UNLAWFUL DISCRIMINATION IN EMPLOYMENT—AN OUTLINE OF THE EUROPEAN COMMUNITY RULES AND CASE-LAW

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I. INTRODUCTION

The law of the European Communities covers those areas in which the Treaties establishing the Communities have conferred competence on their Institutions. In relation to employment, the most important rules are those laid down in or under the 1957 Treaty establishing the European Economic Community (EEC Treaty).

Discrimination on political, religious, or ethnic grounds is not one of the subjects covered by the Community Treaties, although discrimination on grounds of nationality or sex is. It is not therefore possible to discuss the Community rules under the headings suggested. The purpose of this short descriptive paper is instead to present the Community rules and case law as they currently stand, and to indicate why the Community has assumed responsibility for certain aspects of discrimination in employment. It will also be necessary to outline the relationship between Community law and national rules in the Member States and between national and Community procedures for enforcing the rules.

II. DISCUSSION

A. Types of Discrimination Prohibited in Community Law

Only two forms of discrimination are clearly prohibited: discrimination on grounds of nationality and discrimination on grounds of sex. It is possible that other forms of discrimination are prohibited indirectly if they occur as a result of a form of discrimination of the two explicit types mentioned. However, discrimination on political, religious, or

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ethnic grounds independent of those two principal grounds is not a matter for which the Treaties give any clear competence to the Community.[1]

One also must note that the essentially economic character of the Treaties is clearly evident in the social field, in that the scope of the prohibition is, for the most part, limited to questions of, or connected with, either employment or activity as a self-employed person.

B. The Main Rules and Their Scope

1. Discrimination on grounds of nationality

The basic rule is found in Articles 7, 48, 52 and 59 of the EEC Treaty (see Annex). Certain provisions of the 1950 European Coal and Steel Community Treaty (ECSC Treaty) and 1957 European Atomic Energy Community Treaty (Euratom Treaty) are similar in effect, but apply only to coal and steel workers or to those employed in the nuclear industries. The following discussion will be concerned only with the EEC Treaty since it is of general application.

EEC Treaty Article 7 generally prohibits discrimination on grounds of nationality in *any* area covered by the Treaty; it therefore has potential for application outside the area of employment.[2] EEC Treaty Article 48 addresses discrimination as between Community nationals in access to employment and working conditions.[3] EEC Treaty Article 52

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[1] Discrimination on the first two grounds is prohibited by legislative or constitutional provisions in most Member States, if not indeed in all; discrimination on ethnic grounds is prohibited in those Member States in which there are important ethnic minorities.

[2] *See* Gravier v. City of Liège, [1985] E.C.R. 593 and Cowan, judgment of 2.2.1989, not yet published. *Gravier* establishes the right of Community nationals to enter higher education in another Member State on the same financial conditions as nationals of that State; *Cowan* establishes a corresponding right to eligibility for compensation under a public scheme for compensating the victims of violent crime. In *Gravier*, the French plaintiff was in Belgium as a student taking a vocational training course and had never worked in Belgium (combined application of EEC Treaty Articles 7 and 128). In *Cowan*, the British plaintiff was in France simply as a tourist but was deemed entitled to protection against discrimination on grounds of nationality in relation to the French criminal injuries compensation scheme in his capacity as a recipient of services in France (combined application of EEC Treaty Articles 7 and 59).

[3] For the purposes of Article 48, a worker is someone who carries out duties for another, under his direction and control, and receives remuneration in return. The purpose of the employment is irrelevant, once these criteria are fulfilled. Lawrie-Blum v. Land Baden-Württemberg, [1986] E.C.R. 2121 (a salaried student teacher in a public school was therefore a worker, even if she was doing the work as part

creates the right of establishment throughout the Community for all Community nationals, whether physical or legal persons. This right includes both the right of natural persons to exercise a trade or profession in another Member State as a self-employed person and the right of individuals or companies to establish and to operate companies in another Member State. EEC Treaty Article 59 allows for the free movement of services between Member States, without discrimination as between Community nationals, either as to the nationality of the provider of services or as to that of the recipient of those services.

