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Access to Employment and Career Progression for Women in the European Labour Market

**A thesis presented for the degree of Doctor of Philosophy
at the University of Glasgow**

Nicole Ellen Busby

2006

To Calum, and to Eve, Eleanor and Máiri

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Preface

This thesis represents a culmination of work undertaken over the past 12 years of my career. Some of this work has been published elsewhere, the details of which are provided in the Bibliography, alongside the work of others from which I have benefited in my research. Although I would hope that the thesis is wholly original in terms of the range and depth of sources which I have brought together and the particular treatment applied to those sources, my 'original contribution' is claimed by the case analysis undertaken in Chapter 6.

Many people have contributed assistance and support during the completion of this thesis. My supervisor, Dr Jane Mair of Glasgow University's School of Law, has been enormously supportive and has displayed both limitless patience and an ability to read through large amounts of text in a very short space of time. Her perceptive comments and gentle encouragement have been invaluable, particularly during the last few months of writing up. Jane and my second supervisor, Professor Noreen Burrows, employed me as their research assistant in 1995 and, following that appointment, I embarked on the line of enquiry that is presented here. Thanks to both of them for having faith in my abilities and for encouraging me to look at the law critically.

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Finally, special thanks must go to my husband, Calum, for showing me that anything is possible, and to my darling daughters, Eve, Eleanor and Màiri, to whom this work is dedicated.

Nicole Busby

December 2006

Summary

Since its beginning, European Community law has provided for equality between the sexes. The European Court of Justice has been asked by the Member States' national courts to interpret the principle of equality as provided for by Article 141 of the EC Treaty and associated legislation on many occasions. The Court has generally been perceived as progressive in its interpretation of Article 141 which has been held to be directly effective. The scope of potential claims arising under the equality provisions of Community law has been broadened significantly since its inception. Despite this, women continue to suffer discrimination and inequality in the labour markets of all EU Member States, as evidenced by enduring pay gaps. One contributory factor has been identified as the high incidence of gendered segregation that exists, whereby women work in different occupations and at different levels within organisations from men. Furthermore, the use of different terms and conditions of employment on the basis of working arrangements and/or contractual status is commonplace with many low status part-time and temporary jobs filled by women.

The growing complexity in working arrangements has made it difficult to target employment legislation effectively. Utilisation of the existing provisions of Community law requires a reorientation of the traditional conceptualisation of gender relations. This is possible through the application of broad principles, as provided for by the Treaty and the general scheme of Community law, to specific circumstances. The Court of Justice occupies a unique institutional position in this respect as the only authority capable of undertaking such a task coherently and consistently. This thesis considers the Court's reasoning in a group of cases concerning the right to equal treatment of women workers classified as 'atypical' on account of their working arrangements. The purpose of the thesis is to uncover the extent to which the

Court's adjudications on cases referred under the Article 234 procedure can be characterised as having a common output amounting to an identifiable jurisprudence on gender relations. In order to accomplish this task, a systematic analysis of a range of cases conforming to certain specified criteria is undertaken through which the Court's application of certain key principles is examined. The findings reveal inconsistencies in terms of the Court's theoretical dogma and its conceptualisation of the basic tenets of equality which are not discernible from an assessment of its judgments alone. It is concluded that a reassessment of the relative positions and roles of women and men within contemporary society is required in order to enable a more effective application of the law in this respect, starting with the standardisation of 'atypical' working arrangements.

Chapter 1

Introduction

*'The life of the law has not been logic, it has been experience'*¹

Background

From its beginning, the European Economic Community recognised the attainment of equality between the sexes as a desirable goal. The inclusion of the equality principle in Article 119 of the Treaty of Rome may have arisen as a pro-competitive measure intended to harmonise the Member State's provision in this area, but its potential was soon exploited by the European Court of Justice for the purposes of furthering the social as well as the economic aims of the Community. The impact of its judgments on the Member States' legal systems has led to the common perception of the Court as a primary force in European integration, particularly in the field of sex equality. When considered as part of a coherent scheme, the Court's judgments on sex discrimination appear to be generally consistent and its decision-making progressive. In its articulation of the direct effect of Article 119, the Court has made use of teleological reasoning enabling consideration of its place within the wider scheme of Community law in order to give effect to its interpretation. Furthermore, the law-making institutions of the Community have been at the forefront of the development of anti-discrimination law with the introduction of a range of instruments by which the Court has been able to interpret the meaning of Article 141 in ever-more expansive terms. The perception of the Court's jurisprudence on sex equality has been largely favourable as the

¹ Oliver Wendell Holmes, *The Common Law* 1881, (Kessinger Publishing, reprinted 1989), at p.1.

increase in women's labour market participation which has occurred in post-War Europe has been accompanied by the incremental, yet steady, development of the equality principle to encompass such new phenomena as part-time working and maternity rights.

The origins of Community law lie in the development of a political union intended, *inter alia*, to further the neo-liberal ideal of the free market within the context of a unified Europe. This means that the particular conception of equality that underpins Community law generally is formal rather than substantive. Despite the fact that the focus of legislative intent has been on process rather than outcome, the jurisprudence of the ECJ has enabled the development of new and innovative concepts such as indirect discrimination and equal value. Their application has required a reorientation of some of the provisions of anti-discrimination law. The realisation that *prima facie* gender-neutral policy may impact unfavourably on women and that the values ascribed to different types of work might be challenged require an acknowledgment that the causes of labour market inequity may run somewhat deeper than the directly discriminatory behaviour of employers. In seeking to uncover the hidden causes of gender inequality in order to develop a suitable legal response, complex questions emerge which require a re-examination of the ideology on which the very foundation of the common market is predicated. In such circumstances, what choices has the Court made and how has it sought to reconcile its decision-making with the liberal beliefs on which its existence is premised? This thesis is concerned with seeking answers to these questions.

Objectives and Methodology

Primary Objective

The primary objective of the analysis presented here is to uncover the extent to which the Court's adjudications on cases referred under the Article 234 procedure can be characterised as amounting to an identifiable jurisprudence on gender relations. This requires a deeper examination of the Court's decision-making than can be achieved by a cursory assessment of its judgments. In reaching a decision, the Court engages in a process of reasoning which requires the consideration and prioritisation of the various factors at stake. This task necessitates the ascription of value to those factors with the result that some are identified as being of paramount importance and, thus, form the basis for the judgment, while others are rejected as irrelevant or unworthy of attention in the context of the case. This reasoning takes place within the relevant framework provided by Community law which, given the particular nature of the legal order, enables the Court to draw on a wide range of sources including Treaty Articles and secondary legislation as well as certain fundamental principles which are based on the provisions of International law and the constitutional law of the Member States.

In its interpretation of Community law, the Court has been subjected to criticism surrounding the nature of its reasoning which has been characterised as teleological or purposive. This approach has led to charges of judicial activism and claims that the Court has, on occasion, acted as law-maker rather than interpreter. Responses to such criticism, which have sought to defend the Court's position in this respect, are centred on two inter-related factors: a general movement towards a less formalist judicial function and a focus on specific features of the Community legal order such as the fledgling institutional framework and the opaque language

and indeterminate nature of the Treaties themselves. In this thesis, consideration will be paid to the exercise of the judicial function in relation to the Court's jurisprudence on gender relations with a view to ascertaining whether such claims to political activism are, in fact, evidenced by the Court's rationalisation for its decision-making in the field of sex discrimination. What is posited here is that, if proven, the Court's tendency towards activism in the current context may be perfectly defensible on the grounds that the recognition and exercise of the principle of equality is a fundamental precondition to the effective operation of the rule of law.

A Focus on 'Gender'

Rather than focusing on the conferment and adaptation of rights, a deeper assessment of the Court's influence must take account of the theoretical foundations underpinning such provision. Only through such assessment is it possible to identify the driving forces of the Court's decision-making and, thus, to pinpoint its overriding influences. By applying this process to a range of cases it is possible to retrace the path the Court has taken through the choices it has made and, thus, to determine its likely future development. In accomplishment of this task, it is necessary to consider not just the outcome of the Court's thought processes but, as far as possible, those processes themselves. This requires examination of the central concepts utilised by the Court in its reasoning. Such concepts are grounded, not just in legal terminology, but also in the language of the political and socio-economic arrangements which, in the current context, determine the division of labour within the family as well in the labour market.

The Court's jurisprudence is primarily concerned with the prohibition of sex discrimination within employment. However, the application of the equality principle often necessitates broader consideration of social relations and institutions which, due to the gendered nature of work, are instrumental in determining the effects of policy and practices on the individual. The conferment of equality depends not on a strict application of the relevant legal rules, but rather, on an understanding of the relative positions of women and men within labour markets, the identification of differences in behaviour and the reasons for such differences. Thus, the focus of this thesis will be on gender, rather than sex, in recognition of the social and psychological factors that determine society's perceptions of women and men. By considering its decision-making in the context of gender relations, it is possible to examine the extent to which the Court's reasoning has been influenced by the socially constructed normative values ascribed to both sexes.

Interdisciplinary Approach

The central enquiry with which this thesis is concerned is based on broad themes which draw on the contributions made by scholars across a range of disciplines. In exploring the concepts which inform the Court's reasoning, account will be taken of theory grounded in social and economic scholarship as well as that arising from the study of industrial relations. The analysis undertaken, therefore, is interdisciplinary by design, although the focus will be primarily on the contribution of law, defined in its broadest terms, and the methodology utilised in the original analysis presented in Chapter 6 is undoubtedly legal.

Timescale

The research undertaken in this thesis predates the most recent enlargement of the European Union and, therefore, does not take into account specific issues concerning the accession of the 10 newest Member States in May 2004. Although this most recent expansion – in geographical, political and cultural terms - offers obvious opportunities for analysis along gender lines, the effects of enlargement on the Court's jurisprudence are still to be felt. Despite this factor it is anticipated that the analysis offered here will have a wider application than that associated with a particular timescale. A suitable cut-off date has been identified as being 31 December 2005, with the effect that the law is as stated up to and including that date. Amendments and additions to the legislative framework and case law arising after that date have not been considered.

Overview of the Thesis

The theoretical perspectives which inform mainstream thinking in relation to the various concepts examined in this work are considered in Chapter 2. Traditional social and legal theory has tended to undervalue the contribution made by women in the context of social arrangements and this is reflected in the literature reviewed. Furthermore, the fact that many of the dominant theorists have overlooked or have chosen to ignore the gender dimension in the context of their work is explored through an examination of the concept of equality. The absence of woman's voice has led to the development of a specific school of feminist legal theory as a means of taking account of the life experiences of women in the development of proposals for legal and social reform. The perspective adopted in the proceeding analysis is drawn from this work and seeks to discover the extent to which the Court's reasoning has

been influenced by this particular line of enquiry. This thesis seeks to determine whether, and to what extent, the Court's philosophical position in cases concerning sex discrimination has encompassed consideration of women's life experiences.

The facilitation of this aim requires a consideration of the labour market experiences of women and men. The gendered nature of work and theoretical attempts at explaining such phenomena as sex-based discrimination and enduring pay gaps are examined in Chapter 3. This analysis depends largely on the work of labour economists who have presented a range of explanations for the different work experiences of women and men, the most compelling of which is that relating to segmented labour market theory which posits that labour markets are themselves highly gendered. In considering the nature of the market as a determining factor, industrial relations theory is applied. In common with that relating to social and legal theory, much of the literature here is also notable for the lack of a specific gender dimension. However, as the analysis in Chapter 3 demonstrates, the changing nature of work has led to differentiation in terms and conditions between groups of workers, not explicitly on the basis of gender, but rather on the ground of working arrangements. This development has classified those who work part-time and/or on temporary contracts as the providers of cheap, flexible labour in deregulated or unregulated sectors of employment. The flexibility associated with such arrangements serves to benefit employers who enjoy lower wage costs and are able to dismiss workers easily.

Although not specifically provided for under the anti-discrimination legislation, the fact that the majority of such workers are women has meant that protection has been sought by the application of the equality principle to these arrangements. Thus, the Court of Justice has been instrumental in the conferment of rights to such workers which have been largely shaped by

its interpretation of Article 141 of the Treaty. In giving such interpretation, the Court has been required to consider a wide range of factors concerning gender relations such as motherhood, fatherhood and the arrangements pertaining to the division of labour within families. The approach taken by the Court in exercising its judicial function in this respect will inform the consideration of the Court's reasoning throughout this thesis.

The legislative responses which have been developed by the law-making institutions of Community law are presented in Chapter 4. The historical factors which led to the creation of a European Union are considered as is the changing political environment within which such development has taken place. An assessment of Community provision in the broad area of gender relations is undertaken with specific reference to the work of Sandra Fredman. Although Fredman's original analysis was conducted in 1992, many of the weaknesses that were identified in relation to the conceptual foundations of the sex discrimination provisions still hold good. Fredman's critique, which informs many of the sub-themes explored throughout this thesis, focuses on: the particular concept of equality on which the provisions are based; the reliance on a dichotomy between equality and difference; the assumption of neutrality; the subordination of anti-discrimination legislation to the market order and the individualistic nature of the provisions and their enforcement.

The Court of Justice is charged with the interpretation of legislation rather than with its proposition or enactment. Nevertheless, the Court has been required, in discharging its judicial function, to add detail otherwise missing from the provisions themselves. Furthermore, in giving interpretation to the body of Community law, the ECJ's judges have been presented with certain choices regarding the conceptualisation of gender relations required to give meaning to the provisions in the context of the cases before it. The Court's

role can, thus, be seen as pivotal in the perpetuation or rejection of the weaknesses identified by Fredman. This factor informs much of the proceeding discussion surrounding the Court's rationalisation of its decision-making in its case law on sex discrimination.

The composition and function of the ECJ is considered in Chapter 5, alongside an assessment of its jurisprudential development. Recognition is given to the importance of the Article 234 procedure as a means of promoting a dialogue between the Court of Justice and the national courts. This process has been crucial to the interpretation of Article 141 and has led to its application across a wide range of cases arising from the Member States' legal systems. The Court's position within the institutional framework is explored with particular attention to the impact of external factors on its decision-making. The Court has been subjected to criticism regarding its perceived judicial activism on the grounds of its methods of interpretation which have, on occasion, made use of a wide range of sources in order to justify its judgments. It is submitted that the Court's unique position, which arises from a combination of institutional factors, the relative infancy of Community law and its duty to provide adjudication on a diverse range of issues, have necessitated this approach. Furthermore, the relatively wide discretion given to the Court in its decision-making coupled with the lack of binding precedent have enabled the Court to undertake its judicial function in a more creative and purposive way than national courts and this has enabled the adoption of a progressive stance on occasion.

In Chapter 6 an analysis of the Court's interpretation of the equality principle in a group of cases is presented. The female claimants in these cases are deemed as 'atypical' due to their engagement on part-time or fixed-term bases. As identified in Chapter 3, the last two decades have witnessed an increase in these types of working arrangements which are, nonetheless,

still categorised as ‘non-standard’. This is because they do not conform to the normative construct of the standard worker model which is identified through its association with stable, regular full-time work undertaken for a single employer under an open-ended contract of employment. This model has been the main target for legislative intervention intended to provide, *inter alia*, employment protection. Many workers categorised as non-standard have been excluded from the scope of such provisions or differentiated from their full-time, permanent counterparts in relation to pay rates and associated terms and conditions. Sex discrimination claims arising in the Member States have highlighted the fact that many of those with ‘non-traditional’ working arrangements are women. There is no universally accepted definition of the term ‘atypical’ which is an unsatisfactory description in light of the growth in these types of working arrangements. The cases considered in Chapter 6 illustrate the different labour market experiences of women and men and this factor has informed their selection. A full rationale for the selection of cases is set out in Chapter 6 alongside a textual analysis of the judgments. The cases are thematised and grouped according to the nature of the claims and the issues highlighted. This process enables observations to be made regarding the relative values ascribed to specific factors which are identified as being relevant to the Court’s treatment of gender relations.

The findings presented in Chapter 7 identify and consolidate the main themes which have emerged during this investigation. By focusing on the reasoning of the Court of Justice in a specific group of cases, it is possible to draw some broad conclusions regarding the status afforded to gender relations in the Court’s jurisprudence. It is hoped that these findings will have a wider significance, beyond the narrow subject matter of the cases under review, which will inform our understanding, not just of the Court’s *modus operandi*, but of the nature of Community law generally.

Chapter 2

Theoretical Perspectives

*'Female Her Whole Life'*²

Introduction

The European Community legal order has long been at the forefront of the development of sex discrimination law. Much of the progress of recent years has arisen from the Commission's legislative programme, which was particularly active during the 1970s and 1980s in bringing forward a range of legal instruments intended to supplement the provision of the equality principle as enunciated in Article 141. However, the interpretation and application of Article 141 and associated secondary legislation has been the work of the European Court of Justice. Although the Court's operation differs greatly from that of national courts,³ it is apparent that a certain consistency in approach has emerged. This may be tentatively characterised as a philosophical position or jurisprudence and relates to the Court's interpretation of the underlying concepts of equality and discrimination as well as to the development of a common treatment of the issues identified in the cases that have come before it. Despite the fact that the legal competence of Europe's institutions is fettered by the Community's creation as an economic entity, the satisfactory disposal of such cases depends on a range of factors which inform and reflect the public and private lives of Europe's citizens – employment, the family, motherhood and, more recently, fatherhood and paternity. Although commonly bound by the application of the relevant legal rules of Community law,

² From 'Emile' by Jean-Jacques Rousseau (1762). The fuller quote (considered *infra* at p.22) being 'The male is male only at certain moments; the female is female her whole life...'

³ See Chapter 5 *supra*.

these cases originate from the distinct and diverse legal systems of the Member States and the policies and practices on which they are based are often the product of cultural factors related to specific national features and consolidated within Member States' welfare systems. The judges who hear these cases also bring with them a rich and diverse cultural heritage combining the various aspects of their own legal educations and training as well as the broader ideologies of their native states. The purpose of this thesis is to uncover the extent to which the Court's adjudications on cases referred under the Article 234 procedure, which are subject to such a range of influences, can be characterised as having a common output amounting to an identifiable jurisprudence on gender relations.

Before embarking on the key investigation, it is necessary to explore the context within which those rulings have been made. This is because all judicial decision-making has, at its heart, certain notions of the central concepts relevant to the issues under review and their theoretical construction. In the present context, ideas of equality and distributive justice underpin the judiciary's treatment of certain legal questions as well as informing the policy and legislation from which such questions arise. Some of these ideas come from the national legal systems and corresponding industrial relations' traditions of the countries in which the national courts responsible for referring the cases operate and this aspect is central to the thesis presented here. However, all such systems have, at their foundation, common concepts which continue to inform and shape the development of law and policy and which can be reviewed through the work of certain legal and political theorists. What is startling about many of the theorists under consideration is that, although all of them have made important contributions to a general understanding of power relations and the attainment of equality, many have ignored or dismissed the importance of gender in their analyses of human and/or institutional behaviour. This point will be further explored in the following review through the work of

contemporary feminist critiques of traditional theory. I shall also endeavour, where possible, to contextualise the work of the classical theorists by drawing on examples found in contemporary society and legal systems in order to illustrate the continuing relevance and/or influence of their teachings and to introduce some of the themes which inform the later discussions within this thesis.

The Greek School - What is a Woman?

Considerations of the role of women in society can be found in the works of Plato and Aristotle, although the writings of both reveal a misogynistic underpinning unpalatable to contemporary theorists.⁴ As Barnett has noted, careful analysis of their work reveals a complex stance, displaying radicalism for the time and place and amounting to 'an ambiguity about women's position in society'.⁵ In *The Republic*,⁶ in which he speaks through the mouth of Socrates, Plato discusses the family and women's role. Although of the belief that women and men have different natures which make it difficult to argue that they should have the same function, in Socrates' view the only relevant difference is that the 'female bears and the male begets'.⁷ The 'best' women could, therefore, be Guardians (a ruling class) and pursue the same occupations as men. Women's role is thus attributed according to ability and not biological difference. Furthermore, Plato's ruminations on the family and its role within society reveal his belief in a State in which equality is only possible through the abolition of the private family and its replacement with communal wives and children.⁸ As Moller Okin has observed, his vision of an egalitarian society as well as being one in which private

⁴ Moller Okin S., *Women in Western Political Thought*, (Princeton UP 1979).

⁵ Barnett H., *Introduction to Feminist Jurisprudence*, (Cavendish 1998), at p. 84.

⁶ Plato, *The Republic*, R. Waterfield (trans) (OUP 1993).

⁷ *Id.* Bk V, 454e.

⁸ *Id.*, Bk V 454, 456.

property and the family have ceased to exist,⁹ is restricted to the ruling class only, with women in other sectors of society retaining proprietary status subordinated to men and to the ruling class.

In contrast, Aristotle's writings focused on the biological differences between the sexes, which he saw as justification for women's subordination. Woman's physical difference from man was proof of her inferiority as he, by nature, is 'more fitted to rule than the female'.¹⁰ Unlike Plato who sought to change the world in order to reach his 'ideal State', Aristotle accepted the State as a natural entity and sought to explain it.¹¹ In *The Politics*, he argued that the father should retain absolute authority and power over his family, the form of which should be preserved, with women remaining the 'property' of their husbands alongside other existing proprietary arrangements.¹² Although Aristotle rejected much of Plato's schema, the philosophy of both originated from a common set of assumptions relating to the distinction of form and matter. 'Form' was associated with the rational mind and Reason, and 'matter' with the non-rational: rather the object of rational thought and knowledge. Within this framework, the theorists were able to polarise or dichotomise alternatives and this approach is central to Aristotle's considerations of the sexes with women depicted as less than rational and, thus, inferior.¹³ This binary method of analysis, although rejected by feminist jurists for its misogyny, continues to underpin much contemporary thought and emerges as the foundation on which certain institutional arrangements are based. Fredman argues that the 'polarisation of alternatives',¹⁴ posited by the Greek scholars and adopted by later philosophers as a means of explaining the different experiences of men and women, is unhelpful in that 'the dichotomy

⁹ S. M. Okin 'On Plato' in M.L. Shanley and C. Pateman (eds), *Feminist Interpretations and Political Theory* (Polity Press 1991).

¹⁰ *The Nicomachean Ethics*, D. Ross (trans) (OUP 1925): the *Politics* Bk 1 xii, 1259a 37.

¹¹ Aristotle, *The Politics*, T A Sinclair (trans), (Penguin 1962).

¹² *Ibid*

¹³ Barnett, *ibid*, at n. 4, at p. 84.

¹⁴ S. Fredman, *Women and the Law* (OUP 1997) at p. 4.

obscures the possibility of elements of both poles in the same individual.¹⁵ Likewise, de Beauvoir rightly questions Aristotle's logic on the basis of his own belief in the division of matter and form thus, '[I]f matter and form must co-operate in all action, there is no necessity for the active and passive principles to be separated in two different categories of individuals.'¹⁶ Furthermore, to focus on women's sameness or difference from men only serves to contribute to the perpetuation of 'man' as the standard against which 'woman' should be judged, so that 'He is the Subject, he is the Absolute – she is the Other.'¹⁷

Unhelpful as the dichotomisation expounded by the Greek School is in reaching an understanding of the true nature of gender relations, the ideological doctrine intended to explain the relative social positions of women and men is endemic in the philosophy underpinning contemporary social arrangements and supporting institutions. For example, the welfare systems of most industrialised countries are predicated on the assumption that the division of labour within families will place men in the position of main earner or 'breadwinner' and women in that of primary carer and 'homemaker', at least during the childbearing and rearing years. That such ideology continues to inform policy-making at both the macro and micro-levels is not necessarily intentional on the part of governments or employers; there are very few who would articulate the belief that men are better suited to participate in full-time paid employment than women. Furthermore, laws prohibit any policies founded overtly on such presumptions. However, such beliefs are so entrenched in our psyches that they inform our individual and collective actions and enable our unquestioning acceptance of rules and institutions founded on discriminatory criteria which exist at all levels of society. Furthermore, the relationship between certain social groups and the development of legal systems has led to the furtherance of particular interests through the medium of the

¹⁵ *Ibid.*

¹⁶ S. de Beauvoir, *The Second Sex* (trans. H.M.Parshley) (Vintage 1949) at p. 38.

¹⁷ *Id.* at p. 16.

law. Male dominance in the 'public sphere', particularly within political institutions, has led to the furtherance of male interests.¹⁸

In the current context, the most important of Aristotle's dicta is that 'likes should be treated alike',¹⁹ meaning that if two persons have equal status in at least one normatively relevant respect, they must be treated equally with regard to this respect. This 'formal equality' principle has been used as a starting point for legal intervention targeted at the attainment of equality between different social groups. From this theoretical perspective, the question for those concerned with the attainment of equality between the sexes then becomes, 'How are men and women the same and how are they different?' Apart from their obvious biological diversity, other differences might better be explained as socially constructed through the application of gender. The distinction between sex and gender is central to an understanding of the experiences of women and men necessary in any analysis of women's labour market position.

Biological difference, which culminates in women's exclusive ability to bear children, may be the basis for much of the social construction of gender roles so that women are different from men in actual (physical) terms and also due to their placement in the wider society according to their gender. This distinction is closely related to the work of the Greek classicists in that it necessitates scrutiny of the differences between the sexes by consideration of the internal and external relations of the family, both of which can be explored through their efficiency in the

¹⁸ The polarisation of the 'private' and 'public' spheres of civil society, discussed *infra*, actually derives from the Greek school, which drew a distinction between the *polis* (public) and *oikos* (private) – see J. Swanson, *The Public and The Private in Aristotle's Political Philosophy* (Cornell University Press 1992).

¹⁹ The "Aristotelian formula" – Aristotle, *Nicomachean Ethics*, V. 3 1131a10-b15; *The Politics*, III.9.1280 a8-15, III.12. 1282b18-23,.

allocation and use of resources.²⁰ The fact of woman's ability to bear children has been the basis of her role as primary carer within the family and, accordingly, subscription of the role of breadwinner to man. Institutions have been created in support of this arrangement, so that man's space has become the public and woman's the private. While assisting in a general understanding of the sexually divisive nature of society, this simplistic analysis ignores the fact of women's participation in the public sphere as well as belittling the contribution of men in the private. Although familial arrangements and corresponding gender roles may explain the different positions of men and women within contemporary labour markets, they do not assist in reaching an understanding of why such positions persist. Furthermore, if the ascription of women to the private and men to the public spheres is indeed a socially constructed phenomenon, the State's reluctance to intervene in the private arrangements of the family can be seen to have contributed to the continuing subordination of women.

Social Contract Theory - Where is the Woman?

The political and economic changes that swept through European society during the seventeenth and eighteenth centuries gave rise to a particular theoretical movement in which the State's regulation of the public and private spheres was of particular concern.²¹ The concept of patriarchy is central to any discussion of the construction of gender roles but it is acknowledged as being "one of the most conceptually and analytically complex theoretical

²⁰ The term 'resources' is used here and, unless otherwise indicated, throughout this chapter in its broadest sense to refer to **all** appropriate available resources, including those distributed through the provision of welfare benefits.

²¹ In the context of rights-based legal instruments, the period from the early seventeenth until the late eighteenth century witnessed landmarks such as the English Petition of Rights (1627), the Habeas Corpus Act (1679), the American Declaration of Independence (1776), the United States Constitution (1787), the American Bill of Rights (1791) and the French Declaration of the Rights of Man and Citizen (1789). These instruments, based on the concepts of individual rights and popular sovereignty, form the basis for the international standards still applied today as encapsulated by modern-day instruments such as the Universal Declaration of Human Rights.

constructs.²² The term “patriarchy” refers to a form of political power which lies at the heart of traditional jurisprudence and the feminist critique.²³ However, as Pateman has noted, “although political theorists spend a great deal of time arguing about the legitimacy and justification of forms of political power, the patriarchal form has been largely ignored in the twentieth century”.²⁴ As Pateman’s analysis shows,²⁵ the disappearance of consideration of the influence of patriarchy in social and political theory coincides with the emergence of social contract theory during the seventeenth century when the dissolution of the feudal system and the emergence of capitalism were accompanied by a focus on the concepts of individual autonomy and equality before the law. Individuals were no longer the subjects of a pre-ordained hierarchy with their position dependent on whichever level was their birthright. Rather, in the words of Locke, ‘Men [are] by Nature all free, equal and independent’.²⁶ In political terms, the notion of ‘individual consent’²⁷ became paramount so that the State retreated in matters involving personal decision-making, its main function being ‘to act as a neutral umpire between conflicting interests’.²⁸ In terms of legal intervention, this model of the liberal State can be seen as the basis for the public-private divide, in which ‘the ‘public’ State should intrude as little as possible into the sphere of individual autonomy, or the ‘private’ sphere.’²⁹ This division is accompanied by legal abstentionism from the market, which, left to its own devices, will regulate itself. Unfortunately, the promise of greater

²² Barnett *ibid* at n. 4, at p. 57.

²³ *Ibid*.

²⁴ C. Pateman *The Sexual Contract*, Cambridge, (Polity Press 1988), at p. 19.

²⁵ *Ibid*. The concept of patriarchy is a recurring theme throughout Pateman’s text, but of particular interest in this context are Chapter 2 ‘Patriarchal Confusions’ and Chapter 4 ‘Genesis, Fathers and the Political Liberty of Sons’.

²⁶ John Locke, *Two Treatises of Government*, P Laslett (ed) (Cambridge University Press 1988), ‘The Second Treatise’, at para. 95.

²⁷ *Id*.

²⁸ S. Fredman *op cit.*, at p. 6.

²⁹ *Id*, at p. 7

individual freedom did not extend to women who, on the basis of the rationality criterion, were denied full participation in political life.³⁰

Hobbes's *Leviathan*³¹ posited the existence of the Mortal God in place of the separation between the law of God and the law of man. Hobbes's theory is grounded in the notion of sovereignty under which a ruler is granted the power to command through the consent of the governed. The contract made with the sovereign is for "the greater security of society as a whole".³² Although the concept of the social contract can be said to replace man's subordination to God, the arrangements surrounding the contract are still patriarchal in that society is still governed by an absolute ruler. Filmer argued that the idea of a social contract between the sovereign and his subjects was mythical as there was no freedom of choice whether to enter the contract – men were not born free as the social contract theorists argued, but rather into a 'preordained subject status'.³³ For man, this took the form of subjection to the Monarch and, for woman, subjection to the Monarch, her father and her husband.³⁴ In his *Two Treatises on Government*,³⁵ Locke rejected most of Filmer's analysis of social contract theory, but retained his ambivalence about women, accepting women's naturally inferior social status, but arguing that such 'natural disabilities' could be overcome. Although Locke maintained that in matrimony men and women enter a voluntary contract with each other with the primary objective of procreation, he also acknowledged that there is an element of

'mutual Support and Assistance, and a Communion of Interest too, as necessary not only to unite their Care and Affection, but also necessary to their common Offspring,

³⁰ For an analysis of the literature relating to feminist critiques of liberalism, see N. Lacey 'Feminist Legal Theory and the Rights of Women' in K. Knop (ed), *Gender and Human Rights* (OUP 2004), pp. 20-22.

³¹ T. Hobbes 'The Leviathan' (1651), R. Tuck (ed), (Cambridge University Press 1991).

³² Barnett, *ibid* at n. 4, at p. 110.

³³ Sir R. Filmer, *Patriarcha and Other Writings*, J. P. Sommerville (ed) (CUP, 1991)

³⁴ Barnett, *ibid*, at p. 59

³⁵ Edited by P. Haslett (CUP, 1988).

who have a Right to be nourished and maintained by them, till they are able to provide for themselves.’³⁶

However, despite the husband and wife’s apparent equality in Locke’s analysis of marital relations, the husband retained overall power through operation of the ‘last Determination’ which gave him ultimate decision-making on matters pertaining to jointly held properties and interests. This right was based on his ‘ability and strength’ and a husband’s exercise and potential abuse of it separated marital relations from monarchical rule on the basis that the wife had ‘in many cases, a Liberty to separate from him; where natural Right or their contract allows it.’³⁷

As Fredman observes, Locke’s views on women ‘contradict his proclamations of freedom and equality for all’ and, his ‘apparent rejection of patriarchy’.³⁸ On closer consideration, it becomes clear that his writings on patriarchy, made largely in response to Filmer’s work in the context of absolute monarchy, related to man’s subjection to a Monarch and not men’s power over women.³⁹ Locke’s position on women’s equality with men, although perhaps explicit in his recognition of the voluntary nature of the marriage contract,⁴⁰ is obscured by his promotion of the ‘last Determination’ and his separation of political activity from family life. Although he opposed patriarchy in the political context of civil society on the grounds that subjection to a Monarch was in conflict with the freedom to enter a contract voluntarily, Locke did not apply the same standard of justification to the exercise of power within the family. This separation preserves women’s subordinated status within the private sphere and

³⁶ *Id* Pt II at p. 78.

³⁷ *Id* at p. 82.

³⁸ Fredman *op cit.* at p. 8.

³⁹ *Id.*

⁴⁰ Barnett, *op cit* at p. 59.

leaves public life and political participation the domain of men.⁴¹ Furthermore, Locke's categorisation of 'conjugal society' as a voluntary compact between husband and wife gives it 'a measure of legitimacy on his own terms.'⁴² Locke's declarations of freedom certainly appear to have been quite literally restricted to 'man' alone, so that Mary Astell, writing in 1700, was moved to comment 'If all men are born free, why are women born slaves? If absolute sovereignty be not necessary in a state, how come it to be so in a family?'⁴³

Pateman rightly questions Locke's acceptance of the marriage contract as a necessary transaction when, in his hypothesis, 'women are declared to be naturally subject to men. There are other ways in which a union between man and his natural subordinate could be established, but, instead, Locke holds that it is brought into being through contract, which is an agreement between two equals.'⁴⁴

As Lacey states, 'liberal and Enlightenment thinking has been associated with an intensification of feminist analysis',⁴⁵ however this was not apparent in the work of Jean-Jacques Rousseau who was, nonetheless, instrumental in the development of social contract theory during the period of the Enlightenment in the late seventeenth century. Rousseau posited that the formation of the social contract was the moment of the creation of the law and, as such, 'a moment of distinct rationality, in which nature becomes a society, and human

⁴¹ *Id* at p. 60; Pateman *op cit* at p. 21 and Chapter 4.

⁴² Fredman *op cit* at p. 8.

⁴³ M. Astell 'Reflections upon Marriage' in M. Astell and B. Hill, *The First English Feminist* (Gower 1986).

⁴⁴ Pateman *op cit* at p. 54.

⁴⁵ Lacey *op cit* at p. 14. The most notable feminist writer of the time was Mary Wollstonecraft, whose *Vindication of the Rights of Women* was published in 1792. By today's standards, Wollstonecraft's aspiration of improved educational standards for women appears to present a very restricted vision for a more just society. She believed that education would better prepare women for their roles as wife and mother. However, that Wollstonecraft developed and articulated such thoughts at the time that she did is in itself remarkable and is the reason why she continues to be revered today as a forerunner of the later feminist visionaries.

beings become persons, as citizens under law.’⁴⁶ The subject of gender was certainly under discussion at this time and was the focus of great deliberation in the work of Rousseau and his contemporaries.⁴⁷ The replacement of superstition with reason led theorists of the time to question human beings’ capacity for rationality over the pull of nature. Rather than questioning the continued subjection of women, however, Rousseau sought to justify it as being based on the division between mind and biology, with women’s role determined by the latter:

The male is male only at certain moments; the female is female her whole life...everything constantly recalls her sex to her, and to fulfil its function, an appropriate physical constitution is necessary to her...she needs a soft sedentary life to suckle her babies. How much care and tenderness does she need to hold her family together!...the rigid strictness of the duties owed by the sexes is not and cannot be the same.’⁴⁸

Rousseau’s view that woman’s position in society was determined by her physical capacity entrenched the notion that women’s place was the private sphere of home and family and men’s the public sphere of political and economic participation. Such division was justified on the basis that women were less rational and, thus less suited to public life and were more usefully engaged in the caring and nurturing role better matched to their biological state.⁴⁹ Mary Wollstonecraft, writing in response to the views of Rousseau and others, drew a parallel between the subjection of women and that of slaves, arguing ‘if women are by nature inferior

⁴⁶ S. Baer ‘Citizenship in Europe and the Construction of Gender by Law’ in K.Knopp (ed) *Gender and Human Rights* (2004 OUP) at p. 89.

⁴⁷ For example, David Hume and Immanuel Kant.

⁴⁸ J-J. Rousseau ‘*Emile*’ (1762) Bloom A. (trans) (Penguin 1991), at p. 450.

⁴⁹ It should be noted that not all Enlightenment writers shared Rousseau’s views on women, and stark contrasts can be drawn between his writings and the work of Voltaire and Montesquieu who believed women to be capable of equality with men.

to men, their virtues must be the same in quality, if not in degree, or virtue is a relative idea...virtue has only one eternal standard.⁵⁰

The work of the social contract theorists analysed the emergence of a new way of organising society's relations by means of a contract between the ruler and the ruled under the auspices of the Sovereign state. From the outset, women were not party to that contract and their absence from the new order went largely unnoticed. It seems likely that the diminishing influence of patriarchal relations in subsequent considerations of political and social theory is linked to the emergence of what was perceived to be a more egalitarian form of society. That theorists overlooked the continuation of women's subordination is itself illustrative of the dominance of a male perspective in analyses of civil society. As Pateman argues, '[t]he new civil society created through the original contract is a patriarchal social order'.⁵¹ Furthermore, the patriarchal right or 'sex right' defined by Pateman as 'the power that men exercise over women'⁵² extends through civil society. Analyses which attempt to separate the public and private spheres, so that the former becomes the domain of the 'social contract' and the latter the subject of the 'sexual contract', are, therefore, misleading as

'[t]he two spheres of civil society are at once separate and inseparable. The public realm cannot be fully understood in the absence of the private sphere, and, similarly, the meaning of the original contract is misinterpreted without both, mutually dependent, halves of the story. Civil freedom depends on patriarchal right.'⁵³

⁵⁰ Wollstonecraft *op cit* at p. 108.

⁵¹ Pateman *Ibid*, at n. 23, at p. 1.

⁵² *Id*.

⁵³ *Id* at p. 4.

This interrelationship provides a crucial component of any understanding of women's attachment to and performance in contemporary labour markets. What matters in the current context is the extent to which recognition of the interplay between women's real life experiences and patriarchal right has influenced how policy and law have been conceived and interpreted and the nature of such influence. Has adequate consideration been given to the power relations played out within families and workplaces and are the resulting policies and laws prescriptive in this respect? If so, how? Alternatively, do courts and other legal institutions act in a manner that is merely reflective of what is occurring in the context of the society in which they operate, be that at national or supranational level? Of course jurisprudential developments depend, to a large extent, on the nature of the political environment within which courts operate, as characterised by the resulting policy strands from which the legal rules have developed. For example, policies targeted at encouraging women to participate in paid employment must take account of their decreased labour market participation during the childbearing and rearing years. In doing so, it is possible to offer solutions that incorporate pre-existing arrangements within families, thus preserving the *status quo*. Alternatively, such arrangements might be challenged through the operation of targeted policy by which incentives to reconsider the traditional familial arrangements might be introduced. For example, increasing the supply of suitable part-time work enables women to continue to provide childcare and domestic work within the home, whereas the provision of state-funded childcare would facilitate longer working hours for mothers. Perhaps more radically, policy might be targeted at equipping and enabling fathers to share in the care of their children so that the normative construction of 'the worker', on which much domestic policy is based, moves away from the full-time and towards the part-time model. Although it is possible, through policy implementation, to introduce and develop such ideological underpinnings within existing legal systems, the incremental nature of law-making and its

dependence on a range of different actors means that what most systems lack in this respect is a coherent approach. At the supranational level, judicial decision-making can certainly contribute to the development of greater coherence and is, perhaps, uniquely placed in this respect due to its influence over the conceptualisation of certain provisions of national legal systems.

Rawls' Theory of Distributive Justice - Who is a Woman?

In considering the role of judicial decision-making in shaping approaches to gender relations, it is helpful to explore theories of social justice in order to unpack the law and policy-making processes and uncover their foundations. John Rawls, recognised as one of the most influential contemporary political philosophers, uses a model known as the 'original position' in order to rationalise or explain the quest for equality in the context of political and personal freedoms and cooperative arrangements.⁵⁴ In the original position, free and rational beings acting as representatives of real persons are placed behind a 'veil of ignorance' so that they do not know the sex, race, physical disabilities, social class or 'conception of the good' of the persons they represent, although they are aware that such characteristics exist. The representatives also possess a good knowledge of economic systems and human psychology. The aim of the representatives is to choose principles of justice that are suitable to govern a just and fair social order. 'Since all are similarly situated and no one is able to design principles to favour his particular position, the principles of justice are the result of a fair agreement or bargain.'⁵⁵ From this artificial stance, stripped of self-knowledge, the representatives must make decisions about which societal rules best cater to all potential members of society, rather than those favouring a particular individual or group situation.

⁵⁴ John Rawls, *A Theory of Justice*, (OUP, 1972).

⁵⁵ *Id.* at 12.

Under these conditions, rationality dictates that the best way to optimise the interests of the represented is to rule out discrimination on the basis of any of the possible characteristics in order to prevent any resulting disadvantage.

Rawls' work is based on the tradition of social contract theory discussed above through the work of Hobbes, Locke and Rousseau and offers a contemporary application of the social contract as a basis for civil society providing guiding principles of justice and accompanying criteria for a 'nearly just society'. From their original position, the representatives prioritise individual liberty over equality with each citizen having an equal right to the 'most extensive basic liberty compatible with a similar liberty for others'.⁵⁶ The equal basic liberties include 'freedom of thought and liberty of conscience; the political liberties and freedom of association, as well as the freedoms specified by the liberty and integrity of the person; and finally, the rights and liberties covered by the rule of law.'⁵⁷ This is often referred to as the 'equal liberty principle'. In the second of Rawls' principles, social and economic differences must be equally distributed under conditions of equality of opportunity and should provide the greatest benefit to the least advantaged members of society. This might require the giving of more power, income or status to some persons provided that certain conditions are met, basically that life will be made better for those who are currently 'worst off' and that access to the positions of privilege are not blocked by discrimination based on irrelevant criteria. This is the 'difference principle'.

Rawls' work has been subject to scrutiny by feminist theorists with criticisms drawn on a number of fronts. With regard to the implications of his theory on the position of women in society, Fredman finds it 'striking that nowhere in the Theory of Justice is this question

⁵⁶ Rawls *ibid*, at p. 60

⁵⁷ *Id.* at p. 291.

expressly addressed'.⁵⁸ Moller Okin, questioning the absence of notions of justice within the family from Rawls' analysis, finds that his theory appears to overlook the fact that 'modern liberal society to which the principles of justice are to be applied is deeply and pervasively gender structured'.⁵⁹ The reason for Rawls' lack of concern for women's position may be attributable, at least in part, to his methodology, so that the level of abstraction required in the creation of the original position 'proves nothing and clouds our vision'⁶⁰ or, in Pateman's words, creates a 'logical abstraction of such rigour that nothing happens here.'⁶¹ As Matsuda notes, we need to move away from the artificiality created by such abstractions and 'return to concrete realities, to look at our world, rethink possibilities, and fight it out on this side of the veil, however indelicate that may be.'⁶² Rather than enabling identification of the principles of justice required to create a fair society, the level of ignorance required by Rawls' original position makes any understanding of the influences on each individual's perspective impossible. The needs of those disadvantaged groups or members of society can only be truly understood and met by their inclusion in the decision-making process.⁶³

The individualistic focus adopted by Rawls has also been the subject of critical scrutiny from those subscribing to the communitarian approach. In essence, the communitarian view finds Rawls' promotion of the individual as an atomistic being deeply flawed, as it fails to consider the individual's place within the political community. Without such placement and resultant social network of connections to others, the individual has no identity and, correspondingly, rights cannot be ascribed to groups or group members.⁶⁴ The concept of community and its

⁵⁸ Fredman *Women and the Law* op cit, p. 23.

⁵⁹ Moller Okin, S., *Justice, Gender and the Family*, (1989 Basic Books) at p. 184.

⁶⁰ M. Matsuda 'Liberal jurisprudence and abstracted visions of human nature: a feminist critique of Rawls' *A Theory of Justice*' (1986) 16 New Mexico Law Review 613 at 624.

⁶¹ Pateman, *op cit*, at p. 43.

⁶² Matsuda *op cit* at p. 624.

⁶³ Lacey N. 'Theories of Justice and the Welfare State' *Social and Legal Studies* Vol 1 (1992) 323 at 338.

⁶⁴ See Sandel M. *Liberalism and the Limits of Justice* (CUP, 1982), MacIntyre A., *After Virtue: A Study in Moral Theory* (Duckworth, 1984).

absence from Rawls's theory is, according to Cornell, particularly relevant in the context of gender relations due to the maternal bond.⁶⁵ To deny the importance of community in the construction of a theory of justice represents a denial of woman due to the intrinsic connection between mother and child. Moreover, the principles upon which much feminist methodology is predicated require deep consideration of the shared experiences of women, so that techniques such as awareness-raising are deemed particularly useful as a means of identifying and articulating woman's viewpoint.⁶⁶ To overlook the connection and interdependency between individuals and groups of individuals is to deny the contribution of such techniques to contemporary social theory. Furthermore, the individualistic approach taken by Rawls appears, at times, to be misleading when it is remembered that he is, after all, attempting to identify principles for community life.

The exclusion of gender analysis from Rawls's principles of justice cannot be attributed to his choice of methodology alone. His subsequent consideration of other social, economic and political institutions⁶⁷ makes the fact that he omits to apply his theory to the family unsatisfactory and it is in this respect that his work has drawn its greatest level of criticism. In *Justice, Gender and the Family*,⁶⁸ Moller Okin, although critical of Rawls's lack of attention to justice within the family, is otherwise receptive to his theory believing that it has potential from a feminist perspective. Moller Okin views the sharing of childcare within the family as key to the distribution of justice between men and women within individual relationships and also in the context of the wider society. If men shared equally in the provision of childcare, the impact would be felt in the workplace with men and women requiring periods of non-participation in the labour market and flexible working arrangements. The provision of

⁶⁵ Cornell, D., 'Beyond tragedy and complacency' (1987) 81 Northwestern University Law Review 693; 'The doubly prized world: myth, allegory and the feminine' (1990) 75 Cornell Law Review 644.

⁶⁶ Or, more accurately, viewpoints as, of course, not all women share a common viewpoint.

⁶⁷ J. Rawls, *Political Liberalism* (Columbia University Press, 1996) at p. 11.

⁶⁸ Moller Okin *op cit*, at n. 58.

education would also be implicated so that children would ‘become fully aware of the politics of gender’ and the perpetuation of sexual stereotypes would diminish. By eradicating the relevance of gender from the childcare equation, children would be subjected to a process of socialisation that encompasses the principles of justice. Rawls’ approach enables the elimination of characteristics such as gender in the ascription of tasks so that they are distributed on the basis of notions of justice rather than assumptions pertaining to perceived suitability on stereo-typical grounds. This is a particularly useful device when considering concepts that are socially constructed, such as gender, as it enables actions based on preconceptions to be stripped away and replaced by strategies grounded in notions of community. Nonetheless, Rawls’ failure to properly apply his own theory to family relations shows that he is ‘trapped into the traditional mode of thinking that life within the family and relations between the sexes are not properly to be regarded as part of the subject matter of a theory of social justice.’⁶⁹

Much can be deduced from Rawls’ theory about the nature of justice in abstraction, but to uncover a perspective that is useful for analysing gender relations specifically, it is necessary to consider theory that explicitly confronts existing inequalities. Such an approach must pay due consideration to difference, sameness and institutional factors and should seek to explain the nature and causes of inequality as a means of promoting the standard of equality as a desirable goal. Out of such endeavours, a specific line of enquiry has emerged, known collectively as “equality theory”. This is a generic term, encompassing a diverse body of work. The various strands it encompasses share a common focus on the attainment of formal or substantive equality and borrow elements of the theories so far explored: from the Greek School, the dichotomisation of central themes and concepts and the principle of formal

⁶⁹ Moller Okin *ibid*, at p. 184.

equality; from the social contract theorists, the notion of a voluntary agreement between the members of society and the State; and, from Rawls, use of the concept of distributive justice as a levelling tool between social groups.

Equality Theory - How to Treat a Woman?

It is interesting to note that A.V. Dicey, the main architect of the British Constitution with its recognition of the primacy of the rule of law and equality of all individuals before the law, was strongly opposed to the extension of suffrage to women.⁷⁰ Despite Dicey's disapproval, the women's movement gained momentum during the late nineteenth and early twentieth centuries as society's attention turned to the attainment of individual autonomy and equality for all and the legal framework slowly expanded to include such concepts.⁷¹ In 1867 John Stuart Mill made the first parliamentary speech in favour of votes for women and continued in his writing to call for legal recognition of equality between the sexes: 'I am convinced that social arrangements which subordinate one sex to the other by law are bad in themselves and form one of the principle obstacles which oppose human progress; I am convinced that they should give way to perfect equality.'⁷² Mill's call for 'equality' was not new - the concepts of 'Liberté, égalité, fraternité' inspired the French Revolution and have served as the ideals of the body politic ever since. However, the concept of equality is contested⁷³ and, before contemplating its attainment, it is necessary to consider what is meant by 'equality' as a political ideal.

⁷⁰ A.V. Dicey, *Letters to a Friend on Votes for Women* (John Murray, 1909), as cited in Fredman *op cit* at p. 39.

⁷¹ Although it would be 1928 before women in Britain achieved the suffrage.

⁷² J.S Mill, *The Subjection of Women* (Longman, 1869).

⁷³ As Dworkin has written about the concept of equality, 'People who praise it or disparage it disagree about what they are praising or disparaging'. R. Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Harvard University Press, 2000) at p. 2.

The term itself signifies a comparison between two or more objects, persons or processes with at least one quality in common. In order for equality to be achieved or achievable, the subjects need to be similar, but need not be the same.⁷⁴ The term 'equal' can be both descriptive and/or prescriptive depending on the context in which it is used.⁷⁵ For example, although society may accept, fundamentally, that individual members are equal, it may also be true that certain social processes and procedures lead to inequalities between individuals that can be remedied through the application of normative rules. For example, resources may be distributed unevenly so that some are in receipt of greater quantities and prosper at the expense of others. One way of attempting to rectify such inequality is through the use of legal intervention aimed at ensuring equal distribution. In attempting to implant the concept of equality into a legal system, the key issues become identification of the persons or processes to whom the concept might be applied and the areas and degrees of similarity which provide a basis for application of the equality principle. In other words, the term 'equal' might be used to describe different individuals or groups of individuals to whom the prescription of 'equality' might be applied through political intervention to remedy uneven distribution of a particular resource. In whichever context the terminology is used, however, one central question arises: in what respect is equality sought?

In the current context, the common characteristic is men and women's membership of the human race. In the employment sphere, what is at question is the equal right of men and women to economic resources despite their differences. Are those differences significant in this context or should they be overlooked as irrelevant? The distinction between sex (which accounts for biological difference) and gender (which is the socially constructed cause of difference) has been considered, but is it possible or desirable to overlook difference on one

⁷⁴ P. Westen, *Speaking Equality* (Princeton University Press, 1990) at p. 39.

⁷⁵ F. Oppenheim 'Egalitarianism as a Descriptive Concept' in L. Pojman and R. Westmoreland (eds) *Equality: Selected Readings* (OUP, 1997), pp. 55-65.

ground in order to overcome difference on the other? Furthermore, is biology the only real ground of difference between the sexes that does not arise through the process of socialisation or do men and women's physiologies give rise to other, psychological,⁷⁶ differences which make it difficult or impossible to treat the members of both sexes exactly the same in political terms? Furthermore, even if gender roles are the product of social construction, why have they been assigned in the way that they have? The answers to these questions depend largely on the particular conception of equality that is applied. Those subscribing to a strictly utilitarian viewpoint may argue that, once an appropriate degree of similarity has been established, any remaining differences are irrelevant and should be overlooked wherever possible.⁷⁷ The extreme application of this approach results in the assimilation model discussed below in which sex is treated as a wholly irrelevant difference. Those adopting a more pragmatic position, however, argue that the causes of such differences matter as much as the differences themselves, with both requiring adequate consideration if resulting inequalities are to be overcome. Differences which arise out of historical factors manifested through social constructs, such as the ascription of childcare as a "women's issue", must be given due attention alongside differences arising out of the biological functions of both sexes if equality is to be achieved. Of course the methods and extent to which such differences are accommodated are subject to variation depending on the particular political philosophy applied, which might itself be prescriptive or descriptive. The approaches presented are not as simplistic or unitary as this brief description might suggest.⁷⁸ Over time, theorists have

⁷⁶ C. Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Harvard University Press, 1982).

⁷⁷ Feminist thinkers may also wish to set aside the same/difference debate on the ground that to focus on it is counter productive. In the words of Fredman, 'The dualism needs to be abandoned, and instead the underlying power structures need to be challenged and reformed' *Women and the Law, op cit*, at p. 16. For a full and frank exposition of this approach, see the work of MacKinnon (discussed *infra* at pp. 50-53), specifically *Feminism Unmodified* (Harvard University Press, 1972).

⁷⁸ Theorists may, of course, be both utilitarian and pragmatic in their outlook. For example, Jeremy Bentham and John Stuart Mill while both proponents of utilitarianism were also influential social reformers. For an illuminating discussion of their approaches to the furtherance of rights, see H.L.A. Hart 'Natural Rights:

developed sophisticated models that utilise different combinations of the concepts outlined in attempting to present explanations of existing inequalities and to offer appropriate remedies. Some of the posited approaches will be explored in the context of their relevance to sex equality issues.

Utilitarianism

Under a strict utilitarian approach, the concept of equality is of paramount concern in attainment of the ideal that 'each is to count for one, no-one more than one.'⁷⁹ On this basis, the interests of all should be treated equally regardless of the nature of those interests or the individual situations out of which they arise, the overall goal being the maximisation of human happiness. In the context of group or social activity, the morally correct action is the one that maximises utility.⁸⁰ However, this approach has been criticised for failing to be able to deliver its very promise – equality for all. This is because, in the utilitarian calculation, all desires must be accommodated with equal weight including those based on selfish motives and external preferences⁸¹ even when they diminish the rights of others. This distorts the application of the equal treatment principle, which should ensure that everyone is able to claim a fair portion of the available resources. The lack of consideration for morality or justice in the inclusion of interests means that utilitarian theory cannot meet its goal of treating all as equals. As Rawls argues, neglect of the separateness of individuals does not allow a proper interpretation of moral equality as equal respect for each individual.⁸²

Bentham and John Stuart Mills' in *Essays on Bentham: Jurisprudence and Political Theory* (OUP 1982), Chapter 4.

⁷⁹ Ascribed to Bentham by Mill - see J. S. Mill, Utilitarianism in J. Gray (ed) *Mill on Liberty and Other Essays* (OUP, 1991) at p. 199.

⁸⁰ R. M. Hare, *Moral Thinking: Its Levels, Method and Point* (OUP, 1981).

⁸¹ R. Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977) at p. 234.

⁸² J. Rawls, *A Theory of Justice*, *op cit.* at p. 27.

Despite its shortcomings as a 'grand theory', the utilitarian conception of equality has influenced many contemporary thinkers who have taken from it certain elements for use in their work. MacCormick⁸³ has used Bentham's conception of rights as specially protected benefits to develop a specific application of the utilitarian approach in his work on rights as interests. Within this framework, a right can be deemed to exist where someone benefits or stands to benefit from the performance of a duty or where an interest is regarded as sufficiently important to justify the imposition of a duty. As Lacey has noted, this inclusive approach can be applied to both basic human rights and private law rights on the grounds that 'interest theory can simply accommodate choice as one form of interest which – as in the case of contract – may in some circumstances be regarded as sufficiently important to merit special protection by means of a right.'⁸⁴ Furthermore, the conversion of interests into rights enables a more inclusive approach so that 'children and the mentally incapacitated can indeed be rights-holders'.⁸⁵ In the context of sex equality, the broad scope offered by this approach is useful as it enables inclusion of those areas traditionally dichotomised as 'private' and 'public' in reaching an understanding of the extent of existing inequalities, as well as offering a way out of such dichotomisation. However, criticism of interest theory centres on its downgrading of rights as mere reflections of duties and, in its wider context, the ascription of rights as a general feature of utility ranked equally in terms of importance alongside all the other factors likely to maximise human happiness. Furthermore, the lack of consideration for institutional factors,⁸⁶ such as the identification of those against whom rights should properly be imposed and the appropriate enforcement methods, detract from its usefulness as a holistic response to social inequality.

⁸³ N. MacCormick, 'Rights in Legislation' in P. Hacker and J. Raz (eds), *Law, Morality and Society: Essays in Honour of H.L.A. Hart* (OUP, 1977) at p. 189.

⁸⁴ N. Lacey 'Feminist Legal Theory and the Rights of Women', *op cit.* at p. 33.

⁸⁵ *Ibid.*

⁸⁶ Contemporary theorists such as Dworkin, discussed *infra*, have built on interest theory to encompass the institutional features of rights. See R. Dworkin, *Taking Rights Seriously*, *op cit* at n.80; *A Matter of Principle* (Harvard University Press, 1981).

The Assimilationist Ideal

As discussed in the context of the Greek School, much of the debate on the attainment of equality between different social groups focuses on the extent to which members of those groups can be deemed to be the same or different from each other. Application of the concept of equality depends on the existence of some level of similarity between the relevant subjects and this in itself requires comparisons to be drawn. Comparability is the basis for much of the current legislative provision in this area and will be given extensive consideration later on.⁸⁷ What is now under review is the relevance of the same/difference debate and, specifically, the degree of sameness required in order for the goal of equality to be achievable. Mary Wollstonecraft, writing in late eighteenth century England, revealed her frustration at the perception of women as naturally inferior which, she believed, was responsible for their continued subjection,

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.⁸⁸

In seeking to improve the educational prospects of women, Wollstonecraft wished her sex away so that the preconceptions and prejudice that had hitherto prevented equality between the sexes would disappear too. Although Wollstonecraft's understandably limited aspirations and apparent idealism may appear unsophisticated when placed against the backdrop of

⁸⁷ See Chapter 4 *infra*.

⁸⁸ Wollstonecraft, *op cit*, at n.44, at p. 21.

contemporary society, the philosophical foundations of her argument still have currency in what has been termed the 'assimilationist ideal'.⁸⁹

From this perspective, the 'substantially different role expectations and role assignments [ascribed] to persons in accordance with their sexual physiology'⁹⁰ would, in a just society, acquire no more importance than irrelevant categories such as eye colour. Wasserstrom posits the possibility that this type of society might be the product of true sex equality, although he acknowledges the likelihood that 'pluralistic ideals founded on diversity and tolerance'⁹¹ might provide a sounder basis for accommodating sex differences. The philosophical question underpinning Wollstonecraft's and Wasserstrom's vision of equality, that relating to the degree of consideration of difference necessary in the development of legal interventions to counter inequality, is still the subject of intellectual debate. Although it may be impossible and undesirable to ignore genuine biological differences between the sexes in the formulation of policy, the differences ascribed through the construction of gender roles, many of which are based largely on myth,⁹² might be better consigned to the wastelands of history.⁹³ Theoretically, this makes some sense but it requires an over simplistic and inherently unrealistic conception of 'gender' predicated on an assumption that differences arising through the ascription of gender roles can be neatly unpacked from those based on biological difference. In reality, it appears unlikely that a theory that seeks to overlook differences on the basis of sex or gender, although desirable in some respects, would be particularly useful when

⁸⁹ Mainly in the context of the US race debate, see, for example, R. Wasserstrom *Racism, sexism and preferential treatment: an approach to the topics*, 24 University of California Los Angeles Law Review 581 (1977).

⁹⁰ *Ibid* at 587.

⁹¹ *Id* at 607.

⁹² Such as the belief, traced back to the ancient Greek philosophers but universally accepted until as recently as the late nineteenth century that women, by nature, were irrational and thus unsuitable to participate in 'public' life.

⁹³ In *Women and the Law*, *op cit.* at p. 16, Fredman cautions against differential treatment of women which 'has its own dangers, most importantly, in perpetuating stereo-typical assumptions about women and therefore entrenching subordination'

such differences, regardless of their origins, are the basis on which society and its institutions are grounded. Furthermore, by attempting to eliminate difference, we risk obscuring the causes and effects of that difference, when, as Fredman has observed, 'in a plural society, such as that in modern Britain, difference and diversity should be regarded as positive attributes. Equality, far from suppressing difference should accommodate and even celebrate it'.⁹⁴ This approach is in contrast to that currently endorsed by the provision of legislative intervention in the UK and European Community contexts, which relies heavily on the application of equal treatment.

Equal Treatment or Treatment as an Equal?

