above, chapter 7, section 2.1.2.

112. Judgment of the *BAG* of 5.3.1980, NJW 1980, 2374.

113. Hanau and Preis, p. 177, p. 196.

114. Judgment of *BAG* of 11.11.1986, 70 AP Nr 4.

115. Hanau and Preis, p. 197.

116. For statistics on part time work and gender in Germany, see Pfarr and Bertelsmann (1985), p. 132.

117. Pfarr and Bertelsmann (1985), p. 133-134.

118. Bilka Kaufhaus v Weber von Harz, case 170/84, [1986] 2 CMLR 701 (ECJ).

119. Bilka, p. 720.

120. Bilka judgment of 14.10.1986 BB 1987 p 829; discussed in Prechal and Burrows, p. 260-261; cited in Prechal and Burrows, p. 273, note 199.

121. Judgment of 14.3.1989, BB 1989 2115.

122. The employer must show this in the face of evidence that in fact, in many situations, particularly in the areas of production and management, hiring of part time employees may result in a *positive* cost benefit relationship for the employer. See Pfarr and Bertelsmann (1989), p. 265, note 207.

123. Weiss, p. 86.

124. Pfarr and Bertelsmann (1985), p. 129.

125. Pfarr and Bertelsmann (1985), p. 130.

126. Pfarr and Bertelsmann (1985), p. 293.

127. Bertelsmann and Rust, p. 87.

128. see von Colson v Land Nordrhein Westfalen, case 14/83, [1986] 2 CMLR 430; [1984] ECR 1891 (ECJ).

PART III

Comparison and Evaluation

Chapters 8 and 9 contain detailed comparison of the legal provisions regarding justifications for discrimination in the four legal systems examined in the present study. Use of the comparative method enables evaluation of the statutory provisions, and their judicial interpretation, in terms of their functionality in meeting the aims of law which proscribes sex discrimination in employment.

As explained in Chapter 3, it is my position that the general aim of sex discrimination law is 'equality of opportunity' for women and men in employment. Comparison and evaluation will therefore be in terms of 'equality of opportunity' - in its full sense. In order to give substance to the concept of equality in the context of law regulating sex discrimination in the area of employment, the law must operate and be applied in such a way as to counter its 'masculine' orientation, that is, to counter the assumption that the employment relationship is one between employer on the one hand, and a full-time employee, a main bread winner, with no childcare or other domestic responsibilities, in short, an employee who is a man, or who is a woman conforming to this masculine stereotype.

As it is an aim of the study to provide recommendations for the further development of EC law, the comparison and evaluation of provisions concerning justification is effected with a view to establishing which approaches, rules, standards and substantive grounds for justification should be adopted in EC law, and which approaches of the other legal systems examined are less functional than the present EC approach.

The evaluation seeks to take into account a number of issues in its assessment of justifications for discrimination. One basis for criticism may be that the standard for permissible justification is too low to be functional, that is, that the 'legal test' for justification is drawn too broadly, or applied too loosely. The effect of a standard for justification which is too low is that the goal of equality of opportunity may not be achieved. A related issue is that of burden of proof; that is, the question of which party (employer or employee) is to bear the burden of proof at different stages of a claim concerning justification for sex discrimination.

A second basis for criticism may be that the substantive ground advanced as a justification reveals unnecessary sex stereotyping. The aim of equality of opportunity requires that individual women and men be enabled to make employment choices without restriction in terms of sex or gender roles. A third basis for criticism may be that, although the substantive ground of justification is *prima facie* acceptable, the measure adopted in a particular circumstance may not be genuinely necessary, and the aim of the discriminatory measure could be met in some other, less discriminatory way, in other words, that the justification does not meet the principle of proportionality.

Some grounds for justification of discrimination are more readily acceptable as functional than others. Those grounds of justification to which little objection is taken are dealt with fairly briefly. Other substantive grounds of justification require more detailed scrutiny, as to whether they should be regarded as acceptable exceptions to the principle of equal treatment for women and men in employment. The approaches of the four legal systems concerned to these more difficult grounds of justification in the different legal systems are compared and evaluated at more length.

One particularly difficult issue is that of justification of 'positive discrimination', that is, justification of measures, such as entitlement to paid maternity leave, which grant 'special treatment' to women, and therefore discriminate against men. There is no common agreement among commentators as to whether measures of positive discrimination should ever be justifiable (for an example of a feminist writer who argues that positive discrimination should not be justifiable, see Wendy Williams, "The Equality Crisis", in Bartlett and Kennedy, p. 15-34). My position, however, is that some measures of positive discrimination should be justifiable, in order to effect full equality of opportunity.

Although parallels may be drawn between the two types of discrimination (direct and indirect), the standard or 'legal test' for justification, and the substantive grounds by which justification may be established, differ, depending on whether direct discrimination or indirect discrimination is

to be justified. Another difference is that direct discrimination between women and men in pay may, as a general proposition, never be justified (except in the case of 'positive discrimination', which favours women, for example, paid maternity leave), whereas indirect pay discrimination may be. Both direct and indirect discrimination in treatment may be justifiable. Because of the different conceptual considerations concerned, direct and indirect discrimination are dealt with separately. Approaches to justification for direct discrimination are evaluated in Chapter 8; justification for indirect discrimination is dealt with in Chapter 9. Parallels are drawn in the concluding chapter of the thesis, Chapter 10.

Chapter 8

Direct Discrimination

1 Introduction

Rules justifying direct discrimination, that is, discrimination on the ground of sex, exist in all four legal systems examined. Direct sex discrimination may be effected in the refusal of employment, in denial of promotion or in dismissal of an employee, simply on the grounds of the sex of the employee. The rules generally take the form of exclusion provisions provided in the legislation regulating sex discrimination in employment. Judicial interpretation of the non-discrimination rules may also lead to development of circumstances in which direct discrimination is lawfully justified.

1.1 Statutory exclusions

In all four legal systems examined, there exists a general exclusion provision, laid down in the legislation governing sex discrimination in employment, allowing sex discrimination in those circumstances where the sex of the employee is related to the job concerned in such a way that it is regarded as legally justified for exclusively men (or exclusively women) to be employed in that position. Certain occupational activities may only be carried out by women or only by men; either in fact, or in law. In fact, the number of activities which can only be carried out by women or men respectively is extremely small; arguably only those activities entirely dependent on the different biological capabilities of women and men, in particular women's child-bearing capacity, could properly be included. In law, the number of activities for which direct discrimination on the part of employers is justified is somewhat wider. The law, in allowing for these situations in which direct discrimination is justified, is recognising other important values, interests or even rights, which are balanced against the aim of equal opportunity for women and men.

The general exclusion provision operates where, if for the activity concerned, sex is a 'genuine occupational qualification' (in the UK), an 'indisputable requirement' (in Germany), a 'bona fide occupational qualification' (in the US) or a 'determining factor' (in EC law). The terminology of these exclusion provisions indicates broad similarity, and, in fact, the content of these exclusion provisions, indicated by the judicial application of the provisions in the legal systems concerned bears this out to a reasonable extent.

In both the UK and Germany, a list of situations which *prima facie* fall within the exclusion provision is laid down. The German list (the 'Catalogue of Exceptions') does not actually have legislative force, but it is highly persuasive. The lists contain situations such as employment in the arts, where an employee of a particular sex may be required for reasons of artistic authenticity, and employment in the penal system, where it may be required that an employee who is responsible for special care and supervision of prisoners is the same sex as those who are cared for.

In the US and the EC (and in Germany), application of the exclusion provision (that sex is a BFOQ or a determining factor for the job) is not limited to a list of substantive situations laid down in legislation, but is open to judicial interpretation and, in the case of Germany, the interpretation of commentators. The substantive grounds of justification reached by this interpretation are broadly similar to those in the UK; for example, direct discrimination is justified on the grounds of preservation of decency and privacy of third parties, in jobs in the penal system. The functional difference between laying down, in legislation, a list of situations in which direct discrimination may be justified (as in the UK) and leaving the establishment of substantive situations in which direct discrimination may be justified to the courts, in interpretation of a general exclusion provision, (as in Germany, the US and the EC) is minimal, it seems, in practice.

There are, however, good reasons not to rely on a legislative list for establishment of grounds of justification for direct discrimination. The

problem with any list of exceptions is that it can never be exhaustive. The list of GOQs in UK law is supplemented by various other exceptions to the general principle of equal treatment for women and men in employment, for example, a general exemption for employment in the police force[1] and an exemption for ministers of religion[2]. Furthermore, lists tend to contribute to the reinforcement of stereotypes, by discouraging the examination of specific cases on their own merits. In other words, reliance on a list tends to discourage application of an important aspect of the principle of equal treatment, that is, the treatment of individuals as individuals.

For this reason, it is not suggested that the aims of sex discrimination law of the EC would be better served if the EC were to adopt a list of exclusion provisions. Even if the practical problems attendant in establishing such a list could be solved[3], a list of exclusions laid down in legislation would not necessarily function more effectively than judicial interpretation of a general exclusion clause, provided that the judicial interpretation is rigorous and bears in mind the aim of sex discrimination law. Moreover, the aim of equality of opportunity might be much worse served by the establishment of a list, since the potential for exclusion from the principle of equal treatment is much wider if a list of situations in which direct discrimination is *prima facie* justified is given, rather than requiring the individual justification of each situation where direct discrimination arises.

1.2 Standard of justification

More significant than the manner in which statutory exclusions from the equal treatment principle are laid down is the way in which the general exclusion provisions are interpreted and applied by the courts. The standard by which justifications for direct discrimination are tested is, therefore, important. The issue of standard of justification is discussed in some detail in chapter 9, below, in the context of indirect discrimination; it is sufficient to note here that the legal systems examined reveal two broad approaches to the standard of justification for direct discrimination.

The UK and US systems rely primarily on a reasonableness standard. In the UK, the defence of 'genuine occupational qualification' (GOQ) may apply automatically if the factual situation is met, for example in the case of employment in a single sex hospital or prison.[4] However, many GOQs refer to the concept of reasonableness: for example, where privacy and decency are to be protected, it may be a GOQ to employ employees of only one sex if a person 'might reasonably object' to persons of the opposite sex being present[5]; or where it is not reasonable to expect an employer to equip the premises (oil rigs, lighthouses, ships) at which the work is carried out for employees of both sexes, the GOQ defence may apply[6]. The US standard of 'bona fide occupational qualification' is, according to the statute, to be 'reasonably necessary to normal operation of the enterprise'.[7]

In German law and in EC law, the proportionality test applies to exclusions from the equal treatment principle. The proportionality test requires that there must be a real and genuine need to discriminate, and the exclusion must be *necessary* to meet that need. The European Court has established clearly that the exclusions in Equal Treatment Directive, Article 2, may be successfully established only with due regard to the principle of proportionality.[8]

As explained below[9], it is my position that the proportionality test provides a more functional approach to the standard of justification than the reasonableness test.

2 Substantive Grounds of Justification for Direct Discrimination

Substantive grounds for justification of direct sex discrimination are discussed below, using a three-fold categorization. The first category concerns those grounds where the duties of the job require a woman or a man as employee. The second category concerns those grounds where the context of the job justifies direct discrimination, because the context of the job requires the protection of interests of other parties, either specific individuals, or more general, 'societal' interests. The third

category concerns those grounds where the justification relates to the protection of the interests of women themselves.

Grounds of justification related to the duties of the job are dealt with first, as they are the grounds most readily accepted in all four legal systems, as 'genuine occupational qualifications', 'indisputable requirements', 'bona fide occupational qualifications' or 'determining factors'. The example of artistic authenticity is referred to briefly. Grounds of justification which arise through the balancing of the interests of others are discussed second, using the examples of cultural necessity, protection of privacy and decency, and the maintenance of public safety. All four legal systems examined recognise that, in certain circumstances, other interests may override the general principle of equal treatment for women and men in employment. Purported grounds of justification for direct sex discrimination relating to the protection of women are regarded, in the four systems examined, as more suspect, since such grounds tend to rely on stereotyping of women as weak, vulnerable and in need of protection. Even so, such stereotypical reasoning may be found in some judgments.

There is one outstanding exception to the assertion that special protection of women does not in general justify discrimination: the one situation where the special protection of women is regarded as justifiable is where the woman is pregnant. However, the discrimination in this case may often be (or may at least purport to be) for the benefit of women, that is, the discrimination is 'positive discrimination'. Measures of positive discrimination will, by their nature, be disadvantageous to men, as they accord extra rights and privileges to women. However, this direct sex discrimination against men is justified by the special nature of pregnancy. As the issues concerned in justification on ground of pregnancy may be regarded as different from those in other situations of direct discrimination (and also because it is not clear whether discrimination on grounds of pregnancy may be considered to be direct discrimination), pregnancy as a ground for justification is discussed separately, below.

2.1 Artistic authenticity

As noted above, many of the situations covered by the exclusion provisions are those in which the justification for exclusion of either women or men from the activity concerned is more or less universally accepted. For example, all four systems examined consider sex discrimination to be legally justified in certain employment activities in the arts, for instance in dramatic performances, or modelling for painters and sculptors, where the role to be fulfilled is one which could not be carried out authentically if undertaken by a person of the other sex. The exclusion of members of a particular sex from employment in particular artistic roles is essential if the intrinsic qualities of works of art are to be valued and preserved. Who would wish to endorse a female Hamlet, or a male Mona Lisa? The very nature of the job, and the specific duties of the job, that is, for example, the accurate and authentic portrayal of a character in a play, necessitate employment of a person of a particular sex. There can be no objection to a justification on grounds which are so closely related to effective performance of the job.

2.2 Cultural necessity

Another ground of justification for direct discrimination which is, although perhaps a little reluctantly, accepted in the four legal systems examined, is the ground that, due to cultural necessity, an employer is required to employ a person of a particular sex. This ground of justification applies where the activity to be carried out involves work in a country in which it would be difficult, for cultural reasons, for a woman to carry out the work, because women are excluded from the public sphere and from business activity in that country. The justification covers, for example, employment in several Middle Eastern countries, where Islamic law and the prevailing social mores render it more or less impossible for women to carry out business activities. The fact that this ground of justification is narrowly framed, and applicable only where a genuine difficulty would be encountered by a woman employee, represents a statement that the prevailing culture and the position of women in that prevailing culture, in those parts of the world

concerned, is not supported; rather it is hoped that these countries will eventually embrace equality. The ground of cultural necessity is also related to the job; the relationship is not to the actual duties of the job, but to the context in which those duties are carried out. The ground is also related to the 'interests' of others. Allowing the ground for justification involves a recognition that the cultural and religious interests of societies other than Western 'post-Christian' liberal democracies cannot in practice be, and should not be, ignored. To do so would be an unjustifiable exercise of 'cultural imperialism'. Such a ground for justification may be regarded as functional.

2.3 Decency and privacy

It is recognised, in all four legal systems examined, that interests and claims of individuals other than the employee who is discriminated against may provide grounds for justification of direct discrimination in employment. Where concepts of decency, modesty or privacy of individuals are considered important, the effect of protection of these interests may result in direct discrimination against women, or against men. The classic example is employment as a toilet attendant, where men may justifiably be excluded from employment in a women's toilet and *vice versa*. It may be justifiable that the individuals carrying out, for example, the jobs of nurse, or customs officer who is to carry out strip searches, or prison officer, are of the same sex as those with whom they come into close physical contact in carrying out of the duties of the job.

In the case of *Re Sex Discrimination in the Civil Service: EC Commission v France*[10], the European Court relied, *inter alia*, on the ground of privacy to justify sex segregation in the French government's recruitment policies for various posts in prisons. One post for which it was claimed that the sex of the employee would be a determining factor was that of head warder of a single sex prison. In reaching its decision that the direct discrimination was justified, the European Court examined the post of warder, from which individuals are promoted to head warder. The Court held that the specific nature of the post of warder and the conditions in which warders carry out their duties justifies reserving

posts in male prisons for men and those in female prisons for women, on the grounds of protection of the interest of decency and privacy of the inmates with whom the warder is required to work. Although the activities of head warders were not necessarily of such a nature that sex is a determining factor in appointment of head warders, the reasons for appointing head warders from the pool of warders, in particular that head warders should have had experience of the job of warder, justified the policy.

At first sight this decision might seem sound: it is certainly acceptable to stipulate that head warders must have the experience of being warders, and the specific nature of the post of warder and the duties carried out in that post justify the recruitment of male warders for male prisons and female warders for female prisons, on the ground of decency and privacy of the inmates. However the decision of the European Court does not take into account the situation where a female warder, having gained experience in a female prison, wishes to apply for *promotion* to a post for which being of a particular sex is not a determining factor, that is the post of governor of a male prison. In this situation, it is submitted, the exclusion of women should not be justified.

The interests of decency and privacy must be balanced against the principle of equal treatment for women and men in employment. Where the privacy, modesty and decency of another person, with whom the employee is in close contact in carrying out the duties of the job, is at issue, for example in the case of nursing, prison work or other caring professions, this must be balanced against the equal treatment principle, with due regard to equality of opportunity for women. The preservation of decency and privacy, especially of clients or others with whom the employee works closely, cannot be objected to as a justification for direct discrimination in some contexts, although a functional approach may be regarded as one which does not seek to overextend the reach of the ground of justification. Given that a balance of competing interests is required, the act of balancing should, in a functional system, be carried out in light of the genuineness of the interest, and the necessity of the

discriminatory policy. In other words, the application of the standard of proportionality should ensure appropriate application of the rules.

2.4 Public safety or security

All four legal systems examined allow the justification of direct discrimination on grounds of public safety or security. This ground is often advanced in cases concerning employment of women in policing and public order activities. Exclusion of women from particular tasks may be justified on the grounds of the interests of other individuals, as in the case of the ground of privacy; however, in the case of public security, the interest is a more general, 'societal' interest. The ground for justification is that the employment of women in particular jobs presents a real risk to public order and the safety of the public in general.

The position of EC law is that public security and public order may constitute a ground for justification of direct sex discrimination. The European Court faced the issue of justification of exclusion of women from certain policing and public order activities in *Johnston v RUC*[11]. The Court was called upon to interpret the Equal Treatment Directive[12], Article 2 (2), which allows derogation from the equal treatment principle where the sex of the worker is a 'determining factor'. The Court was required to decide whether the policy of the Royal Ulster Constabulary concerning women members, and their equipment, in particular, the policy that women members of the RUC are not armed, was in breach of the Directive. The effect of this policy was that the plaintiff, Ms Johnston, lost her job, where a man in her situation would not have done so.

In its defence, the UK government relied on Article 2 (2) of the Directive, averring that, for the occupational activity concerned, the sex of the worker constituted a 'determining factor', *inter alia*, because of the 'difference in strength between the sexes'[13] and because 'if women were armed they might become a more frequent target for assassination and their firearms could fall into the hands of their assailants.'[14]

The decision of the European Court in *Johnston* suggests that a broad 'public safety' justification would be allowed in any policing activity (or perhaps other activities also) if a Member State wished to exclude the operation of the Equal Treatment Directive. The Advocate General went so far as to state that 'no one doubts' that,

> 'in some circumstances the demands of public order may constitute a legitimate ground for the authorities of a Member State to permit only individuals of one sex to do certain work relating to the maintenance of law and order'.[15]

The Court held,

> 'The possibility cannot be excluded in a situation characterised by serious internal disturbances (*in casu*, Northern Ireland) that the carrying of firearms by policewomen might create additional risks and might be contrary to the requirements of public safety. In such circumstances, the context of certain policing activities may be such that the sex of the police officer constitutes a determining factor for carrying them out. If that is so, a Member State may restrict such tasks to men (Article 2 (2) Directive 76/207)'

It is for the national court to decide whether this is the case, with due regard to the principle of proportionality.[16] The exclusion provision is, however, confined to specific *activities*: it is not applicable to occupations in their entirety.

The application, in the *Johnston* case, of the ground of public safety as justification for direct sex discrimination may be regarded as questionable. The question of why female police officers are more likely to be assassinated than male police officers was not examined, but accepted without evidence and without scrutiny by the European Court.[17] What is the basis for the 'additional risks', referred to in the judgment, to public security, which would be incurred if women were employed as armed RUC officers? Was the reason for the fear of assassination related to the difference in strength between the sexes? If so, the ground for justification was based on a generalisation which should not be available to justify derogation from the equal treatment principle, an important facet of which is the treatment of individuals as individuals. A requirement of a certain amount of strength in an applicant for a job as an armed police officer could be justified, but not a blanket ban on all

women applicants, on the grounds that women are, on average, weaker than men. Was the reason for the fear of assassination related to a perception of women as less efficient in the use of firearms than men? If so, the ground for justification was based on sex stereotyping, which is antithetical to the aim of sex discrimination law. There is no biological reason why women should be less effective in the use of firearms; given sufficient training, there is no reason why women should be more vulnerable than men when faced with a situation of internal disturbance, such as that in Northern Ireland. The (alleged) public perception of women as weaker, more vulnerable to assassination and less effective in carrying out armed policing duties is also a ground of justification based on sex stereotyping. Finally the issue of proportionality seems to have been insufficiently considered. Would the threat to public safety and security be *significantly* increased by the employment of armed women police officers? Unless the threat was sufficiently increased by the presence of women, the proportionality test might not be satisfied, since the prohibition would not be *necessary* to protect public security.

The decision in *Re Sex Discrimination in the Civil Service: EC Commission v France*[18] modified the *Johnston* decision somewhat, narrowing its scope. The case concerned French recruitment practices for, *inter alia*, five categories of job in the national police force. The policy involved separate recruitment competitions for women and men, with a percentage of posts to be allotted to women and men respectively in each competition.

With regard to the posts in the police force, the French Government argued,

> '... the maintenance of public order requires a display of the capacity to use force at all times, which would be disrupted by the large-scale recruitment of women. The need to dissuade potential troublemakers and the physical dangers of the job justify recruiting only a limited proportion of women.'

This is a similar argument to that which was successful in *Johnston v RUC*; it is open, therefore, to similar criticism. In response to the argument of the French government, the Commission countered that a dissuasive effect which police officers may have on those likely to commit

violent or riotous crime has more to do with physical strength of the individual than with the sex of the person concerned[19]. The approach of the Commission concentrates on the characteristics of individual employees or potential employees and removes the sex stereotyping evident in the submission of the French government.

The Advocate General was prepared to countenance the idea that sex could be a determining factor for some police activities, 'where the use of force or a display of the capacity to use force are required'[20], not because men are on average stronger than women, but because 'potential delinquents regard men as more likely to use force'[21].

However, the Advocate General considered that there was no need to decide whether the situation in hand was such a case, because the use of the quota system had not separated out those police activities where a particular threat to public safety was present. 'The activities of the five police corps in question are many and varied ... many of these activities may be carried out by either sex.'[22]

> 'It seems to me that there are many degrees of violent behaviour and it has not been established that women cannot deal with any of them or that, even if for specific areas or for specific purposes, the use of men only is justified, the engagement of women on a quota basis throughout the police force has not been shown to be justified whatever the nature of the activities actually carried out. The French provisions lay down in advance a quota of jobs available to men and women without regard to the context in which the occupational activity is carried out.'[23]

The Commission and the Advocate General countered directly the assumption that women in general are less able to deal effectively with violence, pointing out that generalization is inappropriate, and that the ability to carry out policing and public order duties depends on the physique, strength, and training of the individual concerned. The imposition of quotas throughout the police force and prison service was not only based on male and female stereotypes which are not relevant in individual cases, but also was disproportionate to the proposed aim of the quotas. It could not, therefore, be justified under Article 2 (2).

The European Court agreed that the quotas for the various grades of police officers were not sufficiently related to the specific activities of the jobs concerned, as is required by the wording of Article 2 (2), to justify an exception to the equal treatment principle. The Court held that such a justification relating to 'public security' in general cannot apply to employment in all posts in the police force of a Member State. This is an application of the proportionality principle; the policy had a discriminatory effect greater than was necessitated by its aim, the exclusion of women from employment in situations in which there is a particular threat to public safety or security. The principle of proportionality operated here to support equal opportunities for women and men in this particular sphere of employment.

The position of EC law, as set out in *Johnston v RUC*, may be criticised as one which takes account of sex stereotyping in that it relies on an assumption that, because women are perceived by the 'general public' as more vulnerable than men, or less able to act as skilled police officers in the face of violence, they may be excluded from certain policing activities on grounds of public security. The decision in *Commission v France*, however, seems to approach a more functional interpretation of the ground of public security as justification for direct sex discrimination, by focusing on the proportionality test.

The leading US case, *Dothard v Rawlinson*[24], reveals similar reasoning to that of the European Court in *Johnston*, although the application of the ground of public security as justification for disparate treatment of women is carefully limited to the special conditions under which the employees concerned were to work, that is, in a 'special penitentiary' with high-risk prisoners.

In *Dothard v Rawlinson*[25], which concerned employment in a position of prison guard in a maximum security, all male prison, the Supreme Court held that it was a bona fide occupational qualification (BFOQ) that employees holding the position be male. Stressing that the BFOQ defence was only applicable in the narrowest of situations, the Court held that this was one such situation. The judgment focused on the potential

threat to security in a prison with a high proportion of sex offenders, should women be appointed as prison guards.