Our present subject requires that we look mainly at Article 48 as well as the implementing legislation as interpreted by the European Court of Justice. Article 48 contains the basic rule of equal treatment of Community nationals in access to employment and conditions of employment, and the exceptions to the rule. This article may be said to have a "constitutional" character, in that it has a direct effect in the Member States, i.e. individuals may rely on it directly before national courts, both against acts of public authorities and against those of private employers and trade unions.[4] In other words, Article 48 preempts contradictory national law. Notwithstanding the preemptory nature of Article 48, Community legislation implements the article in detail.[5]

One should also remember that special rules exist which ensure that Community workers and their families continue to have social security coverage when they move from one Member State to another. These are essentially conflict-of-law rules which allow one to identify which State is responsible for which benefit in respect to a certain period of employment or residence. They nevertheless also contain express prohibitions on discrimination based upon nationality.[6]

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of her training). A person may be a worker even if his employment pays so little that he has to make up any difference between what he earns and what he needs by claiming social security. Kempf v. Staatssecretaris van Justitie, [1986] E.C.R. 1741.

[4] *See infra* note 32 and accompanying text.

[5] *See, e.g.*, Council Directive 64/221/EEC, 7 J.O. COMM. EUR. (No. 56) 4.4 (1964) (limiting the scope of the exceptions to Article 48); Council Directive 68/360/EEC, 11 J.O. COMM. EUR. (No. L257) 2 (1968) (abolishing restrictions on the right of residence of Community workers and their families); Council Regulation 1612/68/EEC, 11 J.O. COMM. EUR. (No. L257) 13 (1968) (free movement of workers in the Community). The more important provisions of these instruments are contained in the Annex.

[6] *See* Treaty Establishing the European Economic Community, March 25, 1957, 298 U.N.T.S. 3, art. 51 [hereinafter EEC Treaty] and Regulation 1408/71, 14 J.O. COMM. EUR. (No. L149) 2 (1971) as amended (the social security of migrant workers); *see also* Pinna v. Caisse d'allocations familiales de la Savoie, [1986] E.C.R. 1. *Pinna*

2. Discrimination on grounds of sex

As with Article 48, there must be a link with existing, past or future employment in order for the Community rules to apply. The main instruments are: EEC Treaty Article 119, requiring Member States to implement and to maintain equal pay for men and women for "equal work";[7] Council Directive 75/117/EEC, implementing Article 119 and "extending" it to cases of equal pay for work of equal value;[8] Council Directive 76/207 on equal treatment of men and women in access to employment, as to working conditions and dismissal;[9] Council Directive 79/7 on equal treatment of men and women in relation to public social security;[10] and Council Directive 86/378 on equal treatment of men and women in occupational social security.[11]

C. The Main Exceptions to These Rules

1. Discrimination on Grounds of Nationality - Express Exceptions

EEC Treaty Article 48(3) allows exceptions "justified" on grounds of public policy, public security, and public health (the justification

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involved Article 73 of this Regulation requiring that allowances for families of Community workers be paid at the rate applicable to families of nationals in the country of employment, even if the family members themselves lived apart from the worker in another Member State. The provision contained one express exception: if the migrant worker was employed in France, while his family continued to live in another Member State, the French allowances would be paid but at the (usually lower) rate of allowance paid in the other Member State. On a reference from a French court under EEC Treaty Article 177, the Court had no difficulty in holding that this amounted to indirect discrimination against Community workers, since they were more likely than French workers to have families living in other Member States. This provision of the regulation was therefore invalid as contrary to Article 48.

[7] EEC Treaty, *supra* note 6, art. 119. *See* Garland v. British Rail Engineering, Ltd., [1982] E.C.R. 359 which extends the notion of pay to benefits conferred after the end of the employment relationship, even if they are not contractual but only provided as a concession. The criterion is simply whether the benefit is paid by the employer and by reason of the employee's work for him.

The employer, by extra-contractual concession, granted cheap-rate travel to the families of former male employees, but not to those of former female employees. On a reference by the House of Lords, the Court held that Article 119 applied to this situation. Pay clearly includes such common benefits as company cars and mortgage facilities and can now be considered to include benefits under a company pension scheme and other company social benefits. Barber v. Guardian Royal Exchange Insurance Group, [1990] E.C.R. ____ (Case 262/88, not yet reported).

