

# UNLAWFUL DISCRIMINATION IN EMPLOYMENT— INTERNATIONAL LAW AND COMMUNITY LAW: THEIR INTERRELATIONSHIP WITH DOMESTIC LAW

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## I. INTRODUCTION

International law has made an important and decisive contribution towards the elimination of all forms of discrimination in employment. International instruments recognized basic social rights long before similar recognition was accorded at national levels, especially in the areas of race and sex discrimination. Additionally, various international agencies have prompted the search for a means of effecting equality in the enjoyment of human rights. National legislatures have acknowledged these views as compulsory international norms.

International law in the field of employment discrimination has impacted the European Economic Community (EEC). While international law suffers from ineffectiveness, the law of the EEC has a much stronger effect on individuals and Member States. Two aspects of the EEC's structure account for this difference. First, the laws of the EEC are directly applicable to citizens of Member States in some circumstances. For example, discrimination on the basis of nationality has received direct applicability status. Second, the primacy of EEC law over national law contributes to the effectiveness of EEC anti-discrimination measures.

## II. THE CONTRIBUTION OF INTERNATIONAL LAW TO EMPLOYMENT DISCRIMINATION LAW

International law's theoretical contribution to employment discrimination law progressed through four different stages. In the earliest stage of development, the concept of Equality Before the Law was adopted internationally, and then subsequently on a domestic basis. According to this concept, jurists classified people into groups and then examined the effect of the law upon that group of people. This approach was flawed; it necessarily distinguished between individuals

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in order to classify them, and thus treated people unequally. Instead of creating a single class of people all with equal rights, it created many classes of people with different legal rights. Additionally, not all people were included in a group for legal analysis. For example, during this period women were not given status as a class and therefore were not guaranteed equality. As a result, a few classes of people were guaranteed equal rights *vis-à-vis* others in their class, while the rest were afforded little or no protection.

The second step in the evolution of non-discrimination was the Difference Approach. This approach sought the establishment of human rights without discrimination as to race, color, sex, language, religion, political opinion, national or social origin, property, birth or other status. However, international and domestic interpretation of this theory allowed for some differences in treatment; only ill-founded differences in treatment were to be equalized.

The Equality of Opportunity (or Recognition of the Rights of Social Categories) Approach followed both the Equality Before the Law and Difference Approaches. The first two approaches applied the concept of non-discrimination formalistically towards achieving equality; the Equality of Opportunity Approach, however, followed a substantive approach. To achieve equal opportunity and equal treatment before the law, individuals in these social groups were to receive special consideration to compensate them for their disadvantages. Only then could individuals compete freely. However, it soon became apparent that to achieve equality in most cases, factors other than individual freedom or equal opportunity would have to be taken into account. Also, efforts to compensate individuals could become counter-productive. Achieving equal opportunity for one group without harming another or without jeopardizing other equally important social values could be difficult. In essence, equality of opportunity does not guarantee equality of results.

The Equality of Results Approach or the Pro-active Strategy is the fourth international law contribution to employment discrimination law. This approach requires that the state adopt active measures to modify and to improve the situation of a particular socio-legal category, i.e. women, migrant workers or ethnic minorities. The goal is no longer the prohibition of discrimination, but rather is the implementation of special measures benefitting specific groups to correct any *de facto* inequalities impairing their chances of success.

These four stages are discernable in the development of international law since 1945. The United Nations Charter and the Universal Dec-

laration of Human Rights represent the first stage.<sup>1</sup> The second stage is evidenced by a series of international conventions on human rights providing specific guarantees of equal treatment for special social groups in specific fields. The third stage can be seen in some international instruments framed for the sole benefit of socio-legal groups, i.e. race, ethnic, sex, and migrant worker classifications. A ban on discrimination serves as a general example of this third stage. Expert opinion holds that some of the obligations arising therefrom are self-executing and amenable to direct application within each state's legal system, while others require only an international undertaking on the state's part. Finally, two major instruments reflect the fourth stage: the United Nations Convention on the Elimination of all Forms of Racial Discrimination<sup>2</sup> and the United Nations Convention on the Elimination of all Forms of Discrimination Against Women.<sup>3</sup>