The Supreme Court held that this particular case was not one in which the ground of justification was solely a desire to protect potential women employees[26], but that 'more was at stake'.[27] At the very heart of the duties of the job concerned was the maintenance of security in the prison. Because it could be shown that sex offenders who have already assaulted women are likely to do so again if they could gain access to women in the prison, 'A woman's relative ability to maintain order in a male, maximum-security, unclassified penitentiary of the type Alabama now runs could be directly reduced by her womanhood.'[28]

> 'In a prison system where violence is the order of the day, where inmate access to guards is facilitated by dormitory living arrangements, where every institution is understaffed, and where a substantial portion of the inmate population is composed of sex offenders mixed at random with other prisoners, there are few visible deterrents to inmate assaults on women custodians.'[29]

The important factor of the *Dothard* decision is that the likelihood of assault on a woman prison officer would not only threaten the woman concerned, but also would constitute a serious threat to the basic control of the penitentiary and protection of its inmates and other security personnel. 'The employee's very womanhood would thus directly undermine her capacity to provide the security that is the essence of a correctional counsellor's responsibility.'[30]

The judgment in *Dothard* is difficult, as the dissenting opinion points out, as the ground for justification reveals sex stereotyping.

> 'It appears that the real disqualifying factor in the Court's view is '[t]he employee's very womanhood.' ... In short the fundamental justification for the decision is that women as guards will generate sexual assaults. With all respect, this rationale regrettably perpetuates one of the most insidious of myths about women - that women, wittingly or not, are seductive sexual objects. The effect of the decision is to punish women because their very presence might provoke sexual assaults. It is women who are made to pay the price in lost job opportunities ... The proper response to inevitable attacks on both female and male guards is not to limit the employment opportunities of law-abiding women ... but to take swift and sure punitive action against the inmate offenders.'[31]

The decision to exclude women from the position of prison guards was justified by the assertion that the presence of women would generate sexual assaults. This reasoning, as the dissenting judgment points out, 'perpetuates one of the most insidious of myths about women - that women, wittingly or not, are seductive sexual objects'[32].

The result of perpetuation of this myth is that women are made to pay the price in lost job opportunities. Equal opportunities of women and men in employment cannot be advanced if the legal justification for exclusion of women from posts involving contact with dangerous individuals is based on this type of sex stereotyping. Rather measures should be taken to protect *all* employees in prisons and similar situations from the attempted attacks (whether sexually motivated or not) they will suffer during the course of their employment. 'The proper response to inevitable attacks on both female and male guards is not to limit the employment opportunities of law-abiding women ... but to take swift and sure punitive action against the inmate offenders.'[33]

This argument is appealing, but it is submitted that, although in the majority of situations involving a threat to public safety and security, the exclusion of women should not be justified, for the reasons outlined above, there may be a few situations where the ground of public security, and the general interest of society in law and order, may operate to outweigh the principle of equality of opportunity. The situation in *Dothard* might be regarded as one such situation. Because *Dothard* is so clearly limited to the most exceptional circumstances, the approach of the Supreme Court might be regarded as functional.

The acceptance of public security as a ground for justification of direct sex discrimination may, it is submitted, be functional with regard to the aims of equality of opportunity for women and men in employment, if, and only if, there exists a *real threat* to public security. It should be made clear that, in order to be considered functional, the purported justification should be scrutinised for sex stereotyping. The *Johnston* approach may not be regarded as functional, as there was no real or specific evidence advanced to show why the employment of armed women

police officers should constitute more of a risk, in the particular context of the duties of the job concerned, than the employment of male police officers. The purported justification was based on an assumption that can be understood only in terms of traditional stereotypical generalized assumptions of strength and skill or vulnerability of men and women respectively. The acceptance of this justification, and its proportionality, rests entirely on this assumption. In *Dothard*, the specific (and highly unusual) context in which the work was carried out - a high-risk prison, with a large proportion of male sex offenders among the prisoners - was sufficient grounds to show a real threat to security if women were employed as prison officers; a threat greater than that present where only men were employed.

It is recognised that the distinction between *Johnston* and *Dothard* is a fine one: however, a functional application of the ground of public security should operate to make such careful distinctions, in order to retain employment opportunities for women which are as wide as possible. In fact, experience in the UK shows that women can be extremely effective as prison governors and officers, without threat to public security.[34]

2.5 Safety of women

In the past, in the legal systems of the UK, US and Germany, the ground of safety of women, or the protection of women from danger, has been used to justify direct discrimination against women, in particular in the exclusion of women from jobs which are considered too perilous or otherwise unsuitable for women. For example, in 1908, the US Supreme Court, in *Muller v Oregon*[35], was prepared to uphold legislation governing the hours women were permitted to work, on the grounds that the special protection of women was justified. Various measures of protective legislation remain in force today. However, the general trend, in all four legal systems examined, seems to be the continued narrowing of such protective legislation, leaving only those measures where the protection relates to women's ability to bear children, and therefore the risk to safety is not the same for men.[36]

The European Court has rejected the ground of safety of women as a general justification for the exclusion of women from dangerous jobs. The ground of safety of women was advanced as justification in the cases of *Johnston v RUC* and *Re Sex Discrimination in the Civil Service, EC Commission v France*[37], and was rejected. In the case of *Ministère Public v Stoeckel*[38], the European Court was required to rule on the compatibility of a provision of German law which excluded women from nightwork. The Court pointed out that the risks incurred by women in carrying out employment activities at night were not different in nature to risks incurred by men in similar employment. Therefore the exclusion of women only from those jobs was not justified on any grounds.

The US Supreme Court, in *Dothard*, also rejected the ground of safety of women as a general justification for exclusion of women from employment opportunities. As the Court pointed out, 'the argument that a particular job is too dangerous for women may appropriately be met by the rejoinder that it is the purpose of Title VII to allow the individual woman to make that choice for herself.'

The approach that the ground of justification of women's safety be rejected, in all except those cases concerning pregnancy and maternity, is functional. Women should be given the same opportunity as men to decide whether to accept the risk concerned, and gain the benefits of employment.

2.6 Pregnancy

Grounds relating to pregnancy and maternity of a woman employee, arise frequently as justifications for sex discrimination in employment. The issues concerned in evaluation of justifications for discrimination related to pregnancy may be regarded as conceptually different from those in other situations of sex discrimination, for the simple reason that only women are biologically able to become pregnant and bear children, and that therefore there is, in this instance, a real, factual difference between the position of women and the position of men.

It is not accepted by the courts in all four legal systems examined that discrimination on grounds of pregnancy is direct discrimination.[39] Nevertheless, justification of discrimination based on the ground of pregnancy is discussed in this chapter, concerned with direct discrimination, for three main reasons. The first of these reasons is practical; the European Court regards pregnancy discrimination as direct sex discrimination[40] and, as the focus of the study is EC law, it seems reasonable to follow the position of the European Court. The other two reasons relate more to theory and analysis than practical considerations. It may be asserted that pregnancy discrimination must be direct discrimination, because only women may become pregnant. The discrimination is, of necessity, sex based, and therefore should be characterised as direct discrimination. The third reason for treating pregnancy discrimination as direct discrimination is that discrimination on grounds of pregnancy, or on other grounds relating to pregnancy, does not fit the scheme of a claim of indirect discrimination. Indirect sex discrimination arises where a criterion, *neutral on its face*, is applied in such a way as to result in a disproportionate impact on individuals of one sex. The criterion 'non-pregnant' is not a sex neutral requirement, as all men will always meet the requirement, and it is only women who may sometimes not fulfil it. In any case, it should be made clear at this point that the present discussion does not seek to provide a definitive answer to the question of whether pregnancy discrimination is direct discrimination or not; rather the discussion seeks to explore whether rules developed, and judicial interpretations thereof, regarding the justification of discrimination on grounds of pregnancy, and grounds related to pregnancy, are functional.

The ground of pregnancy itself is not, in any of the four legal systems examined, a permitted ground of justification for discrimination which operates to *disadvantage* women - that is, 'negative discrimination'. There are a number of situations in which discrimination against a pregnant employee may arise: for instance, in the refusal of an employer to employ or to promote a pregnant woman, in the dismissal of an employee who becomes pregnant, and in the exclusion of pregnant women from access to training schemes, seniority rights, or other fringe benefits, for

example, sick pay schemes which do not provide payment when the cause of the illness is pregnancy related[41].

In EC law, it was made clear, in the case of *Dekker*[42], where it was held that the employer was not entitled to refuse to employ a woman on the grounds of her pregnancy, that 'negative discrimination' cannot be justified on grounds of pregnancy. In US law and German law, grounds related to pregnancy, for example, the ability to perform the job safely, could justify detrimental treatment of a pregnant woman, using the BFOQ or legitimate business reason defences (in US law) or establishing that an 'indisputable requirement' to employ a non-pregnant person existed (in German law), but the actual ground of pregnancy itself cannot lawfully justify 'negative discrimination'. In the UK, although discrimination on grounds of pregnancy is not regarded as direct discrimination, in cases in which the employer has successfully defended 'negative discrimination' against a pregnant woman, the employer has relied on a ground related to the pregnancy, such as the woman's absence from work, and not the pregnancy itself.[43] An employer cannot simply rely on pregnancy *itself* as a ground of justification, but justifications which are a consequence of pregnancy may be accepted.[44]

In all four systems, the ground of pregnancy itself may be a justification for discrimination which operates to the *advantage* of women, and. therefore is direct sex discrimination against men - that is, measures of 'positive discrimination'. For example, Article 2 (3) and (4) of the Equal Treatment Directive, as interpreted by the European Court, establish this justification in EC law.[45] In the US, Title VII, as amended, in section 701(k), for example, specifically requires pregnant women to be given the benefits of health plans and paid leave, where other employees 'with similar disabilities or conditions' would enjoy these. The German *Mutterschutzgesetz* (Mother Protection Act) grants women various advantages in the workplace, such as, for example, extra breaks for breastfeeding. In the UK, for example, some employees who become pregnant enjoy the special right to non-dismissal provided by the Employment Protection (Consolidation) Act 1978, section 60.

Most often, it is not the pregnancy itself which is advanced as a ground of justification, but a ground related to the pregnancy. Three different types of such grounds are discussed below. The grounds reflect those discussed above, in that they are categorised as: a) justifications related to the performance of the job, b) justifications related to the balancing of interests of the employer and employee, and c) justifications related to the protection of women. The first type of justification relates to the employee's ability to perform the duties of the job. In general, if no women could perform a particular job (as discussed above), then direct discrimination is justified in the recruitment of employees for that position. By analogy, if no pregnant women could perform the job, then discrimination is also justified. What is concerned here is measures of 'negative discrimination'.

The second type of justification relates to grounds of justification which concern the balancing of interests of the employer and employee. The cost to the employer of, for example, replacing an employee while on maternity leave, may be advanced as a ground of justification, if the employer is required to shoulder the burden of keeping open a job for an employee on maternity leave and is not required to do so for a man who requires leave for a similar reason, for example, a medical reason. What is concerned here is the justification of measures of 'positive discrimination'.

The third type of justification relates to justification in terms of protection of the woman and the foetus. The interests of society in the health and protection of its children are part of the ground for justification of discrimination. The issues of protection of the woman and protection of the foetus are separate, but interlinked, as the health of the foetus depends on the health of the woman. Protective measures are, on their face, designed for women's benefit. A woman employee may derive great advantage from some protective measures; advantage which is not available to a male employee. However, protective measures may equally work to the disadvantage of women, who may be excluded from employment opportunities, and may perpetuate the stereotype of women's vulnerability. The special protection of women cannot therefore be

regarded as clearly falling into the category of 'negative discrimination' or 'positive discrimination'.

2.6.1 Ability to perform the job

The refusal of an employer to employ a pregnant woman, or the requirement that a pregnant employee take leave, is justifiable, in all four systems examined, if the pregnancy jeopardises the employee's ability to perform the job at all, or to perform the job effectively or safely. What is concerned here is the physical ability to perform the job, not inability to work which arises due to the employee's absence on maternity leave.

2.6.1.1 Physical ability

A pregnant employee may be physically unable to perform, or to perform safely, the duties of certain jobs. In this case, differential treatment may be justified.

For example, in the US, discrimination against a pregnant employee is not unlawful if the employee is treated the same as another employee who suffers from a similar physical 'inability to work'. One area where the inability of a pregnant employee to perform the job safely has received judicial attention in the US is that of concern for the safety of passengers where the air stewardess is pregnant. The courts have utilised both the business necessity test and the BFOQ defence to find that an employer airline may operate mandatory maternity leave policies, provided that these do not show discriminatory intent in the way that they are applied, and in particular that the accrual of seniority rights is not affected.[46] This justification is not objectionable if it is based on the proven inability of a pregnant woman to perform the job safely, and not on untested perceptions of capabilities of pregnant women, which may be based on inaccurate stereotyping.

The decision of the European Court, in *Dekker*, that pregnancy discrimination is direct discrimination[47] means that EC law will, at some stage, be required to develop a position to deal with the situation where

the employer claims that a pregnant women is unable to carry out the job. The issue has not yet arisen in a case before the European Court. The general provisions used by the Court to examine justifications for sex discrimination (a genuine need of the enterprise, suitable and necessary[48]) cannot be used, as they only apply to indirect discrimination. However, the Court could seek to rely on Article 2 (2) of the Equal Treatment Directive, which allows Member States to exclude from the field of application of the Equal Treatment Directive occupational activities for which, by reason of their nature or the context in which they are carried out, the sex of the worker constitutes a determining factor.

Provided that the nature of the job is such that the inability to perform can be demonstrated to be directly connected to the pregnancy, little objection can be taken to justification on grounds of physical ability to perform. The approach of the US courts, in their reasoning in the cases concerning air stewardesses, may be regarded as functional.

2.6.1.2 Morality

In the case of some jobs, in particular those which involve contact with young people, in a leadership, teaching or guidance role, employers may seek to argue that a certain standard of morality is required for the effective performance of the job. In two of the legal systems examined, cases have come before the courts in which the employer has argued that it is a requirement of a particular job that women, employed to carry out that job, either remain childless, or, if they wish to bear children, do so within a marital relationship.

In the US, in *Chambers v Omaha Girls Club*[49], the employer, a club for girls and young women, was successful in establishing the business necessity defence, to justify its refusal to employ an unmarried pregnant woman. It was also the employer's policy to exclude from employment men who caused pregnancy outside marriage. The court accepted that the specific nature of the employer's business, 'to foster growth and maturity in young girls by exposing them to the greatest number of available

positive options in life', was such that the refusal to employ Ms Chambers was justifiable.

A very similar issue arose in the UK in *Berrisford v Woodard Schools (Midland Division) Ltd*[50]. Ms Berrisford was employed as a matron at a Church of England girls' boarding school. She was dismissed when she became pregnant, because she did not intend to marry the father of the child. The 'manifestation of extra-marital sex' (that is, the pregnancy) was considered an inappropriate model for the girls in the school. The majority of the EAT held that there was no discrimination, as Ms Berrisford had not been treated more favourably than a man in a similar situation employed by the school. The male comparator accepted by the majority was a teacher, who, on taking up employment in the school had been told to regularise his relationship with the woman with whom he was living at the time, by marrying her. Therefore, the EAT reasoned, where evidence of continuing extra-marital activity was present, a man would also have been dismissed; thus there was no discrimination on grounds of sex.

The justification for discrimination against a pregnant woman in both *Chambers* and *Berrisford* may not be regarded as functional, in terms of equal treatment for women and men. The reasoning assumes that a male comparator would be treated in the same way as the woman concerned was treated. But pregnancy is a special case; men cannot become pregnant, therefore the approach to equality which focuses on comparison between the woman and a 'similarly situated' man is inappropriate in such cases. As the minority opinion in the *Berrisford* decision pointed out, the man regarded as a comparator in this case was not in a similar position to Ms Berrisford. The man had three options available to him: either to leave the job, or to marry his partner, or to break up the relationship. A pregnant woman would not have the third option[51]: she would be required either to leave the job or to marry.

Furthermore, a pregnant woman may not, in fact, have the option of marrying (after all, it takes two to marry!), because the father of the child may refuse to do so. The woman is thus denied a job by reason of

her pregnancy; it should be noted that, in the cases concerned, it was the *pregnancy* which was the reason for the dismissal, as 'a manifestation of extra-marital sex', and not the extra-marital sex itself. It may be assumed that the employer would not have objected to the extra-marital sex had it been clandestine, because a clandestine sexual relationship would not, by definition, provide an 'inappropriate role model' for the girls with whom the employee came into contact in the course of the job.

As David Pannick notes[52], these cases, where the adverse treatment of a pregnant woman is for moral reasons relating to her marital status, could most readily be dealt with if it were made unlawful by legislation to discriminate on grounds of marital status in all circumstances.

However, it should be possible to utilise the existing provisions on sex discrimination to recognise that the sort of treatment accorded to Ms Chambers and Ms Berrisford is direct sex discrimination, because only a woman could be treated in that way. A justification of that discrimination, available on grounds of morality of potential employees, should not be regarded as functional, as it cannot be applied equally to men who have extra-marital sexual relations.

2.6.2 Cost to employer

The absence from work of an employee who becomes pregnant (as opposed to her physical disability to perform the job) inevitably gives rise to costs for the employer. The employer may therefore seek to justify discrimination on ground of pregnancy by asserting that the disadvantage to the employer, such as the costs incurred in finding a replacement for the pregnant employee while on maternity leave, justifies the discrimination. Many of the costs (both in economic cost and in inconvenience) incurred by employers are the result of measures of positive discrimination, which benefit women employees who become pregnant. Where, as is, the case for example in the UK, measures of protective legislation do not apply to all women employees, the employer

may seek to justify, on grounds of cost, discrimination on grounds of pregnancy against a woman who is not protected by the legislation.[53]

The argument that the extra costs faced by employers in providing paid leave for employees who become pregnant justify discrimination cannot be regarded as functional in a legal system which seeks to provide equality of opportunity for women and men in employment. The argument is that women who require leave for reasons related to pregnancy cost the employer more in paid leave than comparable men, who only take leave for sickness. However, a pregnant woman has no real male comparator. To allow this justification for different treatment for women would perpetuate divisions between women and men in employment, as only women may become pregnant. Sex stereotyping would also be reinforced, as employers would be allowed, for example, to refuse to employ any women, on the grounds that 'all women want to get pregnant, have children and leave work', which will cost the enterprise in paid leave.

The aim of equality of opportunity requires, in this case, that employers bear some burden in the implementation of this important measure of social policy. However, it should be stressed that it is not suggested that employers should bear the burden of equalisation of opportunities *unaided*. Apart from anything else, it seems likely that if employers were required to shoulder this burden without assistance, 'covert' discrimination, where employers seek to avoid the obligations of anti-discrimination law, would increase.[54] A system committed to equality of opportunity would provide that the burden on employers to grant paid leave to employees who become pregnant and have children is spread evenly among all employees, employers and the state; this can be done, for example, by employer insurance schemes, and state support. It could be added that if such a system were applied uniformly throughout the EC, a level playing field for employers would result, and no individual employer would suffer a comparative disadvantage. The burden should not be borne by women, in lost opportunities of employment. A justification which allows this cannot be regarded as functional.

The recent UK case of *Webb v EMO Air Cargo*[55], illustrates an approach to the justification of cost and inconvenience to the employer which, it is submitted, is not functional, if the aim of anti-discrimination legislation is accepted as equality of opportunity. In *Webb* it was held that, since a man in a similar situation, for example, who required surgery for a hip replacement, would have been treated in the same way, the employee concerned had not been discriminated against.

Ms Webb was employed to provide cover for another employee of EMO, who was taking maternity leave. During the first few months of her employment, Ms Webb was to be trained alongside this other employee, so she could take on her duties when the maternity leave began. It was expected that Ms Webb would continue in employment with EMO after the maternity leave of the woman she was replacing was over. Shortly after beginning her training, Ms Webb discovered that she also was pregnant. She was dismissed. The Court of Appeal held that, because Ms Webb had been appointed to provide cover for a particular period of time, and, due to her pregnancy, would not be able to provide cover for that time, her dismissal did not breach the Sex Discrimination Act 1975.

This case illustrates one of the most significant problems with an approach based on 'formal equality'[56]. The commitment to the comparative approach, if pregnancy discrimination is to be recognised as sex discrimination at all, requires assimilation of the condition of a pregnant woman to that of a man with an illness which will require him to take leave from employment. If the man is or would have been treated as unfairly as the pregnant woman has been treated, then there is no breach of anti-discrimination legislation. To give effect to the aim of the anti-discrimination legislation, that is to provide real opportunities to women in the area of employment, one must turn this reasoning on its head. Was the woman treated unfairly because she is a woman? If she was dismissed because of pregnancy, a condition which only applies to women (and which, incidentally, is not - as has been argued above - an illness), then this is the case. The *Webb* case can then be seen as one in which a woman was denied the opportunity of permanent employment, solely because she could not be present at work for a few months, which

happened to coincide with the months which the employee providing her training, who would eventually be a co-worker of Ms Webb's, was also to be absent. The reason Ms Webb could not be present at work for that time was pregnancy. If the legislation is to provide for equal opportunities for women in the labour market, then it must operate to take into account the biological differences between men and women; that it is women who give birth to children. Comparison with a man is not possible; determination of whether a woman has suffered unfair treatment because of her pregnancy is. 'Positive discrimination', in favour of women, should be justified in this circumstance.

Reliance on 'formal equality' and the comparative approach led the UK court to allow justification in a situation where the discrimination should not have been justified. This model is, therefore, inappropriate for EC law.

In fact, the European Court has refused to permit, as grounds for justification of discrimination against a pregnant woman, the fact that the employer would be required to bear the costs of the maternity leave. In *Dekker*, it was held that the refusal to employ a pregnant woman because of her pregnancy is direct discrimination, in contravention of the Equal Treatment Directive. The fact that the employer would not receive reimbursement from the state for the sickness benefits which they would have to pay Ms Dekker during her maternity leave, and thus would suffer a financial detriment, was, it was held, insufficient to justify the discrimination.

In *Dekker*, the European Court rejected the formal equality approach, in particular the need for a male comparator. How the employer would have treated a male employee who would have been absent from work for a similar time is irrelevant.[57] This approach is apt for the issue of pregnancy, as no realistic male comparator can be found.

In *Hertz*, it was reaffirmed by the European Court that discrimination on ground of pregnancy of an employee constitutes direct discrimination, but the Court held that the protection from dismissal which this provided for

women did not extend beyond the period of maternity leave set down in the law of the Member State concerned. Ms Hertz was not protected, as her dismissal was the result of her absences from work, after the statutory period of maternity leave, due to a pregnancy-related illness. The statutory period of maternity leave (which could be regarded as direct discrimination against men, who cannot enjoy the benefit) is justifiable in EC law, as a measure of positive discrimination, under Article 2 (3) and (4) of the Equal Treatment Directive, which saves measures concerning the protection of women, as regards pregnancy and maternity, and measures which promote equality of opportunity.

Michael Rubenstein is of the opinion that the approach of the European Court, in its judgment in *Hertz*, is correct, in that, during the period after the maternity leave has expired, the treatment of the woman should be compared with the treatment of a male comparator.

> 'What this decision appears to do, therefore, is establish a protected period under Community law for pregnant women, beginning with the inception of their pregnancy and ending with their resumption of work after statutory maternity leave, during which dismissal for a reason connected with pregnancy or confinement is automatically discriminatory. It is only after statutory maternity leave has expired that a comparison must be made with how a man would be treated in similar circumstances. The ECJ's understandable concern was that a woman would have permanent protection from dismissal because of pregnancy-or confinement-related illness unless *some* limit was laid down.'

Measures which operate to the disadvantage of a woman during the 'protected period' are not justified; thereafter, if a man in a similar situation would be treated in the same way, such measures would be justified.

However, in contrast to Rubenstein, other commentators[58] have criticised the decisions of the European Court in these two cases, in particular *Hertz*, as revealing a conceptualisation of equality which, in that it embraces formal equality, but does not recognise the need for special provisions for women where pregnancy is concerned, is not consonant with full equality of opportunity for women and men.

Gillian More welcomes the decision in *Dekker*, for its 'common sense' approach:

> 'The Court clearly considered that the 'similarly situated' approach proposed by the British was inadequate, but, ... [i]t is doubtful whether it can be said that the European Court of Justice embraced the 'disadvantages' approach to gender discrimination, proposed by MacKinnon: indeed any recognition that women are unfairly burdened with the social costs of reproduction was sadly lacking from both the Court's and Advocate-General's analyses. However the Court's approach was undeniably 'simple' and 'real'. It dispensed with all need for conceptual acrobatics, and presented a common-sense judgment: pregnancy was clearly a condition related to the female gender; and if a woman was treated unfavourably because of a condition specific to her sex, then this was clearly discrimination in breach of Community law. Interpreted broadly, the message from the decision is that the Equal Treatment Directive is intended to prevent working women being disadvantaged by their pregnancy.'[59]

Even so, More concludes that the judgment in *Dekker* is unsatisfactory in that it 'lacks any forthright recognition of women's disadvantaged position in the labour market'[60].