The equal treatment model is based on the Aristotelian formula that 'likes should be treated alike and, thus, bestows the same treatment on individuals regardless of individual circumstances or group membership. Although falling somewhat short of the complete disregard for biological or socially constructed differences expounded by the assimilationist ideal, equal treatment nonetheless explicitly disregards such differences in favour of application of the 'merit principle'. This assumes that, given equal access to the same opportunities, individuals will achieve success through personal effort enabling benefits to be distributed according to merit. The problem with this approach is that it fails to take into account the effects of historical and continuing disadvantage by presupposing that all players have an equal starting point. The continuing effects of patriarchy on gender relations mean that, in the case of women and men, this is simply not true. Although both are recognised as being sufficiently alike so as to be accorded equality, this has not always been the case. Women were expressly excluded from full political participation until relatively recently on

⁹⁴ S. Fredman, *Discrimination Law* (OUP, 2002) at p. 3.

the basis that they lacked the requisite level of rationality necessary for decision-making. The legacy of this exclusion continues through contemporary arrangements, such as the division of labour within families and employment-based discrimination, and the institutional and social norms that support them. As decades of equality legislation have proved, the conferment of formal equality through equal opportunities has not eradicated the effects of historical, legally sanctioned inequality.⁹⁵ Although the impact of law is severely limited in this respect, if its normative effects are considered, greater progress might have been expected. Furthermore, even those areas appearing, *prima facie*, to be appropriate targets for legislative intervention have been slow to change as the approach applied continually misses the target - the most obvious example being the persistence of gendered pay gaps. Contemporary theorists have grappled with the dilemma posed by the need to formulate a legal response capable of bestowing substantive equality on the one hand, whilst preserving the traditional liberal values associated with individualism and freedom of choice on the other. The most influential modern theorist in this respect is Ronald Dworkin whose theory on rights will now be considered.

Dworkin has been categorised as a ‘modified liberal’⁹⁶ as his work, while based on the attainment of equality as an individual right, recognises the role of the State in securing that right. In building his theory, Dworkin distinguishes between the right to equal treatment and the right to treatment as an equal.⁹⁷ The first entails the equal distribution of opportunities, resources and burdens and the second is the right ‘to be treated with the same respect and concern as anyone else’.⁹⁸ In recognising the differing needs of individuals, the appropriate treatment may vary to enable all individuals to be treated as equals - this is ‘fundamental’

⁹⁵ See Chapter 3 *infra*.

⁹⁶ Fredman, *Women and the Law*, *op cit*, at p. 18. Fredman also includes the work of John Rawls, discussed *infra*, and Joseph Raz, specifically *The Morality of Freedom*, (Clarendon Press, 1986), within this categorisation.

⁹⁷ R. Dworkin, *Taking Rights Seriously* (Duckworth, 1978) at p. 227.

⁹⁸ *Ibid*.

whereas the right to equal treatment is 'derivative'. As Dworkin notes, 'In some circumstances, the right to treatment as an equal will entail a right to equal treatment, but not, by any means in all circumstances.'⁹⁹ This is essentially a pluralist argument that recognises and accommodates difference and which goes some way towards countering the difficulties inherent in the application of the equal opportunities approach in the context of gender relations. Although 'Dworkin's theory can be categorised as individualistic to the extent that it is each individual's conception of the good that matters',¹⁰⁰ he argues that it is possible for individual conceptions of the good to involve work for the community.¹⁰¹

Dworkin's approach enables consideration of the relative positions of the targets of equality to be considered in the formulation of political responses and even endorses reverse discrimination or preferential treatment in certain circumstances. This builds on the conceptualisation of interests as rights categorised as 'interest theory'¹⁰² and is grounded in the utilitarian ideal that 'all should count for one and none no more than one.' In achievement of this aim, Dworkin argues that claims of rights have a special force that will always trump policy considerations and even general utility on the grounds that resources should always be targeted at those who need them most. Explicit in Dworkin's theory is a core belief that 'conceptions of legal rights are irreducibly connected to wider precepts of political morality.'¹⁰³ As his focus on law as a moral-based construct illustrates, Dworkin's analysis is grounded in an attachment to the natural law school of thought and a rejection of legal positivism.¹⁰⁴ The latter's dependence on rules based on purely human phenomena as the

⁹⁹ *Id.*

¹⁰⁰ Fredman, *Women and the Law*, *op cit.*, at p.19.

¹⁰¹ Dworkin 'Liberalism' in *A Matter of Principle* (Clarendon Press, 1985) at p. 203.

¹⁰² Discussed above at pp. 33-34.

¹⁰³ Lacey, *op cit.*, at p. 34.

¹⁰⁴ See Dworkin *Taking Rights Seriously*, *op cit* at n.80, in which Dworkin takes positivism in general, and H.L.A. Hart's theory in particular, to task on the basis that it is rights, underpinned by principles, and not judicial discretion which determine the outcome of difficult cases. Dworkin, cannot be categorised as a strict follower of

determinants of law and legal systems cannot be reconciled with Dworkin's belief in the fundamental importance of principles which represent:

'...a standard that is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality.'¹⁰⁵

Dworkin views the market as a useful means of distributing resources and endorses State intervention as long as such interference in the market is predicated on an obligation to treat all individuals as being entitled to equal concern and respect. Therefore, intervention by the State is justified in order to prevent discrimination and to ensure fair distribution of available resources. Dworkin's hypothesis of the equality of resources involves an auction in which everyone can accumulate bundles of resources through equal means of payment with the measure of resources devoted to a person's life being defined by the importance of those resources to others.¹⁰⁶ Once the auction is complete, distribution in a free market then depends on an individual's ambition, with post-auction inequalities attributable to personal responsibility on the basis of 'option luck'. Where unjustified inequalities arise, these should be countered by way of a differentiated insurance system.

Dworkin's form of modified liberalism with its acceptance of a tolerant State, respectful of individual difference yet proactively engaged in protecting against discrimination on moral grounds, has much to commend it as an appropriate theoretical basis for legal intervention

the natural law school as he has formulated his own theory which, while founded in natural law, encompasses a wider range of concepts.

¹⁰⁵ Dworkin 1977 *op cit* at p. 22.

¹⁰⁶ Dworkin 1981 *'What is Equality? Part II: Equality of Resources'* *Philosophy and Public Affairs* 10 283-345 at 290, (reprinted in Dworkin, *Sovereign Virtues. The Theory and Practice of Equality* (Harvard University Press, 2000) 65-119).

aimed at countering inequality. Indeed his observations on the appropriate legal response to racial discrimination have been widely influential and provide a compelling justification for the use of affirmative action in certain circumstances.¹⁰⁷ However, his theories have not found such wide acceptance in their application to gender issues, due largely to his unsatisfactory treatment of the family and familial relations. As Fredman has noted, 'his notions of rationality, autonomy and individualism fail to recognise, and therefore to value, relations of dependence and care, the paradigm example being that of mother and child.'¹⁰⁸ This lack of recognition, which stems from his acceptance of the individual's conception of the good life as the central value attracting State protection, 'simply fails to capture a relationship whereby one person's activities are dictated by another's needs for care, particularly if the dependent could not otherwise survive.'¹⁰⁹ Dworkin's lack of appreciation for the existence of altruism in certain contexts¹¹⁰ is symptomatic of deeper flaws in his analyses of the community¹¹¹ in general and the family in particular.

The framework within which Dworkin's consideration of the family takes place is, in itself, questionable. His use of terminology is inappropriate – he consistently refers to familial obligations as fraternal¹¹² - and his exposition of group obligations as always reciprocal¹¹³ is undoubtedly flawed.¹¹⁴ However, it is in Dworkin's consideration of specific family relationships, such as that which exists between father and daughter, that his analysis reveals a

¹⁰⁷ See 'Reverse Discrimination' in *Taking Rights Seriously*.

¹⁰⁸ Fredman, *Women and the Law*, *op cit*, at p. 20.

¹⁰⁹ *Id.*

¹¹⁰ Whether such altruism is exercised through choice or not – see Dworkin, *Law's Empire* (Fontana Press, 1986) at 437, n 20 in which he remarks that becoming a parent is matter of 'choice' which, of course is not always the case.

¹¹¹ For a comprehensive application of the feminist perspective to communitarianism, see E. Frazer and N. Lacey *The Politics of Community: A Feminist Critique of the Liberal-Communitarian Debate* (Harvester, 1993)

¹¹² *Law's Empire*, *op cit*, at p. 198.

¹¹³ For example, see *Law's Empire*, *id.* at p. 196.

¹¹⁴ See Fredman *Women and the Law*, *op cit*, at p.21.

particularly worrying dynamic. In *Law's Empire*¹¹⁵ he considers the individual's obligation to the community and examines the concept of integrity which, he claims, infers that 'each citizen must accept demands on him' and may 'make demands of others'.¹¹⁶ He illustrates this analysis by reference to 'the dutiful daughter' and asks if a daughter has 'an obligation to defer to her father's wishes in cultures that give parents powers to choose spouses for their daughters but not sons?'¹¹⁷ Dworkin posits that a community which believes daughters to be less equal than sons is not a community of integrity but, if gender equality is accepted, a belief that women need paternalistic protection may give rise to a 'genuine conflict' in terms of moral obligation. In such circumstances, the daughter's obligation to defer to parental control over her choice of spouse is in conflict with her right to individual freedom and autonomy. In contemplating the daughter's 'choices', Dworkin observes that, if she marries against her father's wishes she 'has something to regret. She owes him at least an accounting and perhaps an apology, and should in other ways strive to continue her standing as a member of the community she otherwise has a duty to honour.'¹¹⁸ Dworkin's response, as Barnett has observed, 'reveals his lack of concern with the daughter's dilemma, and her lack of rights'¹¹⁹ which Hutchinson interprets as being attributable to his implicit acceptance of the 'oppression of women masquerading as honour.'¹²⁰

Dworkin's apparent lack of empathy with the hypothetical daughter's predicament displays an absence of appreciation for the factors that contribute to women's disadvantage and which are underpinned by the power relations in families as reflected in societal arrangements. Although far from being misogynistic, he nevertheless neglects to attempt an understanding of the life

¹¹⁵ *Law's Empire* *ibid* at p. 196.

¹¹⁶ *Id.* at 189.

¹¹⁷ *Id.* at 204.

¹¹⁸ *Id.* at 205.

¹¹⁹ Barnett *op cit.* at p. 109.

¹²⁰ A. C. Hutchinson 'The Law Emperor?' in *Reading Dworkin Critically*, (Berg 1992) at p.63.

experiences of women in his consideration of the 'general politics of integrity, community, and fraternity'.¹²¹ Rather than amounting to a minor oversight, this omission resonates through his work which, after all, claims to 'identify and distinguish the diverse and often competitive dimensions of political value'.¹²² This indicates that his 'grand theory' approach to equality, although useful in some respects, is not suited to the study of the nature of gender relations which requires specific consideration of the causes and effects of family relations and their placement in the wider society. As consideration of the work of social theorists demonstrates, Dworkin is not alone in his neglect of the women's perspective. Analysts from the Greek philosophers, through to the social contract theorists, and on to those concerned with contemporary studies of the principles of justice and equality have been guilty of the same neglect. It is no wonder that a body of theory has emerged specifically in defence of the women's perspective in analyses of social, political and economic life. Known collectively as 'feminist theory', this school of thought encompasses a range of ideas so diverse that the use of a common term perhaps obscures more differences than the similarities its use purports to unite. However, central to all of these ideas is a commitment to include the hitherto excluded voice of woman in accounts and explanations of the past with a view to advocating suitable political reforms for the future. Fragments of the work of some of the most prominent feminist theorists have been used throughout this chapter as a means of critiquing the traditional theories under review. In this final section, that work will be considered in more detail with the aim of identifying an appropriate theoretical framework within which the analysis comprising the core of this thesis can take place.

¹²¹ Preface to *Law's Empire*, *op cit* at vii.

¹²² *Ibid* at viii.

Feminist Legal Theory – Putting Women in the Picture

Categorisations of feminist theory have identified four main classifications: liberal, socialist, radical and difference feminism, although, as Lacey has observed, the liberal and socialist schools amount to specific applications of existing political philosophies to women rather than autonomous and distinctive theories in their own right.¹²³ That feminist writers have sought to include the experiences of women in accepted analyses of society is hardly surprising given their long-term exclusion, but such transplantation has been problematic in certain respects. The organic nature of the development of feminist theory means that it is important to consider the various stages of that development in, as far as is possible, chronological order. This will be attempted alongside representations of the criticisms that have been levelled at the different theoretical classifications. It should be noted that these classifications represent models, rather than self-inclusive theories, with the work of some theorists falling between several of the categories.

Liberal Feminism

The liberal ideal, centred on notions of equality and individual freedom, has become the dominant political ideology in Western democratic society. As considered above, the concept of liberalism depends on the acceptance of certain fundamental conditions such as the availability of legal rights, the distribution of resources via markets free from unjustified State intervention and the protection of the private sphere, all of which are predicated upon a primary concern for rationality in society's organisation. From their earliest conception, these conditions have impacted on the lives of women. They have been used to explain the

¹²³ Lacey, *Feminist Legal Theory and the Rights of Women*, *op cit* n. 83, at pp. 20 and 25.

dichotomisation of the sexes and their corresponding gendered roles, to reinforce the *status quo* and to justify the continued subjection of women through their exclusion from full and effective participation in society. Liberal feminists,¹²⁴ while mindful of the weaknesses inherent in the liberal school of thought, seek to eliminate gender-based discrimination by utilisation of the ideological strengths encompassed by the doctrine, specifically through application of the ideals of equality and autonomy. In seeking to apply these ideals, liberal feminism is 'committed to creating similarities between women and men where possible and to eliminating the differences between them.'¹²⁵ Pursuance of this strategy will 'lead to assimilation of women to men in the public world', the downside being, in O'Donovan's estimation, a corresponding 'denial of needs and responsibilities in the private.'¹²⁶

The application of liberal ideals to women's employment is the basis on which legal intervention in the national and EC contexts in the employment sphere is grounded.¹²⁷ The legislative approach owes much to the protection of the individual right to equal treatment articulated through the liberal promise of the same (equal) opportunities for all. The resulting symmetrical application of equality provides corresponding rights to equal treatment to men as well as women. The identification of unequal treatment between two individuals depends on the existence of a preordained standard against which any such treatment can be assessed. In the contemporary employment context, this standard is personified by the normative model of the 'standard worker' who is engaged on a permanent, full time basis and whose labour market behaviour, thus, conforms to that of the (male) breadwinner. For any individual found

¹²⁴ For examples, see the work of early feminist theorists such as Mill cited *infra* at p. 30 and Wollstonecraft at p. 35. The work of liberal theorists such as Ronald Dworkin can also be aligned with this perspective insofar as it can be described as 'feminist'. Dworkin's equality theory, discussed *infra*, is distinct from the 'equal opportunities' approach generally identified with liberal feminism as it recognises and endorses the use of reverse discrimination as necessary for achievement of the individual right to treatment as an equal.

¹²⁵ K. O'Donovan, *Sexual Divisions in Law*, (Weidenfeld and Nicolson, 1985), at p. 35.

¹²⁶ *Ibid.*

¹²⁷ See Chapter 4 *infra*.

to be in receipt of different (and therefore unequal) treatment, there exists, theoretically at least, a comparator of the opposite sex for the purposes of bringing a legal case. This is so whether the recipient of the less favourable treatment is male or female, as rights lie in either direction. On its face this approach prohibits favourable treatment or 'reverse discrimination' although, in some theoretical applications of the liberal perspective, reverse discrimination is accepted as a necessary means to an end, specifically, as a means of protecting the individual's right to equality.

As Fredman notes, the early contribution of liberal feminism should not be under-estimated as it was the 'effective harnessing of liberal concepts to the cause of women's emancipation' that led to the removal of formal legal impediments against women, culminating in the extension of suffrage in 1928.¹²⁸ However, the limits of this approach have since been realised and are illustrated by the lack of progress made in certain respects despite women's formal right to political participation. Criticisms of liberal feminism arise largely from the fact that 'it is not so much a distinctly feminist theory as liberalism applied to women.'¹²⁹ Therefore, any shortcomings inherent in the traditional liberal conception of equality are transferred to its application to considerations of women's perspective.¹³⁰ These arguments, which have already been versed, focus on the individualistic nature of liberalism,¹³¹ its conception of freedom¹³² and adherence to the public/private divide as a means of determining the social arrangements worthy of legal intervention and those best left to self-regulation.¹³³ Liberalism's reliance on these factors has been criticised on the basis that, collectively, they

¹²⁸ Fredman, *Women and the Law*, *op cit*, at p. 11.

¹²⁹ Lacey, *Feminist Legal Theory*, *op cit* at p. 20.

¹³⁰ For a discussion of the characteristics of liberalism subjected to a feminist critiques, see A.M. Jaggar, *Feminist Politics and Human Nature* (Harvester 1983) at pp. 39-48.

¹³¹ See Lacey *ibid* at p. 20 and Fredman *op cit* at p. 14.

¹³² Lacey, *id* at 21, Fredman *op cit* at 14.

¹³³ See K. O'Donovan *Sexual Divisions in Law*, *op cit* at pp. 146-59.

contribute to the preservation of the *status quo* and lead to a failure to take account of the changing lives of women.

The State's role in the liberal analysis, to act as 'neutral umpire',¹³⁴ has also been the subject of fierce criticism by feminists who argue that this is illusory as the State in its various guises is undeniably male. MacKinnon contends that liberalism's promise of equality for women, as achievable by the removal of obstacles to participation in public life, conceals the concept of power in society. In fact, the liberal State is profoundly male and exclusionary of women so that gender relations are actually political relations with gender roles determined by power and powerlessness. MacKinnon questions whether, 'the State [is] to some degree autonomous of the interests of men or an integral expression of them?',¹³⁵ In law, the power relationship is obscured: whether it is the sameness of women and men or their differences which are at question, in both regards the normative standard remains that of man, so that sex equality law,

'...fails to notice that men's differences from women are equal to women's differences from men. Yet the sexes are not equally situated in society with respect to their relative differences. Hierarchy of power produces real as well as fantasised differences, differences that are also inequalities. The differences are equal. The inequalities, rather obviously, are not.'¹³⁶

Socialist (Marxist) Feminism

Although women have been largely left out of the traditional Marxist position, Engels's work on the family incorporated some useful examples of how socialist ideals could be used to

¹³⁴ Fredman *id* at 12.

¹³⁵ C. MacKinnon, *Towards a Feminist Theory of State*, (Harvard University Press, 1989) at p. 161.

¹³⁶ *Id* at pp. 224-5.

transform the lives of women as well as men.¹³⁷ In subsequent analyses of Marxist theory, feminist writers have attempted to incorporate women specifically,¹³⁸ although the central tenet of Marxism remains class and not gender. The attractions of Marxist political philosophy to those concerned with society's power relations are obvious - Marxism offers an alternative analysis to liberalism in which the State is not viewed as neutral but rather as an agent of ideological and political change. Law emerges as an instrument of power used to control and maintain control of the elite over the proletariat. The role of law is not, however, as central to the operation of society as the liberal perspective might suggest. In Marxist theory, society's conditions and the individual's place are determined by the economic base, primarily by the relationship between the relations of production (the means by which individual needs are satisfied) and the forces of production (the available natural resources and available technological skills). A person's social class is determined by his or her position within the relations of production so that those with economic power have control over all other lower classes. By applying the central premise of Marxist ideology, namely the oppression of one class by another, to women's subordinated position within society, feminists have contended that, 'According to this 'dual systems' theory, women's reproductive labour is exploited by men in the same way as the working class's productive labour is exploited by capitalists'.¹³⁹

Despite the obvious parallels between the working class's oppression at the hands of the capitalists and women's subordination through their unequal power relationship with men, there are certain aspects of Marxist theory that deem its application to gender relations unsatisfactory. Women's omission from Marx's original, apparently all-encompassing,

¹³⁷ F. Engels, 'The Origin of the Family, Private Property and the State' (1884) in *Marx and Engels Selected Works* (Lawrence and Wishart, 1968).

¹³⁸ For example, H. Collins, *Marxism and the Law*, (Clarendon, 1982); M.Barrett, *Women's Oppression Today* (Verso, London, 1991).

¹³⁹ Lacey *op cit* at p.25. For an example of this particular theory, see Barrett *ibid*.

analysis of society makes their subsequent 'writing in' appear as the afterthought it patently is. In fact, Marxism's denial of woman's place in society's power dynamic amounts to a benign acceptance of her subordination rather than an oversight. In Engels's analysis of the family, private property and the State,¹⁴⁰ he contends that the destruction of capitalism will result in women's emergence as the equal partners of men. However, the inherent assumption that all exploitation arises on class grounds, fails to take account of the very nature of women's oppression. By failing to acknowledge the patriarchal nature of society which coexists with differences of class and gives rise to a whole other set of inequalities, 'Marxist theory assumes the lack of differentiation in women's lives. Woman's identity becomes invisible.'¹⁴¹ As Harstock has noted, 'Marx's procedure was in fact to set out from men's labour and to ignore the specificity of women's labour.'¹⁴² The failure of Marxist theory to take specific account of the life experiences of women is difficult to set aside and has led to the development of a 'third wave' or radical feminism through which some of the more compelling observations arising from the Marxist analysis of society can be specifically applied to issues of gender relations.

Radical Feminism

Lacey has described radical feminism as 'the most autonomous and distinctive conception of feminism, in that it is exclusively a feminist theory.'¹⁴³ However, she also acknowledges the difficulties in identification of any unifying features among the various strands of feminism whose proponents have claimed a radical basis. Part of that difficulty rests on the fact that all feminists may, by definition, claim to be 'radical' due to the movement's questioning of the

¹⁴⁰ Engels *ibid.*

¹⁴¹ Barnett *op cit* at p. 137.

¹⁴² N. Harstock, *Money, Sex and Power, Toward a Feminist Historical Materialism*, (Routledge and Kegan Paul 1983) at p. 146.

¹⁴³ Lacey *op cit* at p. 23.

central tenets of legal and political thought and aspirations to reorganise society's 'public' institutions to enable women's inclusion. However, as the liberal perspective illustrates, not all feminist perspectives are as challenging to the *status quo* as might be expected, with variation dependent on the nature and methods of change advocated. What the many and diverse theories subscribing to a more radical approach have in common is their focus on the problem of men's dominance over women and women's corresponding subordination to men. As Barnett has observed, 'Women's sexuality lies at the heart of the radical feminist debate. Thus radical feminists analyse the means by which men's sexuality is expressed in forms which result in women's inequality.'¹⁴⁴

Olsen's analysis of the binary divisions in Western political philosophy is particularly useful in pinning down the identifying characteristics of radical feminism.¹⁴⁵ A number of central concepts are considered: male and female; subject and object; public and private; form and substance; mind and body; active and passive; reason and emotion. Radical feminists recognise the hierarchical and sexualised nature of the dichotomies and seek to reclassify the valuations so that the 'second' concepts attract greater recognition. The need for such reconceptualisation arises from the fundamental acknowledgment of women as beings in their own right without reference to their sameness to or difference from a male standard.

Arguably the most influential, and certainly the most prolific, radical feminist theorist is Catharine MacKinnon whose 'dominance theory' is based on the premise that considerations of the extent to which men and women are the same or different are at best unhelpful, at worst conceptually erroneous. Such consideration takes attention away from the real issue – men's power over women. From this perspective, 'Difference is the velvet glove on the iron fist of

¹⁴⁴ Barnett *op cit* at p. 163.

¹⁴⁵ Olsen, 'Feminism and Critical Legal Theory', 8 International Journal of the Sociology of Law (1990) 199.

domination.¹⁴⁶ MacKinnon contributes convincingly to the sex/gender debate by noting that, while sex discrimination law focuses on the sameness of the sexes, gender has been socially constructed on the basis of their differences.¹⁴⁷ In fact both approaches are misleading in the quest for equality as both rely on the male standard, so that 'man has become the measure of all things.'¹⁴⁸

In MacKinnon's view, the equality question requires a reconceptualisation that places power and dominance at its heart. In order to achieve this, MacKinnon breaks down the barriers between the public and private by exploring a wide range of issues such as rape and other forms of violence against women, prostitution, pornography and sexual harassment through the eyes of the subordinated woman. From MacKinnon's perspective all of these issues share a common theme in that they represent manifestations of the abuse of men's power over women. MacKinnon challenges the liberal conception of the neutral State and calls for greater legal regulation of the 'private sphere' in order that society can begin to redress the imbalance of power. In short, for MacKinnon 'the task of feminist analysis is to unmask, unravel, women's subordination and lack of power.'¹⁴⁹ Much of MacKinnon's analysis focuses on the objectification of women, which takes place through the construction of the female as a sexual object for men's use. Society's gender divisions ensure that women remain subordinated in all aspects of private and public life so that 'we are not allowed to be women on our own terms.'¹⁵⁰ In sex discrimination law, the sameness approach requires women to 'measure our similarity with men to see if we are or can be men's equals'¹⁵¹ and the difference debate 'views women as men view women: in need of special protection, help, or

¹⁴⁶ MacKinnon, *Towards a Feminist Theory of the State*, *op cit* at p. 8.

¹⁴⁷ C. MacKinnon, *Difference and Dominance: On Sex Discrimination Law in Feminism Unmodified: Discourses on Life and Law*, 1987, (Harvard UP, 1987).

¹⁴⁸ *Id.*

¹⁴⁹ Barnett *op cit* at p. 169.

¹⁵⁰ MacKinnon, *Feminism Unmodified* at p. 71.

¹⁵¹ *Id.*

indulgence.’¹⁵² Only by analysing gender relations as a matter of political and social power can feminism break out of this paradigm.

Critiques of MacKinnon’s work identify an apparent paradox in that the branch of feminism which declares itself radical relies heavily on the essential or ‘natural’ physical differences between the sexes in order to justify the need for change. The concern is that such essentialism may ‘undercut the main basis for feminist advancement.’¹⁵³ Furthermore, the reduction of women to little other than sexual objects and the supposed homogeneity of women which is inherent in the construction of a ‘woman’s position’ may actually lead back to the objectification of women that radical feminism purports to challenge. This, in turn, excludes consideration of relevant social differences such as ethnicity and class. Cornell has identified an overemphasis of women’s sexuality in MacKinnon’s work that restricts the development of her thesis, as she is ‘unable to affirm feminine sexual difference as other than victimisation.’¹⁵⁴ The personification of woman as victim is reflected in the limited range of substantive issues on which radical feminist lawyers have focused their attention, chiefly those directly associated with sex, sexuality and reproduction. As Lacey notes, ‘they show less interest in economic and political inequities which, one might argue, the law plays a central role in constituting and sustaining.’¹⁵⁵

Despite such shortcomings, the influence of the radical perspective on feminist legal theory cannot be denied. Perhaps the greatest contribution made by theorists such as MacKinnon to developing a better understanding of gender relations has been the construction of woman’s identity in response to the generations of silencing, from the express exclusion of women

¹⁵² *Id.*

¹⁵³ Lacey, *op cit* at p. 24.

¹⁵⁴ D. Cornell ‘Sexual difference, the feminine and equivalency: A critique of MacKinnon’s *Towards a Feminist Theory of the State*’ (1990) 100 Yale LJ 2247.

¹⁵⁵ Lacey, *op cit* at p. 24.

from public life on the grounds of their 'unsuitability', to the omission of women from social and political analyses by some of the most influential contemporary thinkers. MacKinnon's response to such silence is inspired, 'I'm evoking for women a role that we have yet to make, in the name of a voice that, unsilenced, might say something that has never been heard.'¹⁵⁶

Difference Feminism

In contrast to MacKinnon's rejection of comparison as a means of understanding gender relations, those theorists comprising the final classification share an interest in the recognition of women's difference from men. From this perspective such difference, which may arise on physical, psychological or social grounds, should be incorporated into the rules and institutions governing society so that women are explicitly included and are able to benefit from their innate right to equality with men. Despite this common interest, the work of 'difference or cultural feminists' is diverse, largely because of the various academic disciplines within which their theories have evolved. The three most prominent of these theorists are: educational psychologist Carol Gilligan; sociologist Nancy Chodorow and psychoanalyst and philosopher Luce Irigaray. Gilligan's work on the differences in girls' and boys' moral and psychological development has had a profound effect on feminist theory¹⁵⁷ due to its recognition of the different and distinct female voice which can be distinguished from that of the male on the grounds of its 'insights central to an ethic of care'. Chodorow's groundbreaking study of mothering¹⁵⁸ through which she promotes the need for 'equal parenting' has obvious value both in its contribution to the theoretical debate surrounding nature and culture and as a basis for policy reform. Building on the work of De Beauvoir,

¹⁵⁶ *Feminism Unmodified* at p. 77

¹⁵⁷ C. Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Harvard UP, 1982).

¹⁵⁸ N. Chodorow, *The Reproduction of Mothering: Psychoanalysis and the Sociology of Gender*, (California UP, 1978).

Irigaray's 'analysis of woman',¹⁵⁹ which takes place through a definition of 'the rights and duties of each sex insofar as they are *different*',¹⁶⁰ has provided a compelling articulation of woman's social and cultural identity. In seeking to uncover the roots of women and men's differences, the categories of sex and gender are fused rather than denied or rejected. This approach enables recognition of the influences of both physiological and psychological difference as well as the effects of socialisation in the construction of woman's identity, which itself is multi-faceted.

As well as an unashamed interest in women's difference from men, these writers all share 'a certain engagement both with theoretical preoccupations of postmodernism and the sociological category of postmodernity.'¹⁶¹ The movement towards difference feminism entails 'a shift in emphasis towards a questioning of the very idea of gender neutrality, both as ideal and as possible.'¹⁶² The application of 'difference feminism' to legal theory has incorporated consideration of legal reasoning¹⁶³ and method¹⁶⁴ as well as the exploration of specific provisions and corresponding shortcomings in current enforcement. This holistic approach differentiates it from other forms of feminist analysis and frees it from the criticisms of radical feminism's preoccupation with a narrow range of 'women's issues'. Furthermore, by recognising the differences between the sexes without compromising their innate right to equality, difference feminism provides a suitable theoretical framework within which meaningful analyses of gender relations can take place.

¹⁵⁹ L. Irigaray 'Equal or different?' in M. Whitford (ed) *The Irigaray Reader*, (Blackwell, 1991).

¹⁶⁰ De Beauvoir *op cit* at p. 33.

¹⁶¹ Lacey *op cit* at p. 26.

¹⁶² *Id.* See N. Naffine, *Law and the Sexes*, (Allen and Unwin, 1990).

¹⁶³ N. Lacey, *Unspeakable Subjects* (Hart Publishing, 1998).

¹⁶⁴ M.J. Frug, *Postmodern Legal Feminism*, (Routledge, 1992).

Conclusions

In seeking inclusion in political and economic life, women have faced many barriers. The categorisation of men as subjects and women as objects, stemming from the ancient Greek's beliefs in the separation of form and nature, was used to justify the exclusion of women from participation in public life on the grounds of their lack of rationality. This dichotomisation, although no longer expressed, continues to influence the organisation of contemporary societies and the law and policy-making institutions that support them. The separation of the public and private spheres has provided institutional manifestations of the separate worlds of men and women with woman's ability to bear children used to justify her consignment to the latter. In the employment context, the effect of this separation can be seen through the ways in which women participate in labour market activity: by combining paid employment with high levels of family responsibility and by the overcrowding of women into types of work which require the caring and nurturing skills associated with motherhood.

The Enlightenment brought with it many important social and political changes and the reorganisation of social relations that followed in its wake was identified by theorists of the time as comprising a contract between the ruler and his subjects based on consent. However, this analysis failed to take account of the lives of society's female subjects whose subordination was perpetuated. The liberal acceptance of the public/private divide and support for legal abstentionism from the private sphere of the family have contributed to the omission of a female perspective from liberal political theory. This absence of a women's voice is still notable to varying degrees in the work of such influential modern thinkers as Rawls and Dworkin.

This silencing of a woman's voice led to the development of a distinct body of feminist theory which, like womanhood itself, incorporates many views. Some feminist legal theorists attempted to write the experiences of women into existing male-oriented analyses. It is contended that the liberal and Marxist paradigms, which offer valuable insights into the gendered nature of particular socio-economic factors, incorporate the weaknesses of their 'host' theories into analyses of woman's perspective. Radical feminism offers an alternative to existing theory and is specifically designed to take account of women as the subject rather than in the context of their relation to men. Difference feminism enables an articulation of women's cultural identity for its own sake, away from the traditional paradigm of the male standard. Difference feminism has been described as the 'dominant approach within feminist legal theory'¹⁶⁵ and is the theoretical perspective within which the proceeding analysis presented in this thesis will take place.

What is posited here is the need, through legal intervention, to recognise and value women's autonomy within contemporary labour markets, specifically through the standardisation of women's work. The influence of all of the other theoretical strands outlined can be identified throughout the following analysis. The European Community's very existence was founded on the liberal notion of the free market with minimal State intervention and this is evident in the legislative approach adopted which is based on the equal treatment model. As discussed above,¹⁶⁶ the dichotomisation of public and private life continues to shape the policy agenda at both national and supranational levels and this, in turn, has a marked impact on the labour market experiences of women. The dualist approach which characterises legal intervention in the spheres of family and paid employment, coupled with the assimilationist objective of the equal opportunities approach to labour market regulation, combine to necessitate the

¹⁶⁵ Lacey *op cit.*

¹⁶⁶ At p. 15.

identification of an ideal against which all behaviour can be measured. This ideal is personified by the standard worker model characterised by engagement with full-time, permanent employment. In this model there is no evident impact on labour market behaviour arising from personal circumstances, be they the result of the physical experience of pregnancy and childbirth or through the longer-term, but non-sex specific, commitment to raising children and keeping house. The personal experiences of women, which arise due to the sex and gender-based characteristics of womanhood, make it less likely that individual women will be able to conform to the standard worker model, making this implicitly a male model.

The value ascribed to the standard worker model is based on the perception that this is the most efficient means of organising labour and is, therefore, conducive to the smooth running of the market. However, the ability of workers to conform to this arrangement within the public sphere of paid employment depends largely on the provision of unpaid labour within the private domain of the family. Given the nature of contemporary social arrangements and corresponding patterns of labour market behaviour, it is contended that this model is no longer reflective of the experiences of men or women and, therefore, its relevance is questionable. The perpetuation of the standard worker model as a basic tenet of legal intervention and policy formulation arises through a combination of historical factors and continued dependence on certain ideological beliefs in which patriarchy undoubtedly plays a role. Under the current legislative provisions at both national and supranational levels, the promise of sex equality depends largely on the ability of women workers to conform to the normative model of the standard (male) worker. Thus, women's right to equality is subordinated to the male standard, so that man is the subject, women the object or 'other'.

It is asserted that the role of the judiciary within Community law provides a potential way out of this predicament through the teleological approach which has characterised the legal reasoning of the Court of Justice and which enables the use of the broad aspirations contained in the Treaty as a basis for such reasoning. This thesis seeks to determine whether, and to what extent, the Court's philosophical position in cases concerning sex discrimination has encompassed consideration of women's life experiences in order to give effect to the principle of equality, for example, through the improvement of living and working conditions as outlined by the Treaty provisions themselves.¹⁶⁷ Before any discussion of the potential role of the ECJ in overcoming obstacles to the attainment of equality can take place, it is necessary to identify and analyse the specific differences which exist in the labour market behaviour of women and men and this undertaking will provide the basis for the next Chapter.

¹⁶⁷ As articulated by Articles 136 and 137/EC.

Chapter 3

Women's Work

*'Man for the field and woman for the hearth'*¹⁶⁸

Introduction

A transformation has taken place in women's employment in post-war Europe. Women's labour market participation rates have increased in every EU Member State during this period, so that 55% of women are now economically active¹⁶⁹ compared with an average of below 40% in 1960.¹⁷⁰ As closer scrutiny of such statistics reveals, the aggregate figures mask a range of diverse arrangements in relation to the types of paid work in which women are engaged. This diversity relates to hours of work and other terms and conditions of employment. 32% of women across Europe work part-time compared with 7%¹⁷¹ of men and, if job security is taken into account, more women than men are employed on fixed-term contracts.¹⁷² Although women's aggregate participation rate has risen, it still lags 17.2 percentage points behind that of men,¹⁷³ with the mothers of small children having a lower

¹⁶⁸ From 'The Princess' by Alfred Tennyson (1847). The fuller quote, from which this excerpt is taken, is: '...but this is fixt

As are the roots of earth and base of all;
Man for the field and woman for the hearth:
Man for the sword and for the needle she:
Man with the head and women with the heart:
Man to command and women to obey;
All else confusion.'

¹⁶⁹ European Commission (2004) *Report on Equality Between Men and Women*, COM (2004) 115 Final, at p. 4.

¹⁷⁰ The statistics for 1960 are based on the labour market participation rates of women aged 25 to 49.

¹⁷¹ European Foundation for the Improvement of Living and Working Conditions (2002) *Quality of Women's Work and Employment Tools for Change*, at p. 8.

¹⁷² D. Storrie, European Foundation for the Improvement of Living and Working Conditions, *Temporary Agency Work in the European Union*, Luxembourg, Office for Official Publications of the European Communities, 2002.

¹⁷³ European Commission *op cit* at p. 4.

aggregate participation rate than childless women.¹⁷⁴ The persistence of gendered pay gaps in all Member States means that, on average, women earn 16% less per hour than men.¹⁷⁵ Part of the explanation for such variations in pay lies with the highly segregated nature of labour markets which are gendered, so that women work in different employment sectors and jobs from men (horizontal segregation) and at different levels within occupational hierarchies (vertical segregation). Although women have made some inroads into previously male dominated areas of work, the most constant and enduring feature of women's employment in the post-war era can be said to be its comparatively low status. Although it is outside of the scope of this thesis to provide an in-depth analysis of the different employment experiences of women and men, consideration of the appropriate legal responses obviously demands some understanding of the causes of those differences.

As Dickens has noted, the nature of employment is changing with one of the reasons for change attributable to a growth in 'atypical' or 'flexible' employment.¹⁷⁶ The other dominant feature identified by Dickens is the rise of 'networked, boundaryless, (sometimes virtual) organisations in which highly skilled autonomous professional individuals, with occupational or portfolio careers rather than organizational careers, link together with others to work on a non-hierarchical project basis.'¹⁷⁷ This form of highly valued and well rewarded work is generally performed by self-employed individuals through contracts for services and has had an impact on men's work, while increases in atypical employment are more commonly reflected in women's aggregate work patterns. Both of these changes to the working environment have been reflected in recent developments in policy-making at the European-

¹⁷⁴ Some 12.7 percentage rates lower – *ibid* at p. 4.

¹⁷⁵ European Commission *op cit* at p.5. The gendered pay gap has hardly changed in recent years and it is significantly higher in the private sector compared to the public sector.

¹⁷⁶ L. Dickens 'Problems of Fit: Changing Employment and Labour Regulation' British Journal of Industrial Relations 42, 4 2004, pp. 595-616.

¹⁷⁷ *Ibid* at p. 595.

level and are incorporated in the goal of the Lisbon Agenda¹⁷⁸ 'to become the most competitive and dynamic knowledge-based economy in the world capable of sustainable economic growth with more and better jobs and greater social cohesion.'¹⁷⁹

This shift in the objectives of Europe's social policy, which has effected a reorientation of focus away from the programme of harmonisation of social standards towards facilitation of the co-existence of national policies, is likely to have a marked influence on the shape of future regulation at the supranational level. The rationale for such redesign is based on the notion that greater labour market flexibility requires a move away from State intervention. This, according to the industrial relations literature, is a flawed assumption based on an oversimplification of the relationship between regulation and labour market behaviour.¹⁸⁰ If sustained, this notion has obvious implications for any future improvements in the quality of women's employment which is closely intertwined with the growth in atypical work. Furthermore, as Wajeman has argued, gender relations have been omitted from much contemporary industrial relations theory with the result that the changing nature of employment relations has not been the subject of feminist analysis.¹⁸¹ This Chapter will comprise an overview of women's contemporary employment patterns which will identify the salient features of women's labour market position relative to men's. The attempts of economic theorists to rationalise the reasons for such differences will be assessed. This analysis will be contextualised by reference to the relevant literature relating to the study of industrial relations at the supranational level which reveals that the relationship between

¹⁷⁸ Adopted by the Member States' representatives at the meeting of the European Council in 2000.

¹⁷⁹ European Commission 'From the Lisbon Summit to a New Social Policy Agenda', available at: www.europa.eu.int/comm/employment_social/news/2000. The Lisbon Agenda and its articulation through the European Employment Strategy are discussed in Chapter 4 infra.

¹⁸⁰ See G. Standing (1999) 'Globalisation, Labour Flexibility and Insecurity: The Era of Market Regulation', *European Journal of Industrial Relations* 3, 1, 7-37; R. Hyman, 'The Europeanisation – or the Erosion - of Industrial Relations?' (2002) 32 *Industrial Relations Journal* 4, 280-294;

¹⁸¹ J. Wajeman 'Feminism Facing Industrial Relations in Britain', 38 *British Journal of Industrial Relations* 2, 2000, 183-201.

gender and changes in labour market structure is somewhat more complex than generally perceived.

The Rise of Women's Paid Employment

The distinction between paid work outside the home and unpaid work within it originates from the time of the Industrial Revolution. Prior to the concentration of labour in factories, the division between different forms of work had been largely obscured by the prevalence of subsistence agriculture and the various forms of craft work emanating from cottage industries. In the UK, for example, the participation rates of married women engaged in paid labour outside of the home declined from 25% in 1851 to 8.7% in 1921.¹⁸² Following the Industrial Revolution, the need to work outside the home became paramount. Women's primary responsibility for childcare impacted on their working opportunities with a constraining effect in both the ideological and practical senses, so that they were prevented from obtaining paid work by what was believed to be appropriate for them to do and also by what they could actually do. Both of these factors continue to have an influence over the labour market experiences of women.

Although women's employment rates have risen in all 15 of the European Union Member States under review since the mid-1960s, there has been considerable variation in the increases that have taken place in specific countries. Much of this divergence arises from the different relationships between motherhood and paid employment that coexist within the European Union. At the time that women's participation rates started to rise, there were three

¹⁸² S. Atkins and B. Hoggett, *Women and the Law* (Robertson 1984) pp.18-19.

main categorisations applied to European countries:¹⁸³ the Scandinavian model; the Southern European model; and the 'camel's back' model. The Scandinavian model was characterised by the continuous employment patterns of women which were almost the same as those of men. This model has continued to strengthen since the 1980s. The Southern European model reflected those countries with very low participation rates which peaked at around the age of 25 and fell to below 20% for women aged between 25 and 49. During the 1960s this model reflected the participation rates of women in Italy, Portugal, Spain and Greece as well as Austria, Belgium and the Netherlands, although the patterns of female employment in these countries have evolved very differently over the past 40 years. The 'camel's back' model was used to describe the participation rates of women in those countries in which the majority of women left paid employment upon the birth of their first child, returning (often on a part-time basis) once the children were older. In the 1960s the employment rates of women in Germany, Denmark, France and the UK were characterised by adherence to this model, although these countries no longer show similar patterns of behaviour. Despite the fact that the aggregate employment profiles of women in the Member States have developed differently from these models since the 1960s, the employment rates of women in the 25 to 49 age group have continued to increase in all countries.¹⁸⁴ This has been attributed to two inter-related factors: first, women's labour market behaviour has moved closer to that of men and, second, the impact of motherhood on women's employment rates has decreased so that women's economic activity rates in all EU countries have become closer over time.

¹⁸³ N. Le Feuvre and M. Andriocci, *Employment Opportunities for Women in Europe, A report of the EU-funded project 'Employment and Women's Studies: The Impact of Women's Studies Training on Women's Employment in Europe.'* (European Commission, 2003) at p. 16.

¹⁸⁴ *Ibid* at p. 17. Although the trend in women's participation rates is an upward one, the rate of growth should be interpreted with a note of caution as longitudinal analyses of women's engagement in paid employment over a longer time period reveal that the notion that the rise in women's economic participation rates is a twentieth century phenomenon is a myth. In fact, since the mid-nineteenth century, female employment rates have remained remarkably stable. It is the nature of work and the working arrangements that have changed, notably in the UK with the growth of paid part-time work since the 1970s. See C. Hakim, *The Myth of Rising Female Employment*, Work, Employment and Society, 7, 1993 97.

Women's right to participate in employment has not been won easily, with access to certain occupations and to any paid work at specific stages in the lifecycle denied on ideological grounds. Attempts to introduce some forms of market control over the exploitation of workers in the wake of the Industrial Revolution resulted in the introduction of protective legislation¹⁸⁵ which did not always operate to the advantage of women. Maximum working hours and prescriptive safety regulations which applied only to women and children, although largely welcomed, were used as a means of suppressing women's engagement in certain types of work¹⁸⁶ while male workers escaped such restriction. The arduous nature of manual work and poor working conditions that prevailed during the early nineteenth century, coupled with high fertility rates and low infant mortality, undoubtedly made some occupations particularly unsuitable for women of childbearing age. However, it is notable that women's characterisation as the 'weaker sex' was used as a means of reinforcing their unsuitability for participation in the public sphere of work.¹⁸⁷ In the international arena, the exclusion of women from night work was the subject of an early ILO Convention¹⁸⁸ which was followed by a later Convention prohibiting underground work by women in mines.¹⁸⁹ Both of these Conventions are still widely ratified. In the UK, women's exemption from certain professions was enshrined in national law until the start of the twentieth century¹⁹⁰ when exceptions permitted under the reforming legislation allowed for women's exclusion by regulation from any branch or post within the civil or foreign services. This enabled the continued operation of the 'marriage bar' by which women were required to leave certain public sector posts on

¹⁸⁵ For example, the Factories Acts 1819-1844.

¹⁸⁶ S. Fredman, *Women and the Law*, *op cit* at p. 68 *et seq.*

¹⁸⁷ See further A John (ed.) *Unequal Opportunities, Women's Employment in England 1800-1918* (Blackwell, 1986).

¹⁸⁸ Convention No 4 (1919) revised 1934, 1948 and 1990.

¹⁸⁹ Convention No 45.

¹⁹⁰ The Sex Disqualifications (Removal) Act 1919 made it unlawful to disqualify anyone on the grounds of sex or marriage from exercising a public function, holding civil or judicial office or entering a civil profession or vocation.

marriage.¹⁹¹ From a contemporary perspective it is not the introduction of such measures that is most surprising, but the adherence to their ideological foundations in the making and shaping of policy which still persists today despite advances in women's health and socio-economic status and the existence of anti-discrimination legislation.

The obvious tension between domestic responsibility and labour market participation has undoubtedly been the most important factor in the rise of part-time employment among women during the twentieth century. That such work has, until relatively recently, been detrimentally differentiated from full-time employment by Member States' legal systems reflects the State's reluctance to intervene in the operation of the labour market and the willingness of governments to trade off women's employment rights in favour of increased flexibility for employers. As the continuing rise in women's share of the paid labour market relative to men's demonstrates, the central issue in improvements to 'women's work' isn't one of increasing its quantity, but rather improving its quality. This factor will be addressed in the remainder of this chapter with reference to two fundamental questions; what features of 'women's work' are responsible for its low status and what are the potentially effective legal responses?

The Nature of "Women's Work"

A high level of gendered segregation still persists in the labour markets of all Member States¹⁹² despite women having increased their share of employment, making important

¹⁹¹ Which led to a spate of cases brought by teachers who had been forced out of their jobs due to the marriage bars operated by various local education authorities during the 1920s, illustrating the depth and breadth of the use of the exception. See, for example, *Price v Rhondda UDC* [1923] 1 Ch 372.

¹⁹² P. Paoli and D. Merli  European Foundation for the Improvement of Living and Working Conditions, *Third European survey on working conditions*, Luxembourg, Office for Official Publications of the European Communities, 2001; C. Fagan and B. Burchell., European Foundation for the Improvement of Living and

inroads into some previously male-dominated sectors and jobs over the past 40 years.¹⁹³ The highly segregated nature of labour markets along gendered lines, has led to the identification of certain types of paid employment as 'women's work'. Such work is crowded into a narrow range of occupations and, as well as its predominance within certain sectors, has other common characteristics. Although there are some national variations with regard to the degree to which the following identifiable features are present, they have come to represent areas of commonality in the types of paid work undertaken by a large number of women across all EU Member States.

Horizontal segregation occurs where the members of one sex are concentrated in certain sectors, occupations and job types. In the European context, research indicates that there is a high concentration of women in the public sector which accounts for 32% of all women employees, compared with 19% of all male employees.¹⁹⁴ Women who work in the private sector tend to be employed in small and medium sized companies rather than large ones.¹⁹⁵ Women's employment is concentrated in the provision of services within private households, health, education and other care-related activities as well as in sales, hotels and catering, while men predominate in construction, manufacturing, transport, agriculture and financial services.¹⁹⁶ Most people work in sectors in which their own sex either forms the majority or the entirety. In the occupational context, women's jobs tend to involve caring, nurturing and service-related activities with men predominating in jobs involving managerial responsibility and manual and technical work often categorised as 'heavy' or 'complex'. Thus, men fill 80% of the employed armed forces, craft and related trades and jobs associated with plant and

Working Conditions, *Gender, Jobs and Working Conditions in the European Union*, Luxembourg, Office for Official Publications of the European Communities, 2002.

¹⁹³ Eurostat, (2000) *The Life of Women and Men in Europe: A Statistical Portrait*, Luxembourg, Office for Official Publications of the European Communities.

¹⁹⁴ *Third European Working Conditions Survey 2000*.

¹⁹⁵ Fagan and Burchell *ibid.*

¹⁹⁶ *Third European Working Conditions Survey 2000*.

machine operation. Men also hold more than two-thirds of the skilled agricultural and fishery jobs with women predominating in two-thirds of clerical, service and sales jobs.¹⁹⁷ In professional and manual occupations, there is a more even split between men and women at the aggregate level with segregation discernable at the sub-category level: men holding the vast majority of jobs within the physical, mathematical and engineering professions and women predominating in the health and education professions.¹⁹⁸

Vertical segregation occurs where, in any given sector or industry, one or other sex predominates in senior, managerial or well-paid positions and the other is correspondingly over-represented in lower paid jobs and within certain types of employment contract. Although women in Europe have increased their representation within managerial jobs in recent years, there are still clear differences in the gender composition of those filling such jobs.¹⁹⁹ 63% of European workers have a man as their immediate superior, with only 21% working under the authority of a woman.²⁰⁰ Women who are managers or supervisors are more likely to be in charge of other women as less than 10% of male workers have a female manager or supervisor. Men occupy more than 60% of the legislative and managerial occupations, rising to over 70% if the sub-categories of corporate managers and senior government officials are considered.

An assessment of employment status also reveals gendered differences. Women are under-represented in self-employment and account for only 1 in 3 of the 17% of self employed workers in the European labour market. As far as employment arrangements are concerned,

¹⁹⁷ OECD, *Employment Outlook*, 2002.

¹⁹⁸ European Foundation for the Improvement of Living and Working Conditions, *Quality of Women's Work and Employment: Tools for Change*, Luxembourg, Office for Official Publications of the European Communities, 2002 at p. 12.

¹⁹⁹ *Ibid* at p. 13.

²⁰⁰ The remainder do not have a manager.

women are less likely than men to work under permanent contracts with only 44% of all women employed on full-time permanent contracts, compared to 64% of all men. Women are over-represented in respect of fixed-term contracts and men in respect of temporary agency work contracts.²⁰¹ As already noted, women predominate in part-time work and there are persistent gendered pay gaps²⁰² in all European Member States²⁰³ which produce an aggregate average of 16%.

Explaining the Low Status of ‘Women’s Work’

In attempting to rationalise the distinctive employment experiences of men and women, theorists have developed a range of different explanations. These theories can be categorised within three broad groupings: the neo-classical economics perspective; human capital theory (both of which owe much to the work of labour economists of the post-war period); and, segmented labour market theory, often referred to as dual market theory, which provides a socio-economic perspective. All of these theories add something to our understanding of the ways in which gender relations have been played out in the post-war labour markets of Western Europe and each will be considered in turn.

²⁰¹ D. Storrie, European Foundation for the Improvement of Living and Working Conditions, *Temporary Agency Work in the European Union*, Luxembourg, Office for Official Publications of the European Communities, 2002. Although the nature of temporary agency work varies considerably with men predominating at the well-paid end of the spectrum and women at the precarious, low-paid end - see Busby, N, and Christie, D, *The Regulation of Temporary Agency Work in the European Union*, *The Cambrian Law Review* (2005) 36, pp. 15-28.

²⁰² Defined as the differential in average gross hourly earnings between men and women in percentage.

²⁰³ European Commission, *Employment in Europe 2002*, Luxembourg, Office for Official Publications of the European Communities, 2002.

Neo-classical Economics

Those who believe in the primacy and efficacy of the free market as the central means of distributing resources²⁰⁴ argue that the jobs performed by women and the pay they receive are the result of rational decision-making based on free choice by the individuals concerned. Following this ideology, the price of labour is determined in the same way as the price of all commodities, namely by the forces of supply and demand. Wage levels settle at a rate which represents the lowest the employer can pay while still being able to attract suitable applicants. Following this line of reasoning, discrimination appears to be irrational and unnecessary as women's apparent willingness to work for less pay than men should lead to an increase in their employment across all relevant sectors and occupations which should, in turn, break down gendered segregation and contribute to an evening out of the pay differential.²⁰⁵ However, as the available statistics reveal, this hypothesis not been shown to be accurate within the labour markets of the Western European Member States, all of which continue to experience gendered segregation and pay gaps. Disciples of free market ideology have attempted to explain such anomalies away by attributing the differences in men and women's experiences to women's career choices which are made on the basis of their 'natural' capacity as carers. Following this rationale, occupations such as nursing are poorly paid because large numbers of women choose to pursue careers in such sectors on the basis of factors other than pay, such as the feel good factor attained through the altruistic pleasure of 'caring' and the resulting satisfaction in community well-being.²⁰⁶ This analysis asserts that women's relatively low labour market status in comparison to men's is due to supply-side

²⁰⁴ For the most well-known example of neo-classical economic theory applied in the context of sex discrimination, see S.W. Polachek and W.S. Siebert, *The Economics of Earnings* (CUP, 1993). The authors are also proponents of human capital theory (discussed supra) as the next 'logical' step in explaining the persistence of wage anomalies within a 'free market' order.

²⁰⁵ *Ibid* at p. 141.

²⁰⁶ *Id* at p. 206.

characteristics rather than resulting from discrimination in the labour market. As well as the ideological problems inherent in this analysis, the fact that it is premised on the existence of a free labour market has also been the subject of criticism from other theorists. Hyman points out that, 'only in limited respects do 'labour markets' actually constitute markets'²⁰⁷ as they lack the key determinants such as a saleable commodity.²⁰⁸ Furthermore, their sensitivity to influences other than market factors distinguishes labour markets from their more traditional counterparts. Such factors are manifested through the national industrial relations systems which, in the EU context, 'represent varieties of institutional structures which ensure that the employer-employee relationship is not primarily determined by market forces.'²⁰⁹

The neo-classical view that the labour market constitutes a marketplace in the economic sense is, thus, flawed due to the influence of external pressures which serve to dilute the purity of the market so that distribution of relevant resources, through the allocation of jobs and pay rates, are not controlled by market forces. This point can be illustrated with reference to three central principles: 'the rate for the job; no money wage cuts and the right to retain jobs in relation to other potential recruits.'²¹⁰ In the valuing of labour, unlike in product markets, the worth of a particular job is not fixed by the market but is vulnerable to sectoral, regional and organisational variation with many employers operating internal markets where increases in pay are based on such non-market factors as length of service. Public sector collective bargaining can be said to result in the closest thing to a 'going rate', but even in the public sector, wage rates are subject to wide diversity, a trend which looks set to continue further as many public sector employers seek a move towards localised bargaining processes. The

²⁰⁷ Hyman *op cit* at p. 281.

²⁰⁸ As Marx insisted, 'labour' is not a commodity, rather the worker sells her (or his) ability to work, making it impossible to measure any quantifiable property with precision as would be the case with a commodity traded in a product marketplace.

²⁰⁹ Hyman *op cit* at p. 281.

²¹⁰ C. Craig, E. Garnsey and J. Rubery, *Payment Structures in Smaller Firms: Women's Employment in Segmented Labour Markets*, 1984, London, Department of Employment at p. 5.

preservation of terms and conditions under a 'live' employment contract make wage cuts in monetary terms difficult to achieve, even where drops in productivity occur, and this factor also contributes to the protection of employment. As consideration of these principles demonstrates, social factors are more likely to provide explanations for divergence in pay levels than the economic laws of supply and demand.

This is not to say that the neo-classical perspective can be completely dismissed in analyses of the gendered nature of labour markets. On the contrary, its acceptance into mainstream ideology has informed much of the policy development in this area in recent years. Attempts to transplant market-based principles into the operation of labour markets include the increasing use of short-term contracts, particularly through tripartite arrangements which do not attract the same levels of protection under European law as direct employment, and of contracting-out arrangements, by which workers can be legally dismissed and re-engaged through a third party on a lower rate of pay.²¹¹ It is, in fact, particularly important to keep the neo-classical perspective firmly in view as some observers have identified a return to the dominance of market factors in the management of industrial relations in Europe.²¹² In neo-classical theory the market is assumed to be an impersonal mechanism that operates for the greater good, separate from the prejudices which might influence the thought-processes of its participants. In reality, the market is no more or less than the sum of its parts which are constituted by the behaviour of those participants as much as by any other influencing factor. Such behaviour may very well include 'a propensity to discriminate'.²¹³ Furthermore, the very foundations on which the market is built are vulnerable to the effects of institutional discrimination. As Wacjman has noted, the organising forces of industrial relations' systems

²¹¹ See the discussion of Case C-256/01 *Allonby v. Accrington and Rossendale College and Others* [2004] ECR I-873 in Chapter 7 *supra*.

²¹² See, for example, Hyman *ibid*.

²¹³ R. Townsend-Smith, *Discrimination Law: Text, Cases and Materials* (Cavendish 1998) at p. 37.

themselves, such as 'management, trade unions and the State – which appear in the literature as gender neutral are indeed profoundly gendered.'²¹⁴ Perhaps this explains why neo-classical analyses have failed to address the persistence of gendered segregation across Member States in what has otherwise become a fast-moving and dynamic social environment. This failure has caused proponents of labour market rationalisation to develop an alternative approach which, although similar to the neo-classical perspective in its foundations, develops further the justification of differences in women's labour market position relative to that of men.

Human Capital Theory

Human capital theory uses the rationality of free choice as a basis for explaining the relatively low pay and diminution in other terms and conditions of employment which characterise 'women's work'. Following this view, the reasons for such divergence between the pay rates of women and men arise out of a conscious choice made by some women not to invest in their human capital. This is due to the likelihood that such investment will be wasted when, during the years of child-bearing and rearing, they will cease to participate in the public domain of paid employment and return to the private sphere of the home. 'Human capital' is measured by the investment made by an individual in his or her career in terms of such factors as education and training. Investment is translated into monetary worth on the labour market so that an individual who is highly skilled is worth more than an unskilled worker with little formal education and low levels of training. As Polachek and Siebert postulate, women's lower human capital is due to a 'rational (family wealth maximising) division of labour in the home due to women's comparative advantage in child-bearing and rearing.'²¹⁵ This position is

²¹⁴ Wajeman *op cit* at p. 184.

²¹⁵ Polachek and Siebert *op cit* at n. 37. Although, as women are the only sex capable of child-bearing, their capacity in this respect is exclusive rather than comparatively advantageous.

underpinned by an assumption that women are less productive than men in economic terms because of their child-bearing capacity.

The closure of the pay gap between men and women in respect of full-time employment, which has arisen partially on the basis of women obtaining more and better qualifications,²¹⁶ may provide some evidence to support this theory. However, this analysis presents more problems than solutions which are both practical and conceptual in nature. First, the persistently high value afforded to some forms of qualification over others cannot be easily explained by application of human capital theory. The fact that scientific and technical tasks and appropriate qualifications are valued more highly than the socially important tasks undertaken by qualified primary school teachers indicates that their relative worth owes more to the sex of those who predominate within associated jobs than any other factor. Such differentiation also raises questions about whether the relevant (right) factors are rewarded when pay rates are set on the basis of qualifications and skill. Second, evidence suggests that other grounds for extended absence from work do not have the same consequences for an individual's career prospects or the same impact on loss of earnings as breaks related to child-bearing or rearing. The difficulties experienced in obtaining employment by women returning to work after extended absence on such grounds point to the conclusion that the 'choice' exercised in relation to the length and consequences of such absences may be that of employers rather than of workers. When such factors are considered together, it is apparent that the human capital perspective fails to adequately address the persistence of gendered pay gaps.

²¹⁶ In 2003 58% of new graduates in Europe were women – Equal Opportunities Commission, *Women: Europe's Competitive Edge*, 2005, at p. 1.

