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INDIRECT DISCRIMINATION: INTERPRETING *SEYMOUR-SMITH*

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THE preliminary ruling by the European Court of Justice in *Seymour-Smith and Perez*[1] concerning the scope and meaning of indirect discrimination has done little to clarify this perplexing concept. The ruling does not tell the thousands of short-service employees whose claims were stayed pending the litigation whether the qualifying period of two years' continuous service for the right not to be unfairly dismissed[2] is contrary to Community law. Nor does it provide clear standards by which disparate impact is to be tested, nor the relevant time for assessing the legality of an allegedly discriminatory measure, nor the conditions for establishing objective justification.

The application of the ruling to the specific question of the legality of the two-year qualifying period will now fall to be decided by the House of Lords when the cases return there in autumn 1999. This is of limited importance because the Government intends, in the near future, to repeal the disputed two-year rule and to restore the one-year qualifying period which applied before 1985.[3] However, the ECJ's ruling will be of enduring interest. The difficulties which the Advocate-General and the Court had in grappling with the questions referred to them reveal some of the limitations of the concept of indirect discrimination as a means to achieving the fundamental right to equality.[4] More generally, these proceedings under Article 177 (234 in the Consolidated Version) of the EC Treaty reveal a failure by the Court to perform its function of facilitating the national court in interpreting and applying Community equality law in a way which would be consistent and uniform throughout the Union.

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[1] Case C-167/97, *R* v. *Secretary of State for Employment, ex parte Seymour-Smith and Perez* [1999] I.R.L.R. 253.

[2] Currently under Employment Rights Act 1996 (ERA), s. 108(1).

[3] Department of Trade and Industry, *Fairness at Work*, Cm. 3968 (May, 1998), para. 3.10.

[4] See generally, B. Hepple, "Equality and Discrimination" in P. Davies *et al.* (eds.) *European Community Labour Law: Principles and Perspectives,* (Oxford: Clarendon Press), 1996, 237 esp. at pp. 249–253; and, on recent developments, C. Barnard, "The Principle of Equality in the Community Context: *P, Grant, Kalanke and Marschall:* Four Uneasy Bedfellows" (1998) 57 C.L.J. 352.

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I. The Dynamics of the Law of Indirect Discrimination

The introduction of the concept of indirect discrimination into Community law is a remarkable example of judicial creativity, borrowing from American and British models but interpreting them in the radically different procedural context of Article 177 references. In the United States, Title VII of the Civil Rights Act 1964 has been interpreted by the Supreme Court as envisaging two types of discrimination: disparate treatment because of a prohibited reason (*e.g.* race or sex), and disparate impact on protected classes (*e.g.* Blacks, women). In 1971, in *Griggs* v. *Duke Power Co.*[5] the Supreme Court held that it is unlawful discrimination for an employer to use an apparently neutral practice or procedure (*e.g.* a selection test) that disproportionately affects Blacks, unless this is a matter of "business necessity". This has also been applied to gender-neutral practices which have a disparate impact on women.

Two factors have been crucial to the development of disparate impact cases in the American context: class actions and elaborate statistical evidence. Most of these cases are brought by the plaintiff on behalf of a class, for example those Blacks who applied for the job and were rejected, and also those who would have applied had it not been for the discriminatory practice. Proof of the pattern or practice is eased by evidence of discrimination against any member of the class and there is wide scope for discovery of documents and other relevant information. The evidence of disproportionate impact "inevitably is evidence that an entire class has suffered from the violation".[6] Remedies are available to all members of the class going beyond the common law approach of compensating individuals for their losses. The courts can grant equitable remedies, including mandatory injunctions requiring affirmative action, and the courts supervise compliance on a continuing basis. The second essential factor has been the extensive use of statistical evidence in order to show that an apparently neutral employment practice actually has an adverse impact on a protected class. The courts have been expected to choose between conflicting expert testimony often based on sophisticated statistical techniques.

Neither class actions nor statistical expertise are available in employment tribunal proceedings under the British Sex Discrimination Act 1975 and Race Relations Act 1976, in which disparate impact has been translated into the legislative straitjacket of "indirect discrimination". Direct discrimination is defined as less favourable

[5] 401 U.S. 424.