More is even less convinced that the decision in *Hertz* is appropriate: she argues that the creation by the European Court of a 'protected period' of maternity leave during which an employee cannot be dismissed for reasons related to the pregnancy, after which an employee is subject to the same provisions that would be applied to a man who suffered from an illness requiring prolonged leave from work, 'leaves "abnormal" pregnancies, such as Ms Hertz's, without protection'.[61]

More elaborates;

> 'The conceptualisation of the protection of pregnant women from unfair dismissal as being a special privilege, or preferential treatment, is objectionable. Why should those, who for so long have been forced to bear the social cost of childbearing be seen to be receiving a "special deal", rather than just compensation? Were the issue of pregnancy to be approached in an alternative way, however, and discrimination law used as a way to remedy the disadvantages faced by pregnant women in the labour market, then the question of "special rights", and of the point at which they are limited, would not arise (meaning therefore that "abnormal" pregnancies could also be guaranteed protection).'[62]

Josephine Shaw is also of the opinion that the European Court has not come as far in reconceptualisation of sex discrimination as it seems at first glance at the *Dekker* judgment. In view of the *Hertz* decision, it is premature to argue that EC sex discrimination law has reached the position that focuses on women's disadvantages in the labour market.[63]

> 'The insistence on the part of the Court of Justice on drawing a line between dismissal in the course of maternity or pregnancy leave for reasons related to pregnancy, such as sickness, and dismissal after the expiry of that leave, may introduce a pragmatic, policy-oriented "remoteness" element into the doctrinal scheme of discrimination, but it lacks logical consistency. Allowing employers to dismiss women who are absent from illness caused by pregnancy or birth once that illness can be deemed indistinguishable from other forms of illness also suffered by men, may be inevitable where otherwise employers will suffer financial disadvantage, but does not hide the fact that women in those circumstances are still being dismissed because they are women.'[64]

The US Supreme Court rejected all defences to Title VII claims based on costs to the employer in *City of Los Angeles Department of Water and Power v Manhart*[65]. In the context of a employer's pensions policy which discriminated between women and men by requiring higher payments from women, the Supreme Court opined,

> 'In essence, the [employer] is arguing that the prima facie showing of discrimination based on evidence of different contributions for the respective sexes is rebutted by its demonstration that there is a like difference in the cost of providing benefits for the respective classes. That argument might prevail if Title VII contained a cost-justification defense ... But neither Congress nor the courts have recognised such a defense under Title VII.'[66]

The judgment is general in application; it may therefore reasonably be assumed that it applies to discrimination on the grounds of the cost of pregnancy.

If the European Court is to develop a functional model for justification for discrimination against women on grounds of the extra cost burden imposed on the employer, then this model must take into account the fundamental difference between women and men in this context. Men do not become pregnant, and do not suffer from the application of stereotyped assumptions that they will become pregnant and leave work,

thus placing a burden on the employer. The ground of justification at issue concerns the balancing of the interests of employers against those of employees, in determining where the cost burden should lie. Women have had to bear the 'social burden' of childbirth; measures which alleviate that burden by granting women protection from losing their jobs or other employment benefits because they are pregnant redress the balance. It is my position that measures of positive discrimination or protective legislation are appropriate, in order to effect equality of opportunity, where pregnancy is concerned, simply because it is only women who can become pregnant and bear children. The role of childcarer, on the other hand, can equally well be carried out by men, therefore sex neutral provisions should apply to measures concerned with child care responsibilities.[67] In practice, because it is difficult to identify at what moment in time pregnancy related and child birth measures end and child care measures begin, it seems appropriate, at least for the promotion of certainty for employers and employees alike, to establish a 'protected period' during pregnancy and the period immediately following the birth of the child, within which positive discrimination (even if it proved costly) in the woman's favour would be justified. The cost burden on an employer does not provide lawful justification in other instances: care should be taken to exclude it in the case of pregnancy. The equalisation of opportunities for women and men in employment is a measure of social policy, effected for sound reasons, therefore the community as a whole, rather than the individual employees concerned alone, should be required to bear the cost burden. State intervention could secure a system which would ensure that costs inherent in providing equal opportunities for women employees who become pregnant are evenly spread.

2.6.3 Protection of employee or foetus

Different treatment of women employees who are pregnant, or who may become pregnant, may be justifiable if the job is such that the working environment presents a hazard to pregnant woman or to the foetus.

In the UK and Germany, special legislative measures, designed to protect pregnant women, remain in force, in spite of general legislative measures designed to counter all sex discrimination in employment. For example, in the UK, section 51 of the Sex Discrimination Act 1975 provides that a defence to a claim of sex discrimination is available where the employer is complying with an existing legislative provision. The Health and Safety legislation in the UK imposes a duty on employers to safeguard their employees' health and safety. The employer relied successfully on this measure to justify discriminatory treatment of a woman employee in *Page v Freight Hire (Tank Haulage) Ltd*[68]. The plaintiff was employed as a heavy goods driver, a job which from time to time involved carrying chemicals. The employers, having been notified by the manufacturers of a particular chemical that the chemical was dangerous to women of child-bearing age, refused to let Ms Page drive vehicles containing that chemical. It was held that in examination of the justification of the employer's treatment of Ms Page, the matters which were to be considered included the seriousness of the risk being guarded against, the steps reasonably necessary to eliminate it, and, in suitable cases, the wishes of the employees affected. The employer was successful.

Although it is agreed that the EAT's assessment of the relevant factors in assessing a purported justification of this nature is broadly correct, the judgment reveals that the tribunal in fact did not pay sufficient attention to the third factor, that is, the wishes of the individual concerned. It is only if there is no doubt as to the risk, and no other way of protecting the employee available that the wishes of the employee should be ignored. Otherwise a commitment to equality of opportunity requires that a woman be allowed, as Ms Page attempted, to express a willingness to take on the risk and enjoy the benefits of employment. It should not be assumed that all women of a particular age wish to have children. The special protection of women, and not of men, may perpetuate sex stereotyping of women as weak and in need of protection. The justification may not be regarded as functional if it is drawn too broadly.

In contrast to the position in the UK and Germany, in the US, after judicial development of principles not unlike those in the UK at present[69], the legislature passed the Pregnancy Discrimination Act 1978, to the effect that pregnancy discrimination was to be cognisable as direct discrimination on the ground of sex. While a legislative statement to the effect that discrimination on the ground of pregnancy is *prima facie* unlawful is to be regarded as functional as it promotes equality of opportunity, there remain a number of problems with the US legislation. One of the principal problems with the Pregnancy Discrimination Act is that it is not made clear in the legislation whether certain measures of positive discrimination are permissible under it. Justification for positive discrimination on the grounds of protection of pregnant women, and their foetuses is, therefore, difficult to establish.

The Pregnancy Discrimination Act 1978 adds to Title VII of the Civil Rights Act the following section 701(k):

> 'The terms 'because of sex' or 'on the basis of sex' include ... because of or on the basis of pregnancy, childbirth or other related medical conditions; and women affected by pregnancy, childbirth or related medical conditions shall be treated the same for all employment-related purposes ... as other persons not so affected but similar in their ability or inability to work ...'

Linda Howard[70] and Hannah Furnish[71] argue that the provisions of Title VII, including the amendment of the Pregnancy Discrimination Act, are inappropriate to deal with the issue of protection of the foetus from hazardous toxic substances in the workplace. The potential harm to a pregnant employee, a foetus, or even an employee who is fertile, is a possible justification for policies or decisions of employers which discriminate against women, either by treating such women differently or by adverse impact. The potential for actions in tort by employees or children of employees for foetal damage caused by the environment of the workplace may also be regarded as a possible ground for justification. However, the wording of the Pregnancy Discrimination Act 1978, on its face, does not permit the employer to establish justification on these grounds.

The employer could attempt to establish a BFOQ defence for the exclusion of women from activities, or from contact with materials in the course of her employment, which might damage an existing or future foetus. However, the BFOQ defence does not seem appropriate here, as it only applies where 'all or substantially all' women are physically unable to perform the job. The woman might be able to perform the job, but might risk her own health, or the health and development of the foetus, in so doing.

Alternatively, under adverse impact analysis, the employer could have recourse to the business necessity defence, either by referring to the necessity to protect the safety of the foetus as a third party, as in the flight attendant cases[72], or by referring to the economic liability in tort which would arise should the foetus suffer harm[73]. It seems that the first of these purported business necessities cannot succeed as the state of health of the foetus of the employee does not have the requisite nexus with the employer's business[74]. This was established in *Burwell v Eastern Airlines Inc*[75] in which the court stated that the employer,

> 'cannot rest its ... defence on its concern for the health and welfare of flight attendants and their unborn children. Such concerns are laudatory, but do not touch upon the essence of [the employer's] business'[76].

However, it should be noted that the employer in *Burwell* had not, in fact, shown that any harm to the foetus would occur as a result of the woman's employment as a flight attendant. It has been suggested that in a case where the harm to the foetus is clearly shown, a court might be willing to extend the business necessity test to justify special treatment of a pregnant employee.[77]

As for the justification based on costs to the employer, this must be approached with the *caveat* that the US courts have been unreceptive to cost-based justifications in other contexts.[78]

The European Court has not yet dealt with grounds for justification for discrimination against pregnant women which rely on risks to the foetus if employment is continued. The Equal Treatment Directive, Article 2 (2),

could be extended to cover jobs in which exposure to toxic materials or other hazards (the 'context' in which the work is carried out) threatens the health of the foetus. This would involve a reconstruction of the contexts in which the 'sex of the worker is a determining factor'.

A more appropriate approach for EC law would be to utilise Article 2 (3), of the Equal Treatment Directive, which provides that the Directive 'shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity'. The subsection recognises that measures providing special protection for women may be justifiable. The case law of the European Court suggests that the provision is to be interpreted narrowly, only allowing justification for measures which are specific to women's biological condition before and after pregnancy, and which are proportionate to their aims.[79] It is also recognised that the justification based on protection of women should not be used to discriminate against women, but may be applied in cases where positive discrimination is appropriate.

The exemption provision in Article 2 (3) of the Equal Treatment Directive is couched in terms of 'protection of women', not protection of the foetus. This may not, however, pose a problem, as the two issues are closely interrelated. It remains to be seen how the competing claims in this issue will be resolved in the EC, given the approach of the European Court to interpretation of issues concerned with the balancing of competing claims, it seems likely that a functional result would be more or less guaranteed by application of the proportionality test, whereby only a genuine need to discriminate would be justifiable, and only if the measure was no more discriminatory than necessary. Measures justified by the need to grant special protection to women should only be allowed where absolutely necessary, because they constitute direct negative discrimination against men, and also because they may actually be disadvantageous to women also. The EC could learn some valuable (negative) lessons from the US experience, where development of the law has been haphazard. In particular, reliance, in order to protect a woman or foetus, on defences (BFOQ and business necessity defence), developed in other contexts, has

resulted in insufficient considerations of the claims and principles involved.

It is therefore submitted that the EC already has the means to and should develop more functional rules than those developed in the other legal systems examined, rules which balance the commitment to equality of opportunity with the need to provide adequate protection for pregnant women from working environments hostile to the healthy development of the foetus. The proposed Directive on Pregnancy and Maternity[80], if it receives assent of the Member States, will go some way to addressing the particular problems of protection of pregnant women in the workplace. The Directive proposes measures requiring Member States to ensure that pregnant workers are protected from hazardous substances in the workplace, measures allowing employers to reallocate duties of pregnant employees and to provide an alternative to nightwork for employees who give birth both before and after the birth, for a specified time.[81] The Directive makes it clear that women's employment rights are to be maintained.[82] The provision on maternity leave, which requires a minimum leave for the mother of 14 weeks on full pay is to be welcomed, as a justifiable measure of special protection for women workers. The proposed Directive makes it clear that positive measures of protection of women are justifiable: its approach may be regarded as functional.

2.6.4 Family responsibilities

Differential treatment of women employees may be justified in the case of special rights given to women in the provision of extended maternity leave (that is, leave given to mothers beyond a 'protected period' just after the mother has given birth), and parental care policies in general. Views as to the correct approach to the need to balance employment responsibilities and childcare responsibilities differ. Is the solution to grant women special rights, in measures of positive discrimination, to enable them to carry out their responsibilities as mothers, as well as employees? Or is the solution to enact sex neutral provisions, to allow mothers and fathers to care for their children without losing employment opportunities? My position is that measures in the first category are

appropriate for protection of a women during pregnancy and in the period immediately following the birth. The different biological capabilities of women necessitate positive discrimination here. Once the child has passed a certain age and is no longer closely dependent on the mother, sex neutral rules would enable fathers to share the parental role. It should be stressed that effective sharing of the parental role between women and men can only be achieved by 'levelling up' of benefits, for example, paid extended parental leave, at present enjoyed by women only.

In the US, provision for different treatment for women employees in extended maternity leave was not dealt with by the Pregnancy Discrimination Act. Maternity and paternity leave, in general, is governed at a state or local level in the US, which means there is little uniformity in the provisions. Federal provision, including the Pregnancy Discrimination Act, must of course be complied with. However, judicial interpretation of the Pregnancy Discrimination Act has not always provided an appropriate response to policies of employers on extended maternity leave and parental care. As Deborah Rhode explains;

> 'While [the Pregnancy Discrimination Act 1978] has had enormous positive influence on maternity policies, it has by no means solved the problems of reconciling women's family and market roles. In effect, the statute simply prevents employers from singling out pregnant workers for special disadvantages. It does not affirmatively require or encourage provision of disability leaves, job security, flexible schedules, or child-care arrangements that would enable parents to accommodate work and family obligations.'[83]

In other words, the Pregnancy Discrimination Act only goes as far as to require that pregnant employees cannot be treated less favourably than other employees. In order to promote full equality of opportunity, employees (women and men) who become parents, need *more* favourable treatment than employees who are not parents, in some circumstances. This more favourable treatment is justified by society's commitment to its children, coupled with a commitment to ensuring that men and women may enjoy the benefits and burdens of both parenthood and employment equally.

Both men and women are responsible for having children, and the law should contribute to the realisation of equal opportunities in the restructuring of child-care responsibilities, *inter alia* by making it possible for mothers and fathers to enjoy the benefits of employment. If the law only allows the special provision of parental leave to mothers, then it participates in reinforcing sex stereotypes in the allocation of childcare responsibilities. Only women can have children, as biological fact; both women and men can provide care for their children. Special provisions relating to childbirth, justifying discrimination in employment conditions, may be regarded as functionally effective; whereas those which extend into childcare, without providing for parents in general, rather than mothers in particular, are to be spurned as reinforcing sex stereotyping and not promoting full equality of opportunity.

The position of the European Court is no more functional than that of the US Supreme Court in this issue. The European Court ruled on maternity leave in *Hofmann v Barmer Ersatzkasse*[84] and *EC Commission v France*[85], applying Article 2(3) of the Equal Treatment Directive. The provision allows Member States to provide for protection for the biological condition of women during and after pregnancy; and the special relationship between mother and child during the period immediately following pregnancy and birth. In its interpretation of Article 2 (3) in *Hofmann v Barmer Ersatzkasse*[86], the Court emphasised that the special provision for maternity leave covered by Article 2 (3) was to be interpreted narrowly.

A provision of German law granted six months leave following the birth of a child to working mothers. A father wished to claim the leave to look after his child while the mother went back to work. In response to the father's claim that the German law was discriminatory, contrary to Directive 76/207, the European Court held,

> 'In principle, therefore, a measure such as maternity leave granted to a woman ... falls within the scope of Article 2 (3) of Directive 76/207, inasmuch as it seeks to protect a woman in connection with the effects of pregnancy and motherhood. That being so, such leave may legitimately be reserved to the mother to the exclusion of any other person, in view of the fact that it is only the mother

> who may find herself subject to undesirable pressures to return to work early.'[87]

This narrow construction of the European Court of Article 2 (3) was confirmed by the decision in *Re Protection of Women: EC Commission v France*[88]. The case concerned French legislation applying Directive 76/207, which allowed the continuation in collective agreements and employment contracts of certain privileges for women, including extended maternity leave, time off for sick children, an extra day holiday per year per child and allowances for child minders. The Court held,

> 'With regard to the exception provided for by Article 2 (3), this covers the situations of pregnancy and maternity. In case 184/83, *Hofmann v Barmer Ersatzkasse*, the Court held that the protection of women in connection with pregnancy has the objective of protecting the special relationship between a woman and her child over the period which follows pregnancy and childbirth, by preventing that relationship from being disturbed by the multiple burdens which would result from the simultaneous pursuit of employment.
>
> 'It is clear from the general wording of the French legislation ... and from the examples of such particular rights given ... that there is no justification in Article 2 (3) for the disputed provisions. Indeed, as some of the examples show, the particular rights which are kept in force sometimes aim to protect women in their capacity as aged workers or as parents, although male workers can be in these positions as well as female workers.
>
> 'Therefore the French government has not succeeded in demonstrating that the unequal treatment which is the subject of this action, and which it admits, is within the limits laid down by the directive.'[89]

The approach of the European Court in *Hofmann* does not distinguish between provisions protecting women in childbirth, and the period immediately following the birth, and provisions relating to responsibilities of childcare. Justification for special treatment for women only by provisions relating to childbirth is functional, given the aim of the legislation in providing equal opportunity for women and men in employment, as women alone bear the burden of giving birth. The special protection should for practical purposes extend for a certain period after the birth, while the child is still very small, and reliant on the mother. But provisions relating to childcare, the responsibility for which both women and men can share, should not fall within this special period.

After a certain point, maternity rights should give way to equal rights for both parents. To provide otherwise is to require women and men to perform the very roles which the anti-discrimination legislation is trying to break down, in its attempt to provide for equal opportunities for women and men in employment. If it is only mothers who enjoy special rights for the care of children, then this makes women employees more expensive than men, thus further reducing their opportunities. Furthermore, if the law is displaying a real commitment to equality of opportunity, there should be a 'levelling up' of special measures for working mothers, allowing working fathers to take advantage of those provisions equally. Unfortunately, the effect of the judgment of the European Court in *EC Commission v France* is a levelling down of provisions, and the restriction of the application of Article 2 (3) to provisions relating to childbirth.

Hofmann and *EC Commission v France* at the same time *both* take the special protection of women too far, *and* fail to promote formal equality between women and men in provisions on leave for the purposes of childcare, thereby reinforcing sex stereotyping and making women employees more expensive; a position which does not promote equality of opportunity.

Unfortunately it cannot be said that the proposed Directive on Pregnancy and Maternity[52] will provide a more functional approach. Under the provisions of the Directive, Member States will be allowed to provide a period of leave for employees who become pregnant and give birth and to extend this period of protected leave for mothers, but not for fathers. To this extent, the Directive reveals a commitment to the 'special protection model' for discrimination relating to maternity leave, rather than a commitment to the model of full equality of opportunity.

3 Conclusion

As a broad generalisation, justification for direct discrimination should only be available on the narrowest of grounds, where it is unavoidable that women are treated differently from men in the employment sphere. The legal systems examined reveal broad consensus on a number of substantive grounds on which discrimination on grounds of sex is justified. As the discussion above reveals, different grounds for justification of direct discrimination involve very different considerations, in the assessment of whether a ground for justification is applied in a functional manner.

Where the ground for justification is related to the performance of the duties of the job, for example the ground of artistic authenticity, or physical ability to perform, there can be little difficulty with a recognition that such a justification is functional, and necessary, if the promotion of equality of opportunity is not to be stretched to absurdity.

Other grounds of justification relate to the interests of individuals concerned, for example the ground of privacy of other employees, patients or clients with whom an employee comes into contact. It is accepted that there exist interests which, in certain circumstances, may be regarded as more important than the principle of equality of opportunity for women and men in employment, and that therefore such grounds of justification may be accepted as functional. The interests of the employer may also be considered grounds for justification, in a few narrow circumstances. However, it should be stressed that functional justification must be based on a genuine ground and subject to a rigorous application of the proportionality principle.

Measures of 'positive discrimination', which are designed to redress a situation in which women have historically been required to bear the burden of discrimination, for example in the provision of protected maternity leave, are justifiable. The extra cost and inconvenience to the employer of these measures cannot provide a ground for justification of discrimination, where it is recognised that positive discrimination is

necessary to promote full equality of opportunity. However, employers should not be expected to bear the cost without assistance - the state, in effecting a measure of social policy, clearly is required to play a role in the equalisation of cost burdens.

Women's safety or the protection of women must be considered closely in an assessment of its functionality as a justification for discrimination. While it is recognised that, in the case of pregnancy, where risks in the working environment to a woman (and to the foetus) are fundamentally different from risks to men, different treatment of women is justifiable, this is, it is submitted, the extent to which the special protection of women should be regarded as justifiable. Arguments to the effect that women are more vulnerable than men, and should be protected from general hazards and risks in employment in a different way from that in which all employees are protected, should be exposed for what they are - unnecessary and invidious sex stereotyping. Such an approach cannot be regarded as functional, given the general aim of sex discrimination law, which is to promote equality of opportunity.

Furthermore, measures of legislation which grant special rights to women who are mothers should not be extended further than is necessitated by the biological fact that it is women who bear children. Measures granting special rights to working mothers are unjustifiable discrimination against the men who are fathers. Equality of opportunity requires that women and men share the burden (and benefit) of childcare.

The law of the EC has only just begun to address many of these issues. The recent judgments of the European Court in *Dekker* and *Hertz*, and also the approach of the Proposed Directive on Pregnancy and Maternity, are not welcomed without reservation. The reasoning behind these measures does not demonstrate clear commitment to equality of opportunity, as opposed to other conceptions of equality. Some reconsideration of the aims of EC legislation concerned with equal treatment for women and men in employment is required.

Unfortunately, it seems that, as regards positive discrimination, the other three legal systems examined provide no approaches more functional than that of EC law, to justification for direct sex discrimination. Comparison of the different legal systems may be regarded as fruitful however, to the extent that the other systems provide some examples of how EC law should *not* develop, given a commitment to equality of opportunity.

Notes on chapter 8

1. Sex Discrimination Act 1975, Section 17.

2. Sex Discrimination Act 1975, Section 18.

3. Establishing a list with legislative force would almost certainly require unanimity of the Member States (Article 235), which may be difficult. Furthermore, it is likely that the governments of Member States would contend that this was a matter for national law, not EC provision.

4. Sex Discrimination Act 1975, Section 7 (2) (d).

5. Sex Discrimination Act 1975, Section 7 (2) (b).

6. Sex Discrimination Act 1975, Section 7 (2) (c).

7. Title VII, Section 703(e).

8. see Johnston v Chief Constable of the Royal Ulster Constabulary, case 222/84, [1986], 3 CMLR 240, [1986] 3 All ER 135 (ECJ); Re Sex Discrimination in the Civil service: EC Commission v France, case 318/86, [1989] 3 CMLR 663 (ECJ).

9. case 318/86, [1989] 3 CMLR 663 (ECJ).

10. see below, chapter 9, section 1.1.

11. Johnston.

12. Directive 76/207.

13. Johnston, p. 265.

14. Johnston, p. 266.

15. Johnston, p. 256.

16. Johnston, p. 267.

17. see Evelyn Ellis, *Sex Discrimination Law* (Aldershot: Gower, 1988), p. 212.

18. Re Sex Discrimination in the Civil Service : EC Commission v France.

19. Re Sex Discrimination in the Civil Service, p. 667.

20. Re Sex Discrimination in the Civil Service, p. 667.

21. Re Sex Discrimination in the Civil Service, p. 667.

22. Re Sex Discrimination in the Civil Service, p. 667.

23. Re Sex Discrimination in the Civil Service, p. 668.

24. 433 US 321, 97 S Ct 2720, 53 L Ed 2d 786 (1977) (Supreme Court).

25. 433 US 321, 97 S Ct 2720, 53 L Ed 2d 786 (1977) (Supreme Court).

26. see below, chapter 8, section 2.5.

27. Dothard, p. 335-336.

28. Dothard, p. 335.

29. Dothard, p. 335-336.

30. Dothard, p. 336.

31. Dothard, p. 345-346.

32. Dothard, p. 345.

33. Dothard, p. 346.

34. Lynn Wallis, 'So how *should* a prison governor look?', The Independent, 6th August 1992.

35. 208 US 412 (1908) (Supreme Court).

36. see below, chapter 8, section 2.6.3.

37. see above, chapter 4, section 3.1.1.

38. case 345/89, proceedings of the ECJ 15 of 1991, p. 13.

39. see the UK cases of Hayes, Turley and Webb, cited below at note 43.

40. see Dekker, and Hertz, cited below at note 42.

41. see Ellis, p. 166, note 124.

42. Dekker v Stichting Vormingscentrum voor Jonge Volwassen (VJV Centrum) Plus, case 177/88, [1991] IRLR 27 (ECJ); see also Handels-Og Kontorfunktionaernes Forbund i Danmark (acting for Hertz) v Dansk Arbejdsgiverforening (acting for Aldi Marked D/S), case 179/88, [1991] IRLR 32 (ECJ).

