INDIRECT DISCRIMINATION AGAINST WOMEN IN THE WORKPLACE

BY

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ABSTRACT

This dissertation focuses on indirect discrimination against women in employment. It briefly examines the causes of discrimination against women in the workplace. Further it explains the concept of indirect discrimination by tracing its origins in the United States of America and analyses the development of the law of indirect discrimination in the United States until the introduction of the Civil Rights Act of 1991. This analysis involves an examination of the elements involved in proving an indirect discrimination claim and the problems experienced in doing so. The British indirect discrimination laws and cases are then examined to the extent to which Britain deviates from the American approach. The comparative law discussion will indicate the problems that have become an inherent feature of indirect discrimination cases. The problematic nature of proving indirect discrimination necessitates a discussion of the common types of conditions and requirements that indirectly discriminate against women. It is against this background that the present South African legislation on indirect discrimination in employment is analysed and case developments reviewed. Finally, the proposals of the Green Paper on Employment Equity are examined. The recommendations for the introduction of a comprehensive discrimination statute; the introduction of an independent commission; and the formulation of a Code of Good Practice that will provide guidelines to employers, are supported. Further, recommendations are made for a flexible discrimination legislation that provides a broad legal framework which allows for development of the law; the necessity to address issues regarding administration and costs involved in implementing this legislation; the introduction of additional funtions of the independent commission relating to training and access to the law; and the adoption of a statutorily enforced affirmative action policy that addresses the inequalities faced by women in employment.

DECLARATION

"I declare that INDIRECT DISCRIMINATION AGAINST WOMEN IN THE WORKPLACE is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references."

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1 INTRODUCTION

> Discrimination against a group of people on account of some shared characteristic, such as sex, race, colour or age, often takes a subtle form. By reason of historical facts or ingrained attitudes, rules and practices which, upon their face, make no distinction between different groups of people - "facially neutral", in the American terminology - may have the effect of operating unfairly upon a particular group. In such a case a disadvantage may be visited upon members of that group which is not the less real because it is indirect, unintended and even unwitting.[1]

Discrimination is a long and well-established feature of the employment relationship.[2] Yet the impetus towards the introduction of antidiscriminatory legislation has occurred only relatively recently. Even more recent is the appearance of the concept of indirect discrimination in the legislative and judicial arenas.[3]

Indirect discrimination[4] is often inaccurately viewed as a mere expansion of the concept of direct discrimination and therefore a lesser evil that does not warrant legislative or judicial attention. Also often regarded as a lesser evil, especially in the South African context, is the issue of sex and gender discrimination.[5] The

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1 Wilcox J, *Styles v Secretary, Department of Foreign Affairs and Trade* (1988) 84 *ALR* 408 at 421.

2 Painter R.W & Puttick K *Employment Rights* (1993) at 118 (hereafter Painter & Puttick).

3 Indirect discrimination or adverse impact discrimination as it is known in the United States was first formulated by the US Supreme Court in the landmark judgement of *Griggs v Duke Power Co.* 401 US 424 (1971).

4 Indirect discrimination occurs when an employer applies a particular rule or requirement to all its employees, the effect of which is that one group is disadvantaged by this application. "Indirect discrimination thus consists of acts or practices which are fair in form but unequal in impact..."(see Painter & Puttick (1993) at 134.)

5 Sex discrimination is based on the biological differences that exists between males and females. Whereas gender discrimination is based on the psychological and cultural characteristics that are attached to men and women because they belong to these different groups in society.

legacy of the apartheid system, in heightening our awareness of racial discrimination, has had the unfortunate effect of absorbing any significant reaction to discrimination based on sex and gender.

Therefore although the removal of apartheid and the creation of a society based on democratic values has resulted in the lifting of the more obvious barriers preventing previously disadvantaged groups from gaining a measure of equality in the labour market, "subtle barriers remain which are not less real for being harder to detect by victims and perpetrators alike".[6] It is, in fact, naive to expect a ban on discrimination , an insistence on neutral or identical treatment, to alter the grossly disproportionate representation of the dominant group in the higher strata of society substantially.[7]

This work focuses on the "glass ceilings"[8] that continue to prevent women from gaining any measure of equality in employment.

The interim Constitution of South Africa Act 200 of 1993 provided for a "historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex." This "historic bridge" will not be able to achieve its aim of establishing a

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6 Hunter R *Indirect Discrimination in the Workplace* (1992) at xxi.

7 Meyerson D "How useful is the concept of racial discrimination" cited in Heyns C, Van der Westhuizen J and Mayimele-Hashatse T (eds) *Discrimination and the Law in South Africa* Vol 1 (1994) at 14. This was also clearly evidenced in a report in the Pretoria News, " Whites still getting top jobs, big money " on the 17 March 1997, which indicated that a study conducted by the University of Cape Town's Breakwater Monitor revealed that despite affirmative action programmes whites occupied 96% of top management positions as compared to Africans who occupied only 3% of such positions.

8 Hunter (1992) at xxi.

society "based on democratic values, social justice and fundamental human rights"[9] if discriminatory practices against women that are not direct in nature are allowed to continue unchecked in the employment arena. In a country that has most recently become sensitive to issues of direct discrimination, it is therefore necessary to ensure that indirectly discriminatory practices are not allowed to go unchecked in the workplace. This is because discrimination in employment will have a ripple effect on the economic and social fibre of South African society.

> Work confers income, social relationships and status which influence life chances and lifestyles in every other social sphere. Factors which restrict equal opportunity in the labour market for specific individuals or groups affect their social position outside work as well.[10]

It is therefore necessary to examine the causes of indirect discrimination based on gender and sex in employment. It is only with an understanding of the social dynamics of this problem that any comprehensive study on indirect discrimination against women is possible.

2 CAUSES OF INDIRECT DISCRIMINATION AGAINST WOMEN IN EMPLOYMENT

Although it is true that discrimination in employment has a ripple effect on society, it is also true that employment practices often mirror social practices. In *George v Liberty Life Assosciation of Africa Ltd* the court stated that "the workplace mirroring the broader community bears the fruits of the legacy of racial

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[9] Preamble to The Constitution of the Republic of South Africa Act 108 of (1996).

[10] Hunter (1992) at xxii citing Castles, Morrissey & Pinkstone *Migrant Employment and Training and Industry Restructuring* (1989) at 127.

discrimination".[11] The same can be said of sex and gender discrimination.

> Discriminatory employment practices are a manifestation of prejudicial patterns of behaviour in society generally.[12]

Commenting on this quote, Lord Wedderburn in *The Worker and the Law* states that "...many workers bring to their subordinate status as employees additional disadvantages that derive from discrimination against them in the wider society."[13] Therefore the discrimination experienced by women in the employment sector is often a "manifestation" of the discrimination experienced by the female population in society generally.

The subordinate status of women in society can be attributed to a significant extent to stereotyping. Stereotyping initially arose because of the biological differences between men and women. Because of these biological differences, society imposed different roles on the different sexes. This sexual stereotyping was then reinforced over time by the manner in which parents reared their children, such as by encouraging and reinforcing acceptable and appropriate "male" and "female" behaviour. Because of this parental reinforcement, stereotyping cannot be regarded as exclusively a sex issue. Through effective cultural conditioning, it became a gender issue as well.

According to Carol Louw in her thesis, *Sex Discrimination in Employment* this cultural conditioning is then reinforced in our schools and inevitably plays a significant role in the level and nature of education that women receive.[14]

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[11] (1996) 17 *ILJ* 571 (IC) at 590 D-E.

[12] Lord Wedderburn *The Worker and the Law* 3ed (1986) at 447 citing Smith A, Craver C and Clark L *Employment Discrimination Law* 2ed (1982) at 1.

[13] Lord Wedderburn (1986) at 447.

[14] Louw C *Sex Discrimination In Employment* (doctoral thesis) (1992) at 35.

The social stereotyping of the male as the breadwinner and the female as child-rearer and responsible for domestic tasks has produced significant consequences in education. Firstly, the number of women who have received any formal educational qualifications and training is grossly disproportionate to the number of males possessing these qualifications.[15] This can be attributed to the fact that in patriarchal societies like South Africa,[16] parents react to social conditioning make plans for the careers of their sons and not for their daughters. Secondly, the nature of the education received differs. Even when plans for the education of girls are considered, the nature of the education that is received by boys and girls differs.

> Girls selecting a field of study at school tend to prefer the humanities or more literary branches to the sciences or more technical fields. But employment within the latter areas (for example, engineers, chemists and technicians) would help to raise women to a higher level within the occcupational hierachy.[17]

The need to reorganise education and training in order to achieve occupational equality has been proposed and implemented as a labour and social policy in many countries.[18] However, equal education opportunity programmes often operate on the premise that the female working population will achieve equality if women are given the opportunity to receive education and training in male dominated careers. These programmes often ignore the fact that a majority of women will continue to choose traditionally female orientated career paths. The reason for this may lie in the argument that the mainstream of women are better suited for these occupations or, ironically that women themselves have internalised the effects of

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[15] Louw (1992) at 25 states that a *Financial Mail* report on the 13 July 1990 at 23 indicated that "differences in education account for approximately 75% of the occupational differences between men and women in South Africa."

[16] Louw (1992) at 8.

[17] *Ibid* at 25.

[18] Discrimination in education is prohibited in the UK by the 1975 Sex Discrimination Act and in the US by means of Title IX of the 1964 Civil Rights Act.

social stereotyping and therefore continue to choose traditionally female-dominated career paths.

Therefore the question that must be asked at this stage is whether the position of male-dominated careers at the top of the occupational hierachy is due to a correct and unbiased evaluation of these jobs as more beneficial to society or whether their position has more to do with the sexual composition of these careers groups.

The labour market has a tendency to value "looking after material assets rather than looking after people, physical effort over mental effort, the possession of formal credentials over the possession of qualifications developed outside formal avenues...".[19] It is imperative that this value system be reconsidered. This will involve a massive undertaking to re-evaluate careers without the influence of sexually prejudicial social values.

It is a given fact that educational qualifications play a significant role in determining the position occupied by women in employment. However, the combination of educational inequalities and sex and gender stereotyping has resulted in a distinct and undeniable segregation of jobs on the basis of sex. Because of society's perception of women as primarily care-givers and responsible for domestic tasks, women have found themselves predominantly in jobs that are merely an extension of their socially appointed roles. For example, nursing, cooking and cleaning.[20]

Jobs of this nature are perceived as intrinsic to womanhood and therefore not necessary of being learned in the manner in which male skills at work need to be learned.[21]

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[19] Hunter (1992) at 172.

[20] Louw (1992) at 31.

[21] *Ibid.*

Carol Louw comments that what is understood by "skill" is determined by male perceptions.[22] The predominance of this male perception has resulted in the undervaluing of typically female-dominated jobs. This has had the effect of positioning women in low paying jobs which lack stability and advancement by promotion. These "lower pay structures reinforce the stereotype by making it less costly for women to remain at home than for men to do so..".[23]

The effects of social conditioning are numerous. Women are taught from an early age "that paid work should not interfere with domesticity and child-rearing".[24] Therefore women often enter the labour market at a much later age than men once they believe they have fulfilled their child care responsibilities. Women then find themselves in a position where they are competing with males of the same age group with years of experience, education and training. This late entrance into the labour market limits the potential of women to attain employment positions that offer high salaries and good prospects for advancement.

Social perceptions of women are also reinforced in the employment world by the employer who offers mainly part-time low wage employment to women and by women who in attempting to fulfil their social role are unable to conform to the "traditional working model in terms of time".[25] Thus the social allocation of women to the role of child rearing and domestic responsibilites has limited the potential of women to enter the labour market on a full-time basis. This has resulted in a concentration of women in part-time employment. Prospects of promotion in part-time employment are then severely restricted by a career structure which is based on the "male worker" model which assumes a continuous paid working life.

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[22] *Ibid.*

[23] *Ibid* at 35.

[24] *Ibid.*

[25] *Ibid.*

A further significant consequence of stereotyping is the predominance and perpetuation of the male norm in the employment sector. The majority of women have found the working world to be a "hostile place".[26] Sandra Fredman in her article *European Community Discrimination Law : A Critique* reasons that the dominance of the male norm in employment is responsible for the creation and maintenance of this hostile environment for women in the workplace. The perpetuation of dominant male norms has had a significant impact on the role of women in society and hence has limited the role of women in employment.[27]

Rosemary Hunter in *Indirect Discrimination in the Workplace* refers to this as "structural" or "institutional" discrimination,[28] which "arises from the fact that organisational norms, rules and procedures, used to determine the allocation of positions and benefits, have generally been designed, whether deliberately or unreflectively, around the behaviour patterns and attributes of the historically dominant group in public life".[29] This has had a significant impact on the pattern of the working life of women.

The perpetuation of the male norm in employment has created certain perceptions amongst employers as to what constitutes a successful employee. It has been said that:

> Working patterns in the labour market are structured according to the expectation that workers will work full-time for a continuous period from school-leaving age to retirement. Many important benefits flow from conforming to this pattern, including pay increments, seniority rights, training and pension benefits; and any diversion from the pattern is highly penalized in these respects.

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[26] Campanella J "Sex Discrimination"(1990) Vol 7 No 1 *Employment Law* 78 at 78.

[27] Fredman S "European Community Law: A Critique" (1992) Vol 21 No 2 *ILJ* (UK) 119 at 119.

[28] Hunter (1992) at 4.

[29] *Ibid* at 5.

> The central assumption , then, is that domestic and family needs will be taken care of outside of the market. The paradigm worker is the married man whose wife works unpaid in the home, at least for part of her time, looking after children or the elderly and doing domestic work.[30]

Therefore instead of rewarding women for their role in the creation and rearing of future society, women are seen as lacking commitment and seriousness to work. This problem as been formulated as follows:

> ...for whatever reason, whether biologically-based inclination, or social pressures, or the distinctive features of our parenting system, women devote much more of their energy than men to looking after their homes and families, tasks our society has historically undervalued and failed to reward. Furthermore, the burden of this unpaid form of labour, this 'shadow work', combines with the inadequacy of child-care facilities and the expectation of employers that employees should have no family commitments of a kind to interfere with full-time work to make women more risky to employ, and to make it vastly more difficult for those who do have the same career expectations as men to compete for the jobs which society does reward.[31]

The reference to child-rearing and domestic responsibilities as "shadow work" is accurate as these traditionally female duties are shadowed by society's perception that the "real" work is performed outside the home by predominantly males.

There are also assumptions that women are not ambitious because they value child care responsibilites. Employers perceive women as "inevitably about to leave or limit their paid work for children"[32]. Women are also stereotyped as primarily dependent on a male breadwinner. This has had the effect of limiting the potential of women to earn high salaries and attain advancement in the labour market.

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[30] *Ibid* at 120-121.

[31] Meyerson D "Sexual Equality and the Law" (1993) Vol 9 Part 2 *SAJHR* 237 at 251.

[32] Hepple B & Szyszczak E.M (eds) *Discrimination: The Limits of Law* (1992) at 218.

Hepple and Szyszczak go on to say:

> Clearly these limitations will vary between white women and women from diffferent ethnic groups, as well as between women with actual domestic responsibilities and those without. But *all* women, regardless of their real responsibilities are limited by assumptions that women are primarily child-bearers and rearers.[33]

Thus this social conditioning has followed women into the employment arena and resulted in the creation of certain perceptions of women as employees. Employers, whether consciously or sub-consciuosly, apply these social perceptions of women in the workplace. In South Africa and elsewhere, the effects of inflation and economic distress has necessitated the appearance of a dual income family unit. Furthermore due to an increase in divorce rates and pregnancies out of wedlock, women have found themselves in the position of the primary breadwinner of the family. However, despite the economic factor and the significant changes in social patterns, women continue to be inhibited in employment by stereotyped assumptions of their role in society.

Perhaps one of the most significant reasons why indirectly discriminatory practices in employment are not identified as being "wrong" either in the social or the legal context is that prejudices against women have been allowed to flourish in society. This has inevitably led to a situation where such social perceptions and prejudices against women have, firstly, been regarded by society as a whole as normal behaviour and, secondly, and most arlarmingly, by women, as acceptable.

If the social "status quo is maintained then the built-in inequalities will be perpetuated in the workplace".[34] However, the concept of indirect discrimination does not claim to provide the impetus towards a social revolution in the manner in which women are perceived and treated in society. It instead questions the

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[33] *Ibid.*

[34] *George v Liberty Life Assosciation Of Africa Ltd* (1996) 17 *ILJ* 571 (IC) at 590 F.

infiltration of these social perceptions into the employment sector and their effect on employment practices. It has been observed that:

> Indirect discrimination goes some way towards acknowledging the problematic dominance of the male norm. Recognizing that certain practices obstruct the free entry of women into the labour force, indirect discrimination addresses situations in which employment practices or conditions, although treating both sexes alike in the formal sense, have the effect of excluding more women than men.[35]

But does indirect discrimination legislation go one step further by aiming to achieve equality for women in the workplace? And if so, what measure of equality is hoped for?

3 THE CONCEPT OF EQUALITY

Traditionally, antidiscrimination legislation was directed at outlawing direct discrimination and aimed at achieving equality in the workplace. However, the model of equality that was envisaged was based on the principle that everyone in the same situation should be treated identically, that is, they should all be treated on their individual merits without regard to their sex, colour, political beliefs etc.[36] In short, "sexual equality will be guaranteed when the law is sex-blind".[37]

The formal equality model has been severely criticised with regards to the law on indirect discrimination. This model concentrates on ignoring the differences between men and women and treating both sexes in a like manner. However, "the strict equal treatment model does not question dominant norms as long as they do not make overt distinctions between different groups. Where existing policies

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[35] Fredman (1992) Vol 21 No 2 *ILJ* (UK) 119 at 125.