[8] 18 O.J. EUR. COMM. (No. L45) 19 (1975).

[9] 20 O.J. EUR. COMM. (No. L39) 40 (1976).

[10] 22 O.J. EUR. COMM. (No. L6) 24 (1979).

[11] 29 O.J. EUR. COMM. (No. 225) 40 (1986).

for any measure taken on such grounds must, if contested, be established by judicial process). Measures which may be taken on public health grounds are limited to certain serious diseases and conditions listed in the Annex to Directive 64/221. Public policy and public security are not easily distinguished in this context. It is fairly clear from Article 3 of Directive 64/221 that they both relate principally to the prevention of crime and of political subversion. Directive 64/221 limits the possibilities of using these exceptions, principally by providing that they must not be invoked for economic reasons (i.e. to combat unemployment among national workers); as to the exceptions of public policy and public security, they can only be based upon the personal conduct of the individual concerned. The Court of Justice has further limited the use of the exceptions, mainly by applying the principle of proportionality.[12]

EEC Treaty Article 48(4) is an exception which probably does not exist in any federal system, but is inevitable in a Community made up of what remain essentially sovereign States. On its face, Article 48(4) allows Member States to exclude other Community nationals from any job in their public service. In fact, the Court has limited this exception to jobs involving real public authority. In doing so, it has developed a Community notion of what constitutes "the public service" for the purposes of Article 48(4), which is very different from "the public service" as defined by most national rules.[13]

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[12] *See* Adoui and Cornuaille v. Belgium, [1982] E.C.R. 1665. These joined cases involved the expulsion from Belgium of two French prostitutes. Prostitution was not itself an offense in Belgium, although Belgian law did prohibit many activities commonly auxiliary to prostitution. The Belgian authorities based the expulsion order on public order reasons. The applicants applied to a local court for a declaration annulling the expulsion orders on the grounds that they were incompatible with Article 48 and unjustified under Article 48(3). Referring to Article 177, the Court of Justice upheld the defendants' claim. The court reasoned that although there could not be a perfect equivalence between sanctions against nationals and sanctions against non-nationals (the former cannot be expelled from their own countries), any penalty such as expulsion could only be applied to a Community worker in respect of conduct which resulted in "real and effective" sanctions if engaged in by nationals.

[13] *See* Commission v. Belgium, [1980] E.C.R. 3881, [1982] E.C.R. 1845. Although Article 48(4) refers simply to "employment in the public service," it does not apply to *any* job considered by national law to be in the public service, but only to those jobs which involve activities "typical" of the State. ("The State" for this purpose includes local and regional authorities). In other words, the jobs must involve participation, direct or indirect, in the exercise of public authority and the protection of the general interests of the State and other public bodies. *Id.* at 3900, ground 10.

The consequence is that most, if not all jobs, even senior positions, in public

Equally inevitable in a Community such as ours is the question of language; it is not contrary to the principle of non-discrimination in Article 48 to require a job applicant to prove that he or she is sufficiently competent in the local language, provided the nature of the job justifies the language requirement.[14]

Finally, where different States are involved, the problem of determining the equivalence of their vocational qualifications arises. Requiring proof of suitable qualifications is certainly not to be regarded as prohibited discrimination against non-nationals; Article 45 of Regulation 1612/68 leaves the matter for future legislation. In fact, the new Council Directive 89/48 on mutual recognition of certain qualifications at university or similar level will establish a means of ensuring recognition which should greatly assist Community workers seeking employment in other Member States.[15] On the other hand, none of this means that Member States may refuse to even consider qualifications from other Member States which are prima facie similar. States cannot so refuse without giving reasons, and the decision must be subject to judicial review.[16]

2. Discrimination on the grounds of nationality - implied exceptions

Obviously, the rules prohibit indirect as well as direct discrimination.[17] Theoretically, it should therefore be possible to plead that

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commercial and service bodies such as public utilities, public transport undertakings, public hospitals and schools, publicly-owned industries, banks, etc. must be open to all Community nationals who are suitably qualified. The same is true of many more junior posts in the public administration itself. Typical examples of jobs for which a nationality condition can still legitimately be applied are police and armed forces, diplomacy, senior government posts, and the judiciary. This case reflects the application of the principle of proportionality; the Court looked to the purpose of the provision, which it found to be to protect certain important interests of the State. The Court determined that the interest would be sufficiently protected if the nationality requirement were limited to jobs which actually do involve responsibility for protecting those interests and for exercising public authority, which entails making unilateral decisions affecting the rights of individuals.