43. Hayes v Malleable Working Men's Club [1985] ICR 703 (EAT); Turley v Alders Dept Stores [1980] IRLR 4 (EAT); Webb v EMO Air Cargo [1992] IRLR 117 (Court of Appeal); see above, chapter 5, sections 2.1. and 3.1.3.

44. see below, chapter 8, section 2.5.1.1, section 2.6.1.2.

45. see above, chapter 4, section 3.1.2.

46. Burwell v Eastern Airlines 633 F 2d 361 (4th Cir 1980) (Court of Appeals); Harriss v Pan American World Airways 649 F 2d 670 (9th Cir 1980) (Court of Appeals).

47. see above, chapter 4, section 3.1.2.

48. Bilka-Kaufhaus GmbH v Weber von Hartz, case 170/84, [1986] 2 CMLR 701; [1987] ICR 110 (ECJ).

49. 629 F Supp 925 (D Neb 1986).

50. [1991] IRLR 24 (EAT).

51. The woman's only other option, to abort the foetus, is not, of course, comparable to the man's third option, to break up the relationship.

52. David Pannick, 'Sex Discrimination and Pregnancy: Anatomy is not Destiny' 3 Ox. J. L. S. 1 (1983), p. 15.

53. see Webb v EMO Air Cargo [1992] IRLR 117 (Court of Appeal); see below.

54. see Wendy Williams, 'The Equality Crisis', in Katharine T. Bartlett and Rosanne Kennedy, *Feminist Legal Theory* (Boulder, Colorado and Oxford: Westview, 1991), p. 26.

55. [1992] IRLR 117 (Court of Appeal).

56. see above, chapter 3, section 3.1.1.2, 'Formal Equality'.

57. see Michael Rubenstein, 'Highlights' [1991] IRLR 1.

58. Gillian More, 'Reflections on pregnancy discrimination under European Community Law' 1 J. Soc. Welfare and Family L 48 (1992); Josephine Shaw, 'Pregnancy Discrimination in Sex Discrimination' 16 E. L. Rev. 313 (1991); Irene Asscher-Vonk, 'The Place of Maternity in European Society' 20 I.L.J. 152 (1991).

59. More, p. 52.

60. More, p. 55.

61. More, p. 54.

62. More, p. 54.

63. Shaw, p. 320.

64. Shaw, p. 320.

65. 435 US 702, 98 S Ct 1370, 55 L Ed 2d 657 (1978).

66. Manhart, p. 716-717.

67. see below, chapter 8, section 2.6.4.

68. [1981] ICR 299 (EAT).

69. Geduldig v Aiello 417 US 484 (Supreme Court); General Electric Co v Gilbert 429 US 125 (Supreme Court).

70. Linda Howard, 'Hazardous Substances in the Workplace: Implications for the Employment Rights of Women' 129 U. Penn. L. Rev. 798 (1981).

71. Hannah Furnish, 'Prenatal Exposure to Fetally Toxic Work Environments: The Dilemma of the 1978 Pregnancy Amendment to Title VII of the Civil Rights Act of 1964' 66 Iowa L. Rev. 63 (1980).

72. see below.

73. Barbara Lindeman Schlei and Paul Grossman, *Employment Discrimination Law* (New York: American Bar Assoc., 1983), p. 403.

74. Howard, p. 798, p. 825 and p. 831.

75. 458 F Supp 474 (E D Va 1978).

76. Burwell v Eastern Airlines, p. 497.

77. Furnish, p. 99.

78. see above, chapter 6, section 2.1.2.

79. Johnston v RUC, case 222/84, [1986] 3 CMLR 240 (ECJ); Hofmann v Barmer Ersatzkasse, case 184/83, [1984] ECR 3042 (ECJ).

80. Commission proposal COM (90) 406 final - SYN 303; 17-10-90.

81. Article 3.

82. Article 3 (4), Article 4 (3), Article 6 (1).

83. Deborah Rhode, 'Justice, Gender and the Justices', in Laura L. Crites and Winifred L. Hepperle (eds), *Women, the Courts and Equality* (Newbury Park, Calif. and London: Sage, 1987), p. 29.

84. case 184/83, [1986] 1 CMLR 242, [1984] ECR 3042 (ECJ).

85. case 312/86, [1989] 1 CMLR 408 (ECJ).

86. Hofmann.

87. Hofmann, p. 3075.

88. Re Protection of Women : EC Commission v France, case 312/86 [1989] 1 CMLR 408 (ECJ).

89. Re Protection of Women, p. 418.

90. Commission proposal COM (90) 406 final - SYN 303; 17-10-90.

Chapter 9

Indirect Discrimination

1 Introduction

All four legal systems examined recognise that it is not only direct discrimination, on the ground of sex, which must be countered by legislation which has the aim of removing sex discrimination in the employment sphere, but that it must also be possible to counter 'indirect discrimination' (terminology of EC, UK and Germany), or discrimination by 'adverse impact' (US terminology). Indirect sex discrimination arises where the effect of an employment practice or policy is to discriminate against women (or against men). The employer applies a 'requirement or condition' upon which receipt of an employment benefit (hiring for a job, promotion, pay increments or bonuses) or detriment (dismissal, redundancy) rests. The requirement or condition is one with which the proportion of persons of one sex who comply is significantly smaller (or in the case of the application of a detriment, greater) than the proportion of persons of the other sex who comply. Statistical demonstration of this point gives rise to a *prima facie* assumption of indirect discrimination. The employer may rebut the presumption by showing that the requirement or condition is justified. It is evident that the issue of justification is central to the concept of indirect discrimination.

The task of the employer (that is, the successful defence of the discriminatory policy) may be made easier or more difficult, depending on the judicial interpretation of the nature of the test for justification, or the standard by which justification for an employment practice with discriminatory effect is assessed. The ease with which employers may establish justification also depends on where the burden of proof lies in an indirect discrimination claim. The level of difficulty employers experience in justifying practices that appear fair in form, but are discriminatory in effect, may be regarded as an indicator of the extent to which the legislation is being interpreted in line with a commitment to equality of opportunity. For example, if employers can lawfully justify

discriminatory practices by reference simply to their convenience, then the legal rule, or judicial interpretation of legislation, permitting justification cannot be regarded as being aimed at promotion of equality of opportunity, as the mere convenience of an employer should never outweigh the equal treatment principle. On the other hand, if purported justifications are subjected to rigorous analysis by the courts in assessing the applicability and legality of the justifications, in terms of the necessity and proportionality of the requirement or condition, and with a view to the eradication of unnecessary sex stereotyping, then the rules allowing justification may be described as functional. It is recognised that commitment to equality of opportunity for women and men may require employers to bear an extra burden, even if only the burden of the rearrangement of existing employment practices which are indirectly discriminatory.

The following sections will consider aspects of the 'legal test' for justification of indirect discrimination, by means of comparison of the approaches of the four legal systems examined in the study. Three aspects of the 'legal test' for justification are compared and evaluated: the standard by which justification is tested, the 'objectivity' of purported justifications and the rules regarding burden of proof. This is followed by a detailed examination of some substantive grounds for justification of indirect discrimination.

1.1 The standard of justification

The standard or 'legal test' by which justifications for indirect discrimination are assessed varies between the four different legal systems examined in this study. In the UK, the legal standard for justification is that of 'reasonableness'. In the US, the standard required for justification is ultimately referrable to the concept of 'pretext'. In the case law of the European Court and in Germany (where it is a principle of constitutional law), the concept of proportionality informs evaluation of justification for indirect discrimination.

The least functional standard, out of the three approaches considered in this study, for justification of indirect discrimination, is that applied by the UK courts; that is, the standard of 'reasonableness'. In *Ojutiku* it was held that 'if a person produces reasons for doing something which would be acceptable to right-thinking people as sound and tolerable reasons for so doing, then he has justified his conduct'. This standard has been followed in subsequent case law.[1]

The reasonableness test tends to be applied loosely by UK courts in assessing justification for indirect discrimination, without adequate scrutiny as to whether the requirement or condition applied by the employer is appropriate or necessary. For example, gains in efficiency in the operation of the enterprise, which the employer admitted were only minor gains, were held reasonable justification for the detrimental treatment of part time workers, in the case of *Kidd v DRG*[2].

The standard of reasonableness is not functional, as it permits employers unnecessary and inappropriate leeway in establishing justification. It can easily be considered 'reasonable' for an employer to act without showing due concern for and consideration of the principle of equality of opportunity. The 'reasonableness' standard can have the effect of the perpetuation of sex discrimination, as 'reasonable' behaviour (in the sense of common practice) may often be based on sex stereotyping. The law is unable to operate to promote equality of opportunity as long as the perpetuation of historical discrimination may not be challenged, on the grounds that it is reasonable. For example, in *R v Secretary of State, ex parte EOC*, the UK Court of Appeal accepted that the discriminatory effect of legislation which debarred part-time employees from various benefits was justified. The legislation was considered 'reasonable', as to hold otherwise would be detrimental to part-time employees, or those seeking part-time work, especially women, as it would make part-time employees more expensive, and would therefore reduce employment opportunities. It is remarkable that the Court accepted this reasoning without any specific evidence. The ruling is based on a particular stereotyped view of part-time work, especially of women who undertake part-time work, that part-time employees are less valuable to an employer, and less

committed to the job, or the enterprise, than full-time employees, and therefore to make part-time employment attractive to employers, it must be permissible to treat part-time workers worse than full-time employees. Considerations to the contrary, that employers may derive benefit from part-time employees which at least offsets the perceived drawbacks, were not given due weight in the assessment of 'reasonableness'.

It has been demonstrated[3] that the standard of reasonableness applied in this way is not as rigorous as the standard of proportionality. This aspect of the scheme of UK law in assessing justification is less functional than the equivalent provisions in the law of the EC.

In the law of the US, the standard for justification of adverse impact established in *Griggs*[4], that of a 'manifest relationship to the employment in question', has, it seems, been superseded by the more recent case law of the Supreme Court. *Watson*[5] and *Wards Cove*[6] suggest that the employer need only meet the standard of showing 'legitimate business reasons'[7] for the practice with adverse impact and that 'there is no requirement that the challenged practice be "essential" or "indispensable"'[8]. Once the employer has shown a legitimate business reason, the employee may rebut this justification by establishing 'pretext'. One way in which pretext may be shown is by proof that a less-discriminatory requirement or condition was available to the employer. The concept of pretext, therefore, seems similar to that of proportionality. However, because the burden remains with the employee[9], the US standard for justification of indirect discrimination is not the equivalent of an application of the principle of proportionality as developed in EC law.

In German law, the principle of proportionality is part of the general principles of law, and applies also to justification by employers for indirect discrimination.[10] Although the principle is applicable, it seems that there is some way to go before its potential in situations of sex discrimination in the employment context is fully recognised by the courts and, more significantly, by employers. The principle of proportionality has not (yet) featured prominently in German discrimination law[11],

therefore the approach of German law cannot be regarded as the most functional approach of the four legal systems examined.

The European Court, in contrast to the German courts, has placed great emphasis on the principle of proportionality in the assessment of justifications for indirect sex discrimination. Proportionality is an essential part of the *Bilka* test, which constitutes the 'legal test' in EC law for justification of indirect discrimination. According to *Bilka*, the requirement or condition, which indirectly discriminates against persons of one sex, must be 'suitable for attaining the objective and necessary for that purpose'. This part of the *Bilka* test is an expression of the principle of proportionality, a general principle of EC law which requires that the means used to achieve a given purpose must be no more than necessary to achieve that purpose[12]. Strictly speaking, the principle puts the burden on the party seeking to justify the means, in this case, the employer.[13] Possible alternative, less discriminatory means must be considered.

The requirement of proportionality in the justification of policies of employers with discriminatory impact on women is an effective tool in assessing justification. It forces the party applying the indirectly discriminatory requirement or condition (the employer) to show that it is necessary for a genuine purpose, and that it does not exceed the minimum discriminatory effect inherent in achieving this purpose. Application of the proportionality principle will operate to open up jobs (and benefits attendant upon jobs) to more women, as it will exclude those discriminatory practices which are not absolutely necessary for the job and will also require scrutiny of practices said to be justified by some other reason (enterprise or public interest related[14]) in terms of the relationship between that reason and the discrimination. Such a transparent examination of indirectly discriminatory policies will expose practices antithetical to the aim of equality of opportunity. It can therefore be asserted that the function of proportionality as a principle in assessing justifications contributes to the aim of anti-discrimination law as a whole, in its commitment to equality of opportunity.

A 'legal test' for justification of indirect discrimination which requires the application of the principle of proportionality in the assessment of a justification advanced by an employer, is more functional than other 'legal tests'. The requirement that the justification meet the standard imposed by the proportionality principle should operate to screen out purported justifications which are inappropriate given a commitment to equality of opportunity.

In the EC, the effectiveness of the principle of proportionality in assessing claims of justification of indirectly discriminatory practices by employers has been demonstrated in those decisions, (*Bilka*[15], *Rinner-Kühn*[16], *Danfoss*[17]) in which the European Court has been called on to rule on the issue . The European Court should, it is submitted, continue to apply the principle, as an essential factor in the 'legal test' or standard for justification.

1.2 'Objective justification'

An issue related to the standard of justification, which has arisen in the four legal systems examined, in establishing a 'legal test' for justification, is the concept of 'objective justification'. In consideration of justifications advanced for indirectly discriminatory requirements or conditions, the question of whether lawful justifications must be 'objective', as opposed to 'subjective', arises.

In the US, the debate concerning the question of whether adverse impact analysis could apply to 'subjective' selection criteria, or only to 'objective' tests, such as intelligence tests, for prospective employees[18], was resolved in *Watson v Fort Worth Bank*[19]. Whether the practice with adverse impact was 'objective' or 'subjective' was held to be irrelevant; adverse impact reasoning could apply to *any* requirement or condition with which a much smaller number of those in a protected group, as compared to those not protected, could comply. By extension, just as objective practices could be justified, subjective practices could also be lawful in spite of their adverse impact.

In the UK, little reference to the concept of objectivity has been made by the courts and industrial tribunals when discussing justification for indirect discrimination. Ellis is critical of the Court of Appeal in *Ojutiku*[20] in holding that the 'need' of the employer for the discriminatory requirement or condition is 'what is reasonably needed by the party who applies the condition'. She points out that this leaves unclear the question as to whether justification is to be subjective or objective:

> 'was it sufficient to show merely that the employer considered the requirement justifiable, or would it be necessary to prove that it did actually achieve some legitimate object?'[21]

Subsequent case law, especially that applying the ruling of the European Court in *Bilka*, demonstrates that it is insufficient that the employer believes that the requirement is justifiable, but that the requirement is necessary to meet some need of the employer.[22] Ellis argues that,

> '... for safety's sake, and from the point of view of the clarity of the law, it would still be advisable for ... the legislation to make it clear that the test is an objective one, not satisfied merely by evidence as to the subjective intentions of the employer.'[23]

As for the law of the EC, in the *Bilka* case, the European Court envisaged, for justification of indirect discrimination, an 'objective criterion' advanced by the employer. It was demonstrated[24] that the ruling that the criterion be 'objective' does not actually add anything to the rest of the general rule on justification established in *Bilka*. As Prechal and Burrows point out,

> '... there can be no clear definition of what may constitute an objective justification in legal terms since the decision as to objectivity is in itself left to the discretion of a higher authority than the person making the initial decision, and, as such, it may change in the light of different circumstances.'[25]

Similarly in German law, on Pfarr's analysis, where the requirement or condition is either required for job performance, or pursues an 'objectively justified goal', 'objectively justified' here means justified with reference to its aim and with due consideration to the principle of proportionality.[26] It could be therefore be concluded that the inclusion

of a reference to 'objectivity' in the requirements for a legal justification for indirect sex discrimination is unnecessary.

On the other hand, it might be regarded as functional to require, as part of the 'legal test' for justification, that a purported justification may not be 'subjective', in the sense of based on personal preference, rather than on genuine need. An employer could not, then, successfully justify a recruitment policy which excluded persons under a certain height, on the grounds that the employer preferred tall employees. In itself, however, such a requirement would not constitute an adequate standard for scrutiny of purported justifications, as some grounds of justification might not be 'subjective', in the sense used above, but might be unnecessary or disproportionate.

Therefore, it seems that, rather than to inquire into whether a justification is 'objective', a more functional approach would be to concentrate on the particular substantive grounds available for justification[27] and on the appropriate 'standard' (or legal test) of justification, in particular in the application of a standard, such as proportionality, which requires strict scrutiny of discriminatory measures, disallowing unnecessary discrimination or sex stereotyping in requirements or conditions applied to women employees which are purportedly justified. Such a standard will promote equality of opportunity for women and men in employment.

1.3 The burden of proof

The third issue relevant in assessment of the functionality of a 'legal test' relating to the justification of indirect sex discrimination in employment is that of the burden of proof. In most legal systems, the legal rule (*actori incumbit probatio*) is that, in civil cases, it is for the person bringing the claim to prove the case on balance of probabilities. The burden of proof remains with the complainant throughout: if the defendant can show sufficient doubt on the complaint, then the claim will fail, because the burden of persuasion is on the complainant.[28] However, in cases concerned with discrimination in employment, the complainant will

often have insufficient access to the information required to show the discrimination (information which the defendant (the employer) will almost certainly control). Moreover, whilst it may be relatively easy for an employee to establish the requisite statistical disparity to show a *prima facie* case of indirect discrimination, it may be more difficult for an employee to show that the condition or requirement with adverse impact is unjustifiable. For these reasons, and because of the 'unvoiced and often unconscious prejudice which distorts acts or decisions affecting women and persons with family responsibilities'[29], it is argued that the general rule should be modified or reversed in discrimination cases.

There are three stages in an indirect discrimination claim; put simply, at each stage the burden rests either on the employer or the employee. In all four legal systems examined in this study, the initial burden, that of establishing a *prima facie* case, rests on the complainant employee. At the second stage, the employer is required to show that the policy with adverse impact is justifiable, by whatever standard applies in the legal system concerned. The third stage relates to the proportionality of the requirement. In German law, establishment of a successful justification may only be effected if the employer shows that the requirement meets the proportionality test, as the full burden of proof of justifiability transfers to the employer. The shift of burden of proof is required by the equality legislation in German law. In US law, the employer bears only the burden of showing some legitimate justification; the employee must then establish pretext. The application of the doctrine of pretext has the effect of transferring the burden back to the employee. The precise location and nature of the burden of proof at each stage of an indirect discrimination claim in the UK is less clear, but it seems it remains ultimately with the complainant. The law developed by the European Court has left detailed consideration of burden of proof to the national authorities. Although the jurisprudence of the Court stresses that it is for the employer to prove justification, the division between the second and third stage of an indirect discrimination claim is unclear in EC law.

A functional approach to the burden of proof in indirect discrimination cases is provided by German law. Section 611a of the *BGB* provides that,

> 'If, in the event of a dispute, the employee produces evidence suggestive of discrimination on the grounds of sex, *the onus is on the employer to prove* that differential treatment is justified by practical grounds unrelated to sex, or that sex is an indisputable requirement for the activity to be performed.'[30]

The German legal system is the only one of the four examined in the present study in which it is provided by legislation that the burden of proof is different in sex discrimination cases from other civil cases. Section 611a provides for a two stage procedure, in which the employee must first establish facts which suggest discrimination, a lower burden than in most civil cases. The onus then transfers to the employer, to justify the discrimination. The burden of proof is not reversed completely, but the position of the complainant is made easier.[31]

Examination of the case law of the US Supreme Court reveals a less functional approach to the burden of proof in adverse impact cases. The issue of burden of proof in adverse impact cases was addressed in detail in the decisions of the Supreme Court in *Watson* and *Wards Cove*. The Court held that the ultimate burden of showing discrimination against a group protected by the Civil Rights Act 1964 remains with the plaintiff at all times[32]. While it is true that the 'evidentiary burden' of showing 'legitimate business reasons' or other justifications for the policy with adverse impact is on the employer, this is not a reversal of the burden of proof. The employer need not establish that the challenged practice is 'essential' or 'indispensable'[33]. Proof that the purported justification is inadequate is the responsibility of the complainant, who is required to establish that the justification is 'pretext' for a discriminatory motive.
This approach was criticised in the dissenting judgments. In *Watson*, Justice Blackmun, (joined by Justices Brennan and Marshall) did not agree on the points concerning burden of proof (although he concurred in the judgement). In his dissenting opinion, Justice Blackmun is critical of the majority for their inappropriate application of the theory of disparate treatment in adverse impact cases.

'Nothing in our cases supports the plurality's declaration that, in the context of a disparate-*impact* challenge, "the ultimate burden of proving that discrimination against a protected group has been caused by a specific employment practice remains with the plaintiff at all times." What is most striking about this statement is that it is a near perfect echo of this Court's declaration in *Burdine* that, in the context of an individual disparate-*treatment* claim, "the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff."[34]

'The prima facie case of disparate impact established by a showing of a significant statistical disparity is notably different [from a case of disparate treatment]. Unlike a claim of intentional discrimination, which the *McDonnell* factors establish only by inference, the disparate impact caused by an employment practice is *directly* established by the numerical disparity. Once an employment practice is shown to have discriminatory consequences, an employer can escape liability only if it persuades the court that the selection process producing the disparity has "a manifest relationship to the employment in question" *Connecticut v Teal*, 457 U.S. 440,446 (1982), quoting *Griggs v Duke Power Co*, 401 U.S., at 432. The plaintiff in such a case already has proved that the employment practice has an improper effect; it is up to the employer to prove that the discriminatory effect is justified.

'Intertwined with the plurality's suggestion that the defendant's burden of establishing business necessity is merely one of production is the implication that the defendant may satisfy this burden simply by "producing evidence that its employment practices are based on legitimate business reasons." Again the echo from the disparate treatment cases is unmistakable. In that context, it is enough for an employer "to articulate some legitimate, non-discriminatory reason" for the allegedly discriminatory act in order to rebut the presumption of intentional discrimination. *McDonnell Douglas* 411 U.S., at 802. But again the plurality misses a key distinction: An employer accused of discriminating intentionally need only dispute that it had any such intent - which it can do by offering *any* legitimate, non-discriminatory justification. Such a justification is simply not enough to legitimize a practice that has the effect of excluding a protected class from job opportunities at a significantly disproportionate rate. Our cases since *Griggs* make clear that this effect itself runs afoul of Title VII unless it is "necessary to safe and efficient job performance".'[35]

The ruling concerning the burden of proof in adverse impact cases was also criticised in the dissenting judgement of *Wards Cove*[36].

The disagreement between the majority and dissenting judgements in these two decisions of the Supreme Court at face value focuses narrowly on the proper evidentiary standards to be applied in adverse impact

challenges to subjective employment practices. However, the uneasiness of the majority over the emotive issue of quotas and preferential treatment suggests that *Watson* and *Wards Cove* represent a reworking of the *Griggs* doctrine of adverse impact. The discussions per Justice O'Connor and Justice White of the proper meaning and import to be attached to *Griggs* differ fundamentally from those in the dissenting judgements. The use of disparate treatment theory permeates the analysis of the majority judgements 'in a way that calls into question the ability of disparate impact doctrine to remain dissociated from all notions of discriminatory intent'[37].

> 'Such a retreat from distinguishing the two approaches [disparate treatment and disparate impact] could severely curtail the reach of disparate impact. Disparate impact overcame disparate treatment's more limited ability to transform the work-place by not requiring a showing of discriminatory intent.'[38]

The effect of the rules concerning burden of proof in indirect discrimination cases in the law of the US is that a justification advanced by an employer need receive little scrutiny as to its suitability or proportionality. Such scrutiny may only take place in the context of an employee's showing of 'pretext'. As this involves the proof, at least by inference, of discriminatory intent, and as a showing of discriminatory intent may be rebutted by *any* legitimate, non-discriminatory reason, the US position on burden of proof may be regarded as one which operates to favour the employer. This approach may not be regarded as functional, given the points above concerning the difficulties for employees in obtaining evidence, and a commitment to equality of opportunity.

The rules concerning burden of proof in indirect discrimination cases in the UK also reveal, on close examination, an approach which may not be regarded as functional. In the UK, the employee has the burden of proof in establishing facts which amount to indirect discrimination. The employer is then required to show that the requirement or condition of which the employee complains is justifiable.[39] Similarly, the burden of proof rests on an employer seeking to establish a genuine material factor

defence under the Equal Pay Act, section 1 (3). In *Clymo v Wandsworth*, the EAT explained the position as follows,

> 'Two general points must be remembered, the first is that the onus is upon the respondent, and secondly it is the civil burden of proof - more likely than not. The tribunal should look at the condition or requirement and see what it is which the respondent seeks to achieve. That object must be more than a matter of convenience. It is the subject of a managerial decision. It must have a proper purpose when viewed within the whole of the business or organisation for which the respondent is responsible and wherein he or it may have duties or obligations. "Good and adequate reasons" per Stephenson L.J. at p 674 [*Ojutiku v Manpower Services Commission*[40]]
>
> 'If the tribunal is satisfied up to this stage, then it must carry out a broad and objective balancing exercise taking into account all the circumstances of the case and giving due emphasis to the disadvantage caused by the condition or requirement against the achievement of the object sought. The tribunal must then decide whether the respondent has proved his defence.'[41]

Thus far, the UK approach seems perfectly functional. If the 'broad and objective balancing exercise' were applied with due concern for the principle of equal treatment of women and men, there could be little basis for criticism of the approach.