[36] Hunter (1992) at 3.

[37] Meyerson (1993) Vol 9 part 2 *SAJHR* at 237.

appear 'neutral', it simply defines equal treatment by reference to them".[38]

As discussed in the previous section, policies that appear neutral are often determined and influenced by dominant norms. It has been observed that:

> The very idea of a norm implies that whatever is considered "normal" can take on a quality of objective reality, so that it is no longer possible to see that the standard of measurement reflects simply one group of qualities out of an infinite variety of human experience.[39]

In employment the perpetuation of the dominant male norm invariably results in a situation whereby in order to succeed females must conform to this norm. However, this model of equality conceals " the substantive way in which man has become the measure of all things".[40] The only manner in which women can compete in this situation is "to try and discard their differences and behave more like the members of the dominant group".[41] Therefore women who wish to gain some measure of recognition, success and security in employment must take on the attributes of male employees.

For women this would entail pretending that the additional responsibities they face in terms of childbearing and rearing and domestic duties outside the employment situation are non-existent. This artificial process of moulding female workers into male models creates added pressure and tension in the lives of female employees. By ignoring these additional responsibities and treating women as if they were male employees, inequality in employment and in society is entrenched rather than dissolved. It has been said that:

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[38] Hunter (1992) at 5.

[39] *Ibid* at 7 citing Lucinda M. Finley "Transcending Equality Theory: A way Out of the Maternity and Wokplace Debate."(1986) 86 *Columbia Law Review* 1118 at 1154.

[40] Fredman (1992) Vol 21 No 2 *ILJ* (UK) 119 at 120.

[41] Hunter (1992) at 5.

> ...a persons gender, race, impairment, religion and so on includes a whole matrix of shared social, cultural and inherited characteristics that can not simply be made to disappear. Differences, and the detriments experienced by those who are different, may be obscured or denied by an insistence that dominant norms are neutral, but in reality strict equal treatment according to dominant norms has the effect of entrenching patterns of advantage and disadvantage.[42]

In her book, *Indirect Discrimination in the Workplace,* Rosemary Hunter provides an example of this scenario:

> ... some companies efforts to get more women into management positions[is illustrated] by encouraging women to have higher aspirations and greater levels of committment, to work harder and be prepared toaccept more responsibility, attributes that have traditionally been associated with male career progression.Concentration on these attributes ignores the need to question promotion prerequisites, or to devise proposals for compensating career time loss on maternity leave, or to institute child care arrangements, or to explore ways of making management a more attractive position for women.[43]

Thus, under this model women are rewarded for behaviour that conforms to the dominant norm. However, the situation of women is in fact worsened by firstly the pressure to mirror and adhere to the dominant norm whilst at the same time fulfilling the role that women have always played in society. One writer has labelled this as "equality with a vengeance".[44]

The criticisms levied against the formal equality model and the needs that emerged from the introduction of indirect discrimination legislation led to the formulation of the substantive model of equality.

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[42] *Ibid* at 6.

[43] *Ibid* at 5-6.

[44] *Ibid* at 5 citing Lahey K.A. "Feminist Theories of (In) Equality"(1987) 3 *Wisconsin Women's Law Journal* 5 at 15.

This model is based on the premise that in order for "legislation to succeed by eliminating discrimination based on an employee's sex, male and females must have an equal starting point. This means that there must be no barriers regarding, for example, education, services or the labour market itself. Because such barriers do exist(as discussed in the earlier section) differential treatment, which accomodates differences between the sexes, is advocated. The idea is to create substantial equality as opposed to formal equality."[45]

Therefore there must an accommodation of the differences between the dominant norm and the manner in which women approach their jobs. Further, the social hinderances that characterise women's lives must be taken into account. This level of accommodation and tolerance of this deviance from the accepted norm in employment must form the basis of any legislative action that is aimed at outlawing indirect discrimination and thereby achieving equality for women in the workplace.

4 COMPARATIVE LAW

4.1 INTRODUCTION

There is a wealth of information available to South Africa on the law of indirect discrimination. Antidiscrimination legislation in South Africa is not only a relatively new feature in legislation but at this stage is also relatively sparse. However, equipped with two separate statutes that outlaw indirect discrimination[46] and the promise of the passing of a bill on Employment Equity by the end of 1997, it has become increasingly necessary to look outwards for lessons in the formulation and

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[45] Louw C " What is Sexual Equality (with particular reference to equality in the workplace)?" (1994) Vol 35 No 1 *Codicillus* 19 at 24.

[46] The Constitution of the Republic of South Africa 108 of 1996: section 8 (2); The Labour Relations Act 66 of 1995: section 187(f) and Scedule 7 Item (2).

operation of indirect discrimination legislation.

The inception and development of the law on indirect discrimination in the United States of America will be discussed fairly fully. There are two reasons for this. Firstly, "disparate impact" discrimination or "adverse impact" discrimination (as it is known in the US) was first formulated in America. Therefore it seems only logical that any study on indirect discrimination begin in its birthplace. Secondly, US disparate impact litigation has developed through almost three decades and the various changes and developments has provided valuable lessons for the UK, Canada, Europe, Australia and New Zealand. It has been observed that:

> The comparative perspective helps us see through the myths of our system, to uncover the hidden premises on which we build, and to see more clearly the realities of our system and its special characteristics.[47]

Therefore South Africa should gain from these lessons.

The discussion of US law and case developments will include a discussion of the definition and various elements of the concept of indirect discrimination. The problems experienced in America in proving these elements will also be examined. The law and case developments in the UK will only be discussed to the extent to which the laws and case developments have deviated from US law. The limitations of this work do not allow a discussion of indirect discrimination developments in Europe, Australia and Canada. However, the case developments in the US and Britain provide a substantial foundation for a comparative study of indirect discrimination.

It should be noted that the vast majority of cases that were responsible for the development of the disparate impact concept dealt with the issue of race. Initially,

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[47] Spiros Simitis "Denationalizing Labour Law: The Case of Age Discrimination."(1994) Vol 15 No.3 *Comparative Labor Law Journal* at 321 quoting Clyde Summers in Blanpain R & Weiss M (eds) *The Changing Face of Labour Law and Industrial Relations* (1993).

the cases that did concern sex and gender issues were few and far between. However, the principles that emerged from the racial disparate impact suits have played a significant role in the development of the law of indirect discrimination against women. Further, the uniform application of these principles to cases based on various grounds of discrimination imply a consistency of law and judicial method.

4.2 THE UNITED STATES OF AMERICA

In the United States adverse impact discrimination developed largely as a result of the initiatives of the courts. However, the initial role of the American legislature in the formulation and introduction of the concept of adverse impact discrimination can not be ignored.

The United States Civil Rights Act of 1964 (hereafter referred to as the 1964 CRA) is described as "*the* most important civil rights legislation of this century".[48] Certainly with regard to the law of adverse impact discrimination it provided the necessary impetus for the formulation and development of this type of discrimination.

Section 703(a), Title VII of the 1964 CRA states that it shall be an unlawful employment practice for an employer:

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or priviledges of employment, because of such individual's race, color, religion, sex or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, sex, or national origin.

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[48] Schlei B.L & Grossman P *Employment Discrimination Law* 2 ed (1983) Foreword at vii (hereafter Schlei & Grossman).

Although the 1964 CRA was a significant piece of legislation with regards to discrimination, it failed to define the term "discrimination". It has been suggested that interpretations immediately after the promulgation of the Act have indicated that "when Title VII was passed, "discrimination" was viewed by the legislature as meaning simply disparate treatment...".[49] Therefore the wording of the Act left unanswered the question of whether policies which were facially neutral with respect to the above-mentioned forbidden characteristics, but which had discriminatory effects once applied, were permissable under the Act.

This question was consequently answered by means of the establishment by the 1964 CRA of an administrative body called the Equal Employment Opportunities Commission (hereinafter referred to as the EEOC). In 1965 the EEOC in its guidelines on sex discrimination, referred for the first time to indirect discrimination or adverse impact discrimination. It "stated that 'discrimination' could be established by proof of differential treatment of two similarly situated people, *or* by proof of an adverse impact on a class of people".[50] Hence the formulation of the concept "adverse" or "disparate impact" discrimination.

The concept of disparate impact discrimination was addressed by the court for the first time in 1971[51] but only received judicial acceptance by the US Supreme Court

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[49] Hunter (1992) at 16.

[50] *Ibid.*

[51] In the *Phillips v Martin- Marietta Corp.* (400 US 542 1971) case the female applicant was informed by the company that it did not accept applications from women with pre-school children. The company did, however, employ men with children of that age group. Ida Phillips' suit failed in the lower court and in the Court of Appeals. The Court reasoned as follows:
as per se violation of the Act can only be discrimination based solely on one of the categories i.e in the case of sex , women vis a' vis men. When another criterion of employment is added to one of the classifications listed in the Act, there is no longer apparent discrimination based solely on race, color, religion, sex or national origin... [The law] does not prohibit discrimination or any classification except those named within the act itself. Therefore once the employer has proved that he does not discriminate against the protected groups, he is free thereafter to operate his business as he determines, hiring and dismissing other groups for any reason he desires.....
Therefore the court refused to extend the wording of the Act to include the concept of indirect discrimination.

Court in *Griggs v Duke Power Company*.[52]

4.2.1 Griggs v Duke Power Company

The facts of the case were as follows. The Duke Power Company was organised into five different departments: labour, coal handling, operations, maintenance and laboratory and testing. Until 2 July 1965, the date when Title VII of the Civil Rights Act of 1964 took effect, black employees were only employed in the labour department. There was a huge disparity between the wages paid in this department and the other departments. The highest paid jobs in labour paid less than the lowest paid jobs in the other four departments.

The contentious policy was one which required a high school diploma for entrance into any of the departments except labour. Although blacks were no longer prevented from entering the other departments, the diploma requirement was retained. As a further requirement, the company insisted on a minimum score on two professionally prepared aptitude tests for employment in all departments except labour. The required scores were the equivalent of the national median for high school graduates. This was an even more restrictive standard than the high school diploma requirement.

The percentage of black male employees who could meet these criteria was significantly lower than that of white males.[53] The black employees claimed that the employer was liable under Title VII, even in the absence of discriminatory intent, because the practices although neutral on their face, had the effect of excluding some employees because of race.

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[52] 401 US 424 (1971).

[53] The complainants showed that the intelligence tests had the effect of failing demonstrably higher rate of Blacks than whites. Further the high school diploma requirement had the same effect since only 12% of Black males as compared to 34% of white males in that state had completed high school. (see Hunter (1992) at 16).

The Fourth Circuit Court ruled that there had been no disparate treatment (the US term for "direct" discrimination) and therefore refused to afford the employees any relief. In the District Court's view, the purpose of the Act was not to redress the inequalities that existed in the larger social system. It was merely to ensure that all applicants for jobs were treated the same.[54]

The Court of Appeals reaffirmed the decision of the lower court. The Court examined the meaning of Title VII and concluded that the central enquiry was one of discriminatory intent. Because there was no evidence of a discriminatory purpose in the adoption of the requirements, there had been no violation of the Act.

The reversal of the Court of Appeals judgement by the Supreme Court was most accurately referred to by one writer as a "tour de force".[55] The Supreme Court in overturning the lower court's decision, was in effect declaring that disparate impact was as significant a key as disparate treatment to the dissolution of social inequalities. Furthermore the absence of an intention to discriminate did not mean that there had not been a violation of the Act.

The Court stated:

> What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissable classification. Congress has now provided that tests or criteria for employment or promotion may not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox. On the contrary Congress has now required that the posture and condition of the job-seeker be taken into account.It has - to resort to the fable again - provided that the vessel in which the milk is proferred be one all seekers can use. The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation.

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[54] Epstein R *Forbidden Grounds : The Case against Employment Discrimination Laws* (1992) at 195 commenting on this ruling stated that "Disparate treatment, not disparate impact was the key .

[55] *Ibid.*

> Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation.[56]

Therefore this landmark case refused to be bound by the restrictive wording of the 1964 CRA and took a liberal interpretative approach giving effect to the general intention of the Act. The Supreme Court relying on the EEOC guidelines, reasoned that "since the Act and its legislative history support the Commission's construction, this affords good reason to treat the guidelines as expressing the will of Congress."[57] It has been said that:

> ... superior federal courts in the US typically treat major statutes as blue prints of social policy and will thus be concerned to find out the social reality of the "mischief" that a particular Act is designed to remedy, and to interpret the Act so as to give full effect to its purposes.[58]

Therefore despite the lack of discriminatory intent (there was evidence the Company was willing to finance two-thirds of the cost of the tuition fees for high school training of the undereducated employees) the Court still ruled in favour of the complainants, concentrating on the discriminatory *effect* of the policy rather than the discriminatory intent. The Court stated that "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability."[59] Thus *Griggs* had in effect "shifted civil rights policy to a group rights, equality-of-result rationale that made the social consequences of employment practices, rather than their purposes, intent, or

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[56] 401 U.S. 424 (1971) at 431-432.

[57] *Ibid* at 434.

[58] Hunter (1992) at 17 citing O' Donovan K and Szyszczak E *Equality and Sex Discrimination Law* (1988) at 27.

[59] 401 U.S. 424 (1971) at 432.

motivation the decisive consideration in determining their lawfulness".[60]

The Supreme Court then formulated a defense to adversely impact discriminatory practices or policies.

> The touchstone is business necessity.[61]

In effect what the court meant by this was that the high school diploma requirement and the use of intelligence tests must be shown to be related to the performance of the jobs for which such entrance requirements are needed. Congress "placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question".[62]

Therefore *Griggs* went beyond the mere introduction of the concept of adverse discrimination into the judicial arena. It contributed significantly to the law by setting out the stages of enquiry in an adverse impact case. It appears from the judgement that the initial enquiry in a disparate impact case is whether the policy complained of has a disparate impact on a particular group. In satisfying this enquiry the court advocated the use of statistics to prove the existence of the disparate impact. Although the court's use of statistics was criticised by later cases as being unsophisticated, the "validation of a statistical approach to discrimination litigation"[63] was a significant development in the theory of adverse impact discrimination. (The problems experienced in this statistical approach will be discussed in a later section.)

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[60] Belz H *Equality - A Quarter Century of Affirmative Action Transformed* (1991) at 51.

[61] 401 US 424 (1971) at 431.

[62] *Ibid* at 432.

[63] Zimmer M.J, Sullivan C.A, Richards R.F & Calloway D.A *Cases and Materials on Employment Discrimination* 3 ed (1994) at 360 (hereafter Zimmer *et al*).

However, once a complainant had, with the use of statistics, proved that the employment requirement or condition complained of had an adverse impact, it is said that a *prima facie* case of discrimination has been established. The burden then shifts to the employer who must prove that such a policy is related to job performance.

The popular description of the *Griggs* judgement as the "landmark" case on adverse impact discrimination is not unfounded. The Supreme Court had taken a significant step as it discarded past approaches of becoming bogged down in a restrictive semantic debate. This significant approach did not only result in the introduction of adverse impact discrimination into American courts, it also created a liberal interpretative style that has managed to sustain itself and continues to characterise judicial decisions on the topic.

Being the first case on adverse impact discrimination in the US, the manner in which the Supreme Court approached this case was studied and followed, criticised and refined, reversed and reverted back to, to a significant extent. The concept of adverse impact discrimination as envisaged in *Griggs* was formulated as a very simple idea. However, it left several questions regarding important issues unanswered. These were later addressed by several Supreme Court decisions. These decisions will now be discussed to the extent in which they have altered or expanded on the paradigm case of *Griggs.*

4.3 PROVING ADVERSE IMPACT DISCRIMINATION

This section will address the various problems encountered by the American courts in proving adverse impact discrimination.

4.3.1 Proving the impact element

The *Griggs* Court has been criticised as being "permissive" in proving the

plaintiff's *prima facie* case of disparate impact.[64] In proving the adverse impact requirement the Griggs Court examined the high school graduation rates for the entire state of North Carolina. This method of establishing the adverse impact of a requirement or policy has received great criticism.

Zimmer et al, commenting on the approach used in *Griggs*, argues that, "it is at least theoretically possible that the two requirements had no actual adverse impact at the Dan River plant because African-American applicants in that area were better educated and tested higher (or because white applicants in that area were less educated and tested lower)"[65] than the general population of the entire state of North carolina. Therefore the impact measured in *Griggs* may merely be theoretical as opposed to the *actual* adverse impact on the employees affected by the employment practices.

The issue of establishing the adverse impact of an employment requirement or condition was addressed in the following Supreme Court decisions.

In ***Dothard v Rawlinson***,[66] the first American adverse impact case based on sex, the Supreme Court examined the adverse impact of a statutory height and weight requirement on female applicants for the position of correctional counsellor trainee.

In considering the effect of the minimum height and weight standards on this disparity in rate of hiring between the sexes, the District Court followed the *Griggs* approach and compared the number of women and men in the United States,

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[64] *Ibid* at 365.

[65] *Ibid.*

[66] 433 US 321 (1977).

between the ages of 18 and 79, who could comply with these requirements.[67] Accordingly, the District Court found that Rawlinson (the complainant) had made out a *prima facie* case of unlawful sex discrimination.

The appellants, however, argued "that a showing of disproportionate impact on women based on generalized national statistics should not suffice to establish a *prima facie* case".[68] They pointed out the failure of Rawlinson to adduce comparative statistics concerning *actual* applicants for the position at issue.