[6] G. Rutherglen, "Tile VII Class Actions" (1980) 47 U.Ch.L.R. 688 at p. 713; and see generally, B. Hepple, "Judging Equal Rights" (1983) 36 C.L.P. 71 at pp. 75–77.

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treatment on the prohibited grounds.[7] Indirect discrimination involves the application of a requirement or condition to both men and women but the proportion of the women who can comply with it is considerably smaller than the proportion of men who can comply with it, and the employer cannot show the requirement to be justifiable irrespective of sex.[8] One obstacle to the application of this definition is the need to show a "requirement or condition". This appears to be contrary to EC law as expressed in the *Enderby* case,[9] and the Employment Appeal Tribunal has recently been willing to treat a criterion as a "requirement" even though it is expressed simply as being "desirable".[10] A more substantial obstacle is the absence of adequate local labour market statistics, particularly in the absence of any legal requirement on employers to monitor the gender and ethnic composition of the workforce. Moreover, issues of indirect discrimination have to be litigated in the context of individual complaints in which the applicant rarely has legal representation or access to experts in statistics.

The ECJ has developed the concept of indirect discrimination in the context of abstract questions raised in Article 177 references. Article 119 (141 in the Consolidated Version) of the EC Treaty merely provides that there shall be "equal pay without discrimination on the grounds of sex",[11] while Article 2(1) of the Equal Treatment Directive 76/207/EEC states that ". . . there shall be no discrimination whatsoever on grounds of sex either directly or indirectly . . .". These bare provisions have been fleshed out by the ECJ, in particular in cases referred by the British courts, and largely funded by the Equal Opportunities Commission as part of its litigation strategy.[12] A degree of cross-fertilisation of ideas resulted from this strategy. For example it was thought from the decision in *Jenkins* v. *Kingsgate (Clothing Productions) Ltd.*[13] 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. When *Jenkins* returned to the British Employment Appeal Tribunal, the President, Sir Nicolas Browne-Wilkinson (as he then was), stated that the Court's judgment was so unclear that he would apply his own reinterpretation

[7] Sex Discrimination Act 1975 (SDA), s.1(1)(a). There are identical definitions in the Race Relations Act 1976.
[8] SDA, s. 1(1)(b). See also the Burden of Proof Directive 97/80 OJ 1998 L14/6 and the discussion in E. Ellis, *EC Sex Equality Law*, (Oxford: Clarendon Press), 1998, 109–136.
[9] Case C-127/92 [1993] E.C.R. I-5535.
[10] *Falkirk Council* v. *Whyte* [1997] I.R.L.R. 560; *cf. Bhudi* v. *MI Refiners Ltd.* [1994] I.R.L.R. 204 suggesting that *Enderby* was confined to equal pay cases.
[11] A point reiterated in the "interpretative" Equal Pay Directive 75/117/EEC.
[12] See further C. Barnard, "European Litigation Strategy: the Case of the Equal Opportunities Commission" in J. Shaw and G. More (eds.) *New Legal Dynamics of European Union,* (Oxford: Clarendon Press), 1995.
[13] Case 96/80 [1981] E.C.R 911, para. 14.

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of national law, and held that unintentional indirect discrimination against part-time female workers was contrary to the Equal Pay Act, even if not unlawful under Article 119.[14]

In subsequent references from Germany, *Bilka-Kaufhaus*[15] and *Rinner-Kuhn,*[16] the Court made no mention of the requirement of intent. In *Bilka-Kaufhaus* the Court recognised that the exclusion of part-time workers from a company pension scheme which affected substantially more women than men was indirectly discriminatory and so needed to be justified by an objective criterion unrelated to sex. The Court said that it was for the national court to decide whether the pay practice was objectively justified. This requires a three stage assessment, taking account of whether the measures chosen "correspond to a real need on the part of the undertaking, are appropriate with a view to achieving the objectives pursued and are necessary to that end". This test has now been adopted by the House of Lords in the context of both equal pay and sex discrimination.[17]