On a conceptual level, human capital theory appears flawed due to the assumption that all decisions regarding whether to participate in paid employment are made freely and rationally. In reality, the full information on which to base such decisions is rarely available and, even when it is, circumstances may have more to do with decisions regarding the conciliation of family formation and employment than free choice. Furthermore, the perpetually low status afforded to 'women's work' may produce a self-fulfilling quality by which women who realise their prospects are poor will not take a chance on making the necessary investment to improve them. The most fundamental problem with this particular theory as an explanation of women's comparatively poor labour market position, however, is that its application apportions all the blame for that position with the women who find themselves in low paid, low status work, thus exonerating employers and the State from any responsibility for discriminatory practices. In addition, the responsibility for childcare is placed on women who must take the consequences for reproduction in terms of poor employment prospects so that the role of fathers in raising their children, or indeed the role of the State in providing support, are beyond question. This perpetuates the stereotype pertaining to mothers of young children who are perceived as unreliable and uncommitted to paid employment which in turn serves as justification for employers' decisions not to employ or to employ on non-permanent arrangements with less risk attached. Given the lack of alternative available choices, women conform by their acceptance of such terms.

In both the neo-classical and human capital perspectives, the focus on market rationalisation mitigates against the use of legal intervention as a means of improving the quality of women's work on the basis that the market will deal effectively with discrimination where it occurs. This model has been very influential in relation to government policy-making in recent

years.²¹⁷ The empirical basis on which economic theory is often predicated has the effect of making its application appear plausible and, therefore, persuasive. However, economics is a subjective discipline which is not scientifically objective. As Fredman has observed, 'economics, like law, is deeply ideological'.²¹⁸ Market discourse depends on exactly the same conceptual tools as liberal theory with a focus on individualism, autonomy and the neutral State. As discussed in chapter two, such notions and their role in improvements to gender relations may be, at best, illusory and at worst, damaging due to the justification that they provide for different outcomes in the experiences of men and women. Once 'explained' on the basis of the exercise of individual freedom, such differences cease to be subjected to the scrutiny necessary to effect change.

The third and final economic perspective uses some of the features of market rationalisation but applies them from a feminist viewpoint which seeks to avoid 'blaming the victim' and thus results in a more sympathetic, enlightened and enlightening approach.

Segmented Labour Market Theory

In seeking to explain why women are employed in certain jobs which, on average, attract lower rates of pay than jobs filled predominantly by men, Beechey²¹⁹ distinguished between two types of job: primary and secondary. Each type predominates within a particular section of the labour market to such an extent that there are, in effect, two separate markets operating simultaneously. Primary sector jobs have 'relatively high earnings, good fringe benefits, good

²¹⁷ Although in recent years, a modified version of the non-interventionist model has been particularly influential across Western Europe - the 'Third Way' ideology underpins much of the European Social Model and, in the UK context, New Labour's 'New Deal' policy initiatives of the last decade. For a feminist critique of this movement and its effects on women's employment, see Fredman 'The Ideology of New Labour Law' in C. Barnard, S. Deakin and G. Morris (eds) *Essays in Honour of Bob Hepple* (Hart, 2004)

²¹⁸ Fredman, *Women and the Law* at p. 405.

²¹⁹ V. Beechey *Unequal Work* 1987 (Verso 1987).

working conditions, a high degree of job security and good opportunities for advancement while secondary jobs have relatively low earnings levels, poor working conditions, negligible opportunities for advancement and a low degree of job security.²²⁰ Primary jobs are part of a highly structured internal market within which jobs are organised hierarchically, dependent on skills level and corresponding rewards. Recruitment to all but the lowest level jobs is through promotion within the internal market. Secondary jobs are not subject to the same opportunities for advancement and the low skill levels required in performing such jobs means that training is non-existent or minimal. This detracts from the ability of secondary jobs holders, who are predominantly female, to make advancements in their careers.

Although dual labour market theory provides a useful starting point in analyses of men's and women's work, it does not explore gendered occupational segregation adequately as it merely describes what happens on the labour market rather than explaining it. Although providing some insight into vertical segregation, by which occupational hierarchies are linked to reward schemes, dual market theory does not even touch on horizontal segregation by which some occupations are constituted as 'women's work'.²²¹ Furthermore, Craig et al found that many workers in secondary jobs actually have 'considerable levels of skill and experience acquired through informal on-the-job training, and undertake work which makes heavy demands on the workers'.²²² Beechey has argued that the under-valuation of the requisite skills for the jobs predominantly performed by women rests on the basis of those skills, which are often learnt informally in the home and, as such, are not subjected to the same forms of formal measurement applied to other skill sets. Faced with opposition from employers, trade unions have been unable (or unwilling) to establish such skills as being worthy of recognition in pay

²²⁰ *Ibid* at p. 32.

²²¹ Beechey 'Women's Employment in Contemporary Britain' in Beechey and Whitegg (eds) *Women in Britain Today* 1986 (OUP, 1986) at p. 111.

²²² C. Craig, E. Garnsey and J. Rubery, *Payment Structures and Smaller Firms: Women and Employment in Segmented Labour Markets* 1984 (London, Department of Employment) at p. 92.

determination. Such factors have had a profound effect as 'the concept of skill is socially constructed, and an adequate account of the exclusion of women from skilled jobs has to take account of this.'²²³

The separation of markets into distinct entities, thus, appears to be far more complex than the two-autonomy model presented by dual market theory. Craig et al posit the existence of a structured or differentiated labour supply which is 'created through the interaction of the employment system and the system of social organisation.'²²⁴ Through the process of matching jobs with applicants, a market emerges which consists of many diverse segments with differences in the supply of labour dependent on four inter-related factors. First, even if workers enter the labour market with similar characteristics and opportunities, they will acquire different work histories, experience and skills. These factors will limit the mobility of some workers and may even restrict their prospects. Second, the different social characteristics of individuals translate into unequal access to jobs on entry to the labour market. Social characteristics include such factors as educational qualifications and family connections. Third, workers are not generally independent individuals who rely solely on their own wages, but members of social and family groups who pool or share income with others. In recognition of this, employers make assumptions about the relative income needs of specific demographic groups in structuring pay and employment practices. Even if they are not borne out in reality, workers must adjust to those assumptions in order to gain and keep employment. Fourth, the different levels of responsibility that individuals assume in relation to family and domestic commitments restrict some workers' availability in the labour market. Employers are able to take advantage of such workers by paying lower rates that do not necessarily reflect productivity levels. Through the interaction of these four factors, it is

²²³ Beechey *op cit* (women's employment in contemporary Britain) at p. 121; see also A. Phillips and B Taylor, 1980, *Sex and Skill: Notes towards a Feminist Economics*, 6 *Feminist Review* 79.

²²⁴ Craig et al, *op cit* at p. 6.

possible to reach an understanding of women's relative disadvantage in the labour market. The operation of each of the factors allows for the possibility of discrimination which may be direct or indirect and may operate at the organisational level or through more covert, institutional means.

The gendering or sex-typing of jobs arises due to a combination of all of these factors so that employers' assumptions and workers' aspirations converge in a cycle of influence. Cockburn has shown how the whole concept of work is purposefully constructed on gender lines including the use of tools, machinery and new technology.²²⁵ Her fieldwork uncovered the relationships that members of both sexes have with the various physical manifestations of different jobs. Sometimes this relationship is influenced by the association of such objects and their uses with one or other sex, so that 'it is impossible to get a teenage lad to wipe the floor with a mop, although he might be persuaded to sweep it with a broom.'²²⁶ Often, the very design and marketing of objects reflects the expectations of their manufacturers so that they are 'ergonomically sex specific'. Attempts to resist such sex-typing place the dissenter outside of the established workplace norms and the resistance encountered from peers and superiors results in such high social costs that the gendering of jobs is rarely challenged. As Cockburn has observed 'The dichotomies, separations and power inequalities that occur at home and those that occur at work are related and mutually reinforcing.'²²⁷

²²⁵ C. Cockburn, *In the Way of Women: Men's Resistance to Sex Equality in Organisations* (Macmillan, 1991).

²²⁶ *Ibid* at p. 38.

²²⁷ *Id.* at p. 41.

The (Information) Age of Enlightenment?

Identification of the existence and persistence of segmented labour markets on gender grounds offers a valuable insight into the nature of men's and women's work, with the latter undervalued due to its relationship (actual and perceived) with the private sphere of the family in which the labour expended is unmeasured and financially unrewarded. Given the stated aims of governments and policy-makers at both national and supranational levels in relation to the furtherance of sex equality, it is notable that little attempt has been made to mount an effective challenge in relation to this factor. A cursory glance at relevant policy developments in recent years actually indicates the opposite as evidenced by the reliance that is placed on the perpetuation of the normative construct of the standard worker model in the distribution of resources and the continued polarisation of different working arrangements. Consideration will be paid to these inter-related factors to explore how legal intervention might effectively be used as a means of reconciling the private and public spheres of family and work by improving the employment prospects of those women who find themselves unable to comply with the standard worker model.

Dickens has identified a misfit between the changed circumstances of the working relationship and the current regulatory framework which is based on the model of a 'standard' arrangement, specifically that of full-time, permanent employment between an employee and single employer.²²⁸ If gender is added to this conceptualisation, the 'standard' worker is male and there is an implicit assumption that he has responsibility for earning, if not all, the majority of the 'family wage'. Despite its decline and replacement with new forms of social

²²⁸ Dickens *op cit* at p. 597.

arrangement,²²⁹ this model is the basis on which much employment and social security regulation continues to be based.²³⁰ As Wajcman has observed, '[a]lthough the male-breadwinner household is now in the minority, the concept of the family wage lingers on in social policy.'²³¹ In the European context, this point is well illustrated by the very terminology adopted to describe the new forms of work, such as part-time and temporary jobs, which are referred to as being 'atypical.'²³² The fact that such jobs are overwhelmingly filled by women only serves to reiterate the implicit assumption that man is 'the subject' and woman is 'the other'.²³³ This conceptualisation is further entrenched by the use of such phrases in contemporary welfare and employment policy as 'family friendly' and 'work/life balance'. Although such terms appear, on face value, as innocuous – perhaps even comforting – they actually serve to perpetuate the dichotomisation of work and family²³⁴ by endorsing the supposition that, by implication, other employment policy may be unfriendly to families and that work is somehow separate from the 'lives' of the beneficiaries of such measures. For most people, working life is seasoned with a variety of challenges which relate, in different measures at various stages in the life cycle, to both family and career aspirations so that life's experiences cannot be neatly categorised as arising from the public world of work or the private world of family but, rather, arise out of a combination of both. The working mother of pre-school or school-age children personifies this combination of the public and private in a way which appears to have confounded policy-makers. Admittedly, the rise of 'flexible' forms of work among this particular demographic may have occurred as a result of 'worker choice', but is such choice the result of free autonomous decision-making when it arises out of the lack of a suitable alternative?

²²⁹ Due to changes in family formation, such as the rise of single parent households.

²³⁰ Dickens *op cit* at p. 611.

²³¹ Wajcman *op cit* at p. 195.

²³² For a discussion of the use of the term 'atypical' - see Chapter 1 *infra*.

²³³ See S. de Beauvoir, *The Second Sex* (1949), referred to in Chapter 2 *infra*.

²³⁴ The 'public' and 'private' spheres of men and women respectively.

Women 'choose' to work part-time, often through precarious arrangements, because they are expected to combine high levels of unpaid domestic responsibility with paid work. Furthermore, the targeted use of such work as a means of overcoming high unemployment rates illustrates the stubborn refusal of policy-makers to reassess the world of work with a view to uncovering a more reflective model on which to base initiatives. While such a refusal may result in injustices to women, it very effectively preserves existing arrangements whilst appearing to offer an alternative. The continuing rise of women's labour market participation, largely within such 'atypical' employment, provides a useful antidote to critics, which, in turn, gives such initiatives 'the illusion of inclusion'. This self-serving cycle preserves the *status quo* by enabling women to perform their 'dual role' of mother and worker while the assumption of the existence of a male breadwinner within each family unit actually endorses the precariousness of such employment on the grounds that 'women's work' is actually extraneous to the family wage.

The continued undervaluing of women's work, and the subjection of the female workforce through marginalisation of the forms of working arrangement with which women are predominantly associated, provide clear evidence that the forces of patriarchy continue to influence and shape the nature of employment and related policy within the Member States of the European Union. The absence of any real policy focus on childcare issues further illustrates that it is the preservation of the nuclear family with its distribution of roles and responsibilities that holds the attention of policy-makers despite its demographic decline. The existence of segmented labour markets provides the most satisfactory explanation for the continuation and perpetuation of the distinct working patterns and employment experiences of men and women. Furthermore, despite the stated aims of government at both the national and

supranational levels to improve women's employment prospects, it appears that labour markets are becoming more segmented over time²³⁵ with greater divergence in types of work and corresponding arrangements. Through adherence to outdated models, regulatory regimes are failing to keep abreast of such change. The remainder of this chapter will consist of a consideration of the industrial relations literature which, as well as providing a useful articulation of the marriage between standard employment models and regulatory policy, also presents some potential solutions to the current 'problems of fit'.

Industrial Relations in Europe: A Workforce in Transition

Although the growth of women's paid work, characterised as the 'feminization' of the labour force, is noted in industrial relations scholarship, it often appears as an 'add on' rather than as an intrinsic factor in studies of the relevant institutions.²³⁶ This is disappointing as industrial relations, with its innate consideration of labour market trends and the underlying power relations of the employment relationship, provides an ideal framework for the study of gender relations. Indeed, the deep analysis of interaction at all relevant levels which is often undertaken on an empirical basis by scholars in the field potentially provides a far more useful insight into the dynamics of contemporary workplaces and supporting institutions than economic or legal theory can achieve. However, while calls for the neglect of the gendered nature of institutions to be addressed²³⁷ are obviously welcomed, perhaps some of the most useful contributions to the issues under review in this thesis arise from studies which are not

²³⁵ See Dickens *ibid* at n.9; Hyman *ibid*, at n. 13.

²³⁶ See Wajzman *op cit*; A. Forrest 'A view from outside the whale: the treatment of women and unions in industrial relations' in L. Briskin and P. McDermot (eds) *Women Challenging Unions* (University of Toronto Press, 1993) 325-41; L. Dickens, 'What HRM Means for Gender Equality', *Human Resource Management Journal* 8 1998 23.

²³⁷ See Wajzman *op cit*; Dickens (2004) *op cit* at p. 611.

directly concerned with gender relations *per se*, but rather with the changing nature of work in contemporary labour markets.

The changes in working arrangements predicated by the growth of the so-called 'knowledge economy' and the corresponding shift away from heavy industry have commonly been perceived as contributing to the deregulation of labour markets although, as Hyman has observed, this may be misleading. The re-establishment of neo-liberal principles via a return to the *laissez-faire* approach to industrial relations which took place during the 1980s and 1990s necessitated 'the systematic intervention of government in economic affairs and required an unprecedented increase in the societal pervasiveness of state power.'²³⁸ Rather than any relaxation in the State's engagement with the industrial relations process, 'deregulation' 'actually consecrates new rules: intensifying the law of value, with effects which empower some economic actors while disempowering others (the majority).'²³⁹ Furthermore, the intervention of the state in most market economies has been traditionally targeted at restricting the scope for a 'free market' in labour²⁴⁰ on humanitarian grounds or 'from concern at the potential social disruption and disorder which might ensue if competition were to drive standards below a certain threshold.'²⁴¹ In the current context, attempts at equalising pay rates between the sexes provide an obvious example of state intervention in the operation of the 'free market'. However, the use of state enforced mechanisms is not – and has never been – restricted to overt attempts at *improving* working conditions.

The rise in 'flexible' working practices has taken place more by design than by accident, with such arrangements providing a solution to high unemployment rates which is popular with

²³⁸ Hyman *op cit* at p. 283.

²³⁹ *Id.*

²⁴⁰ See K. Polanyi, *The Great Transformation* (Beacon, 1957).

²⁴¹ Hyman *op cit* at p. 283.

employers due to the relatively low levels of long-term commitment required on their part. In regulatory terms, the shift from jobs for life to flexibility has involved 'the advance of contract and the erosion of status in employment',²⁴² with increased emphasis placed on the individual nature of the relationship between employing organisation and worker. As Supiot has observed, 'The terms of the *quid pro quo* that originally underpinned wage-employment status – i.e. subordination for security – have broken down, and the terms of a new *quid pro quo* have yet to be worked out.'²⁴³ While the various forms of regulation utilised in this respect are not explicitly targeted at reducing the quality of jobs, their knock-on effects succeed in doing just that.²⁴⁴

Classifications of industrial relations systems represent an articulation of the various relationships that have arisen over the last century as a result of the 'tension between market pressures towards the commodification of labour (power) and social and institutional norms which ensure its (relative) 'decommodification''.²⁴⁵ The national industrial relations systems in place thus provide a forum for the settlement of the pursuit of free market ideals and the defence of moral principles with national variations representing the various bargains which have been struck between the forces of market efficiency and social justice. The changes that have taken place over the last 20 years in the sectoral make-up of Europe's labour markets and the corresponding shifts in regulatory approaches have made it difficult to apply the traditional industrial relations models as analytical tools. The three models of social regulation which can generally be distinguished in order to provide a conceptual framework

²⁴² Hyman *op cit* at p. 289.

²⁴³ A. Supiot 'The Transformation of Work and the Future of Labour Law in Europe: A Multidisciplinary Perspective', *International Labour Review* 138 (1999) 1, 32 at 36.

²⁴⁴ P. Paoli and D. Merllie, *Third European Survey on Working Conditions 2000*, (2001, Dublin, European Foundation for the Improvement in Living and Working Conditions). The survey's results indicated that employment conditions are worsening for considerable sectors of the workforce, irrespective of contract status.

²⁴⁵ Hyman *op cit* at p. 285, the term 'decommodification' is borrowed from Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Polity Press, 1990).

in this respect are: the Anglo-Irish system which favours a voluntary approach, the Roman-Germanic system which is based on state interventionism; and the Nordic system which relies heavily on self-regulation based on labour market collective agreements.²⁴⁶

Attempting to fit the industrial relations systems of the each of the Member States neatly into one or other of these classifications has always been problematic, with 'fit' more likely to be found on the interface between two or more of the categories. However, any such categorisation, however loosely applied, is becoming increasingly difficult as systems move closer together through a process of Europeanisation. This is largely due to the growth of the multi-national corporation, which has occurred in response to the globalisation of capital markets, and the need to compete effectively. As a result, collective bargaining and other forms of worker solidarity which have emerged from different sets of national circumstances as finely-tuned mechanisms intended to equalise power between the relevant players, have been severely weakened and, in some instances, completely eradicated. Without an effective collective response, individual workers within certain sectors have found themselves increasingly vulnerable to the exercise of managerial discretion. Hyman posits that what is now needed in place of national industrial relations systems is a new form of supranational social regulation.²⁴⁷ The suitability of the European Union as a vehicle for the development of such an innovation is questionable in its current form on the basis of its lack of a 'moral economy'.²⁴⁸ Hyman's reservations are on both ideological and practical grounds. First, the Union's very existence, which is predicated on the grounds of free market ideology, would mitigate against any effective involvement in the negotiation of power between workers and

²⁴⁶ Hyman posits an alternative tripartite classification consisting of three models founded on: legislation and other types of state intervention; agreements (or contracts) negotiated through collective bargaining and; the norms, beliefs and values prevailing in civil society, referred to as 'communitarian regulation', see Hyman *op cit* at p. 284.

²⁴⁷ Hyman *op cit* at p. 291.

²⁴⁸ Hyman *ibid*.

employers. Second, the operation of industrial relations regimes has, at the national level, retained credibility *because* of their localised nature. Furthermore, the very institutions of which the European Union is comprised are not suitable players in the settlement of the social contract on the grounds that,

It comprises a Parliament which is not a legislature, a Commission which is a 'policy entrepreneur',²⁴⁹ and the intermittent bearer of a federalist project which would facilitate a meaningful European industrial relations system (one possible translation of that elusive term, *espace social*), and a Council in normal circumstances firmly committed to restrain such ambitions. The result is a 'regulatory conundrum'²⁵⁰ within a set of processes that 'hovers between politics and diplomacy, between states and markets, and between governments and governance.'²⁵¹ ...the EU is in key respects *not* a supranational state and the European 'social partners' are *not* authoritative national trade unions and employers' organisations at a higher level.²⁵²

The net result of all this is that the domination of market logic in industrial relations, which has emerged as a central feature of its Europeanisation, is likely to mean that outcomes such as status and reward will be shaped by inequalities so that workers 'already disadvantaged (by gender or ethnicity, for example) will suffer further'²⁵³ in relation to access to collective bargaining and in terms of their individual exchanges with employers. If this factor is added

²⁴⁹ G. Majone Understanding Regulatory Growth in the European Community in D. Hine and H. Kassim (eds) *Beyond the Market: The EU and National Social Policy* (Routledge, 1998) 14 at p. 24.

²⁵⁰ M. Rhodes, A Regulatory Conundrum: Industrial Relations and the Social Dimension in S. Liebfried and P. Pierson (eds) *European Social Policy: Between Fragmentation and Integration* (Washington Brookings, 1995) at p. 78.

²⁵¹ B. Laffan, 'The European Union: A Distinctive Model of Internationalization', *Journal of European Public Policy*, 5 1998 2, 235 at p. 236

²⁵² Hyman *op cit* at pp. 290-291.

²⁵³ Hyman *ibid* at p. 285.

to the reliance on the standard worker model as a suitable norm at which to target labour market policy, the future realisation of improved quality in women's work appears elusive.

The Role and Application of Law

The European Commission has pursued a programme of legislative activity in an attempt to respond to some of the issues identified with the relatively low status of 'women's work'. Although these features are present in the national labour markets of the Member States, the Europeanisation of labour has exacerbated their effects due to its increased focus on individualisation within the bargaining process. These proposals, which have been met with varying degrees of success, will be considered in Chapter 4. However, before it is possible to scrutinise the various provisions and their effectiveness in countering the more undesirable effects of market factors in any meaningful way, it is necessary to consider the role of law and its limitations in this respect. Supiot argues against the classification of law as a 'mere tool subservient to some socio-economic rationality' which predominates in some political thinking or, alternatively, as a 'closed system of rules with nothing to offer the world of hard facts'.²⁵⁴ Rather, he posits that law is 'both a determinant and an expression of social relationships'.²⁵⁵ However, although law can anticipate developments, it can also lag behind them and Supiot questions the extent to which the reference model underpinning the conceptualisation of the employment relationship, on which the development of legislation is largely based, is shifting. The reliance of European legal systems (including European Community law) on the 'typical' employment model has already been considered.²⁵⁶ However, in Supiot's analysis, a key feature of the 'new' model is the emergence of a third

²⁵⁴ Supiot *op cit* at p. 32.

²⁵⁵ *Id.*

²⁵⁶ See Dickens *ibid.*

category of worker²⁵⁷ who is 'legally independent (i.e. self-employed) but economically dependent'²⁵⁸ and whose numbers look set to grow. Whatever their contract status, workers are increasingly expected to adapt to the changing demands of employing organisations in respect of acquiring and developing new skills and autonomous working methods while the security associated with the standard employment model continues to diminish. In order to respond effectively to this changing climate, labour law must develop new ways of measuring and classifying occupational status that can 'accommodate career individualization and mobility'.²⁵⁹

The role of the State in the developing industrial relations environment is not as neutral as subscribers to the neo-liberal ideal claim. While it is correct that cultural and historical diversity has shaped national economic and social expectations so that the foundations of the State's legitimacy is subject to variation from one country to another, the widespread tendency to classify the State's interaction with socio-economic policy into two broad categories is misleading. Rather than the bipolar classification of the 'minimalist State' and the 'protector State', the Member States of the European Union each 'embody a combination of these two views – which are not necessarily contradictory – and have endeavoured to ensure both freedom and security for their citizens'.²⁶⁰ On the other hand, the interventionism of the State has implications for its role in the perpetuation of inequalities which cannot be solely attributed to market forces. Through the transfer of state sovereignty to the European Union, such responsibility is shared with the institutions of Community law. Supiot posits the development of a new *modus operandi* for state intervention based on the realisation of procedural and substantive guarantees; the former recognising the need to legislate for the

²⁵⁷ Alongside the legally distinct 'subordinated worker' ("employee" in UK labour law parlance) and genuinely independent entrepreneur ("self employed contractor").

²⁵⁸ Supiot *op cit* at p. 34.

²⁵⁹ *Ibid* at p. 36.

²⁶⁰ *Id* at p. 43.

involvement of as many members of society as possible in the decision-making process and the latter requiring the European Union to 'strive to guarantee fundamental social rights at the European level',²⁶¹ as a matter of priority.

In Dickens' analysis, the relationship between regulation and employers' use of non-standard workers is considered. Although identification of a close correlation between the two has been used as justification for deregulation of the labour market viewed as a necessary step in the creation of part-time and temporary jobs, there is little evidence to support this notion.²⁶² It is, Dickens argues, 'possible to over-estimate the role of law in shaping employer decisions, particularly where these are decentralized to company level'.²⁶³ Conversely, the proposition that improvements to the conditions of atypical work through legal intervention will have a positive impact on workers' acceptance of such contracts can be empirically supported.²⁶⁴ This view of legal regulation 'as enabling rather than constraining'²⁶⁵ can be characterised as the normalisation of atypical or non-standard work. This approach finds some reflection in recent attempts at improvements to part-time and fixed-term work which have been introduced at European level²⁶⁶ as a means of balancing the apparently conflicting concepts of security and flexibility. The theoretical conceptualisation underpinning this legislation will be considered in Chapter 4 alongside other legislative instruments more specifically targeted at the elimination of sex discrimination. However it is worth considering, at this juncture, the importance of the environmental context of 'flexicurity'.

²⁶¹ *Id* at p. 44.

²⁶² Dickens (2004) *op cit* at p. 602.

²⁶³ *Ibid*.

²⁶⁴ E. Rasmussen, J. Lind and J. Visser, (2004) 'Divergence in Part-Time Work in New Zealand, The Netherlands and Denmark' 4 British Journal of Industrial Relations 42, 637-658.

²⁶⁵ Dickens *op cit* at p. 603.

²⁶⁶ The Part-time Workers Directive 97/81/EC and the Fixed-Term Workers Directive 99/70/EC.

In their work Wilthagen et al²⁶⁷ explore the varying degrees of emphasis placed on levels of flexibility and security and the resulting trade-offs made within the legal systems of various Member States.²⁶⁸ They conclude that decentralized and flexible multi-level governance within the national industrial relations systems are important preconditions for the successful introduction of such measures. Fredman posits that the precariousness associated with non-standard work lies in the ‘failure to address the gendered dimension of the issue.’²⁶⁹ From the legal perspective, the ability to move in and out of the labour market, crucial to many women as they juggle paid employment and family responsibility, ‘is portrayed as an autonomy or independence, which makes it both unnecessary and illegitimate to impose social duties on the employer.’²⁷⁰ Courts correspondingly find it ‘difficult to envisage that a social commitment arises on behalf of the employer’ for activities undertaken during time spent away from work. The net result of this is exclusion of the most vulnerable workers from the protection of labour law and, for those able to conform to the contractual requirements, the fault based model on which equality laws are based has severely restricted their use. What is needed to address the difficulties experienced by the non-standard worker is an all encompassing approach to the bestowment of employment rights in which employer duties are recognised as arising due to their labour market power and civic responsibility rather than on the basis of their control over the individual worker.

Conclusions

Women’s disadvantage on the labour market can largely be attributed to the different working patterns of the sexes, with women more likely to work in certain sectors and occupations and

²⁶⁷ T. Wilthagen, F. Tros and H. Van Lieshout, ‘Towards “Flexicurity”? Balancing flexibility and security in EU Member States’ (abstract) IIRA 13th World Congress Plenary and Workshop Abstracts, Berlin, Freie Universitat.

²⁶⁸ Germany, Belgium, Denmark and the Netherlands.

²⁶⁹ S. Fredman (2004) ‘Women at Work: The Broken Promise of Flexicurity’ 33 ILJ 4, 299-319 at p. 318.

²⁷⁰ *Id.*

under particular contractual arrangements than men. The distribution of women's employment in a narrow range of professions clustered at the bottom of organisational hierarchies leads to the low rates of pay and poor terms and conditions associated with 'women's work'. The reasons for the differences in men's and women's labour market experiences are manifold but arise largely as a result of the unequal division of labour within families, with women taking responsibility for childcare and unpaid domestic work. In recent years, the focus of policy on the development of the 'knowledge-based economy' has seen an even wider divergence between the labour market behaviour of men and women. The adherence of policy-makers and legislatures to the 'standard worker' (male breadwinner) model as a suitable target for employment regulation has led to a misfit between current working patterns and labour law.

Economists have attempted to explain the differences in women's and men's work on the grounds of market rationalisation: women are worth less in the labour market because they make free, informed decisions to invest less in their skills and education as they will invariably take long career breaks or hone down their commitment by working part-time during the child-bearing and rearing years. However, such theorising is based on a set of assumptions about women's aspirations and career 'choices' which are not empirically supported. In fact, the decision-making of girls/women over their career aspirations can rarely be said to have been made while in receipt of all the relevant information. Furthermore, market rationalisation and human capital theory cannot adequately explain the persistence of gendered occupational segregation and pay gaps in the light of factors such as the increasing educational achievements of girls. Feminist labour economists have applied a socio-economic analysis, concluding that women and men work largely in segregated labour markets, to which different and diverse conditions apply dependent on a range of factors. All of these

factors create conditions for the exercise of employer discrimination and which rely on employment-related institutions which may themselves be discriminatory. For example, the undervaluing of certain types of work performed by those in the 'caring' professions²⁷¹ predominantly filled by women, is likely to arise due to its association with the unpaid work women perform in the 'private sphere' of the home rather than any corresponding lack of skills or qualifications. Conversely, the higher value ascribed to certain male-dominated occupations²⁷² arises due to assumptions based on the persistent implicit acceptance of the male breadwinner model and the accompanying notion of the 'family wage'. Such unfounded assumptions are translated into policy which serves to entrench and perpetuate existing inequalities.

National industrial relations systems are unable to rise to the challenges presented by the mismatch of employment patterns and labour market regulation due to the dilution in their power which has taken place, in part, due to a process of Europeanisation. In any case, the study of industrial relations is not as attuned to gender issues as might be expected due to a lack of gender-based analysis in the work of specialists which has impacted on the way in which relevant issues are perceived and prioritised. This oversight is not intentional, but arises due to the predominance of industrial processes and an attachment to old-style working arrangements which are somewhat out of step with the new forms of working. Women's labour market participation rates have increased in all Member States, but it is the quality of women's work which is the primary issue, not the quantity. Europe's 'Lisbon agenda'²⁷³ looks set to deliver *more* jobs, but not necessarily *better* ones.

²⁷¹ Such as nursing, primary school teaching, nursery nursing and care workers.

²⁷² Such as secondary school teaching and lecturing in Higher Education.

²⁷³ See European Commission 'From the Lisbon Summit to a New Social Policy Agenda', available at: www.europa.eu.int/comm/employment_social/news/2000.

Although the role of law in the current context may be overemphasised, it can make a difference as an enabling force rather than as a constraint on market forces which, in any case, are not as free from state intervention as is often claimed. The challenges for Community law in overcoming such a range of factors to improve women's relative labour market position are complex: the target for legislation and its interpretation is no longer sex discrimination *per se*, but the normalisation of atypical or non-standard employment; the goal is no longer seen as the conferment of equality, which is correctly perceived as a fundamental human right, but rather the recognition of female characteristics currently conceptualised as 'different', in order that women have access to a more equitable distribution of resources. Discrimination, like gender, is not an organic concept but is socially constructed through the processes and practices of employment-related institutions. What is now required is its deconstruction through careful analysis and targeted activity.

The role of the Court of Justice as interpreter of the Treaties and associated legislation is integral to this endeavour. As working arrangements become increasingly complex and diverse, legislative targets are more difficult to define adequately. Consequently, the resulting provisions are often ineffective in giving protection to those who need it most. Furthermore, the existing body of Community law implicitly provides the appropriate responses to many of the legal problems identified, which are best addressed by the application of broad principles to specific circumstances rather than by the development of restrictive legislation. The Court of Justice occupies a unique position in this respect. By its interpretation of the Treaty and the corresponding principles of Community law, the Court has the potential to assist in the realisation of the objectives of equality and non-discrimination. This is possible in its reasoning in the area of gender relations with which it has the opportunity to engage through

its jurisprudence on sex discrimination. This aspect of the Court's reasoning will be explored later in this thesis,²⁷⁴ the main purpose of which is to uncover the extent to which the Court's adjudications on cases referred under the Article 234 procedure can be characterised as having a common output amounting to an identifiable jurisprudence on gender relations. The development of a coherent and consistent approach by the Court is crucial if it is to have a lasting influence in this respect.

This is not to say that the future legislative activity is not also required. Effective restructuring of the labour market can only take place if both men and women's employment behaviour is studied and adequately understood. Affirmative action may be necessary in order to reorient the gender balance in jobs performed predominantly by men or women. Furthermore, the relationship between childcare and paid employment needs to be reassessed so that the access of either/both parents to flexible working arrangements during the child-rearing years is properly supported and those employed under such arrangements are given the same status as 'standard' workers. Flexible arrangements such as job-sharing, home working, task rather than time-measured working, career breaks and family days are also required and should be legally supported to enable easier conciliation of the dual roles of family care and paid employment. Such initiatives should be available without 'penalties' such as loss of income for taking parental leave. Undoubtedly this reads like a wish list of 'ideal world' aspirations but it is somewhat less fanciful than much of the ideological dogma underpinning contemporary labour and welfare law which relies heavily on outdated and/or illusory concepts such as the male breadwinner, the separation of the private and public spheres and the neutral State. What is required by law-makers is recognition of the reality of people's working and family lives and the adoption of an inclusive approach. Community law has, in

²⁷⁴ See Chapter 6 *infra*.

certain respects, moved towards such recognition, and the development and effectiveness of the various initiatives will be considered in the next chapter.

Chapter 4

European Community Sex Equality Law: Development and Conceptualisation

*'Not merely an economic union'*²⁷⁵

Introduction

In considering the conceptualisation of gender relations in the context of the European legal order, it is necessary to take account of a broad range of legal and policy instruments. In the legal domain, the so-called 'social dimension' consists of both primary and secondary sources covering a wide range of provisions, including those targeted at introducing and improving workers rights generally as well as more specific anti-discrimination measures. Without casting a wide net, it is impossible to assess the overall contribution such provision has made to gender relations at the European level. For example, Directive 97/81/EC²⁷⁶ which introduced the concept of equal treatment for part-time workers in line with that received by their full-time counterparts has undoubtedly had more of an impact in terms of improvements to working conditions for greater numbers of women than, say, Directive 86/613/EEC²⁷⁷ which was intended to provide equal treatment between men and women who are self-employed. This is despite the fact that the former contains no reference to sex equality and the latter is specifically targeted at the prohibition of discrimination between men and women.

²⁷⁵ From the ECJ's ruling in Case 43/75 *Defrenne v SABENA* [1976] ECR 455 (hereinafter referred to as '*Defrenne II*'), in which the direct effect of Article 141 (ex 119) was established.

²⁷⁶ Council Directive 97/81/EC of 15 December 1997 concerning the framework agreement on part-time work concluded by UNICE, CEEP and the ETUC.

²⁷⁷ Council Directive 86/613/EEC of 11 December 1986 on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood.

This apparent anomaly arises due to the gendered nature of labour markets in which it is predominantly women who work part-time, often in low status, poorly paid jobs.²⁷⁸ Self-employed women are not always officially recorded as being so due to the nature of their work which often arises in small family enterprises but, nevertheless, form a relatively small proportion of the total female working population. The nature of women's work makes it difficult to target legislation effectively and some specific provisions may miss their intended target altogether. Furthermore, Directive 92/85/EC²⁷⁹, which provides rights for pregnant women and those who are breastfeeding, arises as a health and safety initiative²⁸⁰ rather than a measure intended to improve equality between the sexes, despite its undeniable contribution in this respect.

This apparently rich tapestry of legislative provision makes the task of identifying the constituent parts of European Community law's overall contribution to gender relations a challenging one. In fact, many of the most influential initiatives that have arisen at the European level are not legally enforceable in the strict sense, but form part of the Community's soft law or policy,²⁸¹ leading to further complexities. The main focus of this thesis, being an analysis of the case law of the European Court of Justice, enables some terms of reference to be mapped out here – obviously the legal base on which cases are referred under the Article 234 procedure serves to limit the range of variables that can be taken into account. The cases considered in Chapter 6, were all referred by national courts for the ECJ's

²⁷⁸ See Chapter 3 *infra*.

²⁷⁹ Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or who are breastfeeding (tenth individual directive within the meaning of article 16(1) of Directive 89/391/EEC).

²⁸⁰ The Directive has Article 138 of the Treaty as its legal base and was introduced under the auspices of Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work, commonly referred to as "the health and safety framework Directive", Article 16 (1) of which provides for the Council to adopt individual Directives based on Article 118a of the Treaty.

²⁸¹ For example, the action programmes to promote equality in the workplace which were replaced, in 2000, with a framework strategy on gender equality, the first of which had as its aim to 'embrace all Community policies in its efforts to promote gender equality' – see COM (2000) 335.

interpretation of Article 141. However, the underlying purpose of the analysis, which is to identify the existence and nature of any emerging jurisprudence, means that the context of the overall environment in which such cases are considered is an integral factor and must take account of any corresponding interrelationship between hard and soft law and policy, however subtle such connections may appear to be. For this reason, the following overview of the development of European social law takes a wide perspective, considering peaks and troughs of legislative activity and identifying important cornerstones before focusing on the specific provision of Article 141 on which the Article 234 referrals under review in Chapter 6 are based.

The Development of European Social Law

European Community law has been described as an ‘ideal vehicle for upholding the principle of sex equality’²⁸² due to its ‘undoubted potential for growth’,²⁸³ and it is true, certainly from a UK perspective, that the European institutions have been at the forefront of developments in law and policy aimed at improving women’s labour market opportunities and associated terms and conditions. In the European legal context, sex equality law forms part of the social policy area in which progress has not always been steady. Indeed, in the early years of the European Economic Community, so little consideration was given to this aspect of European integration, that its initial inclusion appears almost as an afterthought based on economic, rather than social, grounds. The incremental development of social policy, charted from the foundations of the Common Market through to the European Union of the present day, can be divided into five broad stages with degrees of relevant legislative activity varying from one

²⁸² E. Ellis, *EU Anti-Discrimination Law*, OUP, 2005, at p. 7.

²⁸³ *Id.* This potential encompasses institutional and geographical growth as well as the extension of relevant concepts, for example, the inclusion of consideration for human rights in developing and interpreting relevant provisions of EC law.

period to another. Intermittent phases of activity have been followed by intervals of consolidation and “bedding in”, during which law-making has been sparse. In the following classification, which is partially based on that employed by Hervey,²⁸⁴ particular attention will be paid to the development of sex equality legislation and policy.

Laissez Faire (1957 –1972)

The period from 1957 to 1972 has been categorised as ‘*laissez-faire*’ due to the neo-liberalist non-interventionist stance taken in respect of social law.²⁸⁵ The European Coal and Steel Community (ECSC) Treaty was concluded in 1951, followed in 1957 by the Treaties establishing the European Economic Community (EEC) and European Atomic Energy Community (Euratom). The intended aim of the Treaties’ founders was to bring about improvements in the economic welfare of the region on the basis of political integration among the European states of the post-war era. Having witnessed, at first hand, the effects of nationalism through the devastation of the Second World War culminating in the occupation of many countries and increasingly mindful of the potential of the ‘Super Powers’ and accompanying threat of Communism, the notion of increased co-operation between states held many obvious attractions.

The Schuman Declaration of 9 May 1950 had articulated the political consensus in clear terms by proposing that the French and German coal and steel production industries should be placed under a common ‘high authority’. This would provide a framework open to participation by other European countries in the following way:

²⁸⁴ Hervey, T., *European Social Law and Policy*, (Longman, 1998), Chapter 2, at pp. 13-30.

²⁸⁵ In Hervey’s classification, this period is categorised as one of ‘benign neglect’ after T. Mosley, ‘*The social dimension of European integration*’ *International Labour Review* (1990) 129 at p. 149 and Shaw, *European Community Law* (Macmillan, 1993) at p. 329.

The pooling of coal and steel production will immediately provide for the setting up of common bases for economic development as a first step in the federation of Europe, and will change the destinies of those regions which have long been devoted to the manufacture of munitions of war, of which they have been the most constant victims. The solidarity in production thus established will make it plain that any war between France and Germany becomes, not merely unthinkable, but materially impossible.²⁸⁶

The goal of industrial co-operation was accompanied by an aspiration for greater political unity. However, the development of specific social policy was not, at this stage, envisaged or even considered. As Szyszczak has noted, the development of European labour law was initially impeded and has been subsequently hindered by a lack of political will to intervene in labour market regulation.²⁸⁷ Following the recommendations of an expert report,²⁸⁸ those responsible for drafting the original Treaty of Rome kept European intervention in the area of labour relations to a minimum, concentrating on the principle of non-discrimination on grounds of nationality,²⁸⁹ the free movement of workers²⁹⁰ and the establishment of a Social Fund to assist states with labour, welfare and training costs. The provision that ‘each Member State shall during the first stage ensure and subsequently maintain the principle that men and women should receive equal pay for equal work’ under Article 119/EEC²⁹¹ was included at the insistence of France as a competition measure rather than on the basis of employment

²⁸⁶ The full text of the declaration can be accessed at: http://www.europa.eu/abc/symbols/9-may/decl_en.htm

²⁸⁷ E. Szyszczak, *EC Labour Law* (Longman, 2000) at p. 6.

²⁸⁸ *The Ohin Report*, International Labour Office ‘Social Aspects of European Economic Co-operation’ 74 International Labour Review (1956) 99

²⁸⁹ Article 12 EC (ex Article 6).

²⁹⁰ Article 39 EC (ex Article 48).

²⁹¹ Now Article 141 EC, which provides that ‘Each member state shall ensure the principle of equal pay for male and female workers for equal work or work of equal value is applied.’

protection.²⁹² The other relevant legal bases were the generic Articles 100²⁹³ and 235,²⁹⁴ both of which required unanimity voting in the Council and were restricted in their ambit to instruments intended to fulfil the aims of the Common Market.

The Community's founders reluctance to intervene in social matters has been attributed to a shared belief that the Member States' national labour law and industrial relations systems would continue to provide the necessary regulation unencumbered without conflicting with increased European integration. Furthermore, there was 'an assumption that the functioning of the Common Market would bring about a raised standard of living of workers in the EC.'²⁹⁵ This is clearly illustrated by the original wording of the Preamble to the Treaty which declared the Member States' resolve 'to ensure the economic and social progress of their countries by common action to eliminate the barriers which divide Europe.' The original Article 2 set out the aims of the Common Market as being, *inter alia*, to promote 'a harmonious development of economic activities' accompanied by 'an accelerated raising of the standard of living.' This vague objective was further articulated by Article 117 EC, which provided the aims and principles of the limited Social Policy Chapter of the Treaty of Rome 1957:

Member States agree upon the need to promote improved working conditions and an improved standard of living for workers, so as to make possible their harmonisation while the improvement is being maintained.

²⁹² For a detailed and illuminating discussion of the origin of Article 119, see C. Hoskyns, *Integrating Gender: Women, Law and Politics in the European Union* (Verso, 1996), Chapter 3.

²⁹³ Now Article 94.

²⁹⁴ Now Article 308.

²⁹⁵ Szyszczak, *op cit* at p. 6.

They believe that such a development will ensue not only from the functioning of the common market, which will favour the harmonisation of social systems, but also from the procedures provided for in this treaty and from the approximation of provisions laid down by law, regulation or administrative action.

To appreciate how far the development of European engagement in this area has come from these indeterminate beginnings, it is worth comparing the wording of these provisions with that of the current Article 136 EC, which defines the Community's objectives as including,

the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion.

The achievement of objectives will be through the implementation of 'measures which take account of the diverse forms of national practices,' thus acknowledging 'an *explicit* role for the Community to bring about changes in the social policy arena'²⁹⁶ Furthermore, Article 140 EC²⁹⁷ refers to the Commission promoting 'close co-operation' between Member States in a range of areas related to labour law²⁹⁸ and, following the Treaty of Amsterdam, a new Title on employment²⁹⁹ has been inserted into the Treaty directly after the Title on economic policy. These recent developments and their impact on the social law area will be considered later in this chapter. Of relevance at this stage is recognition of the humble beginnings of European

²⁹⁶ *Ibid.*

²⁹⁷ Which repeats the wording of the original Article 118 EC.

²⁹⁸ See Joined Cases 281/85, 283-85/85 and 287/85 *Germany and Other v Commission* [1987] ECR 3203 in which the ECJ ruled that the Commission could take legally binding measures to give effect to its duties under Article 118 EC.

²⁹⁹ Title VIII of Part Three, discussed *supra* at p.113.

social law. From the earliest days of European economic integration, limited political interest and a restricted legal base resulted in little progress in the labour law area with initiatives focused on the development of a health and safety programme³⁰⁰ and provisions relating to the non-controversial area of free movement of workers.³⁰¹

The Birth of Social Action (1972 – 1980)

In contrast to the non-interventionist stance which characterised the beginning of ‘social Europe’, the period from 1972 until 1980 can be described as dynamic. The Paris Summit of 1972 marked a critical point in this sea change when, just prior to the first enlargement of the Community, the heads of state and government issued a joint Declaration outlining their commitment to the development of social harmonisation as well as economic integration. In 1974 the Council passed a resolution for the Community’s first Social Action Programme in which four main areas of activity were highlighted within a broad labour law theme: equal treatment of men and women at work; harmonisation of labour law; the development of common standards for working conditions; and, supranational employment and regional policy. The resulting Programme³⁰² focused on employment protection, industrial democracy and the rights of third country nationals in the EC. This laid the foundations for legislative activity in the areas of sex equality, health and safety, redundancy, acquired rights in the event of a transfer of a business and insolvency rights.

The rationale behind this enhanced interest in social matters has been attributed to a combination of factors. The civil rights movement had been gaining in prominence on an

³⁰⁰ By way of hard law measures using Articles 100 and 235 as their legal bases.

³⁰¹ Which comprises one of the four fundamental freedoms of Community law. As such, the relevant legal base – Article 39 (ex Article 48) - benefited early on from being recognised as having both vertical and horizontal direct effects.

³⁰² Bulletin of the European Communities, Supplement 2/74, at p. 8.

international stage since the 1960s and this development was accompanied by changes in dominant political ideologies.³⁰³ Political interest groups, such as trade unions, which had hitherto organised and garnered support at the national level, began to see the benefits from increased cohesion with their counterparts in other Member States. Perhaps most importantly, the ideologies of the social democratic governments in power within key Member States converged in recognising the importance of social aims in the development of European integration³⁰⁴ and questioning the neo-liberal policies which had thus far informed European-level decision-making on economic matters but which, it appeared, had been ineffective in staving off the approaching recession.³⁰⁵

Alongside the increased emphasis on social justice in Europe's policy objectives, the ECJ was instrumental in the recognition of social interests as being of primary concern in the European legal order. Despite, the fragile legal base and initial lack of political will which informed the development of social policy, the Court had from its inception recognised its own significance in relation to the Community's activities. This can be seen in its early case law concerning the relevance of certain Treaty Articles. In *Defrenne II*,³⁰⁶ the Court considered the role of Article 117 and, whilst acknowledging that it could not give rise to direct effect, found that it could be used as a teleological tool for interpreting other Community law provisions. The Court held that, where pay inequality was due to sex discrimination, compliance with the aims of Article 117 enabled wages to be raised to the higher level. In justifying its decision, the Court declared that the equal pay provisions of Article 119 were directly effective as they,

³⁰³ M. Shanks, *The Social Policy of the European Communities* (1977) 14 Common Market Law Review, 375-83.

³⁰⁴ W. Streek, *Neo-Voluntarism: A New European Social Policy Regime?* (1995) 1 European Law Journal, 31-59 at p. 42.

³⁰⁵ Hervey *op cit* at p. 17.

³⁰⁶ Case 43/75 [1976] ECR 455. The Court's judgement in *Defrenne II* is considered in Chapter 6 *infra*, in the specific context of its impact on the group of cases analysed there.

Form part of the social objectives of the Community, which is not merely an economic union, but at the same time intended, by common action, to ensure social progress and seek the constant improvement of the living and working conditions [of Europe's citizens]³⁰⁷

By the end of the 1970s a range of factors – economic, political and social – combined to stall further expansion of Community competence in the area of labour law. Widespread recession, caused by high unemployment rates and rising inflation, as well as competition from the unregulated labour markets of the Far East and the United States' deregulated, 'flexible' market, caused national governments to reconsider labour market policy and existing industrial structures. Throughout most of the following decade national governments would be prepared only to commit to 'soft law' measures in all areas of labour law including sex equality, so that 'EC action was minimal and ad hoc.'³⁰⁸

Labour Market Flexibility and Deregulation (1980 – 1985)

During the first half of the 1980s, the Member States' governments responded to the pressures presented by the need to compete with unregulated markets by developing protectionist strategies aimed at blocking the development of social policy at the European level. These strategies took various forms, such as the watering down of Commission proposals³⁰⁹ and the blocking of legislation by way of the right of veto³¹⁰ made possible by the requirement of

³⁰⁷ *Ibid* at para 10.

³⁰⁸ Szyszczak *op cit* at p. 8. See also B. Hepple, *The Crisis in EEC Labour Law*, *Industrial Law Journal*, 18 (1987) 129.

³⁰⁹ For example, the agreed text of Directive 86/378/EEC on Equal Treatment in occupational social security differs considerably from the original proposal.

³¹⁰ For example, COM(83) 686 final OJ 1983 C 333/6 on parental leave and leave for family reasons, an initiative that was eventually resurrected in a substantially amended form and concluded as a social partner framework agreement between UNICE, CEEP and the ETUC and enacted as Directive 96/34/EC.

unanimity at Council-level. A period of deregulation ensued at the national levels, based on the principles of labour market flexibility, with Member States resisting attempts at European intervention. Limited social legislation was enacted during this time with the emphasis of any restricted developments on 'soft law' measures³¹¹ and policy initiatives such as the Commission-proposed programme on positive action for women.³¹²

In contrast to the lack of legislative activity, this period in the development of Community law saw the Court of Justice's engagement with many social issues³¹³ through the Article 177³¹⁴ procedure. Although this has been characterised as its activist phase,³¹⁵ it must be borne in mind that the dialogues the ECJ enjoyed with the national courts during this period were instigated by the latter through references made for interpretation of Community provisions. Why this was such a busy time for the Court can be explained by two inter-related factors. First, the Court's judgment in *Defrenne II*³¹⁶ had undoubtedly raised the expectations of claimants and legal advisors within the Member States as to what could be achieved by the application of Community law, particularly through the direct effect of Article 119.³¹⁷ Secondly, the judiciaries within the Member States, fearing misinterpretation of the provisions of Community law and aware of its supremacy, were increasingly willing to engage in dialogues with the European Court.³¹⁸ Nevertheless, it is perhaps noteworthy that

³¹¹ It was during this period that the regulation of working time was first proposed, albeit through a 'soft law' measure, by the draft Council recommendation on the reduction and reorganisation of working time OJ 1983 C 290/4.

³¹² Which culminated in Council Recommendation 84/635/EEC of 13 December 1984 on the promotion of positive action for women, OJ L 331/34-35

³¹³ This was the period in which the pivotal cases concerning the Court's conceptualisation of indirect discrimination originate – see Chapter 6 *infra*.

³¹⁴ Now Article 234/EC.

³¹⁵ See Chapter 5 *infra*.

³¹⁶ Case 43/75 *Defrenne v Sabena* (No 2) [1976] ECR 455.

³¹⁷ See, for example, A. Lester, 'The Uncertain Trumpet. References to the European Court of Justice from the United Kingdom: Equal Pay and Equal Treatment without Sex Discrimination' in H.G. Schermers et al (eds) *Article 177 EEC: Experiences and Problems* (TMV Asser Instituut, 1987), at 164.

³¹⁸ See C. Kilpatrick, 'Community or Communities of Courts in European Integration? Sex Equality Dialogues Between UK Courts and the ECJ' (1998) 4 *European Law Journal* 2, 121.

while the Community law-making institutions were experiencing a phase of political inertia, 'the Court of Justice played a crucial role in keeping labour law issues alive.'³¹⁹

The Internal Market (1986 – 1997)

Following the period of stagnation that had occurred during the first half of the 1980s, the need to develop the internal market was used as an effective means of reigniting European social law. The French socialist administration, under President Mitterand, had been expressly supportive of the notion of a 'European social area'. The development of this concept gained momentum following the appointment of a new Commission with Jacques Delors as President in 1984. The commitment of this new regime to the furtherance of social aims is illustrated by the Commission's White Paper of 1985³²⁰ on the promotion of the internal market programme. In the white paper, Delors argued that equivalence of social laws would be necessary to minimise 'social dumping' which would occur if Member States with relatively low levels of social protection and corresponding employment costs were able to gain a competitive advantage over those with higher costs. As well as attracting inward investors to States with lower labour costs, such disparity would also lead to the practice of posting workers to those States, thus disrupting the smooth functioning of the Internal Market. Speaking in 1986,³²¹ Delors acknowledged the inter-dependence of the social and economic objectives,

The creation of a vast economic area, based on the market and business co-operation, is inconceivable - I would say unattainable - without some harmonisation of social legislation. Our ultimate aim must be the creation of a European social area.

³¹⁹ E. Szyszczak, *EC Labour Law* (Longman, 2000), at page 8.

³²⁰ COM (85) 310 final.

³²¹ Bulletin of the European Communities, Supplement 2/1986, at p. 12.

As Szyszczak has observed,³²² the resulting Single European Act led to developments in three significant respects: the promotion of the social dialogue; the breaking of deadlock made possible by the requirement of unanimity in respect of social provisions and the reform and realignment of the structural funds.³²³ The ‘social dialogue’ enables the two sides of industry to focus discussion on desired objectives and policies implemented through the Member States’ existing industrial relations frameworks. This approach, which was envisaged as being more palatable to national governments and policy players than ‘top down’ intervention, was formalised by Article 118B EC which was inserted by the Single European Act. The end of unanimity voting requirements at Council-level in respect of social measures disabled Member States from exercising their right of veto as a means of stalling progress of Commission initiatives. What Ellis has referred to as a scheme for ‘rolling interdependence’³²⁴ was taken a step further when the Member States pledged to make greater use of majority voting, thereby relinquishing a significant portion of national sovereignty in favour of the Community. Article 118A EC granted power to the Community to enact legislation using qualified majority voting (QMV) and introduced the co-operation procedure with the Parliament for use in areas concerning ‘the work environment’. This latter innovation, described by Szyszczak as ‘an ingenious device’,³²⁵ enabled the development of non-contentious health and safety measures, but also introduced a wider concept of ‘working environment’ based on the Nordic approach, which incorporates employment protection rights and the organisation of work. This opened up the grounds for legislative proposals taking Article 118A as their legal base which, coupled with the simplified procedures, laid the foundations for greater legislative activity. The SEA also introduced a new legal base for the

³²² Szyszczak *op cit* at pp. 9-12.

³²³ See Arts 130 a-e (now 158-162) which identified economic and social cohesion as one of the six priority areas in completion of the Internal Market.

³²⁴ Ellis *op cit* at p. 8.

³²⁵ Szyszczak *ibid* at p. 10.

enactment of general measures affecting the function and establishment of the Internal Market, Article 100A EC,³²⁶ for which QMV and the co-operation procedure were applicable.

The 1992 programme for completion of the internal market contained further provisions relating to the development of social aspects. The Treaty on European Union, agreed in Maastricht in 1992,³²⁷ contained references to federalism which attracted some dissent from among the Member States' governments (notably the UK) but, nevertheless, was ultimately accepted. The creation of the European Union, following ratification of the TEU, changed the nature of the Community with attention focused on a wider set of issues such as the development of a Common Foreign and Security Policy and Justice and Home Affairs and the laying of the foundations for economic and monetary union. However, this apparently enhanced cohesion was accompanied by, what Hervey has described as, the institutionalisation of the Member States' differences in approach to European social policy.³²⁸ These differences are most clearly illustrated by the contention surrounding the Social Policy Agreement (SPA) from which the UK effected an 'opt out'. The complex and questionable constitutional arrangements³²⁹ supporting this development saw the twelve Member States agreeing, by way of a Social Policy Protocol annexed to the Treaty, that the remaining eleven states should be enabled to utilise the EU institutions for the purposes of enacting measures provided for in the SPA.³³⁰ Any such measures would be inapplicable to the UK.³³¹

³²⁶ Now Article 95.

³²⁷ Ratified the following year, commonly referred to as the 'Maastricht Treaty'.

³²⁸ Hervey *op cit* at p. 25.

³²⁹ On this issue and the equally complex arrangements necessitated by the UK's subsequent 'opt in', see N. Burrows 'Opting in to the Opt-out: The UK and European Social Policy' 1997 4 Web JCLI.

³³⁰ See J. Shaw 'Twin-Track Social Europe – The Inside Track' In D. O'Keefe and P. Twomey (eds) *Legal Issues of the Maastricht Treaty* (Wiley, 1994) at pp. 295-311.

³³¹ The Directive on Works Councils 94/45/EC was the first instrument adopted under the aegis of the Protocol and Agreement. The Parental Leave Directive 96/34/EC was similarly adopted and was subsequently extended to the UK by Directive 97/75 [1998] OJ L10/24. The framework agreements on part-time work and fixed-term work were also concluded between the social partners during this time.

By the time the intergovernmental conference (IGC) took place in Amsterdam in 1996, the UK was experiencing a change in its political climate which was to result in the election of a more apparently 'Euro-friendly' Labour government the following year.³³² Discussions at the IGC 'coalesced round three broad interlinked themes: democracy, transparency and efficiency.'³³³ The draft Treaty, agreed at the IGC, was subsequently signed on 2 October 1997 and came into force on 1 May 1999. The new provisions introduced by Amsterdam made technical amendments intended to reinforce the economic, social and political links between Member States.³³⁴ In the social policy area, the Protocol, which had been annexed to the EC Treaty by the TEU, was incorporated into the main body,³³⁵ replacing the existing social policy provisions. This act and the inclusion of a new Title on Employment,³³⁶ aimed primarily at countering unemployment, can be interpreted as a move away from a purely economic conception of the EC towards a more overtly political notion. The provisions prohibiting discrimination on the grounds of nationality³³⁷ were supplemented by the insertion of a new Article 13 authorising the Council 'to take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.' Although its use as a legal base is restricted due to the requirement of unanimity, the inclusion of Article 13 in the Treaty is significant for two reasons: first, it provides significant reinforcement in respect of non-discrimination as a fundamental principle of EC law and, second, it extends the of legal competence of the EC law-making institutions enabling legislation prohibiting discrimination on a far wider range of grounds than was

³³² After which a speedy 'opt in' to the SPA was effected – see Burrows *op cit.*

³³³ J. Steiner and L. Woods *Textbook on EC Law* (OUP, 2003) at p. 8.

³³⁴ The Amsterdam Treaty also renumbered the Treaties.

³³⁵ Now contained in Title XI, Chapter 1.

³³⁶ Title VIII.

³³⁷ Contained in Article 12 (ex Article 6).

previously the case.³³⁸ Furthermore, the promotion of equality of men and women was expressly identified as a task of the Community following Amsterdam.³³⁹

From Social Law to Employment Policy (1998 to present)

Despite the amendments to the law-making process made by the Maastricht and Amsterdam Treaties, the anticipated development of legislative initiatives in the social area had failed to materialise as the twentieth century drew to a close. This can be attributed to two inter-related factors: a reluctance to engage in further harmonisation of social standards at the Member State-level, and a new way of implementing such standards at the supranational level as introduced by the European Employment Strategy through the open method of co-ordination.

Relations between the Member States in the social law field had always been characterised, to a certain extent, by what Hervey has referred to as 'unresolved contradictions and tensions',³⁴⁰ caused by an uneasy co-existence of conflicting models of European social policy. This is clearly illustrated by the disagreements over harmonisation of maternity provisions and the regulation of working time. In both cases, the UK government predictably took a non-interventionist stance in accordance with the tradition of legal abstentionism, whereas Germany's history of state regulation made both initiatives more readily acceptable. In contrast, the Nordic States' employee relations systems, which are largely based on self-regulation underpinned by collective agreements, already utilised the broader concept of

³³⁸ Two directives have already been implemented which take Article 13 as their legal base: Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, which provides specifically for protection against discrimination on the grounds of religion or belief, disability, age and sexual orientation. Furthermore, Council and Parliament Directive 2002/73 amended the Equal Treatment Directive 76/207/EEC in order to apply the same definitions of direct and indirect discrimination to sex as those contained in the Article 13 directives.

³³⁹ By Article 2 EC. The Amsterdam amendments also enabled an enhanced emphasis on the protection of human rights by the amendments made to Articles 6 and 7 of the TEU.

³⁴⁰ Hervey, *op cit* at p. 24.

‘working environment’ necessary for acceptance of such initiatives on the non-contentious ground of workers’ well-being.