[14] *See* Article 3 of Council Regulation 1612/68, EEC, 11 J.O. EUR. COMM. (No. L257) 2 (1968), as interpreted by the European Court of Justice in Groener v. Minister of Education, [1989] E.C.R ___ (judgment of Nov. 28, 1989, not yet reported).

[15] *See* 32 O.J. EUR. COMM. (No. L19) 16, 23 (1989).

[16] *See* Uneclef v. Heylens, [1987] E.C.R. 4097 (a French organization refused without explanation to recognize Belgian soccer trainer's qualification).

[17] Council Regulation 1612/68/EEC, 11 J. O. COMM. EUR. (No. L257) 3, art. 3, para. 2; *see also* Sotgiu v. Deutsche Bundespost, [1974] E.C.R. 153 and Pinna, [1986] E.C.R. 1.

the contested measure, even if indirectly discriminatory, is nevertheless objectively justified. In fact, such a case has never arisen, in contrast to what has happened in the Community case law on sex discrimination. All of the reported cases concern the express exceptions.[18]

3. Discrimination on grounds of sex - express exceptions

The equal pay provisions found in EEC Treaty Article 119[19] and Directive 75/117[20] are unconditional. It is therefore unsurprising that there have been several cases before the Court concerning the possibility of implied exceptions.[21]

Directive 76/207,[22] on equality in access to employment and working conditions, does contain exceptions: particularity of sex as a necessary condition of the job (Clark Gable cannot complain of discrimination if refused the part of Scarlett O'Hara);[23] provisions for the protection of women and unborn children; and positive actions to remedy existing inequality.

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[18] The Court has, nevertheless, occasionally limited the scope of the principle of non-discrimination. Thus, in *Ministere Public v. Even*, [1979] E.C.R. 2019, the Court did not allow a Frenchman who had been employed in Belgium to claim a special benefit for war veterans under Council Regulation 1612/68/EEC, 11 J. O. COMM. EUR. (No. L257) 2 (1968), even though he fulfilled the basic requirements applied to Belgian claimants (i.e. having served in the Allied forces between 1940 and 1945). The Court held that the benefit was not awarded to Belgian claimants by reason of their current status as workers in Belgium, but by reason of their wartime status as persons who were performing their patriotic duties.

[19] EEC Treaty Article 119 provides in its first paragraph that "each Member State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work."

[20] 18 O.J. EUR. COMM. (No. L45) 19 (1975).

[21] *See infra* notes 27 and 28 and accompanying text.

[22] 19 O.J. EUR. COMM. (No. L39) 40 (1976) [hereinafter Directive 76/207].

[23] *See* Commission v. United Kingdom, [1983] E.C.R. 3431. The United Kingdom's legislation implementing Directive 76/207 allowed employers to discriminate on grounds of sex if they were filling a post in a business employing fewer than six employees or recruiting domestic staff. The Commission brought an action under EEC Treaty Article 169 claiming that not all jobs in these categories were such that sex was a determining factor of eligibility for employment. The Court upheld the Commission's action on the ground that the purpose of Directive 76/207 Article 2(2) was to allow the fundamental principle of equal treatment to be reconciled with another such principle, namely "respect for private life." *Id.* at 3448. Ensuring the protection of the latter interest might well mean that for some such jobs, particularly in a private household, it should be possible to insist upon an employee being of a particular sex, but it could not be demonstrated that this was necessary in respect of all of them.

Likewise, Directives 79/7[24] and 86/378,[25] dealing with social security, also contain functional exceptions dictated by financial considerations: Member States and employers may fix different pensionable ages for men and women, and may exclude equality in relation to survivors' benefits and family benefits and certain benefits acquired under past contributions.