While *Bilka-Kaufhaus* concerned indirectly discriminatory conduct by an employer, *Rinner-Kuhn* concerned indirectly discriminatory legislation. A German law obliged an employer to pay sick pay to employees who worked more than 10 hours a week or 45 hours a month. The Court found that such a provision had a disparate impact on female workers and contravened Article 119 unless it could be objectively justified. This required the Member State to show that the means chosen met a necessary aim of its social policy and that the legislation was suitable for attaining that aim. This test is reminiscent of the "intermediate" level of scrutiny applied in the context of the US Equal Protection clause, where the government must show that legislation which discriminates on the grounds of sex serves an important governmental objective and has a "fair and substantial relationship to the object of the legislation".[18]

The decision in *Rinner-Kuhn* paved the way for two important challenges to British employment rights legislation. In the first, *R* v. *Secretary of State for Employment, ex parte EOC*,[19] the House of Lords, without making a reference to the ECJ under Article 177, ruled that the provisions of the Employment Protection

[14] [1981] I.R.L.R. 388.
[15] Case 170/84 [1986] E.C.R. 1607.
[16] Case 171/88 [1989] E.C.R. 2743.
[17] *Rainey* v. *Greater Glasgow Health Board* [1987] I.R.L.R. 26; applied to the Race Relations Act 1976 in *Hampson* v. *Department of Education and Science* [1989] I.R.L.R. 69.
[18] *Reed* v. *Reed,* 401 U.S. 71 (1971); *Kahn* v. *Shevin,* 416 U.S. 351 (1974). This contrasts with the text of strict scrutiny applied in the context of race where the state must show a "compelling government interest" and that the measure is "narrowly tailored" to meet specific state practice (a strict proportionality test that no other means will meet the end).
[19] [1994] I.R.L.R. 176.

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(Consolidation) Act 1978, whereby employees who worked for less than 16 hours a week were subject to different conditions for claiming compensation for unfair dismissal and redundancy pay than those working more than 16 hours a week, were indirectly discriminatory and incompatible with the Equal Treatment Directive and Article 119 respectively. There was disparate impact since 87 per cent of part-time workers in the UK were women. The justification offered by the Secretary of State was that the removal of protection from women in these categories of employment made it more likely that employers would make part-time work available. This defence was rejected on the grounds that this was a mere assertion or belief unsupported by reliable factual evidence. As a result of this decision, the Conservative Government removed the hours threshold.[20]

The second challenge was to the requirement of two years' continuous service in order to qualify for the right not to be unfairly dismissed.[21] This was in the *Seymour-Smith and Perez* cases. The applicants complained that they had been unfairly dismissed but they were unable to register their applications because they lacked the two years' service requirement. They sought an order of certiorari quashing the 1985 Order introducing the two-year rule, claiming that the proportion of women who could comply with the two-year rule was considerably smaller than the proportion of men, so as to amount to prima facie indirect discrimination against women contrary to Article 119 and the Equal Treatment Directive. The Divisional Court rejected the application.[22] The Court of Appeal, however, made a declaration that the two-year qualifying rule was indirectly discriminatory at the time when the parties were dismissed and that there was no objective justification for that discrimination.[23] The House of Lords discharged the Court of Appeal's declaration and decided it was necessary to make an Article 177 reference.[24]

In consultation with the parties the Lords referred five detailed and carefully constructed questions to the Court of Justice. The answers it received, nearly two years later and eight years after the employees were dismissed, were not enlightening and did not merit the expense and time involved in making the reference. The House of Lords would have done better to decide the case itself, as it did in *ex parte E.O.C.*

[20] Employment Protection (Part-Time Employees) Regulations 1995, S.I. 1995/278.
[21] Currently ERA 1996, s. 108(1).
[22] [1994] I.R.L.R. 448.
[23] [1995] I.R.L.R. 464.
[24] [1997] I.R.L.R. 315.