These differences in conception have presented the Commission with difficulties in its attempts to make progress in the harmonisation of social standards. The legislative programmes of the 1970s and early 1980s were largely concerned with the introduction of basic rights, many of which complemented or improved those already available within the Member States’ own regulatory systems, so that, with a few notable exceptions, the Commission’s proposals in this respect posed no real threat to sovereignty. However, in the aftermath of Maastricht, the programme for reform had simply reached saturation point so that any new proposals in the social law area were viewed with suspicion by national governments and, thus, unable to attain the initial agreement necessary in order to instigate the legislative process. Furthermore, the economic climate across Europe as the twentieth century reached its end meant that Member States were not particularly receptive to further labour market regulation. High unemployment rates caused by structural factors such as skills shortages and a lack of inward investment made it an unsuitable environment for further intervention at the European level. The development of the global economy and sweeping changes in commercial and industrial practices led by advancements in information technology gave rise to greater competitive threats. The combination of all of these factors caused the EU institutions to reconsider the policy process. Their response was the introduction of a system of co-ordination of the Member States’ national social policy by way of the European Employment Strategy (EES) which is enforced through the Open Method of Co-ordination (OMC).³⁴¹

³⁴¹ For a more detailed analysis of the process of OMC in the context of the EES, see N. Busby, *‘Pulp Fiction or Hard Fact? The Development of a European Employment Policy’*, (2005) 1 *Journal of Contemporary European Research* 2, pp. 29-38.

The EES is based on the Employment Title³⁴² inserted into the EC Treaty by the Treaty of Amsterdam. The origins of this Title were set down in the 1993 White Paper on growth, competitiveness and employment³⁴³ which expressly linked the three policy areas for the first time. The White Paper concluded that the creation of fifteen million new jobs would be necessary if the key issues of growing unemployment and global competition were to be addressed. The overriding objective was to develop a joined up approach to policy-making so that employment would be integrated with other relevant areas such as fiscal policy. Structural unemployment was becoming a feature of many of the Member States and was attributed to a combination of social and economic exclusion requiring Keynesian and supply-side measures, specifically a mix of proactive policy designed to promote a more inclusive environment and the deregulation of certain aspects of national labour markets.³⁴⁴ The social policy amendments introduced by the Amsterdam Treaty provided an opportunity to formalise the new approach. A new Title on employment was inserted into the Treaty, thus enabling an extension of EC competence in the social policy arena.³⁴⁵ The key provisions are: Article 125 which establishes the objective of a 'co-ordinated strategy'; Article 127(2) which places 'high employment' on the EC policy agenda and Article 128 which sets out the framework for developing and monitoring the 'guidelines for employment'. The reason for the focus on employment at the Amsterdam summit has been explained as arising out of a combination of the promotion of European monetary union (EMU) and the need for a unifying project.³⁴⁶ Despite the emphasis given to the development of an overarching employment policy at the European level, the soft law nature of the strategy has led to

³⁴² Title VIII of Part Three.

³⁴³ European Commission (1994), *Growth, Competitiveness and Employment*, COM (1993) 700 Final.

³⁴⁴ European Commission (2000), *European Employment and Social Policy: A Policy for People*: D-G for Education and Culture.

³⁴⁵ Which, alongside the accompanying Title XI on Social Policy, Education, Vocational Training and Youth, has been described by Burrows as 'merely part of the routine service, an oil change rather than a new engine' N. Burrows, 'The New Employment Chapter and Social Policy Provisions of the Amsterdam Treaty' in J. Usher (ed) *The State of the European Union*, (2000 Longman) at 92.

³⁴⁶ J. Goetschy, 'The European Employment Strategy: Genesis and Development', *European Journal of Industrial Relations* 1999 5 (2), pp. 117-138.

criticism from some quarters.³⁴⁷ It can be argued, however, that the new approach does enable more activity at the European-level in areas of social policy previously the exclusive domain of national governments. As Goetschy has observed, the policy aspects previously encompassed by the development of Social Europe 'tended to lie outside the core of national social policies, so as not to upset sensitivities concerning national sovereignty.'³⁴⁸ The EES, perhaps because of its soft law basis rather than despite it, is arguably a useful means of tackling central issues of concern to all Member States regardless of the national industrial relations systems in place.

The new prominence given to employment policy, and in particular unemployment, was further developed at the Luxembourg summit in 1997 through the adoption of the first employment guidelines by the Heads of State and Government. The approved guidelines incorporated the original four pillars of the EES: employability; entrepreneurship; adaptability and equal opportunities, which were all viewed as crucial factors in the development of sustainable job creation. At the European Council meeting in Lisbon in 2000, the Member States' representatives reiterated their commitment to a new economic and social agenda by the adoption of a strategic goal for the next decade: 'to become the most competitive and dynamic knowledge-based economy in the world capable of sustainable economic growth with more and better jobs and greater social cohesion.'³⁴⁹ Achievement of this goal is through co-ordination of the labour market policies of Member States in an annual cycle. This process, known as the open method of co-ordination (OMC), has been defined by Frank Vandembroucke³⁵⁰ as 'a mutual feedback process of planning, examination, comparison and

³⁴⁷ See, for example, S. Ball, *The European Employment Strategy: The Will but not the Way?* 2001 ILJ 30 (4), pp. 353-374.

³⁴⁸ Goetschy *op cit* at 133.

³⁴⁹ European Commission From the Lisbon Summit to a New Social Policy Agenda, available at: www.europa.eu.int/comm/employment_social/news/2000

³⁵⁰ Belgian Minister of Pensions and Social Affairs and one of the main architects of the process.

adjustment of the policies of Member States, all of this on the basis of common objectives.³⁵¹

At the start of each year, the Council approves the Commission's objectives which have, until now, been drawn up as guidelines based on the four pillars. Member States' national action plans (NAPs) are then submitted for approval by the Commission and the Council.

Whether the co-ordination of national employment policy is the most effective way of dealing with persistent gendered pay gaps and associated issues at the supranational level remains to be seen. What is clear is that the overarching objectives of the European policy agenda are no longer focused on the harmonisation of social policy at the supranational level, but rather are targeted at the co-ordination of employment law at the national levels. The development of equal opportunities was identified as one of the original four pillars of the EES and sex equality has been a recurring priority theme in the guidance for implementation across all of the pillars. However, it is debatable whether the soft law mechanisms employed through the process of OMC will provide an adequate means of responding to discrimination within national labour markets and whether such means can act as an effective replacement for the development of hard law measures intended to harmonise provisions in this area.

The Substantive Provision of Sex Equality in European Law

As outlined above, the legislative provisions that have contributed towards the overall intervention of European law in the field of sex equality are scattered across a range of different instruments. Some of those provisions are specifically targeted at eliminating discrimination on the ground of sex; some are aimed at providing rights for atypical workers and have indirectly benefited high numbers of women due to the gendered structure of labour

³⁵¹ Cited by J. Zeitlin (2002) *The Open method of Co-ordination and the Future of the European Employment Strategy* Presentation to the Employment and Social Affairs Committee of the European Parliament on the first five year evaluation of the Employment Guidelines, 8 July 2000.

markets. Some provisions, such as those provided by the Pregnant Workers' Directive,³⁵² recognise women's difference from men and are intended to provide protection on the grounds of such difference. Consideration will now be paid to the various approaches that together provide the basis for the European Court of Justice's decision-making in the area of gender relations.

Article 141³⁵³ was the Treaty provision which established the principle of equality between the sexes, specifically in the context of pay. Although its scope has been broadened significantly since its inception so that it now provides for equal treatment and has recently been extended to permit some forms of 'positive action',³⁵⁴ it was originally intended as an pro-competition measure and its inclusion was not motivated by concern for women's labour market inequality.³⁵⁵ Despite this negligible beginning, Article 141 has grown in prominence so that, alongside Article 137,³⁵⁶ it serves as a cornerstone for legislative activity in the field of gender relations providing a legal base for a plethora of provisions aimed at the elimination of discrimination between the sexes. These provisions are divided principally into three parts: pay, which is governed by Article 141 and Article 75/1117³⁵⁷; equal treatment by Article 141 and Directives 76/207³⁵⁸, 86/613³⁵⁹ (for the self-employed) and 96/34 (parental leave)³⁶⁰; and

³⁵² 92/85/EC.

³⁵³ Ex Article 119.

³⁵⁴ Following its amendment by the Treaty of Amsterdam.

³⁵⁵ See C. Bernard 'The Economic Objectives of Article 119' in D. O'Keeffe and T. Hervey (eds) *Sex Equality Law in the European Union* (Wiley, 1996).

³⁵⁶ Ex Article 118 which gives the Community competence to support and complement Member States' activities relating to the equal treatment of men and women with regard to labour market opportunities and equal treatment at work, giving the Council the power to adopt directives.

³⁵⁷ Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women, OJ 1975 L 45/19.

³⁵⁸ Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion and working conditions, OJ 1976 L 39/40, amended by Council and Parliament Directive No 2002/73 of 23 September 2003 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion and working conditions OJ 2002 L 269/15.

social security by Directives 79/7³⁶¹; 86/378,³⁶² and 96/97³⁶³. Over the years, distinctions between the three categories have become blurred, particularly in areas in which the European Court has been actively engaged such as the interface between social security and equal pay.³⁶⁴ There are also provisions on the burden of proof in sex discrimination cases contained in Directive 97/81³⁶⁵ which straddle both equal pay and equal treatment. Furthermore, the whole area is underpinned by a considerable amount of soft law, some of which has led to the adoption of hard law in specific areas,³⁶⁶ with other aspects providing broad policy initiatives intended to inform and shape Europe's overall philosophy towards gender equality.³⁶⁷

All of these instruments share a common approach in that they are based on the premise that the provision of equal opportunities will rectify anomalies in the market by enabling women to achieve parity with men through application of the merit principle. The legislation relies on a symmetrical application of its provisions giving equal rights to men and women. Where positive action is permitted, this arises largely as a means of ensuring that women are provided with assistance to improve their access to labour market opportunities in areas where they are underrepresented, for example, through the targeted provision of training thus

³⁵⁹ Council Directive 86/613/EEC of 11 December 1986 on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood, OJ 1986 L 225/40.

³⁶⁰ Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC, OJ 1996 L 145/4-9.

³⁶¹ Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, OJ 1979 L 6/24.

³⁶² Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes, OJ 1986 L 225/40.

³⁶³ Council Directive 96/97/EC of 20 December 1996 amending Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes, OJ 1997 L 46/20.

³⁶⁴ See J. Sohrab, *'Women and Social Security Law: The Limits of EEC Equality Law'* (1994) *Journal of Social Welfare and Family Law* 5; *Sexing the Benefit* (Dartmouth, 1996).

³⁶⁵ Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex, OJ 1998 L 14/6.

³⁶⁶ For example Commission Recommendation 92/131 and Code [1992] OJ L49/1 on sexual harassment which provided a precursor to the amendment to Directive 76/207 made by Directive 2002/73 in this respect.

³⁶⁷ Such as the action programmes and Framework Strategy on Gender Equality, COM (2000) 335 Final.

enabling them to compete with men. Directive 92/85/EEC³⁶⁸ which sets down rights in respect of pregnancy and maternity provides an alternative angle on the same approach, in that it recognises women's difference from men and seeks to provide protection from discrimination in respect of such difference. Although in some respects this can be seen as representing a departure from the European approach to sex equality articulated by the earlier legislative initiatives, it is actually based on the same premise – essentially that women are 'the other',³⁶⁹ and merit protection in respect of their 'otherness' in certain restricted circumstances. The relationship between child-bearing and rearing undoubtedly has a profound effect on women's labour market activity rates and has led to a predominance of female workers engaged in so-called 'atypical employment'. Although legislative instruments intended to offset the precariousness of such arrangements are not concerned with the attainment of 'sex equality' *per se*, the relationship between women's employment and atypical arrangements make it impossible to assess the impact of European law on gender relations without considering the effectiveness of such provisions.

In an influential and oft-cited article published in 1992, Fredman identified five characteristics of anti-discrimination laws which have been subject to criticism and which are all present to varying degrees in the European provisions.³⁷⁰ In considering those provisions, she sought to determine the extent to which EC anti-discrimination law depends on concepts which are 'flawed in the senses identified in the literature',³⁷¹ concluding that although European law was more progressive in some ways than its UK counterpart, it suffered from a

³⁶⁸ Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or who are breastfeeding (tenth individual directive within the meaning of article 16(1) of Directive 89/391/EEC).

³⁶⁹ From De Beauvoir, see Chapter 2 *infra*.

³⁷⁰ S. Fredman, *European Community Discrimination Law: A Critique*, 1992 *Industrial Law Journal* 21, pp. 119-134.

³⁷¹ Fredman *ibid* at p. 119.

failure 'to address the underlying structural obstacles to women's progress'.³⁷² Although Fredman's critique relies on an analysis of Community provision made over 10 years ago, the central tenets on which her objections are based still hold true despite the substantial amendments that have been made to this area over the past decade. The 'flawed' characteristics providing the focus of Fredman's analysis, which are worth revisiting in the context of the current legislative landscape, are: the particular concept of equality on which the provisions are based; the reliance on a dichotomy between equality and difference; the assumption of neutrality; the subordination of anti-discrimination legislation to the market order and the individualistic nature of the provisions and their enforcement.

The particular conception of equality on which the European approach is built remains essentially unchanged. In fact the recent inclusion of specific definitions of the particular types of discrimination at which the provisions of the Equal Treatment Directive are aimed clearly confirms this approach. Article 2 (2)³⁷³ of Directive 76/207 defines direct discrimination as arising 'where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation', and indirect 'where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex.' As Fredman asserts, this conception of discrimination is 'crucially limited by its dependence on a norm of comparison, which is generally the existing male norm.'³⁷⁴ Echoing MacKinnon's³⁷⁵ discontent with this approach to anti-discrimination law, Fredman posits that the application of this conception 'is particularly pertinent in explaining the persistence of labour market disadvantage'³⁷⁶ as an

³⁷² *Id* at 133.

³⁷³ Inserted by Directive 2002/73/EC. The 'new' definitions of direct and indirect discrimination incorporate the interpretation given to the concepts by the ECJ in its jurisprudence on sex discrimination – see Chapter 6 *infra*.

³⁷⁴ *Ibid* at p. 120.

³⁷⁵ For an exposition of MacKinnon's views, see *Feminism Unmodified* (1987), discussed in Chapter 2 *infra*.

³⁷⁶ Fredman *op cit* at p. 120.

inability to conform to a male norm will leave women, particularly those with children, unable to enjoy certain employment-related benefits and might actually lead to them being penalized. In the European context, this approach was particularly prominent in the early case law surrounding pregnancy and childbirth,³⁷⁷ and it can still be seen as central to the ideology informing the ECJ's decision-making in the area of justification for indirect discrimination.³⁷⁸ The work of the Court will be considered in Chapter 6 of this thesis. What is relevant at this juncture is recognition of the fact that the legislation on which the Court's decision-making is based clearly allows for this approach, directly inviting it in certain respects. This view of equality, which can be categorised as being based on the 'equal opportunities' conception,³⁷⁹ is central to the provision of Community law in this respect and actually comprises the central organising force for the four remaining flawed characteristics constituting Fredman's analysis.

The second of those characteristics is the assumed dichotomy of equality and difference. This concept harks back to the Aristotelian formula³⁸⁰ and, although useful in certain respects as a starting point in the development of strategies intended to eliminate discrimination, is severely limited in its application to real life circumstances. For example, an over-reliance on protective legislation aimed at countering the differences between the sexes can lead to the use of unrealistic gender stereo-typing that sees women consigned as the 'weaker sex', inferior to men both physically and mentally. For this reason, maternity rights must tread a

³⁷⁷ See Case C-179/88 *Handels-og Kontorfunktionaerernes Forbund i Danmark v Dansk Arbejdsgiverforening (Hertz)* [1990] ECR I-3979. See also the Court's restricted rulings in Case C-32/93 *Webb v EMO Air Cargo (UK) Ltd* [1994] ECR I-3567 and Case C-394/96 *Brown v Rentokil* [1998] ECR I-4185 in which it was held that a woman absent on the grounds of pregnancy- or birth-related illness is only protected for a specified period and will then be subject to comparisons with a sick male, regardless of the nature of her illness. The provisions of Directive 92/85 have assisted in certain respects in this context by providing specific rights on the grounds of pregnancy and childbirth (see below) but comparisons with a sick male still persist if the woman's illness lasts for longer than the 'protected period' which consists of the duration of the pregnancy and the appropriate period of maternity leave which will be subject to differing national standards.

³⁷⁸ See Chapter 6 *infra*.

³⁷⁹ See Chapter 2 *infra*.

³⁸⁰ That 'likes should be treated alike', discussed *infra* at Chapter 2.

careful path between recognition of the very real need to provide workplace support for the physical and psychological well-being of pregnant workers and those who have recently given birth (and their unborn child or infant) and over-protective blanket provisions based on the assumption that pregnancy and maternity leave all women overly vulnerable and in need of intervention which restricts their activities and personal autonomy.

Measurement against a 'male norm' means that women's physical characteristics or physiological functions appear 'different' or 'abnormal' which in turn leads legislators and those charged with the interpretation of resulting provisions into this latter trap. Furthermore, the consignment of all things child-related as a 'women's problem' perpetuates women's labour market disadvantage through employer's assumptions about the likely effects of such responsibility on career commitment. This, in turn, devalues the relationship between parent and child as women are required either to conceal the effects of motherhood from their workplace, resign themselves to the low-status lifestyle that so often accompanies attempts to 'have it all' or simply admit defeat by exiting the labour market altogether. In reality, of course, the range of factors which influence women's decision-making over whether or not to combine motherhood with paid employment include both economic necessity and personal fulfilment, the latter of which may be best served by labour market activity or not depending on individual needs and circumstances. The effective targeting of legislation aimed at increasing women's labour market security requires consideration to be given to a wide range of factors in order for it to avoid being overly prescriptive and, thus, prohibitive of the exercise of individual freedom. Admittedly, there is some recognition of such potential pitfalls within the European provisions which now incorporate specific protection on the grounds of maternity as well as providing a right to parental leave.

The approach taken toward the accommodation of difference on the grounds of pregnancy by Directive 92/85/EEC has been considered above, but the parental leave provisions, which are based on the premise of equal treatment, are worthy of specific scrutiny here. The approach adopted in Directive 96/34 attempts to equalise the protection of employment for parents of young children who require to have time away from work for family-based reasons. The Directive explicitly recognises that such duties need not be the exclusive responsibility of women by giving equal rights to both parents. The targeting of legislative activity at the alleviation of assumptions based on gender stereotyping makes good sense with an attempt to encourage men to 'assume an equal share of family responsibility'³⁸¹ providing an opportunity to re-negotiate the sexual contract.³⁸² However, the central weakness of this particular legislation is its reliance on pre-existing arrangements within Member States' national welfare systems for its execution which leaves the *status quo* firmly intact. This factor prevents the Directive from being a radical leader in policy-terms making it merely a whisper of dissent lost in the powerful resonance of generations of gendered role-ascription. The provision that such leave may be unpaid,³⁸³ adds further to the entrenchment of gendered stereo-types as decisions regarding who should take time off for the care of young children are likely to be based on financial considerations with the effect that, for many families, loss of the women's (lower) wage for an extended period has less of an impact than losing that of her partner would have.

The assumption of neutrality forms the basis of Fredman's third flawed concept through what she describes as 'a central implication...that differential treatment which benefits women at the expense of men [which] is considered to be as objectionable as its converse, even if its

³⁸¹ Framework Agreement on Parental Leave annexed to Directive 96/34 at para. 1 (8).

³⁸² See Pateman, discussed *infra* at Chapter 2.

³⁸³ Clause 2 (8) of the framework agreement specifies that matters relating to social security are to be determined by the Member States in accordance with national law.

aim is to redress past discrimination against women.³⁸⁴ This overlooks the effects of centuries of patriarchal power exercised over women which, until relatively recently, expressly excluded them from participation in political life³⁸⁵ and which continues to shape the nature of gender relations. It is due to this particular conceptualisation of 'equality' law that positive or affirmative action is expressly prohibited, although in recent years amendments have been made to the text of Article 141³⁸⁶ and to Directive 76/207³⁸⁷ allowing its use in some, restricted circumstances. Under the strict application of the 'equal opportunities' model which forms the basis of European Community sex equality law, the principle of equal treatment must always be applied and both sexes always treated the same unless differential treatment can be justified as one of the restricted grounds for derogation. This means that treatment 'favouring' one sex is perceived as, at the same time, disadvantaging the other. While this is technically true at the time that the treatment is received, such an 'in the moment' interpretation of the effects of 'favourable' treatment only serves to restrict the uses to which the law could otherwise be put. As Fredman observes, such a view 'assumes that equality is an end in itself, rather than a mechanism for correcting disadvantage'.³⁸⁸

This point can be effectively illustrated by reference to what is generally accepted as one of the major contributory factors to women's continuing economic inequality: gendered work patterns and resultant occupational segregation. The labour markets of most industrialised

³⁸⁴ Fredman *op cit* at p. 128.

³⁸⁵ See the general discussion of the effects of patriarchy and MacKinnon's analysis in particular in Chapter 2 *infra*.

³⁸⁶ Article 141(4), inserted by the Treaty of Amsterdam, states 'With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers'.

³⁸⁷ Following its amendment by Directive 2002/73, Article 2(8) of Directive 76/207 now provides for the maintenance or adoption of measures within the meaning of Article 141(4) and Article 8a establishes a duty on the Member States to communicate to the Commission every four years the text of laws, regulations and administrative provisions or any measures adopted pursuant to Article 141(4).

³⁸⁸ Fredman *op cit* at p. 129.

economies are increasingly moving towards non-standard arrangements with high proportions of the workforce currently engaged in so-called “atypical” employment.³⁸⁹ With many of the new working arrangements operating at the lower paid, more “flexible” end of the market, newly created jobs are predominantly filled by women.³⁹⁰ Conversely, the work arrangement used as a standard against which other employment types are judged to be “atypical” is a male standard and has little in common with the career experiences of most low-paid female workers. The problems associated with occupational segregation will never be eradicated until labour market policies which single out non-standard working patterns as somehow deviant are adequately challenged. What is required is the development of policies supported by hard law measures that attempt to redress the imbalances found within existing structures such as employment sectors and supporting institutions. This may include the setting of legally enforceable quotas to increase representation of women (and men) in areas where they are currently underrepresented. In the case of female employment, such redress entails ‘trading up’ to better paid, more sought after employment. The stumbling block here is that, under the current legal regime, such measures are likely to be interpreted as ‘preferential treatment’, thereby crossing the line between the legally acceptable realms of positive action and reverse discrimination which is prohibited by law.³⁹¹ What such conceptualisation fails to acknowledge is that men and women’s employment is not the same: it varies in terms of its nature, the patterns of labour-market behaviour exhibited by the members of both sexes over the life cycle and, concurrently, in relation to the terms and conditions that are applicable under the current system. These factors must be acknowledged if law is to be used as an effective means of redistributing resources and effecting real change.

³⁸⁹ See Chapter 3 *infra*.

³⁹⁰ S Fredman, *Women at Work: The Broken Promise of Flexicurity* (2004) 33 Industrial Law Journal 299.

³⁹¹ For a compelling critique of the conceptualisation of affirmative action in policy-making, see C Bacchi, *Policy and Discourse: Challenging the Construction of Affirmative Action as Preferential Treatment* (2004) 11 Journal of European Public Policy 128.

The primary difficulty faced by legislators seeking to redress the effects of an unequal power relationship between the sexes, whether at the national or supranational level, rests in the structural nature of contemporary labour markets which are, themselves, subject to a multitude of divisions on gender lines.³⁹² Gendered occupational segregation has become such a central feature of the organisation of labour markets that work itself is gendered, with both sexes working exclusively in certain occupations and sectors and, where men and women do work together, women more likely to find themselves at the bottom end of occupational hierarchies. It is this situation which informs the identification of the fourth of Fredman's flawed characteristics: that of the subordination of anti-discrimination legislation to the market order.

It is the need to effectively reconcile the anomaly apparent in the co-existence of a free market order on the one hand with the State intervention required by anti-discrimination legislation on the other which poses the greatest challenge to policy-makers. Such intervention is, by its very nature, invasive in that achievement of the equality goal necessitates interference with the free functioning of the market by attempting to correct the inequalities resulting from the furtherance of the capitalist aim realised through the maximum exploitation of resources for the attainment of profit. In practice, the tensions inherent in such conflicting goals compete so that, without an overriding commitment to its achievement, the equality aim may become severely compromised. Furthermore, initiatives driven by market-deregulation can be effectively misrepresented as constituting attempts to improve women's labour market position, for example, through the expansion of 'flexible' employment flaunted as providing an opportunity to participate. In reality, newly created jobs often amount to low-wage peripheral positions which are poorly protected in the event of changes to employer

³⁹² See Chapter 3 *infra*.

demand and subsequent contractions of the market. Given such basic vulnerability, accompanying legislative intervention is often weak and unenforceable, providing little more than lip service in practical terms.

In the European context, the influence of market forces on the development of sex equality legislation has manifested itself in two specific ways: first, through the use of the objective justification defence in cases of indirect discrimination and, second, in respect of the targeted protection of atypical workers encapsulated by Directives 97/81/EC³⁹³ and 1999/70/EC³⁹⁴ which provide rights for part-time and fixed-term workers respectively. The Court's jurisprudence on justification in indirect discrimination will be considered in depth elsewhere in this thesis,³⁹⁵ but it is worth focusing attention here on the protection afforded to atypical workers under European law. Both directives are aimed at providing non-standard workers with a right to equal treatment with their standard worker counterparts. Although the Directives do not apply any sex-conscious criteria, their effects are more likely to be felt by female workers due to the nature of women's work and the corresponding relationship between childcare arrangements and paid employment. The comparisons required by the legislation are narrowly construed so that the right is to equal treatment with standard workers engaged in broadly similar work, employed by the same employer at the same time under the same type of contract.³⁹⁶ As well as excluding high numbers of atypical workers for the reasons relating to segregated labour markets set out above, this approach has another

³⁹³ Council Directive 97/81/EC of 15 December 1997 concerning the framework agreement on part-time work concluded by UNICE, CEEP and the ETUC, OJ 1997 L 14/9.

³⁹⁴ Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, OJ 1999 L 244/64

³⁹⁵ See the case analysis in Chapter 6 *infra*.

³⁹⁶ Furthermore, Member States are given so much discretion that inequalities in contractual status can be transposed directly into the implementing provisions – see, for example, the UK's implementation of Directive 1999/70 which applies the equal treatment principle to *employees*, rather than the broader category of workers, in order to preserve the differentiation of those who work through tripartite agreements and are often deemed to be self-employed under national law and, thus, excluded from the scope of the The Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002, SI 2002 No 2034.

fundamental flaw, which severely limits its likely impact. The derivative nature of the approach means that it does not provide any substantive rights to workers identified as being disadvantaged and vulnerable, which in turn, means that it presents no challenge to the cause or nature of such disadvantage. In practical terms, the part-time worker who finds herself employed in a sector which is generally low paid has no redress as long as her pay is set at a similarly low rate as that of her full-time counterpart. In any case, the exclusion of agency workers from the protection afforded by either Directive provides unscrupulous employers in unregulated national labour markets with a convenient method of circumventing their obligations. In short, this aspect of European regulation clearly illustrates the end result of a process which seeks to provide protection to vulnerable workers at the same time as catering to the deregulatory regime deemed necessary in order to increase competitiveness.

Finally, Fredman identifies the focus on individuals as being the fifth flawed characteristic of anti-discrimination law, asserting that such a focus 'obscures the essence of discrimination, which is that the opportunities available to a person are determined according to assumptions based on her membership of a group rather than her individual needs or talents.'³⁹⁷ This approach serves to perpetuate the misconception that the problem of discrimination affects one individual whose inability to conform to a (male) norm makes her appear 'abnormal'³⁹⁸ and overlooks that individual's membership of a class or group which, in total, comprises over half the population. As Fredman acknowledges, the enforcement mechanisms of EC law have gone some way towards lessening some of the effects of individualism. For example the European Commission's ability to initiate infringement proceedings under Article 226 places less of a burden psychologically and financially on individual claimants and the Article 234

³⁹⁷ Fredman *op cit* at p. 132.

³⁹⁸ See N. Lacey 'From individual to Community' in B. Hepple and E. Szyszczak (eds) *Discrimination: The Limits of Law*, (Mansell, 1992)

reference procedure has enabled its strategic use by equality agencies and trade unions.³⁹⁹ Furthermore, the shift in the burden of proof following the establishment of a *prima facie* case provides some welcome relief to the individual claimant pitched against a generally more powerful employer.⁴⁰⁰ What remains beyond question, however, is the inappropriate level of reliance placed on individual complaints as the sole means of access to justice in this context. As well as arising piecemeal from the diverse legal systems of the Member States, the time and effort expended in the resolution of individual cases results in a slow and incremental development of important legal principles as well as placing a heavy burden on the individual. However well intentioned or executed subsequent improvements to the current system may be they cannot counter the obvious weaknesses which will continue for as long as the individual complaint continues to be unsupported by any mechanism aimed at providing class remedies.

The Role of the ECJ

This Chapter has focused largely on the legislative provision of European Community law which is intended to provide the right to formal equality between men and women through the application of the appropriate Treaty Articles and secondary legislation. As noted, the European Court of Justice has been instrumental in interpreting these instruments in order to provide substantive rights at the national level, in particular through the direct effect of Article 141. The recent movement away from hard law measures intended to regulate labour market discrimination from the 'top down' towards the introduction of 'bottom up' employment policy co-ordination could lead to an increased emphasis on the role of the Court in interpreting existing provisions in line with the growing emphasis on international

³⁹⁹ Fredman *op cit* at p. 133.

⁴⁰⁰ See Directive 97/80/EC.

standards, particularly with regard to the increasing prominence of the human rights agenda.⁴⁰¹

The Court's interpretation takes place through consideration of the legal texts themselves and through the application of the fundamental and general principles enshrined by the European legal order. In Chapter 5, the composition and operation of the Court will be considered in the context of the Article 234 procedure and, in Chapter 6, the court's reasoning will be specifically considered in relation to a selected group of cases. However, this assessment of the relevant provisions of Community law on which the Court's jurisprudence on gender relations is based would be incomplete without some consideration of the principles themselves.

Fundamental and General Principles of EC Law

In interpreting the substantive provisions of Community law in relation to the circumstances of a particular case, the ECJ applies certain principles which, as well as aiding in the interpretive task itself, enable some consistency of approach. Some of these principles are 'fundamental' in nature, meaning that they are expressed in the EC Treaty, others form the 'general' principles of EC law as they are largely unwritten and have been received through the Court's jurisprudence. Certain general principles have evolved on the basis of fundamental rights through instruments of international law, such as the human rights

⁴⁰¹ As evidenced by the drafting of the EU Charter of Fundamental Rights in 1999 which consolidates the various international human rights and national constitutional provisions within one document. Although not legally binding until (and unless) the Constitutional Treaty is ratified by the Member States, the Charter 'is certainly not without any legal influence or effect.' (P. Craig and G. de Búrca, *EU Law: Text, Cases and Materials*, at p. 362). See further L. Betten *'The EU Charter of Fundamental Rights: A Trojan Horse or a Mouse?'* (2001) *International Journal of Comparative Labour Law and Industrial Relations* 151.

provision of the International Labour Organisation's Convention 111⁴⁰² and the European Convention on Human Rights.⁴⁰³ These fundamental rights have been invoked with increasing frequency before the ECJ even though, in contrast to the fundamental principles themselves, they have a precarious legal base resting on the interpretation of three Articles: Article 230⁴⁰⁴ which empowers the Court to review the legality of Community acts on the basis of *inter alia*, 'infringement of this Treaty' or 'any rule relating to its application.'; Article 288 (2)⁴⁰⁵ which governs Community liability in tort/delict by providing that such liability is to be determined 'in accordance with the general principles common to the laws of member states'; and Article 220 EC⁴⁰⁶ which governs the role of the ECJ and provides that the Court 'shall ensure that in the interpretation and application of this Treaty the law is observed'.⁴⁰⁷ As they are not specifically provided for in the Treaty, there is no indication as to the scope or content of general principles which are left to the ECJ to determine.

Some of the general principles of EC law⁴⁰⁸ have a textual foundation in the Treaty, while others have been developed in secondary legislation. The most familiar are drawn from national constitutional and administrative provisions. Although not an exhaustive list, the following are examples of the more relevant general principles arising in the context of the cases under review in Chapter 6 of this thesis:

⁴⁰² See the Court's judgment in Case 149/77 *Defrenne v SABENA* [1978] ECR 1365 ('*Defrenne III*') in which, referring to the elimination of sex discrimination, it stated 'the same concepts are recognised by the European Social Charter of 18 November 1961 and by Convention No. 111 of the International Labour Organisation of 25 June 1958 concerning discrimination in respect of employment and occupation.'

⁴⁰³ As incorporated into the EU Charter of Fundamental Rights, see n. 127 *ibid.* Chapter III of the ECHR sets out certain equality guarantees, including, under paragraph (b), equality between men and women.

⁴⁰⁴ Ex 173.

⁴⁰⁵ Ex 215(2)

⁴⁰⁶ Ex 164.

⁴⁰⁷ See Chapter 5 *infra*.

⁴⁰⁸ For example, the principle of non-discrimination.

Non-Discrimination

As a general principle, the concept of non-discrimination is binding on both the Community and the Member States. It is expressly mentioned in a number of distinct contexts within the Treaty.⁴⁰⁹ The concept of non-discrimination also arises in EC law as a Community goal and has, therefore, been used as the basis for Community action. As well as in the development of the Charter of Fundamental Rights, this function has also been utilised in recent years as the basis for the addition of Article 13 EC by the Treaty of Amsterdam.

In terms of its place within the wider scheme of EC law, the concept of non-discrimination should be distinguished from the concept of equality. Although the terms 'equality' and 'non-discrimination' are often used synonymously, the former, due to its enshrinement within the Treaty under Article 141,⁴¹⁰ arises as a fundamental principle and the latter is afforded status as a general principle. As the ECJ's case law illustrates, the legal concept of non-discrimination is problematic. In the context of indirect discrimination, the identification of a breach involves the specification of a difference in treatment between two people who are similarly placed followed by the determination of whether the different treatment is justified. The Advocate Generals in two pre-Article 13 cases, *P v S*⁴¹¹ and *Grant*,⁴¹² argued that the general principles of EC law imposed a requirement on the institutions and the Member States not to discriminate in the areas covered by Community law on arbitrary grounds such as sexual orientation or having undergone gender reassignment. However, as the judgments in

⁴⁰⁹ Specifically: Article 13 (ex 6a); Article 12 (ex 6) non-discrimination on the grounds of nationality; Articles 39, 43, 49-50 (ex 48, 52, 59-60) free movement of persons; amended Articles 2 and 3 and 137 and 141 (ex 118 and 119) equal treatment of men and women; Article 34(2) (ex 40(3)) producers/consumers in field of agriculture.

⁴¹⁰ Although originally identified as a fundamental principle of equal pay by the ECJ in *Defrenne II*, the provision of Article 141 has been significantly broadened through the Court's jurisprudence to encompass equal treatment between the sexes.

⁴¹¹ Case C-31/94 *P v S and Cornwall County Council* [1996] ECR I-2143.

⁴¹² Case C-249/96 *Grant v South West Trains Ltd* [1998] ECR I-621.

both cases demonstrate, the Court has been more conservative in this respect: in *Grant* the ECJ ruled that ensuring respect for fundamental rights could not have the effect of extending the scope of the Treaty provisions beyond the competences of the Community so that the Equal Treatment Directive could only be applied in cases concerning differential treatment on the grounds of sex, not sexuality.

Proportionality

The concept of proportionality is the basis on which the test for objective justification in cases of indirect discrimination is based.⁴¹³ The concept itself as applied by the ECJ is an amalgam of specific Treaty provisions which justify Community action only where such action is deemed 'necessary' or 'required' to reach a certain end and certain provisions of the Member States' national legal systems.⁴¹⁴ A specific version of the principle is now enshrined in Article 5 EC which provides that action by the Community shall not go beyond what is necessary to achieve the objectives of the Treaty with its requirements fleshed out in a Protocol to the Treaty. This provision can be used to challenge actions of the Community itself or to test the legality of state actions which fall within the application of Community law and involves a three stage test: (1) whether the measure was suitable to achieve the desired end (2) whether it was necessary to achieve the desired end (3) whether the measure imposed a burden on the individual that was excessive in relation to the objective sought to be achieved.⁴¹⁵

⁴¹³ See Chapter 6 *infra*.

⁴¹⁴ The provisions of German and French law have been particularly influential in this respect – see further Chapter 6 *infra*.

⁴¹⁵ Proportionality *stricto sensu*

Legal Certainty and Legitimate Expectation

The inter-related notions of legal certainty and legitimate expectation are found in many national legal systems but their precise legal content may vary quite significantly from one system to another. What applications of the concepts generally have in common is the desire to develop and apply the law consistently in order that those who may be affected by the application of rules will have an awareness of that fact and will be able to plan and moderate their actions accordingly. This concept is bound up with notions of fairness and constitutes an important tenet of the rule of law. Accordingly, the application of a new rule to events which have already been concluded will generally be unacceptable as it goes against such notions by giving rise to retroactive effect. National legal systems and Community law are, not surprisingly, unreceptive to the actual retroactive application of rules. However, under Community law, retroactive impact may be allowed in certain circumstances if such impact clearly follows from normative terms or from the objectives of the general scheme of which they are part.⁴¹⁶

In the legislative context, apparent retroactivity may be permissible where provisions are applied to events which occurred in the past but which have not been definitively concluded. This is a complex concept which is can be distinguished from actual retroactive application on the grounds that administrations must have the power to alter policy for the future, even where such alteration might have implications for the conduct of private parties planned on the basis of a pre-existing legal regime. In the current context, the use of retroactivity by the

⁴¹⁶ See Case 98/78 *Racke (Firma A) v Hauptzollamt Mainz* [1979] ECR 69.

Court of Justice as a means of restricting the effects of its own judgments in certain circumstances is illustrated by some of the cases considered in detail in Chapter 6.⁴¹⁷

Conclusions

The development of social law within the European legal order has been slow and incremental. Despite its uncertain beginnings, sex equality is now firmly entrenched as an important principle of European law as evidenced by the plethora of primary and secondary legislation supported by soft law initiatives in this area. Furthermore, complimentary provisions exist which are aimed at providing rights to workers, the majority of whom are female, who suffer disadvantage on the grounds of the non-standard nature of their working arrangements. Recent developments include an expansion in the areas of competence of Community law in the broad field of equality which signals a move towards a more inclusive human rights approach to social provision. However, this apparent opportunity for the furtherance of the European Union's social aims has been accompanied by a move away from hard law initiatives towards the co-ordination of employment policy at the Member State level.

Despite the wide range of existing legislative instruments in the equality field, there has been little development in the conceptualisation of equality and related principles within such provision. Even where attempts have been made to strike out against the charge of replicating women's disadvantage by the ascription of conformity to a male norm – notably in the provision of rights to women on the grounds of pregnancy and the introduction of parental leave – the nature of the provisions transposes the same conceptualisation, thus leaving the

⁴¹⁷ Case C-262/88 *Barber v GRE* [1990] ECR I-1889; Case C-78/98 *Preston v Wolverhampton Healthcare NHS Trust* [1999] ECR I-3201; Case C-50/96 *Deutsche Telekom AG v Schröder* [2000] ECR I-743.

status quo intact. The flaws identified in European sex equality law over a decade ago by Sandra Fredman are still relevant today and are to be found in the context of recent additions to the legal framework as well as in the more well-established provisions. In fact, Fredman's critique of European discrimination law mirrors the weaknesses in traditional and contemporary theory⁴¹⁸ so closely, that her analysis constitutes a presentation of the theoretical perspectives placed in a specifically legal context. In this respect the European legal order represents a microcosm of the wider society displaying all of the same symptoms of patriarchal forces and this from a system of law specifically intended to eliminate inequality between the sexes.

The combination of factors outlined above provides an interesting challenge to the European Court of Justice in respect of its role in the interpretation of the provisions of Community law. In contrast to those courts which operate within domestic legal systems, the ECJ is charged with a wide discretion in the execution of its duties, unfettered by the constraints of binding precedent and empowered to utilise a wide range of sources as aids in its reasoning. These factors combine to place the Court in a unique position, even within the relatively weak legislative framework, to develop further the rights of non-standard workers by application of the fundamental principle of equality. This is of particular relevance in the context of this thesis, the main purpose of which is to uncover the extent to which the Court's adjudications on cases referred under the Article 234 procedure can be characterised as having a common output amounting to an identifiable jurisprudence on gender relations.

⁴¹⁸ Discussed in Chapter 2 *infra*.

In the next Chapter, consideration will be given to the Court's role within its institutional setting and an assessment will be made of its considerable sphere of influence over the development of Community law generally and, in particular, in the field of gender relations.

Chapter 5

The European Court of Justice

*'The juridical top of a political iceberg'*⁴¹⁹

Introduction

The European Court of Justice has been identified as having a dual identity and corresponding role within the European Union's institutional structure. In her analysis of the concept of gender within the context of the role of the ECJ, Shaw adopts a 'dual vision' in which the Court is seen as both a legal and political institution,⁴²⁰ so that it operates 'within normatively constraining systems of legal reasoning, argument and interpretation and subject to conceptions of the proper judicial role within a constitutional system' as well as 'responding to the changing agendas inherent in the politics of the EU.' This vision of the Court is central to the approach adopted in this Chapter (as well as in the thesis generally) which attempts to link the Court's developing jurisprudence with the evolving legal and political structures of the EU. As stated elsewhere, the purpose of this thesis is to uncover the extent to which the Court's adjudications on cases referred under the Article 234 procedure, which are subject to such a range of influences, can be characterised as having a common output amounting to an identifiable jurisprudence on gender relations. The context in which the Court operates, within what was established as an economic community with its foundations strongly rooted in the neo-liberal, free market ideology of twentieth century Western Europe, is central to this undertaking. By considering the interplay between the political environment and the Court's

⁴¹⁹ From André Donner, *The Role of the Lawyer in European Integration*, (Edinburgh University Press, 1968). At the time the quote was made (in relation to the criticism that the Court should have adjudicated on the legality of the infamous Luxembourg Accords), Donner presided as a judge in the ECJ.

⁴²⁰ J. Shaw 'Gender and the Court of Justice' in G. De Búrca and J. Weiler (eds) *The European Court of Justice* (OUP 2001) pp. 87-142 at p. 87, see also G. De Búrca, *The Principle of Subsidiarity and the Court of Justice as an Institutional Actor* (1998) 36 JCMS 217.

interpretation of the Treaties and secondary legislation it will be possible to construct a framework within which the central case analysis in Chapter 6 can take place.

Detailed consideration of the Court's jurisprudence will be undertaken in Chapter 6 and the analysis offered here does not attempt to replicate that, rather to ascertain the main stages in the Court's development, so that a deeper and narrower focus can be subsequently applied to a specific group of cases. Before such analysis can take place, the operational aspects of the Court will be considered: the rules of appointment and composition of the Court will be discussed; jurisdictional factors will be identified and the processes and procedures by which the Court operates will also be scrutinised. Particular attention will be paid to the Article 234⁴²¹ procedure by which the cases referred to in Chapter 6 are brought before the Court. Underpinning these considerations and emerging as a central theme throughout this Chapter will be an examination of the ECJ's role in the constitutionalisation of the Treaties which the Court has been credited with through its development of the principles of direct effect and supremacy. This informs an evaluation of the ECJ's external relations with the Member States' national courts and the other Community institutions and also provides a useful means of examining the views of legal scholars and other commentators regarding the perceived impact of the Court's activities on the development of Community law. Finally, the development of the Court's judicial role will be considered to identify the interpretative approaches taken and legal reasoning applied in its treatment of the case law brought before it under the preliminary rulings procedure.

⁴²¹ Ex Article 171 EC.

Judicial Appointment and Composition of the Court

Following the amendments made by the Treaty of Nice, the composition of the Court is governed by Articles 221-225a of the EC Treaty. A Protocol on the Statute of the Court of Justice dealing with the organisation and procedure of the Court was added by the Treaty of Nice. The Treaty provisions on the composition of the judiciary, which permit one judge per Member State, are amended upon each enlargement of the Union. At the time under review in this thesis,⁴²² the number of judges was, thus, 15.⁴²³ Article 233 requires the appointment of a judge to be 'by common accord of the governments of the Member States'. The term of office is six years and the appointment of new judges or reappointment of existing judges is staggered with partial replacement occurring every three years. Article 227 requires the ECJ to be assisted by eight Advocates-General (AGs) and the qualifications, methods of appointment and conditions of office are the same for the Advocates-General as for the judges. Article 167 EC requires those deemed to be suitable for selection as judges or AGs of the ECJ to be 'persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial office in their respective countries or who are jurisconsults of recognised competence.' The extent to which judicial independence can be guaranteed under a fixed term appointment system may be questionable, particularly as the Court's deliberations are not made public.⁴²⁴ However, in practice, most judges have been reappointed and the conditions of office do allow for an element of peer review and self-regulation in that Article 6 of the Statute of the Court provides for the removal of any judge or AG who, in the unanimous opinion of the other judges and Advocates-General, no longer fulfils the necessary conditions and obligations of office.

⁴²² As stated in Chapter 1, the law is considered up to 31 December 2005. Although the 10 newest Member States acceded to the European Union in May 2004, the impact on the Court's jurisprudence of that phase of enlargement had not been felt when the cases under review in Chapter 6 came before the Court.

⁴²³ Now 25 - Article 221/EC specifies one judge per Member State.

⁴²⁴ Although the individual opinions of the A-Gs are made public.

Historically, the gender balance of the Court has been predominantly male, with the first female judge appointed as recently as 1999⁴²⁵, although a female Advocate-General had previously served from 1981-85.⁴²⁶ In recent years, further female judicial appointments have been made to the Court of Justice, by Germany (2000), and to the Court of First Instance by Finland and Sweden (on the accession of those countries in 1995), and a female Advocate-General has been appointed by Austria (2000). As Shaw notes, the limited female participation rates are reflective of the gendered vertical segregation evident in the judiciaries of most of the Member States, particularly where entry is by competition.⁴²⁷ Furthermore, 'although women, as a percentage of the judiciary as a whole [within Member States], are frequently better represented than in other professions, they are very poorly represented in the highest positions.'⁴²⁸ This has a knock on effect with regard to the pool of potential recruits to the Court of Justice, which is drawn primarily from the senior judiciaries of the Member States, although not exclusively as appointments can also be made from academia, national office or other branches of the legal profession. Horizontal segregation also has an impact on the selection of suitable recruits from the national judiciaries as many women judges operate in specialist areas outside of the direct competence of the European Court, for example in family law, and are therefore not considered as suitable potential recruits.⁴²⁹

The causes and effects of a lack of female representation in decision-making have been well versed elsewhere⁴³⁰ and it is beyond the scope of this thesis to revisit them. However, it is

⁴²⁵ By Ireland – Fidelma O'Kelly Macken.

⁴²⁶ Advocate General Simone Rozès.

⁴²⁷ Shaw *ibid* at p. 116. See also S. Kenney, 'The Members of the Court of Justice of the European Communities', (1998/9) 5 Columbia Journal of European Law 101.

⁴²⁸ *Id.*

⁴²⁹ See M. Anasagasti and N. Wuiame, *Women and Decision-Making in the Judiciary in the European Union* (Brussels, OOPEC (DG for Employment, Industrial Relations and Social Affairs, Unit V/D.5, 1999).

⁴³⁰ For an international perspective, see H. Charlesworth, C. Chinkin and S. Wright, 'Feminist Approaches to International Law', (1991) 85 American Journal of International Law 85; for a UK view, see Department for

interesting to note that the same barriers to access and progression appear to affect the careers of those at the top end of the legal profession in the respective Member States as in other areas of employment and public life in general.⁴³¹ Furthermore, in the EU context, the poor participation rates of women are not restricted to the judiciary but also exist across most of the institutions despite the efforts that have been made to improve this position.⁴³²

Regarding the nationality of the judges in the ECJ, Member States have tended to select from among their own nationals, although this is not a formal requirement of the 'one judge per Member State' rule. However, the EC Treaty does require that the judges are entirely independent of the government which selects them and from any other interest group. As Craig and De Búrca contend, the Court's jurisprudence supports the existence of such independence in so far as 'the specific wishes of the individual Member States have had little influence on its decision-making'⁴³³ although the impact of political pressures on the Court's decision-making cannot be overlooked, particularly in the context of relatively 'non-legal' arguments made by Member States before the Court often on policy-related or public opinion grounds. This point can be illustrated with reference to the Court's jurisprudence on equal pay and treatment. In *Barber*,⁴³⁴ the temporal limitation imposed by the Court on the effect of its own judgement, which resulted in the attachment of the 'Barber Protocol' to the Maastricht Treaty, arose as a direct result of representations made by Member States concerning the

Constitutional Affairs, *Increasing Diversity in the Judiciary* (October 2004); for an assessment of the overall EU picture, see M. Anasagasti and N. Wuaime, *Women and Decision-making in the Judiciary in the European Union*, *op cit.*; and for a persuasive critique of the current rejection of affirmative action in the area, see K. Malleson (2006) 'Rethinking the Merit Principle in Judicial Selection', 33 JLS 1, pp. 126-140.

⁴³¹ For a discussion of the explanations for the different career patterns of men and women, see Chapter 2 *infra*.

⁴³² For examples, see the Report from the Commission to the Council, the European Parliament, and the ECOSOC in the implementation of Council Recommendation 96/694 of 2 Dec 1996 on the balanced participation of women and men in the decision-making process, COM(2000) 120.

⁴³³ P. Craig and G. De Búrca, *EU Law Text, Cases and Materials* (3rd ed), (OUP 2003) at p. 89. An alternative view is that the Court's decisions reflect the interests of the most powerful Member States and, in doing so, reinforce their power – see G. Garrett, 'International Cooperation and Institutional Choice: The European Community's Internal Market', *International Organization* 46 (1992) 2, 533-58.

⁴³⁴ Case 262/88 *Barber v Royal Exchange* [1990] ECR I-1889.

financial implications of the retroactive application of contracted-out pension entitlements for all workers affected by the imposition of different retirement ages for men and women under national rules. The argument that to impose the full effect of the judgment retrospectively would have dire consequences for the financial service sectors within Member States was highly influential in the Court's handling of the case. The Court's change of heart in relation to the treatment of positive action measures arose as a direct consequence of external commentary⁴³⁵ between its rulings in the two German constitutional court's referrals *Kalanke*⁴³⁶ and *Marschall*,⁴³⁷ so that, in the former case, a national measure requiring the selection of a female applicant over a male was deemed unacceptable under Article 2(4) of the Equal Treatment Directive (76/207) except where all other factors were equal (i.e. in a 'tie break' situation), whereas in the latter an almost identical measure was permissible as a means of redressing underrepresentation within a specific employment sector. What is interesting about the Court's differing treatment of these two cases is not the express rejection of rules guaranteeing 'absolute and unconditional priority' for women which is, after all, perfectly consistent with the equal treatment approach adopted by European Community law,⁴³⁸ but rather the apparent need to rearticulate the nature of the condition in *Marschall*⁴³⁹ (which was implicit in the policy applied in *Kalanke*⁴⁴⁰) widely referred to as the 'saving clause' in order to justify its departure from the earlier ruling. Consideration of the external factors which influence judicial decision-making is central to this thesis and will be dealt with further in Chapter 6.

⁴³⁵ Including a barrage of criticism from women's interest groups, practising lawyers and academics – see, for example, D. Schiek 'Positive Action in Community Law' (1996) 25 ILJ 239; E. Szyszczak, 'Positive Action After *Kalanke*' (1996) 59 MLR 876; S. Fredman, 'Reversing Discrimination' (1997) 113 LQR 575. In addition, the European Commission issued a communication on the interpretation of the judgment – COM(96) 88.

⁴³⁶ Case C-450/93 *Kalanke v Freie Hansestadt Bremen* [1995] ECR I-3051.

⁴³⁷ Case C-409/95 *Marschall v Land Nordrhein-Westfalen* [1997] ERC I-6363.

⁴³⁸ See Chapter 2.

⁴³⁹ *Op cit* at n. 19.

⁴⁴⁰ *Op cit* at n. 18.

Jurisdiction of the Court

The European Court of Justice occupies a unique position within the political and legal systems of the EU as well as within the national legal systems of Member States. It is, at one and the same time, a constitutional, administrative and civil court and acts as ombudsman and arbiter on practically any question of Community law.⁴⁴¹ Although formally provided for under the Treaty of Rome (and subjected to subsequent amendments), its jurisdiction has developed over time, due partly to the challenges inherent in the interpretation of its own complex legal base and the opaque political aims referred to in the Preamble to the Treaty but also due to emerging constitutional principles which have unfolded incrementally.⁴⁴²

The Court's jurisdiction is set out in Articles 226-243⁴⁴³ of the EC Treaty and Article 46 of the TEU. The key provision in the Court's own interpretation of its sphere of influence is undoubtedly Article 220,⁴⁴⁴ which provides that, 'the Court of Justice and the Court of First Instance, each within its jurisdiction, shall ensure that in the interpretation and application of this Treaty the law is observed.' In the current context, this power has been used most effectively by the Court as a means of developing principles in a process that has become known as the 'constitutionalisation' of the Treaties⁴⁴⁵ and for which the ECJ has been lauded as 'one of the real driving forces of European integration.'⁴⁴⁶ By this process, the Court can

⁴⁴¹ The Court's multiplicity of functions and the resulting high regard which it is held has earned it the nickname 'hobbyhorse' among European lawyers – see T. Koopmans *'The Future of the Court of Justice of the European Communities'* (1991) 11 YBEL 15.

⁴⁴² For a general discussion of the main principles which have been applied by the ECJ most often in this context, see Chapter 4 *infra*.

⁴⁴³ Ex Articles 169-186.

⁴⁴⁴ Ex Article 164.

⁴⁴⁵ F.G. Mancini, (1989) *'The Making of A Constitution for Europe'* 24 CMLR pp. 595-614; J.H. Weiler (1981) *'The Community System; the Dual Character of Supranationalism'* 1 YBEL pp. 268-306; (1991) *'The Transformation of Europe'* 100 Yale Law J. 2403-83;

⁴⁴⁶ O. Pollicino (2004) *'Legal Reasoning of the Court of Justice in the Context of the Principle of Equality Between Judicial Activism and Self-restraint.'* 5 German Law Journal 3, 283, at p. 284. See also, E. Stein,

be seen to have used the powers vested in it to develop and expand what it has categorised as 'key principles' of law which have, in turn, implicitly become enshrined in the Court's interpretation of the Treaties by way of the procedural devices at its disposal. The Court's utilisation of its role in this way, justified on the grounds of preservation of the rule of law, can be illustrated by reference to its expansion of the scope and purpose of Article 141 (ex 119) in *Defrenne II*⁴⁴⁷ by its proclamation that the status of equal pay as a principle of Community law meant that there could be no other finding than that the provision should have direct effect. This had the dual purpose of bestowing enforceable obligations on Member States and conferring subjective rights upon individuals. Although equal pay between the sexes was specifically provided for in the wording of the EC Treaty, the means by which it was applied in order to create a nexus between individual and State was not expressly mentioned, direct effect being the first doctrine not explicitly derived from the wording of the Treaty, but rather from the spirit and the general scheme of Community law. Furthermore, the Court ruled that the inclusion of Article 141 in the Treaty was evidence of the Community's 'double aim' as being both economic and social, thus refocusing the political aspirations of the Community. The specific role of the Court in the establishment of a European Constitution will be considered further below in the section on legal reasoning and judicial activism. The *Defrenne* litigation will be considered in Chapter 6 in the context of its impact on the development and application of the equality principle in European Community law.

'Lawyers, Judges and the Making of a Transnational Constitution' American Journal of International Law, 1 1981.

⁴⁴⁷ Case 43/75 [1976] ECR 455.

The open-ended nature of the Court's role under Article 220 also sees it acting as 'interpreter of the Treaties' (and their limits) giving cause for its adjudication in disputes between the EC institutions over their respective powers and, more controversially, in disputes over the division of competence between the Community and Member States.⁴⁴⁸ As well as its broad function under Article 220, the Court also has specific duties in accordance with its jurisdiction, *inter alia*: Article 226 provides for the Commission to bring infringement proceedings before the Court against Member States in cases of alleged non-compliance with Treaty obligations; Article 227 for Member States to bring proceedings against each other; Article 228⁴⁴⁹ provides the Court with specific power to impose a pecuniary penalty on a Member State which fails to comply with a previous judgment against it; Articles 230-233 enable the Court to undertake judicial review of Community legislation; and Article 234 sets out the preliminary rulings procedure by which national courts or tribunals may refer cases requiring interpretation of Community law. In the current context, it is the last of these duties which has the most relevance as the procedure by which the cases considered in Chapter 6 were referred to the Court. The Article 234 procedure will, therefore, be considered in isolation.

The Article 234 Preliminary Rulings Procedure

The preliminary rulings procedure provided by Article 234 EC has been described as 'the 'jewel in the Crown' of the ECJ's jurisdiction'⁴⁵⁰ in that its importance in shaping Community law and the relationship between the national and Community legal systems could not have been foreseen at its inception. The wording of Article 234 is as follows:

The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

⁴⁴⁸ See Weiler (1991) *id* at n. 27.

⁴⁴⁹ Inserted by the TEU.

⁴⁵⁰ Craig and De Búrca *op cit.* at p. 432.

- (a) the interpretation of the Treaty;
- (b) the validity and interpretation of the acts of the institutions of the community and of the ECB;
- (c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State, against whose decision there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of justice.

The nature of the procedure itself establishes certain factors which, in turn, have a bearing on the nature of the Court's decision-making. For example, the fact that the procedure is reference-based means that the relationship between the domestic courts and the ECJ is not appellate, but depends on the individual national court's decision to refer and to set the terms of reference. Once the ECJ has given its ruling, it will send the case back to the national court which is charged with applying the relevant interpretation of Community law to the case at hand. By this two-way process of communication, relations between the national and Community legal systems have moved from being 'horizontal and bilateral' to become 'vertical and multilateral' in nature.⁴⁵¹ In the early days of the Court's operation, its relationship with the national courts was viewed as existing between equals. Each of the ECJ's rulings on specific cases was made directly to the court of origin, thus establishing a series of separate bilateral relationships between the European Court and the Member States'

⁴⁵¹ *Ibid* at p. 433.

national courts. However, over time, the key principles established by the European legal order (mainly by the Court itself) have changed this arrangement. The ECJ now sits at the top of a European judicial hierarchy served by the domestic courts, which act as enforcers of Community law, with the doctrine of supremacy dictating that a judgment given in response to a referral from one national court has application in all other national courts. This has led to the existence of a multilateral relationship between the ECJ and the domestic courts. Furthermore, the Article 234 procedure has served as the main mechanism by which the national courts and the ECJ have engaged in a discourse on the application of Community law in terms of jurisdictional issues generally but, in particular, when conflicts with domestic provisions have arisen.

Claire Kilpatrick has asserted that this 'dialogue' between national courts and the ECJ merits greater analytical attention than it has been afforded if the process of European integration is to be fully understood. In her work, which concentrates on the sex equality provisions of Community law,⁴⁵² Kilpatrick argues that traditional accounts of European integration tend to overplay the role of the ECJ as a pro-integrationist power. This perception, Kilpatrick contends, is misleading in two important respects: first it downplays the significant contribution of national courts in the development and application of key principles of Community law; and, second, it presupposes that courts generally, and the ECJ in particular, are at all times pro-integrative institutions. In reality, as Kilpatrick has shown, the relationship between the national courts and the ECJ is far more complex than generally assumed and, if tracked over time, displays a dynamic in which the UK courts, at least in the early days of the ECJ's operation, attempted to lead it into areas of uncharted territory by

⁴⁵² C. Kilpatrick, 'Community or Communities of Courts in European Integration? Sex Equality Dialogues Between UK Courts and the ECJ', 1998 4 ELJ 2, 121-147; Turning Remedies Around: A Sectoral Analysis of the Court of Justice, in de Búrca and Weiler (eds) *The European Court of Justice* (OUP 2001) pp. 143-176.

offering ‘opportunities to expand the reach of EC law.’⁴⁵³ The ECJ’s reluctance to provide creative and expansive rulings in response to such opportunities indicates that ‘The Court either did not want them or did not understand them’, leading to the conclusion that ‘The UK courts had a clearer understanding of the potential within the EC sex equality legal structuring than the ECJ.’⁴⁵⁴ This point will be further explored in the case analysis presented in Chapter 6.

That the Court has made an enormous contribution to the development of European Community law generally and the promotion of sex equality specifically is beyond doubt, but it is important that this role is not over emphasised when the history of European integration is written. A number of other institutional actors have also been key players in the process, often unintentionally or without full knowledge of the contribution that they were making at the time. The respective roles of the Member States’ governments and national courts (which have not always been in harmony with each other) and that of the other European Union institutions will be considered below in the section on external relations.