4. Discrimination on grounds of sex - implied exceptions

Case law, which developed initially in the area of equal pay, now extends into social security matters and demonstrates that indirect discrimination, which the directives expressly prohibit, may nevertheless be justified if shown to be the consequence of some policy followed for other reasons which amount to a "real need" of the employer[26] or a "priority consideration" of social policy for the State.[27]

D. Why are these Subjects in the EEC Treaty?

The original reasons for including these subjects in the EEC Treaty were economic. The economic justification for the free movement of

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[24] 22 O.J. EUR. COMM. (No. L6) 24 (1979) [hereinafter Directive 79/7].

[25] 29 O.J. EUR. COMM. (No. L225) 40 (1986) [hereinafter Directive 86/378]. It appears, however, that the exceptions in Directive 86/378 are partly invalid, as company social benefits and pensions have now been held to be governed directly by Article 119 of the EEC Treaty, which allows no such exception. Barber v. Guardian Royal Exchange Insurance Group, [1990] E.C.R. ____(Case 262/88, not yet reported).

[26] Bilka-Kaufhaus v. Weber von Harz, [1986] E.C.R. 1607. A private employer provided its former employees with pensions financed exclusively by itself on the condition they had been employed by the employer full-time for at least fifteen years. A former part-time female employee brought an action based on Article 119, claiming that pensions of this kind were "pay" and that the exclusion of part-time employees amounted to indirect discrimination against women. The employer conceded that over eighty percent of its part-time workers were women. The Court held that such pension benefits were indeed "pay" since they were provided by the employer under contract, by reason of the individual worker's employment. Moreover, in determining whether a rule was indirectly discriminatory, the important factor was the effect, not the employer's intention. This test is the same as that used in the United States. *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971). The Court did, however, leave open the possibility of an employer showing that an employment rule, although discriminatory, fulfills a "real need" of the employer's business and is proportionate to the business objective (i.e. the rule is effective for the purpose intended and no more discriminatory than the purpose requires).

[27] Teuling v. Bedrijfsvereniging voor de Chemische Industrie, [1987] E.C.R. 2497. The Court found justifiable an indirectly discriminatory rule providing couples with a higher minimum income benefit than single persons.

workers pursuant to Article 48 is the optimization of production. It allows the most efficient labor force to gravitate to where the best conditions of employment exist. Similarly, Article 119 was put in the Treaty because in 1957 only one Member State had implemented equal pay for men and women, and this Member State did not want unfair competition from other Member States in which cheaper female labor was used.

The Court of Justice has, however, added an extra dimension to these provisions, turning them both into a kind of human right, independent of the European Convention on Human Rights (which is not of course a Community instrument, though all Community Member States have ratified it). In particular, these rights are characterized as "fundamental," so that exceptions to them are to be construed narrowly. Moreover, individuals may invoke the rights directly before national courts and prevail over contrary national provisions and even, in the case of Articles 48 and 119, against contrary private measures.

E. Relationship Between Community and National Provisions

If a Community provision has "direct effect" before national courts, those courts must apply the Community provision rather than any contradictory national rule.[28] Likewise, if national law is silent

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[28] *See, e.g.*, Marshall v. Southampton and South-West Hampshire Area Health Authority, [1986] E.C.R. 723 [hereinafter Marshall]. Directive 76/207, Article 5(1) requires national laws to ensure that men and women enjoy the same conditions of employment, including those conditions related to dismissal. Directive 79/7, Article 7(1)(a) allows Member States to maintain different retirement ages for men and women for the purpose of granting pensions.

In English law prior to 1986, not only were the pensionable ages different (women: 60, men: 65), but also legal protection against unfair dismissal ceased upon the employee's reaching the normal pensionable age. The *Marshall* plaintiff was dismissed at age 62. It was admitted that had she been a man of the same age, she would not have been dismissed. The national court asked the Court of Justice whether Directive 76/207 *prohibited*, or Directive 79/7 *permitted* the English law. The English court also asked whether Directive 76/207, if found controlling, would have direct effect, thereby preempting incompatible national rules.