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II. The Scope of Article 119 and the Equal Treatment Directive

The first two questions referred could have been regarded as *acte clair*. Question One was whether an award of compensation for breach of the right not to be unfairly dismissed is "pay" within the meaning of Article 119. The related Question Two was whether, if such compensation is "pay", the right not to be unfairly dismissed falls within the scope of Article 119 or of the Equal Treatment Directive. The main significance of this distinction is that while Article 119 rights are directly effective horizontally (and vertically),[25] the Directive can be directly enforced only against organs of the State.[26] In the event of a sufficiently serious failure to implement the Directive there may be a claim for damages against the State,[27] but it seems highly unlikely that such a breach could be found in the case of the disputed two-year qualifying period.

There were strong dicta in earlier cases, by both the ECJ[28] and the House of Lords,[29] in favour of a positive answer to the first question. The argument against this interpretation rested upon the ECJ's questionable finding in the *Gillespie* case[30] that there is a clear distinction between equal pay matters governed by Article 119 and equal treatment in respect of working conditions which is covered by the Equal Treatment Directive, with no room for overlap. According to this argument unfair dismissal compensation cannot be treated as pay because it does not constitute remuneration for work carried out by the employee but is compensation for breach of the employee's working conditions. The ECJ had no hesitation in rejecting this argument and reaching the same conclusion as the English courts and tribunals had favoured.

Since unfair dismissal compensation constitutes pay, the applicants contended, in answer to the second question, that the right of access to such pay without breach of the principle of equality also falls within the scope of Article 119. That logical position did not, however, commend itself either to Advocate-General Cosmas[31] or to the ECJ.[32] The Advocate-General concluded that the legality of the

[25] Case 43/75 *Defrenne* v. *Sabena (No. 2)* [1976] E.C.R 1365.
[26] Case 152/84 *Marshall (No. 1)* v. *Southampton Area Health Authority* [1986] E.C.R. 723.
[27] Cases C-46/93 and C-48/93 *Brasserie du Pecheur SA* v. *Germany*; *R* v. *Secretary of State for Transport, ex parte Factortame Ltd.* [1996] E.C.R. I-1029; Case C-392/93 *R* v. *HM Treasury, ex parte British Telecommunications* [1996] E.C.R. I-1631; Joined Cases C-178, 279, 189 and 190/94 *Dillenkofer* v. *Germany* [1996] E.C.R. I-4845.
[28] *E.g.* Case C-33/89, *Kowalska* v. *Freie und Hansestadt Hamburg* [1990] E.C.R. I-2591, para. 10.
[29] *Ex parte E.O.C.,* at p. 182 *per* Lord Keith; and see too [1995] I.R.L.R. 464, C.A., *per* Neill L.J. at pp. 470–471; *Mediguard Services Ltd.* v. *Thame* [1994] I.R.L.R. 504, E.A.T.
[30] Case C-342/93, *Gillespie* v. *Northern Health and Social Services Board* [1996] E.C.R. I-475, para. 24. This is questionable because it means that there is a gap in the overall protection of EC equality law, similar to the gap between the SDA and EqPA in Britain.
[31] [1999] I.R.L.R. 253 at pp. 265–266.
[32] Paras. 31–41.

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two-year qualifying period was a question of sex discrimination in working conditions which had to be decided under the Equal Treatment Directive. The Court, on the other hand, drew a distinction between compensation, which falls under Article 119, and "the conditions determining whether an employee is entitled, where he is unfairly dismissed, to obtain reinstatement or re-engagement", which falls under the Equal Treatment Directive. The consequence of this is that if an employee with less than two years' service seeks only compensation this is a directly effective right against a private sector employer, but if the employee seeks the primary remedy of reinstatement of re-engagement this is effective only against employers who are organs of the state. That is an absurd result in the context of the British Employment Rights Act 1996, which requires the employment tribunal to consider the primary remedy of re-employment before deciding whether to award compensation. The abstract answer to the Article 177 question is inconsistent with the general principle that remedies are a matter for national law so long as those remedies are effective.[33] The ECJ has actually undermined the national remedies for unfair dismissal by this illogical ruling.