The Supreme Court responded to this argument by stating that "there is no requirement, however, that a statistical showing of disproportionate impact must always be based on analysis of characterisitics of *actual* applicants".[69] [own emphasis added]

The *Rawlinson* Court reasoned:

> The application process itself might not adequately reflect the actual potential applicant pool, since otherwise qualified people might be discouraged from applying because of a self-recognized inability to meet the very standards challenged as being discriminatory. A potential applicant could easily determine her weight and height and conclude that to make an application would be futile. Moreover, reliance on general population demographic data was not misplaced where there was no reason to suppose that physical height and weight characteristics of Alabama men and women differ markedly from those of the national

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[67] The 5'2" requirement would operate to exclude 33.29% of women in the United States between the ages of 18 and 79, while excluding only 1.28% of men between the same ages. The 120 pound weight restriction would exclude 22.29% of the women and 2.35% of the men in this age group. When the height and weight restrictions are combined, Alabama's statutory standards would exclude 41.13% of the female population while excluding less than 1 % of the male population.

[68] 433 US 321 (1977) at 330.

[69] *Ibid.*

population.[70]

The Court, therefore confirmed the Griggs judgment where disparate impact was proved by using national statistics as well.

This approach of using national statistics as opposed to examining the adverse impact of a requirement on the actual applicant pool was followed by the Supreme Court until the decision of ***New York City Transit Authority v Beazer***[71]

In *Beazer* the plaintiffs were challenging the employer's rule of disqualifying people who used methadone.[72] Plaintiffs showed that 81 percent of all Transit Authority (TA) employees suspected of drug use were Black or Hispanic and approximately between 62 and 65 percent of all methadone-maintained people in New York City were Black or Hispanic.[73] The plaintiffs claimed that this disqualifying rule had a disparate impact on employees and applicants of Black or Hispanic origin.

The Supreme Court ruled that a *prima facie* case of disparate impact had not been successfully established.

The Court stated that:

> ...[the statistics about overall drug use tell] us nothing about the racial composition of the employees suspected of using methadone. Nor does the record give us any information about the number of black, Hispanic, or white persons who are dismissed for using methadone...We do not know...how many of these persons [in metadone maintenance

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[70] *Ibid.*

[71] 440 US 568 (1979).

[72] This was a drug used as a substitute for heroin in the treatment of heroin addiction.

[73] 440 US 568 (1979) at 579.

> programs] ever worked or sought to work for TA. This statistic reveals little if anything about the racial composition of the class of TA job applicants and employees receiving methadone treatment."[74]

According to Zimmer et al, the Court in this particular case was making a significant departure from *Griggs* and *Dothard* by suggesting that "the relevant group for deriving impact statistics is the Transit Authority's applicant pool"[75] and not the population of methadone users in New York.

This new development in proving a prima facie case of disparate impact was clearly evident in the cases that followed *Beazer*. Undoubtedly the most significant (and contentious) authority in this respect was ***Wards Cove Packing Co. v Atonio***.[76]

This case involved disparate impact claims, involving the employment practices of two companies that operated salmon canneries in the remote areas of Alaska. Jobs at the canneries were divided into two general types: "cannery jobs", which were unskilled positions filled mostly by nonwhites, and "noncannery jobs", which were skilled positions that were filled with predominantly white workers. The noncannery jobs paid more than the cannery positions.

In 1974 a class of nonwhite cannery workers brought a Title VII action against the companies' hiring and promotion practices. These practices included nepotism, a rehire preference, a lack of objective hiring criteria, separate hiring channels and a practice of promoting from within.[77] The employees claimed that these employment practices were responsible for the racial division of the workforce.

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[74] *Ibid* at 585.

[75] Zimmer *et al* (1994) at 371.

[76] 490 US 642 (1989).

[77] *Ibid* at 647.

The Court of Appeals found that the claimants had established a *prima facie* case of disparate impact discrimination by providing statistics which indicated that there was a high percentage of nonwhite workers in cannery jobs and a low percentage of such workers occupying the skilled noncannery positions.

In reversing the decision of the Court of Appeals, the Supreme Court attacked the lower court's method of proving a *prima facie* case of disparate impact. The Supreme Court stated that "the Court of Appeals' ruling here misapprehends our precedents and the purposes of Title VII".[78]

> The ... comparison ... fundamentally misconceived the role of statistics in employment discrimination cases. The "proper comparison [is] between the racial composition of {the at-issue jobs] and the racial composition of the qualified ... population in the relevant labor market". It is such a comparison - between the racial composition of the qualified persons in the labour market and the persons holding at-issue jobs - that generally forms the basis for the initial enquiry in a disparate-impact case. Alternatively, in cases where such labor market statistics will be difficult if not impossible to ascertain, we have recognized that certain other statistics - such as measures indicating the racial composition of "otherwise-qualified applicants" for at-issue jobs - are equally probative for this purpose.[79]

In this case the skilled noncannery positions were the jobs-at-issue. The Supreme Court reasoned that the proper comparison would have been to compare the racial composition of the at-issue-jobs and the racial composition of the section of the labour market that was qualified to hold at-issue-jobs. The Court of Appeals had therefore erred in making a comparison between the racial composition of cannery and noncannery jobs because"...the cannery workforce in no way reflected 'the pool of *qualified* job applicants" or the *qualified* population in the labor force'.[80]

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[78] *Ibid* at 650.

[79] *Ibid* at 650-651. [The statement within quotation marks has been extracted from *Hazelwood School District v United States* 433 U.S. 299 at 308(1977).]

[80] *Ibid* at 651.

The Supreme Court stated:

> Racial imbalance in one segment of an employer's workforce does not, without more , establish a prima facie case of disparate impact with respect to the selection of workers for the employer's other positions....As long as there are no barriers or practices deterring nonwhites from applying for cannery positions, if the the percentage of selected applicants who are nonwhite is not significantly less than the percentage of qualified applicants who are nonwhite, the employer's selection mechanism probably does not operate with a disparate impact on minorities.[81]

Therefore the *Wards Cove* decision, following the initiative of the Supreme Court in *Beazer*, represented a significant departure from earlier cases where comparisons were based on national statistics (see *Griggs* and *Rawlinson*). Perhaps the most significant approval of this section of the *Wards Cove* decision, that is relating specifically to proving the disparate impact element, came in the form of the 1991 Civil Rights Act, (hereafter the 1991 CRA).

Congress had criticised the *Wards Cove* decision as having "weakened the scope and effectiveness of Federal Civil Rights protections..."[82], and overturned a substantial part of the *Wards Cove* judgement. However, the Court's ruling with regard to proving the adverse impact of an employment policy was not overturned and continues to be followed by US courts.[83]

The imperative question at this stage is whether this is good law? For the most part, yes.The narrowing down of the comparison pools provided realistic figures of the workers who were adversely impacted. However, it posed new difficulites. The statistics gained from a national pool would, in all probability, be more

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[81] *Ibid* at 653.

[82] The United States Civil Rights Act of 1991: section 2 (2).

[83] In *Stender v. Lucky Stores*, Inc., 58 FEP 1346 (N.D. Cal 1992) the *Wards Cove* judgement with regard to establishing a *prima facie* case of disparate impact was followed.

accessible because studies on a national level are conducted on a regular basis and figures can easily be obtained from them. However, in order to obtain statistics that compared the pool of qualified applicants to the pool of workers who occupied at-issue jobs, a complainant would have to embark on a specialised study which would firstly, be costly and time consuming and secondly, the information required is usually within the exclusive knowledge of the employer. This had the unfortunate affect of discouraging disparate impact claims.

4.3.2 The required degree of disparity

A further problem that arose out of the first element in proving a disparate impact case was the question of what "degree of difference [was] sufficient to warrant legal interference".[84]

The cases remain unclear in this respect. In *Griggs* the Court seemed to imply that the impact must be "substantial". In *Albermarle v Moody* the Court used the word "significantly different" to describe the degree of impact required. In *Washington v Davis* the court used the words "substantially disproportionate" to describe the disparate impact. However, according to Shlei and Grossman these decisions afforded little or no guidance on "just what threshold mathematical showing of variance ... suffices as a 'substantial disproportionate impact'".[85] Although the language of these judgments seems to suggest that the impact had to be of a sizeable nature, the exact quantum of disparity required was left unanswered. This resulted in a situation whereby "the courts ... operated on an unfortunate *ad hoc* basis in determining the existence of substantial adverse impact".[86]

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[84] Player M.A., Shoben E.W. and Lieberwitz R.L. *Employment Discrimination Law: Cases and Materials* (1990) at 424.

[85] Shlei and Grossman (1983) at 98 citing *Moore v. Southwestern Bell Tel. Co.*, 593 F.2d 607, 608,19 FEP 663, 664 (5th Cir. 1979) Footnote 72.

[86] *Moore v. Southwestern Bell Tel. Co.*, 19 FEP 232, 234(E.D. Tex. 1978).

The Courts did, however, receive some guidance when the issue of substantial adverse impact was addressed by the EEOC in its Guidelines on Employee Selection Procedures. The Commission took the following position.

> A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) or (eighty percent) of the rate for the group with the highest rating will generally be regarded by Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact.[87]

This eighty percent test, however, posed several statistical problems. The test has been criticised as being limited in its application.[88] It has been suggested that the test is best suited in situations where large groups of workers are involved. One study indicated that where the group of workers involved were as little as five, the application of the eighty percent rule would result in a 50 percent chance of a false charge of discrimination.[89] Further, the test is said to work "best" if there are only two comparison groups of workers. Therefore where there exists several racial or ethnic groups the possibilty of failure increases.[90]

The limitations of this work do not allow a lengthy discussion of the statistical problems involved. However, the problems experienced indicate that the introduction of statistics had opened a Pandora's box. This had the effect of complicating adverse impact suits.

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[87] Uniform Guidelines on Employee Selection Procedures (1978) 29 CFR s 1607. 4D (1989).

[88] Zimmer *et al* (1994) at 208-211.

[89] *Ibid* at 208, citing the calculations conducted by Boardman A.E. "Another Analysis of the EEOC 'Four-Fifths' Rule" 25 *Mgmt. Sci* 770 at 773 (1979). This study also indicated that if the group was as large as 50 the chance of a false charge of discrimination would over 20 percent.

[90] *Ibid* at 209.

The great diversity of cases that followed the *Griggs* judgement resulted in the expansion of the concept of adverse impact discrimination. However, this diversity brought with it several questions that had not been within the contemplation of the Supreme Court in *Griggs*. This section will address these questions.

4.3.3 The Bottom Line Argument

One of the issues that developed out of the first element of establishing disparate impact was what has been referred to as the "bottom-line" argument. In terms of this argument "an employer's acts of racial discrimination in promotions - affected by an examination having disparate impact - would not render the employer liable for the racial discrimination suffered by employees barred from promotion if the "bottom line" result of the promotional process was an appropriate racial balance."[91]

This theory was first formulated by the Supreme Court in *Connecticut v Teal* [92] where the Court addressed the question of whether it was possible for an employer to refute a claim of disparate impact based on the employer's "bottom-line"statistics.

The respondents were black employees of the Department of Income and Maintenance of the State of Connecticut. Each had received a provisional promotion to the position of Welfare Eligibility Supervisor and had remained in that capacity for approximately two years. In order to obtain permanent status as supervisors, the respondents had to participate in a selection process that insisted, amongst other requirements, on the passing of a written examination. The respondents failed the exam and consequently instituted a Title VII action against their employer. They alleged that the test excluded a disproportionate number of

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[91] 457 US 440 (1982) at 440.

[92] *Ibid.*

blacks and was not job related.[93]

However, the employers defended its actions in the following manner. They stated that promotions were made from an eligibility list that was drawn up from all those who had passed the written exam. The factors that were considered when awarding a promotion to a person on the eligibility list were "past work performance, recommendations of the candidates' supervisors and, to a lesser extent, seniority".[94] However, the employers also applied an affirmative action policy when choosing persons from the eligibility list for promotion. They claimed that the aim of this policy was to ensure that a significant number of black employees were promoted to the capacity of supervisors. As a result of the application of this affirmative action policy a greater percentage of blacks who were on the eligibility list were promoted as compared to the white employees who were eligible for promotion.[95] Therefore, the employers argued that there was no disparate impact as the "bottom-line" result were "more favourable to blacks than whites".[96]

The District Court ruled in favour of the employers, holding that "bottom-line" percentages provided by the employers "precluded the finding of a Title VII violation." The Court in effect was ruling that "the results of the written examination alone was insufficient to support a *prima facie* case of disparate impact in violation of Title VII".[97]

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[93] 54.17% of the blacks who wrote passed as compared to 79.54% of the whites who wrote that passed.

[94] 457 US 440 (1982) at 444.

[95] Of the 48 identified black candidates who participated in the selection process, 22.9 percent were promoted (as compared to 13.5% of the white population).

[96] 457 US 440 (1982) at 444.

[97] *Ibid* at 445.

The United States Court of Appeals, however, reversed the decision of the lower court and stated that the "bottom line" results does not prevent employees from establishing a *prima facie* case. Neither does it provide an employer with a defense to such a case.

The Supreme Court referred to the *Griggs* judgement where the court had relied on s703(a)(2) of the 1964 CRA. The Court stated that the focus of this section was on employment practices, policies and tests that denied equal employment opportunities.

Thus in this particular case the written examination represented a bar or "barrier" to equal employment opportunities. The fact that the final number of blacks promoted was greater than the number of whites promoted was considered irrelevant by the court. The Supreme Court stated:

> The suggestion that disparate impact should be measured only at the bottom line ignores the fact that Title VII guarantees those individual respondents the *opportunity* to compete equally with white workers on the basis of job-related criteria.[98]

The case also clarified the group versus individual debate surrounding disparate impact cases. The Supreme Court made specific reference to s 703(a)(2) of the 1964 CRA which prohibited employment practices "that would deprive or tend to deprive *any individual* of employment opportunities". The Court stated unambiguously that "the principal focus of the statute is the protection of the individual employee, rather than the protection of the minority group as a whole. Indeed, the entire statute and its legislative history are replete with reference to protection for the individual".[99]

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[98] *Ibid* at 451.

[99] *Ibid* at 453-454.

> It is clear that Congress never intended to give an employer license to discriminate against some employees on the basis of race or sex merely because he favorably treats other members of the employees group...[100]

Therefore according to the *Teal* judgment, "bottom-line" statistics could never be a defence to disparate impact cases as a racially balanced workforce will not prevent an employer from being liable for acts of discrimination that tend to have an adverse impact on certain individuals of a group.

This Supreme Court decision was followed in the *Wards Cove Packing v Antonio* judgment. The Court confirmed the *Teal* judgment by stating that "an employer cannot escape liability under Title VII by demonstrating that, 'at the bottom line', his work force is racially balanced.."[101]

However, the *Wards Cove* judgment went a step further by stating that this bottom-line argument does not apply exclusively to employers. The Court reasoned that complainants would also be prevented from using bottom-line statistics in proving disparate impact. This leads to a discussion of what has been referred to as the particularity rule.

4.3.4 The Particularity Rule

In 1989 the Supreme Court addressed the situation where employment selection is made on the basis of a variety of factors. The imperative question was whether

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100 *Ibid* at 455. The Court stated further that "In Phillips v Martin Marietta Corp., we recognized that a rule barring employment of all married women with preschool children, if not a bona fide occupational qualification under s 703(e), violated Title VII, even though female applicants without prescool children were hired in sufficient numbers that they constituted 75 to 80 percent of the persons employed in the position that the plaintiff sought".

101 490 US 642 (1989) at 656.

a plaintiff could prove disparate impact by establishing that the selection process in general had created a racial imbalance in the workforce *or* was it necessary for a plaintiff to identify the particular practice that caused the racial disparity.

The Supreme Court took the view that disparate impact could not be established by "showing that 'at the bottom-line' there is racial *imbalance* in the workforce".[102] In order to impart liability to an employer a complainant had to identify the particular policy or hiring requirement that was responsible for the disparate impact. The Supreme Court stated that "as a general matter, a plaintiff must demonstrate that it is the application of a specific or particular employment practice that has created the disparate impact under attack. Such a showing is an integral part of the plaintiff's *prima facie* case in a disparate impact suit under Title VII".[103]

In applying this ruling to the facts of *Wards Cove* the Court stated that in attacking the various objective and subjective practices of the employer the "respondents will also have to demonstrate that the disparity that they complain of is the result of the one or more employment practices that they are attacking here, specifically showing that each challenged practice has a significantly disparate impact on employment opportunites for whites and nonwhites".[104]

This section of the *Wards Cove* judgment was modified to some extent by the 1991 CRA. Section 703(k)(1)(B) of the Act states:

> (i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except if the complaining party can demonstrate to the court that the

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102 *Ibid* at 657.

103 *Ibid.*

104 *Ibid.*

elements of the respondent's decisionmaking process are not capable of seperation for analysis, the decision making process may be analysed as one employment practice.

(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

Therefore although the 1991 CRA confirmed the particularity rule it recognised the difficulties that such a rule posed to complainants and provided a measure of protection for complainants who could not separate a particular employment practice from the general decision-making process.

Although this exception to the particularity rule can be commended, it should be noted that the burden placed on complainants to, firstly, identify particular practices and, secondly, provide statistics that indicate the disparate impact of such practices is unduly heavy. These decisions seem to be moving in a direction whereby it is becoming increasingly difficult for complainants to prove a prima facie case of discrimination. This is made more problematic by the fact that a substantial proportion of the information required to prove a *prima facie* case of disparate impact is within the exclusive knowledge of the employer and thus inaccessible to the worker/s.