However, since an employer is able to establish justification if the policy is 'reasonable', and need only show that, on balance of probabilities, this is so, the UK approach may not be regarded as the equivalent of the shifting of the legal burden of proof.[42] If the employee is to succeed in UK law, in practice it is incumbent upon the employee to show that the employer's justification is unreasonable.[43]

The legislative provision on the burden of proof in cases of unfair dismissal in the UK provides a contrast to the position in cases of indirect discrimination. The employee claiming unfair dismissal is first required to prove that he was dismissed. Thereafter the burden transfers to the employer to show, first, the reason for the dismissal and, second, that it constitutes one of the five grounds set out in the statute on which a dismissal is held to be fair. If the employer fails in either of these points, the dismissal is automatically unfair.[44] This is a complete reversal of the burden of proof.

The case law of the European Court is unclear on the question of the ultimate burden of proof, that is, on who bears the burden of establishing proportionality, at the third stage of an indirect discrimination claim. The *Bilka* decision makes it clear that the employer is to produce grounds justifying the indirectly discriminatory policy, and that the national court is to assess the justification as to whether it meets a genuine need of the enterprise and, if so, whether it satisfies the principle of proportionality. It is not clear, however, where the burden of showing that the purported justification meets the principle of proportionality rests. If the employee is able to propose alternative, less discriminatory measures which would also meet the need of the enterprise, then the employee's case is considerably strengthened, as such evidence is likely to suggest that the policy challenged is disproportionate. It is questionable, however, whether the burden in practice of showing disproportionality should rest thus on the employee. Rather it should be for the employer to demonstrate the proportionality of the policy concerned.

In the light of the above discussion, it is submitted that the German approach to the burden of proof, especially in cases of indirect discrimination, is the most functional approach of the four examined. As the law stands, it might be open to the European Court to move to an approach such as that provided by German law, but only if the specific question of burden of proof were raised before the Court in a reference under Article 177. A more satisfactory means for the adoption of such an approach would be by EC legislation. The Commission has proposed a modification, by Directive, of the burden of proof in all sex discrimination cases in EC law. The proposed directive on the burden of proof in the area of equal pay and equal treatment for women and men[45] provides, in Article 3, that,

> '(1) Member States shall ensure that where persons who consider themselves wronged by failure to apply to them the principle of equality establish at any stage of the proceedings before a court or any competent authority, as the case may be, a presumption of discrimination, it shall be for the respondent to prove that there has been no contravention of the principle of equality. The complainant shall have any benefit of doubt which remains.'

> '(2) A presumption of discrimination is established where a complainant shows a fact or series of facts which would, if not rebutted, amount to direct or indirect discrimination.'

The proposal would have the most far-reaching effects in cases concerning proof of direct discrimination; however, it could also be of benefit to complainants in indirect discrimination cases, as any doubt as to the validity of the purported justification would be to the complainant employee's benefit.

It seems unlikely, however, that the proposed directive will receive the necessary assent from the Council of Ministers. It is therefore suggested, as a practical step towards functional rules concerning justification for indirect sex discrimination in employment, that the European Court continue to stress the importance of the requirement that purported justifications meet the principle of proportionality, and that it is for the person applying the discriminatory requirement or condition, that is, the employer, to show that the means are appropriate to the ends, and that there are no less discriminatory means available.

2 Substantive Grounds of Justification for Indirect Discrimination

Analysis of the case law of the four legal systems examined in this study reveals three 'types' of substantive grounds for justification of indirect discrimination: 'job related justification', 'enterprise related justification' and 'public interest related justification'. While all four legal systems examined recognise that a plurality of substantive *grounds* exists, by which indirect discrimination may be established, none of the systems reveals any recognition (judicial or legislative) that different considerations apply to different *types* of grounds. Nevertheless, it is submitted that conceptual separation of the different types is essential, if a functional approach to justification for indirect discrimination is to be developed. This is because different considerations apply in the assessment of different types of justification.

The three types of justification are defined as follows. A job related ground of justification is one which is necessary for the performance of

the duties of the job, for example, the requirement that an employee has undertaken training essential for effective performance of the job, or the requirement that the employee has sufficient strength or dexterity to carry out the job. An enterprise related ground of justification is one which is related to the general effective running of the employer's enterprise as a whole, for example, the requirement that employees work full time, as otherwise the business will suffer under the cost burden of the extra changes of shifts necessitated by part time employees. A public interest related ground of justification is one which is related to the broad public or social benefit provided by the discriminatory requirement or condition, for example, the granting of special social assistance only to those individuals or groups with the greatest need.

In general, a legal system which made a distinction between justification for job related reasons, justification for 'enterprise-related' reasons and justification for 'public interest related' reasons would function more effectively in providing equality of opportunity for women and men than one which did not. The reason for this is that different concerns apply, and should therefore be weighed by courts, for each type of justification. In the case of a job related justification, analysis should be limited to whether the indirectly discriminatory requirement is directly necessary to the *specific duties of the particular job.*[46] Other purportedly job related justifications should be rejected as spurious. 'Enterprise related' justifications involve consideration of different concerns; in particular they will normally require the balancing of the interests of the employer and the employee, including the burden of cost incurred by the employer in removing the discrimination. 'Public interest related' justifications involve concerns of a different nature again: the factors to be considered in the assessment of such a justification include the general benefit to 'society as a whole' provided by the indirectly discriminatory legislation.

It should be evident from the above that the authenticity of a job related need of an employer may be fairly easily assessed; whereas enterprise related and public interest related needs will require more scrutiny. A conceptual separation of the different types of need of the enterprise will assist in the creation of fine-tuned, sharp rules (rather than blunt

instruments) which function to justify discrimination in a system which is committed to equality of opportunity. Ultimately the balancing of enterprise related needs of employers and interests of employees will be a matter of policy. This is even more so in the case of public interest related needs, where the indirectly discriminatory measure often aims to effect a provision of social policy. The justification may therefore only be assessed in terms of the relative importance of the social policy concerned, on the one hand, and the goal of equality of opportunity for women and men, on the other hand.

It should be stressed, however, that in none of the legal systems examined in the present study has there been consistent judicial recognition of the difference between 'job related', 'enterprise related' and 'public interest related' justifications.

The German commentators, Pfarr and Bertelsmann, have proposed an analysis of German law which suggests that the conceptual separation suggested in this study would be possible in German law. The analysis of Pfarr and Bertelsmann is similar to that adopted in this study in its division between justification when the requirement or condition is 'required for the activity' and justification when the requirement or condition 'pursues an objectively justified goal'. However, neither other commentators, nor the German courts have shown clear commitment to this analysis. The examples cited in other commentaries, interpreting what constitutes a valid indisputable requirement of the job, justifying indirect discrimination include job related justifications, such as the ability to lift and carry heavy goods, and enterprise related justifications, such as working hours, without conceptual distinction between them.[47] The approach of the German legal system, concerning conceptualisation of different types of justification, cannot be regarded as functional.

The judiciary in the UK uses 'reasonableness' to assess the authenticity of a purported need of the employer. Job related needs, enterprise related needs and public interest related needs may all be 'reasonable'; however a more stringent assessment of purported justifications would separate the three types of justification as different in nature. A job

related need should only be reasonable if it is actually linked to the duties of the job. The standard of justification put forward in *Ojutiku*[48], that 'sound and tolerable reasons' exist for the discriminatory policy makes no distinction between reasons related to the job and those related to the enterprise as a whole. In *Rainey*[49] and *Carey*[50], the reasonableness standard was applied to an enterprise related justification; in *Clymo*[51], the same standard was applied to a job related justification, with no sign that the EAT was of the view that different considerations might apply in that case. In *R v Secretary of State, ex p EOC*[52], the reasonableness standard was applied to a public interest related justification. Because there is no conceptual separation between the different types of justification, the approach of the UK courts and industrial tribunals, as regards the nature of justification, cannot be regarded as functional, in terms of equality of opportunity. However, it should perhaps be noted that the main weakness of the UK position concerns the standard of justification (reasonableness) applicable in UK law, rather than its approach to justifications of differing natures.

In the US, in the leading case of *Griggs*[53], the Supreme Court held that justification of adverse impact was by reference to 'business necessity' or 'job relatedness'. This was in the context of 'objective selection criteria', which are similar (although not identical) to job related requirements or conditions. The decisions in *Watson*[54] and *Wards Cove*[55] have the effect of making adverse impact claims more difficult to establish, in that the employee retains the ultimate burden of proof, and in effect has to show that the requirement or condition is not based on a genuine need, but is a 'pretext' for discriminatory intent. In *Wards Cove*, it was stressed that there is no requirement in adverse impact analysis that the condition be 'essential' or 'indispensable'. However, it is submitted that while the standard of an 'essential' or 'indispensable' criterion may not be appropriate for enterprise or public interest related justifications, the standard *is* appropriate for justifications which purport to be related to the duties of the job. If the US courts were to divide conceptually between the two types of justification, then they could apply the old *Griggs* test to job related justifications, and a modified version to enterprise related justifications. However no such conceptual division

is evident in the US federal case law; rather the general principles developed in *Griggs*, the business necessity defence and the statutory BFOQ defence, are used for all purported justifications.

Although the European Court has recognised substantive grounds for justification of all three types, the law of the EC cannot be regarded as more functional than that of the other three legal systems examined, as the European Court has not distinguished between the different types of justification. The *Bilka* test applies in EC law to all types of justification. The Court recognised, in *Danfoss*[56], that a requirement (upon which pay increments were granted to employees that employees had undergone training specific to the duties of the job was justified. The *Bilka* test, as it presently stands, is also applicable to enterprise related justifications, as cases where national courts have applied the *Bilka* ruling, such as for example *Rainey*[57], demonstrate. The Court has also recognised broader 'public interest related') justifications. In *Rinner-Kühn*[58], the Court considered that the exclusion of part-time employees from a statutory sick pay scheme might in principle be justified on the grounds of social policy, if the *Bilka* test were met. In short, the European Court applies a unified test to justification of indirect discrimination, where a differentiated test would be more functional.

The following discussion seeks to compare and evaluate substantive grounds of justification advanced by employers in the different legal systems examined. The three-fold division of types of justification is followed, with discussion first of job related justifications, then enterprise related justifications, and finally public interest related justifications.

2.1 Job related justifications

As explained above, it is submitted that job related justifications should be relatively easy to deal with under a general statutory scheme with a commitment to equality of opportunity. To provide equal access for women and men to all jobs, and to avoid sex stereotyping in employment roles, it is important that those requirements and conditions advanced by employers which purport to be related to the duties of the job are in fact

necessary (in its strict sense) for the job to be carried out. Part of the assessment of necessity should require that the standard set by application of the principle of proportionality is met by the employer.

Two areas in which job related requirements are indirectly discriminatory are examined. The first is the requirement for the physical ability to perform the job, where that requirement, which may be indirectly discriminatory against women, particularly if it concerns muscular strength, is necessitated by the actual duties of the job itself. Many jobs, and not only those regarded traditionally as 'male' work, require a certain amount of muscular strength on the part of the employee, for example, agricultural work, employment in the building trade or work in a warehouse, or, industrial cleaning, nursing or child-care. An unjustified muscular strength test in an employer's hiring policy will have the effect of excluding a disproportionate number of women from the job, and therefore be indirectly discriminatory.

The second area examined is the requirement or condition for qualifications, training and seniority, to which employment benefits are frequently attached. These may not necessarily be strictly necessary to perform a job[59], but are nevertheless regarded as justifiable requirements, as indicators of the abilities of the person concerned.

2.1.1 Physical abilities

In all four legal systems examined, justification for indirect discrimination is available on grounds of physical abilities necessary to perform the job.[60] For example, there are some activities, which are undertaken in the course of employment, for which a certain amount of muscular strength is required. In particular, the lifting of heavy weights, the carrying of loads, and any repetitive strenuous muscular effort undertaken during employment, will require an employee to have a certain amount of physical strength. If the duties of a job are such that these activities are to be carried out, all four legal systems examined consider that muscular strength is a substantive ground on which the employer may justify indirect discrimination.

Indirect discrimination may occur in the use of criteria such as muscular strength, in the decision to hire an employee, since the proportion of women who can comply with the requirement is much smaller than the proportion of men who can comply.

The reliance by the employer on factors such as muscular strength, in hiring, should not be justified if the factors do not relate directly to the duties of the job. If an employer applies a lifting test to applicants for a job which involves only light or occasional lifting, this will unnecessarily exclude a disproportionate number of women from employment.

Even where the requirement or condition relating to muscular strength seems to be directly related to the duties of the job, one must be careful not to fall into the trap of assuming that the way in which the employer organises the work at present is the only way that it can be arranged. The installation of lifting machinery, for example, would open up many jobs involving lifting and carrying to those with less physical strength (a large proportion of whom would be women). This of course again comes down to a question of who bears the burden of establishing equality of opportunity in employment.

In addition to the situation where an employee is denied *access* to a job through an indirectly discriminatory requirement for muscular ability, the higher evaluation, reflected in wage levels, of particular qualities, in this case, muscular strength, may lead to indirect discrimination in *pay*.

The payment of employees who carry out tasks requiring muscular strength at a higher rate than other staff may be lawful, on the grounds that the demands of heavy physical work justify a higher pay rate than that of other, less physically demanding tasks. The position of the courts regarding justification for job related justifications is, therefore, relevant to job evaluation, since job related criteria, provided they are justified, could be used to distinguish between jobs, and between grades within jobs, in a job evaluation scheme.

If job evaluation schemes are based on characteristics which men fulfil more easily than women (such as muscular strength, at issue here), then the work which is carried out predominantly by men is consistently valued higher than work carried out predominantly by women. A significant number of women then are employed on jobs considered to be low value. An employment system which has historically valued strength over other qualities or characteristics, such as manual dexterity, will result in the grouping of women in jobs which are less highly valued (and therefore less well paid) than others. Legislation requiring equal pay and equal treatment for women and men in employment, if committed to equality of opportunity, should operate to prevent the perpetuation of the pattern of lower pay for women by requiring each employer to act in a non-discriminatory manner as 'an independent institution of distributive justice'[61]. Wage levels should be set with reference to the value of a particular job.

> 'The key to success for this legislation thus lies, first, in the development of a coherent and persuasive conception of a job's value, which remains distinct from its market value, and secondly, in resistance to any attempt to reinstate external market forces as the appropriate test of distributive justice.'[62]

It should be noted at this point that the present study does not attempt to provide a detailed analysis of the issues pertaining to equal work for equal value, but is limited to a discussion of the specific question of justification for indirect discrimination, which has sometimes arisen in equal value claims.

The European Court ruled on the issue of whether muscular strength could be used as a criterion of a job evaluation scheme in *Rummler v Dato-Druck*. The Equal Pay Directive provides that,

> 'where a job classification system is used for determining pay, it must be based on the same criteria for both men and women and so drawn up as to exclude discrimination on grounds of sex.'

The Advocate General considered the 'scheme' of Article 1 of the Directive.

> 'Its effect, with regard to job classification systems, is that common criteria must be used for men and women workers and that the system must be organised in such a way as to exclude discrimination on grounds of sex.

> '... it is not necessary for each individual criterion to be drawn up in such a manner as to rule out discrimination, but the system as a whole must be framed with that purpose in mind.
>
> 'If it appeared that, in spite of the guidelines for their application laid down by the Bundesarbeitsgericht, the use of common criteria, such as those in this case (demand on muscles, heaviness of the work), would probably lead to a degree of discrimination against women in this more narrow domain, that would not mean that under the principles of the directive such criteria could not be applied. The important question is whether discrimination is inherent in the general scheme of the agreement or whether the common criteria as a whole are selected, defined and weighted in such a way as to avoid discrimination on grounds of sex.
>
> 'From the point of view of Community law nothing more can be said in that regard. ... [A]ny further findings are a matter for the national court.'

The Commission, in its submission, agreed that all that the Directive requires is that a job classification system must be non-discriminatory *as a whole*.

The European Court held that,

> '... the principle of equal pay requires essentially that the nature of the work to be carried out be considered objectively. ... Where a job classification system is used in determining remuneration, that system must be based on criteria which do not differ according to whether the work is carried out by a man or a woman and must not be organised, as a whole, in such a manner that it has the practical effect of discriminating generally against workers of one sex.'[63]

The Court continued, agreeing with the Advocate General,

> 'Even where a particular criterion, such as that of demand on the muscles, may in fact tend to favour male workers, since it may be assumed that in general they are physically stronger than woman workers, it must, in order to determine whether or not it is discriminatory, be considered in the context of the whole job classification system, having regard to other criteria influencing rates of pay.'[64]

A particular criterion, such as the one in question, may be justified by the nature of the job, where the pay difference is necessary 'in order to ensure a level of pay appropriate to the effort required by the work and thus corresponds to a real need of the undertaking'[65]. However, even

where this may be established, the job classification system as a whole must not be discriminatory.

The judgment of the European Court also suggests that use of the male or the female standard as a starting point for evaluation would not be justified; rather an average should be used.

> '... Any criterion based on values appropriate only to workers of one sex carries with it a risk of discrimination and may jeopardise the main objective of the directive, equal treatment for the same work. That is true even of a criterion based on values corresponding to the average performance of workers of the sex considered to have less natural ability for the purposes of that criterion, for the result would be another form of pay discrimination: work objectively requiring greater strength would be paid at the same rate as work requiring less strength.'[66]

The effect of the judgment in *Rummler v Dato Druck* is to put the onus on the national courts to determine, on a case by case basis, whether or not job classification systems as a whole are non-discriminatory. Apart from requiring a national court to determine whether an individual criterion is sufficiently job related, and therefore corresponds to a real need of the employer, the European Court has left the evaluation of job classification systems to the courts of Member States.

To achieve a functional system of job evaluation, with due regard to the principle of equal treatment of women and men in employment, factors used in job evaluation should be carefully scrutinised for justifiability, and any evidence of sex stereotyping should be eradicated. The ruling of the European Court in *Rummler* seems at least to approach such a functional system.

2.1.2 Seniority, qualifications and training

There are two ways in which a requirement for seniority, qualifications or training may be indirectly discriminatory against women. The first arises where women, in general, are disadvantaged, through different career patterns or different educational expectations from those of men. The second is more unusual; it arises where previous *direct* discrimination may later be perpetuated as *indirect* discrimination against the same

individual, once the original directly discriminatory practice has been abandoned.

The attachment of benefits in the employment sphere to seniority may indirectly discriminate against a large proportion of women, whose career patterns may differ from the male archetype. Women are more likely than men to take a break from employment for child care and family reasons, and therefore are less able to accrue seniority. Although in general it may be agreed that the educational opportunities available to women are improving, there still remains a degree of gender based 'channelling' in education and training, whereby women are not encouraged to undertake and do not put themselves forward for certain types of training, and are therefore under-represented in certain spheres of employment[67]. The indirect discrimination in these cases arises through the *de facto* position of many women.

In contrast, in the second case, indirect discrimination arises through previous direct discrimination. An employment practice which perpetuates the effects of past direct discrimination on the basis of sex may be attacked on the grounds that it now constitutes indirect discrimination. Seniority systems may have the effect of freezing the relative positions of employees, which result from past discrimination. A woman first refused employment on grounds of sex, but employed at a later date, will acquire less seniority than a man employed meantime. Seniority is used to determine benefits of employment, such as promotion, pay increments and protection from redundancy. Moreover, if a seniority system is applied on a departmental level, rather than across the whole firm, it can have the effect of 'locking in' employees. A person denied access to a department which is particularly desirable, through direct discrimination, will lose all seniority rights if eventually transferred there.

The approaches of the courts in the legal systems examined show that, in both sorts of situation, it is fairly easy for employers to justify requirements for seniority, qualifications and training. Courts tend to accept seniority systems as genuine, unless there is some evidence that the employer intends to discriminate.

In the US, the provisions of 'bona fide seniority systems' were saved from the provisions of Title VII by the Mansfield-Dirksen Amendment to section 703(h):

> 'Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority ... system ... provided that such differences are not the result of an intention to discriminate.'[68]

The Supreme Court ruled on the application of this provision in the case of *International Brotherhood of Teamsters v US*[69]. The US government alleged that the employer concerned was acting in a discriminatory manner, contrary to Title VII, against black and Spanish-surnamed Americans by refusing to recruit, hire, transfer or promote them to long-route driving positions on an equal basis with whites. The government also alleged that the seniority system, which was part of the collective bargaining agreement adopted by the employer and International Brotherhood of Teamsters, perpetuated past racial discrimination. The Supreme Court was called upon to rule on the applicability of section 703(h). According to the ruling in this case, a seniority system will be bona fide, and therefore justifiable, if it is free from discriminatory intent or purpose.

> 'The seniority system in this litigation is entirely bona fide. It applies equally to all races and ethnic groups. To the extent that it 'locks' employees into non-line-driver jobs, it does so for all. The city drivers and servicemen who are discouraged from transferring to line-driver jobs are not all Negroes or Spanish-surnamed Americans; to the contrary, the overwhelming majority are white. The placing of line-drivers in a separate bargaining unit from other employees is rational, in accord with the industry practice, and consistent with National Labor Relation Board precedents. It is conceded that the seniority system did not have its genesis in racial discrimination, and that it was negotiated and has been maintained free from any illegal purpose. In these circumstances, the single fact that the system extends no retroactive seniority to pre-Act discriminatees does not make it unlawful.' [p 355-356]

Thus, section 703(h) 'immunises seniority systems which apply equally to all workers even though they preserve the effects of employment

discrimination, so long as the intent to discriminate does not enter into their negotiation, genesis or maintenance.'[70]

The reasoning of Teamsters is equally applicable to sex discrimination cases. In *United Air Lines v Evans*[71], Ms Evans had been employed by the Airline for two years, then was forced to leave her employment there because of a rule which barred female, but not male, flight attendants from being married. She was rehired four years later in 1972, and tried to claim seniority credit for her earlier period of employment with the airline. The employer refused, and she brought an action for breach of Title VII. The Supreme Court held that she had failed to bring an action in time, and that in any case she had not shown that the seniority system was not 'bona fide', therefore it was protected by section 703(h).

Kenneth Karst describes the interpretation of section 703(h) in *Evans* as 'questionable'. The Court in *Evans* applied the reasoning of *Teamsters* to discrimination effected *after* the Act. As Karst points out, 'all the legislative history, as well as the Court's decision in *Franks*, indicates that section 703 (h) was enacted to maintain only those seniority rights existing in 1965, the effective date of title VII'[72]

The Supreme Court followed *Teamsters* in 1982, reiterating its ruling that, 'to be cognisable, a claim that a seniority system has a discriminatory impact must be accompanied by proof of a discriminatory purpose'.[73] Here, as in *Teamsters* and *Evans*, the Supreme Court is using reasoning which properly belongs in disparate treatment analysis, that is proof of the intent of the discriminator, in an issue of adverse impact analysis. The effect and usefulness of adverse impact analysis is thus weakened.

> 'Because any seniority system is the product of many considerations, to require that an invidious motive be the main one would foreclose many meritorious challenges and would be contrary to the long-established principle that exemptions to remedial legislation should be narrowly construed.'[74]

The US approach cannot, therefore, be regarded as functional.

In the UK, seniority was used successfully to justify discrimination in the case of *Edmonds v Computer Services (South-West) Ltd*[75]. In establishing its defence, the employer relied on the fact that the male comparator had greater responsibility than Ms Edmonds, because of his seniority. The tribunal considered that if a purported male comparator actually had greater responsibility, this would render the two jobs incomparable. If the comparator had the potential to exercise responsibility, the tribunal was willing to consider this a genuine material difference under section 1 (3) of the Equal Pay Act 1970, thus justifying the difference in pay.

The higher pay of an employee who actually exercises greater responsibility cannot be objected to as a functional justification. However, reliance on the mere *potential* to exercise greater responsibility is more questionable. There is no link between the capacity (seniority) which is being rewarded (in a male employee) and the effective (or more effective) performance of the job. Because the seniority requirement indirectly discriminates against women, a functional approach would require *specific justification* of the requirement. The approach of the UK tribunal in *Edmonds* cannot, therefore, be regarded as functional.

The European Court and the Advocate General considered, in *Danfoss*, that seniority can be considered to be an objective justification for differences in pay, because it nearly always has an effect on the way an employee carries out the duties of the job. While an assertion that this is always the case might be open to criticism, it cannot be denied that seniority, because of the experience it implies, will have some sort of relationship to the performance of the employee. The use of the criterion of seniority cannot be objected to *per se*. Training and qualifications, the European Court held, could be a permissible justification, if they were relevant to the performance of the specific duties of the job concerned. The requirement that the employer show the link between the training and the duties of the job is functional. If there is no link, then the requirement is not proportional to the aim it purports to meet, that is, the employment of persons qualified or trained to carry out the actual duties of the job. Failure to meet the proportionality principle will always result in failure

of the purported justification in EC law. The rule applied by the European Court in *Danfoss* may be regarded as functional.