III. Disparate Impact and Equality-Proofing

The third and fourth questions went to the very heart of indirect discrimination. These were, what is the legal test for establishing whether a measure has such a degree of disparate impact as between men and women so as to amount to indirect discrimination, and at which points of time must this test be applied, *i.e.* when the measure is adopted, when it is brought into force, or when the employee is dismissed? The Advocate-General was of no help to the Court in answering these questions because he entirely misunderstood the nature of the indirect discrimination alleged and also misinterpreted the British legislation on the qualifying period in cases of sex discrimination.[34]

There are, in effect, four options as to the legal test for establishing that a measure has a disparate impact. The first is a rule-of-thumb of the kind adopted in the US Equal Employment Opportunity Commission Uniform Guidelines on Employee Selection Procedures.[35] These state that a selection rate for any race, sex or ethnic group which is less than four-fifths (80 per cent.) of the group with the highest rate will generally be regarded as evidence of adverse impact.

[33] See, for example, Case 33/76 *Rewe-Zentralfinanz* v. *Landwirtschaftskammer für das Saarland* [1976] ECR 1989.
[34] [1999] I.R.L.R. 253 at pp. 265–273.
[35] *Federal Register,* vol. 43, No. 166, 25 August 1978.

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Smaller differences in selection rates may nevertheless constitute adverse impact where they are "significant" in both statistical and practical terms or where a user's actions have discouraged applicants disproportionately. This rule has the advantage of being relatively easy to apply, but on the only occasion so far in which a UK appellate court has considered it, the Court of Appeal in Northern Ireland has refused to endorse the rule, preferring to leave the matter to the discretion of employment tribunals.[36]

The second option is an impressionistic or "eyeball" approach which asks, as the Sex Discrimination Act does, whether or not the difference in impact is "considerable". The UK Government argued for this approach, attaching to the word "considerable" the meaning of a "large disparity".[37] The advantage of this approach is that it does not rely solely on numbers, which may be an unreliable guide since they depend upon the size and male/female composition of the employer's work force or (in the case of a legislative measure) the national labour force.

A third approach, for which the applicants argued, is to ask whether there is an inherent risk that a measure adopted by a Member State will have a disparate impact as between men and women.[38] This accords with the important decision of the Court of Appeal in *London Underground Ltd.* v. *Edwards*,[39] upholding a tribunal finding that a rostering system requiring an early morning start had an adverse impact on women with family responsibilities, even though only one of 21 women train drivers positively complained about the arrangements. The tribunal had found that 100 per cent. of the 2,023 male train drivers and 95·2 per cent. of the women could comply with the rostering arrangements. Potter L.J. said that the statutory test served the dual function of (1) prescribing as the threshold for intervention a situation in which there exists a substantial and not merely a marginal discriminatory effect as between men and women, and (2) ensuring that the disparate impact is inherent in the application of the requirement or condition and is not simply the product of unreliable statistics or fortuitous circumstances. This approach has the advantage of allowing the tribunal to use its general knowledge and to look outside the pool for comparison to take account of social facts, such as that 10 times as many women as men are likely to be single parents and responsible for a child. Moreover, more women than men are likely to be employed on short-term contracts.

[36] *McCausland* v. *Dungannon District Council* (1994) 53 E.O.R. 50.
[37] [1999] I.R.L.R. at p. 259.
[38] [1999] I.R.L.R. at p. 258.
[39] [1998] I.R.L.R. 364 C.A.

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The fourth approach, for which the European Commission argued, is to adopt a "statistically significant" test, whereby a provision is indirectly discriminatory where it affects a significantly different number of members of one sex.[40] This test was said to enable the national court to determine whether a difference in impact is due to a mere chance or whether it reflects a social fact or structural phenomenon.

The ECJ did not consider the first of these options (the four-fifths rule), and failed to give any clear guidelines as to whether the second, third or fourth options is to be preferred. The judgment accepted the UK Government's argument that the correct comparison is between the proportion of men in the work force able to satisfy the two years' requirement and those unable to do so, and, on the other hand, to compare those proportions as regards women in the work force. It is not sufficient to consider the number of those affected.[41] The Court then went on to say that the test is whether a "considerably smaller proportion of women than men" is able to satisfy the two-year requirement (*i.e.* the second or third option),[42] but it appears to be having its cake and eating it, by going on to adopt a test of statistical significance.[43] The crunch comes when the Court states that the statistics in this case (77·4 per cent. of men and 68·9 per cent. of women could comply when the two-year rule was introduced in 1985) "do not appear, *on the face of it*, to show that a considerably smaller proportion of women than men is able to fulfil the requirement imposed by the disputed rule" (emphasis added).[44] The final decision is, however, left to the national court.