*A. The United Nations Convention on the Elimination of All Forms of Discrimination Against Women*

The United Nations Convention on the Elimination of All Forms of Discrimination Against Women is important because it illustrates the current trend towards equal opportunity and non-discrimination. Article 4 of this Convention states that

[a]doption by states parties of temporary special measures aimed at accelerating *de facto* equality between men and women shall not be considered discrimination as defined in this Convention, but shall in no way entail, as a consequence, the maintenance of unequal or separate standards; these measures shall be discontinued when the main objectives of equality of opportunity and treatment have been achieved. Adoption by states parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity, shall not be considered discriminatory.<sup>4</sup>

This is the first clear statement ever made in an international and universally applicable legal instrument declaring that positive action neither constitutes discrimination nor derogates from the principle of equality (provided the measures adopted are temporary and are aimed at correcting inequality where it has actually occurred).

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<sup>1</sup> G.A. Res. 217A, U.N. Doc. A/810 (1948).

<sup>2</sup> International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195.

<sup>3</sup> G.A. Res. 34/180, 34 GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46 (1979).

<sup>4</sup> *Id.*

The legal implications of Article 4 are of paramount importance. Article 4 does not simply acknowledge a fundamental right or freedom, nor does it simply provide protection to one special group. Here, probably for the first time in this field, an international convention includes a blanket provision reflecting a unified interpretation of a general principle of law, common to all legal systems. Once a state has ratified the UN Convention without making reservations to Article 4, three significant guarantees implicit in Article 4 become entrenched in that state's domestic law. These guarantees are as follows: (1) where preferential treatment is granted to a person or group of persons of one race or one sex, that treatment will never be construed as an illegal derogation from the general principle of equality between persons (provided that any such special measures are temporary and serve to bring about equality more rapidly); (2) such measures will be adopted and will continue until the goals of equal opportunity and treatment are achieved; (3) states will adopt positive action measures, applicable to their relationships with citizens, groups, and institutions, whenever necessary to achieve one of the rights enshrined in the United Nations Conventions and incorporated into their domestic legislation.

Article 4, however, has its weaknesses. First, the Article provides no sanctions for breach. Also, there are no guidelines establishing who has the burden of proof in contentious situations. Similarly, the Article does not define direct and indirect discrimination. These deficiencies make the Article difficult to enforce.

### *B. The International Labour Organization*

The I.L.O., since 1919, has also been instrumental in developing treaties and recommendations which define rights and instrumental in developing treaties and recommendations which define rights and establish codes of conduct in labor law, social security law, and social protection law. The I.L.O. Employment Policy Convention (No. 122) provides in Article 1 that "there is freedom of choice of employment and the fullest possible opportunity for each worker to qualify for, and to use his skills and endowments in, a job to which he is well suited, irrespective of race, colour, sex, religion, political opinion, national extraction or social origin."<sup>5</sup> The Recommendation Concerning Employment Policy (No. 122) provides further guidelines on

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<sup>5</sup> I.L.O. Convention Concerning Employment Policy, July 9, 1964, No. 122, art.1, 569 U.N.T.S. 65.

measures and methods of promoting "full, productive and freely chosen employment."<sup>6</sup>

Discrimination in employment and occupation is specifically addressed and proscribed by the Discrimination (Employment and Occupation) Convention (No. 111)<sup>7</sup> and the Discrimination Recommendation.<sup>8</sup> Under Article 2 of the Discrimination Convention (No. 111), ratifying states undertake "to declare and pursue a national policy designed to promote . . . equality of opportunity and treatment in respect of employment and occupation with a view to eliminating any discrimination in respect thereof."<sup>9</sup> Legislative and administrative action, educational programs, and the cooperation of employers' and workers' organizations and other appropriate bodies are envisaged by Article 3 as means of furthering this policy.<sup>10</sup>