4.3.5 The employer's defence of Business Necessity

As discussed earlier, the landmark case of *Griggs* formulated the defence to a disparate impact claim. In stating that "[t]he touchstone is business necessity"[105] the Court did not envisage the problems and confusion that would follow in the trail of its judgment. The root of the confusion was the statement that immediately followed the introduction of "business necessity" as a defence. In explaining business necessity the *Griggs* Court stated that "[i]f an employment practice which operates to exclude Negroes cannot be shown to be related to job

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105 401 US 424 (1971) at 431.

performance, the practice is prohibited".[106] Thus the concept of "job relatedness" was also introduced.

This "interchangeability of terms"[107] resulted in great confusion and a semantic debate that had a profound effect on the judicial decisions that followed *Griggs*. The central issue surrounding this debate was whether the use of both these terms meant that they were to be "viewed as requiring only that an employer prove that his employment practices are legitimately related to job performance"[108] or whether by using the word "necessity," it was requiring some showing of essentiality to the operation of the business?"[109]

Initially, "business necessity" was construed as meaning "job relatedness". Shlei and Grossman suggest that the reason for this interpretation could lie in the fact that other language used in *Griggs*, for instance "a reasonable measure of job performance"[110] and the Court's reference to the EEOC Guidelines which provide that selection tests must be "significantly correlated with important elements of work behaviour which comprise or are relevant to the job"[111] led to this conclusion. However, it may also sucessfully be argued that there was reference to vocabulary that would lead one to conclude that the Court in referring to "business necessity" construed this as meaning the operational requirements of the business. Example of such language is the reference to "genuine business

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106 *Ibid.*

107 Shlei and Grossman (1983) at 113.

108 *Contreras v City of Los Angeles*, 656 F.2d 1267 at 1278-79, 25 FEP at 873 (9th Cir, 1981).

109 Shlei and Grossman (1983) at 113.

110 401 US 424 (1971) at 436.

111 EEOC Guidelines on Employee Selection Procedures, 29 CFR s 1607 35 FED REG. 12333 (1970) quoted in *Griggs* 401 U.S. 424 (1971) at 433 [footnote 9].

need".[112]

This situation was addressed by the Supreme Court decision of ***Albermarle Paper Co. v Moody***.[113] In this case the Court in addressing the issue of "job relatedness" referred to "a manifest relationship to the employment in question"[114] and ignored the concept of business necessity.

Albermarle had required applicants for employment in the skilled lines of progression to have a high school diploma and to pass two tests.[115] The central issue in this case was whether the results of the validation study, undertaken by the Company to study the "job relatedness" of its testing programme, constituted a valid defence to the claim of disparate impact. The study compared the test scores of current employees with the assessment of their competence by their relevant supervisors. This was done in ten job groupings selected from the middle to top spectrum of the workforce. The study revealed that there existed a "significant statistical correlation" between the ratings of the supervisors and the scoring of the tests.[116]

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112 401 US 424 (1971) at 432.

113 422 US 405 (1975).

114 *Ibid* at 425.

115 The Revised Beta Examination, allegedly a measure of nonverbal intelligence and the Wonderlic Personnel Test (available in alternative Forms A and B), allegedly a measure of verbal facility.

116 The significant correlation with supervisorial ratings in three job groupings for the Beta test, in seven job groupings for either Form A or Form B of the Wonderlic Test, and in two job groupings for the required battery of both the Beta and the Wonderlic Tests.

The District Court ruled that it had been proved that the tests were job related. The Court of Appeals stated that the Lower Court had erred in its decision.

The Supreme Court addressed the question of whether the employer had shown its tests to be job related and referred to the *Griggs* judgment:

> Nothing in the Act precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance. What Congress has commanded is that any tests used must measure the person for the job and not the person in abstract.[117]

Further, the Court made reference to the "Guidelines" issued by the EEOC for employers seeking to determine, through professional validation studies, whether their employment tests are job related.

> The message of these Guidelines is the same as that of the Griggs case - that discriminatory tests are impermissable unless shown, by professionally acceptable methods, to be " predictive of or **significantly correlated** with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated.[own emphasis added].[118]

In applying these Guidelines the Supreme Court ruled that the employer's validation study had failed to satisfy the job relatedness requirement. There were several reasons for this conclusion. Firstly, there was no significant correlation between the test scores and the supervisors' ratings. The Court stated that "the study's checkered results..."[119] would not entitle Albermarle to impose its

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117 401 US 424 (1971) at 436.

118 29 CFR s 1607.4(c).

119 The Beta Exam showed a correlation in only three of eight lines of job progression. In terms of the Wonderlic tests Form A and Form B, only one of the forms showed significant correlation and this was in respect of only four job grades. In two of the studied job grades no significant correlation could be shown.

testing programme under the Guidelines. Secondly, the validation study compared test scores to the subjective ratings of supervisors. The Court stated that the standard against which the supervisors were required to rank employees "was extremely vague and fatally open to divergent interpretations".[120]

The Court stated:

> There was no way of knowing precisely what critieria of job performance the supervisors were considering, whether each of the supervisors was considering the same criteria or whether, indeed, any of the supervisors actually applied a focused and stable body of criteria of any kind.[121]

Thirdly, the company focused its study on job groupings that were situated at the top end of the line of job progressions. The Court regarded this as fatal to the legitimacy of the validation study. The Supreme Court stated:

> The fact that the best of those employees working near a top of a line of progression score well on a test does not necessarily mean that the test or some particular cutoff score on the test, is a permissible measure of the minimal qualifications of new workers entering lower level jobs.[122]

Thus the Court suggested that this method of testing should rather be utilised as a "promotion device, rather than as a screen for entry into low-level jobs".[123]

Finally, the validation study's selected pool of study comprised of experienced white employees. However, in practice the test was applied to all new job

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120 422 US 405 (1975) at 433. The court also stated that "supervisors were asked in each of the groupings to determine which ones [employees] they felt irrespective of the job they were actually doing, but in their respective jobs, did a better job than the person they were rated against" [*ibid*].

121 *Ibid.*

122 *Ibid* at 434.

123 *Ibid.*

applicants who were "younger, largely inexperienced, and in many instances nonwhite".[124] Therefore since the test was applied at the threshold of employment, the fact that a correlation was shown between the test results and supervisor ratings at the top of the employment spectrum, does not in itself prove that these tests were related to the jobs of applicants in the lower skills line progression at the Company.

The *Albermarle* judgment succinctly indicated that the Supreme Court would approach the employer's defence of job relatedness with caution. It also indicated that employers would not be able to absolve themselves from liability in disparate impact suits merely by contracting a professional to conduct a validation study. The approach of the Court here suggested that validation study results would not be readily accepted. Instead these results and the manner in which the study was conducted would be scrutinised.

It was also a significant judgment in that the appropriate standard of proof of job relatedness had been characterised by vagueness in past judgments. Although *Albermarle* did not take a direct approach of defining "job relatedness", its reference and reliance on the EEOC guidelines, as well as its' discussion of the reasons for refuting the defence in this instance, provided the Supreme Court with a significant precedent with respect to the job relatedness defence.

However, this was to change dramatically in the following year with the Supreme Court Judgment of ***Washington v Davis***[125] which also examined the issue of job relatedness.

The District of Columbia police department required for admission to its police academy a high school diploma and a 50 percent pass on a "Test 21" developed by the United States Civil Service Commission to measure "verbal ability,

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124 *Ibid* at 435.

125 426 US 229 (1976).

vocabulary, reading and comprehension."[126]

The District Court ruled that the test had an adverse impact on black applicants. The Court of Appeals, however, reversed the lower court's decision, finding that the test was valid.

The Supreme Court addressed the issue of the "job relatedness" of the test. The Court concluded that minimum verbal and communicative skill would be "very *useful, if not essential*, to satifactory progress in the training regimen".[127]

Agreeing with the District Court's decision, the Supreme Court stated:

> Test 21 was directly related to the requirements of the police training program and that a positive relationship between the test and the training course performance was sufficient to validate the former, wholly aside from its possible relationship to actual performance as a police officer.[128]

Therefore the court in declining to follow the EEOC guidelines, applied a "usefulness" test. The implication of this approach was significant. The vocabulary used in the EEOC guidelines and followed in *Albermarle* was "significant correlation". The *Griggs* judgment referred to the "manifest relationship"of the requirement to the job. Therefore the EEOC guidelines and the Supreme Court decisions prior to *Davis* envisaged the defence of "job relatedness" as a strict standard whereby a requirement could not be validated unless it was essential for the performance of the job in question. The *Davis* judgment made a significant departure from this approach by lowering the strict standard of essentiality. It has been observed that:

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126 *Ibid* at 235.

127 *Ibid* at 250.

128 *Ibid.*

> Business "necessity" was apparently a matter of whether the criterion in issue had a reasonable relationship to the job in issue."[129]

This issue was also addressed in the *Wards Cove* decision where the court stated:

> the dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer. The touchstone of this inquiry is a reasoned review of the employer's justification for his use of the challenged practice. A mere insubstantial justification in this regard will not suffice, because such a low standard of review would permit discrimination to be practiced through the use of spurious, seemingly neutral employment practices. At the same time,though, there is no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business for it to pass the muster.[130]

According to Shlei and Grossman[131], this reference to "legitimate employment goals" as well the statement by the Court in *Dothard v Rawlinson* in a footnote that selection devices must be "necessary to safe and efficient job performance".[132] indicates "business necessity" had moved away from the *Albermarle* approach of a legitimate relevance to job performance. The nature of the defence was now characterised by the operational requirements of the business.

The *Wards* judgment was "seen by many as an evisceration of the entire disparate impact theory".[133] The case "radically redefined the defence of business necessity by taking out "necessity" and replacing it with the notion of reasonable employer justification".[134]

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129 Cox P.N *Employment Discrimination* (1987) at 7-36 - 7-37.

130 490 US 642 (1989) at 659.

131 Shlei and Grossman (1983) at 113.

132 433 US 321 (1977) at 332, footnote 14.

133 Zimmer *et al* (1994) at 361.

134 *Ibid* at 426.

> The touchstone of this inquiry is a reasoned review of the employer's justification for his use of the challenged practice...[T]here is no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business for it to pass the muster.[135]

This judgment received severe critcism. In fact "the major thrust of the Civil rights Act of 1991 was to overturn these aspects of *Wards Cove...*"[136] Congress rejected the ruling by the *Wards Cove* Court that a practice need not be essential or indispensable. The 1991 CRA returned to the *Griggs* formulated concepts of "business necessity" and "job relatedness".[137] However, instead of clarifying the issue, this return to "concepts .... enunciated by the Supreme Court in *Griggs* ... and in other Supreme Court decisions prior to *Wards Cove Packing*..."[138] led to a return of a barrage of critical comments regarding the interchangeable use of these concepts.

Thus the CRA of 1991 proved to be a legislative disappointment with regard to the defence of business necessity. Having identified the problem that *Wards Cove* had introduced by lowering the standard of proof to reasonableness, a great deal of faith was placed in this piece of legislation to clarify the defence of "job relatedness". Regrettably, however this faith was misplaced. It is hoped that the characteristic innovative style of the courts in America will clarify this situation.

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135 490 US 642 (1989) at 659.

136 Zimmer *et al* (1994) at 426.

137 See s 703(k)(1)(A) where it is provided that "an unlawful employment practice based on disparate impact" occurs when (i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basi of race, color, religion,sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity".

138 Zimmer *et al* (1994) at 427.

4.3.6 Burden of proof

The paradigm judgment of *Griggs* approached the issue of the onus of proof in a disparate impact case in the same simplistic manner in which it approached other issues in the case.

The Supreme Court in the *Albermarle* decision succinctly summarised the position taken by the *Griggs* court with regards to the onus of proof.

> In Griggs v. Duke Power Co. this Court unanimously held that Title VII forbids the use of employment tests that are discriminatory in effect unless the employer meets " the burden of showing that any given requirement [has]...a manifest relationship to the employment in question." This burden arises ofcourse, only after the complaining party or class has made out a prima facie case of discrimination, i.e.,has shown that the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants.[139]

Therefore the complainant bears the inital burden of proof. He/she has to prove a *prima face* case of discrimination by establishing that the requirement or condition in question has a disparate impact on the particular group of persons to which the applicant belongs. Once the complainant has been successful in discharging this burden, the onus shifts to the employer to defend the employment practice as having a "manifest relationship to the employment in question".

However, the *Albermarle* court took this two-stage process a step further in the following manner.

> If the employer does then meet the burden of proving that its tests are "job related," it remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in effecient and trustworthy workmanship." Such a showing would be evidence

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139 422 US 405 (1975) at 425.

that the employer was using its tests merely as a "pretext" for discrimination."[140]

Thus the Court introduced the concept of "alternative practices". The complainant would in this instance bear the burden of proving that these alternative practices could accomplish the same goals that the employer stated was necessary for the efficient running of his business, without the disparate impact on the complainant. Although, perhaps it was intended as a means of providing the complainant with another opportunity to substantiate his case, it did place a significant burden on a complainant who would have to provide evidence which was not always easily ascertainable. Further the provision of alternative practices operates on the premise that a worker is knowledgable with respect to employment practices. This is usually an employer's field of expertise. Thus once again the complainant met with difficulties.

The 1991 CRA did little to reduce the impact of these difficulties. The Act returned to pre-*Wards Cove* decisions. This effectively meant that since the introduction of alternative practices emerged prior to *Wards,* this feature of disparate impact discrimination remained.

Expanding on the onus of proof issue, the Court in *Dothard* stated that the burden of justifying the employment practice was a burden of production and not a burden of persuasion. The Court stated that the burden of persuasion remained with the plaintiff. What the *Dothard* Court meant by this was the employer merely had to provide a business justificated reason. The employer did not bear the burden of persuading the Court that this was a justifiable reason. This onus was borne by the plaintiff.

The *Wards Cove* decision confirmed this judgment and provided a reason for adopting this approach.

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140 *Ibid.*

> ...To the extent that [other] cases speak of an employer' "burden of proof" with respect to a legitimate business justification defense, see, *e.g. Dothard v. Rawlinson*, they should have been understood to mean an employer's production - but not persuasion - burden. The persuasion here must remain with the plaintiff, for it is he who must prove that it was "because of such individual's race, color," etc., that he was denied a desired employment opportunity.[141]

Relying on the *Albermarle* and *Watson* judgments, the Court stated that despite the fact that an employer may be successful in establishing a business necessity defence, the complainants may still have a chance of succeeding with their case. This can be achieved by providing alternative tests or selection devices which "would also serve the employer's legitimate [hiring] interest[s], [but] without a similarly undesirable racial effect".[142]

The Court stated that if the complainants afforded alternatives to petitioners' hiring practices that reduce the racially-disparate impact of practices currently being used and the employer refused to adopt these alternative practices, this would lead to an inference that employer's reason for adopting the practice at issue was a discriminatory one.

However, the *Wards Cove* Court softened the blow of this judgment on employers by cautioning the Court about adopting such alternatives.

> "Courts are generally less competent than employers to restructure business practices," *Furnco Construction Corp. v. Waters* , 438 U.S. 567, 578, 98 S.Ct. 2943, 2950, 57 L.Ed.2d 957 (1978); consequently the judiciary should proceed with care before mandating that an employer must adopt a plaintiff's alternate selection or hiring practice....[143]

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141 490 US 642 (1989) at 660.

142 *Ibid* .

143 *Ibid* at 661.

The Court was effectively saying that business should be left to the business world and the limited expertise of the courts in this arena should encourage cautious decisions in the adoption of proposed alternative practices.

Further the Court stated that "[f]actors such as the cost or other burdens of proposed alternative selection devices are relevant in determining whether they would be equally effective as the challenged practice in serving the employer's legitimate business goals".[144]

The above statement leaves little doubt as to why this judgment has been the focus of much active debate and criticism. The Court was encouraging the prioritisation of cost and efficiency factors over the effects of adverse impact discrimination.

It is no doubt understandable why the *Wards Cove* decision did not enjoy a very long judicial history. The Civil Rights Act of 1991 overruled this judgement to a significant extent. According to Zimmer et al "[t]he overiding purpose of the new statute is to provide statutory authority and provide statutory guidelines for the adjudication of disparate impact suits under Title VII."[145]

The 1991 CRA addressed the issue of onus of proof and provided the following ammendments. Once the complainant had established the disparate impact, the burden of proof shifted to the employer who had to "demonstrate" that "the challenged practice is job related for the position in question and consistent with business necessity."[146] This burden was now extended to include the burden of persuasion as well as production.[147]

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144 *Ibid.*

145 Zimmer *et al* (1994) at 361-362.

146 United States Civil Rights Act of 1991: section 3(3).

147 The statute defines demonstrate as "meets the burden of production and persuasion" (see s 701 (m) of the Civil Rights Act of 1991).

4.3.7 Conclusion

Thus it clearly evident that although disparate impact originally developed as a relatively simple idea, it has evolved into a highly sophisticated concept. Although *Griggs* was criticised by later decisions, as being an over-simplistic judgment that ignored several important issues, there is a lot to be said for simplicity. This is especially so since the sophistication that has characterised later judgments has brought with it a difficulty and uncertainty that has had a significant effect on disparate impact suits.

4.4 BRITAIN

The concept of indirect discrimination first appeared in Britain in 1975 by means of the Sex Discrimination Act of 1975. This was largely due to the influence of the United States.[148] However, beyond the adoption of the central principles regarding indirect discrimination as formulated by *Griggs*, British case law on indirect discrimination developed very much as a result of the practice of the British judiciary to give effect to the specific provisions as laid down in the legislation. This was in distinct contrast to the American approach of giving effect to the general intention of the legislation.