The Court seems to be equating statistical significance with a "considerable" difference, since, where the sample is relatively small, a difference of less than 10 per cent. is insufficient to prove indirect sex discrimination. However, as Catherine Hakim has pointed out, tests of statistical significance should be irrelevant here since the issue is substantive significance.[45] Statistical significance tests were devised to solve the problem of small sample sizes, but once there is a very large sample (*e.g.* the national labour force), then statistical significance tests are misleading. Where the sample is large, then the question is whether the differences are substantially or practically important. This is ultimately a matter of judgment for national courts but it usually requires large, visible and substantial differences between the groups, and this is best ascertained by looking at the usual pattern

[40] [1999] I.R.L.R. at p. 259.
[41] Para. 59.
[42] Para. 60.
[43] Para. 62.
[44] Para. 64.
[45] C. Hakim, *Key Issues in Women's Work,* (London: Athlone), 1996, p. 195.

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of behaviour of the majority group. This can be *supplemented* by an easy-to-apply rule of thumb such as the four-fifths rule. The heavy reliance on statistical proof has been heavily criticised in the USA, as being based on faulty statistical and factual assumptions.[46] In order to be reliable sophisticated statistical techniques are required which lie beyond the resources of parties in individual legal suits. To the extent that the Commission and the ECJ are suggesting to national courts that they should rely on statistics as the primary method of proof, the ruling is retrograde. We need to heed the warning of an American judge that "too many use statistics as a drunk man uses a lamppost—for support and not illumination".[47]

The fourth question before the ECJ highlights the legal uncertainty which flows from reliance on statistics as the primary proof of indirect discrimination. The statistics in this case showed that over the period 1985 to 1993 the proportions of men and women who had two years' or more service with their current employer ranged for men, from a minimum of 72·5 per cent. to a maximum of 78·4 per cent., and for women from a minimum of 63·8 per cent. to a maximum of 74·1 per cent. Throughout the period 1985 to 1991 the ratio of the proportion of men qualified to the proportion of women qualified was about 10:9 reducing to about 20:19 in 1993. In other words, the disparate impact appears to have diminished over time. This makes it crucial to determine the moment of time at which the disparate impact test is to be applied, not least because the objective justification which existed at one time may not exist at another. The advantage of requiring the application of the test at the time a measure is adopted and implemented is that this compels gender-proofing of legislation and other measures and regular monitoring of their effect. This corresponds well with the current government (and EU) policy of "mainstreaming" equal opportunities.

The Court failed to give an unequivocal answer to this question, preferring to throw it back to the national court, stating that "the point in time at which the legality of a rule of the kind at issue in this case is to be assessed by the national court may depend on various circumstances, both factual and legal".[48] It was suggested that if the authority is alleged to have acted ultra vires (as in these judicial review proceedings), then this is in principle the time when the rule was adopted[49] but in cases of application of the rule to an individual, it is the time of application which is relevant. By focusing

[46] See *e.g.* Kingsley R. Browne, "Statistical Proof of Discrimination: Beyond Damned Lies'" (1993) 68 Washington L.R. 477.
[47] *Keely* v. *Westinghouse Electric Corp.,* 404 F.Supp. 573 (E.D.Mo. 1975).
[48] Para. 46.
[49] Para. 47 and implicit in para. 63.

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on a particular point of time (as the questions required the Court to do), there is a danger that one will overlook the need for persistent disparate impact as the best evidence of indirect discrimination. The Court of Appeal in this case had sensibly considered the statistics over the whole period in question. The ECJ has added nothing of value to this common sense approach.