In a society in which competition on merit is the paradigm, where equality is conceptualised as 'formal equality', it seems self-evident that differences in access to jobs, conditions, pay and other benefits are justified in terms of the different levels of seniority, qualifications and training of the employees concerned. Commitment to full equality of opportunity requires assessment of whether the persons being treated equally have an equal starting point. As a 'job related' justification, the requirements of seniority, qualifications or training should be subjected to close scrutiny. If the employer can show that the requirements, in terms of personal qualifications, which are applied to its employees, are strictly necessary because of the duties of the job, then justification will be established. Other reasons advanced should be treated with circumspection, especially if they reveal sex stereotyping. The approach of the European Court, which requires a real link between the requirement for seniority or training, and the performance of the job concerned, coupled with the general requirement that all justifications meet the proportionality test, may be regarded as the most functional of the legal systems examined.

2.1.3 Requirement to work full-time

It is accepted by the European Court, in German law and in the law of the UK that discrimination against part-time employees constitutes indirect discrimination against women. Because the percentage of women who work part-time is considerably higher than that of men, and because women, due to family and child-care duties, are in general less able than men to undertake full-time employment, practices and policies which disadvantage part-time workers may fall foul of provisions of law prohibiting indirect sex discrimination. This was accepted by the European Court in its earliest case-law on indirect discrimination[76] and is now accepted in the law of Member States of the EC, including the UK and Germany.

In an early UK case concerning part-time employment, the Employment Appeals Tribunal (EAT) rejected the assertion that the requirement that an employee work full-time is a self-evidently justified requirement. *The Home Office v Holmes*[77] concerned a woman employee who took maternity leave and then wished to return to work as a part-time, rather than full-time, employee. When the employer refused, she claimed that this was unlawful discrimination. The Industrial Tribunal (IT) agreed.

Upholding the decision of the IT, the EAT stressed the individual nature of its decision,

> 'The present case stands very much upon its own. It is easy to imagine other instances, not strikingly different from the present case, where the result will not be the same. ... There will be cases where a policy favouring full-time staff ... is found to be justified.'

The decision as to justifiability of discrimination against part-time workers was to be one entrusted to the individual tribunal, and would depend on the facts of each case. The result of this approach left the status of the decision uncertain. Since each individual IT could come to a different conclusion on similar facts, it was doubtful whether the decision (except, of course, for Ms Holmes) was binding on the Home Office.[78]

To give the ruling general application and effect, an exposition of which factors should be considered in the question of whether discrimination against part-time workers could be justified was required. The EAT refused to give any detailed guidance as to the possible circumstances in which the requirement for full-time employees may be justifiable, thus leaving the way open for conflicting rulings from different ITs. As Rubenstein points out,

> 'The conflict of interest, between management's desire to organise its operations in the way it regards as most efficient and the problems this may pose for women with dependent children, is one found in organisations up and down the land. To permit this to be resolved by ITs purely on the facts of each case is to invite each case to be separately litigated and to court inequity in outcomes.'[79]

In the later case of *Clymo v Wandsworth LBC*[80], it was held by the EAT that the requirement to work full-time (and not job share) was justified by the nature of the duties of the job. Ms Clymo (a branch librarian) asked to work part-time and share her job with her husband. The employer (local authority) refused to permit job sharing at such a high level. The EAT considered;

> 'it seems clear that in many working structures ... there will be a grade or position where the job or appointment by its very nature requires full-time attendance.'[81]

The EAT distinguished between those jobs (for example, cleaner) in which full-time work would clearly be 'a requirement or condition' which would trigger an inquiry into indirect discrimination, and those (for example, managing director) in which full-time work is 'part of the nature of the employment'.[82] The EAT considered, however, that it is for an employer to decide what is required for the purposes of running the business, subject only to the standard of reasonableness.

> 'Provided that the decision made by the respondent employer is reasonable - made upon adequate grounds - and responsible - bearing in mind the need to avoid discrimination based upon sex and balancing that need against other needs and responsibilities - then the decision is one for management.'[83]

This decision is unsatisfactory because it functions to allow justifications which are convenient, or even positively advantageous, for employers, and does not take due account of disadvantages suffered by women. It is not disputed that there exist, at one end of the scale, jobs for which full-time work is a necessary part of the job, but between those, and jobs at the other end of the scale, which are now accepted as appropriate for part-time employees (cleaner), there exists a gradation of jobs. Within this gradation there are jobs which it may be perfectly feasible for part-time employees to carry out, with only minimum inconvenience to the employer, but which are regarded in current employment practice as requiring full-time employees.

A functional approach to justification of the requirement to work full-time would require that the employer show that the nature of the job is such that a full-time employee is necessary. The *actual duties of the job* must

necessitate a full-time employee. Application of the principle of proportionality and clarification of the burden of proof by the courts would weed out purported justification for indirect discrimination in hiring for these jobs, if coupled with a real commitment to equal opportunities. The real commitment to equal opportunities might require that as many jobs as possible be open to part-time employees, since this would enable more women (and also men) to participate in employment as well as carry out their domestic and childcare responsibilities, thus breaking down sex role stereotyping.

2.2 Enterprise related justifications

Enterprise related justifications relate to the broad economic needs of employers, rather than the narrow duties of the job. They are justifications which relate to the job in its wider context, the whole enterprise of the employer. For example, an employer may seek to justify the exclusion of part-time employees from receiving certain employee fringe benefits, on the grounds that the extra administration entailed by part-time employees presents a cost burden on the employer. Justification for discriminatory practices which are based on enterprise related reasons is more difficult to scrutinize for functionality in meeting the general aim of sex discrimination law than job related justification. The reason for the difficulty is that the decision as to justifiability usually involves some sort of policy decision, or at least a balancing exercise between different claims and interests of the parties concerned; the employer and the employee. For this reason, it is particularly important that the principle of proportionality plays its full role. It should also be recognised that the reorganisation of the employment environment, into an arrangement based on equal opportunities (and the concomitant changes in wider society), towards which the legislation outlawing sex discrimination is aimed, cannot be effected without some challenge to the status quo, in which women are systemically disadvantaged. A commitment to equal opportunities will therefore necessitate some burden upon those (the employers, and some male employees) who benefit from the current organisation of the world of work. Therefore justification based *solely* on the (perceived) detriment

to the enterprise, which a change in the status quo would involve, must be regarded with some caution.

2.2.1 Economic and administrative efficiency

The ground of economic and administrative efficiency, as a ground for justification of indirect sex discrimination on the part of employers, has arisen most often in the case of discrimination against part-time employees. Most provisions which disadvantage part-time workers do not relate to the hiring process[84], but to pay and other conditions of employment. The justification for these provisions is related more generally to the employer's enterprise as a whole, for example, the employer may treat full-time staff more favourably on the grounds that it must retain some full-time staff for the proper operation of the business. This claim is to be evaluated as an enterprise related justification.

The leading case on discrimination against part-time employees in the jurisprudence of the European Court is *Bilka Kaufhaus v Weber von Hartz*[85]. The facts of this case have already been discussed in detail, and will not be re-iterated at this point. On the question of justification for the policy excluding part-time workers from an occupational pension scheme, the Court examined the arguments put forward by Bilka and by Ms Weber von Hartz.

> 'In its observations, Bilka contends that the exclusion of part-time employees from the occupational pension scheme aims solely to discourage part-time employment. In this connection it claims that part-time employees normally refuse to work late in the afternoons and on Saturdays. Consequently it was necessary for Bilka, in order to ensure the presence of a sufficient number of employees at these times, to make full-time work more attractive than part-time work, by limiting admission to the occupational pension scheme to full-time workers only. Bilka deduces from this that, on the basis of the judgment in *Jenkins*, it cannot be accused of having breached Article 119.
>
> 'With regard to the reasons invoked as justification for the exclusion in question, Mrs Weber points out that Bilka is not obliged to recruit part-time employees and that, if it decides to do so, it is not authorised subsequently to limit the pension rights of

> those employees, who already suffer a curtailment of their rights due to their shorter working hours.'[86]

Rather than deciding on the issue of justifiability, given the facts of the case, the European Court left the decision to the national court, holding,

> 'it falls to the national court, which alone is competent to assess the facts, to decide whether, and if so to what extent, the grounds put forward by an employer to explain the adoption of a pay practice which applies irrespective of the employee's sex, but which in fact affects more women than men, can be considered to be objectively justified for economic reasons. If the national court finds that the means chosen by Bilka meet a genuine need of the enterprise, that they are suitable for attaining the objective pursued by the enterprise and are necessary for that purpose, the fact that the measures in question affect a much greater number of women than men is not sufficient to conclude that they involve a breach of Article 119.'[87]

The ruling in *Bilka* was applied in UK law in the context of the justification that the indirectly discriminatory practice was necessary for the administrative efficiency of the enterprise in the case of *Rainey v Greater Glasgow Health Board*[88]. The payment of prosthetists recruited at a later date at a lower (standard NHS) scale than the prosthetists initially recruited (who were all male), was justified as follows:

> '... the new prosthetic service could never have been established within a reasonable time if [the earlier employees from the private sector] had not been offered a scale of remuneration no less favourable than that which they were enjoying. That was undoubtedly a good and objectively justified reason for offering [them] that scale of remuneration.'

As regards the new recruits, a lower pay, at the general rates, was justifiable, as,

> '...from the administrative point of view, it would have been highly anomalous and inconvenient if prosthetists alone ... were to have been subject to a different scale.'

It was more efficient from an administrative point of view to pay subsequent recruits on the standard scale. There was no other way open to the employer to employ prosthetists at the later date and still meet the need for efficiency, given the existence of an all-encompassing, negotiated pay scale within the NHS at lower rates than equivalent pay scales in the

private sector[89]. Administrative efficiency, according to the House of Lords, operates as a 'genuine need of the enterprise'.

> 'I consider that read as a whole the ruling of the European Court would not exclude objectively justified grounds which are other than economic such as administrative efficiency in a concern not engaged in commerce or business.'[90]

It was felt by the Court that this type of justification was particularly appropriate for a concern not engaged in commerce or business.

However there is another way to view the facts of this case, and that was the view of the dissenting opinion in the Scottish EAT. This view was that it was contrary to the sex discrimination law applicable in the UK for the Greater Glasgow Health Board to set a pay scale that was unacceptably low, fill up as many positions as possible with women, and only to set a higher scale in order to fill the remaining positions with men. Such a practice was, in the opinion of the dissenting judge, tantamount to deciding to pay men more than women for doing the same job.

On this analysis, the approach of the UK court, in applying the test of EC law in *Bilka*, allowed justification to be established regardless of the hidden discrimination against the women employees at whose expense the employer gained its efficiency. Justification of discrimination by reference to discriminatory conditions on the labour market cannot be regarded as functional; to allow such justification would completely undermine the effect of the law on indirect discrimination[91].

Applying the ruling in *Bilka* from the European Court, the German *BundesArbeitsGericht (BAG* (Federal Labour Court rejected the claims of the employer[92]. As regards organisational problems and higher costs to the employer in the employment of part-time workers, the *BAG* held that the impact of part-time workers on these could only be regarded as minimal, and in any case was offset by benefits to the employer in employing part time workers. As for the necessity to encourage Saturday working, the *BAG* pointed out that, even if this was a 'genuine need of the enterprise', the pensions policy was not "suitable for attaining the

objective". In particular there was no differentiation in the pension scheme between Saturday workers and part-time workers, neither was provision made in the scheme for part-time workers to qualify for the scheme by working on Saturdays.

The strict application of what, according to the ruling of the European Court in *Bilka*, justifies indirect discrimination has been used by the *BAG* in other decisions regarding indirect discrimination against women by the application of different measures to part-time workers to those applied to full-time workers. For example the granting of a *Versorgungsordnung* (benefit) by an employer only to full-time workers was held to be indirectly discriminatory and not justified[93].

The employer's position was that, as part-time workers were not prepared to work at unfavoured times, the organisational requirements of the business, in particular its sales strategy, were such that full-time workers were more beneficial to the employer. The employer advanced personnel statistics to support this claim. The *BAG* was not satisfied that these statistics were sufficient to discharge the burden on the employer to show justification, *inter alia* because the statistics in fact indicated that there was no difference in the contributions of full and part-time workers.

The second ground relied upon by the employer was that the cost burden of part-time employees was higher than that of full-time employees. The *BAG* did not accept the evidence advanced to prove this assertion. The evidence advanced amounted to a list of the cost factors of part-time employment, without comparing these with the cost factors of full-time employment. The *BAG* held that the employer had failed to produce adequate evidence to justify the discrimination, as, in a cost benefit analysis, all the relevant cost factors must be compared.

In German law, in accordance with the application by the *BAG* of the ruling of the European Court in *Bilka*, the cost of part-time employees does not necessarily justify discrimination. The employer, if it is to succeed, must advance specific evidence that the indirectly discriminatory

measure is necessary, that is, that it pursues objectively justified goals and is suitable and necessary for this purpose. This may be particularly difficult for the employer, as there is evidence that, in many employment situations, particularly in the areas of production and management, the employment of part-time employees may result in a *positive* cost benefit to the employer.[94] The employer is therefore required to show that, in its particular undertaking and for the particular job concerned, the relative costs to the employer of full-time and part-time employees are such that it is necessary to treat full-time workers more favourably. Furthermore the employer must show that the more favourable treatment of full-time workers actually operates to the employer's economic advantage, and that the more favourable treatment is necessary and proportionate, that is, that there exists no other, less discriminatory solution.

The approach of the German *BAG*, in its interpretation of the ruling of the European Court in *Bilka*, may be regarded as functional. Its focus on the suitability and proportionality of the indirectly discriminatory condition requires that the employer prove a specific need of the enterprise, for example, efficiency of the business, *which cannot be met in any other way*. An indirectly discriminatory requirement which meets this test may be regarded as justifiable: requirements which do not meet the test represent an inappropriate restriction upon the opportunities for women in the sphere of employment.

Pfarr and Bertelsmann[95] argue that even if the employer proves that the proportionality test is met, this does not justify the disadvantaging of part-time employees. The alleged or actual unfavourable cost benefit relationship of women's work compared to men's work was advanced, historically, as justification for denying women equal pay with men. It is now common to all legal systems which aim to outlaw sex discrimination in employment that the equal pay principle disallows the evaluating of women's work as lower in economic value than other work. This evaluation would be done by confining women to activities or jobs only undertaken by women, and calculating the costs to the employer (and thereby justifying pay differentials) only by reference to these gender

specific groups[96]. Pfarr argues that instead the costs and benefits to the employer should be calculated by reference to the staff as a whole. In this way, the burden of exceptional costs of individual employees or groups of employees would then be carried by the whole workforce. Then it is clear that it would be unfair to allow men to be paid more than women.

In effect, Pfarr's argument wishes to equate part-time work with women's work, thereby bringing the issue within the remit of direct discrimination. It is submitted that this would contribute an unnecessary extension of the concept of indirect discrimination. Rather, a functional approach to the question of justification for discrimination against part-time workers would satisfy the need to balance employer's enterprise interests with the principle of equal treatment for women and men in employment. The interpretation of the *BAG*, of the standard of EC law in *Bilka*, represents an example of such a functional interpretation.

However, the drawback of the ruling of the European Court in *Bilka*, reiterated in subsequent decisions[97], is that it is for the national court to decide on the question of justification, given the test of necessary, suitable and proportionate. The European Court has given insufficient guidance for national courts. In particular, as was shown above, the interpretation of *Bilka* by the courts and tribunals in the UK is inadequate. The approach of the UK courts overstresses the need for 'efficiency' and 'efficiency in administration' of employers[98] and does not require that the employer meet the proportionality test. The burden of proof also varies between Member States.[99] It is submitted that the European Court should adopt a refined version of *Bilka*, applicable to enterprise related justifications, which stresses that the employer must prove (in accordance with the normal civil standard) that there is a genuine need for the requirement or condition, and must show that the requirement or condition is proportionate to the purported need of the enterprise. Emphasis should also be put upon the duty of national courts to give due weight to the purpose of anti-discrimination legislation.

2.3 Public interest related justifications

The third type of substantive ground for justification is that of public interest. A public interest related justification may arise in two different contexts. The first, and most common, is that in which provisions of legislation, or other measures taken by the State, result in indirect discrimination against women in employment. The employer concerned will then seek to rely on statutory authority, as a defence to a claim of indirect discrimination. The question then arises as to whether statutory authority constitutes a complete defence, or whether the statutory measure itself may be tested for justifiability. The second context is that in which a public interest related justification, which is not grounded in legislation, is raised by an employer. For example, an employer who provided crêche facilities for those of its workers who had no partner at home to care for their children (a provision which would be indirectly discriminatory against men) could seek to justify the measure on the grounds that it served a social need of its employees and their children, and thus was 'public interest related'. Such a ground of justification has not, however, been established by an employer in any of the cases discussed below.

Public interest related justifications arise most often in the context of indirectly discriminatory legislation. Normally, statutory authorization will constitute a complete defence to a sex discrimination claim. Certainly in UK law, statutory authority is sufficient justification for indirect discrimination, as there are no means available to challenge primary legislation before the courts.[100] In the US and in Germany, legislation could be challenged on the grounds that it is unconstitutional; however, this might prove extremely difficult to establish in practice.[101] The position as regards EC law is fundamentally different. The doctrines of direct applicability and direct effect of provisions of EC law[102] mean that, in order to challenge national legislation of the Member States, the complainant need only show that the national legislation is incompatible with EC law. The provisions of EC law will then apply automatically. Therefore, if an employee shows that the statutory provision concerned

is incompatible with a measure of EC law, the defence of statutory authority may be unavailable to the employer.

The analysis of public interest related grounds of justification is, it is submitted, certain to require different considerations from those applied to job related and enterprise related justifications.[103] In particular, the broad public benefit of a legislative measure may be deemed to be more important, in the particular circumstance, than the principle of equal treatment. The very nature of public interest related justifications requires that the State at least be able to rely on the social purpose of the legislation in establishing justification. The 'social purpose' could perhaps be regarded as the equivalent of an employer's 'genuine need'.

It could be argued that there is no reason why the standard of justification should not be as strict for the State as it is for employers. The legislation or State measure concerned should be suitable to meet its aim, and should fulfil the requirements of the proportionality test. On the one hand, it could be argued that even this standard may prove too strict, as application of the proportionality principle would have the result that the measure would not be justified if there was any less discriminatory way in which the aim of the legislation could be achieved, no matter what the cost. On the other hand is the argument that the State is well-placed (in fact, better placed than the individual employer) to remove indirect discrimination, even if to do so is costly, and therefore that a commitment to equality of opportunity requires a restrictive interpretation of justification in this context. It is recognised, however, that this is a delicate issue, as the legislation, which an individual complainant seeks to challenge, may well in fact be meeting a genuine public need or serving a public interest, or at least purports to be serving such an interest.

It is perhaps in recognition of the delicacy of a judicial challenge of a legislative measure that the Advocate General suggested, in a case concerning a public interest related justification[104], that measures based in legislation should be regarded as justified unless the complainant

shows that the statute conceals intent to discriminate. The Advocate General argued that,

> 'because of the potentially disruptive effects of attacking a statutory provision as compared to an individual act of discrimination, the applicant should demonstrate not only the fact of discrimination but also that there were factors such as the structure of the labour market which show that the discriminatory measure must be related to sex.'[105]

It is submitted that the argument of the Advocate General is inappropriate in an indirect discrimination claim. As Szyszczak points out,

> 'In effect, this is introducing a standard tantamount to the applicant showing an intention to discriminate. The crux of an indirect discrimination claim is the *effects* of the measure or discriminatory act.'[106]

The application of a standard appropriate to direct discrimination is not functional in the case of indirect discrimination, as the very foundations of indirect discrimination are fundamentally different from those of direct discrimination. Notwithstanding the problems admittedly inherent in allowing challenges of legislation before the courts, it is to be welcomed that the Court did not support the reasoning of the Advocate General on this point.

Although it is recognised that the proposition that legislation, particularly legislation purportedly for the benefit of the public, should be challengeable by individuals before the courts, may be a somewhat problematic stance, it is my position that the tendency of the courts to accept a need related to a societal interest *without scrutiny* is unacceptable. The State must, at the very least, be required to prove that the indirectly discriminatory measure really serves a genuine public interest. The Courts should not be satisfied by the unsupported assertion of a government minister that the measure is justified.

2.3.1 Reduction of employment opportunities

In general, indirect sex discrimination may be justified on public interest related grounds, where a measure of employment legislation, which disadvantages one particular group of workers, is grounded in a measure of social policy or seeks to achieve an aim with a broad public benefit.

The UK Court of Appeal addressed the issue of whether the provisions of UK law, found in the Employment Protection (Consolidation) Act 1978, which excluded part-time workers from various rights relating to unfair dismissal and redundancy payments, were contrary to Article 119 and the Equal Pay Directive, in *R v Secretary of State for Employment, ex parte EOC*[107]. The UK court was obliged to follow the guidance of the previous case law of the European Court on this matter.

The judgment of the Court of Appeal suggests that the grounds of justification referred to by the European Court in *Bilka* and *Rinner-Kühn* (economic needs of an employer and social policy) are not necessarily appropriate to consideration of the justifiability of provisions of national legislation;

> 'The "objective justification" for any indirect discrimination may therefore embrace a number of different facts, and, in the case of primary legislation, is likely to involve consideration of aspects of social policy and similar considerations of broad national significance which would not arise in the case of an ordinary employer.'[108]

The UK government justified the legislation by reference to the assertion that employment opportunities in part-time work would be considerably reduced if additional burdens were to be placed on potential employers. There is a greater administrative burden involved in employing part-time employees, and the reduced rights of part-time employees, in the payment of redundancy payments, are counterweight to that extra administrative burden. To declare the legislation incompatible with Article 119 would have the effect of reducing the number of part-time jobs available to those who want them.

2.3.1 Reduction of employment opportunities

In general, indirect sex discrimination may be justified on public interest related grounds, where a measure of employment legislation, which disadvantages one particular group of workers, is grounded in a measure of social policy or seeks to achieve an aim with a broad public benefit.

The UK Court of Appeal addressed the issue of whether the provisions of UK law, found in the Employment Protection (Consolidation) Act 1978, which excluded part-time workers from various rights relating to unfair dismissal and redundancy payments, were contrary to Article 119 and the Equal Pay Directive, in *R v Secretary of State for Employment, ex parte EOC*[107]. The UK court was obliged to follow the guidance of the previous case law of the European Court on this matter.

The judgment of the Court of Appeal suggests that the grounds of justification referred to by the European Court in *Bilka* and *Rinner-Kühn* (economic needs of an employer and social policy) are not necessarily appropriate to consideration of the justifiability of provisions of national legislation;

> 'The "objective justification" for any indirect discrimination may therefore embrace a number of different facts, and, in the case of primary legislation, is likely to involve consideration of aspects of social policy and similar considerations of broad national significance which would not arise in the case of an ordinary employer.'[108]

The UK government justified the legislation by reference to the assertion that employment opportunities in part-time work would be considerably reduced if additional burdens were to be placed on potential employers. There is a greater administrative burden involved in employing part-time employees, and the reduced rights of part-time employees, in the payment of redundancy payments, are counterweight to that extra administrative burden. To declare the legislation incompatible with Article 119 would have the effect of reducing the number of part-time jobs available to those who want them.

The evidence submitted by the Secretary of State to prove these assertions was described as 'general, unspecific and speculative'.[109] Nevertheless, the Court of Appeal was willing to accept the evidence as 'inherently logical'.[110] The court therefore accepted the allegations of the Secretary of State, without any scrutiny or proof:

> 'We shall assume without further evidence that any reduction in the number of employment opportunities would be socially undesirable.'[111]

It is remarkable that the Court was willing to accept the justification advanced by the government *without further evidence*. The result of this approach is that there is, in UK law, it seems, no real burden on the State seeking to justify an indirectly discriminatory statutory measure. It was sufficient to suggest that amendment of the legislation concerned, in order to give greater rights to disadvantaged employees, would result in too great a detriment to employers, and therefore a reduction in part-time jobs. The approach of the UK court disregards completely the *Bilka* doctrine that justification must be suitable and necessary, and must comply with the proportionality test, and that the party pleading justification must prove its case.

As Simon Deakin points out:

> 'Although the European Court has repeatedly said that the question of whether a particular practice is justifiable is one for national courts, it is clear that the correct version of the test must be applied, and that some types of argument will be too vague or general to fall within the range of permissible defences.'[112]

The justification offered by the Secretary of State was that the legislation reflected a 'need to reduce to a minimum regulation which might have the effect of inhibiting the creation of new jobs'[113]. As noted above, the court did not submit the justification to detailed scrutiny. Deakin points out that a comparison with the provisions in other Member States concerning social rights for part-time employees reveals that many Member States have lower hours thresholds than those in the UK, or no thresholds at all, for the equivalent rights. For example, in France, employers are required by law to grant part-time and full-time workers parity in employment conditions. In France, there is evidence to suggest

that available part-time employment actually increased following the introduction of these measures. Certainly there exists no clear evidence that laws granting equal treatment to part-time workers have lead to the massive reductions in available jobs suggested by the UK government.[114]

Deakin concludes,

> '... While it is beyond doubt that the thresholds have a discriminatory effect which predominantly concerns women workers, at no stage has evidence been produced to show that this policy of selective exemption is more likely to increase employment opportunities than the opposite policy, of legislating to harmonise employment conditions as far as possible between part-time and full-time workers. The government's position is, in the end, based on a firm ideological commitment to deregulation *as such*.'