The fact that the ECJ does not operate under a system of binding precedent⁴⁵⁵ has also had an important bearing on the operation of the preliminary rulings procedure. The freedom to depart from its previous rulings, unfettered even from an obligation to justify such action,⁴⁵⁶ has provided the Court with far greater opportunities than the national courts to engage in creative and pragmatic decision-making. Whether or not the Court has always made full use

⁴⁵³ Kilpatrick (1998) *ibid* at p. 140.

⁴⁵⁴ *Id.*

⁴⁵⁵ The Court is not part of a hierarchical system and Community law is based on the civil law system and, as such, does not recognise the doctrine of *stare decisis*. However, in the interests of legal certainty, the Court does generally follow its own previous decisions unless there is good reason for not doing so. See, generally, A. Arnall, ‘Owning up to Fallibility: Precedent and the Court of Justice’, (1993) 30 CMLR 247.

⁴⁵⁶ In practice, when departing from a previous decision or the reasoning in a particular case, the Court has tended to explain its reasons for doing so, although in the infamous example of Cases 267-268/91 *Keck and Mithouard* [1993] ECR I-6097, the Court, in departing from its previous case law, neglected to specify which decisions were being set aside.

of such freedom is a moot point and will be further considered through an examination of the relevant literature on judicial activism below and in the context of the cases under scrutiny in Chapter 6. However, what is worthy of identification at this juncture, is that the lack of binding authority on the Court's activities has enabled the development and application of specific concepts which have proved to be of primary importance to the furtherance of social aims generally and gender equality in particular. As early as 1963,⁴⁵⁷ the Court decreed that the Treaty provided rights for individuals in Member States which could be enforced by them in the courts, thus creating the principle of direct effect. The following year,⁴⁵⁸ by stating that the Member States had 'limited their sovereign rights... [and] created a body of law which binds both their nationals and themselves,' the Court held that the principle of supremacy is implied into the Treaty. These concepts did not originate from the Court's consideration of sex discrimination *per se*, but have been utilised in that context to expand the available provisions of Community law.⁴⁵⁹ The fact that direct effect and supremacy were both deemed to be applicable to early sex discrimination cases presented to the Court by virtue of the Article 234 procedure has undoubtedly created a receptive environment for subsequent cases on related issues and has further facilitated the application of resulting principles within the national legal systems. The concepts themselves and their corresponding interpretation by the Court are certainly worthy of further analysis, but the role played in their development by the procedure itself should also be acknowledged.

The way in which preliminary rulings are dealt with represents a cyclical arrangement which is at once innovative and self-perpetuating: an individual litigant instigates proceedings before a national court on the basis that a Member State is in breach of a Community provision

⁴⁵⁷ 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1.

⁴⁵⁸ Case 6/64 *Flaminio Costa v Ente Nazionale per l'Energia Elettrica (ENEL)* [1964] ECR 585.

⁴⁵⁹ Most notably in *Defrenne II* in which the Court held that the former Article 119 (now 141) was sufficiently precise to be capable of having direct effect.

which provides specific individual rights enforceable through the national courts; a ruling is subsequently sought from the ECJ by the national court on the relevant provision of Community law; the ECJ finds the provision under review to be directly effective, thus enabling its further development in terms of both its enshrinement in the European legal order by implication and by its application once the case is returned to the court of origin for final adjudication. By this process, two things are ultimately achieved: the litigant is able to secure a remedy and Community law is further developed, thus illustrating the important role - both in national and supranational terms - played by the preliminary reference procedure as the means by which the constitutional doctrines of supremacy and direct effect were first applied. However, in its development of the doctrinal aspects of EC law and their resultant enshrinement within a constitutional context, the Court did not act in isolation but as part of a broader scheme in which it has acted, at times, as instigator and, at other times, disciple: in which it has both led and been led. It is on the Court's external relations that attention will now be focussed.

External Relations

The fact that the Article 234 procedure was used early on in the Court's history in cases of sex discrimination has meant that it is now perceived as providing a useful means of gauging the conceptualisation of gender relations in the EU institutions generally.⁴⁶⁰ Whether this perception is correct is open to debate, but it is easy to see how it has entered into accounts of the Court's institutional role. The plethora of case law which has resulted from the referrals of national courts to the ECJ provides a rich source of available data, ripe for analysis on a

⁴⁶⁰ See, for example, R.A. Cichowski, 'Women's Rights, the European Court, and Supranational Constitutionalism' *Law and Society Review* 38 (2004) 3, pp. 489-512.

seemingly endless basis. Some of this analysis is quantitative in nature,⁴⁶¹ but much of it is qualitative, as commentators have used it to explore, *inter alia*, the process of supranational constitutionalism,⁴⁶² the relationship between national Courts and the ECJ⁴⁶³ and the application of legal reasoning.⁴⁶⁴ As much of the literature demonstrates, the Court has benefited from an influential reputation in this respect – its development of the concept of supremacy and its subsequent finding of the direct effect of Article 141 has placed it in a unique judicial position from where it has been able to influence policy-makers at both national and supranational levels.

The distinct features of the ECJ's operation as a non-appellate, provider of opinion and the lack of binding precedent over its decision-making have meant that it is viewed as being distinct from national courts and is heralded as an agenda-setter in respect of national legal systems, wielding great influence over the established policy-making institutions within the Community. This perception of the Court's position within the wider institutional context presupposes a level of cooperation and agreement which has not always been present in its dealings with the Commission, Council and Parliament. Furthermore, as Kilpatrick has shown, it is important not to underestimate the nature of the two-way relationship between the ECJ and the national courts which serve, after all, as instigators of the references placed before the European Court and also reserve the power to interpret its rulings in accordance with existing national provisions. For this reason, any attempt to identify the nature and extent of the Court's jurisprudence on gender relations must also pay due consideration to the

⁴⁶¹ See, for example, A. Stone Sweet and T.L. Brunell, 'The European Court, National Judges and Legal Integration: A Researcher's Guide to the Data Set on Preliminary References in EC Law, 1958-98' ELJ 6 (2000) 2, pp. 117-127.

⁴⁶² Cichowski *op cit.*

⁴⁶³ Kilpatrick (1998), *op cit.*

⁴⁶⁴ O. Pollicino, 'Legal Reasoning of the Court of Justice in the Context of Equality: Between Judicial Activism and Self-restraint', 5 (2004) German Law Journal 3, 283-317.

national origins of its case law in terms of both the legislative provisions from which they arise and the socio-political environment in which those provisions operate. In terms of identifying the scope of national origins, this is a relatively easy exercise as a preliminary trawl through the relevant case law identifies a multiplicity of cases from certain Member States,⁴⁶⁵ often on related issues, and a correspondingly low number or complete lack of referrals from other Member States. This is, in itself, an interesting finding and while it cannot, of course, be used as evidence of either a superior knowledge or complete ignorance of EC law in the case of the non-referring national courts, it does tell us something of the nature of the socio-political systems and resultant legal provisions of those that *have* made regular use of the procedure. For example, the Court has been asked on a number of occasions by the UK courts for guidance on the appropriate treatment of female part-time workers under EC law.⁴⁶⁶ The case law in this respect has arisen as a result of the indirect discrimination provisions of the UK's domestic legislation coupled with the growth of part-time work among women with young children. Likewise, the relative lack of success for individual litigants in German referrals tells us something of the nature of current thinking on gender relations within that jurisdiction.⁴⁶⁷ That the policies utilised by German employers, particularly within the public sector, are more progressive and controversial than those of other Member States, at least in the eyes of the national judiciary is illustrated by the referral of questions concerning the legality of certain positive action measures under European law. These referrals have come about as a consequence of the German Constitutional Court's willingness

⁴⁶⁵ The UK courts were responsible for referrals to the ECJ in over 17% of the total number of cases dealing with equal pay and equal treatment between 1958 and 1998, representing the largest share of such cases in national terms by a quite considerable margin. The second largest share came from Denmark (5.80%). Source: Stone Sweet and Brunell (2000), *op cit* at n.43.

⁴⁶⁶ See: Case 96/80 *Jenkins v. Kingsgate (Clothing Productions) Limited* [1981] ECR 911; Case C-243/95 *Kathleen Hill and Ann Stapleton v. Revenue Commissioners and Department of Finance* [1998] ECR I-3739; Case C-78/98 *Preston and Others v Wolverhampton Healthcare NHS Trust* [2000] ECR I-3201, all discussed at length in Chapter 6 *infra*.

⁴⁶⁷ 67% of German preliminary references in the broad area of gender equality law between the years 1971 and 1993 concluded with the ECJ finding that the national practice was in violation of EC law: source Cichowski *op cit* at n.42, at p. 498.

to make use of the preliminary reference procedure in response to a couple of cases brought before it on the basis of the progressive use of such measures by the L nde civil services.⁴⁶⁸ The Court's subsequent treatment of these issues has had important repercussions in a far wider context than the domestic legal systems from which they arose, but, without the determination of the litigants involved, the requisite margin of doubt regarding the correct interpretation of the law, and the national courts' foresightedness, the ECJ would never have been given the opportunity to consider them. In this respect, the Court acts as a receptacle for the issues that are presented to it by national courts, rather than as an instigator of legal reform. This point will be further explored in the context of the cases presented in Chapter 6.

If the Court is considered in its broader context as one of a set of institutional actors in the story of European integration, other pearls of perceived wisdom must be subjected to scrutiny. The Court's reputation as an agenda-setting institution, providing a contemporary Constitution based on the development and application of sound normative concepts such as non-discrimination and equality which have been expanded to provide a clear set of enforceable rights must also be open to question. On the issue of supremacy and direct effect, a historical analysis reveals that the Commission's Legal Service had proposed the idea that Treaty rules should be directly effective long before the Court adopted that approach.⁴⁶⁹ Furthermore the seemingly incremental development of the nature of Community law in which the finding of supremacy followed a few steps behind the application of direct effect is also questionable if an historical perspective is adopted. The Court's assertion in *Van Gend en Loos*⁴⁷⁰ that the Treaty created directly enforceable rights was clearly understood at the

⁴⁶⁸ Case C-450/93 *Kalanke* and Case C-409/95 *Marschall*, *op cit*.

⁴⁶⁹ E. Stein, 'Lawyers, Judges and the Making of a Transnational Constitution', *American Journal of International Law*, 75 (1981) 1, at 24; D. Wincott, 'The Role of the Law or the Rule of the Court of Justice? An 'Institutional' Account of Judicial Politics in the European Community', *Journal of European Public Policy* 2 (1995) 4, 583-602.

⁴⁷⁰ Case 26/62 [1963] ECR 1.

time to imply the supremacy of Community law and *vice versa*. This much is clear from the opinion of Advocate-General Roemer who argued against the direct effect of Treaty Articles on the ground that the Treaty of Rome contained no supremacy clause.⁴⁷¹ As Wincott has observed, the Court's decision to allow the direct effectiveness of Treaty provisions without reference to the concept of supremacy says much about its political character at the time.⁴⁷²

The introduction of the supremacy principle a year after the Court's initial finding of direct effect is significant in that it happened at a time when it was clear that the decision in *Van Gend en Loos* had not, after all, been subjected to the widespread negative criticism in Member States that had perhaps been envisaged. The lack of a clear definition of the supremacy principle has not detracted from its application, but its meaning is still contested and, thus, the principle remains controversial.⁴⁷³ The Court's original affirmation of the supremacy of Community law,⁴⁷⁴ may not have defined what it actually *was*, but was crystal clear on what it meant for the national legal systems. The furore expected on the introduction of the concept of direct effect *did* occur following the Court's clear enunciation of the effect of the supremacy principle in *Flaminio Costa*.⁴⁷⁵ The judgment attracted particular opposition from, *inter alia*, the Bundesverfassungsgericht⁴⁷⁶ which asserted that, in cases of conflict between European Community law and constitutionally grounded provisions of national law, the latter should prevail.⁴⁷⁷ Perhaps partially in response to such criticism, the ECJ developed a jurisprudence which encompassed fundamental human rights worthy of protection by

⁴⁷¹ A-G's Opinion in *Van Gend en Loos*, *ibid*, at 118.

⁴⁷² D. Wincott (2000), 'A Community of Law? 'European' Law and Judicial Politics: The Court of Justice and Beyond,' 35 *Government and Opposition* 1, 3-26.

⁴⁷³ Article I-6 of the Constitutional Treaty (if it is ever ratified) will provide the first explicit constitutional definition of the principle of supremacy by its statement that 'The Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States.'

⁴⁷⁴ In Case 6/64 *Flaminio Costa v Ente Nazionale per l'Energia Elettrica (ENEL)*, *op cit* at n. 40.

⁴⁷⁵ *Ibid*.

⁴⁷⁶ The German constitutional court.

⁴⁷⁷ See the German court's decision in '*Solange I*' [1974] 2 CMLR 540 at 549-50.

application of the principle of supremacy and, it is through the benevolent distribution of such dogma that the Court has gained its reputation as the main architect of the constitutionalisation of the Treaties.⁴⁷⁸ Joseph Weiler has attributed this development to 'sheer judicial power'⁴⁷⁹ but, as Wincott has asserted,⁴⁸⁰ it owes something, at least, to the Court's support from its fellow (political) institutions, in particular the Council of Ministers. Without such reinforcement from the Member States' highest authorities, it would in reality have been incredibly difficult for the Court to have sustained its application of the supremacy principle despite the moral currency of its corresponding dicta.

Acceptance of the Court's interdependence on its fellow institutions is crucial in any analysis of its judicial role, which has changed over time dependent on the political environment in which it has found itself. If a longitudinal perspective is applied to the development of the ECJ's reasoning, the portrait that emerges is of the Court both as a judicial activist, making law rather than interpreting it, and as a pragmatic driving force in the integrative process. The markers in the switching of the Court's role are thrown down by the various stages in the political development of the Community and resonate with the legislative developments considered in Chapter 4, so that three broad stages in the development of the Court's jurisprudence can be identified.

⁴⁷⁸ J.H.H. Weiler (1981) *The Community System: The Dual Character of Supranationalism* 1 YBEL pp. 268-306; G. Mancini (1989) *The Making of a Constitution for Europe* 24 CMLR pp. 595-614; K. Lenaerts (1990) *Constitutionalism and the Many Faces of Federalism* 38 American Journal of Comparative Law pp. 205-64.

⁴⁷⁹ J.H.H. Weiler, (1986) *Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights within the legal order of the European Communities*, 61 Washington Law Review 3, pp. 1103-55.

⁴⁸⁰ D. Wincott *Human Rights, Democracy and the Role of the Court of Justice in European Integration* Democratization 1 (1994) 4, pp. 251-71.

The Development of the Court's Jurisprudence: The Impact of External Factors

The Constitutionalisation of the Treaties

First, as outlined above, the Court's early preoccupation with the construction of the framework of Community law, rather than the substantive impact of its judgments, undeniably placed it in the role of lead architect in the constitutionalisation of the Treaties. However, as a consideration of the Court's legal and political environment at the time reveals, the Court's activism arose as much as a result of a combination of external factors as from any bold brilliance on its own account. In its infancy, the ECJ's dealings with national courts were perceived as being between equals, thus creating a relationship of trust. The lack of any clear unifying principles in the Court's jurisprudence led to the development of a series of bilateral relationships based on the limited range of issues presented in the piecemeal case law that had come before it. In the context of the Community itself, the unanimity requirements of the decision-making process meant that the development of legislation was slow and laborious and political initiative sluggish, as typified by the 'laissez faire' approach characteristic of the early days of European social law and policy.⁴⁸¹ Furthermore, the immaturity of the legal order made it possible for the Court to avoid certain difficult political issues on which it would have been more or less impossible to arrive at a legal decision, the most obvious example of this being the 'Luxembourg Accords' of 1966, which were responsible for the specification of unanimity within the decision-making process.

The 'compromise' struck by the Luxembourg Accords resulted from the French ministers' boycott of the Council of Ministers, at President de Gaulle's instructions, on the basis that

⁴⁸¹ See Chapter 4 *infra*.

Member State governments should reserve the right to block Community legislation on the grounds of national interests. The Treaty actually provided for a move towards a decision-making process based on a system of qualified majority voting (on expiry of the transitional period) which would enable any individual government to be out-voted. The setting aside of this provision, albeit in specified circumstances, and its replacement with a completely different arrangement by way of an amendment outside of the Treaty is certainly legally questionable and would, under a more mature legal system, have been subjected to judicial review. Writing at the time, one of the Court's judges rejected the possibility of the ECJ's consideration of the issue on the grounds that,

'it would have been the definite end of the communities as communities if the opposing parties had gone to law and asked a ruling of the Court on details that were no more than the juridical top of a political iceberg. Under the existing conditions, the capacity of the legal framework to support the weight of such controversies is yet only a limited one...The legal bearing capacities of the community must be given time to grow. Time itself is an important factor. Each ruling that is implemented by a member state is a nail in the construction that strengthens its solidarity and brings integration a step further.'⁴⁸²

The Court's early activism can thus be seen as having been born out of a combination of its early favourable relations with national courts, a lack of legislative activity within the Community and the immature constitutional arrangements which enabled a fortuitous amendment to the decision-making process to go unchallenged. Within this environment, unfettered by the national governments or courts and left largely to its own devices by its

⁴⁸² André Donner, *The Role of the Lawyer in European Integration*, (Edinburgh University Press, 1968), at pp. 62-3.

institutional partners, the ECJ embarked on its programme of constitutionalisation, a process that was largely completed by the end of the 1970s.

Development of the Internal Market

Stage two of the Court's engagement with the development of Community law is linked to the construction of the internal market following the deregulatory stance of Community legislation during the first half of the 1980s. Following publication of the Commission's famous White Paper of 1985,⁴⁸³ in which the (then) President Jacques Delors called for, *inter alia*, the equivalence of social laws in order to minimise social dumping, the Court's jurisprudence focussed on the involvement of national courts in enforcing Community law.⁴⁸⁴ This endeavour was not always successful,⁴⁸⁵ but its political motivation is clear – the furtherance of economic integration necessary for the creation of the single market was reliant on a well functioning enforcement system, which in turn required increased co-operation with, and mutual recognition between, Member States. The fledgling European Constitution was advantageous in the programme of integration that followed⁴⁸⁶ and this, in turn, contributed to the legitimacy of the institutions, particularly the Commission, as visionary architects of a new system of supranational governance. The ECJ, however, was paying for its early activism and suffered a loss of reputation as the leading proponents of the backlash accused the court of making, rather than interpreting, the law.⁴⁸⁷

⁴⁸³ COM(85) 310 Final.

⁴⁸⁴ See E. Szyszczak, 'Future Directions in European Union Social Policy Law' (1995) 24 ILJ 31.

⁴⁸⁵ See Kilpatrick (1998) *ibid* at n. 34, for a compelling account of the dialogues between national courts and the ECJ which took place in the context of sex discrimination law at this time.

⁴⁸⁶ In social law terms, this included the promotion of the 'social dialogue', the breaking of the use of unanimity voting in the Council of Ministers and the adoption by all of the Member States, except the UK, of the Charter of the Fundamental Social Rights of Workers.

⁴⁸⁷ H. Rasmussen, *On Law and Policy in the European Court of Justice: A Comparative Study of Judicial Policymaking* (Nijhoff, 1986); P. Neill, *The European Court of Justice: A Case Study in Judicial Activism* (European Policy Forum, 1995).

Much of the criticism directed at the Court can also be attributed to the belated engagement by political scientists with the Court's perceived role in European integration. As Wincott has observed, 'Until the 1990s political scientists interested in European integration largely ignored the role of the Court. Once it had been noticed, the attention paid to the ECJ exploded.'⁴⁸⁸ As far as academic opinion was concerned, this attention worked in the Court's favour, as well as to its detriment, with one account of the Court's role in the revitalisation of the integration process, as embodied by the Single European Act, heralding the ECJ as the 'unsung hero' of an 'unexpected twist of the plot.'⁴⁸⁹ However, the Court's early activism was seen by others as having contributed to the 'democratic deficit' with its engagement in policy bringing the issue of its independence into question. This period in the Court's history is often characterised as one of disenchantment among the national courts and governments and general distrust in the Court's neutrality⁴⁹⁰ culminating with the *Barber*-protocol of 1990 and the introduction of the concept of 'subsidiarity'⁴⁹¹ in the Treaty on European Union in 1992.

The Impact of Globalisation

The third stage in the Court's development, and of Community law generally, occurred during the 1990s. Global factors, particularly the reshaping of the political landscape of Eastern Europe, the enhanced scope of the European Union and the increased complexity of the supporting legal structure following the TEU all contributed to the creation of a new and uncertain environment for the Court of Justice. Furthermore, the Court's earlier attempts at judicial activism and the corresponding disapproval of national governments had inevitably

⁴⁸⁸ Wincott (2000) *ibid* at note 54, at p. 6.

⁴⁸⁹ A. Burley and W. Mattli, 'Europe before the Court: A Political Theory of legal integration' 47 International Organization 1 (1993).

⁴⁹⁰ See, for example, H. Rasmussen, *The European Court of Justice* (GadJura, 1998), at p. 329.

⁴⁹¹ Article 5EC (inserted by the TEU) provides that 'In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can, therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.' For a full account of the impact of subsidiarity on the role Court's role as a policy actor, see G. de Búrca, (1998) 'The Principle of Subsidiarity and the Court of Justice as an Institutional Actor' 36 JCMS 2, pp. 217-235.

led to 'a decline in judicial authority and legitimacy.'⁴⁹² During the 1990s, the Court sought implicitly to renegotiate the boundaries of its own competence and this was reflected in what has been categorised as the exercise of self-restraint in its jurisprudence.⁴⁹³

Whether such political pressures did in fact have any bearing on the Court's decision-making in the area of case law under review in this thesis will be specifically examined in the context of the cases themselves in Chapter 6. What is imperative at this juncture is an acknowledgement of the Court's place within its broader institutional environment. The Court's role as both instigator and disciple, depending on the political environment in which it found itself at key stages in the development of Community law, provides an interesting backdrop to the remainder of this Chapter which will consider the methods of interpretation employed by the ECJ in its own reasoning. The impact of external influences on the Court's jurisprudence is of primary concern in the case analysis undertaken in Chapter 6 and the purpose of this section is to provide a suitable framework within which that analysis can take place. First the relevant Treaty provisions dealing with the Court's interpretive role will be considered; the methods developed by the Court over time will then be examined; and, finally, the relevant principles of Community law will be identified in the context of their contribution to the Court's jurisprudence on gender relations.

The Development of the Court's Jurisprudence: Legal Reasoning and Methods of Interpretation

The European Court of Justice's approach to interpretation is generally described as purposive or teleological meaning that, in interpreting a rule, account is taken of the purpose, aim and

⁴⁹² Rasmussen *ibid* at 297.

⁴⁹³ See R. Dehouse, *The European Court of Justice – The Politics of Judicial Integration*, (1998); M. Shapiro, 'The European Court of Justice' in P. Craig and G. De Burca (eds) *The Evolution of European Law* (1999 OUP)

objective that the rule pursues. The Court has confirmed this approach in *CILFIT*,⁴⁹⁴ in which it declared ‘every provision of Community law must be placed in its context and interpreted in the light of the provisions of EC law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied.’⁴⁹⁵ The teleological approach is consistent with the dynamic and evolving nature of the European Community within which the exclusively economic imperative has been expanded significantly to encompass a much broader system of values affecting social issues and the protection of human rights. Furthermore, the narrow scope of the Treaties’ aims, which restrict the Community’s competence, and the relative immaturity of the European legal order itself have combined to ensure that the Court is always conscious of its place in the greater scheme. Given these factors, it is not surprising that the Court has taken great care to justify its decision-making on the basis of the overall aims and intentions of the Treaty provisions. That is not to say that the ECJ has always been confined and uncreative in its decision-making. On the contrary, as noted earlier, the Court has often attracted criticism on the grounds that it has overstepped the judicial mark and become law-maker, driven by the desire to meet political objectives rather than interpreting the law for its own sake.⁴⁹⁶ Such charges are serious as they raise questions concerning judicial independence and strike at the heart of the Community’s democratic legitimacy. In order to uncover the basis for such criticism and to assess whether it is valid, the Court’s reasoning must be considered. This is a difficult undertaking as not much has been written on the subject,⁴⁹⁷ probably because little guidance exists on how the individual judges should reach a collective decision and the Court is obliged

⁴⁹⁴ Case 283/81 *Cilfit v Italian Ministry of Health* [1982] ECR 3415.

⁴⁹⁵ *Id.* at 3430.

⁴⁹⁶ See H. Rasmussen (1986) *op cit* at n. 69.

⁴⁹⁷ A small body of literature exists, the more noteworthy of which include: A. Bredimas, *Methods of Interpretation and Community Law* (North Holland, 1978); J. Bengoetxea, *The legal Reasoning of the European Court of Justice* (OUP, 1993); T. Koopmans ‘The Theory of Interpretation and the Court of Justice’ in D. O’Keeffe and A. Bavasso (eds) *Judicial Review in EU Law* (Kluwer, 2000); J. Bengoetxea, N. McCormick and L.M. Soriano, ‘Integration and Integrity in the Legal Reasoning of the European Court of Justice’ in G. De Búrea and J. Weiler (eds) *The European Court of Justice* (OUP 2001), pp. 43-85.

not to make its deliberations public, so that, 'All we know about the Court's reasoning is written in its judgments'.⁴⁹⁸ As far as the processes applied in order to arrive at these judgments are concerned, they are 'sometimes firmly grounded and clearly spelled out, sometimes maddening Delphic offerings, always the product of judicial negotiation and compromise.'⁴⁹⁹

Although it is acknowledged by the judges themselves that poor legal reasoning attracts criticism which can be damaging to the Court's authority and legitimacy,⁵⁰⁰ as is the case in all judicial decision-making, the human element cannot be eradicated or ignored. As Schepel states, 'Judges are humans of flesh and blood, their motives for arriving at certain decisions are probably political and moral as much as legal, they probably settle differences with each other for strategic reasons or sheer lack of time rather than in the belief that they have arrived at the correct legal solution.'⁵⁰¹ As previously acknowledged,⁵⁰² law is a subjective discipline: it is not scientifically objective and the thought processes of individual judges are but one manifestation of this. Furthermore, and attached to this point, the various ways in which the law evolves and operates are deeply ideological. In the current context, the judicial treatment of particular Community issues derives from a combination of the application of legislative provisions, themselves the result of political processes, and the particular theoretical perspectives of the Court's judges. To think otherwise, for example that judicial decision-making takes place in a 'black box' where all external factors are (and should be) suspended, is both naïve and illusory. In reaching an understanding of why the Court arrived at certain decisions, the task, therefore, is to unpack the various elements of the decisions themselves by

⁴⁹⁸ H. Schepel (2000), 'Reconstructing Constitutionalization: Law and Politics in the European Court of Justice' 20 *Oxford Journal of Legal Studies* 3, 457-468 at p. 466.

⁴⁹⁹ *Id* at p. 466.

⁵⁰⁰ U. Everling 'Zur Begründung der Urteile des Gerichtshofes der Europäischen Gemeinschaften' (1994) 29 *Eurparecht* 127.

⁵⁰¹ *Ibid* at 466.

⁵⁰² In Chapter 2 *infra*.

systematic means capable of enabling some broad comparisons to be drawn between separate but related judgments.

These elements arise out of various sources, some express and identifiable, such as the Treaty provisions themselves, others more opaque but, nonetheless, implicit in the Community legal order, such as the perceived objectives of the Treaties and secondary legislation and the Institutions' overall vision of the Community's aims and aspirations. The interpretation afforded to all of these sources, however, is not static in nature but has evolved over time alongside the development of Community law and can only be fully understood through a process of contextualisation. This requires the application of an holistic approach which places the decisions in the time and place in which they were reached and which must pay due consideration to the overriding political climate and corresponding objectives, as well as the relevant external pressures faced by the Court and its fellow Institutions. Furthermore, the rich cultural fabric of the Court itself has undoubtedly had an impact on the decision-making process, so that different compositions of the Court and the accompanying legal traditions of the judges' own countries of origin must themselves give rise to differences in the understanding of what 'legal reasoning' is.⁵⁰³

⁵⁰³ One clear example of this is provided by Judge Everling's observation that, during the 1970s, the Court's change in its approach from a tendency to lay down general principles to a more case-specific stance arose partly out of changes in the composition of the Court brought about by the arrival of judges 'from the common law tradition, schooled in case law.' U. Everling, *The Court of Justice as a Decisionmaking Authority* in Michigan Law Review Associations, *The Art of Governance: Festschrift zu Ehren von Eric Stein* (1987), 156, 163. See also Advocate General Jacob's assertion that the criticism levelled at the Court in respect of its perceived politicisation is misconceived as it actually overlooks the notion of constitutional jurisprudence on which the Court's foundations are based. The misconception arises largely due to the unfamiliarity with this particular conception of the judicial role within some of the Member States – F. Jacobs, 'Is the Court of Justice of the European Communities a Constitutional Court?' In D. Curtin and D. O'Keeffe (eds) *Constitutional Adjudication in European Community and National Law* (Butterworths 2002), 25 at p. 32.

Despite being prevented from breaking the secrecy of deliberations,⁵⁰⁴ the Court's judges have been fairly forthcoming about what goes on in Chambers.⁵⁰⁵ Furthermore, however they arrive at their decisions, they are obliged to provide a legal justification for it.⁵⁰⁶ Although an appreciation of legal reasoning cannot deconstruct the role of the judges, it can restrict the range of possible choices and impose specific criteria of validity. Despite such restrictions on the decision-making process, the charge that courts, from time to time, engage in judicial activism rather than legal interpretation remains. The operational features of the Court of Justice,⁵⁰⁷ its position as a supranational institution and the aspirational nature of many of the provisions which it is responsible for interpreting have made this charge particularly resonant in critiques of the Court's activities.⁵⁰⁸ Responses to such criticism have tended to draw on the repositioning of the judicial function so that, rather than the out-dated reductive concept which places the judge purely in an ascertaining role without personal responsibility or creative means, the judiciary are viewed as interpreters and creators of law.⁵⁰⁹ The reasons for this shift in focus have been attributed to the radical transformation of the role of law and government in modern welfare states⁵¹⁰ by which a 'revolt against formalism'⁵¹¹ has emerged.

⁵⁰⁴ Article 35 of the Statute of the Court of Justice provides that 'The deliberations of the Court shall be and remain secret.'

⁵⁰⁵ U. Everling, *The Court of Justice as a Decision-making Authority* (1984) 82 Michigan Law Review 1294; D. Edwards *How the Court of Justice Works*, (1995) 20 ELR 539.

⁵⁰⁶ Bengoetxea (1993) *id.* at p. 114, distinguishes between 'context of discovery' and 'context of justification'. The former relates to the process of uncovering what caused the Court to arrive at one decision in favour of other possible outcomes. Given the secrecy of deliberations, this will always be a matter of conjecture. However, the collective published output (the judgment and the Advocate General's opinion) provide something more than an account of the Court's decision-making process, rather, they provide an account of what makes the decision the right legal decision by stating legal reasons for what is opined or answered. This is known as the context of justification.

⁵⁰⁷ Discussed *supra* at pp. 143-150.

⁵⁰⁸ The most noteworthy being H. Rasmussen, *On Law and Policy in the European Court of Justice* (Martinus Nijhoff, ed, Copenhagen 1986), but see also H. Rasmussen, *Between Self Restraint and Activism: A Judicial Policy for the European Court* 13 ELRev 28 (1988) and P.O'Neill, *The European Court of Justice: a Case Study in Judicial Activism*, *op cit.*

⁵⁰⁹ O. Pollicino (2004), *Legal Reasoning of the Court of Justice in the Context of Equality: Between Judicial Activism and Self-restraint*, 5 German Law Journal 3, at p. 286.

⁵¹⁰ By which the significant growth in State intervention in fields previously the domain of self-regulation (see Chapter 3 *infra*) has led to a corresponding increase in judicial activity.

⁵¹¹ This phrase was originally coined by the French lawyer F.Geny, who argued in favour of revealing the voluntaristic, discretionary element of judicial choice rather than merely focussing on the pure, mechanical logic of judicial reasoning. Came about in response to the excessive legalism of the post-codification era.

From this perspective, the judicial function is characterised as a means of providing meaningful contemporary solutions to legal problems which require systematic contextual interpretations of the applicable rules and must also take account of the impact these rules will have on human conduct in society.⁵¹² This movement towards enhanced judicial creativity encompasses an acceptance of the element of choice in the judicial function, whereby abstract logic must sit alongside concerns involving economic, political, ethical, sociological and psychological factors as the available means by which decisions are reached.⁵¹³ If this approach is considered in the context of the European Court of Justice' jurisprudence, two factors emerge which, together, provide a compelling justification for the Court's engagement in creative decision-making: the institutional framework and the language and nature of the Treaties themselves.

With regard to the institutional framework, the charting of the various political phases that have shaped the Community's history⁵¹⁴ reveals an inter-relationship between the relevant law-making mechanisms and the Court's perceived activism. For example, the need for unanimity in the Council of Ministers and the resulting political inertia which characterised the first half of the 1980s led to increased activism by the Court with creative decision-making utilised as a means of filling the void left by the relative inactivity within the legislative arena. As Judge Kutscher has explained, the legislature's inactivity has, at times, compelled the Court to engage in problem-solving which should be undertaken by law and policy-makers.⁵¹⁵ By referring to the aims of the Community and to general principles of EC

⁵¹² See T. Koopmans, (2000) 'The Theory of Interpretation and the Court of Justice' in D. O'Keeffe and A. Bavasso (eds), *Liber Amicorum in Honour of Lord Slynn of Hadley*, Vol 1, Judicial Review in European Union Law, Kluwer L International Law 48.

⁵¹³ For expansion of this point, see M. Cappelletti (1981) 'The Law Making Power of the Judges and its Limits' M.U.L.Rev 15 at 22.

⁵¹⁴ See Chapter 4 *infra*.

⁵¹⁵ H. Kutscher, *Methods of Interpretation as seen by a Judge of the Court of Justice* (Luxembourg 1976) 2, sect 6(a).2.

law, the Court's judges have sometimes found themselves 'compelled to interpret from the standpoint of the existential necessities of the Communities and ensure the maintenance of their capacity to function.'⁵¹⁶ Furthermore, the European democratic deficit, by which the relationship between the wishes of the electorate and political decision-making is often difficult to identify, confers legitimacy upon judicial creativity which would not apply to legal systems within developed democracies.⁵¹⁷

As far as the language and nature of the Treaties are concerned, it can be argued that the Court is encouraged to interpret in a creative way which is distinct from the processes employed by national courts specifically because of the source materials that it is asked to interpret. The compromised nature of the Treaties and secondary legislation, which have resulted from a series of bargains struck between States on the basis of common goals but with divergent political beliefs and legislative traditions, means that the resulting framework often reads as little more than a series of aspirational statements lacking in the requisite detail on which clear, sustainable legal solutions may be based. In such circumstances, the Court is left with little choice but to '[tease] out the meaning and implications of the treaties (or of instruments enacted pursuant to the treaties), [to show] how they support one view or line of action rather than another.' This process 'must be the very stuff of justification in this context.'⁵¹⁸ In the case of secondary legislation, the objective-based nature of directives by which the national legal systems are entitled to implement suitable provisions in line with the principle of subsidiarity, adds further to the apparent vagueness of the legal texts which the ECJ is compelled to interpret. The Court's obligation to provide an answer to the questions referred to it in line with the general principles of legal certainty and legitimate expectation, is also

⁵¹⁶ O. Pollicino *op cit*, at p. 288.

⁵¹⁷ T. Koopmans, The Roots of Judicial Activism, in Mather and Petzold (eds), *Protecting Human Rights: The European Dimension, Studies in Honour of Gerard J. Wiarda*, (Kluwer, 1988) 327

⁵¹⁸ J. Bengoetxea, N. McCormick and L.M. Soriano (2001) *ibid* at n. 79, at p. 44.

relevant here as, in order not to send the litigant or national court away without an answer, the Court may, at times, have to provide 'a creative answer to questions when there is no obvious answer.'⁵¹⁹ Added to this dynamic, the apparent difficulties in linguistic interpretation inherent in the drafting of legal texts which must have application across the range of European languages, mean that the resulting texts are sparse and imprecise in comparison to national legislation.

All of these factors conspire to make some of the usual methods employed in case analysis particularly unsatisfactory when applied in the European Community context. As Bengoetxea et al have argued, the concepts of judicial activism and judicial self restraint as normative or interpretive ideology are not particularly helpful devices when attempting to explain or justify the decision-making processes of the ECJ and should, perhaps, be abandoned in favour of a legal reasoning approach.⁵²⁰ This makes sense for the technical reasons outlined above. Furthermore, attempts to separate the legal and political factors which influence the Court's jurisprudence are often unhelpful as the overriding objective of European integration⁵²¹ has justified the active role taken by the Court at certain times in its history. By focusing on legal reasoning as a suitable means of analysing the Court's jurisprudence, attention is drawn to

'how the Court takes account of reasons - legal norms, values, principles, policies - to justify its decisions. The question is neither whether the Court uses policy arguments nor whether it goes beyond the literal meaning of legal provisions. The question is rather whether and by what considerations its decisions are justified or, at the very least, rationally justifiable.'⁵²²

⁵¹⁹ D.T.Keeling, In Praise of Judicial Activism, but what does it mean and has the European Court of Justice ever practiced it?' in C. Gialdino, (ed) *Scritti in Onore di G.F. Mancini*, (Bellini, Milan 1998),505 at p. 512.

⁵²⁰ J. Bengoetxea et al (2001) *ibid* at note 79, at p. 44.

⁵²¹ In both the economic and political senses.

⁵²² *Id.*

In order to utilise this approach, it is necessary to recognise the difference between the 'context of discovery' and 'context of justification',⁵²³ and to focus on the latter so that account is taken of what is known, in the Court's mind, to be the legally justifiable reason for its decision in a given case, rather than relying, for analytical purposes, on assumption and conjecture.

Conclusions

The legal reasoning approach provides the basis for the analysis applied to a specific group of cases in Chapter 6, for which the published judgments and Advocates-Generals' opinions are scrutinised in order to determine the interpretation applied to the general principles of Community law by the Court in its consideration of gender relations. The Court's conceptualisation of the principles of non-discrimination and equality is of specific interest in this endeavour, but the analysis is not confined merely to those principles with an obvious connection to the subject matter, but rather seeks to assess the Court's use of all the general principles in its rationalisation of specific judgments.

The purpose of this analysis is to consider how the Court uses key principles in dealing with the concepts and ideology underpinning referrals from national courts in its decision-making processes. The overriding objective, as expressed elsewhere, is to discover whether the ECJ can be said to have developed an identifiable jurisprudence in its case law on gender relations and, if so, how this jurisprudence might be categorised. In making such assessment case reports will first be considered on their own merits so that common features can be identified enabling the cases to be grouped or categorised. Once this process is completed, contextual

⁵²³ See note 88 *ibid.*

factors will be considered and broad conclusions drawn. By this process, it will be possible to determine whether developments in the case law can be explicitly linked to extraneous factors in both general terms, for example, the extent to which the Court's conception of the role of family has influenced its application and interpretation of principles, and in specific circumstances, for example, how influential market forces have been as a suitable means of justifying discrimination and whether such influence has changed over time dependent on political factors. By this process, it is hoped that conclusions can be drawn regarding the nature of the Court's jurisprudence.

Chapter 6

The Case Law of the European Court of Justice

*The Context of Justification*⁵²⁴

Introduction

Chapter 5 concluded by defending what some have seen as the Court's 'activism' by positing that the unique position in which it finds itself leads the Court to apply a contextual interpretation to the issues presented to it under the preliminary rulings procedure. The Court's teleological approach to interpretation gives it a wide discretion when faced with decision-making, as long as the decision reached can be justified on the basis of the Treaty provisions.⁵²⁵ The Court's constitutionalisation of the EC Treaty led to its landmark decision in *Defrenne II* in which Article 141 (ex 119) was found to be directly effective, thus extending its scope in ways not previously envisaged. The national courts have responded by making use of the preliminary rulings procedure provided by Article 234 EC (ex 171) ever since. The determination of litigants and legal advisors and the willingness of national courts to make referrals, have, on many occasions, provided the Court with opportunities to utilise its discretion in order to apply creative judicial decision-making to a range of issues arising from the broad area of gender relations. Furthermore, the *Defrenne II* judgment categorised non-discrimination on the grounds of sex as a fundamental principle of Community law, thus providing scope for according it a very high status when faced with a range of possible outcomes, meaning, in technical terms, that the Court could, if inclined, use furtherance of the

⁵²⁴ From J. Bengoetxea, *The Legal Reasoning of the European Court of Justice* (OUP, 1993), discussed in Chapter 5 *infra*.

⁵²⁵ In the broadest sense. Factors aiding interpretation could, for example, include a consideration of the 'spirit' of the Treaty.

equality principle as a possible justification for deciding a case in a certain way. The obvious tension between this possibility and the Court's place as one institution within the wider context of a primarily economic community provides further grounds for analysis.

If the structure of contemporary labour markets is considered,⁵²⁶ the deregulatory stance inherent in the creation of a single market has led to the emergence of new ways of working. This has had the effect of changing the nature of the commodification of labour in the post-war economies of the Member States. This 'new' conceptualisation of work has changed the relationship between employer and worker from being a mutually dependent arrangement based on the concept of an ongoing commitment between the parties with corresponding rights and obligations, to a range of diverse arrangements founded primarily on the needs of the organisation which are increasingly met by means of dispensable, short-term contracts which lack any clear commitments on the part of the employer to the welfare and well-being of the worker. From the worker's perspective, the shift in contractual arrangements has placed many of those engaged in low-paid, precarious employment in a position of economic dependence with a decline in social protection concluding, in some circumstances, in legal independence from the employing organisation.

This shift in the nature of working relationships has taken place against the backdrop of an increase in the labour market participation rates of women, particularly working mothers. Furthermore the gendered nature of labour markets which arises due to the real life experiences of women as the primary providers of childcare (and increasingly elder care) places women more often than men in low status employment, often part-time and/or short-term. Because of its differences from the full-time, permanent model more typical of male

⁵²⁶ See Chapter 3 *infra*.

employment, such work has been categorised as 'atypical'. The causes of discrimination within the employment relationship can, thus, be identified in two ways: by the occurrence of individual, overt acts of discrimination on gender-related grounds which place the recipient at a disadvantage in comparison to others ('direct' discrimination) and by the application of business-based or administrative policies which appear *prima facie* to be gender neutral but which have a disparate impact on the members of one sex compared to the members of the other ('indirect' discrimination). Because of the gendered nature of labour markets, a policy which places those with a particular 'atypical' working arrangement at a disadvantage is likely to have a disproportionate impact on women compared to men.

These developments are clearly mirrored in a range of cases with which the European Court has been confronted over the past 20 years. The majority of the cases dealing with the rights of 'atypical' workers have formed the basis of referrals to the ECJ due, in some respects, to the novelty factor – the new methods of working are as different from traditional working arrangements as those filling them are different from the normative concept of 'worker'. Consequently, provisions operating within national legal systems lack the requisite detail on which to base decisions and, faced with new problems, little previous guidance and a whole new range of possible legal outcomes on the basis of Community provisions,⁵²⁷ national courts have taken the opportunity to refer specific questions for adjudication by the European Court. Some of these cases are related to workplace practices based on assumptions regarding working patterns and corresponding levels of employee commitment and economic necessity to work which have been used to justify different rates of pay on the basis of hours worked or through the casualisation of labour. Some of them have arisen on the basis of national legislation and policies which have had the explicit aim of differentiating certain groups of

⁵²⁷ See Chapter 4 *infra*.

workers in order to distinguish them from the standard (male breadwinner) model and which have had the effect of marginalising the workers in question by providing them with lower standards of social protection. Such actions can, on the face of it, be rationalised if the primary objectives of Community law are assumed to be the furtherance of economic goals as set out in the Treaty, within the context of which even the provision of equal pay for men and women was included on the basis of economic integration between Member States. Furthermore, certain aspects of supranational labour market policy at the European level have supported the deregulation of labour markets as a means of job creation in the face of rising unemployment.⁵²⁸

Confronted with stark choices concerning the interpretation of substantive provisions which form part of a legal system founded on the basis of the economic imperative on the one hand, and the chance to apply Community law creatively in order to further develop the equality principle on the other, what choices has the Court made? Has it taken advantage of its unique position and interpreted the law creatively in its decision-making? What theoretical perspective has it adopted in its conceptualisation of the normative values required to interpret such provisions? Has its purposive approach been utilised more often to further the aims of the 'free' market order in preference to the pro-regulatory stance required to confront the challenges provided by the attainment of substantive equality or *vice versa*? When the Court is faced with a range of possible conceptual tools, some of which may, in application, produce conflicting results, do certain principles trump others? If so, which ones and on what basis? Finally, in seeking to interpret the relevant provisions of Community law consistently in line with the requirements of the principles of legal certainty and legitimate expectation, has the Court developed what might be viewed as an identifiable jurisprudence on gender relations?

⁵²⁸ See Chapter 4 *infra*.

Methodology

In this chapter, the judgments of the ECJ in a group of selected cases will be analysed in order to provide answers to the questions posited above. The approach taken in this analysis is based on the application of legal reasoning, as discussed in Chapter 5, whereby, attention is drawn to the nature and extent of the considerations used to justify the Court's decisions.⁵²⁹

In applying this approach to the selected cases, the focus will, therefore, be on the 'context of justification'⁵³⁰ within which the Court has reached its decision, with emphasis on what is known to be the legally justifiable reason for that decision. To assist in this endeavour, account will be taken of the published judgments of the Court and the Advocate-Generals' opinions as appropriate, the latter providing some insight into the reasoning of the Court in cases where the judgment and opinion concur and serving as a useful means of eliminating the alternative position(s) not adopted by the Court in cases in which the judgment deviates substantially from the opinion.

The analytical tools providing the means by which the cases are grouped and compared will comprise the relevant principles of EC law as applied and interpreted by the Court. Some of these arise as fundamental principles of European law as well as serving as the normative concepts on which the legislative measures under review are based, for example, non-discrimination. Others have been categorised as general principles and, as such, have developed incrementally in conceptual terms often as a result of their interpretation by the Court, for example, equality. The identification of the relevant principles will depend on those applied by the Court in the range of cases under consideration and is, therefore, deductive.

⁵²⁹ See J. Bengoetxea *et al* (2001) discussed in Chapter 5 *infra*.

⁵³⁰ *Ibid* at p. 44.

One of the aims of the analysis is to determine whether, and to what extent, a hierarchy of principles can be identified by which the Court gives preference to particular principles in terms of their perceived relative value.

Before this analysis can take place, the terms of reference must be established comprising: the methods by which the cases have been selected and justification for doing so (rationale) and the identification of the appropriate legislative framework in which the cases have arisen and which forms the bases for their referrals to the ECJ.

Rationale for selection of cases

If the Court's case law dealing with the broad range of sex equality issues is considered, there are a substantial number of cases which have direct relevance and which could, depending on the rationale applied, ostensibly be used as a basis for the analysis within this thesis. However, if the salient points explored in this work are considered, such as the shortcomings of the current legal regime and the contemporary composition of the labour force across the European Union, certain central themes emerge. In order to identify a group of cases which could be managed adequately in order to provide some meaningful findings in response to the issues under review in this thesis, certain ground rules have been established. These are based on observations presented as a result of the enquiries undertaken in Chapters 2 - 5 and can be set out as follows:

Timescale

During the process of writing this thesis, the European Union has undergone the most significant enlargement of its history by the accession of 10 new Member States from among the former Eastern European States, extending the membership of the Union from 15 to 25 Member States. Another two countries, Romania and Bulgaria, look set to join the Union at the turn of the year 2006/7. Although this vast expansion, in geographical, political and cultural terms, offers obvious opportunities for analysis on gender lines, the origins of this work pre-date this latest phase of enlargement by some time. Furthermore, the effects of enlargement on the working of the Court are still to be felt. Nevertheless, it is anticipated that the analysis offered here will have a wider application than that associated with a particular timescale. As is customary in legal analyses, I have identified a suitable cut-off date as being 31 December 2005, with the effect that the law is as stated up to and including that date. Amendments and additions to the legislative framework and new case law arising after that date have not been considered here.

The Preliminary Rulings Procedure under Article 234 EC

As explained in Chapter 5, the basis of the cases under consideration here is the preliminary rulings procedure provided by Article 234 EC. The obvious merits in selecting cases by way of this procedure have been outlined in Chapter 5, but include: the procedure's importance in the development of Community law; the resulting discourse between the ECJ and the national courts on the scope of Community law; the role of the procedure as the primary driving force in the relationship between the national and Community legal systems; and the obvious

opportunity to examine case law which has been considered and decided specifically on the basis of issues concerning the place of gender relations within the employment sphere.

The use of Article 234 EC as a means of identifying suitable case law provides a common framework for the cases which have all come before the Court as referrals from national courts. In practical terms, this means that they all have their legal base in provisions arising from the relevant national legal system which, in turn, have a relationship with a specific instrument of Community law (see below). At a basic level, the various national provisions can be thematised in order to identify broad parallels between the cases in relation to the issues they deal with and this will form part of the overview of cases presented below. However, the focus of the analysis is on the work of the Court of Justice - more specifically on the legal reasoning applied in order to reach justifiable decisions on a range of cases with a particular emphasis on whether or not there has been a consistent approach in this respect.

Equal Pay and Equal Treatment

In seeking to examine the development of the conceptualisation of gender relations by the Court of Justice, there are several legislative provisions that could serve as potentially suitable foundations on which to proceed. For example, the free movement provisions of the Treaty and associated secondary legislation have provided the basis for a plethora of referrals under the Article 234 preliminary rulings procedure dealing with issues related to both employment and social security rights. However, the primary focus of this thesis is on employment, more specifically on the relationship between the composition of the female workforce in terms of sectoral features such as hours of work and contract type, the forms of discrimination which have arisen as a result of such features and the legal responses that have developed.

Accordingly, the relevant Treaty provision is Article 141 EC and the associated secondary legislation the Equal Pay Directive 75/117/EC and the Equal Treatment Directive 76/207/EC. The cases under review have been referred to the ECJ in order to ascertain the interpretation of Community provisions on a number of grounds and care has been taken not to be overly prescriptive in selecting the cases on the basis of specific provisions as to do so could detract from the value of the findings which are, after all, based on the fundamental and general *principles* applied by the Court in its reasoning. However, when the cases themselves are grouped (see below), it is the interpretation of Article 141 which emerges as the most commonly used ground for referrals.

The Rights of 'Atypical' Workers

As set out in Chapter 3, political, economic and social factors have led to a change in the nature of working relationships within contemporary labour markets. Increased competition on a global scale and the information revolution have been used as justification for the deregulation of some aspects of the working relationship which, in turn, has given rise to certain common features across Member States such as the growth of atypical work. In contrast to the transformation that has taken place within the employment sphere, the unchanging nature of the division of labour within families has ensured that the role of women as the primary providers of care persists and this continues to have a marked impact on their labour market behaviour. Although women with families increasingly remain in or re-enter the labour market during the child-bearing and rearing years, large numbers of those women work part-time or under temporary contracts, often under precarious arrangements and in areas of unskilled work viewed as low status.

Over the past 20 years, the ECJ has been confronted with a range of cases dealing with various aspects of the relationship between female atypical workers and their employing organisations. The emergence of such cases from across the Member States shows that national legal systems have often found this shift in working arrangements difficult to reconcile with the existing concepts surrounding work and with established legal principles. In other words, where women's difference from men is most apparent – in their attachment to 'new' working arrangements on the grounds of family responsibility – national law is often unclear or inadequate in providing legal solutions and courts are often unsure whether the established provisions of Community anti-discrimination law can be interpreted or extended so as to provide protection. The introduction of specific legislation intended to provide protection for part-time and temporary workers at the European level has been discussed in Chapter 4 and the shortcomings of that legislation in dealing with the challenges presented on gender discrimination grounds are set out there. The cases presented here are distinguished from those specifically related to the Part-time and Fixed-term Directives as they either pre-date that legislation or because they raise issues not adequately dealt with other than by a consideration of the pre-existing and well-established equal pay and equal treatment provisions.

Indirect Discrimination and Objective Justification

As established, the focus of the following analysis is on the composition of the female workforce and related structural features. Accordingly, the cases selected have their origins in the indirect discrimination provisions of national law. The concept of indirect discrimination is essentially concerned with a results-based approach to issues of inequality, that is to say that it arises where apparently consistent treatment results in an unequal outcome. This may

have a detrimental effect on an individual but application of the concept also recognises the impact of the treatment on women as a group. Although falling far short of the next logical step of demanding an equal outcome, European Community law has long recognised the link between the application of apparently neutral policy and the perpetuation of disadvantage in the group sense. The use of the concept of indirect discrimination as a means of challenging the discriminatory effects of structural factors gives it a particular relevance in the current context. This application of the concept to individual cases provides a redistributive quality, although its failure to explicitly link process to outcome is acknowledged as limiting the value of the concept as a means of ensuring full participation of groups and a corresponding fair distribution of benefits.⁵³¹

The cases selected have a common foundation in that all of them have arisen from the application of a measure or policy whose impact is potentially detrimental to women as a group, or to particular groups exclusively made up of women (e.g. mothers), or to particular groups which consist predominantly of women (e.g. single parents or those who act as the primary providers of care within families). All of these cases provide examples of challenges to the systemic gender discrimination which occurs due to the impact of policy, be it at the micro (workplace or sectoral) level or at the macro (national) level, which is detrimental because it fails to take account of the differences in women's working lives when measured against the normative employment model presented by the male breadwinner.⁵³²

Unlike its legislative partner direct discrimination, which can never be justified, indirect discrimination can be justified in certain circumstances. In the European Community context, defences advanced by employers and/or national governments against charges of indirect

⁵³¹ See Chapter 2 *infra*.

⁵³² See Chapter 2 *infra* for female labour market composition and Chapter 3 for same/difference debate and contribution of 'difference feminism'.

discrimination are subject to a proportionality test known as ‘objective justification’ as determined by the guidelines set out in one of the earliest indirect discrimination cases to come before the Court, *Bilka Kaufhaus*.⁵³³ The nature of the reasons proffered as justifications for indirect discrimination vary depending on the circumstances of each case, but fall into two broad categories: those based on the needs of a particular business and those arising due to the application of an administrative rule or procedure which can be rationalised on non-gender specific grounds. The cases under consideration offer examples of both types of justification (see below). An examination of the attempts to provide justifications, alongside their relative merits as ascribed by the Court in its consideration of cases involving *prima facie* sex discrimination, provides an opportunity to assess the status afforded to principles such as non-discrimination and equality in judicial decision-making concerning gender relations within a market order.⁵³⁴

In summary, the group of cases under consideration in the following analysis were selected on the following grounds:

- Timescale - all pre-date the effects of the most recent EU enlargement.
- Preliminary rulings procedure – all were referred to the ECJ by national courts under the Article 234 EC (ex 177) procedure.
- Common legal base - All are based on questions concerning the correct interpretation of Article 141 EC (ex 119) and/or Directives 76/207/EC and/or Directive 75/117/EC.
- Atypical workers - All are concerned with the rights of atypical workers within EC law.

⁵³³ Case 170/84 *Bilka-Kaufhaus GmbH v. Karin Weber Von Hartz* [1986] ECR 1607, discussed in detail in Case Analysis below.

⁵³⁴ See Chapters 3 and 4 *infra*.

- Indirect discrimination and objective justification – All deal with claims brought on the basis of indirect discrimination provisions and include an attempt to objectively justify such discrimination.

List of Cases under Review

If the above criteria are applied to the ECJ's case law, the following group of cases is identified (in chronological order):

Case 96/80 *Jenkins v. Kingsgate (Clothing Productions) Limited* [1981] ECR 911

Case 170/84 *Bilka-Kaufhaus GmbH v. Karin Weber Von Hartz* [1986] ECR 1607

Case 171/88 *Rinner-Kühn v. FWW Spezial-Gebäudereinigung GmbH & Co. KG* [1989] ECR 2743

Case 33/89 *Kowalska v Freie und Hansestadt Hamburg* [1990] ECR I-2591

Case 184/89 *Nimz v Freie und Hansestadt Hamburg* [1991] ECR I-297

Case C-360/90 *Arbeiterwohlfahrt der Stadt Berlin NV v Bötzel* [1992] ECR I-3589

Case C-57/93 *Vroege v NCIV Instituut voor Volkshuisvesting BV & Stichting Pensioenfonds NCIV* [1994] ECR I-4541

Case C-128/93 *Fisscher v Voorhuis Hengelo BV & Stichting Bedrijfspensioenfonds voor de Detailhandel* [1994] ECR I-4583

Case C-297/93 *Grau-Hupka v Stadtgemeinde Bremen* [1994] ECR I-5535

Cases C-399/92, C-409 and 425/92, C-34, 50 and 78/93 *Stadt Lengerich v. Helmig* [1994] ECR I-5727

Case C-457/93 *Kuratorium für Dialyse und Nierentransplantation v Lewark* [1996] ECR I-243

Case C-278/93 *Freers and Speckmann v Deutsche Bundespost* [1996] ECR I-1165

Case C-1/95 *Gerster v. Freistaat Bayern* [1997] ECR I-5253

Case C-100/95 *Kording v Senator Für Finanzen* [1997] ECR I-5289

Case C-246/96 *Magorrian and Another v. Eastern Health and Social Services Board and Another* [1997] ECR I-7153

Case C-243/95 *Kathleen Hill and Ann Stapleton v. Revenue Commissioners and Department of Finance* [1998] ECR I-3739

Case C-50/96 *Deutsche Telekom v Schröder* [2000] ECR I-743

Case C-281/97 *Krüger v. Kreiskrankenhaus Ebersberg* [1999] ECR I-5127

Case C-78/98 *Preston and Others v Wolverhampton Healthcare NHS Trust* [2000] ECR I-3201

Case C-77/02 *Steinicke v. Bundesanstalt Für Arbeit* [2003] ECR I-9027

Case C-256/01 *Allonby v. Accrington and Rossendale College and Others* [2004] ECR I-873

Case C-196/02 *Nikoloudi v. Organismos Tilepikinonion Ellados AE* [2005] ECR I-1789

Case C-285/02 *Elsner-Lakeberg v Land Nordrhein-Westfalen* [2004] ECR I-5861

Case Analysis

Introduction

The preliminary reference procedure requires the framing of specific questions by the court of origin which form the basis of the ECJ's interpretation. These questions are shaped by the factual and legal bases of the case and, subsequently, by the relevant national legal framework. Although it desists from interpreting provisions of national law, the Court makes contact with those provisions through the construction of the questions and in its formulation of responses to those questions. Furthermore in its investigation of the case, the Court is exposed to specific features of national labour markets and workplace practice which, on occasion, amount to contributory factors in why a particular issue has become legally contentious. In the context of the Court's judgments, all of these elements, where identifiable, provide rich sources of analysis. In addition, a review of the arguments advanced by the legal representatives of the parties to the cases and the submissions made by the Commission and other Member States, insofar as what was accepted by the Court as appropriate and what was rejected, enables the analyst to deduce something of the nature of the factors which influence judicial decision-making in this respect. In devoting attention to the particular group of cases selected, I am primarily interested in discovering how what have become the accepted normative concepts in the Court's jurisprudence on gender relations were first articulated and subsequently received into Community law.

To enable such assessment it is necessary to first establish the relevant conceptual framework which has developed incrementally through the Court's jurisprudence on the group of cases under review. The first three of the cases with which the Court was confronted have been

particularly influential in this respect and will be given full consideration below. Once the conceptual framework is established and its strengths and weaknesses identified, it will be used to further explore the remaining cases in terms of the issues raised and their subsequent treatment by the Court. Consideration will be paid to the nature of these issues in terms of their national origin and corresponding place within domestic legislative and industrial relations frameworks as a means of deducing whether the Court's jurisprudence is likely to have had a wide-reaching impact or has been confined, in certain respects, to the specific features of a narrow range of national concerns. The effect of the Court's jurisprudence on public policy and law-making will also be considered.

Laying the Conceptual Foundations: *Jenkins, Bilka-Kaufhaus and Rinner-Kühn*

In chronological order, the first three of the cases under review led to the establishment of certain key features of what is now accepted as the correct treatment of claims by part-time female workers relating to issues of alleged sex discrimination under the provisions of EC law. Consideration of these cases in the order in which they came before the Court enables some assessment of the incremental development of the Court's interpretation of those provisions and the influence of national measures. This process invites analysis of the choices made by the Court in determining the meaning and scope of the principle of equality under Article 141 EC and associated secondary legislation. In addition some assessment is possible of the nature and extent of the transposition of doctrine from the national legal systems of the courts of origin into the Community legal order. This takes place by a process of cross fertilisation in which concepts and their contextual meanings cross over from one Member State legal system into Community law and, through application, into the legal systems of the other Member States. Given the relative infancy of the Court at the time these early cases

came before it and the untested nature of the provisions with whose interpretation it was charged, it is asserted that we are looking at a stage in the development of EC law when everything was up for grabs: the Court's definition of its own judicial role; the underlying meaning of the aspiration of equality articulated by the Treaty; the identification, position and interpretation of the principles which would emerge as the guiding lights of Community law and the place of gender relations within European integration.