The Court held that Article 5(1) of Directive 76/207 does prohibit national laws resulting in the type of discrimination caused by the pre-1986 English pension-age laws. The Court also held that the directive does have direct effect, but only for *public* employers. The age at which a person may claim a pension is a matter of social security law, which is covered by Directive 79/7. This exception to the principle of equal treatment applies only to the specific social security law question. It has nothing to do with the age at which a person loses protection against dismissal. Rather, the latter is a question of employment law and is governed by the Directive on equality in employment.

on the subject, the Community rule applies directly. If a national rule on the subject is merely ambiguous, it is to be interpreted, so far as possible according to the national canons of interpretation, so as to conform with the Community rule.[29]

These provisions do not prevent the Commission, as the body responsible for proposing and enforcing Community law, from taking steps directly against the Member State concerned to require it to change its law in accordance with Community law. It means that in addition individuals who consider themselves to be victims of an act of discrimination prohibited by Community law, or to be prohibited pursuant to that law, can take the initiative themselves before national courts. It is a supplementary and highly effective means of enforcement.

The legal form of the provision concerned determines against whom the provision has direct effect. Regulations (of the Council or of the Commission) are "directly applicable" in the Member States by virtue of Article 189 EEC, i.e. they form part of national law without further enactment, whether at Community or national level and must be applied by national courts. They are normally directly effective as well, both against the State and against other individuals, such as private employers, if their terms so state or imply. Regulation 1612/68 on the free movement of workers[30] contains provisions which bind not only public but also private employers, and indeed trade unions.[31]

Articles of the Treaty are not stated by the Treaty to have any effect for or against individuals. Nevertheless, the Court has held many such articles to create rights which individuals can invoke against

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[29] *See, e.g.*, Beets-Proper v. F. Van Lanschot Bankiers N.V., [1986] E.C.R. 773, 793 (the Court of Justice of the European Communities concluded that Article 5(1) of Directive 76/207 means that the national courts must interpret relevant national rules, so far as possible under national canons of interpretation, in such a way as to disallow express or implied contract provisions that would force termination of a contract of employment at the age when the employee becomes entitled to a retirement pension. If this age requirement is different for men, termination of women at an earlier age would be discrimination in violation of Directive 76/207); Harz v. Deutsche Tradax, [1984] E.C.R. 1921, 1944 (A Member State is entitled to choose an award of compensation as the appropriate sanction for a breach of the principle of equal treatment set out in Directive 76/207; if it does so, but does not provide what the measure of damages is, the national judge must, so far as the national rules of interpretation allow, award "adequate" compensation - a conclusion which follows from the nature and the purpose of the directive.); *see also* Colson and Kamann v. Land Nordrhein-Westfalen, [1984] E.C.R. 1891, 1910.

[30] J.O. COMM. EUR. (No. L257) 2 (1968).

[31] *See, e.g., Id.* at arts. 7 and 8.

the state in national courts, or even, if the terms and purpose of the provision so permit, against other individuals, notably their employers. Such is the case with EEC Articles 48[32] and 119.[33] The test of whether a provision has "direct effect" before national courts is whether it is "unconditional and sufficiently precise" and thus capable of imposing an obligation, complete in itself, which national courts can easily enforce.

Provisions of directives can be invoked in national courts if they meet this test. However "of themselves," they only create obligations for Member States, which cannot set up the provisions of their national law against those of a directive which they themselves have

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[32] *See* Walrave and Koch v. Association Union Cycliste Internationale, [1974] E.C.R. 1405. This case involved an international sporting federation rule requiring that teams in certain events be composed of nationals of the same country. The plaintiffs claimed that the rule violated Article 48 in that it prevented them from teaming up with cyclists of other Community nationalities. In a reference, the Court held that Article 48, as well as arts. 7 and 59, applied directly, not only against public authorities, but also against acts of other bodies (possibly including private employers) which involve discrimination in access to employment against nationals of any Member State:

> 17. Prohibition of such discrimination does not only apply to the action of public authorities but extends likewise to rules of any other nature aimed at regulating in a collective manner gainful employment and the provision of services.
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> 18. The abolition as between Member States of obstacles to freedom of movement . . . which [is among the] fundamental objectives of the Community . . ., would be compromised if the abolition of barriers of national origin could be neutralized by obstacles resulting from the exercise of their legal autonomy by associations or organizations which do not come under public law." *Id.* at 1418-19, grounds 17 and 18.