To allow justification for indirectly discriminatory measures based on such a commitment is, it is submitted, antithetical to the principle of equality of opportunity. The approach in *R v Secretary of State for Employment, ex parte EOC* may not be regarded as a functional approach to justification for the disadvantaging of part-time employees through measures of employment legislation.

2.3.2 Genuine special social needs

Employment legislation which has as its purpose the alleviation of genuine social needs of some individual members of society may often be framed in a manner which is indirectly discriminatory against women. A number of examples were noted above[115], including the following: in Germany, the rule that 'double earners' are to be dismissed first in a redundancy situation; in the US, a head of household rule for rights to certain benefits, such as pensions; and, in the UK, measures targeting, for special benefits, a particular group of unemployed people.

In general, as long as the measure is not applied in a directly discriminatory manner, broad public interest related justifications, related to genuine social needs, tend to be accepted by the courts in Germany, the UK and the US. Factors taken into account include the efficient use of resources[116], the assistance of those with a particular need[117], and

the minimisation of social detriment[118]. The courts are likely to accept as *bona fide* measures which provide for genuine social needs and subject such measures to little scrutiny in terms of their discriminatory impact.

Cases where indirect discrimination arises in the provision of a social benefit often arise because social patterns do still correspond, to a large extent, with sexual stereotypes. In order to provide social benefit and to relieve need, social policy measures, such as head of household rules, or the 'double earners' rule, reflect the status quo. So long as such rules are framed in a sex neutral manner, so that either women or men may take advantage of, for example, the role of head of household, they may be regarded as compatible with equality of opportunity.

The first case in which the European Court was required to deal with a public interest related justification for indirect discrimination on the part of an employer was the case of *Rinner-Kühn*. *Rinner-Kühn* concerned a provision of German law[119] which obliged employers to pay sick pay for up to six weeks, but excluded from its application employees who worked not more than 10 hours a week or 45 hours a month. Ms Rinner-Kühn fell into this category of employees and was refused sick pay. The employer's defence was, naturally, that it was acting in compliance with the legislation. The question of the compatibility of the legislation with the relevant provisions of EC law (Article 119 and Directive 75/117) was referred by the Oldenburg *Arbeitsgericht* to the European Court.

The German government, requested by the Court to provide information on the reasons which motivated the legislation, sought to justify the provision by reference to the contention,

> 'that the workers affected by the legislation were not integrated in or connected with the undertaking in a comparable way to that of other workers and that, therefore, the conditions for recognition of duty of care from the employer towards them, including an obligation to pay wages, did not exist.'[120]

According to the Commission, this argument was completely ill-founded and inappropriate:

> 'It was hard to see why it should be economically defensible and socially necessary to grant the benefit of six weeks' payment of wages to full-time workers whilst those who are employed for minimal periods, who are the socially weaker, should be refused such payment. Social protection was being withdrawn exactly where in practice one was most reliant upon it.'[121]

The reason the purported justification is inappropriate relates to the purpose of the sick pay legislation in the first place. The granting of social security to workers who cannot work due to illness is a plank of social policy. It is not a perk of the job, to be given in proportion to the amount of work (in terms of time) carried out by an employee. Indirect sex discrimination in the provision of sick pay could be regarded as concealing sex role stereotyping in its application. According to this stereotype, only full-time employees (men) are carrying out 'real work', as main breadwinners, and they (and indirectly their families) should be provided for by state protective laws if they cannot earn due to illness. Part-time work (women's work) is an extra, 'pin money', or 'a bit of pocket money', and is not 'real work'; therefore there is no need to provide for social security in the case of sickness for part-time workers. The implication is that there is a 'real bread winner' who can support a part-time worker who is ill. This reasoning ignores the fact that, for many families, the income of a woman working part-time makes the difference between being above or below the poverty line. It also devalues part-time work in an arbitrary manner. The argument of the German government cannot be regarded as a functional ground for justification.

The Court, applying its earlier ruling in *Bilka*, held that national legislation which permits employers to exclude part-time employees from the continued payment of wages in the event of illness, where that provision affects a considerably greater number of women than men, is not compatible with Article 119, unless the Member State concerned can show that the legislation is justified by objective factors not related to sex.[122] Probably the most significant effect of the Court's application of the *Bilka* test is that, for a Member State to justify indirectly discriminatory legislation, the proportionality test must be met. As in

Bilka, the final decision as to justifiability is, however, left to the national court.

The European Court has followed its ruling in *Rinner-Kühn* in cases concerning indirectly discriminatory provisions of social security legislation, where justification on grounds of genuine social needs is advanced. The guiding principle seems to be that the purpose of the legislation or measure, that is, the provision of social benefit to a meritorious or needy category of persons, is to be balanced against its discriminatory effect.[123] As elsewhere, in accordance with the ruling in *Bilka*, the European Court applies the general principle of proportionality in its assessment of justification.[124] To the extent that the proportionality test provides more scrutiny than the tendency to accept public interest related justifications without evidence of discriminatory intent, the approach of the European Court may be regarded as more functional than that of the courts of the other legal systems, in particular the UK, examined in this study.

It is submitted that indirectly discriminatory social policy measures should only be justifiable if related to genuine needs of individuals. If the criteria, for example, for receipt of a benefit, are framed to be related to need, clearly defined in terms of the needs of the person and sex neutral, then no objection may be taken to the measures, despite their discriminatory effect. If, on the other hand, social policy measures are framed according to sexual stereotyping, they should not be regarded as justifiable. The State should be required to prove that the social policy measure fulfils a genuine need. The proportionality test should be applied in order to scrutinise the need. The difficulty in effecting the delicate weighing up and balancing of the goal of alleviation of social need against the goal of provision of equality of opportunity has not, however, been adequately addressed, in any of the case law considered in this study, even in the case law of the European Court.

3 Conclusion

It is inevitable that indirect discrimination will be justifiable on broader grounds than direct discrimination. The nature of indirect discrimination is that a requirement, condition or measure is applied in such a way that the effect or impact is discrimination against those in a 'protected group', in this context, women, or men. The requirement or condition applied will almost always have a purpose other than intended discrimination against the protected group. The *purpose of the requirement* or condition may justify its continued use, in spite of its adverse impact.

In the assessment of justification for indirectly discriminatory measures, a balancing exercise is required, between the reason for application of the measure, on the one hand, and, on the other hand, the equality of opportunity for women and men in employment which anti-discrimination legislation aims to secure. Justifications of three different types (job related, enterprise related and public interest related) have been identified for the purposes of this work. A functional approach to justification will vary for each type of justification.

Job related justifications, which seek to defend the discriminatory impact of the requirement or condition because of its relationship to the duties of the job, should not be accepted unless a direct relationship with the performance of the actual tasks entailed by the job concerned is demonstrated. A muscular strength requirement is only justifiable if the job actually entails use of that type of strength, in the manner tested.

Justifications related to the broader needs of the enterprise, such as the efficient organisation of the business as a whole, should be scrutinised for sex stereotyping, with due regard to the commitment to change of the status quo implied by the principle of equality of opportunity for women and men in employment.

It is more difficult to assess whether a 'public interest related' justification is appropriate or functional. It is recognised that the issues concerned in a public interest related justification are different from

those concerned in job related or enterprise related justifications, not least because the indirectly discriminatory measure is likely to be contained in legislation. Measures designed to alleviate social need may be indirectly discriminatory, but the public interest in such measures may be judged to outweigh the goal of equality of opportunity in some circumstances. However, in the carrying out of the balancing exercise required, some assessment of public interest related grounds of justification may be effected by a requirement that the party justifying the measure proves that it is genuinely necessary. Justifications which are revealed to be based on sex stereotyping should not be accepted. Some scrutiny may also be provided by use of the principle of proportionality -with appropriate consideration of the fact that non-discrimination is not the only aim to be taken into account in the weighing of the measure.

One factor of a functional approach to justification, which all three types (job related, enterprise related and public interest related) share is that the test of proportionality must be met. If the means chosen to meet the need of the employer, or of the State, in the case of a public interest related justification, are not in proportion to its ends, then justification should not be established. On this issue, the jurisprudence of the European Court, and the provisions of German law, provide a functional approach. Linked to the proportionality test is the issue of burden of proof, which, in a functional approach to justification for indirect discrimination, should be placed on the party seeking to justify a discriminatory practice, that is, usually, the employer. When the discrimination is the result of a measure taken by a state, the state should bear that burden.

To date, the approach of the European Court to substantive grounds of justification for indirect discrimination has been to lay down broad principles, only in the most general terms, and to leave assessment of the necessity of specific indirectly discriminatory requirements or conditions largely to the national court. This has resulted in inconsistency of interpretation, and the inclusion of grounds of justification which are in antithesis to the principle of equality of opportunity for women and men

in employment. None of the other legal systems examined reveals an approach more functional in its entirety. Examination and comparison of those legal systems does, however, provide some aspects of the justification for indirect discrimination which the European Court could perhaps emulate, and some which it should reject.

If equality of opportunity for women and men in employment is to be effected, the European Court should adopt a more sophisticated analysis in its approach to justification for indirect discrimination, building on the judgment in *Bilka*. The new approach should make a conceptual differentiation between different types of justification, should clarify the burden of proof in indirect discrimination cases, should require that the 'need' which the discriminatory requirement or condition meets is a genuine need, should stress the doctrine of proportionality and should emphasise that justification for indirect sex discrimination is an exception to an extremely important principle of EC law, that of equal treatment of women and men.

Notes on chapter 9

1. see Greater Glasgow Health Board v Carey [1987] IRLR 484; Hampson v DES [1989] ICR 178; Clymo v Wandsworth LBC [1989] 2 CMLR 577 (EAT).

2. [1985] IRLR 190 (EAT).

3. see above, chapter 5, section 2.1.1; see also T. K. Hervey, 'Justification for Indirect Sex Discrimination in Employment: European Community and United Kingdom Law Compared' 40 I.C.L.Q. 807 (1991).

4. 401 US 424, 91 S Ct 849, 28 L Ed 2d 158 (1971) (Supreme Court).

5. *487 US 977, 108 S Ct 2777,* 101 L Ed 2d 827 (1988) (Supreme Court).

6. *490 US 642, 109 S Ct 2115, 104 L Ed 2d* 733 (1989) (Supreme Court).

7. Watson, p. 998.

8. Wards Cove, p. 2126.

9. Watson, Wards Cove; see below, chapter 9, section 1.3.

10. Hanau and Preis, see above, chapter 7, section 2.2.1.2.2.

11. see Klaus Bertelsmann and Ursula Rust, 'Equal Opportunity Regulations for Employed Women and Men in the Federal Republic of Germany', in Michel Verwilghen (ed), *Equality in Law Between Men and Women in The European Community* Vol 2 (Louvain-La-Neuve: Presses Universitaires de Louvain, 1986), p. 93-94, 99-101.

12. Internationale Handelsgesellschaft mbH, case 11/70, [1972] CMLR 255; [1970] ECR 1125 (ECJ).

13. but see below, chapter 9, section 1.3.

14. see below, chapter 9, sections 2.2 and 2.3.

15. Bilka-Kaufhaus GmbH v Weber von Hartz, case 170/84 [1986] 2 CMLR 701; [1987] ICR 110 (ECJ).

16. Rinner-Kühn v FWW Spezial Gebaudereinigung GmbH & Co KG, case 171/89, [1989] IRLR 493 (ECJ).

17. Handels-Og Kontorfunktionaerernes Forbund i Danmark v Dansk Arbejdsgiverforeining (acting for Danfoss), case 109/89, [1989] IRLR 532 (ECJ).

18. see David L. Rose 'Subjective Employment Practices: Does the Discriminatory Impact Analysis Apply?' 25 San Diego L. Rev. 63 (1988), p. 63; Elizabeth Bartholet 'Application of Title VII to Jobs in High Places' 95 Harv. L. Rev. 947 (1982); Earl M. Maltz 'Title VII and Upper Level Employment' 77 N.W. U. L. Rev. 776 (1983).

19. Rose, Maltz, Bartholet.

20. Ojutiku v Manpower Services Commission [1982] IRLR 418; [1982] ICR 661 (Court of Appeal).

21. Evelyn Ellis, *Sex Discrimination Law* (Aldershot: Gower, 1988), p. 87.

22. see, for example, Rainey v Greater Glasgow Health Board [1987] 2 CMLR 11 (House of Lords).

23. Ellis, p. 89.

24. see above, chapter 4, section 2.2.1.1.

25. Sacha Prechal and Noreen Burrows, *Gender Discrimination Law of the European Community* (Aldershot, Hants: Dartmouth 1990), p. 3-4.

26. see above, chapter 7, section 2.2.1.2.2.

27. see below, chapter 9, section 2.

28. see Explanatory Memorandum for the proposed Directive on the burden of proof in the area of equal pay and equal treatment for women and men COM(88) 269 final.

29. Jennifer Corcoran, 'Report of a Comparative Analysis of the Provisions for Legal Redress in Member States of the EEC in respect of Article 119 of the Treaty of Rome and the Equal Pay, Equal Treatment and Social Security Directive' *V/564/84 - EN* final, p. 53-56.

30. BGB Section 611a; my italics.

31. European Parliament, 'Report of the network of experts on the implementation of the equality directives' PE 126.417/def./ann.I (1987), p. 5.

32. Watson, p. 997.

33. Wards Cove, p. 2125.

34. Watson, p. 1000-1001.

35. Watson, p. 1004.

36. Wards Cove, p. 2131-2132.

37. Stephen L. Carter, 'The Supreme Court - Leading Cases' 102 Harv. L. Rev. 143 (1988), p. 314.

38. Carter, p. 315-316.

39. Sex Discrimination Act 1975, Section 1 (1)(b).

40. [1982] IRLR 418; [1981] ICR 515 (Court of Appeal).

41. Clymo v Wandsworth LBC [1989] 2 CMLR 577 (EAT).

42. European Parliament, 'Report of the network of experts on the implementation of the equality directives', p. 19.

43. see Rainey, Carey, Hampson and Clymo. The employer was successful in establishing a reasonable justification in all of these cases.

44. see Employment Protection (Consolidation) Act 1978, Section 57; see also Adrian Keane, *The Modern Law of Evidence* (London and Edinburgh: Butterworths, 1989) p. 58; Ellis p. 156-157.

45. COM(88) 269 final.

46. *compare with chapter 8* - Justification for direct discrimination where sex is a determining factor, GOQ, BFOQ, indispensable requirement.

47. see above, chapter 7, section 2.2.1.2.1.

48. [1982] IRLR 418 (Court of Appeal).

49. [1987] 2 CMLR 11; [1986] 3 WLR 1017 (House of Lords).

50. [1987] IRLR 484 (EAT).

51. [1989] 2 CMLR 577 (EAT).

52. [1992] 1 All ER 545 (Court of Appeal).

53. 401 US 424, 91 S Ct 849, 28 L Ed 2d 158 (1977) (Supreme Court).

54. 487 US 977, 108 S Ct 2777, 101 L Ed2d 827 (1988) (Supreme Court).

55. 490 US 642, 104 L Ed 2d 733, 109 S Ct 2115 (1998) (Supreme Court).

56. case 109/89, [1989] IRLR 532 (ECJ).

57. [1987] 2 CMLR 11; [1986] 3 WLR 1017 (House of Lords).

58. case 171/89, [1989] IRLR 493 (ECJ).

59. For example, many professions require that employees hold a degree qualification; however it would not be impossible to carry out the actual duties of the job without such a qualification.

60. A requirement for physical ability to perform a job would certainly meet the reasonableness test of the UK, has been used successfully as a BFOQ in the US (eg Rosenfeld v Southern Pacific Co 444 F2d 1219 (9th Cir 1971), and would be *zwingend geboten* (compellingly required) in terms of German law.

61. Hugh Collins, 'Equal Pay: case note' 16 ILJ 272 (1987), p. 272.

62. Collins, p. 272.

63. Rummler v Dato Druck, case 237/85, [1987] 3 CMLR 127, p. 139 (ECJ).

64. Rummler, p. 139-140.

65. Rummler, p. 141.

66. Rummler, p. 141.

67. For example, the percentage of Graduate Engineers registered with the UK Engineering Council who are women is 0.95%. The UK Equal Opportunities Commission Statistics Unit 1991 figures give the percentage of women in the occupational group of 'professional and related in science, engineering, technology and similar fields' as 14.02%, and in the occupational group of 'management' as 26.98%.

68. Civil Rights Act 1964, Title VII, Section 703(h).

69. 431 US 324, 97 S Ct 1843, 52 L Ed 2d 698 (1979) (Supreme Court).

70. Kenneth L. Karst, 'Supreme Court Cases' 91 Harv. L. Rev. 250 (1977), p. 251.

71. 431 US 553, 97 S Ct 1185, 52 L Ed 2d 571 (1977) (Supreme Court).

72. Karst, p. 257.

73. American Tobacco Co v Patterson 456 US 63; 1025 C Ct 1534; 71 L Ed 2d 748 (1982) (Supreme Court).

74. Karst, p. 259.

75. [1977] IRLR 359 (EAT).

76. see Bilka, p. 720.

77. [1984] IRLR 299 (EAT).

78. see Rubenstein, 'Highlights' 1984 IRLR 1.

79. Rubenstein, 'Highlights' 1984 IRLR 1.

80. [1989] 2 CMLR 577; [1989] ICR 250 (EAT).

81. Clymo, p. 261-262.

82. Clymo, p. 262.

83. Clymo, p. 262.

84. but see above, chapter 9, section 2.1.

85. case 170/84, [1986] 2 CMLR 701 (ECJ).

86. Bilka, p. 720.

87. Bilka, p. 721.

88. [1987] 2 CMLR 11; [1986] 3 WLR 1017 (House of Lords).

89. Of course, the case would not have arisen were NHS employees paid at the same rate as private sector health employees.

90. Rainey, p. 20.

91. see Carey.

92. Bilka judgement of 14.10.1986 BB 1987 p. 829; discussed in Prechal and Burrows, p. 260-261; cited in Prechal and Burrows, p. 273, note 199.

93. Judgment of 14.3.1989, BB 1989 2115.

94. See Heide M. Pfarr and Klaus Bertelsmann, *Diskriminierung im Erwerbsleben* (Baden-Baden: Nomos, 1989), p. 265, note 207; see above, chapter 7, section 3.2.2.2.

95. Pfarr and Bertelsmann (1989), p. 266.

96. BAG AP Nr 4 on Art 3 GG; cited in Pfarr and Bertelsmann (1989), p. 266, note 210.

97. Rinner-Kühn; Kowalska v Freie und Hansastadt Hamburg, case C 33/89, [1990] ECR I - 2591, [1992] ICR 29.

98. Rainey; Reed Packaging v Boozer [1988] IRLR 333 (EAT).

99. see above, chapter 5, section 2.2 and chapter 7, section 2.2.

100. but see below, as regards challenge on grounds of incompatibility with EC law.

101. see above, chapter 6, sections 1 and 2.1.4 and chapter 7, sections 2.1.2 and 2.1.3.

102. Van Gend en Loos, case 26/62, [1963] CMLR 105 (ECJ); Van Duyn v Home Office, case 41/74, [1975] 1 CMLR 1; [1974] ECR 1337 (ECJ).

103. see Erika Szyszczak, 'Note on Rinner-Kühn' 19 I.L.J. 114 (1990), p. 116.

104. Rinner-Kühn v FWW Spezial Gebäudereinigung GmbH & Co KG, case 171/89, [1989] IRLR 493 (ECJ).

105. quoted from Szyszczak.

106. quoted from Szyszczak.

107. [1992] 1 All ER 545 (Court of Appeal).

108. R v Secretary of State for Employment, p. 564.

109. R v Secretary of State for Employment, p. 565.

110. R v Secretary of State for Employment, p. 565.

111. R v Secretary of State for Employment, p. 565.

112. Simon Deakin, 'Part time work: Further isolation on social policy' 1992 C.L.J. 26, p. 28.

113. R v Secretary of State for Employment, p. 568.

114. Deakin, p. 28.

115. in chapters 5-7.

116. Cobb v Sec State for Employment [1989] ICR 506 (EAT).

117. Wabheim v JC Penney and Co 705 F 2d 1492 (9th Cir 1983) (Court of Appeal).

118. Cobb; double earners rule in *Kundingungschutzgesetz.*

119. *Lohnfortzahlungsgesetz* (Act on the Continued Payment of Wages).

120. Rinner-Kühn, p. 494.

121. Rinner-Kühn, p. 494.

122. Rinner-Kühn, p. 496.

123. Teuling, case 30/85, [1988] 3 CMLR 789; [1987] ECR 2497 (ECJ); EC Commission v Belgium, case 229/89, [1991] IRLR 393 (ECJ).

124. Rinner-Kühn, p. 496.

Chapter 10

Conclusion

This study has been mainly concerned with exploring exceptions to the general principle of equal treatment for women and men, in the form of justifications for sex discrimination in employment. The very existence of exceptions to a general principle - any general principle - will tend to undermine that general principle. It is, therefore, of crucial importance, in order to ensure that the core principle is protected from erosion, to limit exceptions in a reasoned and principled manner. In the case of the general principle of equal treatment of women and men, because there are some situations in which the real differences between women and men require their different treatment, there is genuine reason to maintain some (albeit carefully limited) exceptions. In practice, without such exceptions, the principle runs the risk of being rejected as altogether too strong to apply.

With the focus of the study on the law of the EC, I adopted a comparative methodology, on the *grounds that this would*, at the very least, provide valuable insights, and that a comparative approach might, under certain circumstances, present a 'model solution'. In arriving at a functional approach to justifications for sex discrimination in employment, the conceptualization of equality espoused by the courts in developing standards for justification is fundamental. In the event, although there are elements present in all the systems which may be regarded as consistent *with my position*, my analysis of approaches to justifications in the four different legal systems, those of the EC, UK, US and Germany, reveals no system with a consistent commitment to the conceptualization of equality as 'equality of opportunity'. Therefore, none of these systems may be regarded as offering a 'model solution'. However, this does not vitiate the usefulness of the comparative approach, as a source of a number of insights.

Comparison of the approaches of the four legal systems to issues concerned with justifications for sex discrimination in employment revealed

areas of broad agreement and similarity, as well as certain areas of difference. In terms of contrasting points of view, either the similarities or the differences may seem unexpected. Seen in the light of common political ideologies (Liberal democracy), it may seem surprising that any significant differences exist between the approaches to justifications to sex discrimination in employment within the different systems. Seen in the light of the different historical developments of the relevant areas of law, it is the extent of similarities that may seem remarkable. Use of the comparative method is helpful in maintaining a balance between these two conflicting points of view.

Similarities between the four systems are especially striking in comparison of the *substantive grounds* accepted by courts as grounds of justification for sex discrimination in employment. The substantive grounds available are diverse and numerous. In none of the legal systems examined is there an attempt to limit substantive grounds; such limitation is, however, not necessarily either achievable or desirable. The clear consensus over certain substantive grounds (for example, protection of decency and privacy of clients or customers, or maintenance of public order) suggests that these grounds may be regarded as generally acceptable. However, mere evidence of consensus is insufficient grounds for the acceptance of a particular justification as *functional*. Functionality of justifications may only be assessed in the light of the purpose of sex discrimination law as a whole, that is, by my contention, the promotion of equality of opportunity. Comparison of the approaches of the legal systems examined also reveals a common thread of inadequate analysis of justifications in particular areas (for example, on questions of positive discrimination, differentiation between pregnancy and family responsibilities, and protection of women), in terms of equality of opportunity.

The principal differences between the approaches of the legal systems examined are found in their approach to questions related to the *standard* by which justifications for sex discrimination in employment may be established. The standard of justification encompasses all issues concerned with the 'legal test' for justification, including that of the burden of proof in a case concerning justification. The standard of

'reasonableness', as applied in the UK and the US, may be considered to be less functional than the standard of 'proportionality', as applied in the EC and in Germany.

As noted above, the importance of the principle of equal treatment for women and men requires that exceptions to that principle should only be available on carefully limited grounds. It follows, then, that a functional standard by which justifications may be established would not permit discriminatory behaviour on grounds of 'mere convenience'. However, because a number of interests (for example, the interests of the employer in maintaining a competitive enterprise), at least some of which are also regarded as relevant, compete with the interests of employees who may have been discriminated against, a functional standard could not go so far as to require 'absolute necessity' in order to justify discrimination. A functional standard must be found somewhere in the centre of a continuum between convenience and necessity.