According to the British Sex Discrimination Act of 1975 (hereafter referred to as the SDA):

> A person discriminates against a woman in any circumstances relevant for the purposes of any provision of this Act if-.....
>
> (b) he applies to her a requirement or condition which he applies equally to a man but-
>
> (i) which is such that the proportion of women who can comply with it is considerably smaller than the proportion of men who can comply with it, and
>
> (ii) which he cannot show to be justifiable irrespective of the sex of the person to

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148 When the Sex Discrimination Bill was introduced in 1974, it provided for direct discrimination only. It was only after the British Home Secretary's visit to the US that indirect discrimination was included in this bill. (see Hunter (1992) at 21).

whom it is applied, and

(iii) which is to her detriment because she cannot comply with it.[149]

From the above legislation, several important features regarding the law on indirect discrimination comes to the fore.

Firstly, unlike the United States, the concept of indirect discrimination developed in Britain as a result of its legislative introduction and not through the initiatives of the British courts. In fact it can been argued that the British courts were better equipped at the out set, to deal with indirect discrimination cases because of the existence of a statute that explicitly set out the manner in which indirect discrimination cases were to be proved.

Secondly, although the general principles of *Griggs* were influential in the drawing of this legislation, this "definition of indirect discrimination is not a direct transcription from the formulation of adverse impact dicrimination in Griggs."[150]

There were two significant departures from US law. The first was the widening of the defense of "business necessity" or "job relatedness". Under British law this defense is "justifiablity irrespective of sex". Thus according to Hunter, "something not strictly necessary could be justifiable".[151] The second departure was the addition of the requirement that the complainant must have suffered a detriment.[152] The implications of these departures from American law will be examined later in this section.

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149 A similar section appeared in the UK Race Relations Act of 1976 as well.

150 Hunter (1992) at 22.

151 *Ibid* at 26 citing McCrudden C "Institutional Discrimination" (1982) 2 *Oxford Journal Of Legal Studies* 303 at 375-8.

152 According to Hunter, the reasoning behind this requirement was to ensure that the legislation was invoked by "genuine victims" and not merely "concerned citizens" (1992) at 22.

This section will briefly examine the various elements as set out in the SDA and the problems experienced with regards to these elements.

4.4.1 The application of a requirement or condition

Initially, the British courts' interpretation of this element was liberal. This liberal approach was indicated by the acceptance by British courts of a wide variety of requirements and conditions. Some examples which indicate this liberal approach are the following:

1. A redundancy agreement with the trade union that provided for part-time workers to be retrenched first.[153]
2. A requirement that all employees work on a full time basis.[154]
3. A requirement that applicants for a position must be between the ages of 17 and 28.[155]
4. The requirement that applicants for a job should not have young children.[156]
5. A refusal to hire people living in a particular area.[157]

However, this liberal approach was curtailed by a Court of Appeal decision in *Perera v Civil Service Commission and Department of Customs and Excise,* which

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153 *Clarke v Eley (IMI) Kynoch Ltd* (1982) *IRLR* 482 (EAT). The court ruled that the proportion of women who could fulfil the requirement to work full time was considerably smaller than the proportion of men.

154 *The Home Office v Holmes* (1984) *IRLR* 299 (EAT). The applicant in this case could not fulfil this requirement after the birth of her child.

155 *Price v Civil Service Commission* (1977) *IRLR* 291 (EAT).

156 *Hurley v Mustoe* (1981) *IRLR* 208 (EAT).

157 *Hussein v Saints Complete House Furnishers Ltd* (1979) *IRLR* 337. This case involved the refusal of an employer to hire people living in an area in Liverpool where the majority (50%) of the population was black.

ruled that a requirement or condition must act as an absolute bar to employment or continued employment. The effect of this decision was that mere preferences was not sufficient to establish the existence of a requirement or condition.[158]

This decision was also followed in ***Meer v London Borough of Tower Hamlets***.[159] The Court of Appeal confirmed the lower court decision that the criterion which related to previous experience at Tower Hamlet was not a "must" that is not an absolute bar to employment. It was merely a preference of the employer. It was therefore not a condition or requirement within the meaning of s. 1(1)(b).

The implication of these decisions is that "employers are given a wide prerogative in matters of selection and promotion".[160] Where criteria are expressed as mere preferences rather than an absolute bar to employment, applicants who are indirectly discriminated against as a result of these "preferences" will have no recourse in terms of the law.

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158 *Perera v Civil Service Commission and Department of Customs and Excise* (No 2) (1983) *IRLR* 166 (CA). In this case a number of selection criteria were used. These included age; practical experience in England; ability to communicate in English etc. The court stated that these requirements were not absolute "musts" without which the applicant would not succeed. The court reasoned that an applicant who could not communicate in English could still be successful if he/she scored highly with regard to the other factors.

159 (1988) *IRLR* 399 (CA). This case involved an application by Mr Meer for the position of Head of the legal department with Tower Hamlets. There were 23 applicants for the position and 12 were selected for "long-listing". Mr Meer was not selected. The criteria for long-listing was: age; date of admission as a solicitor, present post, current salary, local government experience, London government experience, length in present post, and Tower Hamlets experience. All the applicants who had Tower Hamlet experience were placed on the long-list. Mr Meer contended that this was a requirement that indirectly discriminated against applicants of Indian origin. He relied on s. 1 (1) (b) and s. 4(1) (a) of the Race Relations Act of 1976.

160 Painter & Puttick (1993) at 136.

It has been observed that "this approach risks undercutting the entire indirect discrimination concept...,"[161] since very few hiring practices operate as absolute bars to employment. Further an employer who is faced with a indirect discrimination charge could successfully claim that a hiring procedure was a preference rather than a bar to employment. Because selection processes often operate in a clandestine manner where the exact reason for the success or failure is unknown to the candidiate, it would be difficult to refute such a claim.

Recognising the problems inherent in this element of an indirect discrimination case, there have been suggestions and proposals by the Commission for Racial Equality and the Equal Opportunities Commission that the wording of the relevant Acts be expanded to include any *practice,policy or situation* which has an adverse impact on one sex or racial group should amount to indirect discrimination.[162]

Despite these proposals, the decisions in *Perera* and *Meer* were followed in the 1989 decision of *Clymo v Wandsworth London Borough Council.*[163] The Court ruled the refusal of the employer to allow the employee to job-share and the insistence on full-time employment was not a condition or requirement. It was rather "the nature of the job". The implication of the judgment was that if a particular "condition" was part of the nature of the job, i.e an inseparable feature of the job, then it would not be considered a requirement in terms of the SDA.

The uncertainty surrounding the Court's interpretation of "requirement or condition" is evidenced by a Northern Ireland Court of Appeal decision in *Briggs*

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161 *Ibid* citing Byre A *Indirect Discrimination* (1987).

162 This was the proposal of the Commission for Racial Equality in 1985 in *Review of the Race Relations Act 1976 : Proposals for Change;* and the Equal Opportunities Commission in 1988 in *Equal Treatment for Men and Women : Strengthening the Acts.*

163 (1989) *IRLR* 241.

v North Eastern Education and Library Board[164] where the court held that the after-school attendance was a "requirement" or "condition". The court stated that the fact that the nature of a job requires full time attendance does exclude after-hours attendance from being regarded as a requirement in terms of the Act.

Although *Briggs* was not a British case, European trends do not go unnoticed in Britain. Britain's position as a member of the European Community means that British national laws must maintain the standards set by the Community. Therefore the manner in which the element of "requirement or condition" is interpreted in the European Court of Justice will strongly influence British interpretations.[165] This is an indication that Britain will move towards towards the adoption of the principles as set out in the proposals of the Commission for Racial Equality and the Equal Opportunities Commission, as these principles are in line with European Community principles.

The implication of this interpretation for the plaintiff is significant. This extension of the meaning of requirement and/or condition to a practice, policy or situation will bring a diversity of employment practices under attack and simplify the process of proof for the plaintiff. However, the use of the word "situation" may result in the casting of too wide a net. The consequences of this broad approach may result in additional interpretative problems.

4.4.2 Can a considerably smaller proportion of the protected group comply with the requirement or condition?

There were two problematic issues that emerged under this requirement. Firstly,

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164 (1990) *IRLR* 181. Briggs, a school teacher was required to paticipate in extra-curricular teaching duties after school hours. She requested relief from these duties after the adoption of a baby. She was told that this request would be granted but that she would receive a demotion as a result of it. Briggs argued that this requirement of after school attendance had an adverse impact on women.

165 Hunter (1992) at 23.

how does the complainant prove the disparate impact of the condition, that is that there is "a considerably smaller proportion of the protected group" who can comply. And secondly, what is the meaning of "can comply"?

In proving that the proportion of one sex/race group that can comply with the condition or requirement is considerably smaller, the use of statistical evidence is allowed. However, unlike the American approach where statistical evidence is regarded as imperative in proving this element, British courts have taken the approach that statistical evidence is not essential in proving this element if it is possible to do so without their use.[166] Noting the problems assosciated with statistical proof in the US, this informal method of proving disparate impact has definite advantages for the British plaintiff who is not burdened with gathering complex data.[167]

A further issue facing British courts was the dilemma of deciding on the correct "pool" for comparison. In *Price v Civil Service Commission* the EAT held that the appropriate comparison was between men and women who possessed the necessary qualification. The reason afforded for limiting the "pool" to people who possessed the necessary qulaifications was because it was only this group that could be adversley affected by the age requirement.

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166 *Perera v Civil Service Commission and Department Of Customs and Excise*(No2) (1983) *IRLR* 166 (CA) and *Briggs v North Eastern Education and Library Board* (1990) *IRLR* 181 (NICA) where the court stated that tribunals were not barred from taking their own knowledge and experience into account in determining whether a requirement or condition had a disparate impact on a protected group.

167 See also O' Donovan K and Szyszczak E " Indirect Discrimination - Taking a Concept to Market - II" (1985) *New Law Journal* 42 at 42 where it was said that ..."there is a growing tendency for tribunals to rely on common sense knowledge rather than hard empirical evidence."

This early decision was confirmed in *Pearse v City of Bradford Metrapolitan Council*[168]. Ms Pearse was a part-time lecturer who was unable to apply for a full time post at the college where she worked because the only persons eligible to apply were full-time employees of the local authority. Pearse submitted statistical evidence which showed that only 21.8 per cent of the female academic staff employed by the college worked on a full-time basis as compared to 46.7 per cent of the male staff who worked full-time. The court, however, rejected the selected pool of comparison. The EAT ruled that the correct pool for comparison would have been those with the appropriate qualifications for the post, rather than the those who were eligible because of the full-time nature of their employment.

Although these judgements confirmed each other, consistency in the approach of choosing the correct pool of comparison was hindered by the EAT decision in *Kidd v DRG (UK) Ltd.*[169] The court held that the choice of a correct pool was an issue of fact within the discretion of the tribunal. The advantage of this approach would be the flexibility that would allow consideration of the circumstances of individual cases. However, there are inherent dangers in this approach. Consistency in the application of principles will be hindered. Further too much faith is placed in the tribunals to apply its discretion without any formula or principles to base its decision.

The *Kidd* court held further that on the issue of how small a proportion should be before it can be regarded as considerable was also a matter of personal opinion. This has differed greatly from the US position where the courts tend to abide by the eighty per cent rule or 4/5 rule as proposed by the EEOC. Although there are problems with this American approach, the dangers involved in an approach that relies on personal opinion are all too clear. Personal opinion allows the infiltration of subjective elements which hinder consisitency in the law.

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168 (1988) *IRLR* 379.

169 (1985) *IRLR* 190 (EAT).

Mandla v Lee the court examined whether a Sikh schoolboy could comply with the school's uniform requirement and remove his turban. The court ruled that "can comply" should be interpreted as meaning "can in practice" or "can consistently with the customs and cultural conditions of the racial group".[170] It should not be misinterpreted or misconstured as meaning "theoretically possible".

This was also the decision in *Price v The Civil Service Commission and Society of Civil and Public Servants*.[171] The EAT ruled that "It should not be said that a person 'can' do something merely because it is *theoretically possible* for him to do so; it is necessary to see whether he can do so *in practice*".[172] Thus although it was theoretically possible for a woman to meet the maximum age requirement of 28 years by not having children during these years, it was not possible in practice.

These decisions are of great significance to sex and gender discrimination. Often women can theoretically work on a full-time basis. However, the obligations that women face outside work make this impossible in practice. This approach takes into account the real situation of women and must be commended.

4.4.3 Has the condition or requirement operated to the detriment of the complainant?

Race and sex legislation in Britain has included the additional element of suffering a detriment. Therefore, under British law it is insufficient to show that a condition or requirement has an adverse impact. The complaining party must also show that he/she has been disadvantaged by this requirement or condition. The underlying

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170 (1983) 2 AC 548 at 565-566.

171 1978 ICR 27 at 31.

172 In *Price* the employer argued that it is possible for women not to have children in their 20's. This would enable them to comply with the civil service maximum entry age of 28. Although this was possible in theory, it was impossible in practice.

motive behind the inclusion of the element is to separate the real victims from concerned citizens and to "prevent hypothetical test cases from swamping the tribunals".[173]

4.4.4 Can the Employer Justify the Condition or Requirement?

In Britain the defence available to an employee once the employee has proved a *prima facie* case of indirect discrimination is that the requirement or condition which has been applied must be justifiable irrespective of the gender, race or marital status of the person to whom it is applied.

Initially, the courts approach was in line with the *Griggs* judgement. In *Steel v The Post Office*[174] the EAT stated that a practice is not justifiable unless its discrimnatory effect is justified by the *need, not convenience,* of the business or enterprise.

However, in *Ojutiku and Oburoni v Manpower Services Commission*[175] the necessity defence was substantially weakened when the Court of Appeal took the view that where a person produces reasons for doing something which would be acceptable to right thinking people as sound and tolerable reasons for doing so, then he has justified his conduct. This effectively diluted the test of justifiability[176] and in effect reduced the burden on the employer.

However, in *Hampson v Department of Science*[177] the Court of Appeal in supporting the dissenting judgement of Lord Justice Stephenson in *Ojutiku* ruled

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173 Painter & Puttick (1993) at 139.

174 (1977) *IRLR* 288.

175 (1982) *IRLR* 418.

176 Painter & Puttick (1993) at 139.

177 (1989) *IRLR* 69.

that the test for justifability requires striking a balance between the discriminatory effect of the condition or requirement and the needs of the employer.

Although the *Hampson* judgment can be commended for its departure from *Ojutiku*, it resulted in the creation of another problem. This problem was formulated as follows:

> The difficulty is that in balancing the employer's needs against those of a women who has suffered discrimnatory treatment, corporate needs may automatiically assume greater weight.[178]

The "balancing of interests approach" is thus problematic especially in the British context where courts are accustomed to applying "well adjusted" laws.[179] Thus it is clearly evident that in adapting the adverse impact model to the British system, some of the problems experienced in America in proving indirect discrimination were avoided. However, in the same instance new problems in proving indirect discrimination arose that were distinctively British. Therefore, the British Courts in their attempt to avoid the problems experienced in America, created several new problems for themselves.

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178 Painter & Puttick (1993) at 140 citing Morris and Nott *Working Women and the Law : Equality and Discrimination in Theory and Practice* (1991) at 88.

179 See Hervey T.K "Justification for indirect discrimination in employment: European and UK law compared" (1991) Vol 40 *International and Comparative Law Quarterly* 807 at 810 where the European Court decision of *Bilka- Kaufhaus v Weber von Hartz* /[1986) 2 C.M.L.R. 701 is discussed. The case represented a return to the strict standard of *Griggs* by formulating an objective justification test which comprises of the following elements : an objective criterion; a genuine need; suitable and necessary for that purpose. The author does, however, state that later British decisions indicate a reluctance to follow the E.C. decision.

4.5 CONCLUDING REMARKS

A discussion of the law and case development in America and Britain was necessary for two reasons. It indicates the manner in which the indirect discrimination concept adopts a significantly different character as a result of the influence of the legislative and judicial systems of that country. Also it indicates that often a problem addressed in one country may be ignored in another.

Thus the discussion of the development of indirect or adverse impact discrimination in the major countries of the Western world has brought to the fore important legal principles and problems experienced in proving indirect discrimination. However, integral to the sucess of any indirect discrimination legislation is the ability of protected groups such as women to recognize a situation in which they have been indirectly discriminated. This can only be achieved by identifing the policy or condition or requirement that is the cause of the alleged adverse impact.

5 EMPLOYMENT CONDITIONS AND REQUIREMENTS THAT INDIRECTLY DISCRIMINATE AGAINST WOMEN IN EMPLOYMENT

This identification of the discriminatory policy or condition of employment is of great significance when dealing with sex and gender discrimination. Social perceptions and stereotypes about women have resulted in a situation where these requirements or conditions have been internalized by the workplace to the extent that they are often viewed by employers and employees as "normal, natural, common".

Thus even with the introduction of indirect discrimnation legislation these conditions and requirements continue to dominate the employment arena because

of their "accepted" status. Often they will operate in a manner which deters female applicants from applying in the first instance.

Therefore it is imperative that this study include an identification and examination of the conditions and requirements that have an adverse impact on women in employment.[180] The purpose of this section is to create an awareness of the common types of suspect requirements or conditions or policies.

5.1 REQUIREMENTS

The nature of work necessitates the insistence by an employer on the fufilment of certain criteria when candidates apply for a position or promotion. Generally these requirements will be an inherent feature of the job in question, that is, the work required of the applicant cannot be accomplished without the fulfilment of these criteria. However, requirements for a position or promotion are often unrelated to the job at issue. Such requirements tend to perpetuate prejudices and social perceptions about women.