Discrimination, as defined in Article 1, includes "any distinction, exclusion or preference made on a basis . . . which has the effect of nullifying or impairing equality of opportunity or treatment . . ."<sup>11</sup> Article 1(b)(2) provides that "[a]ny distinctions, exclusions, or preferences in respect of particular jobs based on the inherent requirements thereof shall not be deemed to be discrimination."<sup>12</sup> Furthermore, "[a]ny measures affecting an individual who is justifiably suspected of, or engaged in, activities prejudicial to the security of the State . . ."<sup>13</sup> as well as "measures of protection or assistance provided for in other [I.L.O. instruments] shall not be deemed to be discrimination."<sup>14</sup> The Discrimination Recommendation provides scientific guidelines for the formulation and implementation of the relevant national policy.

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<sup>6</sup> I.L.O. Recommendation Concerning Employment Policy, July 9, 1964, No. 122, *reprinted in* INTERNATIONAL LABOUR CONVENTIONS AND RECOMMENDATIONS 1919-1981, at 69, 70 (1982). *See also* I.L.O. Recommendation Concerning Employment Policy, 1984, No. 169, *reprinted in* R. BLANPAIN, INTERNATIONAL ENCYCLOPAEDIA FOR LABOUR LAW AND INDUSTRIAL RELATIONS, Codex at 690a (1985).

<sup>7</sup> I.L.O. Convention Concerning Discrimination in Respect of Employment and Occupation, June 25, 1958, No. 111, 362 U.N.T.S. 31.

<sup>8</sup> I.L.O. Recommendation Concerning Discrimination in Respect of Employment and Occupation, June 25, 1958, No. 111, *reprinted in* INTERNATIONAL LABOUR CONVENTIONS AND RECOMMENDATIONS 1919-1981, at 49 (1982).

<sup>9</sup> *See supra* note 7, at 34.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 33-34.

<sup>12</sup> *Id.* at 34.

<sup>13</sup> *Id.* at art. 4.

<sup>14</sup> *Id.* at art. 5.

In addition, the Workers with Family Responsibilities Convention (No. 156)<sup>15</sup> and Recommendation (No. 165)<sup>16</sup> are aimed at creating equality of opportunity and equality of treatment with respect to economic activity for male and female workers who have family responsibilities.

The I.L.O. has also published instruments concerning the economic status of women. The principal instruments in this area include: Equal Pay for Work of Equal Value (No. 100);<sup>17</sup> Workers with Family Responsibilities (No. 156);<sup>18</sup> Equality of Treatment (Social Security) Convention (No. 118);<sup>19</sup> the Social Policy (Basic Aims and Standards) Convention (No. 117);<sup>20</sup> and the Human Resources Development Convention (No. 142).<sup>21</sup>

While conventions have inspired domestic legislation, in the absence of domestic standards aimed at implementing the conventions ratified by a state, the texts of the treaties themselves play an insignificant role in shaping national law.

### III. THE EUROPEAN LEVEL

At the European level, the Council of Europe has adopted two important instruments: the European Convention on Human Rights<sup>22</sup> and the European Social Charter.<sup>23</sup> The Convention on Human Rights is concerned primarily with the protection of political rights as opposed to social rights. However, some provisions are relevant to the

<sup>15</sup> I.L.O. Convention Concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities, June 3, 1981, No. 156, *reprinted in* INTERNATIONAL LABOUR CONVENTIONS AND RECOMMENDATIONS 1919-1981, at 52 (1982) [hereinafter Workers with Family Responsibilities].

<sup>16</sup> I.L.O. Recommendation Concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities, June 23, 1981, No. 165, *reprinted in* INTERNATIONAL LABOUR CONVENTIONS AND RECOMMENDATIONS 1919-1981, at 56 (1982).

<sup>17</sup> I.L.O. Convention Concerning Equal Remuneration for Men and Women Workers of Equal Value, June 29, 1951, No. 100, 165 U.N.T.S. 303.

<sup>18</sup> See Workers with Family Responsibilities, *supra* note 13.