IV. Objective Justification

The fifth question concerned the legal conditions for establishing a defence of objective justification. It will be recalled that in *Bilka-Kaufhaus* the ECJ laid down a strict, three-stage test for objective justification of indirectly discriminatory conduct and this approach was largely followed in the case of indirectly discriminatory legislation in *Rinner-Kuhn*. The *Rinner-Kuhn* approach has been adopted in the context of social security in *De Weerd*,[50] and in *Lewark*[51] the Full Court reaffirmed this test in respect of pay. Yet a week after its judgment in *Lewark* the Court made a surprising departure from this ruling in the context of social security in the cases of *Nolte*[52] and *Megner and Scheffel*.[53] *Nolte* and *Megner and Scheffel* concerned German social security law under which individuals working less than 15 hours per week and whose income did not exceed one-seventh of the monthly reference wage were termed "minor" or "marginal" part-time workers. Since these workers were also not subject to the statutory old-age insurance scheme covering invalidity and sickness benefit, they did not have to pay contributions. They were also exempt from paying contributions for unemployment benefit. After stating the standard test for objective justification, the Court went on to qualify this by stating that social policy is a matter for the Member States who can choose the measures capable of achieving the aim of their social and employment policy. They therefore have a broad margin of discretion. The Court concluded "that, in exercising its competence, the national legislature was reasonably entitled to consider that the legislation in question was necessary in order to achieve that [its] aim".[54] This test of "reasonableness" is significantly weaker than the more rigorous test envisaged in *Rinner-Kuhn* and *Lewark*.

[50] Case C-343/92 *De Weerd, née Roks and others* [1994] E.C.R. I-5721, paras. 33 and 34.
[51] Case C-457/93 *Kuratorium fur Dialyse und-Nierentransplantionen eV* v. *Lewark* [1996] E.C.R. I-243.
[52] Case C-317/93 *Nolte* v. *Landesversicherungsanstalt Hannover* [1995] E.C.R. I-4625.
[53] Case C-444/93 *Megner and Scheffel* v. *Innungskrankenkasse Vorderpfalz* [1995] E.C.R. I-4741.
[54] The Court reached similar conclusions in Case C-8/94 *Laperre* v. *Bestuurcommissie beroepzaken in de provincie Zuid-Holland* [1996] E.C.R. I-273, and Case C-280/94 *Posthum van Damme* [1996] E.C.R. I-179.

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The meaning of the justification test was also at issue in *Seymour-Smith.* The Court seemed to vacillate between the *Rinner-Kuhn* and *Nolte/Megner* test. The UK Government argued that the risk of proceedings for unfair dismissal brought by employees who had only fairly recently been engaged was a deterrent to recruitment. The Court said that it could not be disputed that the encouragement of recruitment constituted a legitimate aim of social policy.[55] It added that "It must also be ascertained, in the light of all the relevant factors and taking into account the possibility of achieving the social policy aim in question by other means, whether such an aim appears to be unrelated to any discrimination based on sex and whether the disputed rule, as a means to its achievement, is capable of advancing that aim".[56]

The UK Government, introducing the language of reasonableness, maintained that a Member State should merely have to show that it was reasonably entitled to consider that the measure would advance a social policy aim. The Court recalled that in *Nolte/Megner* it had observed that, in choosing the measures capable of achieving the aims of their social and employment policy, the Member States have a broad margin of discretion. It added:

> "75. However, although social policy is essentially a matter for the Member States under Community law as it stands, the fact remains that the broad margin of discretion available to the Member States in that connection cannot have the effect of frustrating the implementation of a fundamental principle of Community law such as that of equal pay for men and women.
> 76. Mere generalisations concerning the capacity of a specific measure to encourage recruitment are not enough to show that the aim of the disputed rule is unrelated to any discrimination based on sex nor to provide evidence on the basis of which it could reasonably be considered that the means chosen were suitable for achieving that aim.

The Court then reformulated the test for justification in its answer to the national court:

> "77. Accordingly, the answer to the fifth question must be that if a considerably smaller percentage of women than men is capable of fulfilling the requirement of two years' employment imposed by the disputed rule, it is for the Member State, as the author of the allegedly discriminatory rule, to show that the said rule reflects a legitimate aim of its social policy, that that aim is unrelated to any discrimination based on sex, and that it could reasonably consider that the means chosen were suitable for attaining that aim.