5.1.1 Physical requirements

The labour market has provided an active arena for the predominance and perpetuation of the social perception of the worker as being an able bodied male.[181] This has had severe implications on the availability of certain positions to women. Where there is an insistance on physical attributes that are distinctly male, female applicants are disproportionately excluded from selection for appointment.

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180 Some of these conditions may have been mentioned or discussed to some extent in the previous section.

181 Hunter (1992) at 122.

This was evidenced in the US case of *Dothard v Rawlinson*[182] where there was a height requirement of 5 feet 2 inches for prison guards. The effect of this requirement was that it excluded one-third of the female population of the US and only 1% of the total male population. There was also a minimum weight requirement of 150 pounds which had a similar effect of excluding a significantly larger proportion of women as compared to men for employment.

The reasoning behind these physical requirements is usually because of the security type positions that are being offered and/or that the position requires an element of strength. However, these physical requirements are often founded on social perceptions rather than actual job requirements.

Society has viewed man as the element of strength, that is, the traditional hunter. This view of man is founded on the "...uncritical acceptance of the myth that women are the weaker sex."[183] There may be some substance to this view since it is a biological fact that *generally* men are physically stronger than women. However, these biological differences that have now developed into social prejudices have resulted in the assumption that *all* women are not strong.[184]

Based on these assumptions, an employer will justify the necessity of these physical requirements by stating that a certain level of strength is required for a particular job. A further justification is that the job requires the creation of an

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182 433 US 321 (1977).

183 Campanella J "A mandate to discriminate" (1993) Vol 9 No.5 *Employment Law* 102 at 102.

184 *Ibid* at 103. The author criticised the decision of the Industrial Court in *Ntsangani v Golden Lay Farms* (1992) 13 *ILJ* 1199 (IC) where the LIFO policy was abandoned where special skills were involved. The ability to perform heavy work was interpreted as a special skill. Therefore only women were retrenched because they performed "light" work. The author states that this view of "heavy" work as ".. a special skill which only men can possess...appears to have been nothing more than an untested perception or assumption.

"impression of aggressiveness and intimidation".[185] These justifications are based on the premise that strength is necessarily derived from weight and height factors and that an applicant's ability to be aggressive and intimidating has nothing to do with his/her state of mind, that is, his/her character, and everything to do with physical attributes. This is as ludricrous as suggesting that in addition to the necessary academic qualifications, a judge should satisfy certain height and weight requirements in order to maintain order in the courtroom and create an image of authority.

Thus it has become increasingly necessary to evaluate these physical requirements in order to determine whether they are genuine job requirements or whether they "... remain [to] serve merely to perpetuate the image of maleness surrounding those positions."[186] This will involve an evaluation of the requirements for the job in question. Rosemary Hunter advises that an employer who wishes to avoid claims of indirect discrimination would "need to look carefully at what aspect of job performance the requirement was designed to measure, and to see whether there was some other, less discriminatory way of measuring that attribute, or indeed whether that attribute was actually necessary to job performance."[187]

Hunter provides an example which illustrates the manner in which such an evaluation was accomplished.

> A South Australian Fire Service stipulated that applicants must have a minimum chest measurement of 96.5 cm. After a complaint to the Commissioner for Equal Opportunity, the requirement was deleted in favour of a specific lung capacity test which offered women a fairer opportunity to comply. The service also set different body fat tests as a measure of fitness, in view of the physiological differences between men and women.[188]

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185 Hunter (1992) at 124.

186 *Ibid* at 122.

187 *Ibid* at 124.

188 *Ibid* citing South Australia, Commissioner for Equal Opportunity, *Ninth Annual Report, 1984-85* (1986) at 10-11.

Therefore these requirements can only be said to be "valid when they provide accurate predictions of job performance. Where tests relate to physical or functional attributes, it will be necessary to determine whether those attributes are genuinely required for successful job performance (which ofcourse requires accurate job analysis to begin with)".[189]

A further problem facing women is that even where a female applicant is able to meet these physical requirements, she is often unsuccessful in the final selection process where she is "measured" against taller, heavier men. This "best man for the job" approach ensures that the applicant chosen is a male even though a female applicant has fulfilled all the requirements in order to perform the job successfully. Thus the criteria used in the final selection processes must also be questioned if their effect has an adverse impact on women.

5.1.2 Formal experience and educational qualifications

The insistence on formal experience and educational qualifications is often unquestioned. The reason for this may be attributed to the value system of our labour market which rates skilled positions over unskilled positions. This value system also places importance on experience gained in the formal labour market in paid positions. This approach has had an adverse impact on women in employment.

The life patterns of women are often dictated by the social responsibilites of the female population. Most women find themselves performing "shadow work" in the home by caring for children and performing other domestic duties. This work is almost always unpaid and its importance to society greatly undervalued. Women who manage to accommodate a work life into this domestic life pattern are often found in part-time low status positions or work on a voluntary basis on community projects and in welfare organisations. Thus on entering a labour market that

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189 *Ibid.*

"values formal qualifications and/or experience in paid positions for selection purposes but discount[s] experience and skills gained in an unpaid capacity...."[190] women find themselves in a disadvantaged position.
It has been stated:

> A woman interviewed in one study commented that "too much emphasis on education for a caring job is not required. Experience as a mother is undervalued by employers, but you gain a lot of skills from that experience".[191]

There is also the general presumption that skills are gained by attaining formal educational qualifications. In short, a "good" employee is a graduated one. Educational requirements "are predicated on the assumption that high school graduates will be able to achieve in industry because they have been able to achieve in school. Yet it cannot be assumed that people only leave school because of inability to achieve. Furthermore, graduation merely demonstrates an ability to pass school tests, which are not designed to predict job performance".[192]

As already discussed in the first section of this work, the role of women as primarily care-givers of their offspring and responsible for domestic tasks has resulted in a retarded entrance of women into the educational sphere. Because of this inequality of educational qualifications between the sexes, an insistence on educational requirements will have the effect of excluding more women than men from selection.

In many instances educational qualifications may be an accurate measure of the appropriateness of a candidate for a job. However, it is equally true that often an

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190 *Ibid* at 170.

191 *Ibid* citing Foster L, Marshall A. and Williams L.S. *Discrimination against Immigrant Workers in Australia* (1991) at 98.

192 *Watkins v Scott Paper Company* 530 F 2d 1159 (5th Cir, 1976) at 1182.

insistence on a certain level of educational qualifications has little to do with fulfilling the functions required from the job-at-issue. It may in fact represent an unintended and unconscious manner of reproducing a workforce that is male dominated.

This creates a need to analyse the jobs in question and to determine whether the qualifications asked for are necessary for the performance of the jobs-at-issue.

> The kind of job involved determines the degree of scrutiny... unskilled work requiring educational qulaificatins would be suspect. Requirements for high school diplomas and college degrees for non-professional positions must also be questioned."[193]

Further often aptitude tests that are intended to measure the suitability of an applicant for a position will emphasise skills such as maths and science abilities. As also discussed earlier, the domination of males in the mathematical and scientific fields will encourage test results that tend to favour male applicants over female applicants.[194] Obviously where a position requires science and mathematical skills, this form of testing would be acceptable. However, where such skills or the level of skills tested are not required for the position in question, such a test will serve merely to adversely effect women.

Often the skills and educational requirements required on entrance into a particular job, are only necessary once the applicant has received a promotion to a higher level within that company or are skills that the applicant could have gained through on-the-job experience. Thus it is imperative that an investigation be conducted into whether such tests and educational requirements are an accurate measure of the ability to perform the job that is being applied for.

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193 Hunter (1992) at 143.

194 *Ibid* at 145.

5.1.3 Age limits

Age limitations in advertisements for jobs are common place. Often such limitations insist on applicants in their mid twenties to thirties.[195] The popular employer reasoning behind these age limits is that "organisations often prefer their career stream recruits to be young, hoping to produce in the future a flow to senior positions of personnel who are mature yet still dynamic, and who have absorbed enough of the organisation's culture to be safely entrusted with its maintenance".[196]

However, this age period which is regarded as most viable by employers is also the reproductive years of female employees. This conflict has resulted in the exclusion of women from career opportunutities because they are significantly absent from the labour market caring for young children during this period. Once they enter or re-enter the labour market, as the case may be, they find themselves competing with men of their age group who have years of job experience and educational qualifications.

These age requirements need to be assessed. Careful inspection may reveal the tendency to favour the normal worker as a young male without child care responsibilities. The reason for such age requirements must receive careful examination to deduce whether the age group required is the only that can fulfil the functions required of the job. A lot may be said for the argument that employees of an older age may enter the labour market with a sense of maturity and responsibity that the employer will find beneficial to his/her organisation.

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195 In *Price v Civil Service Commission* (1976) IRLR 405; (1978) ICR 27; (1978) IRLR 3 at 5 the applicants had to be under the age of 28. This had the effect of directly discriminating against women.

196 Hunter (1992) at 151. This reasoning is, however, based on the socially prejudicial supposition that older individuals are incapable of being dynamic or absorbing the culture of the organisation.

5.1.4 Mobility and Seniority

Often the criteria for promotion and advancement in employment are based on "unquestioned organisational imperatives, such as the ability to serve where the organisation requires an uninterrupted length of service".[197]

Women are less capable of complying with these requirements than men. In most situations the female supplies a secondary income to the family unit. Thus it is unlikely that a female will be in the position to uproot her children and her spouse in order to fulfil a job requirement of mobility.

Mobility is not only assosciated with promotional benefits. Often mobility is required of employees for training purposes. The very nature of a woman's role in society reduces the chances of her becoming mobile in order to receive training and thereby improve her working conditions. The necessity and reasonableness of mobility requirements must be weighed against the possibility of receiving training in some other manner. This will necessitate a departure from past policies in order to take into account the "typical life patterns of women".[198]

Further employment policies that render promotions dependant on the length of service or seniority have an adverse impact on women who are less capable than men of conducting an uninterrupted work life because of child care responsibilites. Thus women often lose out on promotions and other benefits such as bonuses because they are unable to conform to the male norm of an uninterrupted work life. This male norm is based on the premise that the private life of a employee must be distinct from the public or working life of that employee. This is only possible in the male situation where being married and having children offers little or no constraints on the ability of the male to perform his job. This is in sharp

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197 *Ibid* at 152.

198 *Ibid* at 153 quoting the NSW ADB, " Examination of a Practice in the New South Wales Secondary Teaching Service : Report to the Premier, September 1979", cited in its *Annual Report for the year ended 30 June, 1980* (1981) at 46.

contrast to a female, who is greatly inhibited in her work life by marriage and child care responsibilties. Policies that promote seniority and mobility fail to recognize these constraints.

The justification of seniority requirements is that "seniority goes hand in hand with experience which generally places a worker in a better position to carry out his duties."[199] It may for the most part hold true that seniority is indicative of good job performance. However, often seniority systems serve only to "perpetuate the effects of past discrimination".[200]

> In *Steel v. Union of Post Office Workers*[201] women postal workers were denied permanent status until 1975 when the UK SDA came into force. From that date women were employed on the same terms as men their seniority running form the date of permanence. As a result one woman who had been employed since 1961 lost out in a competition for a walk allocated on the basis of seniority to a man who had gained permanence in 1973. The post office conceded that its seniority requirement was one with which a smaller proportion of woman than men could comply. The Employment Appeals Tribunal approved the use of indirect discrimination provisions to remove the effects of past discrimination.[202]

Thus in view of the adverse impact of seniority and mobility clauses on women, the general acceptability of such requirements must be discarded in preference for an approach that is cautious in that does not assume the reasonableness of these requirements but instead leaves it open to question.

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199 *Handels - og Kontorfunktionaerernes Forbund i Danmark v Dansk Arbejdsgiverforening* (1989) ECR 3199 at 3228.

200 Hunter (1992) at 183.

201 (1978) ICR 181.

202 Hunter (1992) at 183.

5.2 CONDITIONS OF EMPLOYMENT

5.2.1 Part-time work

As explained earlier, due to the life patterns of women, there tends to be a concentration of women in part-time employment. The predominance of women in part-time employment is not the subject of this discussion. The evil aimed at here is the inferior conditions and terms of employment that characterises part-time jobs. These inferior conditions tend to adversely affect women employed in these positions. The down playing of part-time work once again can be attributed to the domination of the male norm.The workplace is "saturated by male values".[203] These values encourage full-time employment and regard full-time workers as making a significant contribution to the labour market. It has been pointed out that "the treatment of part-time workers as second-class citizens stems from the fact that within the masculine universe, part-time work is regarded as synonymous with optional, short-term and/or casual work".[204]

This has resulted in the deprivation of benefits to the part-time worker. Hunter provides examples of policies and conditions of employment that have been responsible for the creation of the inferior status of part-time work.[205] Some of these include the refusal to allow part-time employees to apply for promotion; the denial of benefits such as bonuses, allowances, housing subsidies, leave to part-time workers; low pay; and a redundancy sheme which provides for selecting part-timers first.

These conditions of employment of part-time workers must be assessed. The argument that women can attain better work conditions for themselves by obtaining full-time employment ignores the essence of this problem. This is neither

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203 *Ibid* at 165 citing Burton C *The Promise and the Price : The Struggle for Equal Opportunity in Women's Employment* (1991) at 3.

204 *Ibid* at 156.

205 *Ibid* at 157.

an option or a solution for most women.

> For many women ...part-time work ia a permanent and necessary arrangement that allows them adequately to fulfill both domestic and financial and/or intellectual imperatives. [206]

Thus employers are advised to attach the same degree of importance to part-time work. It is a permanent and undeniable feature of employment. To avoid indirect discrimination charges, the conditions affecting part-time employment must be re-evaluated.

Further, the archaic view of the employee as a full-time worker must be questioned. Improvement of conditions of part-time workers as well as accomodating full-time female employees who can no longer fulfil the commitments of full-time work must be encouraged. Such accommodation can take the form of flexible hours or job sharing.[207]

Employers may argue against this accommodation on efficiency grounds. However, it has been suggested that:

> ...the provision of flexible work options makes economic sense in terms of increased productivity, reduced turnover rates and absenteeism , the attraction of quality staff and the improved staff morale.[208]

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206 *Ibid.*

207 In *Carey v Greater Glascow Health Board* a Scottish court allowed a health worker to work on a job-sharing basis after maternity leave. In *Wright v Rugby Council* the court "... provide[d] a basis for women to challenge rigid working hours where flexibility is needed for child care purposes. In this case the applicant asked if she could come to work half an hour late and take only half an hour lunch break to allow her to deliver and collect her child. An industrial Tribunal ruled that a failure to vary working hours would amount to indirect sex discrimination" [see Hunter (1992) at 158].

208 Hunter (1992) at 158.

Therefore employers would be best advised to investigate the business advantages of such a programme.

5.2.2 After-Hours Obligations

An informal condition of employment may take the form of after hour work obligations. "An expectation that employees will socialise with colleagues and customers out of hours ....operate[s] as a constraint on women's employment".[209] After-work obligations may also take the form of attending conferences or training programmes. According to Hunter, the domestic and child care responsibilities of women reduce the ability of women to comply with these requirements.[210] This is because of the conflicting roles of employee and mother/wife. Women are therefore left with little opportunity to further their education and training thereby limiting their advancement opportunitites.

The neccessity of after-hour obligations must be questioned and the possibility of providing for training programmes during working hours must be looked at.

5.3 RECRUITMENT POLICIES

The danger of recruitment policies is in the uncertainty of the criteria being used to select applicants. Often interviews are the basis of selection. Over and above the general requirements for a job, it is an often taken-for-granted custom that the "impression" created by an applicant at an interview carries great weight in determining success or failure. However, the impression created is determined by those judging the behaviour of the applicant.

Thus " an interview panel ... composed entirely of men and ... more familiar with male applicants, is likely to apply assessment criteria to all applicants that are of

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209 *Ibid* at 156.

210 *Ibid*.

proven effectiveness only in relation to male presentation styles".[211] Therefore female applicants who possess the official requirements for a job are excluded from selection because they lack a "second set of characteristics, associated with traditional male incumbents".[212]

This perpetuation of male characteristics by interviewing panels has been termed "homosocial reproduction".[213] It has been observed that:

> A supervisor who is judging a subordinate for promotion potential tends to look for traits in the subordinate which the supervisor feels he himself has".[214]

Therefore there is a need for clearly defined job pre-requisites or the dominant workplace culture will reproduce itself.[215]

Thus having identified some practices or requirements that tend to indirectly discriminate against women, it is important to note that this is not an exhausted list. The above discussion is an indication of the common types of conditions and requirements that operate in an indirectly discriminatory manner against women.

However, the recognition of indrect discrimination practices is insufficient if this recognition is not made within the framework of a legal system that effectively prohibits indirect discrimination. The following section will examine this legal framework in South Africa.

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211 *Ibid* at 167.

212 *Ibid* at 165.

213 *Ibid* citing Lipman-Blumen J "Towards a Homosocial Theory of Sex Roles : An Explanation of the Sex Segregation of Social Institutes" in Blaxall M and Reagan B (eds) *Women and the Workplace* (1976) at 16.

214 *Ibid* at 171 citing Schlei and Grossman *Employment Discrimination Law* 1st ed (1976) at 172.

215 *Ibid.*

6 SOUTH AFRICA

South African society has not escaped the restrictive social patterns that distinguish the role of men and women. "South Africa has been described as a patriarchal society".[216] This description encompasses the idea of man as the leader and ruler of his family. It also encompasses the idea of a distinct division of labour whereby women are exclusively responsible for domestic tasks such as child care, cleaning and cooking. These tasks are seen as duties that are inherently "female" and are unpaid. "Paid work generally is regarded as the domain of men".[217] This division of roles is evident not only in Western cultures in South Africa. It is also a significant feature of African, Hindu and Muslim cultures. Thus traditionally, across the wide spectrum of cultures in South Africa, women remained absent from the workplace.