In common with the overwhelming majority of the cases under review, *Jenkins*, *Bilka-Kaufhaus* and *Rinner-Kühn* were all concerned with inequities in pay rates between full and part-time workers. *Jenkins* was referred by the UK's Employment Appeal Tribunal (EAT), *Bilka-Kaufhaus* by the German Federal Labour Court and *Rinner-Kühn* by the Labour Court in Oldenburg. All sought clarification of the compatibility of national measures with Article 119 EC (now 141).⁵³⁵

*Jenkins v Kingsgate*⁵³⁶

In the first case to come before it on the issue of inequality in pay on the basis of hours of work, the Court was particularly receptive to the UK Employment Appeal Tribunal's suggestion that such cases be viewed as indirect discrimination claims. In order to proceed on this basis, the fact that the majority of part-time workers are female is used to show that a policy of paying lower rates to part-timers has a disproportionate adverse impact on women. The door is then open for the employer to justify the policy on gender neutral grounds

⁵³⁵ Which had been found to have both vertical and horizontal direct effects in Case 43/75 *Defrenne v SABENA* [1976] ECR 455.

⁵³⁶ Case 96/80 *Jenkins v. Kingsgate (Clothing Productions) Limited* [1981] ECR 911.

In *Jenkins*, the applicant was employed on a part-time basis for 30 hours per week as a skilled machinist. In its Harlow factory, where Mrs Jenkins worked, Kingsgate (Clothing Productions) Ltd employed 83 full-time workers, whose normal working week was 40 hours per week, and six part-time workers, five of whom were women. The one male part-time worker was viewed as an exceptional case in that he had been allowed to stay on past normal retirement age and worked 16 hours per week. Before the introduction of the Sex Discrimination Act 1975 and the Equal Pay Act 1970, which were jointly enacted in 1975, male and female employees had been paid at different rates but there was no difference in the hourly rates of pay of full-time and part-time workers. However, in response to the requirements of the legislation, new rates of pay were introduced which equalised full-time rates for men and women but distinguished those working for less than 40 hours per week who were categorised as ‘part-time’ and paid 10 per cent less per hour. Mrs Jenkins brought a complaint before an industrial tribunal that the difference between her pay and that of a full-time male employee contravened the equality clause inserted into her contract of employment by the Equal Pay Act 1970. Kingsgate asserted that the differential rates of pay were not attributable to the sex of the workers concerned but rather were intended as a disincentive to part-time working so that the optimum use could be made of machinery. Jenkins’ claim before the industrial tribunal failed and she appealed to the EAT which referred the case for consideration by the ECJ under the provisions of Article 177 EEC.⁵³⁷

In paying consideration to the theoretical and legal foundations underpinning Jenkins’ claim and the subsequent reasoning of the Court of Justice, it is important to place the case in its historical context. The concept of indirect discrimination was still very much in its infancy within the UK legal system at the time of the EAT’s referral of *Jenkins* to the ECJ, having

⁵³⁷ Now Article 234 EC

been introduced into statute by the Sex Discrimination Act 1975 (SDA) just five years earlier. The SDA's enactment was not directly related to the UK's membership of the Community, but had been influenced by the legislative changes introduced to US law to prohibit race discrimination and, therefore, the Act's provisions did not result from the intended implementation or interpretation of any Community provisions. The influence of the US Supreme Court's decision in the race discrimination case *Griggs v Duke Power Co*⁵³⁸ on the development of the UK's legal framework is demonstrated by the inclusion and framing of the concept of indirect discrimination in section 1 (1) (b) of the Act. The concept of indirect discrimination, although recognised by the ECJ in its earlier case law,⁵³⁹ was not expressly provided for in the Treaty or in secondary legislation until much later.⁵⁴⁰

Although the concept of indirect discrimination, as articulated in the SDA, was applied by the European Court, the statutory provision itself was not under consideration. This is because, when *Jenkins* was originally considered by the industrial tribunal (at which stage the claim failed), the claimant relied on section 1 of the Equal Pay Act 1970 (EqPA) arguing that, as she was engaged on like work with a male comparator who was employed on a full-time basis, she was entitled to equal pay. The Industrial Tribunal accepted the employer's defence under s. 1(3) EqPA, that the difference in pay was attributable to a material difference other than the difference of sex between Mrs Jenkin's case and that of her male colleague.

In referring the case to the ECJ, the EAT asked, *inter alia*, whether the principle of equal pay contained in Article 119 (now 141) of the Treaty and Article 1 of the Equal Pay Directive required that pay for work at time rates should be the same irrespective of the hours worked

⁵³⁸ 401 US 424 (1971) see below at pp. 208-9.

⁵³⁹ See, for example, Case 152/73 *Sotgiu v Deutsche Bundespost* [1974] ECR 153.

⁵⁴⁰ Directive 97/80 /EC on the burden of proof (OJ 1997 L14/6).

each week, or whether the employer's aim of attaining a commercial benefit by encouraging workers to do the maximum possible hours of work justified the payment of different rates dependent on hours of work (Question 1). Furthermore, the Court was asked whether, and in what respects, the application of Community law would differ 'if it were shown that a considerably smaller proportion of female workers than of male workers is able to perform the minimum number of hours each week require to qualify for the full hourly rate of pay.' (Question 3).

Given the relative lack of experience of UK tribunals in dealing with the legal provisions under review, the EAT displayed what appears to be an impressive insight into the issues at stake in framing the questions for consideration in the way that it did. Question 1 invites consideration of the employer's policy as an acceptable justification for *prima facie* discrimination. Question 3 opens the door, perhaps regrettably (see below), to the application of the concept of indirect discrimination. The identity and role of Mrs Jenkins' Counsel is noteworthy at this juncture. Anthony (now Lord) Lester QC acted on her behalf and she was assisted throughout the proceedings by her trade union⁵⁴¹ and the Equal Opportunities Commission. Anthony Lester's involvement is particularly relevant to the conduct of the case given that his status as one of the chief architects of the UK legislation would have given him a far greater degree of familiarity with the concepts and rationale thereof than the majority of practitioners at that time.⁵⁴² Following the failure of his client to secure the right to equal pay with her male colleagues before the industrial tribunal, we are told that 'counsel for Mrs Jenkins conceded that...he could not succeed [at the EAT] on the basis of the British

⁵⁴¹ The National Union of Tailors and Garment Workers.

⁵⁴² See the Advocate General's opinion, at p.4. in which he contrasts Mrs Jenkins' representation with that of the unrepresented employer commenting that her case is 'fully represented'.

legislation alone' hence the invocation of Article 119 and Article 1 of the Equal Pay Directive.⁵⁴³

The Court's judgment in *Jenkins* has been the subject of criticism (see below) on the basis that its wider application is difficult to discern and the Court's responses to the questions referred reveal little of the reasoning applied. In contrast, the Advocate General's opinion, with which the Court appears to have concurred, sets out the various theoretical and conceptual grounds relevant to the case and so is considered at length in the following analysis.

The Advocate General's Opinion

In his opinion, delivered on 28 January 1981, Advocate General Warner set out the Commission's finding that, although no Member State had legislation which required part-timers' pay to be proportionate to that of full-timers, the effects of collective bargaining had achieved that result in many Member States. In fact the UK was the only Member State in which it was not uncommon for part-time work to be paid at a lower hourly rate.⁵⁴⁴ Under the UK's legislative provisions on equal pay, such differential pay rates would be acceptable where they resulted in inequalities in pay between a female and male worker only if the variation was found to be 'genuinely due to a material difference (other than the difference of sex) between her case and his.'⁵⁴⁵

The Commission, in its submission, supported the argument underpinning the first questions posed by the EAT which A-G Warner interpreted as being that 'the very wording of Article

⁵⁴³ *Id* at 596.

⁵⁴⁴ *Id*.

⁵⁴⁵ Equal Pay Act 1970, s. 1 (3).

119 required that pay for work at time rates should be the same irrespective of the numbers of hours worked each week; and secondly that, under Article 119, any commercial benefit that an employer might derive from encouraging full-time work by paying higher rates for it was irrelevant.⁵⁴⁶ A-G Warner considered whether Article 119 (see above) could be read in this light, concluding that, in order to ascribe the necessary interpretation, the phrases ‘the same job’, ‘the same work’ (paragraph 3 of Article 119) and ‘equal work’ (paragraph 1 of Article 119) would all have to be accorded the same meaning, thus allowing for their interchangeable use. That the phrases ‘equal work’ and ‘the same work’ were intended to have the same meaning was, in the Advocate General’s opinion, unproblematic. However, the change from ‘equal’ (or ‘the same’) ‘work’ to the ‘same job’ occurred in all the different language texts of the Treaty and, thus, appeared to be deliberate. This meant, AG Warner concluded, that, although a part-time and full-time worker may perform equal work, they do not have the same job.⁵⁴⁷ In drawing this distinction between the ‘work’ and the ‘job’, AG Warner effectively closed off the possibility that an employer’s policy of differentiating pay rates on the basis of hours of work might potentially amount to direct discrimination. Following this reasoning, the jobs performed are different and the gender of the incumbents becomes irrelevant and gives way to the possibility of justification.

Turning to the employer’s defence that the differential pay rates were not related to the sex of part-time workers but were based on the desire to facilitate the optimum use of machinery by encouraging full-time working, A-G Warner again disputed the approach proffered by Mrs Jenkins. The ‘Clay Cross approach’ advocated by the claimant drew on the reasoning of Lord

⁵⁴⁶ A-G’s Opinion at 598.

⁵⁴⁷ In its submission, the Commission rejected this approach arguing that it was the ‘post’ and not the number of hours worked which determine whether or not two jobs are the same. This line appears to be supported by the Court in its judgment in Case 129/79 *Macarthys Ltd v Smith* [1980] ECR 1275 in which it was found that, in deciding whether a female worker is performing the same work as a male worker, regard should be had to the *nature of her services*.

Denning M.R. in an earlier case before the Court of Appeal,⁵⁴⁸ in which Denning had clearly enunciated his opinion that the intention of the employer must be set aside if his actions resulted in unlawful discrimination. To accept market-based 'excuses' such as a woman's willingness to work for less than a man or a man's request for higher wages than a woman's would result in the UK legislation being a 'dead letter' as '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.'⁵⁴⁹ AG Warner, although accepting of the approach adopted by the Court of Appeal, found 'no support in the *Clay Cross* case for the wide proposition that counsel for Mrs Jenkins sought to derive from it.'⁵⁵⁰

In reaching this conclusion, the Advocate General relied on the decision of the industrial tribunal in *Jenkins* in asserting that there was no evidence to support the supposition that 'differentiation was a hangover from the days when Kingsgate paid all its female employees at lower rates than its male employees.'⁵⁵¹ This is challengeable on two related grounds: First, the policy of paying different pay rates to full and part-time workers had been introduced by Kingsgate in November 1975 in response to the impending introduction of the Equal Pay Act 1970 and the Sex Discrimination Act 1975 in December of that year,⁵⁵² before which, although men and women had been paid at different rates, there had been no differentiation on the grounds of hours worked. Secondly, the IT in finding against Mrs Jenkins as a matter of law, remarked that if different rates of pay were legally payable to part-time and full-time workers 'this in itself smacks of inequality among the sexes because by the very nature of things the part-time workers are bound to be mostly women'.⁵⁵³ Given the tribunal's

⁵⁴⁸ *Clay Cross (Quarry Services) Ltd v Fletcher* [1979] ICR 1.

⁵⁴⁹ *Id.* at p.5A, D.

⁵⁵⁰ AG's Opinion at 599.

⁵⁵¹ *Ibid.*

⁵⁵² A-G opinion at 595.

⁵⁵³ *Id.* at 596.

acknowledgment of the limitations in the wording of the UK statute and the blatancy of the employer's change of policy, it is regrettable that the Advocate General, and ultimately the Court itself, were not more accepting of Lord Denning's approach in *Clay Cross*, in which he advocated a purposive interpretation of employers' attempted defences taking cognisance of the intention of the statute, as to do otherwise would seriously undermine its effect.

Having opened the door for a potential justification on the part of the employer, AG Warner turned his attention to the concept of disparate impact. In her case before the EAT, Mrs Jenkins had argued that, if her primary argument (of direct discrimination) failed, the disproportionate adverse impact of the employer's policy to encourage workers to engage in a 40 hour week should be considered. This arose due to the fact that, because of their family responsibilities, women were generally less able to work 40 hours per week than men. Although it is not formally acknowledged, this amounts to what is now familiar as indirect discrimination. In support of this line of argument, Jenkins' counsel cited the US Supreme Court's judgment in *Griggs*.⁵⁵⁴ Interestingly, the Commission had rejected this approach out of hand describing it as a 'half-way house' and questioning its enforcement as being 'difficult to monitor in practice'.⁵⁵⁵ Nonetheless, this was the approach favoured by the Advocate General and, ultimately, by the Court itself and has remained the accepted formulation for dealing with equal pay and treatment claims by part-time (and other 'atypical') workers under the sex discrimination provisions of EC law ever since. AG Warner approved this approach as the only one 'that reconciles the need to prevent discrimination between full-time and part-time workers with the need to prevent injustice to an employer who differentiates between [such] workers for sound reasons unconnected with their sex'.⁵⁵⁶ In arriving at the conclusion that such cases should be approached as 'indirect discrimination' claims, the Advocate

⁵⁵⁴ *Op cit* at n. 15 - see below pp. 208-9.

⁵⁵⁵ AG opinion at 599.

⁵⁵⁶ *Id* at 601.

General drew support from the Court's jurisprudence on the application of the principle of non-discrimination in the context of nationality.⁵⁵⁷

The Judgment in *Jenkins*

In broadly concurring with the findings of the Advocate General, the Court held that the purpose of Art 119 was to ensure the application of the principle of equal pay for men and women for the same work. The differences of pay prohibited by that provision are, therefore, based exclusively on the sex of the employee and, thus, differences in rates of remuneration for full and part-timers do not offend the Article provided the difference is due to factors which are objectively justified and not attributable to discrimination based on sex. Article 1 of Directive 75/117 was designed to facilitate the practical application of Article 119 and in no way altered its scope or content. The provisions of Article 119 would be directly effective in circumstances where the national court could apply the criteria of equal work and equal pay to establish that different pay rates for full and part-time workers amounted to sex discrimination.

Criticism at the time of the judgment was centred on its opaqueness rather than its reasoning, so that 'it was thought from the decision...that the ECJ had a narrow understanding of the concept of indirect discrimination, namely that an action was only discriminatory when it was intended to be so.'⁵⁵⁸ The President of the EAT, Sir Nicolas Browne-Wilkinson had such

⁵⁵⁷ Case 152/73 *Sotgiou v Deutsche Bundespost* [1974] 1 ECR 153; Case 61/77 *Commission v Ireland* [1978] ECR 417; Case 237/78 *Caisse Regionale d'Assurance Maladie (C.R.A.M.), Lille v Palermo* [1979] ECR 2645.

⁵⁵⁸ C. Barnard and B. Hepple, 'Indirect Discrimination: Interpreting *Seymour Smith*' 58 (1999) Cambridge Law Journal (2), 399-412 at 401. See also C. Kilpatrick (1998) 'Community or Communities of Courts in European integration? Sex Equality Dialogues between the UK Courts and the ECJ' 4 ELJ 2, 121-147 at p. 140 in which the judgment is described as being 'extremely confused'. For confirmation of the belief that *Jenkins* applied only to circumstances where there had been an intention to discriminate see the UK's submission in *Bilka-Kaufhaus*.

difficulty trying to apply the judgment that he used his own interpretation of national law in finding that unintentional indirect discrimination against part-time female workers was contrary to the Equal Pay Act 1970 even if it was not prohibited by Article 119.⁵⁵⁹ It is unfortunate that, given the subsequent application of the judgment in *Jenkins* to a wide range of cases on related issues, the decision was not based on more solid foundations. In fact, the Court's treatment of the case and its use as authority in later cases dealing with the issue of objective justification (see below) had set the law in this respect on a path which has become increasingly contentious over the years.

Given how much was at stake, the ECJ's treatment of *Jenkins* must be viewed as disappointing when placed in the context of the subsequent development of the law in this area. Although it has been hailed as the case in which the Court enabled part-time workers to utilise Article 119 as a basis for claims before national courts, one cannot help but wonder how things might have turned out if the Court had accepted Mrs Jenkins' primary argument that the discrimination she endured amounted to *direct* discrimination. From a vantage point of over 20 years' experience of such cases, this may at first consideration seem entirely inappropriate. However, if our knowledge of the incremental development of the law in this respect is set aside and a deconstructed analysis of the issues is applied, it emerges as being as much of a possibility as the Court's actual finding that such cases should be dealt with as *indirect* discrimination claims.

When stripped back to its bare essentials, the categorisation of the claim in *Jenkins* as direct discrimination does not, in fact, necessitate a huge leap in terms of reasoning but merely requires the setting aside of the hours of work performed as a relevant criterion for the

⁵⁵⁹ [1981] IRLR 388.

establishment of 'different' jobs. In other words, if the hours of work are deemed to be irrelevant in determining the nature of the job, a straightforward comparison between the pay received by Mrs Jenkins and her male comparator for the same work amounts to a direct breach of the principle of equality as provided by Article 119. This was the essence of the claimant's primary argument and was accepted as the correct approach by the Commission in its submission. The wording of the Article could easily have been interpreted as supportive of this approach in its provision that 'pay for work at time rates shall be the same for the same job.'⁵⁶⁰ On this basis, the comparison would have been between the hourly pay received by the part-time worker with that of her full-time comparator. Given that the workers concerned were of different sexes, a finding of direct discrimination would have ensued with no opportunity for justification.

The Court's judgment in *Jenkins* raises the possibility that a 'commercial benefit' might be used as a means of justifying differential pay rates, although it was in the next case to be considered by the Court that this issue was specifically dealt with (see *Bilka* below). The use that has been made of this potential escape route for employers in some of the case law involving atypical workers since *Jenkins* is extremely questionable with most amounting to little more than thinly disguised attempts at circumventing the sex discrimination legislation.

It is important to clarify that the criticisms set out here in relation to the suitability of indirect discrimination as a means of dealing with the claim in *Jenkins* should not be read as a complete rejection of the use of indirect discrimination in all related circumstances. On the contrary, the development of disproportionate impact as a suitable means of assessing certain employer and state policies has been a very welcome addition to anti-discrimination law. It is

⁵⁶⁰ Article 119, paragraph 3.

clear that indirect discrimination is the most appropriate means of dealing with cases covering a wide range of issues,⁵⁶¹ but what is contentious is the assumption, explicit in the ECJ's jurisprudence since *Jenkins*, that the right not to be discriminated against on the grounds of sex will only apply to 'atypical' workers if it can be derived from the application of a 'neutral' policy (imposed by an employer or the State – see *Rinner-Kühn* below) which cannot be justified on non-gender grounds. This assumption removes the necessity of a thorough assessment of the factual basis against non-justifiable provisions by the national courts and enables claims to succeed under EC law only if a number of technical procedural hurdles can be cleared, often through the application of wholly subjective criteria.

The Relationship between Women's Labour Market Participation and Family Responsibilities

The most significant shortcoming of the Court's approach in *Jenkins* is the refusal to consider the actual cause and effect of the employer's policy of paying less to part-timers. Although it is not within the Court's jurisdiction to establish the factual basis of the case, nor to consider the application of the national provisions under review, some assessment of the motive informing the employer's behaviour would surely have permitted a more pragmatic view to have been taken. The EAT, in framing the questions for referral, did appear to invite this. The employer's claim that the policy was for reasons of 'commercial benefit' means merely that the lower pay rates saved money – a 'justification' which would have had equal application in a policy concerned with the explicit payment of women at lower rates than men. The conferment of the principle of sex equality, at least in a formal sense through its enshrinement

⁵⁶¹ Specifically those arising from 'equal value' claims which necessitate comparisons between different jobs or professions – see, for example, Case C-127/92 *Enderby v Frenchay Health Authority and Another* [1993] ECR I-5535 and those in which the discrimination arises from a combination of factors such as the application of a collective agreement which limits the effects of national legislation or *vice versa* – see below at pp. 219-227.

in the Treaty, carried a financial cost for employers, but it was accepted that this was a price worth paying. To subordinate this principle so early on in its interpretation under EC law to the potential whim of employers who wish to avoid associated costs has had a profound effect on the rights of female workers engaged in 'women's work'.⁵⁶²

If the Court had been minded to take a wider view of the issues raised by the case in giving its judgment, the reasons why Mrs Jenkins and her part-time colleagues worked the hours they did would have been directly relevant to the outcome. This would have necessitated some consideration of the women's need to balance paid employment with family responsibilities and the employer's decision to employ part-timers at a lower pay rate would have emerged as the punitive measure it effectively was. In fact, the relationship between part-time work and family responsibility *was* implicitly accepted by the Court as a relevant factor in its finding of indirect discrimination. If Mrs Jenkins' reasons for working part-time had been directly attributed to her gender, her case could surely have succeeded as a direct discrimination claim.⁵⁶³ Of course, there is an inherent difficulty in ascribing family responsibilities as solely the concern of women as this carries with it certain stereo-typical assumptions that all women are mothers and/or always have primary responsibility for childcare and household chores. Subsequently, where such assumptions inform the application of legal doctrine there is a danger that they will become embedded in the normative concepts on which policy and law-making are based and, thus, be perpetuated. This difficulty illustrates the important dividing line recognised in the debate concerning sex and the construction of gender (see Chapter 1). However, to desist from attempting to target law effectively at the removal of sex discrimination which arises through the real life experiences of women would avoid any

⁵⁶² See Chapter 3 *infra*.

⁵⁶³ This has been how the jurisprudential approach to cases concerning dismissal on the grounds of pregnancy and maternity has evolved - see Case C-32/93 *Webb v EMO Cargo (UK) Ltd* [1994] ECR I-3567. These types of claims only succeeded latterly, once the woman's sex was viewed as the reason for any discrimination on the grounds of pregnancy and maternity.

opportunity to challenge the construction of gender roles effectively. If female part-time workers had been recognised as the victims of direct sex discrimination and had won the right to equal pay with male full-timers, perhaps the construction of gender roles would have been the subject of informed legal debate, rather than merely providing further justification for the marginalisation of part-time work.

*Bilka Kaufhaus*⁵⁶⁴

In the second case to come before it on the issue of equal pay and part-timers, the Court revisited the specific issue of justification in cases of indirect discrimination. *Bilka Kaufhaus* was referred by the German Federal Labour Court⁵⁶⁵ three years after the Court's judgment in *Jenkins*. It is interesting to note that, despite the infancy of the Court's jurisprudence in this context, the application of indirect discrimination as an appropriate means of dealing with part-time workers' rights had become accepted to such an extent since *Jenkins* that a straightforward application of the concept of direct discrimination under Article 119 is not even considered. Instead the German case, which raises questions regarding the rights of access of part-time workers to occupational pension schemes, was heard as an indirect discrimination claim in the domestic court which asked the ECJ for clarification of the application of Article 119 to an employer's policy which excluded part-timers from membership of a pension scheme and guidance on what might qualify as an acceptable justification in this context. The German court's questions, on which the reference is based, were all explicitly framed around the Court's decision in *Jenkins*. As with the EAT in *Jenkins*, the national court displays both insight into and an open minded approach to the issues before it as reflected in the range of questions asked.

⁵⁶⁴ Case 170/84 *Bilka-Kaufhaus GmbH v. Karin Weber Von Hartz* [1986] ECR 1607.

⁵⁶⁵ Bundesarbeitsgericht.

Bilka-Kaufhaus GmbH was part of a chain of department stores. The company's full-time workers were given a non-contributory pension on retirement. Part-time employees did not qualify for the pension scheme unless they had been employed for at least 15 years at the time of their retirement. The employer contended that the exclusion of part-timers from the scheme was to discourage part-time employment. This was part of a strategy to make full-time work more attractive as full-time workers were required to cover the evening and Saturday opening times which were unpopular with part-time workers. This, the employers contended, amounted to an economic reason as referred to in *Jenkins*, and was thus capable of justifying the differential pay rates. Conversely, the claimant, Ms Weber von Hartz, argued that the reason advanced for the pay differences arose as a matter of employer choice and was not justified as '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.'⁵⁶⁶

In making its reference to the ECJ, the German court asked whether the exclusion of part-time workers from an occupational pension scheme amounted to an infringement of Article 119 if it had a disproportionate effect on more women than men. (Question 1) and (a) Whether the exclusion of part-timers could be objectively justified on the grounds of a policy to deter part-time working arrangements, even if such a policy is not necessary for reasons of 'commercial expediency'? (b) Whether the undertaking is under a duty to structure its pension scheme so as to take account of the 'special difficulties experienced by employees with family commitments in fulfilling the requirements for an occupational pension' (Question 2)⁵⁶⁷

⁵⁶⁶ *Bilka ibid*, at p.710.

⁵⁶⁷ Paraphrased from the case report.

The Advocate General's Opinion

In giving his opinion, Advocate General Darmon interpreted the respondent's view as being that the *Jenkins* judgment had implied that no distinction should be made between 'direct' and 'indirect' discrimination as 'Part-time work consolidates the traditional roles between men and women, without making women economically independent. It is thus, she says, a manifestation of the conflict inherent in the situation faced by women: home and family on the one hand, employment on the other. Furthermore, in the present economic circumstances it encourages the employment of men in full-time positions.'⁵⁶⁸ In its defence, Bilka argued that market factors related to the scarcity of labour during the 1970s had led to the necessity to give preference to the employment of full-time workers. This had been the rationale for the current pension arrangements which were not based on any sex-related criteria.

The confusion caused by the Court's judgment in *Jenkins* is apparent in the UK's submission which argued that Article 119 was only applicable where an element of intention on the part of the employer was present, so that 'the court cannot step into the shoes of the employer in assessing his choice of business policy'.⁵⁶⁹ Moreover, the UK opined that Article 119 did not apply to 'indirect discrimination'.

The distinction between direct and indirect discrimination was also central to the Commission's submission which argued that the terms 'covert' and 'indirect' discrimination were not particularly useful in defining the scope of the principles laid down by the Court.⁵⁷⁰

⁵⁶⁸ A-G's Opinion at 117.

⁵⁶⁹ A-G's Opinion at para 10.

⁵⁷⁰ This confusion in terminology originated in *Defrenne II*, in which it was held that Article 119 could have direct effect in situations of direct discrimination, but could not in cases of indirect (disguised) discrimination which would require further legislation in order to define it – see [1976] ECR 455, at para. 18. This distinction was subsequently removed from the Court's jurisprudence, starting with its decision in the current case.

The judgment in *Jenkins*, read alongside the reference to *Griggs* in Advocate General Warner's opinion inferred that the Court 'intended to indicate that the absence of discriminatory intent on the employer's part is not enough to justify a finding that a provision which in fact placed women at a disadvantage was not contrary to the prohibition of discrimination.'⁵⁷¹ With regard to Question 2 in the current case, the Commission submitted that the social objective of Article 119, as articulated in *Defrenne II*, can 'be effective only if employers' pay policy does in fact take into account the living and working conditions of women employed part-time.'⁵⁷² This would have required a wide consideration of the social objective of promoting improvements in the working and living conditions of Europeans as articulated in Articles 136 and 137.⁵⁷³

In considering the direct applicability of Article 119, AG Darmon did toy with the possibility that the current claim amounted to direct discrimination.⁵⁷⁴ He did so to draw attention to what he called the 'terminological ambiguity' in the German Court's first question. If the pay practice in *Bilka* amounted to 'different pay (in a broad sense) for identical work carried out under different conditions (full or part-time)', it would be classified as direct discrimination within the meaning of the judgment in *Defrenne II*. However, this consideration was pushed to one side as 'it is not the nature of the discrimination which determines the competence of the court'.⁵⁷⁵ In referring to the Advocate General's opinion in *Jenkins*, AG Darmon emphasised that it was the issue of Article 119's direct effect that was at stake in such cases rather than the nature of the discrimination. Having latched on to *Jenkins*, the Advocate General opined (quoting directly from AG Warner's Opinion) that a difference in pay applied without distinction to workers of both sexes is not in itself contrary to the provision of Article

⁵⁷¹ A-G's Opinion at para 11.

⁵⁷² A-G's Opinion at para 11.

⁵⁷³ Ex 117 and 118.

⁵⁷⁴ *Id.* at para. 12.

⁵⁷⁵ *Id.*

119 as it may be based on economic grounds which may be objectively justified ‘by factors other than discrimination based on sex’.⁵⁷⁶ It was up to the national court to determine whether the difference in pay was in reality based on sex.

Turning to consider whether the specific pay policy in *Bilka*, which was referred to in Question 2a as not being necessary for ‘reasons of commercial expediency’, Advocate General Darmon stated that, following *Jenkins*, a measure that is ‘not economic in nature’ could not be dismissed as a justification. If such a measure were deemed to amount to a justification, ‘Nothing would appear to prohibit an employer from implementing a staff policy which encourages full-time employment, if that choice complies with the applicable rules of law and does not reflect an intent to discriminate.’⁵⁷⁷ However, this must be balanced with the fact that the socio-cultural constraints faced by working women ‘do not impose on employers additional obligations restricting their normal freedom to determine staff policy.’⁵⁷⁸

The Judgment in *Bilka*

The Court first considered the applicability of Article 119 to the pension scheme operated by Bilka, holding that the contractual nature of the scheme⁵⁷⁹ meant that it did amount to ‘consideration’ in return for labour and, thus, fell within the scope of Article 119. In response to Question 1, the Court found that Article 119 was infringed by the exclusion of part-time employees from an occupational pension scheme, ‘where that exclusion affects a far greater

⁵⁷⁶ *Id.* at para. 13.

⁵⁷⁷ *Id.*

⁵⁷⁸ *Id.*

⁵⁷⁹ As distinguished from a statutory scheme which would fall outside of the scope of Article 119 – see Case 80/70 *Defrenne v Belgium* [1971] ECR 445.

number of women than men, unless it could be shown that the exclusion was based on objectively justified factors unrelated to any discrimination on grounds of sex.⁵⁸⁰

In formulating its answer to Question 2 (a), the Court set down what has become the definitive test for objective justification in cases of indirect discrimination, holding (in line with the Commission's submission) that justification will be possible only where the measures chosen correspond to a real need on the part of the undertaking, are appropriate with a view to achieving that objective and are necessary to that end. The Court then responded to Question 2 (b) in the negative by stating that Article 119 did not impose an obligation on employers to organise their occupational pension schemes so as to take into account the particular difficulties faced by those with family responsibilities.

The Test for Objective Justification

The court's decision in *Bilka* has been widely welcomed as establishing a right of access to occupational pension schemes for part-time workers and the guidance it provided for the application of this right has been used extensively ever since.⁵⁸¹ However, if the reasoning applied in the case is considered, several weaknesses can be identified which have had far-reaching implications for the application and development of the equality principle in this context. First and foremost, the Court's reliance on the shaky foundations of the *Jenkins* case has meant that the success of related claims will depend on the ability of the claimant to show that denial of the right of access has a group impact, or, put more simply, complies with the requirements of indirect discrimination. As discussed above, this position could have been

⁵⁸⁰ Judgment at para. 28.

⁵⁸¹ Although, depending on the circumstances of the case, with varying degrees of success – see the section below on Retirement and Work-related Benefits, at pp. 239-252.

avoided by a straightforward comparison of the pay⁵⁸² of a male full-time worker and a female part-time worker. The conceptualisation of all equal pay claims by part-time workers as potential indirect discrimination subordinated this right to the need to advance statistical data which support the claim. Following *Bilka*, this right was further qualified by the need to ensure that such discrimination could not be 'objectively justified' on the basis of potentially subjective criteria. The reliance on statistical information in this respect has provided difficulties in sectors where women predominate in both full and part-time work.⁵⁸³ For part-time women workers in such sectors, the requirement to show that a far greater number of women than men are affected by the discriminatory act can be unsurpassable if the comparison relied upon is between full and part-time workers. In such circumstances, the claim becomes a non-starter and, even where such 'proof' is forthcoming, the applicant must ensure that the discriminatory act cannot be justified.

The Court clarified the nature of the test for objective justification in *Bilka* by attaching certain criteria to its use. In order for a measure to be capable of being objectively justified, it must correspond to a real need on the part of the undertaking, be appropriate with a view to achieving that objective and be necessary to that end. This approach represents an amalgam of the principle of proportionality which is present in the national legal systems of several Member States.⁵⁸⁴ In German law, the test of proportionality rests on an assessment of three factors: suitability of the measure under review for the attainment of the desired objective; the necessity of the disputed measure (i.e. there is no alternative measure available which is less restrictive of the individual's freedom); and the proportionality of the measure to the restrictions that are thereby involved.⁵⁸⁵

⁵⁸² Including, under Article 119, membership of an occupational pension scheme

⁵⁸³ Such as teaching and nursing.

⁵⁸⁴ France and Germany being the most prominent examples.

⁵⁸⁵ Craig and de Búrca (2003) *op cit* at p. 372.

The test expounded by the Court in *Bilka* differs substantially from the contemporary German formulation through its self-justifying stance that the measure be both 'appropriate' and 'necessary' in its achievement of the objective ('the real need of the business'). Use of the German test is qualified only by weighing up the effect of the measure and the restriction of the individual's freedom, whereas no such requirement is present in the test as stated in *Bilka*. In fact, the *Bilka* test can be read in almost 'leading' terms in favour of employers' interests: once a 'real need' is identified, the measures chosen to support it serve to justify their own existence by being both appropriate and necessary to ensure it is achieved. Although the Court made it clear that the use of the test should always be considered by national courts in light of the specific facts of each case, the conceptual foundations of this test are questionable as a means of furthering the principle of equality. Its main weakness lies in the lack of any requirement to balance the employer's needs against those of the individual disadvantaged by the imposition of the measure. In *Bilka* these components amounted to the gaining of a commercial advantage by a business pitched against the denial of an individual's pension rights. If the loss suffered by the claimant due to the discrimination caused is weighed up against the consequences of deprivation of the business need (as required by the German test), it is at least possible to make an assessment of the relative values of the factors at stake. In the context of the relationship between employer and employee, it also becomes apparent that some rights may be more fundamental in securing the well-being and security of workers than others, with entitlement to a pension placed high up this list.

This leads to the next issue; that raised by the Court's response to Question 2 (b) concerning whether, in formulating the arrangements pertaining to pension entitlement, employers should take any account of the 'special difficulties experienced by employees with family

commitments in fulfilling the requirements for an occupational pension'. The Court found this to be beyond the scope of Article 119 with no other basis under EC law as it stood. In *Bilka* it had been argued that employers should be under an obligation to ensure that periods when women workers have had to meet family responsibilities should count as periods of full-time employment for the purposes of calculating pension entitlement.⁵⁸⁶ The Court's refusal to entertain the possibility that the effects of part-time employment or breaks in continuity of employment could not be mitigated by the provision of Article 119 perpetuates the disadvantage suffered by women in old age. Furthermore, given the apparently wide application of Article 119 as set out in *Defrenne II*, could the Court not have enabled this link between the principle of equality and the living and working conditions of Europeans to be established by applying a contextual or teleological approach to take in the effects of the social aims of Treaty as articulated by Article 119's near neighbours, Articles 117 and 118?⁵⁸⁷ More fundamentally, it is questionable that the Court's answer to Question 1 regarding the prohibition under Article 119 of exclusion of part-time women workers from an occupational pension scheme can be seen as indicative of any real commitment to the principle of equality in such circumstances if the factors influencing women's inability to work full-time cannot be considered as relevant to the interpretation afforded to Article 119. In its reasoning in *Bilka*, it appears that the Court was prepared to go only so far, in enabling Article 119 to be interpreted in light of the impact of measures on women as a 'group', and no further. The future success of such claims would depend, not on the existence or impact of discriminatory measures, but rather on the ability to advance statistical data in support of the existence of such impact with, in cases where it could be identified, the resulting discrimination vulnerable to the possibility of justification.

⁵⁸⁶ Judgment in *Bilka op cit.* at para 40.

⁵⁸⁷ Now Articles 136 and 137.

Proving Disproportionate Impact

The use of statistical data as a means of providing evidence in support of (or to disprove) such claims has its origins in the US Supreme Court case *Griggs v Duke Power Co.*⁵⁸⁸ Although *Griggs* was referred to by both of the Advocate Generals in *Jenkins* and *Bilka* and by the Court in *Jenkins* as authority for the application of the indirect discrimination approach, the reasoning applied by the Supreme Court has little in common with the ECJ's approach in either case.

In *Griggs*, the practice of applying the criteria of a high school education or passing a general intelligence test as conditions of employment were found by the Supreme Court to be prohibited⁵⁸⁹ if they were not significantly related to job performance and operated to 'freeze' the *status quo* of prior discriminatory employment practices. The reasoning of the Court was based on the fact that the practical effect of the criteria was to disqualify black applicants at a substantially higher rate than white applicants. This was because, under the conditions pre-dating the passing of the Civil Rights Act, black people had received inferior educations in segregated schools. Furthermore, the jobs to which the criteria were attached had formerly been filled only by white employees as part of a longstanding practice of giving preference to white applicants. Although *Griggs* was brought as a class action and the petitioners' claim was demonstrable by the use of statistical data, the Supreme Court's decision did not rest on the presentation of that data⁵⁹⁰ but rather on the nature and effect of the criteria. In deciding

⁵⁸⁸ 401 US 424 (1971).

⁵⁸⁹ By Title VII of the Civil Rights Act 1964.

⁵⁹⁰ The data was in fact necessary to prove the validity of the claim, as the failure of one black individual to graduate from high school or pass the intelligence test could have been merely indicative of the fact that the individual was of below average intelligence. However, by presenting a statistical analysis showing that all of the applicants who had not completed high school or taken the test had continued to perform satisfactorily, the petitioners were able to show that the criteria were irrelevant in assessing job performance. In *Bilka*, in contrast, the act of excluding part-time workers from the pension scheme and its effects on the individual were obvious without statistical proof.

whether such a policy could be justified *despite* its impact, the Court held that the ‘touchstone is business necessity’,⁵⁹¹ meaning the necessity of the application of the criteria. In the circumstances, the criteria were not found to be necessary as they were not significantly related to job performance. Although the Court recognised that a balance must be struck between the attainment of equality and the pursuit of satisfying genuine business needs, in reaching its decision preference was given to the elimination of historical disadvantage suffered by black people in line with the overriding objectives of the legislation.

This approach can be fundamentally distinguished from the reasoning applied by the ECJ. By specifically stating that it was not necessary for account to be taken of the particular difficulties faced by those with family responsibilities in the formulation of employers’ policies, the ECJ in *Bilka* closed off the possibility that such issues could be raised as relevant factors in subsequent claims. In relation to *Griggs*, the guidelines set down by the European Court on the test for objective justification differ fundamentally from those established by the Supreme Court on the issue of justification for disparate impact by way of which ‘the posture and condition of the job-seeker [should] be taken into account’.⁵⁹² Furthermore, the European Court’s interpretation of the phrase ‘commercial expediency’ appears to be substantially different from that of the Supreme Court’s reading of ‘business necessity’, with the former being established as a ‘real need on the part of the undertaking’ and the latter arising from a job-centred necessity measurable by the performance (actual or potential) of the incumbent.

By the European Court’s treatment of the claims in *Jenkins* and *Bilka*, the operation of the principle of equality in relation to those who sought to pursue part-time work alongside family responsibilities very quickly became subordinated to the technicalities of indirect

⁵⁹¹ Judgment in *Griggs*, *op cit* n. 65, at 431.

⁵⁹² *Id.* at 430.

discrimination claims which were open to the possibility of justification on a potentially wide range of grounds. Furthermore, the subjective nature of the test coupled with the wide discretion given to national courts in interpreting such justifications looked set to be the cause of different standards of application across Member States. These concerns will be further explored below in the context of subsequent cases brought by atypical workers on a variety of grounds.

Both *Jenkins* and *Bilka* were concerned with the applicability of Article 119 to employer's policies which, *prima facie*, disadvantaged female part-time workers in comparison to their male full-time counterparts. In both cases, the employers concerned attempted to defend their policies on the grounds that they were gender neutral as their objective was to discourage part-time work and encourage full-time work. The Court, at least theoretically, accepted that this was a legitimate practice as long as the use of such a policy could be justified on the grounds of genuine business needs. Furthermore, in the Court's interpretation of Article 119 in *Bilka*, the relationship between the necessity for women to work part-time in order to balance their labour market activity with family responsibilities was found not to be a relevant factor for employers to consider in the formulation of workplace policy, at least in relation to occupational pension schemes. This was despite the fact that the correct approach in formulating such a claim was to show that the policy in question had caused a disproportionate adverse impact on women as a group or on a particular group of women due to their family responsibilities.

Despite the recognition of formal equality as a legislative aim within the legal systems of Member States, the development and application of policy in many areas is still heavily influenced by the public/private dichotomy within which women are viewed as 'the other' by

measurement against a male norm.⁵⁹³ This is apparent in many of the State-led policy strands relevant to public and private sector employment in relation to which Article 119 has direct effect.⁵⁹⁴ Following the ‘success’ of the claims in *Jenkins* and *Bilka*, it was only a matter of time before a case came before the ECJ in which a worker sought to review the legality of a State measure which had an adverse impact on her pay due to her status as a female part-time employee.

Rinner-Kühn⁵⁹⁵

The claimant, Mrs Rinner-Kühn, was employed by an office cleaning business for 10 hours per week. During a period of illness, she was informed that she was not entitled to sick pay in accordance with national legislation⁵⁹⁶ which excluded those who worked 10 hours or less per week from the continued payment of wages. Mrs Rinner-Kühn submitted a claim to the Labour Court asserting that the provision constituted discrimination against women contrary to Article 119 as the number of women in part-time employment was considerably higher than the number of men so employed. In response, the German Government stated that the exclusion of part-time workers from the obligation placed on employers to continue to pay wages during periods of illness was due to the fact that such workers were not as integrated in or dependent on the undertaking employing them as other workers.

The German Court asked the ECJ to consider the compatibility of the legislative provision that excluded part-time workers from the continued payment of wages during periods of illness with Article 119 and Council Directive 75/117 (the Equal Pay Directive) in light of the

⁵⁹³ See Chapter 2 *infra*.

⁵⁹⁴ See Case 43/75 *Defrenne II* ECR 455

⁵⁹⁵ Case 171/88 *Rinner-Kühn v. FWW Spezial-Gebäudereinigung GmbH & Co. KG* [1989] ECR 2743.

⁵⁹⁶ Lohnfortzahlungsgesetz (Act on the Continued Payment of Wages).

fact that the proportion of women adversely affected by the provision was considerably greater than the proportion of men.⁵⁹⁷

The Advocate General's Opinion

The first issue considered by Advocate-General Darmon was whether sick pay should be recognised as 'pay' for the purposes of Article 119. In referring to the Court's definition of pay in an earlier case⁵⁹⁸ as 'any other consideration, whether in cash or in kind, whether immediate or future, provided that the worker receives it, albeit indirectly, in respect of his employment from his employer', A-G Darmon contemplated whether sick pay could be included in this definition. The crucial factor was deemed to be the origin of the payment which, if it had been directly made by the state, would have constituted a form of social security and thus been excluded from the scope of Article 119 as established in *Defrenne III*.⁵⁹⁹ However, the payment in the present case was made by the employer and so was contractual in nature. This meant, in A-G Darmon's opinion, that it should be regarded as 'pay' within the meaning of Article 119.⁶⁰⁰

Referring to the judgments in *Jenkins* and *Bilka*, the Advocate General expressed some hesitancy about their application to the circumstances of the current case due to the nature of the measure under review as a State provision. The need to apply the criteria for objective justification in order to justify such an action, as established in *Bilka*, would necessitate reliance on the reasons for its enactment which may be difficult to discern particularly if it

⁵⁹⁷ Statistics requested by the Court from the Commission showed that the category of employees whose normal working week was less than ten hours was made up of significantly more women than men in seven Member States with Germany at the top of the table with 89% of such workers being women.

⁵⁹⁸ Case 12/81 *Garland v British Rail Engineering* [1982] ECR 359.

⁵⁹⁹ Case 149/77 *Defrenne v SABENA* [1978] ECR 1365.

⁶⁰⁰ A-G's Opinion at p.4 (937).

had been introduced by Parliament. Following *Bilka*, AG Damon opined that it was possible to infer that a measure is not necessarily incompatible with the Treaty solely because it has a discriminatory effect provided 'it is based on objective factors and is not meant to be discriminatory'.⁶⁰¹ In the current context, the impact of the measure could be distinguished from an employer's policy on the grounds that the effects of State policy on men and women was just one of a number of factors which must be taken into account in formulating such policy. In the interests of legal certainty, the Advocate General asserted that the favoured approach would be to refrain from reversing the burden of proof so that the legislative provision should only be found to be incompatible with Article 119 if it could be shown to have been based on objectives related to sex discrimination.

The Judgment in *Rinner-Kühn*

The Court appears not to have had the same difficulties as A-G Damon in considering whether national legislative measures should be excluded from the provision of Article 119 or subject to any special treatment in this respect. In referring to its judgment in *Defrenne II*, the Court recalled that Article 119 had imposed on Member States an obligation, during the first stage, to ensure the application of the principle that men and women should receive equal pay for equal work. Furthermore, the exclusion of certain part-time workers from the provision of sick pay and the disproportionate impact of such a policy on women, as compared to men, meant that the provision was contrary to the aim of Article 119.

Rejecting the approach suggested by the Advocate-General that the use of the objective justification requirement might not be appropriate in the case of State policy, the Court

⁶⁰¹ *Ibid* at p.7 (942).

applied essentially the same test as that formulated in *Bilka* which had equal application regardless of the nature of the measure as a State provision or an employer policy. The terminology adopted by the Court in *Rinner-Kühn* varied from that used in *Bilka*, so that the ‘real need of the business’ became ‘a necessary aim of social policy’⁶⁰² and rather than requiring the means chosen to achieve that aim to be ‘appropriate and necessary’, the Court in *Rinner-Kühn* stated that it must be ‘suitable and requisite’.⁶⁰³

Although it was for the national court to determine whether a legislative provision which, although gender neutral on its face, affects a greater number of women than men is justified on objective grounds unrelated to sex, the Court did proffer an opinion regarding the suitability of the explanation given in the current case. The German Government’s submission that those working less than 10 hours a week were not as integrated in, or as dependent on, the employing undertaking as others amounted to ‘generalisations about certain categories of workers’ and thus did not enable criteria which were objective and unrelated to sex discrimination to be identified.⁶⁰⁴ However, if the Member State could show that the means chosen met a ‘necessary aim of its social policy’, the ‘mere fact that the provision affect[ed] a much greater number of female workers than male workers’ could not ‘be regarded as constituting an infringement of Article 119.’⁶⁰⁵

Social Policy as a Ground for Justification

The Court’s approach in *Rinner-Kühn*, which was broadly consistent with that in *Jenkins* and *Bilka*, did serve to further the principles of legal certainty and legitimate expectation in the

⁶⁰² Judgment at para 14.

⁶⁰³ *Id.*

⁶⁰⁴ *Ibid* at para. 13.

⁶⁰⁵ *Id.* at para 14.

area of part-time workers' rights in cases of sex discrimination. However, the entrenchment of the conceptualisation of such pay claims as individual indirect discrimination claims with the opportunity for employers and Member States to defend their actions through the advancement of an objective justification meant that the law on atypical workers' rights was now written. There would be no further opportunity for Article 119 to be interpreted as providing an absolute right to the same 'pay' (as defined under Article 119) for men and women regardless of their hours of work or other contractual arrangements which deviated from those applicable to the normative model of the 'standard worker'.⁶⁰⁶ Furthermore, the judgment in *Rinner-Kühn* regarding the possible justification for State provisions which amounted, *prima facie*, to discrimination against women workers due to their inability to comply with the normative model gave Member States an apparently wide discretion in this respect. That such provisions could be justified if they amounted to a necessary aim of social policy had the potential at least to enable States to develop self-fulfilling strategies which differentiated between different groups of workers in order to encourage or discourage certain labour market behaviour on economic or social grounds, with those who were disadvantaged having no clear protection under Community law. In this respect, the *status quo* remained more or less intact with further opportunities for the deregulation of labour markets being potentially compatible with the principle of equal pay as provided for under Article 119. In the years since *Rinner-Kühn*, Member States have sought to utilise this potential in different ways with various degrees of success and some of those attempts will be considered in the proceeding analysis.

⁶⁰⁶ Specifically those exhibiting the 'typical' characteristics of the (male) norm - full-time and permanent.

The Court's Jurisprudence on Sex Discrimination and Atypical Workers

Following the early trio of cases considered above, the ECJ has adjudicated on the interpretation of Community law in the context of a further 18 cases concerning atypical workers' rights to equal pay and treatment. The assessment of the Court's reasoning in *Jenkins*, *Bilka* and *Rinner-Kühn* identified certain key features which served to undermine the principle of equality when applied to the rights of women workers classified as 'atypical' due to their inability to conform to a normative model of the 'standard worker'. These are:

1. The conceptualisation of atypical workers' claims as indirect discrimination

The requirement to show a disproportionate impact on women as a group or a specific group of women coupled with the fact that, even where such claims can be made out, the discriminatory practice or policy is potentially capable of justification, have presented insurmountable difficulties to some would-be claimants. The effect of conceptualising claims in this way, although helpful as a means of providing otherwise unattainable redress, severely limits the use of Article 141 and associated legislation in this context as the interpretation of the principle of equal pay and treatment is not capable of providing fundamental direct rights to women. The use of statistical data, although 'objective' on its face, may be deeply subjective as the selection of different 'pools for comparison' can produce different results; furthermore, not all women who are disadvantaged due to their inability to work full time on the grounds of family responsibilities are able to show a disproportionate impact as 'women's work' is traditionally overcrowded with women in both full and part-time posts. The deciding factor for differentiating part-time and full-time work, according to *Jenkins*, is in the nature of 'the job' so that, according to the Court's reasoning, *certeris parabus*, the job performed by

full-time and part-time workers will be deemed to be different, even if the tasks performed and the working methods are identical.⁶⁰⁷

2. The relationship between women's labour market participation and family responsibilities (sex/gender)

It is clear from the reasoning applied in *Jenkins* and from the response to Question 2(b) in *Bilka* that Article 119 (now 141) does not impose an obligation on employers to take account of the relationship between women's labour market behaviour and family arrangements in the formulation of policy. This finding sends out a mixed message to employers who must attempt to reconcile it with the possibility that the imposition of certain measures may give rise to indirect discrimination which is not justifiable unless the *Bilka* test can be met. As a consequence, although the reasons for women's 'different' labour market behaviour need not explicitly inform employer behaviour, implicitly the reverse appears to be true as strategies promoting seemingly 'neutral' policies should take account of their likely or possible impact on women as a group or a specific group of women. Consequently, there is no express requirement for any authority (employers, the State, the courts) to question the effects of historical disadvantage on, for example, women's labour market behaviour or career progression arising from a recent past of lawful discrimination against women in employment or to consider the social construction of gender with regard to the biological differences between the sexes.

⁶⁰⁷ Case 96/80 *Jenkins v. Kingsgate (Clothing Productions) Limited* [1981] ECR 911.

3. The use of the objective justification test

The weaknesses of this particular aspect of the Court's jurisprudence have been discussed in some detail above and can be summarised in the following terms: the proportionality test formulated in *Bilka* is based solely on employer's needs and, in its application, does not require this aspect to be weighed against the impact of the loss or detriment sustained by the individual as a result of the discrimination; apparently wide discretion is given to employers and Member States in attempts to justify indirect discrimination on the grounds of the 'real need of the business' or a 'necessary aim of social policy'.

All of these factors, when considered in the context of the court's jurisprudence in the three early cases are indicative of the stance taken with regard to gender relations and, specifically, the subordination of women's rights to a market order in which the standard worker model (male, full-time breadwinner) is assumed to be the most efficient provider of paid labour in line with the smooth operation of the market. However, in order to continue to conform to this particular model of male behaviour during and beyond the years of family formation, men depend on women's conformity to an equally traditional model of female behaviour by providing essential childcare and other unpaid work within the family. The Court's jurisprudence, in effect, supports the continuance of such gendered roles within families and the workplace by consistently finding, in the early cases at least, that the right to equal pay is largely dependent on the ability of the individual to exhibit male characteristics in regard to labour market behaviour. Failing this, the 'right' cannot be guaranteed. The next stage of

analysis, will seek to establish whether this position has been sustained by the Court in its subsequent judgments. The following questions will underpin this analysis:

- Did the Court consistently apply such reasoning to the cases that came after *Jenkins*, *Bilka* and *Rinner-Kühn* or has its own evolution enabled a more progressive stance?
- Was the reasoning applied by the Court in subsequent cases concerning the interpretation of Article 141 more teleological in nature in line with other areas of its jurisprudence and the early promise of *Defrenne II*?
- Are restrictions to the ‘wider view’ permitted by the Court on occasion more often applied in the circumstances where women are at their most different from men (i.e. when they seek to reconcile the public and private domains by combining the challenges of family responsibility with paid employment)?

The Differentiation of Contractual Terms through Collective Agreement

In *Kowalska*,⁶⁰⁸ the Court found that a contractual arrangement applicable to civil servants made through a collective agreement⁶⁰⁹ did fall within the scope of Article 119. This was the first of a line of referrals from German courts concerning the use of collective agreements which discriminated against part-timers by the imposition of less favourable terms and conditions than those applicable to full-timers⁶¹⁰ or, as in the present case, by their total exclusion from certain work-related benefits. The issue at stake in *Kowalska* was the exclusion of part-timers from the arrangements for severance pay which was normally payable upon retirement. The scheme under review excluded those who worked less than 38 hours per week on the grounds that ‘part-time workers do not provide for their needs and

⁶⁰⁸ Case 33/89 *Kowalska v Freie und Hansestadt Hamburg* [1990] ECR I-2591.

⁶⁰⁹ Namely the Bundesangestelltentarifvertrag (Federal Civil Service Employees’ Collective Agreement) hereinafter referred to as the ‘BAT’.

⁶¹⁰ See Case 184/89 *Nimz* (n. 92 below) and Case C-1/95 *Gerster* (n. 133 below).

those of their families exclusively out of their income from their employment'.⁶¹¹ On this basis, it was contended by Ms Kowalska's employers, there was no duty to provide temporary assistance for such employees on termination of employment.

The Court found that the practice of excluding part-time workers from a severance pay scheme amounted to indirect discrimination which was potentially justifiable under the *Bilka*⁶¹² test. In contrast to its judgment in *Rinner-Kühn*,⁶¹³ the Court remained silent on the appropriateness of the employer's defence in *Kowalska* which depended wholly on a stereotypical view of part-timers' attachment to the labour market and the classification of such workers' income as 'pin money' subsidiary to that of the 'breadwinner'. Nevertheless, the value of the judgment in *Kowalska* remains the Court's willingness to accept that, where discrimination arises as a result of a collective agreement, part-time workers should be entitled to the same treatment and made subject to the same scheme, proportionately to the number of hours worked, as other workers.⁶¹⁴

In *Nimz*,⁶¹⁵ the Court was confronted with the differential use of length of service requirements for the purposes of incremental progression. As in *Kowalska*, the scheme in question had been collectively agreed by the parties to the BAT⁶¹⁶ and provided that length of service for those who worked for more than 50% and for less than 75% of normal working hours should be calculated at half the period of employment in comparison to those who regularly worked normal working hours.⁶¹⁷ The claimant had been employed on a part-time basis (20 hours per week) for six years and was refused reclassification to a higher grade

⁶¹¹ Judgment at para 14.

⁶¹² Case 170/84 *Bilka-Kaufhaus GmbH v. Karin Weber Von Hartz* [1986] ECR 1607.

⁶¹³ Case 171/88 *Rinner-Kühn v. FWW Spezial-Gebäudereinigung GmbH & Co. KG* [1989] ECR 2743.

⁶¹⁴ Judgment at para 21.

⁶¹⁵ Case 184/89 *Nimz v Freie und Hansestadt Hamburg* [1991] ECR I-297.

⁶¹⁶ See above at note 86.

⁶¹⁷ Defined as 35 hours per week.

available to full-time workers with a comparable length of service on account of her part-time status in accordance with the BAT. In order to qualify for progression under the scheme, she would have to have worked for 12 years. Her employers contended that the differential treatment was based on the fact that full-time workers or those who worked for 75% of normal working time acquired the abilities and skills relating to their job more quickly and had more extensive experience than those classified as part-time.

The Court followed *Kowalska* in holding that Article 119 should be interpreted as precluding a collective agreement which discriminated against part-time workers unless such a provision could be objectively justified. In referring to its earlier judgment in *Rinner-Kühn*, the Court found the employer's defence amounted to 'generalisations about certain categories of workers'⁶¹⁸ which did not make it possible to identify objective criteria which are unrelated to discrimination on the grounds of sex. Whilst acknowledging that 'experience goes hand in hand with length of service, and experience enables the worker in principle to improve performance of the tasks allotted to him',⁶¹⁹ when deciding on the objectivity of such a criterion, regard must be had to the circumstances of each individual case and 'in particular the relationship between the nature of the work performed and the experience gained from the performance of that work upon completion of a certain number of working hours.'⁶²⁰

The judgment in *Nimz* is of particular interest in the current context for two reasons: on the one hand the Court acknowledged the value of seniority as a potentially valid criterion in assessing suitability for career progression, but on the other, it hinted at the use of a more rigorous assessment than that applicable in the current case whereby the job holder's competences should be measured in some way as a basis for incremental progression. The use

⁶¹⁸ Judgment at para 14.

⁶¹⁹ *Ibid*

⁶²⁰ *Id.*

of seniority as a sole means of assessing suitability for progression up a pay scale, although still widely used in public sector employment, will generally disadvantage women as a group due to the mobility in and out of the labour market during the years of family formation and dependency which characterises women's employment.⁶²¹ That this observation did not inform the Court's reasoning in *Nimz* more explicitly, particularly given the discriminatory nature of the scheme in question, served to restrict the potentially wide impact of the judgment. However, the Court's implicit advocacy of a competence-based approach which takes account of the genuine connection between time served and the acquisition of skills and abilities regardless of part or full-time status, is progressive. Furthermore, the establishment of this important connection marks a move away from the Court's earlier position that once a job is performed on a part-time basis, it differs in some way in its nature from its full-time counterpart.⁶²² In *Nimz*, the Court implicitly accepted that, where the tasks performed by full and part-time workers are identical, decisions regarding pay progression should place emphasis on the actual levels of competence acquired through completion of those tasks rather than on the assumed levels of competence of part-time workers as measured against those of full-time workers. In this respect, *Nimz* marks a change of direction in the Court's jurisprudence on part-time women workers by their recognition as autonomous post-holders, capable of having their own standards of achievement, rather than as a tolerable aberration from the normative model of the standard (male) worker.

The progress made in the reasoning of the Court in *Nimz*, however, was short-lived.⁶²³ In joined cases *Helmig*,⁶²⁴ the Court backtracked on this advancement in finding that an overtime

⁶²¹ See Chapter 3 *infra*.

⁶²² See Case 96/80 *Jenkins*, *op cit* at n. 13.

⁶²³ Although the Court's recognition of the need to view part-time workers in certain respects independently from their full-time counterparts did re-emerge in its later judgments in Case C-1/95 *Gerster*, Case C-243/95 *Hill and Stapleton* and Case C-285/02 *Elsner-Lakeberg* – see below at n. 160.

⁶²⁴ Cases C-399/92, C-409 and 425/92, C-34, 50 and 78/93 *Stadt Lengerich v. Helmig* [1994] ECR I-5727.

supplement payable under a collective agreement to full-time staff who worked more than their ordinary working week,⁶²⁵ was not payable to part-time workers working in excess of *their* normal contractual working week. The claimants in the five cases referred by German courts on almost identical facts, were all subject to collective agreements⁶²⁶ which excluded part-time workers from eligibility for overtime supplements unless they worked in excess of the normal working hours applicable to full-time workers. The claimants argued that such supplements should be available to them for any hours worked in addition to their individual contractual hours. The employers' responses to the allegations of indirect sex discrimination were focused on two inter-related issues as articulated in the various questions referred by the German courts. First, the intention of the overtime premium payment was to compensate for an 'increased physical burden and to prevent the imposition of excessive demands upon employees' and, in the case of part-time workers 'no comparable burden is imposed where the [worker] merely exceeds the contractually agreed working hours without working the normal weekly hours worked by a full-time employee'.⁶²⁷ Second that 'it may generally be assumed that restriction on leisure time affects employees employed for normal working hours...more than part-time employees.'⁶²⁸

In reaching its decision, the Court stated 'there is unequal treatment wherever the overall pay of full-time employees is higher than that of part-time employees for the same number of hours worked.'⁶²⁹ Consequently, the fact that part-time employees would receive the same

⁶²⁵ In this context 38.5 hours per week.