[55] Para. 71.
[56] Para. 72.

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So where do we stand? It is still not clear which test is being applied. It appears that the judges could not agree between them which way to go and so the resulting judgment reflects the competing views, with those favouring a more rigorous approach to equality getting their way in paragraphs 75 and 76; those favouring a more market-oriented concept, winning through in paragraph 77. It also does not provide much assistance to national courts. There seem now to be at least three tests for objective justification: the strict *Bilka* test for indirectly discriminatory conduct by employers, recently affirmed in *Hill and Stapleton,*[57] the weaker *Seymour-Smith* test for indirectly discriminatory employment legislation, and the very dilute test for social security legislation in *Nolte*/*Megner*. No explanation has been offered for these different tests.

The House of Lords is in an unenviable position. The Court, adopting its traditional stance to Article 177 references, pointed out "that it is ultimately for the national court, which has sole jurisdiction to assess the facts and interpret the national legislation, to determine whether and to what extent a legislative provision, which, though applying independently of the sex of the worker, actually affects a considerably higher percentage of women than men, is justified by objective reasons unrelated to any discrimination on grounds of sex".[58] However, such scruples did not trouble the Court in *Megner* where the Court itself decided that "the legislation in question was necessary to achieve a social policy aim unrelated to any discrimination on the grounds of sex".[59]

V. Conclusions

The judgment reeks of compromise between different views among the 15 men who make up the Court. It must lend weight to those arguing for the Court to allow for dissenting opinions. One must also question the role of the Advocate-General who took it upon himself to redefine the issues presented by the parties and then made submissions without a proper understanding of the national law. The Article 177 procedure in this case has worked against consistent interpretation and application of Community law, and not for the first time in respect of the right to equality.[60] It has been argued that

[57] Case C-243/95 *Kathleen Hill and Ann Stapleton* v. *Revenue Commissioners* [1998] E.C.R. I-3739 (job sharers returning to full-time work).

[58] Para. 67.

[59] The Court decided similarly in *Nolte*, above n. 52 and *Laperre*, above n. 54, without citing any evidence nor considering whether the social policy aim could be achieved by other means.

[60] See *e.g.* Case 69/80 *Worringham* v. *Lloyds Bank* [1981] E.C.R. 767, in which the Court reformulated the question to one which it wanted to answer: see A. Lester, "The Uncertain Trumpet: References to the Court of Justice from the United Kingdom", in H.Schermers *et al.* (eds.) *Article 177: Experiences and problems* (The Hague, North Holland) 1986; Case 19/81, *Burton* v. *British Railways Board* [1982] E.C.R. 554 in which the Court misapplied the derogations

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the quality of the judgments of the Court of Justice is declining due to its very high workload. One of the suggestions made to limit the number of cases is to restrict the right of referral to superior courts.[61] In *Seymour-Smith* the reference was made by the highest court, yet the opportunity was missed to give clear guidance to national courts. The problem is more deep-seated than the overloading of the Court.

The real problem is that while the Court of Justice is capable of pronouncing on questions of formal equality, it lacks access to the statistical and social science advice which is needed to assess arguments about disparate impact and objective justification. This is inherent in the Article 177 procedure which rests upon providing generalised answers to abstract questions. Most national courts in Europe also lack the capacity to undertake the kind of sociological and statistical analysis found in major US litigation, nor have they developed class actions which nurtured disparate impact litigation in the USA. But, at least, the national courts are closer to the real situation and more likely to be able to evaluate differences in impact and justifications for apparently neutral practices. The one virtue of the ECJ's judgment is that it leaves the House of Lords and other courts and tribunals in the UK virtually free to step boldly back into the domain of indirect discrimination, and to make their own assessments rather than hang on to the many nuances of nebulous words from Luxembourg.

in Directive 79/7 to Directive 76/207; and *Jenkins* v. *Kingsgate (Clothing Productions) Ltd.* (above) in which the Court's answer could not be understood.

[61] Barnard and Sharpston, "The Changing Face of Article 177 References" (1997) 34 C.M.L.Rev. 1113.

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