Today, however, it may be argued that the term "patriarchal society" is a misnomer because the traditional distinction of roles between men and women in modern South African society have been dissolved. Such an argument can only be described as presumptious. It is true that due to a variety of socio-economic reasons women have made a significant entrance into the workplace. But does this new role of women in employment indicate a departure from their more traditional roles? Simply, has paid work resulted in the emancipation of women from the inferiority that was assosciated with their domestic role?

Societal trends do not indicate such an emancipation. The stereotypes that emerged as a result of the patriarchal division of labour continue to disadvantage women. Furthermore, the changing the role of women in society has resulted in additional burdens and responsibilites. The Green Paper on Employment Equity states that "[w]omen typically face the burden of unpaid household labour in

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216 Louw (1992) at 8.

217 *Ibid.*

addition to generating an income".[218] This combined with educational factors which indicate a disparity between the sexes in the level of education received, has been responsible for the inequitable situation that women now find themselves in employment.

These difficulties facing South African women in employment is a reflection of international trends. However in South Africa the inequity faced by women in employment is compounded by past racial discrimination. This has added to the complexity of the situation in South Africa. This work does not aim to explain the interaction between race and gender. The vastness of such a topic warrants an independent study. The aim of this section is to address indirect discrimination legislation provisions in South Africa which apply to all women irrespective of race.

6.1 LEGAL RECOGNITION OF INDIRECT DISCRIMINATION IN SOUTH AFRICA

The transformation from an apartheid society to a "new political, social and legal order [which professes to] place a high emphasis on freedom, human dignity and equality of every individual citizen" necessitated the formulation of legislation that outlawed discrimination.[219] The Constitution of South Africa represented a significant move in that direction.

The concept of indirect discrimination first appeared in the form of a clause in the Interim Constitution of the Republic of south Africa. This same clause was later included in the final Constitution.

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218 Green Paper: Policy Proposals for a New Employment and Occupational Equity Statute *Government Gazette* No. 17303, 1 July 1996 at 23 (hereafter The Green Paper : Employment Equity).

219 *Assosciation of Professional Teachers & Another v Minister of Education and Others* (1995) 16 ILJ 1048 (IC) at 1076.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, mantal status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.[220]

There are two important features regarding the wording of this section that come to the fore. Firstly, the use of the word "unfairly" indicates that the Constitution anticipated circumstances when discrimination would be regarded as "fair". This was later evidenced by the formulation of a national affirmative action policy that is aimed at addressing past discrimination.

Secondly, the use of the words "one or more" indicates that a claim could be brought on more than one ground at the same time. For example, sex as well as race. This indicates a willingness by the legislature to accommodate circumstances where there exists an interaction of two or more grounds that have a discriminatory effect. This would guard against the artificial and cumbersome exercise of attempting to fit the discrimination complained of into one of the prohibited grounds. It would also allow a complainant who failed on the ground of sex to succeed on the alternative selected ground. This must be commended as a realistic approach especially in the South African context where "[w]e ...often find it difficult to separate race from class from sex oppression because in our lives they are most often experienced simultaneously".[221]

Finally the words "one or more" indicate that this is not an exhaustive list and therefore indirect discrimination on other unmentioned grounds, such as marital status, may also succeed.

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220 The Constitution of the Republic of South Africa Act 108 of 1996: Chapter 2, Bill of Rights: section 9(3) and (4).

221 Hepple & Szysczak (eds.) (1992) at 214.

With regard to the proving of discrimination, the Constitution stated :

> Discrimination on one or more grounds listed in subsection(s) is unfair unless it is established that the discrimination is fair.[222]

This section did not make reference to any defence to indirect discrimination. Neither did it explain what degree of proof would satisfy the "sufficient" requirement. This was a general enactment, the purpose of which was to provide a general protection and an impetus towards the formulation and introduction of more comprehensive legislation on discrimination.

This general clause in the Constitution was reproduced and added to, in the Labour Relations Act 66 of 1995, in order to facilitate its application in labour.

Schedule 7 Item 2(1) provides:

> (1) For the purposes of this item, an unfair labour practice means any unfair act or omission that arises between an employer and an employee, involving-
>
> (a) the unfair discrimination, either directly or indirectly, against an employee on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, diability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility;
>
> (2) For the purposes of sub-item (1) (a) -
>
> (a) "employee" includes an applicant for employment
>
> (b) an employer is not prevented from adopting or implementing employment policies and practices that are designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms; and
>
> (c) any discrimination based on an inherent requirement of the particular job does not constitute unfair discrimination.

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222 The Constitution of the Republic of South Africa 108 of 1996, Chapter 2 Bill of Rights: s 9(5).

This section signified a departure from past labour legislation in that it was the first time that applicants for employment were afforded protection. This is of particular significance to indirect discrimination cases because it is often at the threshold of employment that indirect discrimination is most evident. Further, following in the foot- steps of the Constitution, the Labour Relations Act provided specifically that affirmative action policies that aimed at advancing previously disadvantaged groups would escape an attack of discrimination.

Finally and of greatest significance was the incorporation of the defence of the "inherent job requirements". This defence was first formulated by the International Labour Organization at its Discrimination (Employment and Occcupation) Convention in 1958.[223] The Convention stated that "...any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination".[224]

The Concise Oxford Dictionary defines "inherent" as a "permanent and characteristic attribute". This suggests a strict standard. Therefore, requirements that cannot be removed from the job in question without dramatically altering the nature of the job will be regarded as inherent requirements. A job that can be performed without the imposition of such requirements will fail this standard.

It has been suggested that the principles established in the British Sex Discrimination Act of 1975 should be used as guidance in determining whether a particular requirement is "inherent".[225] The criteria listed in the Sex

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223 International Labour Organisation Convention No. 111 of 1958.

224 *Ibid* at Article 1(2).

225 Du Toit D, Woolfrey D, Murphy J, Godfrey S, Bosch D & Christie S in *The Labour Relations Act of 1995* (1996) at 403. See also Grogan J *Workplace Law* (2nd ed) (1997) at 168.

Discrimination Act include authenticity;[226] the need to preserve privacy and decency[227]; and the nature of the establishment or the part of it in which the work is done.[228] These criteria will provide useful guidelines for South African cases.

This defence is a welcome departure from international trends. The American defence of "business necessity" and/or "job relatedness" and the British defence of "justifiability" were often interpreted in a manner which allowed discrimination if business reasons, such as efficiency and profitability, were offered. Noted, the interpretation of the defence in these countries received a rollercoaster reception in that the defence also received strict interpretation. But this led to confusion and inconsisitency in the courts' approach. Thus South Africa in applying this strict standard, will hopefully find itself better equipped to apply this defence and prevent the judicial errors that were made abroad.

A further section relating to indirect discrimination can be found in section 187 (f) of the Labour Relations Act of 1995. This section states that a dismissal will be regarded as automatically unfair if the reason for the dismissal is:

> ...that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin,

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226 According to Grogan (1997) at 168, footnote 4, 'authenticity' refers to "possession by the employee of some inherent attribute [which] is an essential characteristic of the role he or she is to perform."

227 An example of such a situation would be where a female nurse is required in a hospital ward for women.

228 In *Diaz v Pan American Airways Inc.* 442 F2d 1273 (9th Cir) (1981) the nature of the establishment was considered and the employer justified his employment of females only, for the position of flight attendants by stating that that the position required compassion which was necessary to calm nervous or timid passengers. However, this justification was based on the assumption that men did not possess compassion. The case also addressed the issue of the degree to which customer preference should be allowed to determine the acceptability of a requirement.

colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility.

(2) Despite subsection (1) (f) -

(a) a *dismissal* may be fair if the reason for the dismissal is based on an inherent requirement of the job;

(b) a *dismissal* based on age if the employee has reached the normal or agreed retirement age for persons employed in that category.

This section is a reproduction of Schedule 7 Item 2. However, of great importance is the status granted to dismissals based on reasons related to direct or indirect discrimination. Such dismissals will be regarded as automatically unfair unless the defence of inherent job requirements as explained in the above paragraph is successful. This status of an automatically unfair dismissal indicates the importance that the Labour Relations Act placed on outlawing discrimination in employment.

There are also various comparative law issues that emerge from these sections.

Firstly, the introduction of the concept of indirect discrimination in South Africa occurred by means of legislation as it did in Britain. However, unlike British law, South Africa has no seperate legislation dealing exclusively and directly with discrimination. The question that must be asked is whether there is a need for a separate discrimination statute or whether the provisions in the Constitution and the Labour Relations Act are sufficient. This issue will be dealt with later.

Secondly, by specifically including indirect discrimination in the aforementioned Acts, the legislature has indicated that it has taken note of the initial problems experienced in America and Canada where the exclusion of indirect discrimination provisions and a definition of discrimination, led the courts to initally interpret discrimination as encompassing direct discrimination only, that is discrimination with intent. The specific inclusion of indirect discrimination has curtailed any potential debate as to whether the legislature intended the inclusion of indirect discrimination.

However, although the Constitution and the Labour Relations Act have included the concept of indirect discrimination, both Acts failed to define the term. Perhaps relying on the wealth of international information and case development on the subject our courts will turn to international sources for a detailed definition. This has already been evidenced in some early indirect and direct discrimination cases.

Thirdly, South African indirect discriminatcion provisions do not follow in the foot-steps of their British counterparts, in that a detailed step-by-step procedure for proving indirect discrimination is not reflected in either the Constitution or the Labour Relations Act.

Perhaps the reason behind this was to allow the courts the opportunity to create a balance between the American and the British approaches, to prevent an endless semantic debate and to allow for a measure of judicial discretion in developing a procedure for proving indirect discrimination. It will be interesting to see whether the courts choose to rely on the American liberal approach or the more conservative British approach.

An alternative reason for the exclusion of a more detailed section on indirect discrimination could be that the complexity of an indirect discrimination case was never within the contemplation of the legislation when it drew up the Constitution and the Labour Relations Act. If this is the case, this will have serious implications for future indirect discrimination cases in South Africa.

It is therefore necessary, in the light of the above discussion to examine the manner in which indirect discrimination cases have been dealt with by our courts.

6.2 SOUTH AFRICAN CASE LAW

The cases that discuss the concept of indirect discrimination are few. It is remarkable that, in a country that has voluntarily turned its back on lawful discrimination, claims based on discrimination, either direct or indirect, seem to be

appearing out of the woodwork in a reluctant and cautious manner.

The first South African case that dealt with the issue of indirect discrimination arose during the era of the 1956 Labour Relations Act, that is, before any labour legislation outlawing indirect discrimination existed. In *Collins v Volkskas Bank (Westonaria Branch) A Division of ABSA Bank Ltd*[229] the court dealt with the issue of whether an employment policy that allowed for a period of 3 to 5 months' maternity leave subject to the condition that after maternity leave had been granted, such leave would not be granted again unless two years of service had passed since the last period of maternity leave had been taken, was an unfair labour practice in terms of section 46(9) of the Labour Relations Act of 1956. The plaintiff alleged direct discrimination.

In deciding the case the court looked at section 8(2) of the Constitution and Article 5(e) of the ILO Convention 158 of 1982, which states that absence from work during maternity leave shall not constitute a valid reason for dismissal. (It is interesting to note that had this case occurred after the enactment of the 1995 LRA, this would be regarded as an automatically unfair dismissal.)

The respondent's argument was that this was not sex discrimination because the real reason for the employee's dismissal was her incapacity and the fact that the reason for her incapacity affected women only did not make the policy discriminatory. The court saw this as the opportune moment to introduce the concept of indirect discrimination. The court referred to the ILO Convention 111of 1958 and the defence of "inherent job requirements". However, relying on the *Griggs* judgment the court interpreted the defence as one of "business neccessity". On the basis of this defence, the court stated that the policy could not be justified on the basis of the operational requirements of the business.

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229 (1994) 5 (9) *SALLR* 34 (IC).

The principle established in this case is that there must be a valid commercial rationale for an employment policy. This approach was in fact highly criticised in the US and the UK as it places greater importance on business values of profitability and efficiency than the discriminatory impact of policies on employees.

Also of great significance to future indirect discrimination cases was the non-interventionist approach adopted by the court with regard to policies that were a result of collective agreements. Marcus AM stated that "only if such an agreement results in a manifestly gross unfair labour practice being perpetrated against an individual member or employee, would this court be possibly justified in intervening or striking down the provisions of a collective agreement".[230]

The problem with this approach is all too clear. In awarding informal judicial protection to collective agreements, the court was placing higher priority on collective agreements rather than their possible discriminatory effects. Although the aim of the 1956 and the 1995 Labour Relations Acts was to encourage collective bargaining, it is doubtful whether the legislature intended to afford this degree of protection to collective agreements. Perhaps the reasoning behind this part of the judgment was the voluntary and cooperative nature of a collective agreement. However, individuals who join a union do not, in agreeing to be bound by collective agreements entered into by that union and the employer, also consent to bear the discriminatory effects of any policy that emerges from such an agreement.[231]

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230 *Collins v Volkskas Bank* (1994) 5 (9) *SALLR* 34 (IC) at 41.

231 see also Campanella J "A mandate to discriminate" (1993) Vol 9 No. 5 *Employment Law* 102 at 104 where the author comments on the Industrial court's deference to collective bargaining in *Ntsangani v Golden Lay Farms* (1992) 13 *ILJ* 1199 (IC). "To sanction gender discrimination just because it is the product of a collective bargaining agreement is incorrect....some aspects of fairness must remain beyond the sphere of autonomy created by collective bargaining. Discrimination is one such area. The value which equality has as a norm or principle of fairness should not be subordinated to the value of collective bargaining."

In the following year the Industrial Court drew a distinction between the concepts of direct and indirect discrimination in *Association of Professional Teachers & Another v Minister Of Education And Others*.[232] In doing so, the Court referred to the American case of *International Brotherhood of Teamsters v United States* where the court stated:

> Claims of disparate treatment, which involve employer's alleged treatment of some people less favourably than others because of their race, color, religion, sex or national origin, and as to which proof of discriminatory motive is critical, may be distinguished from claims that stress disparate impact, which involve employment practices that are facially neutral in thier treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity.[233]

The court also referred to the Canadian decision of *Ontario Human Rights Commission v Simpson's Sears Ltd.* In this decision the court stated that adverse impact discrimination "arises where an employer ... adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory *effect* upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties or restrictive conditions not imposed on other members of the workforce".[234]

The court, relying on the Title VII of the US Civil Rights Act of 1964, referred to s 703(e) where provision was made for the "bona fide occupational qualification" defence. The Industrial Court interpreted this as meaning the "inherent requirements of the job". It stated that not all forms of discrimination will be

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232 (1995) 16 ILJ 1048 (IC). Although this case involved a home owner's policy that discriminated directly against women on the basis of their sex and marital status, the court drew a distinction between indirect and direct discrimination.

233 97 SCt 1843 (1977) at 1844.

234 (1985) 2 SCR 536 at 551.

regarded as unfair. "The deciding factor should be a person's ability to do a job"[235]

The court explained what was meant by this by quoting from another Canadian case. In *Andrews v Law Society of Britsh Columbia*[236] the court said that "distinctions based on personal characteristics attributed to an individual solely on the basis of assosciation with a group will rarely escape a charge of discrimination, while those based on an individual's merits and capacities, will rarely be so classed".[237]

This was also a significant judgment in that it addressed the issue of compensatory measures to be awarded to plaintiffs who had been discriminated against. Although the court did not refer specifically to indirect discrimination in this regard, the general wording of its judgment suggests a general application of these principles to direct as well as indirect discrimination.

The court referred to the report of the Committee of Experts on Equality in Employment in Occupation (ILO) para 2.2.7 where it said:

> Discrimination causes material and moral harm; although it may be relatively easy, as regards discrimination in remuneration to repair the damage incurred by means of an adjustment in the level of remuneration, back-pay and punitive damages, as evidenced by pertinent legislation adopted in this connection in a number of countries, remedies for discrimination in access to training, employment or occupation do not usually render themselves to purely financial compensation... The courts may order a variety of measures, including the reinstatement of workers dismissed on racial grounds, the payment of back wages, allowances and promotions of which they may have been deprived owing to the employer's discriminatory practices. The courts may also order the employers to cease and desist from such practices, However, in the situation where such discrimnation is

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235 (1995) 16 *ILJ* 1048 (IC) at 1085.

236 (1989) 1 RCS 143.

237 *Ibid* at 144-5.

> particularly serious or has existed for a long time, these remedies do not suffice. For this reason, the Courts have sometimes ordered, or the parties have voluntarily agreed to undertake, affirmative action measures to remedy the effects of past discrimination.

Thus this case represented the first case in South Africa to legally acknowledge the defence of "inherent job requirements". This was even before the enactment of the Labour Relations Act of 1995, which subsequently included this defence. More importantly, the interpretation of this defence was strict and excluded business operational reasons.

Although the case did not afford a detailed explanation of the manner in which an indirect discrimination claim could be proved, it did provide South African courts with a precedent for indirect discrimination cases with regard to the compensatory measures to be awarded in such cases.

The most recent case on indirect discrimination was *Swart v Mr Video (Pty) Ltd*[238] where the court examined the requirement that a shop-assistant be under the age of 25. The applicant was refused the position because she was three years older than the required age. The Commission for Conciliation, Mediation and Arbitration(hereafter referred to as the CCMA) stated that discrimination could only be justified if it was based on the inherent requirements of the job. The reason provided by the employer for the age limit was that the position required someone who was willing to take instructions from young persons and compatibility with young members of staff. However, the CCMA ruled that the reasoning was insufficient to meet the "inherent requirement" defence since the applicant was willing to work with and/or under younger people.