⁶²⁶ In Cases C-399/92, C-425/92 and C-78/93 the BAT was applicable (see note 86 *ibid*). In the other cases, the appropriate collective agreements, containing identical provisions to the BAT were as follows: in Case C-409/92, the Ersatzkassentarifvertrag (Collective Agreement relating to Private Health Insurance Scheme Employees); in Cases C-34/93, the Knappschaftsangestelltentarifvertrag (Collective Agreement for Employees covered by the Miners' Insurance Fund; in Case C-50/93, the Rahmentarifvertrag für die Gewerblichen Arbeitnehmer im Gebäudereinigerhandwerk (Collective Agreement Applicable to Employees in the Industrial Cleaning Sector).

⁶²⁷ Question 3 in Case C-399/92 – see the judgment at para 4.

⁶²⁸ Question 2 (b) in Case C-34/93 – see judgment at para 4.

⁶²⁹ Judgment at para 27.

overall pay as full-timers if they worked more than the normal working hours 'because on doing so they become entitled to overtime supplements',⁶³⁰ meant that the provisions were found not to give rise to 'different treatment as between part-time and full-time employees' and were therefore compatible with Article 119.

The reasoning applied in *Helmig* represents a narrow application of the already limited conceptual foundations of the Court's jurisprudence on indirect discrimination by failing to take specific account of the relationship between women's labour market participation and family responsibilities. The relevance of this aspect, in the Court's reasoning, was always restricted⁶³¹ but, in its previous judgments on the application of Article 119 to part-time women workers,⁶³² the reasons why women work part-time were at least acknowledged through its findings of indirect discrimination. In ruling that the payment of overtime premium rates was not applicable to part-time workers, the Court had taken a retrograde step from its position in *Nimz*, by reasserting the subordination of part-time workers' rights to the 'normal' working practices of their full-time counterparts. Furthermore, although not specifically referred to in the judgment, one cannot but wonder how influential the employers' attempted justifications were over the Court's position. *Helmig's* legacy appears to be an acceptance by the Court that women's double burden of paid employment and family responsibility is insignificant when measured against the physical effort expended in conformity to the normal working hours of the standard worker. Furthermore, the association of part-time work and unrestricted 'leisure' time brought about by the unchallenged defence of the terms of the collective agreements reveals a complete lack of understanding of the reality of women's working lives.

⁶³⁰ Judgment at para 29.

⁶³¹ See above at p. 216.

⁶³² See, for example, Case 98/80 *Jenkins*, Case 170/84 *Bilka*, Case 171/88 *Rinner-Kühn*, Case 33/89 *Kowalska* and Case 184/89 *Nimz* above.

In a more recent case on the application of collective agreements to part-time women workers' terms and conditions,⁶³³ the Court was asked to consider the applicability of Article 141 to a Christmas bonus scheme which excluded part-time workers on the grounds that their employment relationship was not covered by the collective agreement governing the scheme.⁶³⁴ The claimant in *Krüger* had reduced her working hours to less than 15 per week⁶³⁵ following the birth of a child. She had returned to work early while on childcare leave for which she was paid a childcare allowance which was guaranteed for three years as long as her earning remained under the social insurance threshold. On being refused the annual Christmas bonus, equivalent to one months' salary, Ms Krüger brought an action before the labour court in Munich. The employers asserted that, under the collective agreement, persons in minor employment were excluded from its scope. The labour court regarded the practice of excluding such workers as indirect discrimination as 90% of those receiving similar benefits to Ms Krüger were women. A further complicating factor was that, under the scheme, those who did not work while on childcare leave received the Christmas bonus in the first year of their leave.

In contrast to the ECJ's previous case law involving the use of collective agreements in which the alleged discrimination arose solely as a result of the relevant agreement, the application of the scheme in *Krüger* came about through a combination of the agreement coupled with the provisions of national legislation. This enabled the use of a 'social policy' justification⁶³⁶ articulated as 'the fact that persons in minor employment are not required to pay social

⁶³³ Case C-281/97 *Krüger v Kreiskrankenhaus Ebersberg* [1999] ECR I-5127.

⁶³⁴ The BAT - see n. 86 *ibid*.

⁶³⁵ Classified as "minor employment" under the Sozialgesetzbuch (Code of Social Law).

⁶³⁶ See Case 171/88 *Rimmer-Kühn op cit* at n.72.

insurance contributions'.⁶³⁷ In considering this as a potential justification, the Court referred to its previous case law in the field of social security⁶³⁸ in which it had been established that 'as Community law now stands, social policy is a matter for the Member States. Consequently, it is for the Member States to choose the measures capable of achieving the aims of their social and employment policy. In exercising that competence, the Member States have a broad margin of discretion.'⁶³⁹ However, the Court distinguished the current situation from those relevant to the social security cases in that it was the terms of the collective agreement which were the cause of the different treatment of part-timers, rather than a measure adopted by the German legislature in the exercise of its discretionary power or an application of a basic principle of the national social security system. On this basis, the exclusion by collective agreement of those engaged in minor employment from entitlement to the annual bonus was found to constitute indirect sex discrimination.

The reasoning applied in distinguishing the origin of the discriminatory measure in the current case from discrimination which arises through the application of national legislation in the social or employment fields tells us much about the development of the social policy justification since its establishment in *Rinner-Kühn*. Although willing to apply a generally consistent approach to cases involving employers' policies causing disproportionate adverse impact for part-time women workers, the Court appeared reluctant to apply the same interpretation of the principle of equality under Article 141 and associated legislation in cases concerning the 'broad margin of discretion' afforded to Member States. *Rinner-Kühn* had come before the Court in 1989 and *Krüger* in 1999. During the intervening ten years, the

⁶³⁷ AG Léger's Opinion at para. A43.

⁶³⁸ In cases C-317/93 *Nolte v Landesversicherungsanstalt Hannover* [1995] ECR I-4625 and C-444/93 *Megner and Scheffel v Innungskrankenkasse Rheinhessen-Pfalz* [1995] ECR I-4741— see judgment in *Krüger* at para 28.

⁶³⁹ Judgment at para 28.

Court had considered the discriminatory impact of national measures on three occasions. It is on those cases that attention will now be focused.

Measures Arising though the Application of National Legislation

In a line of German cases with almost identical facts, the Court was asked on three separate occasions to interpret Article 119 and Directive 75/117 in the context of compensation for attendance at training courses connected with the work of staff committees. In *Bötel*, the first of the cases to come before the ECJ, the claimant who worked an average of 29.25 hours per week attended training for 50.3 hours in one week. Those normally working 40 hours per week were entitled to compensation equal to the amount of time spent on the course in excess of their normal working week.⁶⁴⁰ Ms Bötel was paid for her normal working hours but did not receive pay for the additional time spent at the training course due to a loophole in the legislation which made no provision for part-time workers' attendance at such training in excess of their usual working hours. This appears to have arisen by accident rather than design as 'the BetrVG envisaged only the case of full-time workers'.⁶⁴¹

In giving its judgment, the Court observed that the exclusion of part-time workers from provisions enabling the payment of compensation for attendance at training courses over and above their normal working hours would be likely to dissuade such workers, the majority of whom are women, from participating in staff committees and related activities, thus making it more difficult for such workers to be represented. Accordingly, the court had no hesitation in finding the national legislation in question to be contrary to Article 119 and Directive 75/117

⁶⁴⁰ As provided for under s.37 of the Betriebsverfassungsgesetz (Act on the Organisation of Enterprises) hereinafter referred to as "the BetrVG".

⁶⁴¹ Case C-360/90 *Arbeiterwohlfahrt der Stadt Berlin NV v Bötel* [1992] ECR I-3589, at para. 451.

unless the Member State could establish that it was justified by objective factors unrelated to sex discrimination.

In *Lewark*,⁶⁴² the same issue was reopened by the Bundesarbeitsgericht⁶⁴³ which was of the opinion that the judgment given in *Bötel* was based on a misunderstanding of the legal position of staff council members under German legislation. What the ECJ had failed to consider, according to the Bundesarbeitsgericht, was that staff council functions are performed on an honorary and unpaid basis 'outside of any relationship of subordination'.⁶⁴⁴ Accordingly, their performance does not constitute 'work' within the meaning of Article 119 and the compensation provided for by the legislation does not constitute pay but is aimed at ensuring that staff council members do not lose wages as a result of attending training. Furthermore, it was contended, the German legislation did not differentiate between staff council members working part-time and full-time as they were all protected in the same way against loss of wages. In an attempt to cover all possibilities, the Court offered as a potential justification the fact that payment of staff council functions at a rate above that equal to the actual loss of wages might potentially compromise the independence of staff council members who might be influenced by the 'attraction of special payment'.⁶⁴⁵

The ECJ, in part, held on to its reasoning in *Bötel* by stating that, although the compensation in question was not contractual in nature, it was 'nevertheless paid by the employer by virtue of legislative provisions and under a contract of payment'⁶⁴⁶ and, accordingly, did fall within the scope of Article 119. Furthermore, following *Helmig*,⁶⁴⁷ the Court found that unequal

⁶⁴² Case C-457/93 Kuratorium für Dialyse und Nierentransplantation v Lewark [1996] ECR I-243.

⁶⁴³ Federal Labour Court

⁶⁴⁴ Judgment at para 14.

⁶⁴⁵ Judgment at para 16.

⁶⁴⁶ Judgment at para 22.

⁶⁴⁷ Cases C-399/92, C-409 and 425/92, C-34, 50 and 78/93 [1994] ECR I-5727 *ibid*.

treatment arose wherever the overall pay of full-time employees is higher than that of part-time employees for the same number of hours worked. This was the case in circumstances where training courses were organised during full-time working hours, but outside the individual working hours of part-time workers, if the amount of compensation for attendance was only payable in proportion to the number of hours normally worked by the individual. As a consequence, the Court held that the application of the legislative provisions under review did amount to indirect discrimination. However, the Court was less emphatic on the issue of objective justification leaving the door ajar to the possibility that the role of staff councils in the development and operation of German social policy meant that 'the concern to ensure the independence of the members of those councils thus...reflects a legitimate aim of social policy.'⁶⁴⁸ It would still be up to the national court to determine that the difference in treatment was suitable and necessary for achieving that aim. An identical approach was taken in *Freers*⁶⁴⁹ later the same year in which the Court went one step closer to condoning the German government's line of defence by stating that the aim of assuring the independence of staff council members appeared to be 'unrelated to any discrimination on grounds of sex.'⁶⁵⁰

Strictly speaking this is true, but it is the Court's change in direction from its earlier judgment in *Bötel*⁶⁵¹ that is the most striking feature of the Court's jurisprudence in this respect. In finding that the oversight which had primarily excluded part-timers from inclusion in the legislative arrangements for compensatory payment ultimately amounted to a potentially legitimate aim of social policy in *Lewark*⁶⁵² and *Freers*,⁶⁵³ the Court appears to have backed down under the pressure exerted by the German legislature. In fact the defence advanced in

⁶⁴⁸ Judgment at para 38.

⁶⁴⁹ Case C-278/93 *Freers and Speckamnn v Deutsche Bundespost* [1996] ECR I-1165.

⁶⁵⁰ *Ibid* at para 27

⁶⁵¹ *Op cit* at n. 118.

⁶⁵² *Op cit* at n. 119.

⁶⁵³ *Op cit* at n. 126

Lewark and *Freers* is reminiscent, at least in its presumptive tone regarding the utilisation of non-working time by those who work part-time, of the Court's judgment in *Helmig*.⁶⁵⁴ The assumption that any hours which are not spent participating in paid employment are at the disposal of part-time workers as 'leisure time' fails to recognise the reasons why so many women engage in such work. Furthermore, for those who usually assume responsibility for childcare during hours when they are not in paid employment, the attendance at training courses may result in an additional financial burden if alternative arrangements such as nursery provision or childminder hours are necessary. The argument that compensation for effectively working overtime would potentially be seen as a bonus or an incentive to participate in staff council activities, thus undermining the independence of such participants, is nonsensical when applied to part-time workers who, if they wished to increase their income and had the time available, would surely simply increase their usual contractual hours.

As envisaged from the Court's early jurisprudence on the application of the equality principle to atypical women workers, the imposition of State measures which have an indirectly discriminatory impact on such workers has presented the Court with particular difficulties. The need to reconcile a consistent application of the law in observance of the principles of legal certainty and legitimate expectation with the 'broad margin of discretion'⁶⁵⁵ afforded to Member States in choosing the measures capable of achieving the aims of their social and employment policy appears to have prevented the Court from providing clear guidance in cases concerning State-imposed measures. Added to this dynamic is the potential scope for circumvention of the equality principle presented to Member States in relation to their dual role as legislature and employer. The following group of cases concern the alleged discriminatory impact of measures applied to civil service workers. The Court's treatment of

⁶⁵⁴ *Op cit* at n. 101.

⁶⁵⁵ See *Krüger op cit* at n. 110.

the attempted justifications advanced by the various State departments will be considered in order to discern whether, in such cases, the State's role as law-making authority is given prominence over the obligations placed on it by EC law as employer.

The State as Employer

In *Gerster*⁶⁵⁶ and *Kording*⁶⁵⁷ the ECJ was asked to consider the compatibility of Article 119 and Directives 75/117 and 76/207 with German statutory rules which distinguished between part-time and full-time civil service workers for the purposes of calculating length of service as a prerequisite for promotion (in *Gerster*) and for the granting of exemption from a qualifying exam for tax consultants (in *Kording*). Although caught by different provisions of Statute,⁶⁵⁸ what both cases had in common was the differential calculations applied under the statutory rules for length of service in respect of full and part-time workers.

In *Gerster*, periods of employment for those who worked for at least half of the full-time hours were counted as being equal to two-thirds of normal working time.⁶⁵⁹ Under the BAT, progression to a higher grade with a resulting pay rise was partially dependent on the completion of six years' employment at normal working hours.⁶⁶⁰ On completion of the requisite period of employment, individual staff members were automatically placed on a waiting list for consideration for promotion with their cases reviewed when they reached the

⁶⁵⁶ Case C-1/95 *Gerster v. Freistaat Bayern* [1997] ECR I-5253.

⁶⁵⁷ Case C-100/95 *Kording v. Senator Für Finanzen* [1997] ECR I-5289.

⁶⁵⁸ The *Laufbahnverordnung* (Bavarian Regulations on Career Structure) in *Gerster* and the *Steuerberatungsgesetz* (Act on Tax Consultancy) in *Kording*.

⁶⁵⁹ For those who worked less than 50% of full-time hours, there was no calculation made for length of service (see AG Pergola's Opinion at fn 3), presumably meaning that such workers were completely excluded from consideration for promotion under the appropriate rules. However, as Ms Gerster was included in the category of those who worked between 50 and 75% of full-time hours this aspect was never investigated.

⁶⁶⁰ This case differed from *Nimz* (see above), as promotion to the higher grade was not based solely on the completion of a specific period of service.

top of the list at which time other relevant factors pertaining to the individual's suitability for promotion were considered. Ms Gerster had a long record of employment with the civil service (since 1968) but had taken 3-years' unpaid leave for family reasons, returning to work part-time in 1987. In 1993, she requested that her six years part-time employment be treated as full-time employment for the purposes of calculating length of service for promotional purposes. Her request was rejected and she was informed that the vacant post would be filled by an official on the list of those eligible for promotion.

In *Kording*,⁶⁶¹ the applicant had been employed by the Revenue office in Bremen for 20 years at the time of her claim, although her weekly hours had varied from full-time from 1972-1980 to 20 hours per week from 1980 to 1992. In 1992, Ms Kording asked the Finance Minister whether her period of employment met the requirements as to length of service for exemption from the examination to qualify as a tax consultant. The national rules stated that such exemption should be granted to those who had been employed in one of a specified number of posts for not less than 15 years. She was informed that the length of service requirement for exemption from the examination referred to full-time work with part-time workers' length of service calculated pro rata the hours actually worked and normal working hours.

In restricting its judgment to the specific circumstances of the *Gerster*⁶⁶² case, the Court held that, although Article 119 was applicable to public servants, the rules in question were primarily concerned with access to career advancement and were only indirectly linked to pay and, thus, fell outside of the scope of Article 119 and Directive 75/117.⁶⁶³ However, Articles 1 and 3 of Directive 76/207 were held to be relevant to the measures under review which had a disproportionate impact on the promotional prospects of part-time workers as compared to

⁶⁶¹ *Op cit.* at n. 134.

⁶⁶² *Op cit.* at n. 133.

⁶⁶³ *Gerster* Judgment at para. 25.

full-time workers. As 87% of part-time employees in the Bavarian civil service were women, the differential calculation of length of service as a basis for consideration for career advancement was held to be prohibited in principle by Directive 76/207 unless it could be objectively justified.⁶⁶⁴ The Court then turned its attention to the justification advanced by the Bavarian State that the system was based on the need to establish a 'general yardstick in terms of length of service against which the professional experience of employees can be assessed before they can be regarded as eligible for promotion to a higher grade.'⁶⁶⁵ The different length of service requirements were, thus, justified on the basis that part-time workers would take longer than their full-time counterparts to acquire the professional skills and abilities necessary for duties at a higher level. Ms Gerster had countered this claim by asserting that, in the course of the last 10 years of her employment, she had performed duties attaching to the grade to which she aspired to be promoted.⁶⁶⁶

Referring to its judgment in *Nimz*,⁶⁶⁷ the Court repeated its criticism of the subjective nature of 'an alleged special link' between length of service and the acquisition of knowledge and experience as amounting to no more than a generalisation concerning certain categories of worker.⁶⁶⁸ It was up to the national court to decide whether part-time employees were 'generally slower than full-time employees in acquiring job-related abilities and skills'⁶⁶⁹ and to consider whether the competent authorities were in a position to establish that the measures chosen complied with the test for an objective justification in accordance with the Court's decision in *Rinner-Kühn*.⁶⁷⁰ It is unclear from reading this part of the judgment whether the Court intended the question of justification to hinge on the Bavarian State's need to establish

⁶⁶⁴ *Id.* at para 34.

⁶⁶⁵ Judgment at para 36.

⁶⁶⁶ Judgment at para 37.

⁶⁶⁷ *Op cit.* at n. 92.

⁶⁶⁸ Judgment at para 39.

⁶⁶⁹ *Id.*

⁶⁷⁰ *Op cit.* at n. 72.

a clear connection between the number of total hours prescribed by the statutory rule governing promotion and the acquisition of the requisite skills and experience to do the job at the higher grade or whether, in the event that such a connection could not be established, the statutory rules could be justified by alternative means so long as they amounted to a legitimate social policy aim and were proportionate to the achievement of that aim.

In *Hill and Stapleton*,⁶⁷¹ the court was confronted with the application of a measure applicable to civil servants employed by the Irish Revenue Commission which differentiated between those employed on a job-share basis⁶⁷² and full-time employees in the calculation of length of service for the purposes of incremental progression up a pay scale. On returning to full-time work after two years of job-sharing, the applicants had been denied assimilation to a point on the scale in accordance with their actual length of service on the basis of a rule⁶⁷³ which distinguished between job-sharers and full-time staff in relation to pay with the scale of pay applicable to job-sharing staff being equal to 50% of that appropriate to full-time staff. The relevant scheme made no specific reference to the incremental credit for those who job-shared and later converted to full-time work, however, a letter sent by the Department of Finance in 1987 had provided that 'an officer who has served for two years in a job-sharing capacity should be placed on the second point of the full-time scale (equivalent to one years' full-time service).'⁶⁷⁴

Under the relevant scheme, an increment was defined as 'an increase in pay for which provision is made in a pay scale. As a general rule, increments are granted annually provided

⁶⁷¹ Case C-243/95 *Kathleen Hill and Ann Stapleton v. Revenue Commissioners and Department of Finance* [1998] ECR I-3739.

⁶⁷² Who worked one week on, one week off.

⁶⁷³ Namely Circular 3/84.

⁶⁷⁴ Judgment in *Hill and Stapleton* at para 8.

an officer's services are satisfactory.⁶⁷⁵ Both applicants returned to full-time work after two years' job-sharing and were placed one point up the scale from where they had been placed on commencing their job shares. The Irish Labour Court referred the case to the ECJ in order to determine whether the scheme in question was contrary to Article 119 and Directive 75/117 if its effect was that employees who convert from job-sharing to full-time work 'regress on incremental scale and hence on their salary scale'⁶⁷⁶ or whether such a measure could be objectively justified.

In contrast to the situation in *Gerster*,⁶⁷⁷ the national court had already considered the relationship between time served by the applicants and the acquisition of experience and was satisfied that 'a job-sharer could acquire the same experience as a full-time worker'.⁶⁷⁸ This removed from the ECJ the opportunity to rely in giving its judgment on this aspect as a possible justification for the differences in pay as it had done in *Gerster*. Instead, the Court was compelled to reject as irrelevant the justifications provided by the Revenue Commissioners and Department of Finance that there was an established practice in the civil service of crediting only actual service and that the reward system established by this practice maintained staff motivation, commitment and morale.⁶⁷⁹ Furthermore, the employer's attempts to justify the differential pay rates on economic grounds were also rejected by the ECJ as 'an employer cannot justify discrimination arising from a job-sharing scheme solely on the ground that avoidance of such discrimination would involve increased costs.'⁶⁸⁰

The Court acknowledged that almost all of those who worked under job-sharing arrangements

⁶⁷⁵ Circular 9/87 as quoted at para 9 of the Judgment.

⁶⁷⁶ Part (b) of the question referred as quoted in para 15 of the Judgment.

⁶⁷⁷ *Op cit.* at n. 133

⁶⁷⁸ Judgment at para 27.

⁶⁷⁹ Judgment at para 38.

⁶⁸⁰ Judgment at para 40.

in the Irish Republic were women and that approximately 83% of those who chose that option did so in order to be able to combine work and family responsibilities. Furthermore, the Court stated that 'Community policy in this area is to encourage and, if possible, adapt working conditions to family responsibilities.'⁶⁸¹ The onus was, thus, on the Revenue Commissioners and the Department of Finance to establish before the national court that the measure under review could be objectively justified by application of the criteria set down in *Rinner-Kühn*.⁶⁸²

In *Elsner-Lakeberg*⁶⁸³ a teacher who normally worked for 60 hours per month was prevented from receiving remuneration for working an additional 2.5 hours a month on the grounds of a rule⁶⁸⁴ that excluded civil servants from receiving overtime payments unless the additional hours worked exceeded three hours a month. The Administrative Court⁶⁸⁵ at Minden referred the case to the ECJ in order to ascertain the compatibility of the national provision with Article 119 and Directive 75/117. The Land Nordrhein-Westfalen as employer, backed by the German Government, sought to counter the allegation of discrimination on the grounds that part-time teachers and full-time teachers were treated in exactly the same way under the scheme in question as both groups of workers would be eligible to overtime payment only in circumstances where the overtime worked exceeded 3 hours in one month.

The Court, however, took a different view in finding that the requirement to work an additional three hours before the entitlement to remuneration for additional hours was

⁶⁸¹ Judgment at para 42.

⁶⁸² *Op cit.* at n. 72.

⁶⁸³ Case C-285/02 *Elsner-Lakeberg v Land Nordrhein-Westfalen* [2004] ECR I-5861.

⁶⁸⁴ The Verordnung über die Gewährung von Mehrarbeitsvergütung für Beamte (Regulation on the granting of remuneration for excess hours for civil servants) 1992 as amended 1998.

⁶⁸⁵ Verwaltungsgericht.

triggered represented a 'greater burden for part-time teachers than...for full-time teachers'⁶⁸⁶ as the extra hours represented 3% of a full-time teacher's usual working hours and 5% of a part-time teacher's usual working hours. Since the number of additional teaching hours giving entitlement to pay was not reduced for part-timers in proportion to their working hours, their treatment differed from that received by full-time teachers. As usual, whether such different treatment could be objectively justified was a matter for the national court.

The Court's reasoning in *Gerster*,⁶⁸⁷ *Hill and Stapleton*⁶⁸⁸ and *Elsner-Lakeberg*⁶⁸⁹ represents, to some extent, a continuation of its recognition in *Nimz*⁶⁹⁰ that those who work part-time comprise an autonomous group whose treatment by employers need not be defined by the nature of their difference from those who work full-time. This is illustrated in *Gerster*⁶⁹¹ by the Court's finding that part-timers may well be capable of attaining the necessary experience for promotional purposes within the same timeframe as those who work full-time or, at least, should not be assumed to require double the amount of time needed by full-time workers to acquire such experience. This ascribes a greater value to the contribution made by part-time workers than that afforded them under the Court's previous judgments in *Helmig*,⁶⁹² *Lewark*⁶⁹³ and *Freers*.⁶⁹⁴ The Court's treatment of the issues in *Hill and Stapleton*⁶⁹⁵ is indicative of a more explicit acceptance of the relationship between family responsibilities and women's need to work part-time than had previously been the case in *Jenkins*⁶⁹⁶ and

⁶⁸⁶ Judgment at para 17.

⁶⁸⁷ *Op cit* at n. 133.

⁶⁸⁸ *Op cit* at n. 148.

⁶⁸⁹ *Op cit* at n. 160.

⁶⁹⁰ *Op cit* at n. 92.

⁶⁹¹ *Op cit* at n. 133.

⁶⁹² *Op cit* at n. 101.

⁶⁹³ *Op cit* at n. 119.

⁶⁹⁴ *Op cit* at n. 126.

⁶⁹⁵ *Op cit* at n. 148.

⁶⁹⁶ *Op cit.* at n. 13.

Bilka.⁶⁹⁷ This is illustrated by the Court's acknowledgment that the aim of Community policy was to adapt working conditions to fit family circumstances. In *Elsner-Lakeberg*⁶⁹⁸ the Court's reasoning is based on the notion that providing the same (equal) treatment to those who are differently situated can, in certain circumstances, result in discrimination. This view represents an alternative perspective from what was previously perceived to be the correct formulation as demonstrated by the earlier case of *Helmig*.⁶⁹⁹

Of course, the possibility of objective justification was left open in each of these cases as a matter to be decided by the court of origin with the State's position as employer providing the opportunity for justification on the grounds of social policy. However, the reasoning informing the Court's judgments, at least, demonstrates a move towards the application of the equality principle as a means of providing self-standing rights to part-time workers with their treatment assessed independently of that received by full-time workers. In each of these cases, the Court considered the outcomes resulting from the application of the policies in question in order to inform its decision-making regarding their compatibility with the principle of equality. This is encouraging and the fact that the policies under review were essentially imposed by the State appears to have made no difference to the Court's robust approach. However, the area of policy that has been the most contentious in this respect is that concerned with retirement benefits on which the ECJ's interpretation has been sought on several occasions. Attention will now be focused on this area.

⁶⁹⁷ *Op cit.* at n. 41.

⁶⁹⁸ *Op cit.* at n. 160.

⁶⁹⁹ *Op cit.* at n. 101.

Retirement and Work-Related Benefits

The Court's jurisprudence on part-time workers' pension entitlement has evolved through its consideration of two separate but related policy strands. Many of the cases concern the applicability of the equality principle to State pension schemes, whilst in others it is the applicability of rules concerning the operation of occupational or contracted-out schemes which are in question. The focus of this thesis is on the regulation of the employment relationship, and so the former group of cases, which have as their legal base the social security provisions of EC law,⁷⁰⁰ are outside of its scope and will not be specifically considered. However, the Court's jurisprudence in the remaining cases concerning part-time workers' rights of access to occupational pension schemes provides a fascinating insight into the Court's reasoning where furtherance of the principles of equality, effectiveness and legal certainty converge, ultimately leading to the development of a strategy which reveals much about the place of sex equality in the European legal order and the underpinning conceptualisation of gender relations.

The Court's first opportunity to consider the issue of part-time workers' rights of access to occupational pension schemes after its early ruling in *Bilka* was presented by the cases *Vroege*⁷⁰¹ and *Fisscher*.⁷⁰² In these cases, which followed the Court's judgment in *Barber*,⁷⁰³

⁷⁰⁰ Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security; Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes; Council Directive 96/97/EC of 20 December 1996 amending Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes.

⁷⁰¹ Case C-57/93 *Vroege v NCIV Instituut voor Volkhuysvesting BV and Stichting Pensioenfonds NCIV* [1994] ECR I-4541.

⁷⁰² Case C-128/93 *Fisscher v Voorhuis Hengelo BV and Stichting Bedrijfspensioenfonds voor de Detailhandel* [1994] ECR I-4583.

⁷⁰³ Case C-262/88 *Barber v Guardian Royal Exchange Assurance Group* [1990] I ECR 1889.

four years earlier, the Dutch Court⁷⁰⁴ requested guidance in relation to the applicability of *Barber* to part-time women workers who were members of an occupational pension scheme. The court was asked to consider, for the first time, the interpretation of the temporal limitation imposed by the Barber Protocol on the applicability of Article 119 to benefits under occupational pension schemes. Under the Protocol such benefits should not be considered as remuneration for the purposes of Article 119 if they were attributable to periods of employment prior to 17 May 1990⁷⁰⁵ except where they arose in respect of claims which were instigated prior to that date. The claims in *Vroege* and *Fisscher* concerned the payment of back-dated benefits to part-time workers previously denied membership of the pension schemes. Ms Vroege's claim was based on the terms of a collective agreement⁷⁰⁶ which had excluded those who worked less than 80 per cent of full-time hours and Ms Fisscher's claim on Dutch legislation⁷⁰⁷ which had excluded married women from joining such schemes. Following the *Barber* judgment, the Dutch legislation and the terms of the collective agreement had been amended to enable those who had previously been excluded from the schemes to join. Both claimants sought to have their membership of the pension schemes backdated to the date of the Court's judgment in *Defrenne II*.⁷⁰⁸ The national court sought clarification of the applicability of the temporal effect of the Barber Protocol in such circumstances.

In giving its judgment in *Vroege*,⁷⁰⁹ the Court cited *Bilka-Kaufhaus*⁷¹⁰ as authority for the proposition that Article 119 'covers not only entitlement to benefits paid by an occupational

⁷⁰⁴ The Kantongerecht Utrecht.

⁷⁰⁵ The date of the judgment in *Barber*.

⁷⁰⁶ The NCIV collective labour agreement.

⁷⁰⁷ Namely the *Bedrijfspensioenwet* (Act on Compulsory Membership of an Occupational Pension Scheme 1949).

⁷⁰⁸ Case 43/75 *Defrenne v SABENA* [1976] ECR 455 (*Defrenne II*).

⁷⁰⁹ *Op cit.* at n. 178.

⁷¹⁰ *Op cit.* at n. 41.

pension scheme but also the right to be a member of such a scheme'.⁷¹¹ With regard to the Barber Protocol, the Court stated that the imposition of the temporal limitation should be restricted to the context of that case. It had arisen due to the Court's finding that Member States and the other parties concerned had been reasonably entitled to consider that Article 119 did not apply to pensions paid under contracted out schemes due to the transitional derogations in respect of the determination of pensionable age permitted by Directives 79/7⁷¹² and 86/378.⁷¹³ However, as far as the right to join an occupational pension was concerned, 'there is no reason to suppose that the professional groups concerned could have been mistaken about the applicability of Article 119'.⁷¹⁴ This had been settled since the Court's judgment in *Bilka* which did not impose any temporal limitation, thus enabling those deprived of the right to claim retroactive membership from 8 April 1976⁷¹⁵ as long as the contributions relating to the appropriate period of membership were paid in full by the worker. The same reasoning was applied in order to grant rights of access to additional benefits payable under such a scheme in the Northern Irish case *Magorrian*.⁷¹⁶ However it is the Court's treatment of another aspect of the claims in *Fischer* and *Magorrian* which is most worthy of comment in the current context, that of the application of time limits under national legislation as a means of restricting the effectiveness of the remedies available under EC law.

⁷¹¹ Judgment in *Vroege* at para 15.

⁷¹² Article 7(1)(a).

⁷¹³ Article 9(a).

⁷¹⁴ Judgment at para 25.

⁷¹⁵ The date of the judgment in *Defrenne II*.

⁷¹⁶ Case C-246/96 *Magorrian and Cunningham v Eastern Health and Social Services Board and Department of Health and Social Services* [1997] ECR I-7153.

National Procedural Autonomy

In *Fisscher*,⁷¹⁷ the Court had been asked, as a side issue, whether it was relevant that the claimant had not acted earlier to enforce the rights she now claimed to have had.⁷¹⁸ The court interpreted this as a reference to whether national rules relating to time limits for bringing actions could be relied on against workers who were asserting their right to join an occupational pension scheme. In response the Court stated that such rules could be relied on with regard to actions based on Community law as long as they were no less favourable with regard to such actions than for similar actions of a domestic nature.⁷¹⁹

In *Magorrian*,⁷²⁰ this issue was revisited with reference to the time limits imposed by the UK legislation which, in the case of occupational pensions, limited the retroactive application of such schemes to two years.⁷²¹ The imposition of time limits *per se* was not an issue in *Magorrian*, as both applicants were still employed at the time of their claims. However, the scheme in *Magorrian* contained a provision that, in order to obtain certain benefits, a minimum of 20 years' membership was required. The imposition of the two-year rule, if allowed to stand, could potentially prevent a part-time worker from ever qualifying for additional benefits under such a scheme as she could only ever benefit from the two year retroactive application of the scheme in question and would, thus, never be able to attain the necessary 20 years' membership. This anomaly would have occurred if the correct interpretation of the two-year rule was deemed to be that it should be applied *before* calculating the worker's pension entitlement. With reference to this issue, the industrial

⁷¹⁷ *Op cit.* at n. 179.

⁷¹⁸ See Question 6 referred by the national court in *Fisscher*.

⁷¹⁹ The Judgment in *Vroege and Fisscher* at para 39.

⁷²⁰ *Op cit.* at n. 193.

⁷²¹ Regulation 12 of the Occupational Pension Schemes (Equal Access to Membership) Regulations (Northern Ireland) 1976 No 238.

tribunal asked whether the two-year rule amounted to ‘denial of an effective remedy under Community law’. The Court responded that Community law did preclude the application of such a time limit in circumstances where, in the event of a successful claim, its application would ‘render any action by individuals relying on Community law impossible in practice.’⁷²² However, this finding was qualified by the Court’s observation that, in general, the laying down of such procedural rules was a matter for Member States.⁷²³ By confining the application of the two-year rule to the circumstances of the scheme in *Magorrian*, the Court was able to preserve the maintenance of the national rule whilst enabling the claimants in the present case to have access to an effective remedy.

Thus the scene was set for the next UK case to come before the Court on the issue of retroactive membership by female part-time workers of an occupational pension scheme. In *Preston*⁷²⁴ the stakes were somewhat higher as the pension entitlements of 60,000 UK public and private sector workers, previously denied membership of a pension scheme, rested on the outcome of the case. In accordance with UK legislation,⁷²⁵ every contract of employment is deemed to include an equality clause. The statutory rules under review in the case provided that any claim in respect of such a clause must be brought within a period of six months following the cessation of employment⁷²⁶ and that retroactive claims in respect of a failure to comply with an equality clause would be restricted to a period of two years before the date on which the proceedings were instigated.⁷²⁷

⁷²² *Magorrian* Judgment at para 44.

⁷²³ Judgment at para 37.

⁷²⁴ Case C-78/98 *Preston and Others v Wolverhampton Healthcare NHS Trust* [2000] ECR I-3201.

⁷²⁵ Section 1 (1) Equal Pay Act 1970.

⁷²⁶ Section 2 (4) Equal Pay Act 1970.

⁷²⁷ Section 2 (5) Equal Pay Act 1970 as amended by Regulation 12(1) Occupational Pension Schemes (Equal Access to Membership) Regulations 1976.

The 22 claimants were all part-time workers who had been denied membership of contracted-out pension schemes⁷²⁸ at some time in the past on the grounds of their part-time status and whose claims had been selected as test cases in order to establish the correct legal framework for disposal of such cases. Following the Court's judgments in *Vroege*⁷²⁹ and *Fisscher*,⁷³⁰ some 60,000 part-time workers in the UK had instigated proceedings before industrial tribunals claiming they had been denied membership of the various occupational pension schemes in contravention of Article 119. The schemes had been amended at various times between 1986 and 1995 in order to admit them and their claims related to retroactive membership dating back, in some cases, to before 8 April 1976.⁷³¹ None of the schemes in question contained the type of qualifying period provided for in the *Magorrian*⁷³² scheme, so that the application of the two-year rule stood to seriously undermine the effectiveness of any remedies available to the claimants, some of whose claims were in any case time-barred by the application of the six-month rule.⁷³³ The House of Lords, accordingly, referred the cases to the ECJ to determine the compatibility of the national time limits with 'the principle of EC law that national procedural rules for breach of Community law must not make it excessively difficult or impossible in practice for the claimant to exercise her rights under Article 119.'⁷³⁴

The Judgment in *Preston*

In giving consideration to the compatibility of the 'six month rule' with European provisions, the Court referred to the 'principle of effectiveness' which seeks to ensure that procedural

⁷²⁸ Such as the National Health Service (NHS) Pension Scheme, the Teachers' Superannuation Scheme, the Local Government Superannuation Scheme, The Electricity Supply (Staff) Superannuation Pension Scheme, The Electricity Supply Pension Scheme, the Midland Bank Pension Scheme and the Midland Bank Key-Time Pension Scheme.

⁷²⁹ *Op cit* at n. 178.

⁷³⁰ *Op cit* at n. 179.

⁷³¹ The date of the judgment in *Defrenne II*.

⁷³² *Op cit* at n. 193.

⁷³³ Equal Pay Act 1970, s. 1(1).

⁷³⁴ Question 1 in *Preston*.

rules laid down by Member States do not have the effect of rendering rights conferred by Community law ineffective in practice. The Court stated that, where such time limits were reasonable, it was settled in case law that they represented an application of the principle of legal certainty by preventing administrative decisions from being vulnerable to legal challenge indefinitely.⁷³⁵ On this basis, and following the reasoning of Advocate-General Léger,⁷³⁶ the Court held that the six month limitation provided by s.2(4) of the EqPA ‘...does not render impossible or excessively difficult the exercise of rights conferred by the Community legal order and is not therefore liable to strike at the very essence of those rights.’⁷³⁷

The Court considered the limitation imposed by the application of the two-year rule. Referring to its judgment in *Magorrian*,⁷³⁸ the Court acknowledged that, although application of the two year time limit did not completely deprive the claimants of their rights, such restriction of access to membership did nonetheless have the effect of severely reducing the practical effect of the right to claim retroactive membership of an occupational pension scheme.⁷³⁹ In finding national procedural rules which seek to restrict the calculation of a claimant’s pensionable service to be precluded by Community law, the Court’s judgment appears, *prima facie*, to be clear and consistent with its earlier jurisprudence in *Vroege*⁷⁴⁰ and *Fischer*.⁷⁴¹

⁷³⁵ see Case 33/76 *Rewe* [1976] ECR 1989; Case C-261/95 *Palmisani v Istituto Nazionale della Previdenza Sociale* [1997] ECR I-4025.

⁷³⁶ In his opinion delivered on 14 September 1999. See also A-G Léger’s opinion and the judgment of the ECJ in the related case C-326/96 *Levez v Jennings (Harlow Pools) Ltd* (1998) ECR I-7835.

⁷³⁷ *Id.* at 34.

⁷³⁸ *Op cit* at n. 193.

⁷³⁹ *Preston judgment id* at 35.

⁷⁴⁰ *Op cit* at n. 178.

⁷⁴¹ *Op cit* at n. 179.

However, the distinction drawn by the Court between the inter-related legal concepts of *time limits* and *limitations in time* actually served to severely diminish the usefulness of this decision for those awaiting guidance on how best to advance related claims. The former are legislative provisions which set out the time in which something must be done, represented in this case by the six-month time limit provided for by the EqPA. The latter relate to the limit imposed on the periods of service that may count towards the accrual of a benefit in the approximation of a remedy, such as the two-year rule. Although theoretically diverse, the concurrent application of such provisions has the practical effect of fudging such apparent distinction. This is because the operation of a time limit imposed on the right to make a claim will depend on the duration of the limitation in time which will, in turn, have a direct effect on the availability of a remedy. In *Preston*,⁷⁴² the fact that all of the appropriate pension schemes were amended between 1985 and 1996 to admit part-time workers as members, ironically, presented insurmountable difficulties for many of the women. Those whose employment had ceased on the grounds of retirement (or for some other reason) following their admittance to the appropriate scheme, were prevented from initiating proceedings on the grounds of the application of the two year rule. In this context the judgment changed nothing as failure to initiate proceedings in the six months following cessation of the employment rendered any potential claims time-barred despite the otherwise potentially retroactive nature of the claim. This is particularly unjust as the failure to instigate proceedings arose due to the apparent lack of a suitable legal basis at the time of their cessation of employment. The ECJ dealt with the two rules separately in line with the terms in which the referred questions were framed, but, for the reasons set out above, it is necessary to apply an integrated approach in order to analyse the practical impact of the ruling.⁷⁴³

⁷⁴² *Op cit* at n. 201.

⁷⁴³ For an analysis of the practical effects of this ruling on the various categories of UK workers represented by the test case, see N. Busby 'Only a Matter of Time' *Modern Law Review*, 64 (2001) 3, 489-499.

The reasoning informing the judgment in *Preston*⁷⁴⁴ is revealing in its failure to follow through the practical implications of the imposition of national procedural rules in circumstances which, after all, resulted from the UK's failure actively to acknowledge the impact of the Court's jurisprudence, arguably since *Defrenne II*,⁷⁴⁵ but certainly since *Bilka*.⁷⁴⁶ The fact that the UK government did not sit up and take notice that the exclusion of part-time workers from occupational pension schemes was prohibited by EC law until, in some cases 20 years after the ECJ's articulation of that fact, appears to have had little bearing on the Court's treatment of the resulting litigation. Rather than achieving the stated aim of preserving legal certainty, the judgment in *Preston*⁷⁴⁷ seems to have been the likely source of confusion surrounding the legitimate expectations of those with apparently worthy claims and an uneven application of available remedies for those directly involved in the litigation.

The deference shown to Member States' authority in autonomous procedural policy-making by the Court is surprising if considered alongside the fundamental issues at stake which basically concerned the entitlement of one generation of female workers to retirement pensions which, according to Community law, were always rightfully theirs. This disregard for the welfare rights of women in old age is indicative of the questionable commitment of the Court to interpret Community law in order to remedy the discriminatory effects of the past. Without a more explicit acknowledgment in its reasoning of the economic contribution made by working women in both the labour market and corresponding arrangements surrounding family life, it is perhaps unsurprising that the Court, when faced with choices regarding the relative importance of various legal principles, chose to subordinate women's rights to equal pay and treatment to the rights of autonomy enjoyed by Member States.

⁷⁴⁴ *Op cit.* at n. 201.

⁷⁴⁵ *Op cit.* at n. 12.

⁷⁴⁶ *Op cit.* at n. 41.

⁷⁴⁷ *Op cit.* at n. 201.

The Court's abdication of responsibility towards the generation of women caught in the post-*Defrenne* era, many of whom face retirement with reduced pensions as a result of the effects of national procedural rules which may or may not have been struck by the incremental development of the Court's jurisprudence on State and occupational pension provisions, is further illustrated by its judgment in the earlier case *Grau-Hupka*.⁷⁴⁸ The claimant, who was in receipt of a State pension and worked part-time, was paid at a lower rate than comparable full-timers in line with national legislation⁷⁴⁹ intended to be applied to those who combined part-time work with a full-time occupation.⁷⁵⁰ Ms Grau-Hupka argued that, the fact that her pension had been reduced by the loss of earnings resulting from time away from paid employment due to child rearing, distinguished her pension from wages earned through full-time employment and necessitated her continued employment. Thus, she contended, it was contrary to Article 119 to treat both forms of income in the same way. The Court, in giving its judgment, stated that the relevant Community provisions on social security⁷⁵¹ did not oblige Member States to grant advantages in respect of old-age pension schemes to those who had brought up children or to provide benefits where employment had been interrupted to bring up children.⁷⁵² Consequently, the resulting reduction in pension entitlement did not preclude payment at a lower rate for part-time work than full-time work under Article 119.⁷⁵³

⁷⁴⁸ Case C-297/93 *Grau-Hupka v Stadtgemeinde Bremen* [1994] ECR I-5535.

⁷⁴⁹ Namely Section 2(1) of the *Beschäftigungsförderungsgesetz* (Act to Promote Employment).

⁷⁵⁰ The national court acknowledged that most of the workers in this category were men as women's 'twin responsibilities of career and family' made it unlikely that they would be able to engage in full and part-time work concurrently - see the Judgment at para 15.

⁷⁵¹ Directive 79/7 on equal treatment in matters of social security.

⁷⁵² Judgment at para 27.

⁷⁵³ Although see also the Court's judgment in Case C-77/02 *Steinicke v Bundesanstalt für Arbeit* [2003] ECR I-9027 in which the Court found that a statutory rule which restricted the right of public sector workers to work part-time upon retirement to those who had worked in a full-time capacity for three of the five years preceding retirement was prohibited by Articles 2(1) and 5(1) of Directive 76/207.

Schröder – The Tide Turns?

In *Schröder*⁷⁵⁴ the Court was, once again, asked to consider the applicability of the Barber Protocol to national rules permitting previously excluded part-time workers access to an occupational pension scheme. The claimant, who had worked for her employers for 20 years⁷⁵⁵ before retiring in 1994, sought to challenge the rules under which her supplementary pensionable entitlement had been calculated. The rules in question were contained in a collective agreement⁷⁵⁶ which, until 1992, excluded those who worked for less than full-time hours. Although at the time of Ms Schröder's retirement, the collective agreement had been amended to give part-time workers access to the occupational pension scheme, the temporal limitation contained in the Barber Protocol had been applied with the effect that her entitlement was limited to benefits accruing from the date of the *Barber*⁷⁵⁷ Judgment in 1992. The claimant sought to obtain the benefits that she would have accrued if she had been granted retroactive membership of the scheme from the date that she was given a permanent contract with the employer in 1975.

Deutsche Telekom contended that, although the principle of equality between men and women was enshrined in the constitutional provisions of German law,⁷⁵⁸ Article 119 of the Treaty had precedence over the German Constitution and, thus, the limitation of its effects in time arising from the Barber Protocol should be applied to limit the application of the provisions of national law. This was the first time that an attempt had been made, in the

⁷⁵⁴ Case C-50/96 *Deutsche Telekom v Schröder* [2000] ECR I-743.

⁷⁵⁵ The first year of her employment had been on a temporary contract and was, thus, outside of the scope of her claim.

⁷⁵⁶ Tarifvertrag über die Versorgung der Arbeitnehmer der Deutschen Bundespost (Collective Agreement concerning Pensions for Employees of the German Post Office).

⁷⁵⁷ *Op cit.* at n. 231.

⁷⁵⁸ Article 3 of the Grundgesetz für die Bundesrepublik Deutschland (the Basic Law) provides '(1) All persons shall be equal before the law. Men and women shall have equal rights. (2) The State shall encourage effective attainment of equal rights for men and women and shall take actions to remove existing disadvantages.'

context of atypical workers' rights, to utilise the Court's jurisprudence as a means of *reducing* the rights available under national law. Furthermore, it provided the Court with its first opportunity to explicitly consider a potential conflict between the social and economic aims of Article 141 since the 'dual purpose' of the Article had been articulated by the Court in *Defrenne II*. This was because the constitutional provision, if applied, would provide a solution to the problem posed in *Schröder* by enabling access to the occupational pension scheme in question as a basic constitutional right with no retroactive restrictions.⁷⁵⁹ This could be interpreted as giving rise to a distortion of competition between economic undertakings within Member States as not all national legal systems provided such rights which would, thus, put German employers and pension administrators in a less favourable position than comparable organisations in other States.

In giving its judgment, the Court referred to the proposition that the 'right not to be discriminated against on ground of sex is one of the fundamental human rights whose observance the Court has a duty to ensure.'⁷⁶⁰ This meant that the 'economic aim pursued by Article 119 of the Treaty, namely the elimination of distortions of competition between undertakings established in different Member States, is secondary to the social aim pursued by the same provision, which constitutes the expression of a fundamental human right'.⁷⁶¹ Accordingly, part-time workers in Germany could claim retroactive membership of occupational pension schemes unfettered by either of the temporal restrictions⁷⁶² applicable under Community law.

⁷⁵⁹ See Question 6 referred by the Landesarbeitsgericht (Regional Labour Court). The Grundgesetz predates even the Court's judgment in *Defrenne II* and, if applied, would provide rights for women in Germany with less retroactive restrictions than those applicable in any other Member State.

⁷⁶⁰ Judgment at para 56.

⁷⁶¹ Judgment at para 57.

⁷⁶² In respect of the dates of the Court's judgments in *Defrenne II* or *Barber*.

The Court's recognition of the application of the equality principle as a fundamental human right is welcomed and this development, although expressly linked to its own jurisprudence,⁷⁶³ surely owed much to the Member States' approval and subsequent adoption of the Charter of Fundamental Human Rights. Given that the vast majority of the cases under review in this analysis (15 out of 23) were referred by German courts largely to determine the compatibility of Article 119 with the provisions of national law,⁷⁶⁴ it is surprising that the explicit articulation of the equality principle under German constitutional law had not been directly raised before in this context. However, even if it had, it is not a certainty that the Court would have given priority to the social, rather than economic, aim of Article 141. By the time *Schröder*⁷⁶⁵ came along, the external environment in which the Court operates was changing with the recognition of human rights as a principle of Community law placed very high up the political agenda.⁷⁶⁶ Against this backdrop and faced with an inescapable challenge to consider the prevalence of national human rights standards over corresponding Community standards, the Court was left with little option but to make a rare admission that the former should prevail. Whether this proclamation will translate into a substantive development in the Court's jurisprudence on equality between the sexes, or amount to nothing more than a mere ideological statement, remains to be seen.

The common thread in all of the cases reviewed thus far has been in the ECJ's conceptualisation and treatment of indirect discrimination claims raised by part-time female workers. However, in the broader spectrum of 'atypical' working practices by which women have sought to combine family commitments with paid employment, the differentiation of

⁷⁶³ Specifically Case 149/77 *Defrenne v SABENA* [1978] ECR 1365; Joined Cases 75 and 117/82 *Razzouk and Beydoun v EC Commission* [1984] ECR 1509 and Case C- 13/94 *P v S and Cornwall County Council* [1996] ECR I-2143.

⁷⁶⁴ Albeit through their articulation in collective agreements.

⁷⁶⁵ *Op cit.* at n. 231.

⁷⁶⁶ As illustrated by the development of the 'new' Article 13 as an enabling measure intended to significantly broaden the grounds of discrimination prohibited under EC law.

other contractual terms alongside those relating solely to hours of work have arisen. The main development here has been in the use of temporary contracts and, under national provisions, 'contracting out' arrangements which enable employing organisations to avoid the usual obligations arising through contractual relations. In Member States where collective agreements are used as a means of regulating industrial relations, there is generally little difference between the terms and conditions of those employed directly and those whose services are procured through indirect means.⁷⁶⁷ However, in labour markets characterised by high levels of deregulation in which employment protection is increasingly reliant on individual agreements,⁷⁶⁸ these types of arrangements have flourished. In the last group of cases under review, the use of such practices within two Member States is considered. *Allonby*⁷⁶⁹ was concerned with the UK practice of contracting out part-time workers previously employed by the public sector to private concerns and *Nikoloudi*⁷⁷⁰ with the use of temporary contracts in respect of part-time employees.

Contract status – *Allonby* and *Nikoloudi*

In *Allonby*, the claimant's temporary employment contract was terminated by her employer along with those of other temporary staff (mostly female) in order to avoid new legal obligations to provide equal treatment for part-time workers.⁷⁷¹ Ms Allonby's services were subsequently 'bought in' by arrangement with an employment agency with which she was required to register as self-employed. Consequently, she suffered a reduction in her hourly

⁷⁶⁷ Such as through tripartite arrangements involving the use of employment agencies - see N. Busby and D. Christie, 'The Regulation of Temporary Agency Work in the European Union', *The Cambrian Law Review*, (2005) 36, 15-28.

⁷⁶⁸ See Chapter 3 *supra*.

⁷⁶⁹ Case C-256/01 *Allonby v Accrington & Rosendale College* [2004] IRLR 224

⁷⁷⁰ Case C-196/02 *Nikoloudi v Organismos Tilepikinonion Ellados AE* [2005] ECR I-1789.

⁷⁷¹ Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (SI 2000/1551) which transposed Council Directive 97/81/EC into UK law, see para 10 *Allonby*.

rate of pay and was excluded from a state-administered pension scheme⁷⁷² which was restricted to those employed by public bodies. The services of the permanent lecturing staff (mostly male) were directly retained by the college, thus preserving their employment status in accordance with national provisions,⁷⁷³ Ms Allonby's attempt to claim equal pay by comparing herself with one of these individuals failed at the employment tribunal on the grounds that, as a temporary agency worker, she was not in 'the same employment' as the college's own employees. The Court of Appeal referred the case to the ECJ in order to clarify whether the direct effect of Article 141 enabled a woman to claim equal pay with a man in the circumstances of the case and also to claim access to the pension scheme either by comparison with her male colleague or by proving indirect discrimination on the grounds that the number of female teachers who would be eligible to join the pension scheme by complying with the requirement of employment was considerably lower than the number of eligible male teachers.

In giving its response to the first question, the Court adopted a consistent approach in line with its decision in an earlier case⁷⁷⁴ in finding that, as the difference in pay could not be attributable to a single source, Article 141 could not be relied on as directly effective.⁷⁷⁵ On the issue of the pension scheme, however, the Court found that Ms Allonby's exclusion did amount to indirect discrimination under Community law without the need to identify an actual comparator.⁷⁷⁶ This was because the classification, under national law, of a worker as self-

⁷⁷² The Teachers' Superannuation Scheme.

⁷⁷³ Section 1 (6) of the Equal Pay Act 1970 which required a comparison with a member of the opposite sex in the same employment.

⁷⁷⁴ Case C-320/00 *Lawrence v Regent Office Care Ltd* [2002] ECR I-7325. The claimants in *Lawrence* were providers of a range of Council services which, in line with UK public policy, had been subjected to compulsory competitive tendering. Although not specifically considered here, the Court's reasoning in *Lawrence* serves as a precursor to its treatment of the wider issues raised in *Allonby*. For the author's analysis of the impact of the Court's judgment in *Lawrence*, see N. Busby, 'Equal Pay and Contracting Out: *Lawrence v Regent Office Care Ltd*' 7 *EdinLR* 2 (2003) 233-240.

⁷⁷⁵ Judgment in *Allonby* at para 50.

⁷⁷⁶ *Ibid* at paras 79 and 84.

employed could not prevent the application of Article 141 if the worker's independence was 'merely notional, thereby disguising an employment relationship within the meaning of that Article.'⁷⁷⁷

Although the clarification given to the definition of a 'worker' under Article 141 is to be welcomed,⁷⁷⁸ this decision is indicative of the danger posed by the deregulation of labour markets and the resulting marginalisation of the equality principle as articulated by Article 141. Setting the pension issue to one side, the Court's reasoning underpinning its response to the question of the direct effect of Article 141 in the current circumstances is revealing in its interpretation of the nature of the relationship between the worker and the organisation utilising her services. As in its earlier judgment in *Lawrence*,⁷⁷⁹ the Court was of the opinion that liability for discrimination will only arise if fault can be established. However, this approach denies recognition of the systemic forms of discrimination which result from institutional arrangements for which it has become increasingly difficult to apportion blame. In the context of the current case, the Court's denial of a relationship between the College and the agency, which was set up specifically to reemploy lecturers on less favourable terms and conditions than those directly employed, reveals an extremely narrow interpretation of the concept of 'fault'. The fact that the difference in treatment in *Allonby*⁷⁸⁰ resulted directly from a managerial decision which was based explicitly on the desire to circumvent the effects of Community legislation appears to have had no influence over the Court's ruling. This sends out a worrying message to UK employers – specifically that reductions in labour costs can be achieved by avoiding the obligations arising from the application of the equality principle

⁷⁷⁷ Judgment in *Allonby* at para 71.

⁷⁷⁸ It was in fact the first time that the term has been defined for the purposes of Article 141. The definition is 'a person who, for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration'. Para 67 of the judgment.

⁷⁷⁹ *Op cit* at n. 251.

⁷⁸⁰ *Op cit* at n. 246.

through the contracting out of services.⁷⁸¹ The Court's treatment of the pension issue is comforting insofar as it illustrates a lack of tolerance for the 'dressing up' of an employment relationship as self-employment for the purposes of escaping certain forms of liability but, read alongside the ruling on the equal pay claim, it provides an inconsistency in outcome.

In *Nikoloudi*,⁷⁸² the Court was confronted with a provision of a workplace rule book⁷⁸³ which disregarded periods of part-time work entirely for the purposes of calculating length of service. In order to be appointed as an established member of staff, temporary staff must have completed two years of continuous full-time employment.⁷⁸⁴ The claimant worked as a cleaner on a part-time basis for 18 of the 20 years she was employed 'as a temporary member of staff under an employment contract of indefinite duration'.⁷⁸⁵ During the remaining two years of her employment, she worked on a full-time basis, after which she was pensioned off. She sought to claim the difference in pay that she would have received during the last two years of her employment if her part-time employment had been taken into account in calculating her length of service. Furthermore, she claimed that the rule which excluded her from claiming her status as an established staff member amounted to sex discrimination contrary to Community law. This assertion was supported by the fact that the only temporary members of staff working part-time were cleaners who were all female.⁷⁸⁶

⁷⁸¹ The proposed Temporary Agency Workers' Directive (see COM (2002) 149 Final) was designed to counter such practices by providing some much needed specific protection to the vulnerable group of agency workers typified, in the UK context, by the claimant in *Allonby*. However, a lack of progress at Council-level, due to a veto in which the UK played a major part, has meant that the proposal failed to make progress and has, for the time being, been shelved.

⁷⁸² Case C-196/02 *Nikoloudi v Organismos Tilepikinonion Ellados* AE [2005] ECR I-1789.

⁷⁸³ Namely the General Staff Regulations of the Organismos Tilepikinonion Ellados (the Greek public telecommunications organisation).

⁷⁸⁴ In accordance with a collective agreement.

⁷⁸⁵ See para 14 of the judgment in *Nikoloudi*.

⁷⁸⁶ *Nikoloudi* at para H3. This was in accordance with the General Staff Regulations, Article 24(2)(a) of which stated that only 'female cleaners' could be taken on for indefinite duration for part-time work.

The Small Claims Court in Athens⁷⁸⁷ referred the case to the ECJ asking a series of five questions which are complex in structure and inter-related in nature but which, in essence, seek clarification on the compatibility of the rules in question with Article 141 and Directives 75/117 and 76/207. In addition, the Court was asked to consider whether the exclusion of part-time temporary female workers from the benefits derived from the collective agreement was prohibited under Article 141.

The Court first considered whether the rule which allowed only women to be employed on a part-time basis amounted to direct discrimination. The employers contended that this rule had been introduced 'for socio-political reasons to support women and to meet their particular needs.'⁷⁸⁸ The Court responded to this by stating that 'the creation of a category of exclusively female workers...does not constitute in itself direct discrimination against women', rather it was the unfavourable treatment by reference to that category which could potentially amount to discrimination.⁷⁸⁹ The application of the rule that only full-time workers qualified for appointment as established staff members implicitly excluded the part-time female cleaners and this potentially amounted to direct discrimination. In order for there to be no direct discrimination, 'the factor characterising the category to which the excluded worker belongs must be such as to place that worker in a situation that is objectively different, with regard to appointment as an established member of staff, from the situation of those who are eligible to become established.'⁷⁹⁰ It is unclear what factors the Court had in mind in providing what effectively amounts to a possible justification for direct discrimination.

⁷⁸⁷ The Irinodikio Athinon.

⁷⁸⁸ A-G's opinion at AG25.

⁷⁸⁹ *Ibid* at para 34.

⁷⁹⁰ Para 40 of the judgment.

On the issue of whether the exclusion of part-time workers from the terms of the collective agreement, which in effect prevented their conversion to permanent contracts, was prohibited by Article 119, the Court was more magnanimous. In line with its earlier rulings in *Nimz*⁷⁹¹ and *Gerster*,⁷⁹² the Court held that, where an employee's benefits depend on length of service requirements, it may be indirectly discriminatory for the employer to disregard part-time service or to count such service only on a *pro rata* basis unless the policy can be objectively justified. The employer's contention that the difference in treatment was founded on objective reasons of general public and social interest, namely that 'the national public-utility undertaking should not bear excessive burdens',⁷⁹³ was found by the Court to amount to 'a mere generalisation insufficient to show that the aim of the measures at issue were unrelated to any discrimination on the grounds of sex.'⁷⁹⁴

These final two cases provide a sharp contrast in terms of the different public sector policies relating to part-time work in place within Member States. The UK and Greek national courts' relationships with the European Court are distinct but this fact appears to have made little practical difference to the effect of the policies under review on the workers concerned. The UK courts were among the first to refer equal pay cases involving part-time female workers to the ECJ and it is interesting to note that the public employers in *Allonby*⁷⁹⁵ were only moved to take action to avoid the equalisation of terms and conditions of part-time and full-time staff on the introduction of the Part-Time Workers Regulations.⁷⁹⁶ The timing of this action reveals the lack of impact that over 20 years of equal pay litigation at national and European levels has had on the prospects of part-time women workers. The circumstances in *Allonby* represent

⁷⁹¹ *Op cit.* at n. 92.