The points on this continuum at which the respective legal systems examined place their standard of justification differs between the common law and the civil law systems. It is my view that the position in the two civil law systems examined is more functional than that in the two common law systems. The standard in the legal systems of the UK and the US, whereby discrimination may be justified if the court considers it 'reasonable', is not to be regarded as functional, because its effect in practice is to require the employee to show that the action of the employer was *unreasonable*. Coupled with the rules concerning transfer of burden of proof in discrimination cases in the UK and the US, application of the standard of reasonableness places too great an onus on the employee, and therefore reveals insufficient commitment to the importance of the principle of equal treatment. On the other hand, the standard required by the principle of 'proportionality' is to be regarded, broadly speaking, as a functional standard. The proportionality test operates as a means of effecting a balance between the genuine interests (and 'needs') of employers and the principle of equal treatment of women and men employees. Correct application of the proportionality test ensures that discriminatory behaviour will be justified, if, and only if,

there are no less-discriminatory means available for fulfilling the genuine need met by the discriminatory behaviour.

I contend as a general proposition that situations in which employers seek to justify discriminatory behaviour should be subjected to individual scrutiny and validation; a functional approach will accept justifications only where there exists a specific genuine need for the discrimination or the discriminatory effect. This proposition may sound trivial, but in fact the study revealed a number of examples (in particular, in the area of justifications related to general public interests) in which the courts accepted alleged genuine needs of employers (or of the state) without specific proof that the measures were necessary. In a functional model, the employer (or whoever alleges justification) would be required to *prove* a genuine need, and would not be able to establish justification on unsubstantiated allegations.

Perhaps the most significant proposition of a general nature to emerge from the study is that different 'types' of substantive grounds of justification for sex discrimination in employment require fundamentally different considerations. An analytical framework in which different types of substantive grounds are placed would provide a functional approach to the problem of admitting certain exceptions (but not others) to the general principle of equal treatment. None of the legal systems examined was found to attempt the categorization of substantive grounds in this manner. I identified three 'types' of substantive grounds for justification: job related justifications, enterprise related justifications, and public interest related justifications. Although I have hitherto only applied this categorization to justifications for *indirect* discrimination, in retrospect I believe that the same categorization could also prove fruitful in analysis of purported substantive grounds of justification for *direct* discrimination.

The first type of substantive ground covers that category of situations in which the ground of justification is related to performance of the job. In a functional model, justification in such a case could only be established where there is an actual relation between the need to

discriminate (directly or indirectly) and the duties of the particular job to be carried out. The ground of artistic authenticity provides a clear-cut example of a functional job related justification. It must also be regarded as functional to accept justification (generally for indirect discrimination) based on the employee's physical ability to perform the job. However, purported job related justifications based upon women's (or men's) perceived abilities (as opposed to their actual abilities) would be rejected. Justifications based on the grounds of protection of women may pose as job related justifications, if they reflect a perceived need to protect women from work regarded as 'heavy' or 'dangerous', which 'women are unable to perform'. These grounds of justification should not be regarded as functional. Equality of opportunity requires that women enjoy the same choice as men to accept or to reject 'risky' employment. Protective measures for employees (which are generally accepted as a matter of social policy) should as far as possible extended to employees of both sexes; this 'levelling up' of protection may be regarded as desirable, if equal treatment is not to be reduced to 'equal detrimental treatment'. The one exception to the general proposition that grounds based on women's perceived capabilities and the need to protect 'the delicate sex' should not be regarded as functional is that of different treatment of women in their biological capacity as childbearers. In this instance, the different situation of women from that of men justifies discriminatory treatment, for example in the exclusion of pregnant women from employment in an environment proven to be harmful to the foetus.

The second type of substantive ground covers those situations where the ground of justification is related to the efficient running of the employer's enterprise. The main question in an assessment of the functionality of an enterprise related justification is that of how the legitimate interests of an employer may be balanced against the costs of implementing the principle of equal treatment. On the one hand, a functional approach to justification would not deny the employer some protection from, for example, the costs of providing protected leave to an employee who becomes pregnant. On the other hand, a functional approach to justification of sex discrimination would not automatically admit every cost-based ground of justification. Use of the principle of

proportionality provides a functional standard by which the courts may effect the balancing exercise in assessment of the competing claims of employer and employee. When the courts apply the standard of proportionality to enterprise related grounds of justification, care should be taken to place to emphasis on the principle of equal treatment for women and men in employment. In practice, application of the standard of proportionality would mean that, where a complainant employee is able to show a non-discriminatory alternative to the discriminatory action, this would be decisive of the case, in that the employer would be unsuccessful in attempting to establish justification. Although this is not strictly within the remit of the study, my position is that, while employers may be expected to bear some of the costs of equality of opportunity, some sort of state intervention (for example in the provision of maternity leave insurance schemes for employers) is probably necessary to effect the changes in the employment sphere required to achieve equality of opportunity.

The third type of substantive ground of justification, that of public interest related justifications, also has a central concern the question of balancing of competing interests. In the case of public interest related grounds of justification the balancing exercise is more delicate than in the previous type of ground. Where a public interest related ground of justification is advanced for indirectly discriminatory measures found in legislation, in a functional model, the state would be required to show that the discriminatory effect was genuinely necessary for achieving some specific measure of social policy. Given that the state is able to do so, the question for the courts to decide is how to balance the social aim of the measure concerned against the principle of equal treatment. Again the principle of proportionality provides a functional standard by which justifications may be assessed. When the courts apply the standard of proportionality to public interest related grounds of justification, due recognition should be given to the social aim of the measure concerned, as well as to the principle of equal treatment of women and men. It might be suggested that, in a functional model, where the state does show a genuine need for a social measure, it is only in the narrowest of situations that a court would be willing to overturn it.

Grounds of justification related to the interests of the children of employees may also be regarded as public interest related justifications, although here the 'public interest' is probably a type of 'paternalistic' concern for the mother and child. The granting of parental leave to working mothers of children has been used as a ground for justification of measures of positive discrimination, where women enjoy rights as mothers which men are not permitted to share. It is my contention that measures of positive discrimination should be limited to measures related to the different treatment of women as childbearers, not least because such measures may actually be disadvantageous to women in the long run, by allowing them to be perceived as more costly employees. Outside the 'protected period' (of pregnancy, child birth and a short time thereafter), a functional model would admit no justification for measures which are not sex neutral, or which are not applied in a sex neutral manner. Childcare (as opposed to childbearing) may be undertaken just as effectively by men as by women; both women and men should have the opportunity to combine the benefits and burdens of parenting with those of employment, if they so desire. It may be the case that the general interests of society in the well-being of its children might justify the more favourable treatment of employees who are *parents*, but this issue falls somewhat beyond the scope of this study.

EC law *regarding justifications* for sex discrimination in employment is still very much in the process of development. There are a number of ways in which EC law in this area could more closer towards espousal of the aim of equality of opportunity. With this in view, I outline four major recommendations:

- The standard for justification applied by the European Court, that of proportionality, should continue to be applied. As it seems to be the case, in at least some Member States (the UK being an example) that the courts fail to apply this principle precisely, some explanation for the benefit of the national courts of the meaning of proportionality and its particular application in cases of justification of sex discrimination, including its bearing on the burden of proof, should be provided.

• Grounds advanced as justification for discrimination (especially for direct discrimination) should continue to be subjected to individual scrutiny and validation. The party alleging justification should be required to prove a genuine need for the discrimination or the discriminatory effect. Grounds advanced for justification should be 'transparent' and not inarticulated. These requirements are already part of the *Bilka* test, but, again, it seems that they are not strictly interpreted or enforced by national courts. The European Court should therefore stress this part of the *Bilka* test.

• The existing measures of EC law permitting justification for direct discrimination (for example the Equal Treatment Directive, Article 2) do not deal with justifications related to pregnancy. Measures, probably legislative in nature, should be adopted, based upon the conception of equality of opportunity.

• The European Court should adopt a differentiated test for justification of indirect discrimination. The *Bilka* test is unified: it may be regarded as functional for the type of substantive ground of justification for sex discrimination for which it was developed, that is, enterprise related justifications. A more functional test would differentiate between job related justifications (which would only be acceptable where directly related to the performance of the specific duties of the job), enterprise related justifications (to which the *Bilka* test as it currently stands would apply), and public interest related justifications (where the balancing of the interests of the state and those of the employee concerned is a more delicate issue). A modified version of the standard of proportionality may need to be applied to public interest related justifications, as it would not be functional for any non-discriminatory or less discriminatory measure, *whatever its financial or social cost*, to be used to show lack of justification for the measure concerned.

The extent to which the goal of equality of opportunity is achieved depends on the relative value given by courts to that goal. A functional approach to the issue of justifications for discrimination should play a

part in the opening up of greater opportunities, not just for women, but also for men, in employment.

Bibliography

ABRAHAMS, Henry J., *The Judicial Process* (New York and Oxford: Oxford University Press, 1986).

ARNULL, Anthony, 'Equal Treatment and Job Classification Schemes' 12 E.L.Rev. 62 (1987).

ARNULL, Anthony, *The General Principles of EEC Law and the Individual* (London: Leicester University Press, 1990).

ASSCHER-VONK, Irene, 'The Place of Maternity in European Society' 20 I.L.J. 152 (1991).

BARTHOLET, Elizabeth, 'Application of Title VII to Jobs in High Places' 95 Harv.L.Rev. 947 1982 .

BARTLETT, Katharine T. and KENNEDY, Rosanne, eds , *Feminist Legal Theory* (Boulder, Colorado and Oxford: Westview Press, 1991).

BARTLETT, Katharine T., 'Feminist Legal Methods' 103 Harv.L.Rev. 829 (1990 .

BAYEFSKY, Anne F., 'The Principle of Equality or Non-Discrimination in International Law' 11 Human Rights L.J. (1990 .

BLANKENBURG, Erhard and ROGOWSKI, Ralf, 'German Labour Courts and the British Industrial System' 13 J.L.S. 67 (1986 .

BOURN, Colin and WHITMORE, John, *Discrimination and Equal Pay* (London: Sweet and Maxwell, 1989 .

BOURN, Colin, *Sex Discrimination Law: A Review* London: Institute of Employment Rights, 1992 .

BROX, Hans, *Arbeitsrecht* (Stuttgart: Kohlhammer-Studienbücher, 1989 .

BUCKLEY, Mary and ANDERSON, Malcolm, eds , *Women, Equality and Europe*, Basingstoke and London: Macmillan, 1986 .

BULMER, Simon and PATTERSON, William, *The Federal Republic of Germany and the European Community* London: Allen and Unwin, 1987 .

CAMPBELL, Dennis and HEPPERLE, Winifred, *The U.S. Legal System* Den Haag: Martinus Nijhoff, 1983 .

CARTER, Stephen L., 'The Supreme Court - Leading Cases' 102 Harv.L.Rev. 143 (1988).

CECCHINI, Paolo, *1992 - The European Challenge* (Aldershot, Hants: Wildwood, 1988).

CODE, L., 'Simple Equality is Not Enough' 64 Australian Journal of Philosophy 48 (1986).

COLLINS, Hugh, 'Equal Pay: case note' 16 I.L.J. 272 (1987).

COLLINS, Hugh, 'Methods and Aims of Comparative Contract Law' 11 Ox.J.L.S. 396 (1991).

COMMISSION OF THE EC, *Women of Europe: 10 Years* (Brussels: Women's Information Service, 1988).

COMMISSION OF THE EC, *Community Law and Women* Supplement No 25 to 'Women of Europe' (Brussels: Women's Information Service, X/152/87/EN).

CONAGHAN, Joanne, 'Statutory Maternity Pay and the European Dimension' 20 I.L.J. 314 (1991).

CORCORAN, Jennifer, 'Report of a Comparative Analysis of the Provisions for Legal Redress in Member States of the EEC in respect of Article 119 of the Treaty of Rome and the Equal Pay, Equal Treatment and Social Security Directive' V/564/84 - EN final.

CRITES, Laura L., and HEPPERLE, Winifred L., (eds), *Women, the Courts and Equality* (Newbury Park, Calif. and London: Sage, 1987).

DAUSES, M., 'The Protection of Fundamental Rights in the Community Legal Order' 10 E.L.Rev. 398 (1985).

DAVIES P., and FREEDLAND M., *Labour Law*, (London: Weidenfield and Nicholson, 1984).

DEAKIN, Simon, 'Part time work: Further isolation on social policy' 1992 C.L.J. 26.

DIEDRICH William L. and GAUS William, *Defense of Equal Employment Claims* (New York: McGraw Hill, 1982).

DÖRNER. Klemens Maria, *Praktisches Arbeitsrecht* (Köln: Wirkschaftsverlag Bachem, 1990).

DWORKIN, Ronald, *Taking Rights Seriously* (London: Duckworth, 1978).

EDWARDS, Susan, (ed), *Gender, Sex and the Law*, (Beckenham: Croom Helm, 1985).

EISENSTEIN, Hester, *Contemporary Feminist Thought* (London: Unwin, 1984).

ELLIS, Evelyn, *Sex Discrimination Law* (Aldershot, Hants: Gower, 1988).

ELLIS, Evelyn, 'Discrimination on the Grounds of Pregnancy in EEC Law' 1991 P.L. 159.

EQUAL OPPORTUNITIES COMMISSION *Equal Pay - Making it Work* (Manchester: EOC, 1985).

FORRESTER, Ian S. and ILGEN, Hans-Michael, *The German Legal System* (South Hackersack NJ: Fred B. Rothman, 1972).

FURNISH, Hannah, 'Prenatal Exposure to Fetally Toxic Work Environments' 66 Iowa L.Rev. 63.

GRES, Joachim and JUNG, Harald, *Handbook of German Employment Law* (Deventer: Kluwer Alfred Metzner, 1983).

HANAU, Peter and PREIS, Ulrich, 'Zur mittelbare Diskriminierung wegen des Geschlechts', (1988) Z.f.A. 19.

HARE, Ivan, 'Pregnancy and Sex Discrimination' 20 I.L.J. 124 (1991).

HARRISON, Kate, 'Pregnancy Discrimination and European Community Law' 1991 N.L.J. 454.

HARTLEY, T. C., *The Foundations of European Community Law* (Oxford: Clarendon Press, 1986).

HARVEY, Ruth A., 'Equal Treatment of Men and Women in the Workplace: The Implementation of the European Community's Equal Treatment Legislation in the Federal Republic of Germany' 38 Am.J.Comp.L. 31 (1990).

HERVEY, Tamara K., 'Justification for Indirect Sex Discrimination in Employment' 40 I.C.L.Q. 807 (1991).

HORN, Norbert, KÖTZ, Hein and LESER, Hans, *German Private and Commercial Law* (Oxford: Clarendon Press, 1982).

HOSKYNS, Catherine, 'Women, European Law and Transnational Politics' (1986) Int.J.Soc.L. 299.

HOWARD, Linda, 'Hazardous Substances in the Workplace: Implications for the Employment Rights of Women' 129 U.Penn.L.Rev. 798 (1981).

IDS Employment Law Handbook 29 *Sex Discrimination and Equal Pay* (London: IDS, 1984).

KAHN-FREUND, Sir Otto, 'On Uses and Misuses of Comparative Law' 37 M.L.R. 1 (1974).

KARST, Kenneth L., 'Supreme Court Cases' 91 Harv.L.Rev. 250 (1977).

KEANE, Adrian, *The Modern Law of Evidence* (London and Edinburgh: Butterworths, 1989).

KINGDOM, Elizabeth, *What's Wrong with Rights?* (Edinburgh: Edinburgh University Press, 1991).

KOMMERS, Donald P., *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham and London: Duke University Press, 1989).

KOOPMANS, T., (ed), *Constitutional Protection of Equality* (Leiden: A.W. Sijthoff, 1975).

LACEY, Nicola, 'Dismissal by reason of pregnancy' 15 I.L.J. 43 (1986).

LACEY, Nicola, 'Legislation Against Sex Discrimination: Questions from a Feminist Perspective' 14 J.L.S. 411 (1987).

LANDAU, Eve C., *The Rights of Working Women in the European Community* (Brussels: Commission of the EC, 1985).

LEONARD, Alice M., *Judging Inequality* (London: Cobden Trust, 1987).

LETHBRIDGE, Jane, *Equal Employment Opportunities for Women* (London: Anglo-German Foundation, 1989).

LEWIS, R. (ed), *Women and Minorities* (Oxford: Basil Blackwell, 1986).

LOFASO, Anne, 'Pregnancy and Parental Care Policies in the US and the EC: What do they tell us about underlying societal values?' 12 Comp.Lab.Law J. 458 (1991).

LUSTGARTEN, Laurence, 'The New Meaning of Discrimination' (1977) P.L. 178.

McCRUDDEN, Christopher, (ed), *Women, Employment and European Equality Law* (London: Eclipse, 1987).

McDONALD, Laughlin, *Racial Equality* (Skokie, Illinois: National Textbook Co, 1977).

McGINLEY, Gerald P., 'Sex Discrimination - A Comparative Study' 49 M.L.R. 413 (1986).

McKEAN, Warwick, *Equality and Discrimination under International Law* (Oxford: Clarendon Press, 1983).

MacKINNON, Catharine A., *Toward a Feminist Theory of the State* (Cambridge, Mass: Harvard University Press, 1989).

MacKINNON, Catharine A., 'Toward Feminist Jurisprudence' 34 Stanford Law Review 703 (1982).

McLEAN, Sheila and BURROWS, Noreen, *The Legal Relevance of Gender* (London: Macmillan Press, 1988).

MALTZ, Earl M., 'Title VII and Upper Level Employment' 77 Northwestern University L. Rev. 776 (1983).

MARKESINIS, Basil, 'Comparative Law, A Subject in search of an Audience' 53 M.L.R. 1 (1990).

MATLIN, Diane Wingo, 'Civil Rights - Section 703(h) - Post-Act Perpetuation of Pre-Act Discrimination Through an Established Seniority System' 52 Tul.L.Rev. 397 (1978).

MEEHAN, Elizabeth, M., *Women's Rights at Work - Campaigns and Policy in Britain and the United States* (Basingstoke: Macmillan, 1985).

MORE, Gillian, 'Reflections on pregnancy discrimination under European Community Law' 1 J.Soc. Welfare and Family L. 48 (1992).

NAPIER, Brian, 'Note on James v Eastleigh Council', 1989 N.L.J. 1494.

NEWELL, David, (ed), *Aspects of Employment Law* (London: Fourmat, 1990).

NIELSEN, Ruth and SZYSZCZAK, Erika, *The Social Dimension of the European Community* (Copenhagen: Handelshjskolens Forlag, 1991).

O'DONOVAN, Katherine, *Sexual Divisions in Law* (London: Weidenfeld and Nicholson, 1985).

O'DONOVAN, Katherine and SZYSZCZAK, Erika, *Equality and Sex Discrimination Law* (Oxford: Basil Blackwell, 1988).

PANNICK, David, *Sex Discrimination Law* (Oxford: Clarendon Press, 1985).

PANNICK, David, 'Sex Discrimination and Pregnancy: Anatomy is not Destiny' 3 Ox.J.L.S. 1 (1983).

PERATIS, Kathleen Willert and CARY, Eve, *Women and the Law* (Illinois: National Textbook Co., 1977).

PESCATORE, P., 'Fundamental Rights and Freedoms in EC Law' (1970) Am.J.Comp.L. 343.

PFARR, Heide M. and BERTLELSMANN, Klaus, *Gleichbehandlungsgesetz - Zum Verbot der unmittelbaren und der mittelbaren Diskriminierung von Frauen im Erwerbsleben* (Wiesbaden: Herkules Druck 1985).

PFARR, Heide M., and BERTELSMANN, Klaus, *Diskriminierung im Erwerbsleben - Ungleichbehandlungen von Frauen und Männern in der Bundesrepublik Deutschland* (Baden-Baden: Nomos, 1989).

PLAYER, Mack A., *Federal Law of Employment Discrimination* (St. Paul, Minn.: West, 1981).

POVALL, Margaret and LANGKAU-HERRMANN, 'Equal Opportunity Developments for Women in Local Government in the Federal Republic of

Germany and Great Britain' 10 Equal Opportunities International 11 (1991).

PRECHAL, Sacha and BURROWS, Noreen, *Gender Discrimination Law of the European Community* (Aldershot, Hants: Dartmouth, 1990).

REILAND, Christine 'Sex Discrimination in Collective Agreements' 20 I.L.J. 79 (1991).

ROSE, David L., 'Subjective Employment Practices: Does the Discriminatory Impact Analysis Apply?' 25 San Diego L.Rev. 63 (1988).

ROSS, Jennifer, 'Reason, Ground, Intention, Motive and Purpose', 53 M.L.R. 392 (1990).

ROSS, W.D., *The Works of Aristotle* (London: Oxford University Press, 1925), Vol. 9, Ethica Nicomachea, Book V.

RUBENSTEIN, Michael, 'Highlights' [1984] IRLR 1.

RUBENSTEIN, Michael, 'Highlights' [1991] IRLR 1.

RUBENSTEIN, Michael, 'Highlights' [1992] IRLR 105.

SACCO, Rodolfo, 'Legal Formants: A Dynamic Approach to Comparative Law' 39 Am.J.Comp.L. 1 (1991).

SACHS, Albie and HOFF-WILSON, Joan, *Sexism and the Law* (New York: Martin Robertson, 1978).

SCHAUB, Günther, *Arbeitsrechts Handbuch* (München: C.H. Beck, 1987).

SCHLEI, Barbara Lindeman and GROSSMAN Paul, *Employment Discrimination Law* (New York: American Bar Association, 1983).

SCHLESINGER, Rudolf B., *Comparative Law: Cases, Text, Materials* (Mineola: Foundation Press 1970).

SCHMID, Gunther and WEITZEL, Renate, (eds), *Sex Discrimination and Equal Opportunity - The Labour Market and Employment Policy* (Aldershot: Gower, 1984).

SCHMIDT, Folke, *Discrimination in Employment* (Stockholm: Almquist and Wiksell, 1978).

SCHWEITZER, Carl-Christoph, *Politics and Government in the Federal Republic of Germany: Basic documents* (Leamington Spa: Berg, 1984).

SHAW, Josephine, 'European Community Judicial Method: Its Application to Sex Discrimination Law' 19 I.L.J. 228 (1990).

SHAW, Josephine, 'Pregnancy Discrimination in Sex Discrimination' 16 E.L.Rev. 313 (1991).

SHAW, Josephine, 'Note on Rinner-Kühn' 14 E.L.Rev. 430 (1989).

SHRUBSALL, Vivien, 'Article 119, Pensions and Part-time Workers' 16 I.L.J. 52 (1987).

STANG-DAHL, Tove, *Women's Law* (Oslo: Norwegian University Press, 1987).

STEIN, Eric, 'On Uses, Misuses and Nonuses of Comparative Law' 72 Northwestern University L. Rev. 198 (1977).

STEINER, Josephine, *A Textbook on EEC Law* (London: Blackstone Press, 1990).

STEINER, Josephine, 'Sex Discrimination under UK and EEC law; Two plus Four equals One' 32 I.C.L.Q. 399 (1983).

SUNDBERG-WEITMAN, Brita, *Discrimination on Grounds of Nationality* (Amsterdam and New York: North Holland, 1977).

SZYSZCZAK, Erika, 'European Court Rulings on Discrimination and Part-time Work and the Burden of Proof in Equal Pay Claims' 19 I.L.J. 114 (1990).

TOWNSHEND-SMITH, Richard, *Sex Discrimination in Employment: Law, Practice and Policy* (London: Sweet and Maxwell, 1989).

VERWILGHEN, Michel, (ed), *Equality in Law Between Men and Women in the European Community* (Louvain-La-Neuve: Presses Universitaires de Louvain, 1986).

VIERDAG, E. W., *The Concept of Discrimination in International Law* (Den Haag: Martinus Nijhoff, 1973).

WADE, E.C.S., *Administrative Law* (Oxford: Clarendon Press, 1988).

WALKER, D. J., *Sex Discrimination* (London: Shaw & Sons Ltd, 1975).

WALLIS, Lynn, 'So how *should* a prison governor look?', The Independent, 6th August 1992.

WASSERSTROM, Richard, 'Racism, Sexism and Preferential Treatment' 24 Uni. of California L.A. Law Rev. 581 (1977).

WATSON, Alan, *Legal Transplants* (Edinburgh: Scottish Academic Press, 1974).

WATSON, Alan, 'Legal Transplants and Law Reform' 92 L.Q.R. 79 (1976).

WEISS, Manfred, *Labour Law and Industrial Relations in the Federal Republic of Germany* (Deventer: Kluwer, 1987).

WESTERMANN, Harm Peter, (ed), *Munchener Kommentar zum Bürgerlichen Gesetzbuch* Vol III (Schuldrecht - Besonderer Teil, 1988).

WOLGAST, Elizabeth, *Equality and the Rights of Women* (London: Cornell University Press, 1980).

WOLLSTONECRAFT, Mary, *A Vindication of the Rights of Women* (London: Dent, 1929).

ZÖLLNER, Wolfgang, *Arbeitsrecht* (München: C.H. Beck, 1983).

ZWEIGERT, Konrad and KÖTZ, Hein, *Introduction to Comparative Law* (Oxford: Clarendon Press, 1987).