<sup>19</sup> I.L.O. Convention Concerning Equality of Treatment of Nationals and Non-Nationals in Social Security, June 28, 1962, No. 118, 494 U.N.T.S. 271.

<sup>20</sup> I.L.O. Convention Concerning Basic Aims and Standards of Social Policy, June 22, 1962, No. 117, Part V, 494 U.N.T.S. 249.

<sup>21</sup> I.L.O. Convention Concerning Vocational Guidance and Vocational Training in the Development of Human Resources, June 23, 1975, No. 142, art. 1, §5, 1050 U.N.T.S. 249.

<sup>22</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

<sup>23</sup> European Social Charter, Nov. 18, 1961, 529 U.N.T.S. 221.

field of labor law. For example: Article 4 outlaws the performance of "forced or compulsory labour;" Article 8 guarantees that "[e]veryone has the right to respect for his private and family life, his home and his correspondence;" Article 9 guarantees "freedom of thought, conscience and religion;" Article 10 guarantees "the right to freedom of expression;" Article 11 grants: "[e]veryone the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests;" and Article 14 prohibits any discrimination in the exercise of the rights and freedoms enshrined in the Convention.<sup>24</sup>

Article 11 of the European Convention on Human Rights safeguards the right to freedom of association, including the right to belong to a trade union. Although the European Court of Human Rights has stopped short of embracing the right not to belong, it nevertheless held that the British legislation was in violation of the Convention.<sup>25</sup> In particular, it held that in order to be lawful, a union membership agreement must first allow for the protection of non-members at the time the agreement is signed; second, it must allow for objections to membership on grounds of conscience as well as religion; and third, it must allow for a choice of unions to which the individual may be permitted to belong. Accordingly, this decision implicitly adhered to a policy of non-discrimination.

The Trade Union and Labor Relations Act, as amended in 1976,<sup>26</sup> reflects the goals espoused in the European Convention on Human Rights. This Act provides that unions and management can enter into a union membership agreement requiring that a specific class of employees belong to one or more specified trade unions. Where such an agreement exists, a dismissal for failure to belong to the union potentially would be lawful. An exception is provided for people who have genuine religious objections to trade union membership. This Act is particularly important since so many Europeans are in unions or work in closed shops. For example, Dunn and Gennard found that by mid-1978, at least 5.2 million employees in Great Britain were known to work in closed shops, amounting to 23 percent of

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<sup>24</sup> The European Court of Human Rights case, *Young, James and Webster v. United Kingdom*, 44 Eur. Ct. H. R. 1, (Ser.A) (1981), which dealt with the exercise of the closed shop in the United Kingdom, is a good example of the effectiveness of the Convention upon domestic law and practices in the United Kingdom.

<sup>25</sup> *Id.* at 21.

<sup>26</sup> The Trade Union and Labour Relations Act 1974, ch.52.

the total work-force. Since then, however, the number of formal union membership agreements has fallen sharply.

The Employment Acts of 1980 and 1982<sup>27</sup> provide that a valid union membership agreement must be approved by a ballot of the workers affected by it. Otherwise, a dismissal for non-membership will be automatically unfair. However, even where a valid ballot has been held, a wide range of exemptions exist. People may thereby decline joining even though they voted.

The second instrument adopted by the Council of Europe in regard to non-discrimination is the European Social Charter. However, from the stand-point of effectiveness, the Social Charter does not play a significant role because its supervision and control mechanisms are weak.

#### IV. THE EUROPEAN ECONOMIC COMMUNITY

The situation is very different in the EEC legal system due to the supra-nationality of Community rules. One of the fundamental values of the EEC is the Rule of Equality.<sup>28</sup> This means equality not only between citizens of the Community but also between the Member States. Under the Rule of Equality, a citizen of the Community may neither be placed at a disadvantage nor be discriminated against because of his or her nationality. All Community citizens are equal before the law, but only in regard to the scope of the objectives of the Treaty of Rome (EEC Treaty). Therefore, the Rule of Equality provides no protection against nationality based discrimination occurring in a field outside of the economic, financial or commercial scope of the Treaty.