Although the issue of indirect discrimination was correctly identified, the case approached the issue in far too simplistic a manner. It did little to develop the law on indirect discrimination.

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238 1997 2 *BLLR* 249 CCMA.

It is clear that South Africa has a long way to go before we can describe our case law on indirect discrimination as "developed". In a country where the workplace is, in all probability, saturated with indirect discriminatory practices, one would have expected a sturdy flow of complaints since the enactment of the 1995 Labour Relations Act. The above case law does not reflect this. Can the reluctant appearance of indirect discrimination cases be attributed to the frightening notion that South Africans have become impervious to discrimination in that we see nothing wrong with such practices? An easier notion to accept would be that "we must not build up an exaggerated faith in the efficacy of law"[239] because legislative enactment will not neccessarily encourage complainants to come forth.

However, only two years after the enactment of the Labour Relations Act, speculations of this nature are perhaps premature. It is, however, an opportune time to encourage further legislation and proposals that will aim at preventing indirect discrimination.

7 PROPOSALS AND RECOMMENDATIONS

The general clause prohibiting indirect discrimination in the Constitution is insufficient to ensure protection against discrimination. Prevention and protection against discriminatory practices in employment can only be effectively achieved by introducing "positive legislative support".[240] It has been said that :

> ....the constitutional enactment is a shield, but the victim of discrimination needs a sword as well. The sword is legislation that forbids discrimination.[241]

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239 Wedderburn (1986) at 447 quoting Lustgarten.

240 Tarnopolsky W.S *Discrimination and the Law* (1982) at 25.

241 *Ibid* at 25.

This legislation must take the form of a separate statute that outlaws discrimination in employment. Therefore the inclusion of the sections prohibiting discrimination in the Labour Relations Act is also insufficient. What is required is a comprehensive discrimination statute that ensures equity in employment and builds on the general principles encapsulated in the Constitution Act 108 of 1996 and the Labour Relations Act 66 of 1995. The proposed statute will pertain particularly to the workplace and will cover all grounds of discrimination. Such a statute will also provide an indication to employers and employees that government attaches priority to the prevention and eradication of discriminatory practices in employment.

The South African government has recognized the need for the introduction of a separate discrimination statute. In July of 1996, the Department of Labour published a Green Paper on Employment and Occupational Equity.[242] The Paper contains proposals for the achievement of employment equity. These proposals would be included in a future discrimination statute. The paper also invited comments on these proposals.

This section examines the recommendations and proposals made by the Green Paper for the achievement of equality in the workplace. It critically analyses these proposals and makes further proposals for indirect discrimination legislation and the facilitation of indirect discrimination claims.

7.1 A BRIEF APPRAISAL OF THE GREEN PAPER : POLICY PROPOSALS FOR A NEW EMPLOYMENT AND OCCUPATIONAL EQUITY STATUTE

The South African government's proposal of an Employment Equity Bill will represent the "first intervention to do away with all forms of discrimination in occupation and employment."[243] The proposals made in the Green Paper are

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242 Green Paper: Employment Equity (1996).

243 *Ibid* at 2 (Foreword).

broad policy proposals. There is, however the promise of more definitive proposals which will be incorporated in a White Paper on Employment Equity in the near future. At this stage though it is necessary to briefly examine these policy proposals to determine the direction of future discrimination legislation.

The Green Paper focuses on the protection of three historically disadvantaged groups: viz., black people, women and disabled persons. The inclusion of women under this umbrella of protection is reflective of the Constitution of the Republic of South Africa Act 108 of 1996 where these same groups are afforded protection. It indicates that that government as well as society acknowledge the fact that historical disadvantages arose not only because of apartheid, but also very significantly, because of social prejudices. This new status of women as a "protected" group will necessitate an improvement in the status of women in the workplace and hence in society.

A significant feature of the Green Paper is the indication by the Department of Labour that government is aware that antidiscrimination legislation alone will not be sufficient to protect individuals.[244] The realisation is that South Africa is no exception to the rest of the world in that there are various components to employment discrimination. The most significant of these are cultural and institutional discrimination in the workplace. It is therefore necessary to address these growth areas of discrimination and to encourage cultural and insitutional change in the workplace.

Thus the Green Paper proposes the following, as its central themes for the achievment of employment equity:

1. Antidiscrimination legislation to protect individuals combined with measures to encourage institutional and cutural change by employing organisations.
2. Accelerating training and promotion for individuals from historically

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244 The Green Paper : Employment Equity (1996) at 30.

disadvantaged groups in this context.

3. As far as possible, mediation and arbitration to resolve disputes, with strong legal protection against discrimination and harassment.[245]

The wording of the above aims indicates an intention not only to protect individuals from existing discriminatory practices in existing workplaces, but also to *prevent* discrimination by transforming the nature of the workplace so that discriminatory employment practices are non-existent. This can be achieved by promoting conditions that foster employment equity for all.

A future discrimination statute aims to achieve this in the following manner. Firstly, the Paper prohibits sexual harassment in employment.[246] This will represent the first clause of this nature in employment legislation in South Africa and is an indication of a commitment to protect the rights of women in the workplace.

Secondly, the Paper identifies selection and recruitment procedures as critical areas that warrant legislative attention.[247] It advocates a "systemic transformation of advertising procedures."[248] This transformation is hoped to be achieved in the following manner. Advertising procedures must be reformed so that they reach all "realistic"[249] candidates. The significance of this approach is that advertisements should reach *all* candidates who possess the minimum requirements and not only those from a particular sector of the population. To ensure that advertisements reach all qualified candidates, the following measures should be adopted. Firstly, the prevention of advertising in papers that reach a limited audience and secondly, discouraging word of mouth recruitments. It is

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245 *Ibid.*

246 *Ibid* at 34.

247 *Ibid.*

248 *Ibid.*

249 *Ibid.*

evidently clear that one of the main aims of the future legislation will be an avoidance of reproducing the present constitution of the workforce.

The Paper also lists a further aim of redefining criteria for employment. The purpose of this evaluation of criteria is to ensure that the requirements that are insisted upon for certain positions are requirements that are necessary for the job, which means that they are legitimate, and do not represent a means of creating "barriers" or "hurdles" in employment. This will involve a massive job analysis campaign, the purpose of which will be to investigate the "inherent" requirements of every position available in the South African workplace.

The Paper also advocates an emphasis on skill rather than formal educational qualifications. Further, it emphasises the need to recognize experience gained in different types of organisations and institutions. It identifies the fact that possibly, seniority may operate as a discriminatory factor. It advocates the avoidance of psychometric tests unless they accommodate diversity and encourages a reappraisal of the LIFO principles that often tend to perpetuate past discrimination policies.[250] All of the above mentioned factors indicate a policy of accommodation of the differences and social hinderances that the disadvantaged groups bring to the employment sector.

Most significantly, employers who, in the past were protected from discrimination charges because the reason for the decision was unknown, will now be compelled to afford reasons for the selection, recruitment, dismissal and so on.[251] This will have the effect of rendering the decision-making process open and available for scrutiny. This "glass-house" effect will discourage decisions that cannot be justified.

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250 *Ibid* at 35.

251 *Ibid.*

Finally, the Paper advocates an "organisational audit". This "audit is to be conducted by employers who will report back to the Department of Labour on a regular basis. The purpose of this audit will be to gather information[252] which will aid in monitoring representativeness and employment equity in various sectors of employment. Employers will also be encouraged to use the data gathered from these audits to develop and adopt plans for change.

The overall indication from the Green Paper is that the clauses encapsulated in such a statute will be of a very general nature, leaving the development of indirect discrimination cases to the courts expertise. It has been common experience abroad that complicated lengthy procedures deter indirect discrimination claims and results in much confusion amongst complainants, defendants and judicial officers. Thus it is suggested that future discrimination legislation in South Africa provide a broad legal framework that is capable of flexibility. Following the approach in the US, a democratic South Africa should be encouraged to place a sufficient degree of faith in the liberal interpretative style of its courts. Equipped with a broad legal framework, the labour courts will be in a position to apply the principles encapsulated in the statute to individual cases. This will encourage a dynamic quality in indirect discrimination law.

The Paper also indicates that an "encouraging" approach to employers will be adopted. The phrasing of the Paper in "should" rather than "must" indicates that employers will be given the opportunity to transform the workplace through their own initiatives and co-operate with the Department of Labour in doing so. This reluctance to adopt an adversarial approach is understandable. Employers are more

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252 This information will include, inter alia: employment, pay and benefits in the major categories of race, gender, and disability; programmes and policies on human resource development; organisation of work in terms of skills and responsibilites required by different positions, and hours worked; transport, housing and caring arrangements and preferences of employees, by race and gender, including options of hours worked; languages used and language competence; procedures for hiring, training, promotion, retrenchment and transfers etc (see The Green Paper: Employment Equity (1996) at 36).

likely to bring about transformation with an encouraging nudge by government rather than by the immediate introduction of punitive measures for a lack of commitment to change. In fact, the Paper proposes to implement incentives that will encourage employers to promote employment equity. This approach recognizes the fact that transformation will be a timely and costly project. The willingness of employers will aid this process.

Also, especially in the context of indirect discrimination, employers are often unaware of the discriminatory effects of certain practices. Therefore particularly in circumstances where there is no evidence of a discriminatory motive, employers will benefit from assistance in removing the discriminatory practices and implementing new ones. Further, by encouraging employers to accept guidance in the form of The Code of Good Practice, an atmosphere of assistance and co-operation will be fostered. Employers will not see themselves or be seen as the "guilty" and would be more susceptible to accepting advice.

It is suggested, however, that this voluntary approach to employer-initiated change should limit itself to the early stages of transformation. Having encouraged transformation, a continuous check must be placed on the workplace and a failure to implement suitable measures or a lack of commitment to transformation and employment equity must be met by punitive measures against "guilty" employers. Discrimination is a serious issue and the legislative implications should also be of a serious nature.

Lastly, the procedural proposals of the Green Paper must be examined.

The Green Paper provides an institutional framework for the implementation of a discrimination statute. The Department of Labour will be responsible for the implementation of the legislation. The administration of the legislation will be conducted by two bodies. The first will be the Directorate for Equal Opportunites.

The Directorate will develop codes of good practice that will provide guidelines to employers on various issues such as recruitment, selection, dismissal and retrenchment. This body will also guide employers in formulating and implementing policies that encourage employment equity. It will also be responsible for a continual assessment of advances made by such policies.

The establishment of this directorate is very much in line with international trends where commissions in the US and Britain have proved extremely effective in developing the law of indirect discrimination.[253] It is, however, submitted that further functions of this Directorate should include:

* The provision of assistance to employees who allege discrimination. In most instances employees will not know how to process a claim of discrimination. This body must make this information available to employees. Further, it must provide assistance in the processing of claims. This assistance may be as simple as aiding in the completion of forms.

* As an independent body it must provide advice and guidance to employers as to the suitability of present employment practices and suggest cost efficient ways to minimise discrimination.

* It must be involved in training individuals who will be responsible for enforcing legislation. There must also be training of individuals who will be responsible for the gathering and analysing of audit data.

* It must be responsible for a job analysis campaign and the training of job analysis experts. It must set out guidelines as to what would would incorporate an "inherent job requirement" in various circumstances.

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253 American Employment Opportunities Commission and the British Equal Employment Commission.

* It must educate employees on the rights available to them in terms of the new legislation. It must also inform employers in this respect. The analysis of the nature of indirect discrimination claims in an earlier section has indicated that access and knowledge of legislative protection is a necessary feature for sucessful discrimination litigation. In most instances individuals are unaware of the rights available to them. This problem must be addressed.

Although the duties envisaged will place a heavy burden on this body, the specialised nature of discrimination claims necessitates the performance of these functions.

A further body known as the Labour Directorate will be responsible for the enforcement of the legislation. It will regulate compliance with appropriate procedures and will ensure that data required is returned and the necessary plans for employment equity made.

Therefore, the Directorate for Equal Opportunities will serve an advisory function whereas the the Labour Directorate will serve as an enforcement body. It is submitted that this distinction in roles is extremely necessary. The need for an independent body that can be consulted on various issues of discrimination by employers and employees is imperative. This body must remain distinct from enforcement in order to gain any measure of credibility amongst all stakeholders.

The establishment of these various bodies and the functions that have been prescribed to each of them may introduce various practical problems. Firstly, the resources of the Department of Labour are limited. The enactment of the proposed policies will require a level of expertise that may be difficult to find. Further, the costs involved will be great. However, one wonders to what extent this resource deficiency will affect the full implementation of the proposed legislation. It is suggested that administrative problems of this nature be addressed at this stage to avoid significant problems later.

The Paper also advocates the resolution of discrimination disputes by way of conciliation, mediation and arbitration. Therefore all disputes must first be referred to the Commission for Conciliation, Mediaton and Arbitration and only on appeal is access to the Labour Court allowed. The Labour Appeal Court will be the court of final instance. This approach is commended. It is an indication that the future discrimination legislation will be drawn up in a manner that will be in accordance to the general principles contained in the Labour Relations Act. This will encourage a consistency and stability in the resolution of labour disputes. Further, it will promote a culture of consultation and co-operation between employers and employees.

The Green Paper, also addresses the issue of the burden of proof. Taking note of problems experienced overseas, it advocates reducing the burden of proof of the complainant. The Paper suggests that once a complaint of discrimination has been registered, the employer will bear the burden of proving that the practice is not discriminatory. This will have the effect of encouraging indirect discrimination complaints.

An affirmative action policy has also been advocated by the Green Paper. Once employers have conducted the required organisational audit, they will be required to formulate an affirmative action policy. It is submitted that integral to the aim of promoting equality for women in the workplace is an effective affirmative action policy. The problems facing women in employment cannot be eradicated without an attack on the root of the problem. The source of this problem is the conflicting role of women as child rearers and responsible for domestic duties and her role as an employee. This has resulted in a continuing conflict between the obligations at home and at work.

The Green Paper addresses this issue by advocating a reorganisation of the workplace in order to accommodate the obligations of women outside the working environment. This accommodation can take the form of the provision of child care facilities at work. This would enable women who are otherwise to limited to

certain hours of work to extend these hours because of the benefit of child care. Further accommodation could take the form of job sharing or flexible work hours that allow women to work as well as care for their home and children. Training and educational programmes must be planned during working hours or if such accommodation cannot be made, child care facilities outside working hours and during training sessions should be arranged. This accommodation of the social obligations of women should form part of an affirmative action programme.

Affirmative action programmes should not be aimed exclusively at affording opportunity to disadvantaged groups at the threshold of employment. Selecting women for employment and then releasing them into a "hostile" work atmosphere would do little to "enable" women in the workplace. The problems encountered by women in employment are experienced at every conceivable level of employment. Therefore policies should aim at accommodating women in the workplace.

The Green Paper has been critcised as being "a little short on detail in the area of enforcement of affirmative action procedures".[254] It is submitted that the pervasive nature of discrimination against women will necessitate the statutory enforcement of afirmative action policies in favour of women. "The legislature should thus impose a statutory duty to develop affirmative action. It should provide a basic legal framework within which these specific policies could be developed by employers."[255]

It would be naive to assume that the implementation of a discrimination statute will occur without several substantive and procedural problems. Moreover, the reaction of employers to the legislation will depend on the strictness of the measures adopted. However, this should not dissuade the implementation and enforcement of a widely anticipated statute.

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254 Cheadle H *Current Labour Law* (1996) at 49.

255 Louw (1992) at 371.

8 CONCLUSION

It has been stated that:

> One of the fundamental human rights is the right to earn a living, free of discrimination on any ground other than ones relating directly to a person's ability to perform. [256]

In a country that has committed itself to democracy and the preservation of human rights, the protection and advancement of a woman's right to earn a living is a necessary feature of any society that prides itself on the principles of equality and fairness.

It is thus imperative that the disadvantages facing women in employment be addressed. The stereotyping of women and the biasness that accompanies such stereotyping continues to exist and flourish in society. The aim of indirect discrimination legislation is not to address the inequalities and prejudices that face women in society, but the more modest one of preventing these prejudices and hinderances from infiltrating the workplace by "insisting that the employment market and its practices be modified to take account of domestic responsibilties".[257] It is, however, hoped that conditions that foster equity in the workplace will encourage a change in social attitudes.

Therefore, South Africa, as it stands at the threshold of a new democratic dispensation finds itself in a uniquely enviable position. Twenty-six years after the landmark decision of *Griggs v Duke Power Co.*,[258] discrimination laws in South Africa can develop with the advantage of hindsight. The lessons of our international counterparts should prove helpful in avoiding the problems experienced in proving indirect discrimination abroad. Furthermore, the varying

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256 Editors *Columbia Human Rights Law Review* (1973) 5 at 261.

257 O'Donovan K and Szyszcak E (1985) 42 at 44.

258 401 U.S. 424 (1971).

roles of the courts in the US and Britain in interpreting indirect discrimination clauses should also provide a valuable lesson for South African courts. Therefore South Africa having taken the initiative to prohibit indirect discrimination by means of the Constitution[259] and the new Labour Relations Act[260] now finds itself facing a massive task ahead to ensure that these indirect discrimination clauses as well as future discrimination legislation do not become meaningless and inaccesible to workers. It is for this very reason that academic research in this area of law must be encouraged and pursued.

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259 The Constitution of the Republic of South Africa Act 108 of 1996.

260 The Labour Relations Act 66 of 1995.

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