The Court was nevertheless careful to distinguish between sports as an economic activity (i.e. access to employment in sport, which was employment like any other and covered by EEC Treaty Article 48 and Regulation 1612/68) and purely sporting considerations such as the organization of matches. The EEC Treaty did not prohibit the organization of matches between national teams selected on a national basis.

[33] *See* Defrenne v. Société Anonyme Belge de Navigation Aérienne Sabena, [1976] E.C.R. 455. A former flight attendant asserted her right to backpay for the difference between her wages and those paid to a man admitted to have been doing the same job. On a preliminary question from the Belgian court, the Court of Justice held that although EEC Treaty Article 119 referred only to Member States, that did "not prevent rights from being conferred at the same time on any individual who has an interest in the performance of the duties thus laid down." *Id.* at 475, ground 31. Moreover, the principle of equal pay binds private employers as well as public "since article 119 is mandatory in nature, the prohibition on discrimination between men and women applies not only to the action of public authorities but also extends to all agreements which are intended to regulate paid labour collectively, as well as to contracts between individuals." *Id.* at 476, ground 31.

failed to implement correctly (a rule which has been described as a form of estoppel).[34] Individuals may not rely on provisions of directives before national courts as against other individuals.[35] This rule naturally creates some difficulties of interpretation, particularly in the area of sex discrimination, where it can be extremely difficult to distinguish between a problem of pay, covered by Article 119 of the EEC Treaty (which can be relied on as against a private employer in national proceedings) and a problem of conditions of employment, covered by Directive 76/207 or 86/378 (which can only be relied upon before national courts as against the State).

F. Enforcement of the Community Rules - Role of National Courts

As has been indicated above, Community rules on sex and nationality discrimination can be enforced in two ways. First, the European Commission can take proceedings before the Court of Justice of the Communities under EEC Treaty Article 169[36] against a Member State which has failed to bring its law into line with Community law. This is of course a purely "international" sanction and will only remedy matters for the future. The Court's judgment, if the action is successful, takes the form of a declaration that the Member State has failed to comply with its obligations. Such a declaration is binding on the Member State which must put an end to the infringement.[37] However, no specific legal, as opposed to political, sanction backs up this obligation.

Second, individuals may themselves rely upon relevant Community provisions before national courts: (i) if it is a provision of a regulation, whose terms impose an obligation, whether on public bodies, on individuals or both; or (ii) if it is an article of the Treaty, or of a directive, which has been interpreted by the Court of Justice as having direct effect and if it is "unconditional and sufficiently precise" as to create an enforceable obligation.[38] This claim can be effective against existing discrimination, without waiting for the national law to be modified, if the alleged discriminator is one against whom the

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[34] *See, e.g.*, Pescatore, *The Doctrine of "Direct Effect": An Infant Disease of Community Law*, 8 EUR. L. REV. 155, 169 (1983).

[35] *See* Marshall, *supra* note 29, at 749, ground 18.

[36] EEC Treaty, *supra* note 6, art. 169.

[37] *Id.* at art. 171.

[38] *See* Becker v. Finanzamt Münster-Innenstadt, [1982] E.C.R. 53, 71.

particular provision may be invoked. These methods are complementary and are in no sense mutually exclusive.

If the national court has doubts as to whether the particular provision relied on before it has direct effect, or as to the extent of that effect, or simply as to the interpretation of the terms of the provision, it can (and if it is a court of last instance must) refer a question of interpretation to the Court of Justice under EEC Treaty Article 177.[39] This provision serves the further purpose of ensuring the uniform application of Community law throughout the Community.

On the other hand, if the national court considers the meaning of the Community provision to be clear, it may apply the provision without reference to the Court of Justice. Equally, if the meaning, once obscure, has now been made clear by judicial interpretation in that court, the national court may go ahead and apply the provision itself in accordance with that interpretation. This is obviously a delicate area. Controversial instances have occurred in which higher courts in the Member States have interpreted Community provisions themselves, without seeking guidance from the Court of Justice. These courts have concluded that the Community provisions did not take precedence over a competing national rule, although the terms of the Community rule strongly suggested the opposite and might well have been so interpreted had the national court referred a question of interpretation to the Court under EEC Article 177.