The EEC Treaty provisions granting equal treatment and the elimination of all forms of discrimination in employment are specifically related to key groups: (a) migrant workers, wage-earners, and self-employed persons and (b) men and women. Articles 46, 52, and 60 of the EEC Treaty require equal treatment of Community citizens in regard to the right of work, freedom of establishment, and freedom to provide services. These Community rules, which guarantee the fundamental freedom of professional life, constitute a fundamental Community right to freedom of movement and freedom to choose and to practice a profession.

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<sup>27</sup> Employment Act, 1980, ch.42; Employment Act, 1982, ch.46.

<sup>28</sup> Treaty of Rome, Mar. 25, 1957, art.7, 298 U.N.T.S. 3.



The details of these rights, as elaborated in numerous instruments, include the following: all wage-earners in the Community may apply for job vacancies regardless of their nationality; workers in one Member State may reside in another Member State with their families; and, workers are eligible for the same rights as nationals as regards working conditions and terms of employment. However, the Treaty does retain a few restrictions on grounds of public security or public health, particularly in regard to employment in the public service.

A number of European Court of Justice cases have focused on matters relating to Community social law. On several occasions, the Court has expressly stated that the justification for restrictive measures against workers and members of their families must be considered in the light of Community rules, the principle of non-discrimination, and defense requirements.

The principle of non-discrimination applies not only to conditions governing free movement, residence, and work conditions, but also to all social benefits. For example, the Court stressed that migrant worker's children are entitled to the same benefits as the children of nationals of the country of residence.<sup>29</sup> In another ruling, the widow of a migrant worker was held to be eligible for a reduced fare railway card for large families that previously had been restricted to nationals.<sup>30</sup>

Article 119 of the EEC Treaty provides for equal pay for men and women. Due to the absence of necessary implementing legislation, it was the Court of Justice that ultimately effectuated Article 119 and gave women these rights.<sup>31</sup> The Court held that Article 119 does not simply lay down an abstract principle; rather, Article 119 imposes on the national courts a duty to ensure protection of the right to equal pay. This duty arises when discrimination directly results from contract provisions or collective agreements and in cases where men and women doing the same work in the same private or public undertaking are paid at different rates. According to the Court, equal pay was fully guaranteed by the original Member States in January 1962, the beginning of the second stage of the transition period, and by the new Member States in January 1973, when the Act of Accession

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<sup>29</sup> *Pinna v. Caisse d'allocations familiales de la Savoie*, [1986] E.C.R. I.

<sup>30</sup> *Cristini v. S.N.C.F.*, [1975] E.C.R. 1085 (preliminary ruling requested by the Cour d'appel, Paris).

<sup>31</sup> *Defrenne V. Société Anonyme Belge de Navigation Aérienne Sabena*, [1976] E.C.R. 455.

came into force.<sup>32</sup> To avoid a flood of applications for retroactive compensation and the economic upheaval that this would entail, the Court ruled that, with the exception of cases commenced prior to the judgment, the direct effect of Article 119 could be invoked only in cases of unequal treatment arising after the decision. Subsequent to these decisions, five directives have been adopted in the field of equal treatment.

### III. CONCLUSION

In conclusion, international treaties and conventions gradually evolved to recognize and to provide for equality in employment and equality in treatment. These treaties then influenced individual countries to introduce domestic legislation guaranteeing non-discriminatory employment practices. The United Nations Convention on Human Rights, Article 4, and various I.L.O. conventions and recommendations have encouraged the European countries to draft protective instruments between the European countries and between the EEC Member States. The supra-nationality of the EEC rules mandates that each member state implement the non-discrimination provisions at a domestic level. Additionally, the European Court of Justice, the European Court of Human Rights, and national courts effectively implement these various equality in employment instruments. This is a dynamic area of law—international treaties and domestic legislation are growing and changing to reflect the evolution in thought on equality of employment.

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<sup>32</sup> *Id.* at 479.