⁷⁹² *Op cit.* at n. 133.

⁷⁹³ Para 50.

⁷⁹⁴ Para 52.

⁷⁹⁵ *Op cit.* at n. 246.

⁷⁹⁶ See n. 248 *ibid.*

a strategy pursued with the specific aim of continuing the practice of differential treatment for part-time workers in comparison to their full-time counterparts. Furthermore, on the main issue of equal pay, the claim failed as Article 141 was found not to be applicable.

Nikoloudi, in contrast, represents an early attempt to bring an indirect discrimination claim before the Greek courts⁷⁹⁷ and is the first sex discrimination case to be referred by Greece to the ECJ. The facts as reported and the questions referred reveal a complex situation in which workplace rules and the terms of a collective agreement converge to specifically exclude part-time women workers from access to certain work-related benefits, not least of which is the security associated with permanent employment. Despite the apparently obvious discriminatory effect of a rule which ascribes part-time work as a women-only activity, with the effect that only women can be deprived of such benefits, the ECJ steered away from giving a clear ruling in this respect choosing instead to provide an opportunity to the public employers to offer a justification for direct discrimination.

Conclusions

In seeking to draw some meaningful conclusions from the above analysis, it is necessary to identify aspects of commonality in the Court's treatment of the cases under review. This is not an easy task as the analysis reveals a high degree of divergence in the Court's reasoning, despite the factual similarities between the cases. Some of the claims are concerned with the effects of a collective agreement on the pay rates of part-time workers (*Kowalska*,⁷⁹⁸ *Nimz*,⁷⁹⁹

⁷⁹⁷ See Bulletin of the Commission's network of legal experts on the application of Community law on equal treatment between women and men No 1/2004, at p. 32 in which the Greek expert states (in 2004) that, until very recently, no indirect discrimination claims were brought before the courts.

⁷⁹⁸ Case 33/89 [1990] ECR I-2591.

⁷⁹⁹ Case 184/89 [1991] ECR I-297.

*Helmig*⁸⁰⁰ and *Krüger*⁸⁰¹); some with the application of national legislation which *prima facie* has a discriminatory effect on certain workers' pay rates (*Bötel*⁸⁰², *Lewark*⁸⁰³ and *Freers*⁸⁰⁴); in other cases it is the State's role as employer that is under scrutiny (*Gerster*,⁸⁰⁵ *Kording*⁸⁰⁶ and *Hill and Stapleton*⁸⁰⁷); the arrangements relating to retirement and work-related benefits have also proved a rich source of case law (*Vroege*⁸⁰⁸, *Fisscher*⁸⁰⁹, *Magorrian*,⁸¹⁰ *Preston*⁸¹¹, *Grau-Hupka*⁸¹² and *Schröder*⁸¹³); and, finally, the contract status of certain categories of worker has given rise to allegations of sex discrimination (*Allonby*⁸¹⁴ and *Nikoloudi*⁸¹⁵). Despite the varied nature of the policies under review and their different national origins, all of the claims are concerned with the use of different terms and conditions of employment for 'standard' workers and those deemed to be 'atypical'. In the case of the latter group, which, consists wholly or mainly of women in all the cases, this differentiation tends to have a detrimental effect on pay and work-related benefits.

The expansion of women's employment that has taken place in the post-war economies of Europe's Member States has largely been in the provision of part-time work⁸¹⁶ which enables those with children to combine family responsibilities with paid employment. As *Jenkins* illustrates, prior to the introduction of anti-discrimination legislation, women were subjected to less favourable treatment in employment on the grounds of assumptions concerning their

⁸⁰⁰ *Op cit* at n. 101.

⁸⁰¹ *Op cit* at n. 110.

⁸⁰² *Op cit* at n. 118.

⁸⁰³ *Op cit* at n. 119.

⁸⁰⁴ *Op cit* at n. 126.

⁸⁰⁵ *Op cit* at n. 133.

⁸⁰⁶ *Op cit* at n. 134.

⁸⁰⁷ *Op cit* at n. 148.

⁸⁰⁸ *Op cit* at n. 178.

⁸⁰⁹ *Op cit* at n. 179.

⁸¹⁰ *Op cit* at n. 193.

⁸¹¹ *Op cit* at n. 201.

⁸¹² *Op cit* at n. 225.

⁸¹³ *Op cit* at n. 231.

⁸¹⁴ *Op cit.* at n. 246.

⁸¹⁵ *Op cit* at n. 247.

⁸¹⁶ See Chapter 3 *infra*.

value as workers arising from what was perceived to be their lack of commitment to the labour market. Once the legal landscape changed and female workers gained formal equality with their male counterparts, new ways in which to differentiate their terms and conditions were sought by employers with variations in working arrangements providing the most obvious ground. So, discrimination on the grounds of sex, now unlawful, became discrimination on the grounds of hours of work which may have been legally questionable but was not specifically prohibited. Unsurprisingly, legal challenges to this new form of legitimate discrimination were raised on the grounds that, despite the re-labelling, the effect of such policies was the same. National courts, unsure of the effect of European Community provisions on this new uncharted area of law, referred cases to the ECJ and those early referrals resulted in the development of a conceptual framework that is still in place today. Once this framework had been established, certain ideological foundations were bedded in which influenced the further development of the Court's jurisprudence. When placed in the more general context of the Court's jurisprudence on sex discrimination, the judgments under review appear to conform to the application of a consistent approach. However, as a detailed analysis demonstrates, the concepts and underpinning ideology have been subjected to a high degree of divergence in certain respects. Taking each of these aspects in turn, I will attempt to identify the nature of this divergence by way of the case law reviewed.

The Conceptual Framework

Indirect Discrimination

The above analysis of the Court's conceptual framework questions the use of indirect discrimination as a suitable means of classifying claims of alleged discrimination against

atypical workers in all circumstances. This is the approach adopted by the Court since *Jenkins* and rests on a distinction made in that case between the nature of the job performed by part-time and full-time workers. In *Jenkins*,⁸¹⁷ the work performed by both groups of workers was essentially the same, the only differences being the sex of the workers concerned and the hours of work performed. The Court accepted the employer's explanation that the differences in pay were not linked to the workers' sex and so the only factor that remained on which the differential pay rates could be explained was that of hours of work. Men were not prevented from working part-time although the vast majority of such workers were women. Thus the basis for the subsequent finding of indirect rather than direct discrimination was deemed to be the nature of the job as performed by a part-time worker. The Court ruled that such differentiation was based on the application of a neutral policy which, if it had a disproportionate impact on the members of one sex, was prohibited by Article 119, although if the distinction between part-time and full-time work could be justified in some way, the resulting discrimination might be acceptable. The Court was silent on what factors distinguished one from the other, leaving interested parties to fill in the blanks. In deciding the case in this way, the Court subordinated the operation of the equality principle in this context to the need to show that a neutral policy had caused a disproportionate impact on the members of one sex. The fact that the policy in *Jenkins*⁸¹⁸ was not 'neutral', but was designed as a means of escaping liability for sex discrimination and served to perpetuate the discrimination that had existed prior to the introduction of the legislation, was overlooked.

In attempting to identify the differences in the nature of a job as performed by part-time and full-time workers, one possible explanation could rest in the total amount of time spent by workers performing the tasks required by the job. If a correlation could be established

⁸¹⁷ *Op cit* at n. 13.

⁸¹⁸ *Ibid.*

between the total amount of time spent by the worker on the tasks and the acquisition of skills and experience which served to benefit the organisation, the differences in pay could, perhaps, be justified. This was the basis of the employers' defences in *Nimz*⁸¹⁹, *Gerster*⁸²⁰ and *Kording*⁸²¹ in which it was asserted that the time taken by part-timers to acquire the necessary skills and experience for progression up an incremental pay scale or for promotional purposes was proportionate to the time actually worked so that those who worked half of the standard working hours would take twice as long as full-timers to reach the required standard. The Court sensibly rejected this approach in all three cases stating that the assumption that time spent performing particular tasks equated to a proportionate acquisition of skills and experience amounted to generalisations about certain categories of workers which were unsustainable. This finding appeared to free the rights of part-time workers from the need to adhere to standards set by those able to conform to the normative full-time model, thus recognising atypical workers as being capable of operating autonomously despite their differences from the norm. However, in *Helmig*,⁸²² the Court returned to the narrow construction of achievement by finding that the payment of overtime supplements was only appropriate if the extra hours worked were above and beyond those performed by the standard full-time worker. Furthermore, in *Nikoloudi*⁸²³ the Court appeared to hint at the possible existence of a factor capable of characterising part-time workers (apart from their sex) which would justify the differentiation of contractual terms and in *Allonby*⁸²⁴ the transfer of part-time workers to different contractual arrangements was found to amount to just such a factor.

⁸¹⁹ *Op cit* at n. 92.

⁸²⁰ *Op cit* at n. 133.

⁸²¹ *Op cit* at n. 134.

⁸²² *Op cit* at n. 101.

⁸²³ *Op cit* at n. 247.

⁸²⁴ *Op cit* at n. 246.

The Use of the Objective Justification Test

The use of a proportionality test as a means of gauging the appropriateness of various forms of justification for indirect discrimination appears, *prima facie*, to provide a fair and consistent approach to what are essentially a range of diverse grounds. However, the nature of the test itself is wholly subjective and can be interpreted as dependent on employer-led criteria rather than on the requirement for a balanced assessment of all of the factors at stake. It is unsurprising that the Court's reasoning surrounding the test has varied considerably in certain respects and, although always qualified by deference to the national court as the appropriate authority to determine whether the ground advanced should be regarded as meeting the required standard, the Court has, on occasion, opined as to the suitability of certain criteria. This has generally arisen in cases where the framing of the questions by the national court have required a direct response. For example, in *Bilka*,⁸²⁵ the Court was specifically asked to rule on whether the objective to employ as few part-time workers as possible was an acceptable means of justifying lower pay rates for such workers. However, the Court has, on occasion, responded unprompted to the justifications advanced by employers or, more commonly, through the submissions of the government of the country of origin. This was the case in *Rinner-Kühn*⁸²⁶ in which the court refuted the German government's claim that those working less than 10 hours per week were not sufficiently integrated in or dependent on the employing organisation to justify the payment of sickness benefit. In contrast, the Court has also sometimes desisted from giving an opinion of the relative weight of a potential justification as it did in *Kowalska*.⁸²⁷ This was despite the stereotypical basis of the justification which rested on the perceived lack of economic necessity for

⁸²⁵ *Op cit* at n. 41.

⁸²⁶ *Op cit* at n. 72.

⁸²⁷ *Op cit* at n. 85.

those working part-time to be eligible for severance pay under a collective agreement and which was similar in nature to that in *Rinner-Kühn*.⁸²⁸

Given the limited number of cases under review, it is difficult to reach any definitive conclusions regarding differences in the Court's treatment of employer and State-led justifications, but some preliminary observations can be made. In its role as employer, the State does not appear to have been the recipient of particularly favourable treatment in this respect as the judgments in *Gerster*⁸²⁹, *Kording*⁸³⁰ and *Hill and Stapleton*⁸³¹ illustrate. However, where the alleged discrimination results from a legislative measure and the attempted justification is correspondingly advanced by the Member State's government, the Court appears to be more receptive to persuasion than in cases involving the imposition of an employer's policy or one arising from a collective agreement (see *Krüger*⁸³²). This is demonstrated by the Court's treatment of the incremental development of the justification in *Bötel*,⁸³³ *Lewark*⁸³⁴ and *Freers*⁸³⁵ which remained the same in substance but which grew in prominence, at the German government's insistence, as the cases unfolded. This is perhaps not surprising given the different standards in operation with respect to employers' policies which must comply with the test as expounded in *Bilka*⁸³⁶ and those arising on the grounds of social policy for which Member States retain a 'wide margin of discretion'. The use of this discretion is most notable in the context of the Court's treatment of retirement and work-related pensions, in which respect the procedural autonomy of Member States appears to trump the equality principle regardless of the consequences, as shown by the Court's

⁸²⁸ *Op cit* at n. 72.

⁸²⁹ *Op cit* at n. 133.

⁸³⁰ *Op cit* at n. 134.

⁸³¹ *Op cit* at n. 148.

⁸³² *Op cit* at n. 110.

⁸³³ *Op cit* at n. 118.

⁸³⁴ *Op cit* at n. 119.

⁸³⁵ *Op cit* at n. 126.

⁸³⁶ *Op cit* at n. 41.

reasoning in *Preston*.⁸³⁷ With ultimate responsibility for the acceptance or rejection of attempted justification resting with the national courts, the influence of the ECJ on this aspect is not finite. However, the inconsistent treatment of potential defences for discriminatory policies is surely questionable in the context of the Court's objective of furtherance of the principles of legal certainty and legitimate expectation.

Ideological Foundations

In establishing the conceptual framework within which such claims could be assessed, the Court's reasoning has, by necessity, ventured into considerations of the relationship between labour market participation and family responsibility. The effects of past discrimination loom large in this respect as many of the unfounded assumptions regarding women's ability to combine this 'dual role' were the cause of unfavourable treatment by employers prior to the introduction of the anti-discrimination legislation and the Court's interpretation of Article 119/141. Furthermore, many of the legislative measures and those arising from the application of collective agreements are based on such assumptions, and the stories told by the cases themselves often concern women who, despite long periods in paid employment, find themselves the recipients of reduced pension entitlement in old age. Consequently, the issues for the Court have been whether, and to what extent, the effects of past discrimination should inform the reasoning applied in its case law and what role the relationship between women's paid employment and unpaid labour within the family should have in the ideological foundations underpinning its jurisprudence.

⁸³⁷ *Op cit* at n. 201.

In this respect, as in the application of the conceptual framework, the Court's reasoning has proved inconsistent with, on the one hand, its rejection of generalisations concerning certain categories of workers as objective justifications (see *Bilka*,⁸³⁸ *Nimz*⁸³⁹ and *Nikoloudi*⁸⁴⁰) and, on the other, its adherence to the standard employment model as a yardstick against which all other categories should be measured (see *Helmig*⁸⁴¹). The Court's jurisprudence on overtime payments can be used to illustrate this inconsistency. In *Helmig*,⁸⁴² the Court held that those working part-time were not eligible for overtime supplements unless they exceeded the standard (full-time) working hours, whereas in *Elsner-Lakeberg*⁸⁴³ a requirement that all workers, regardless of normal hours of work, would only receive overtime payments for working in excess of three extra hours per month was prohibited by Article 141. The reason for the prohibition was that the application of a blanket provision resulted in a 'greater burden' for part-time workers. In contrast, in *Lewark*⁸⁴⁴ and *Freers*,⁸⁴⁵ the Court found that the non-payment of overtime for part-time workers' attendance at training courses in accordance with national legislation could amount to a legitimate aim of social policy as it preserved the independence of those serving on staff committees. The fact that part-time workers often work reduced hours because of the need to balance paid employment with other responsibilities was not considered to be relevant.

In its case law in this context, the Court oscillates from one position to another, sometimes accepting the effects of the past and the difficulties inherent in combining paid employment with family responsibilities as relevant factors in its decision-making, sometimes not. In

⁸³⁸ *Op cit* at n. 41/

⁸³⁹ *Op cit* at n. 92.

⁸⁴⁰ *Op cit* at n. 247.

⁸⁴¹ *Op cit* at n. 101.

⁸⁴² *Ibid.*

⁸⁴³ *Op cit* at n. 160.

⁸⁴⁴ *Op cit* at n. 119.

⁸⁴⁵ *Op cit* at n. 126.

Grau-Hupka,⁸⁴⁶ the Court found that, as the calculation of statutory pension entitlement is not required to take account of years spent bringing up children, paying a reduced rate to a woman who is in receipt of a reduced state pension is compatible with the equality principle. In a later judgment (*Steinicke*⁸⁴⁷), the court held that to exclude former part-time workers from a scheme designed to enable those in receipt of pensions to undertake part-time work as a means of supplementing their income is contrary to Article 119 unless it can be objectively justified.⁸⁴⁸ In *Hill and Stapleton*⁸⁴⁹ the Court acknowledged that Community policy should encourage and, if possible, adapt working conditions to family responsibilities, yet, in *Nikoloudi*⁸⁵⁰, the Court rejected the notion that workplace rules which allowed women cleaners to work only on a temporary and part-time basis and then subjected them to less favourable terms and conditions than their permanent, full-time (mostly male) colleagues amounted to direct discrimination as ‘there is nothing to prevent women working full-time.’

In drawing distinctions between the theoretical approaches to different cases, the Court does reveal something of its underlying logic. As illustrated by its use of the test for objective justification (see above), the Court appears to be more receptive to the notion that account should be taken of the effects of past discrimination and family responsibility in circumstances in which no particular burden will be imposed on the State. For example, the contrast provided by its preservation of national procedural autonomy in *Preston*⁸⁵¹ and the approach taken in *Schröder*⁸⁵² is stark. In *Preston*, the six-month time limit for bringing actions was allowed to stand despite the practical difficulties that its imposition would present

⁸⁴⁶ *Op cit* at n. 225.

⁸⁴⁷ Case C-77/02 *Steinicke v. Bundesanstalt Für Arbeit* [2003] ECR I-9027.

⁸⁴⁸ Admittedly the rationale applied here was economic in nature as it was noted the ‘the provision at issue excludes from access to a part-time working scheme the very group of people, namely public servants working part-time, who in fact make a considerable contribution to the unblocking of the employment market.’ See the judgment in *Steinicke* at para 65.

⁸⁴⁹ *Op cit* at n. 148.

⁸⁵⁰ *Op cit* at n. 247.

⁸⁵¹ *Op cit* at n. 201.

⁸⁵² *Op cit* at n. 231.

to would-be claimants, whereas, in *Schröder* the application of a temporal limitation as a means of restricting retroactive membership of an occupational pension scheme was prohibited on the grounds that the right not to be discriminated against on ground of sex arises as a fundamental human right. This distinction, however, does not extend to cases concerning the State as employer, as evidenced by the Court's rulings in *Gerster*, *Kording* and *Hill and Stapleton*.

Perhaps the most startling aspect of the Court's jurisprudence in the context of the cases under review is not demonstrable by what factors it *did* consider in preparing the majority of its judgments, but rather, in the potential items for consideration that it *did not* consider. Following the Court's judgment in *Defrenne II*,⁸⁵³ in which its teleological approach to reasoning was used to great effect, it was assumed (if not expected) that the Court's jurisprudence in the social policy field would continue to draw on the interpretation of Article 119 in terms of its position in the wider legal framework provided by the Treaty. In Chapter 5 the Court's exercise of its judicial function was assessed, with many commentators taking the view that the 'judicial activism', for which the ECJ has on occasion been criticised, is wholly justifiable in the context of its position within the European Community legal order. The teleological nature of the Court's reasoning, apparent in other areas of its work, promised much in terms of its interpretation of the equality principle. In *Defrenne II* the Court delivered what must still be regarded as an insightful judgment based on the aspirational thrust of the Treaty. In finding that the principle, as enshrined in Article 119, was directly effective, the Court articulated the social objectives of the Community which were interpreted as providing new possibilities for those concerned with the elimination of sex equality.⁸⁵⁴ In

⁸⁵³ *Op cit* at n. 12.

⁸⁵⁴ See A. Lester, 'The Uncertain Trumpet. References to the European Court of Justice from the United Kingdom: Equal Pay and Equal Treatment without Sex Discrimination' in H.G. Schermers et al (eds) *Article 177 EEC: Experiences and Problems* (TMV Asser Instituut 1987) 164.

support of this proclamation, reference was made to the contextual position of Article 119 as part of a chapter devoted to social policy and whose preliminary provision, Article 117,⁸⁵⁵ marked the need to promote improved working conditions and an improved standard of living for workers.

In its subsequent rulings on the interpretation of Article 141 in the context of the employment rights of atypical female workers, the Court has made an undeniable contribution through its recognition of the applicability of the concept of indirect discrimination. However, its judgments in this respect have been, in the main, both conservative and inconsistent allowing a slow and incremental development of those rights based on a restrictive interpretation of the equality principle. Only in *Schröder*,⁸⁵⁶ is there evidence of a return to the wide-ranging, pragmatic decision-making of *Defrenne II* and, even then if its later judgments are considered,⁸⁵⁷ the Court's recognition of the over-riding importance of the Treaty's social objectives appears as little more than a political statement.

⁸⁵⁵ Now Article 136.

⁸⁵⁶ In which the Court reiterates the contextual importance of Article 141's position in the Treaty in the same terms as in *Defrenne II* – see the judgment in *Schröder op cit* at para. 55.

⁸⁵⁷ *Preston op cit* at n. 201; *Nikoloud i op cit* at n. 247.

Conclusions

*'Now, with our experience, we see Community law
through a glass darkly'*⁸⁵⁸

Introduction

The organisation of work can tell us much about society generally and the place of individuals within it. By studying the labour market behaviour of women and men, it is possible to establish a connection to the corresponding arrangements pertaining to the family and to gain an insight into the personal and formal relations between citizens and the State. This enables an understanding of the value systems which inform both personal and group choices which, in turn, are reflected in the extent and nature of State regulation. Ultimately, some assessment is possible of the circumstances of those engaged in paid employment, culminating in the corresponding levels of economic independence possible through group membership and the degree of autonomy enjoyed by the individual. In this thesis, the study of labour markets and corresponding legal responses in the field of gender relations has been undertaken with a view to ascertaining whether the European Court of Justice has developed an identifiable jurisprudence in this context. This has necessitated a wide-ranging field of enquiry which has been concerned with the establishment of the underlying theoretical foundations, identification of the nature of the different employment experiences of women and men, assessment of the relevant legal responses and, ultimately, with an analysis of the reasoning informing the ECJ's decision-making in a group of cases concerning the anti-discrimination provisions of Community law.

⁸⁵⁸ A. Lester, 'The Uncertain Trumpet. References to the European Court of Justice from the United Kingdom: Equal Pay and Equal Treatment without Sex Discrimination' in H.G. Schermers et al (eds) *Article 177 EEC: Experiences and Problems* (TMV Asser Instituut 1987) 164, at p. 165, cited in Chapters 4 and 6 *infra*.

The array of working arrangements which are to be found within contemporary labour markets are diverse, reflecting the rich social and cultural mix of those deemed to be economically active. However, in even the most elementary analysis of the labour markets of Western Europe, the sexual divisions of work cannot be overlooked. Gendered patterns of behaviour persist, to varying degrees, in all of the European Union Member States under review in this thesis. Women continue to work in different occupations and sectors from men and at different levels within occupational hierarchies, often with less favourable pay and conditions. Furthermore, incidences of discrimination on the grounds of sex persist so that women are subjected to less favourable treatment than men, both through the workplace practices of individual employers and through systemic discrimination which arises from procedures and policies at the macro-level which have a disproportionate impact on women as a group. This is despite the long-standing existence of legal intervention intended to equalise the employment opportunities of both sexes. The difficulties inherent in the effective targeting of legal responses to such complex and diverse issues give the Court of Justice a particular prominence in its role as the interpreter of Community law.

Although its limited potential as a sole engine of change is acknowledged, the normative value of the law as an organising force has long been recognised in terms of its contribution to the ascription of acceptable modes of behaviour and, through its punitive effects, the enforcement of such behaviour. The possible legal responses to incidences of sex discrimination are many and varied and generally consist of a combination of constitutional provisions, legislative activity, 'soft law' policy measures and the interaction of courts in interpreting such measures. Success will be largely dependent on the interpretation given to the central concepts utilised in the development of a doctrinal response which can only be

achieved through the judicial function. From the early days of its inception, the European Community has undoubtedly been at the forefront of the development of sex equality law in the employment sphere. The concepts of non-discrimination and equality are enshrined in the EC Treaty and have been further articulated by the provisions of secondary legislation and through the jurisprudence of the European Court of Justice.⁸⁵⁹ Despite its influence in this respect, the conceptualisation of the notions surrounding gender relations utilised by Community law are largely dependent on the foundations of traditional social and legal theory and, thus, the weaknesses inherent in such theory are transposed into its provisions. In fact those same weaknesses, which combine to thwart or dilute attempts aimed at bringing improvements to women's labour market position, are also present in the work of contemporary theorists and have necessitated the development of a specific school of feminist legal theory as a means of taking account of the life experiences of women in the development of proposals for legal and social reform.⁸⁶⁰

In the discharge of its judicial function, the Court has generally adopted a teleological approach to its decision-making so that it interprets the provision in question in furtherance of the aims and objectives of the Community and Union as a whole. If the Court's early jurisprudence in the field of sex discrimination is considered, the reasoning informing its judgments was undoubtedly of this nature so that, for example, in finding Article 119 to be directly effective, consideration was given to its place in the overall scheme of Community law.⁸⁶¹ This approach also enabled the Court's articulation of the 'double aim' of Article 119 in recognition of the social as well as economic objectives of Community law. These aspects of the Court's jurisprudence on sex discrimination were instrumental in instigating the dialogues on gender relations with national courts in which the ECJ has engaged for the past

⁸⁵⁹ See Chapter 4 *infra*.

⁸⁶⁰ See further Chapter 2 *infra*.

⁸⁶¹ Case 43/75 *Defrenne v Sabena* (No 2) [1976] ECR 455.

30 years through the Article 234 reference procedure.⁸⁶² The expectations of claimants and legal advisers regarding the likely impact of Community law were initially high and the national courts' willingness to refer cases for adjudication provided the ECJ with opportunities to reorient the conceptualisation of gender relations through its jurisprudence. However, rather than the informed reasoning which might have been expected in this regard, the Court's decision-making has generally been based on a narrow and, at times restrictive, interpretation of Article 119/141. This prompts questions regarding the particular theoretical perspective taken by the Court and, indeed, whether a coherent and consistent strategy has actually been developed in this respect. It is with this enquiry that the thesis presented here is primarily concerned in its objective of uncovering the extent to which the Court's adjudications on cases referred under the Article 234 procedure can be characterised as having a common output amounting to an identifiable jurisprudence on gender relations.

The theoretical perspective adopted in this investigation is undoubtedly a feminist one. The school of feminist legal theory is broad and encompasses many different approaches to the study of sex and gender. However, what all of these approaches share as a common goal is the inclusion of women's voices which have for so long been excluded in dominant studies of social, economic and legal theory. This exclusion has arisen both intentionally, on the grounds that women were not worthy of specific attention, and incidentally due to oversights on the part of (male) theorists. Regardless of the reasons for its exclusion, the denial of woman's experience serves to weaken such theory and, in areas where broad observations are made regarding the organisation of society and the potential development of appropriate legal rules, render it unhelpful.

⁸⁶² See Chapter 6 *infra*.

Much of the debate within contemporary feminist theory has been concerned with whether the differences between men and women should be considered as paramount in the development of doctrinal responses to work-related discrimination or whether focusing attention on such difference weakens claims regarding the attainment of equality between the sexes as women are, once again, defined by their biological function.⁸⁶³ The approach adopted in this thesis to what has been characterised as the 'same/difference' debate is that there is a middle ground between these two diametrically opposed positions. The different experiences of women and men on the labour market and within family arrangements result as much from gender differences as from those associated with physiology, but they do exist and they do impact on the lives of women, often detrimentally. To deny them would be to deny woman's voice. Furthermore, to intentionally overlook the differences in women's labour market behaviour would be implicitly to condone the assimilation of woman to the normative construct of the standard (male) worker and passively accept the value of that standard. What the preceding analysis has demonstrated is that, even for men, the usefulness of the full-time, permanent model of employment as a target for protective legislation is diminishing.⁸⁶⁴ The so-called 'atypical' worker, personified by the claimants in the case analysis in Chapter 6, may well be the standard worker of the future.

In this respect, the conceptualisation of gender relations adopted by the Court is instrumental in the conferral of rights to 'atypical' workers who suffer sex-based discrimination ostensibly on the grounds of their working arrangements. This is because, in the absence of effective specific legislation, such workers have been solely reliant on the Court's interpretation of the principle of equality to gain any improvements in their working conditions. As the arrangements surrounding employment become more complex and diverse, the targeting of

⁸⁶³ See the discussion of the Greek School and the Social Contract theorists in Chapter 2 *supra*.

⁸⁶⁴ See Chapter 3 *infra*.

legislation becomes more difficult with resulting provisions often being ineffective in giving protection to those most in need. Furthermore, in its broad context, the existing body of Community law already implicitly provides potential responses to the legal problems identified. The Court of Justice occupies a unique position in this regard as the only authority with the ability to make the requisite connections between labour market inequalities and legal remedy. This is possible through the process of rationalisation in its decision-making as well as through the effect of the judgments themselves. In order to effectively address the shortcomings within the current legal framework, it is necessary for the Court's philosophical position to encompass consideration of women's life experiences in giving effect to the equality principle.

Concepts and Constructs: Polar Opposites or *Ejusdem Generis*?

In Chapter 2 consideration was paid to the development of feminist legal theory as a means of explaining and countering the differing labour market experiences of men and women. Some feminist analysts use as their starting point the central concepts identified by traditional explorations of such difference, others choose to reject established dogma on the basis that they were conceived from a male perspective without any attempt to incorporate woman's viewpoint. Although much can be learned about the nature of society from the approaches adopted in the earliest considerations of gender relations, what most traditional accounts have in common is the absence of woman's voice, so that her contribution to social arrangements is either completely ignored or is explained on the basis of unrealistic assumptions about her identity. Nevertheless, such considerations do provide a useful starting point, not least because they continue to inform much contemporary thinking in the public policy arena, but

also because by exploring the standard against which all things are measured, it is possible to identify the 'otherness'⁸⁶⁵ that constitutes women's perceived identity.

The Greek School, through the work of Aristotle and Plato, established the use of dichotomisation as a means of exploring the differences between the sexes, so that woman was defined by her physiological difference from man as the weaker sex, confined by her ability to bear children to the private sphere of the family. Woman's physical difference from man was perceived as being indicative of her non-rational psychological state, while man's assumed predisposition to rationality and reason meant that he was 'more fitted to rule than the female'.⁸⁶⁶ Although no longer expressly articulated in contemporary thinking on gender relations, the legacy of the Greek philosophers has been that certain fundamental elements of their schema continue to have a profound influence on the provisions of welfare and labour law. In the current context, this influence is manifested in three inter-related aspects: the polarisation of the sexes through the ascription of gender roles; the identification of the 'male norm'; and the Aristotelian notion of equality.

The social construction of gender has, as its starting point, the physical differences between the sexes. However, the biological functions of woman and man are merely the bases on which gender is constructed so that, long after the physiological states of pregnancy and childbirth have passed, the tasks inherent in caring and nurturing, however menial and far removed from the reproductive function, continue to be viewed as 'woman's work'. Busied with the daily toil of house-keeping and tending to the needs of others, women are often less available and less willing to commit to full-time paid employment. Men, on the other hand, having performed their biological function early in the procreative process, are able to meet

⁸⁶⁵ S. de Beauvoir, *The Second Sex* (trans. H.M.Parshley) (Vintage 1949), discussed in Chapter 2 *infra*.

⁸⁶⁶ Aristotle, *The Nicomachean Ethics*, D. Ross (trans) (OUP 1925): the Politics Bk 1 xii, 1259a 37.

the needs of their dependants through participation in the labour market, by the exchange of labour for remuneration. This co-dependency within the family means that woman is economically dependent on man and he relies on woman for the fulfilment of his physiological and psychological needs. This scenario may be grounded as much in stereotypical notions as in the reality of life in contemporary society. However, it does have a certain resonance given that, even in two-parent families where both partners work, women are more likely than men to assume domestic responsibility. This division of labour (his paid, hers unpaid) gives rise to a set of binary factors organised around the central concepts of work/family and public/private which continue to shape our perception of what it is to be male or female. Where such divisions are reflected in the reality of family and working life, it is unclear whether they are the result of free choice made on the basis of individual aspiration or whether they are the product of socialisation, perpetuated by the reflected organisation of social arrangements and State support mechanisms. What is clear is the message that women's and men's experiences are different and that difference is clearly demonstrated by their labour market behaviour.

As growing numbers of women continue to work outside of the home during the years of family formation, the State and employers face challenges to the established legal framework within which labour law operates. The constituent parts of this framework are at once formal and informal, regulatory and voluntary and arise through a combination of State intervention and the development of employee relations at the workplace level. Like all socially constructed institutions, the world of work is gendered. Through its association with the public sphere, the arrangement of paid work is male-dominated and, thus, the product of patriarchal forces. To be economically active is to be available and willing to work full-time: to be able to maximise output, so that the standard worker is employed on a full-time,

permanent basis with no other demands on his time and, due to the ascription of gendered roles within the family, is male. The working mother with her obviously divergent needs poses a problem for employers and the State: she has other competing interests on her time and requires to mould work around the needs of her family which will vary over her life cycle, so that she has differing phases of dependency outside of her employment which are reflected in her availability for work. In fact, she is so different from the male standard worker that she is viewed as non-standard, her working arrangements are categorised as 'atypical' and she is defined as 'the other'.

The Aristotelian principle of equality dictates that 'likes should be treated alike' unless there is a compelling justification for doing otherwise. This is the basic tenet on which the current approach to the elimination of discrimination is based within the European Community legal system.⁸⁶⁷ It necessitates an 'equal opportunities' conception of equality so that women are deemed to be the same as men and, thus, assimilated to the same model as that displayed by the normative construct of the standard worker. Manifestations of the physical differences between the sexes are accounted for within the general framework, so that maternity attracts specific employment protection based on a system of rights which apply throughout the duration of the pregnancy and for the period of maternity leave provided for under national rules. Beyond this period, differences on the grounds of sex (or gender) will cease to be acknowledged and likes will once again be treated alike. What this approach overlooks is the fact of woman's experience arising from historical disadvantage which has left her differently situated from man and is reflected in contemporary family arrangements. This disadvantage is perpetuated by her inability to conform to male-based norms such as that of the standard worker on the grounds of domestic responsibility. Thus woman is trapped within the confines

⁸⁶⁷ See Chapter 4 *infra*.

of her gender by the ascription of her role which determines the division of labour within families and which is reflected in the institutional arrangements pertaining to paid employment. While it is true that some men might also favour the opportunity to attempt a more even balance of paid employment and family involvement, the current legal and social framework is generally unsupportive of this.

The Role of the State

In attempting to theorise the reordering of social arrangements which took place during the Enlightenment, writers of the time acknowledged the dissolution of the confining effects of patriarchy and its replacement with individual freedom.⁸⁶⁸ The social contract theorists of the seventeenth and eighteenth centuries may have differed in their opinions on the precise nature of the renegotiation that was taking place, but they concurred on one important issue – the place of woman in society. The influence of Greek philosophy is clear in analyses of the reordering of society from Locke's 'last Determination', in which a husband retained the right to all decision-making within a marriage on the basis of his sex's predisposition to logic and reason, to Rousseau's belief in the separation of mind and biology with woman's nature determined by the latter and man's by the former. Despite the notion of an agreement between the ruler and the ruled under the auspices of the sovereign State, the forces of patriarchy continued as the central source of power in relations between the sexes. Women were largely confined to the private world of the family, while men enjoyed greater political freedom through participation in public life. There was no negotiation over the terms of the sexual contract which was dictated by men.⁸⁶⁹ In fact the new emphasis on individual consent and the State's retreat in matters of personal decision-making left the private spheres of home and

⁸⁶⁸ See the discussion of the social contract theorists in Chapter 2 *infra*.

⁸⁶⁹ C. Pateman *The Sexual Contract*, Cambridge, (Polity Press 1988), discussed in Chapter 2 *supra*.

family untouched and the resulting power dynamic vulnerable to the effects of the free market.

In the contemporary context, the notion of the neutral State in liberal theory presupposes that the distribution of resources via the market will reach a state of equilibrium free from unjustified State interventionism. The emphasis is, thus, on individualistic notions of attainment and personal freedom. Such thinking overlooks the effects of patriarchy which are evident in the institutional arrangements governing employment and family relations and which are manifested in gender-based discrimination in the labour market. Feminist critics argue that, far from being neutral, the State in its many guises is undeniably male. From the Marxist perspective, the State as an ideological and political actor can, in the right conditions, serve as a force for good in overcoming inequalities. Contemporary theorists such as Dworkin and Rawls⁸⁷⁰ have focused their attention on how the fair distribution of resources might best be achieved and their insights provide valuable analyses of both group and individual behaviour in the attainment of equality and of the concept of equality itself. However, in common with their predecessors, these theorists omit to pay any specific attention to women's position in society, so that their theories are unsatisfactory in considerations of sex and gender.

Through the study of industrial relations' theory⁸⁷¹ it is possible to assess the role of the State in shaping the overall environment within which the exchange of labour for remuneration takes place. Such analyses have tended to overlook the gender dimension inherent within the organising forces, so that employers, trade unions and the State appear as gender-neutral. Nevertheless, the emerging picture is one of segmentation within the labour market which

⁸⁷⁰ Both of whose work is discussed in Chapter 2 *supra*.

⁸⁷¹ See Chapter 3 *infra*.

tells us much about the nature of relations between the relevant parties. The Europeanisation of the exchange between worker and employer has disempowered the institutions involved in industrial relations at the national levels, so that regulation takes place at the supranational level without the traditional forms of worker involvement in the negotiation process. At the Community level, economic factors such as the creation of new jobs as a means of countering rising unemployment have shaped the policy agenda in recent years. The redesign of the EU regulatory model has led to a shift away from the development of hard law provisions in the broad field of social policy, intended to correct the discriminatory effects of the market, towards the co-ordination of national policy in the narrower sphere of employment. This development is based on the notion that increased labour market flexibility requires a retreat from State interventionism. However, as the neo-liberalism of the 1980s and 1990s illustrates, deregulation actually involves the systematic intervention of government and a corresponding increase in State power.

Labour Market Regulation: From National to Supranational

The very existence of the European Union is predicated on the liberal notion of free market ideology with minimal State intervention. This dynamic means that the Community law-making institutions are unlikely to engage in the process of legislative activity designed to ensure better employment protection unless such action can be economically rationalised. This is particularly true where improvements in worker security are associated with greater regulation and a diminution of labour market flexibility. The inclusion of Article 119 in the Treaty of Rome was predicated on the basis of a pro-competitive argument. Its potential, which was later exploited by the ECJ, was initially overlooked. The growth of part-time work contributed to the creation of a segmented labour market through the interaction of the

employment system and the system of social organisation. The forces of supply and demand converged to create a largely unregulated workforce of part-time female workers distinguishable from their male counterparts, not on the protected ground of their gender, but on the unprotected ground of their working arrangements. As early case law illustrates, faced with the prospect of having to provide equal pay for women and men, employers found new ways of differentiating workers for the purposes of circumventing legal obligations.⁸⁷²

The rise in unregulated labour market practices and the accompanying shift towards flexibility from jobs for life has involved what Supiot has identified as the advance of contract and erosion of status so that the *quid pro quo* of subordination for security has broken down and has not been renegotiated.⁸⁷³ This trend is clearly reflected in the practices and policies highlighted in the cases under review in this thesis. The State is not a neutral player in the developing industrial relations environment, but the traditional bipolar classification of minimalist State or protector State is misleading. Each of the Member States, though their own employee relations models, represent a combination of these two positions. State responsibility for the perpetuation of inequalities between the sexes is not solely attributable to market forces and, through the transfer of sovereignty to the European Community, such responsibility must be shared with the institutions of the Community law. However, as is clear from the changing nature of work itself and the institutions which support it, the target of legislative and judicial activity is no longer sex discrimination *per se*, but rather the normalisation of non-standard employment.

⁸⁷² Case 96/80 Jenkins v. Kingsgate (Clothing Productions) Limited [1981] ECR 911, discussed in Chapter 6, *supra*.

⁸⁷³ A. Supiot 'The Transformation of Work and the Future of Labour Law in Europe: A Multidisciplinary Perspective', *International Labour Review* 138 (1999) 1, 32, discussed in Chapter 3 *supra*.

The Role of European Community Law

Through its recognition of equality as one of the fundamental principles of Community law, the European Court of Justice has been at the forefront of developments in this area. However, as the updated application of Fredman's critique of Community law⁸⁷⁴ in Chapter 4 has shown, the furtherance of this principle within the current legislative framework is problematic. This is largely due to the fact that the current conceptualisation of the central determinants is based on the attainment of formal rather than substantive equality. This approach has been useful in its promotion of sex equality as a desirable goal, but its limitations are particularly apparent when the furtherance of women's rights conflicts with the Community's overarching objective of preserving the market order. The 'flexicurity' ideal is a case in point, as the tension inherent in the realisation of the dual goals of labour market flexibility and worker security is palpable. That is not to say that it is unattainable but, rather, that the current regulatory framework works against the simultaneous achievement of both goals. Attempts have been made in recent years to redress the imbalance in the relationship between these two objectives by the introduction of specific legislation intended to equalise terms and conditions of employment for part-time and temporary workers. However, as the analysis in Chapter 4 demonstrates,⁸⁷⁵ inequalities which are experienced by such workers on the grounds of working arrangements **and** gender remain outside of the scope of such initiatives. This is due to the legislation's reliance on the use of comparisons as a means of providing rights which, given the high levels of gendered labour market segregation that are particularly prevalent in the lower paid end of the jobs spectrum, makes it unworkable for many. Alongside this substantial technical hurdle is another more fundamental flaw. The

⁸⁷⁴ S. Fredman, *European Community Discrimination Law: A Critique*, 1992 *Industrial Law Journal* 21, pp. 119-134.

⁸⁷⁵ See Chapter 4 *supra* at pp. 126-7.

derivative nature of the legislation leaves workers identified as being 'atypical' outside of the norm. Their right to equality is dependent on how similar to the 'standard worker' they can show themselves to be. This means that its provisions do not provide any self-standing rights to workers identified as being disadvantaged and vulnerable and, thus, present no challenge to the causes or nature of such disadvantage.

What is required in order to standardise the 'atypical' worker is, therefore, the recognition of an individual right to equality and non-discrimination which is not subordinated to the normative construct presented by the 'standard' worker'. It is, in fact, what Dworkin defines as the right to treatment as an equal⁸⁷⁶ which is distinguished from equal treatment on the basis that the first entails the equal distribution of opportunities, resources and burdens and the second is the right 'to be treated with the same respect and concern as anyone else'. In order to recognise the differing needs of individuals, it may be necessary to vary the appropriate treatment. The right to treatment as an equal is fundamental, whereas the right to equal treatment is derivative. This particular objective is difficult to legislate for, particularly within the current Community framework, as it is indefinable in statutory terms and its identification and application requires creative thinking with the emphasis on outcomes rather than processes. However, it does have currency within the human rights approach to the conferment of equality and is articulated in International instruments such as the European Convention on Human Rights. It is, thus, compatible with the equality provisions of the EC Treaty. In certain circumstances, Article 141 and associated legislation could be interpreted as conferring a right to be treated as an equal alongside the more commonly recognised right to equal treatment. As the interpretive force within the Community legal order, the ECJ is in a unique position to develop this particular conceptualisation of the principle of equality. Given

⁸⁷⁶ R. Dworkin, *Taking Rights Seriously* (Duckworth, 1978) at p. 227 – for a discussion of Dworkin's theory of rights and its subjection to a feminist analysis, see Chapter 2 *infra*.

the Court's ground-breaking work in the area of sex equality, particularly in light of its ruling in *Defrenne II*,⁸⁷⁷ this would perhaps not be out of step with its early jurisprudence. Furthermore, the Court's development of its own role within the legal order has led it to consider a wide range of sources in its reasoning, attracting criticism at times for what has been perceived as political activism.⁸⁷⁸

In Chapter 5 the Court's role as an institutional actor was considered. Although the chronological development of the Court's jurisprudence can be linked to a series of historical and political events, the Court's perceived activism has undoubtedly been overplayed by certain analysts. Rather than fulfilling its own political agenda, the judicial creativity employed by the Court in its decision-making can be largely attributed to the necessity, inherent in its function, to give interpretation to what were hitherto undefined and uncharted areas of the Treaty. By establishing the principles of supremacy and direct effect through its jurisprudence, the Court certainly grew in prominence within the institutional context and has been rightly acknowledged as a driving force in European integration. Following its early ruling in *Defrenne II*,⁸⁷⁹ in which recognition was given to the social as well as economic objectives of integration, the Court has been identified as an influential force in the furtherance of equality. However, the opaque, aspirational language in which the Treaty provisions were drafted and the incremental development of a new and complete legal system are both factors which have contributed to the Court's development of its purposive and teleological approach to reasoning. Furthermore, the democratic deficiencies arising due to the relative infancy of the institutions has conferred legitimacy on levels of judicial creativity which may well not have been acceptable within the legal systems of developed democracies. Alongside these factors, the political inertia that characterised certain stages of the European

⁸⁷⁷ Case 43/75 [1976] ECR 455.

⁸⁷⁸ See further Chapter 5 *infra* at pp. ??

⁸⁷⁹ *Op cit* at n. 4.

Community's legislative history,⁸⁸⁰ has meant that in order to discharge its judicial function, the Court has been required to fill the void by engaging in problem-solving as a means of providing answers to the questions referred by national courts under the Article 234 procedure.

Given the Court's unique role, the anticipation of those concerned with the development of the equality principle has been immense. Much was expected of the Court in this context following the early promise of its ruling in *Defrenne II*, perhaps too much for the Court to deliver. In focusing on a relatively narrow range of non-contentious issues in this thesis, an attempt was made to avoid the temptation of overestimating the Court's likely contribution. The principles of equality and non-discrimination were clearly provided for in the Treaty and their meanings had been enunciated by the Court by the time the group of cases considered in Chapter 6 came along. All of these cases were primarily concerned with issues of sex discrimination but all of them presented aspects which required further clarification: fine tuning or the slight reorientation of the doctrine established in previous judgments. In developing responses to the questions asked by national courts, the ECJ was presented with the opportunity to sow small yet important seeds of progress in the field of gender relations. By utilising the existing provisions of Community law and building on its own jurisprudence, the Court's influence in this respect could have been wide-reaching yet relatively non-controversial. What requires to be identified, then, is whether the Court has delivered its early promise.

⁸⁸⁰ See further Chapter 4 *infra*.

The European Court's Jurisprudence on Gender Relations: Delphic Utterances or Coherent Reasoning?

In this thesis the 'atypical' female worker is personified by the claimants in the group of cases which form the central analysis presented in Chapter 6. These workers are all classified under Community law as 'atypical' or 'non-standard' on the basis of the hours they work or through their contractual status. The role of the State is examined in the context of the imposition of policies which operate at the macro-level and through consideration of its role as employer as many of the cases are concerned with public sector employment practices. By analysing the text of the ECJ's judgments and accompanying Advocate Generals' opinions, it has been possible to deduce something of the Court's reasoning. These findings are organised around what have been identified as the central issues which emerge from a consideration of the differences between women's and men's labour market behaviour and which are, thus, central to any discussion of judicial approaches to gender relations. Furthermore, the anomalies in treatment which result from denial of these factors require to be adequately addressed in future cases if the principle of equality is going to be usefully developed so as to provide improved rights for women workers. The central issues, which will be considered below in the context of the case analysis presented in Chapter 6, are: the alleviation of the effects of past discrimination; consideration of women's 'dual role' in flexible work arrangements; the use of the 'standard worker' model and the changing nature of work. Although the cases reviewed in this thesis are concerned with the application of the equality principle to atypical workers, it is hoped that the observations presented here regarding the Court's contribution to the development of gender relations will have application across a wider range of cases with which the Court's jurisprudence is concerned.

The Effects of Past Discrimination

It can be asserted that the only effective means of fully addressing the legacy of past discriminatory practices and policies is through a programme of positive discrimination which would entitle women to favourable treatment with a view to increasing representation in those sectors and levels of employment in which they are currently underrepresented⁸⁸¹. This observation, however well-founded, is not particularly helpful in the current context for two reasons. First, the conception and application of positive action is still developing under Community law and, while there are good reasons for optimism regarding its future use, positive discrimination has never been expressly permitted due to its incompatibility with the equal treatment approach which underpins Community anti-discrimination law. Secondly, even though positive action may serve as a very useful means of addressing underrepresentation where vertical segregation indicates a paucity of women in promoted or senior posts, it cannot do much to counter the effects of horizontal segregation which finds women and men working in different sectors and in different jobs from each other. This type of segregation is a structural feature of the labour markets of all EU Member States and has been a major contributory factor in the persistence of gender-based inequalities such as the enduring pay gap.⁸⁸²

Many of the cases analysed in Chapter 6 illustrate the difficulties inherent in attempts to draw comparisons between workers of different sexes for the purposes of complying with the technical requirements of legislation when the requisite 'comparators' simply do not exist. However, in some of the cases reviewed, the Court was provided with the opportunity to take

⁸⁸¹ For a rationalisation of reverse discrimination on these lines, see C Bacchi, 'Policy and Discourse: Challenging the Construction of Affirmative Action as Preferential Treatment' (2004) 11 *Journal of European Public Policy* 128, cited in Chapter 4 *supra*.

⁸⁸² See Chapter 3 *infra*.

account of the effects of past discrimination in its reasoning as a means of informing its interpretation of Article 141.⁸⁸³ While enabling the Court to stay within the legally defined boundaries, such interpretation would have provided much needed clarification regarding the purpose of Article 141 which, through this process, could have been used as a means of providing treatment as an equal beyond the formal provision of equal treatment. As its reasoning in *Schröder*⁸⁸⁴ has indicated, the Court has not been completely unreceptive to this notion and has made use, on occasion, of a purposive interpretation in order to further develop the equality principle along these lines. However, the most striking feature of this aspect of the Court's reasoning has been its inconsistency. By the categorisation of the cases presented in Chapter 6, it has been possible to show how this aspect of the Court's reasoning has been heavily influenced by its adherence to the market order. In those cases in which the Court's decision-making could have resulted in high levels of government expenditure through a requisite change in policy or by compensatory payments at the Member State-level, the Court has resorted to a narrow application of the equality principle⁸⁸⁵ or has placed controls on the retroactive effects of its own judgments.⁸⁸⁶

The most obvious area in which an appreciation of the effects of past discrimination on women's position in society could have been used by the Court to further develop the equality principle through its jurisprudence is that relating to retirement and pensions. Many of the claimants represented in this area of the Court's case law were among the first citizens of a united Europe. Their work experiences had no doubt been blighted by the economic instability which led to the creation of the Community and by the effects of legitimate

⁸⁸³ See in particular the cases discussed in the section on Retirement and Workplace Benefits in Chapter 6 *infra*.

⁸⁸⁴ Case C-50/96 *Deutsche Telekom v Schröder* [2000] ECR I-743 discussed in Chapter 6 *infra*.

⁸⁸⁵ For example Case C-297/93 *Grau-Hupka v Stadtgemeinde Bremen* [1994] ECR I-5535 discussed in Chapter 6 *infra*.

⁸⁸⁶ Case C-262/88 *Barber v Guardian Royal Exchange Assurance Group* [1990] I ECR 1889; Case C-78/98 *Preston and Others v Wolverhampton Healthcare NHS Trust* [2000] ECR I-3201, discussed in Chapter 6 *infra*.

discrimination visited against women in the labour market. At the time their cases were considered by the ECJ, many of these women found themselves living on reduced pensions at the end of long working lives. By resorting to litigation, they had attempted to use the law as a means of ensuring that, at least in old age, the effects of past discrimination might be acknowledged and partially overcome. The questions posed by the national courts in this context arose on the grounds of uncertainty about the meaning and extent of the equality principle. The Court of Justice was repeatedly given the opportunity to provide some relief to a generation recognised as the victims of earlier discrimination. However, in its efforts to protect Member States' competence in determining issues of social policy, the Court refused to consider the effects of past discrimination, thus enabling its perpetuation, on the grounds of national procedural autonomy and legal certainty.

Women's 'Dual Role'

The rise of part-time employment among women is closely related to the need to balance work and family responsibilities. The decision increasingly taken by women to remain in paid employment during the child-bearing and rearing years undoubtedly results from a wide range of cultural, social and economic influences. In seeking to combine the needs of family with labour market participation, women display a communitarian ethos⁸⁸⁷ through their commitment to both the public and private domains which runs counter to the individualistic principles of neo-liberalism. This dual role not only serves the needs of the wider society but is also compatible with labour market policy which is targeted at the creation of flexible working arrangements. However, the trade off for seeking to balance family needs with paid employment is to be found in corresponding levels of job security, as those who work part-

⁸⁸⁷See E. Frazer and N. Lacey *The Politics of Community: A Feminist Critique of the Liberal-Communitarian Debate* (Harvester, 1993), cited in Chapter 2 *supra*.

time are often subjected to reduced terms and conditions in comparison to full-time workers and are also vulnerable to precarious contractual arrangements.

As the cases reviewed in Chapter 6 demonstrate, the Court of Justice has been asked to consider whether the family responsibilities of women should be taken into account in the interpretation of the equality principle on many occasions.⁸⁸⁸ Given the factual bases of many of these cases, recognition of the relationship between labour market behaviour and family responsibilities would appear to be implicit in the issues before the Court in any case: if women did not need to reconcile work inside the home with that undertaken outside, the issue of sex discrimination would not have arisen in relation to non-standard working arrangements. However, rather than acknowledging that this is *de facto* the basis of many of the referrals, the Court has generally resisted allowing any explicit consideration of the connection between working arrangements and the needs of families to enter into its reasoning. This has been the cause of confusion regarding the conceptualisation of gender relations in the Court's jurisprudence which can be illustrated with reference to the use of indirect discrimination as a means of determining the application of the equality principle in all cases concerning atypical workers.⁸⁸⁹

Indirect discrimination may be defined as arising due to the imposition of a gender neutral policy which disproportionately affects one sex. However, can a policy which expressly permits the differential treatment of part-time workers really be deemed 'gender neutral' if all

⁸⁸⁸ See, for example, Cases C-399/92, C-409 and 425/92, C-34, 50 and 78/93 *Stadt Lengerich v. Helmig* [1994] ECR I-5727; Case C-457/93 *Kuratorium für Dialyse und Nierentransplantation v Lewark* [1996] ECR I-243; Case C-278/93 *Freers and Speckmann v Deutsche Bundespost* [1996] ECR I-1165 in which the Court's reasoning is discussed in Chapter 6 *supra*.

⁸⁸⁹ Following the Court's initial judgment on the application of the equality principle to part-time workers in Case 96/80 *Jenkins v. Kingsgate (Clothing Productions) Limited* [1981] ECR 911, discussed at length in Chapter 6 *infra*.

or the majority of such workers are female? This is particularly questionable if such an arrangement is sought to enable the conciliation of family responsibilities with paid employment. In its findings of indirect discrimination, the Court has indicated that such practices are only potentially incompatible with the principle of equality, as the outcome of cases is determined by the vagaries of the objective justification test applied by the national courts. The meaning and correct application of indirect discrimination has, thus, become confused. As useful as it has been in developing rights for atypical workers, its application in certain circumstances to cases in which the practices or policies complained of actually amounted to **direct** discrimination has impeded the development of such rights.

The ‘Standard Worker’ Model and the Normalisation of Atypical Work

The last aspect of the Court’s reasoning worthy of further consideration is related both to the effects of past discrimination and to women’s dual role and its contemplation presents an ideal juncture at which to close this discussion. The use of the standard worker as a normative model for the purposes of policy formulation and the targeting of legal intervention has appeared throughout this thesis as a recurring theme. This particular concept has its origins in the philosophical and social theory considered in Chapter 2. The assessment of the changing nature of work in Chapter 3 concluded that the use of new working arrangements has led to a decline in full-time, permanent employment contracts. However, the presence of the standard worker is tangible throughout much of the Court’s reasoning, as evidenced by the analysis in Chapter 6.

It is, in fact, the preservation of this model as the measure of everything that has led to the categorisation of part-time or non-permanent working arrangements as ‘atypical’. In the wider

context, this standard is the subject of political attention with the variety of alternative working arrangements constituting 'the other'. Of course, what the standard worker model actually represents is the worker of a disappearing age. In its adherence through its decision-making to this model as a means of identifying the relative merits of the claims before it, the European Court has contributed to the subordination of the rights of women workers to this out-dated and diminishing standard. The reasoning of the Court in the cases under review, on occasion, has enabled recognition of woman's right to autonomy, to achievement on her own terms and in her own way, independent of the normative model of the standard worker. The resulting decisions which, *prima facie*, appear to be fairly innocuous, have actually been among the most important of the Court's judgments due to their contribution to the standardisation of the atypical worker.⁸⁹⁰ The effect of such action is to liberate woman from her subordination to man. However, such reasoning has been rare and has generally been accompanied by the possibility of the removal or restriction of her freedom through the opportunity given to the relevant authority to legitimise its discriminatory behaviour.⁸⁹¹ That the Court has not been bolder in this respect has severely diminished its overall contribution to the development of the equality principle through the recognition of woman's difference from man as a positive force.

To return to the question at the centre of this enquiry, it would appear from the cases reviewed that the Court has indeed developed an identifiable jurisprudence on gender relations through its interpretation and application of Article 141. However, the resulting philosophical position

⁸⁹⁰ See, for example, Case 184/89 *Nimz v Freie und Hansestadt Hamburg* [1991] ECR I-297 (discussed in Chapter 6 *infra*), in which the Court's rejection of the alleged link between length of service and the attainment of knowledge and experience as a sole basis for incremental progression could, if given more prominence in the judgment, have made a substantial contribution to the Court's jurisprudence in this respect. Nevertheless, this stance was usefully reapplied in its reasoning in subsequent cases – see Case C-1/95 *Gerster v. Freistaat Bayern* ECR I-5253; Case C-243/95 *Kathleen Hill and Ann Stapleton v. Revenue Commissioners and Department of Finance* [1998] ECR I-3739; Case C-285/02 *Elsner Lakeberg* [2004] ECR I-5861.

⁸⁹¹ By the use of the objective justification defence discussed in Chapter 6 *supra*.

is coloured by the presence of the standard worker to such an extent that it replicates many of the mistakes of the past. A systematic assessment of the Court's decision-making certainly uncovers far more in this respect than an overview of its judgments alone can reveal. The Court's rulings are apparently consistent and have been heralded as providing rights to workers hitherto outside of the scope of anti-discrimination provisions. However, at a deeper level, its jurisprudence is strewn with inconsistencies in terms of its theoretical dogma and its conceptualisation of the basic tenets which vary considerably dependent on the interests at stake which are, in turn, dictated by its attachment to the market order. Furthermore, the Court's theoretical perspective is steeped in the basic assumptions of neo-liberalism, such as the neutrality of the State, the focus on individualism and the attainment of market equilibrium through non-intervention, despite the fact that such assumptions are grounded in ideological doctrine rather than independent objectivity. Perhaps the most disappointing aspect of the Court's reasoning in this respect has been its failure to take account of woman's voice and, by doing so, to perpetuate the denial of its value.

Table of Legislation

EC Treaty

Article 5EC

Article 12 (ex Article 6).

Article 13

Article 39 (ex Article 48).

Article 141 (ex Article 119).

Article 136 (ex Article 117).

Article 137 (ex Article 118).

Article 220 (ex Article 164).

Article 226 (ex Article 169).

Article 227 (ex Article 170).

Article 228 (ex Article 171).

Article 229 (ex Article 172).

Article 230 (ex Article 173).

Article 231 (ex Article 174).

Article 232 (ex Article 175).

Article 233 (ex Article 176).

Article 234 (ex Article 177).

Article 235 (ex Article 178).

Article 236 (ex Article 179).

Article 237 (ex Article 180).

Article 238 (ex Article 181).

Article 239 (ex Article 182).

Article 240 (ex Article 183).

Article 241 (ex Article 184).

Article 242 (ex Article 185).

Article 243 (ex Article 186).

The Statute of the Court of Justice.

Directives

Council Directive 75/117/EEC Equal Pay Directive (OJ 1975 L45/19)

Council Directive 76/207/EEC Equal Treatment Directive (OJ 1976 L39/40)

Council Directive 79/7/EEC Social Security Directive (OJ 1979 L6/24)

Council Directive 86/378/EEC on Occupational Social Security (OJ 1986 L283/27)

Council Directive 86/613/EEC on Equal Treatment for the Self-employed (OJ 1986 L359/56)

Council Directive 89/391/EEC Health and Safety Framework Directive (OJ 1989 L183/15)

Council Directive 92/85/EEC Pregnancy Directive (OJ 1992 L348/1)

Council Directive 96/34/EC on the framework agreement on parental leave (OJ 1996 L 145/4)

Council Directive 96/97/EC on occupational social security amending Directive 86/378/EEC (OJ 1997 L46/20)

Council Directive 97/80 /EC Burden of Proof Directive (OJ 1997 L14/6)

Council Directive 97/81/EC concerning the framework agreement on part-time work (OJ 1997 L14/9)

Council Directive 1999/70/EC concerning the framework agreement on fixed-term work (OJ 1999 L244/64)

Council and Parliament Directive No 2002/73 of 23 September 2003 amending Council Directive 76/207/EEC Equal Treatment Directive (OJ 2002 L 269/15)

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