G. Discrimination on Other Grounds

As has been pointed out above, Community law does not directly prohibit discrimination on grounds other than nationality and sex, such as race, political opinions and activities, religious convictions, or sexual orientation. Nevertheless, there are indications in the case law that such forms of discrimination can be prohibited in Community law.[40]

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[39] EEC Treaty, *supra* note 6, art. 177.

[40] *See, e.g.*, Moser v. Land Baden-Württemburg, [1984] E.C.R. 2539, which involved a German measure excluding political extremists from public employment. The measure was attacked as contrary to EEC Treaty Article 48 and Directive 64/221, but the Court held that these provisions were not applicable in this action which concerned a 'purely internal' situation since the plaintiff was a German national in Germany who had not exercised the freedom of movement in the Community. *See also* Van Duyn v. Home Office, [1974] E.C.R. 1337, 1351 (the Court upheld a British rule prohibiting non-British nationals from working for Scientologist organization within Great Britain on the grounds that there were allegedly equivalent

It should be noted, finally, that even though the Community rules just discussed only apply where there is a connection with previous, existing or future employment, the consequence of a finding that a particular measure is unlawfully discriminatory contrary to those rules on sex equality may often be that for internal reasons, the Member State concerned modifies its law with completely general effect. One example was *Drake*,[41] in which the United Kingdom's formal obligation to comply with Directive 79/7[42] was simply to make the contested benefit available to married women who had given up work in order to care for an invalid. In fact, the benefit was extended to all married women doing such work, who had previously been excluded from it.

III. SUMMARY AND CONCLUDING REMARKS

Although the Community rules against discrimination in employment were originally included in the EEC Treaty for economic reasons, the case law of the Court of Justice has turned them into superior rules of law, having a "constitutional" status, in that they override any provisions of national law in the Member States which may be inconsistent with them. If their terms so require or allow, and the instrument in which they appear so allows, they may also bind individuals (in this case, private employers) in the Member States, in place of any inconsistent national rule which those individuals may have been applying. Moreover, they can be enforced not only through classic international procedures (Court action by an international organization, in this case the European Commission, against the infringing Member State) but also by the suit of an individual, before any national court in the Member States which has jurisdiction over questions of employment law.

Although the Community rules at present only cover discrimination on grounds of nationality or sex, their existence has introduced, in these areas, a form of "constitutional" control over the laws of the

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national rules discouraging British nationals from participating in Scientology activities); Netherlands v. Reed, [1986] E.C.R. 1283, 1284 (national rules allowing nationals to obtain residence permits for Community living companions must also allow non-national *workers* to obtain permits for the non-working, non-national living companions).

[41] Drake v. Chief Adjudication Officer, [1986] E.C.R. 1995.

[42] Directive 79/7, *supra* note 25.

Member States, even in those states which have no formal constitution.[43]

[43] For a particularly interesting example involving the United Kingdom, *see* Johnston v. Chief Constable of the Royal Ulster Constabulary, [1986] E.C.R. 1651. The Sex Discrimination Act 1975 and corresponding Northern Irish legislation implementing Directive 76/207 provided that the principle of equal treatment did not apply where the alleged act of discrimination had been taken for reasons of public security. A Minister's certificate that an act had been taken for security purposes was conclusive evidence in any United Kingdom court, which would therefore be required to decline jurisdiction of the case. Directive 76/207 Article 6 meanwhile required that Member States must ensure that all persons considering themselves aggrieved by failure to apply the principle of equal treatment to them should be able to have recourse to the law.

In response to a request for a preliminary ruling from the Northern Irish court, the Court of Justice held that the existence of Article 6 meant that a national court could simply ignore the Minister's certificate and hear the case on the merits. Article 6 of the Directive is directly applicable and could be relied upon before national courts by anyone whose case had been cut short by the application of the rule in question.

The importance of the decision becomes more apparent when one remembers that the United Kingdom has no written constitution. In providing a remedy in this type of case, Community law has created, in the areas to which it applies, a kind of check upon the constitutionality of laws.