
EUROPEAN COMMUNITY SEX EQUALITY LAW

EVELYN ELLIS



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General Editor's Foreword

The subject of this book, the principle of equal treatment for men and women in European Community law, is a subject of intrinsic importance in a variety of ways. It brings together questions of fundamental human rights, issues of great social importance, and policy matters of very considerable economic significance. Community law in this field has had, and is continuing to have, a substantial and immediate impact on such matters as pay, on access to and conditions of employment, on pensions, on social security benefits, etc.

However, many of the issues discussed in this book are of even wider significance. This is because the principles developed in the field of sex equality, and the lessons to be learnt, are often relevant across the whole field of Community law. It is remarkable to recall that the notion of equal treatment for men and women figures only once in the Community Treaties, and that the provision in question, Article 119 of the EEC Treaty, appears to be little more than a statement of principle, and is confined to the field of equal pay for equal work. Nor do the Treaties confer any specific legislative competence for the implementation of the principle of equal pay or of equal treatment generally. In these areas, perhaps more than anywhere else, the Court of Justice, and to some extent the Community legislature, have put flesh on the bones of the Treaty.

The role of the Court was strikingly apparent in its decision in 1976 in the second *Defrenne* case which applied to Article 119 the principle of direct effect, requiring the courts of the Member States to enforce its provisions directly. Since then, the scope of the article has been spelt out, so as to apply, for example, to occupational pension schemes in the *Barber* case in 1990. Moreover, many principles of fundamental importance to the Community legal system are to be found in the Court's case-law on sex equality, including the use as an exceptional judicial technique of the prospective ruling, the spelling out of the conditions in which directives may produce direct effect, the elaboration of the duty of national courts to interpret and apply national legislation in accordance with relevant directives, and the emerging principle of the duty of national courts to provide the remedies necessary for the full enforcement of Community rights.

This book therefore will be welcomed not only as an analysis of a subject of inherent importance but as illuminating the Community legal system, since the subject is one which is indispensable for all students of the workings of Community law.

Francis Jacobs

August 1991

Author's Preface

The author would like to express her thanks to Julian Currall and Chris Docksey of the Legal Service of the Commission, and also to Evelyn Collins of the Commission's Equal Opportunities Unit, for their kind help in the closing stages of preparation of this book. For the opinions expressed in it, and any errors, the author is of course solely responsible.

E.E.

5 July 1991

Table of Cases

Abdulaziz, Cabales and Balkandali v. UK (1985) 7 EHRR 471	122,123
Acterberg-te Riele v. Sociale Verzekeringsbank Cases 48/88, 106/88 and 107/88 [1990] 3 CMLR 323	182
Administration des Douanes v. Société Cafés Jacques Vabre [1975] 2 CMLR 336	10
Airola v. Commission Case 21/74 [1975] ECR 221	128,129
Albion Shipping Agency v. Arnold [1981] IRLR 525	93
Allied Corporation v. Commission Cases 239/82 and 275/82 [1984] ECR 1005	124
American Cyanamid Co. v. Ethicon Ltd. [1975] AC 396	34
Amies v. ILEA [1977] ICR 308	93
Amministrazione delle Finanze dello Stato v. Denkvit Italiana Srl Case 61/79 [1980] ECR 1205	31,85
Amministrazione delle Finanze dello Stato v. Meridionale Industria Salumi Srl Cases 66, 127&128/79 [1980] ECR 1237	85
Amministrazione delle Finanze dello Stato v. Simmenthal SpA Case 106/77 [1978] ECR 629	34
Barber v. Guardian Royal Exchange Assurance Group Case C-262/88 [1983] IRLR 240 and [1990] 2 All ER 660	26, 28, 45, 46, 50-2, 54, 55, 58, 59, 60, 61, 86, 87, 88, 97, 105, 119, 133, 136, 142, 145-8, 197, 198, 202
Barnes v. Costle (1977) FEP Cases 345	74
Becker v. Finanzamt Munster-Innenstadt Case 8/81 [1982] ECR 53	21, 22, 25
Beets-Propert v. Van Lanschot Bankiers NV Case 262/84 [1986] ECR 773	27
Belgian Linguistic Case Judgment of 23 July 1968, Publ. ECHR, Ser. A, vol. 6 (1968), 4	122
Bilka-Kaufhaus GmbH v. Weber Von Hartz Case 170/84 [1986] ECR 1607	47, 48, 51, 52, 57, 59, 72, 73-4, 76, 77, 79, 90, 104, 108, 146, 192
Bock v. Commission Case 62/70 [1971] ECR 897	125
Bonino v. Commission Case 233/85 [1987] ECR 739	159
Bonsignore v. City of Cologne Case 67/74 [1975] ECR 297	17
Bourgoin v. Ministry of Agriculture and Fisheries [1985] 3 All ER 585	32
British Railways Board v. Paul [1988] IRLR 20	93

Brown and Royle v. Cearns and Brown Ltd. <i>EUR</i> 6 (Mar./Apr. 1986), 27	68
Burton v. British Railways Board Case 19/81 [1982] <i>EUR</i> 555	43, 46, 48, 57, 70, 97, 141, 142, 146, 197, 199
Calpak SpA v. Commission Case 789/79 [1980] <i>EUR</i> 1949	124, 125
Clark v. Chief Adjudication Officer Case 384/85 [1987] 3 <i>CMLR</i> 277	189, 190
Clarke v. Cray Precision Engineering, <i>EUR</i> 27 (Sept./Oct. 1989), 20	88
Clay Cross Ltd. v. Fletcher [1979] <i>ICR</i> 1	78
Cohn-Bendit v. Ministre de l'Intérieure [1980] 1 <i>CMLR</i> 543	9, 18, 19, 20
Comet BV v. Produktschap voor Siergewassen Case 45/76 [1976] 2 <i>EUR</i> 2043	31
Commission v. Belgium Case 102/79 [1980] <i>EUR</i> 1473	29
Commission v. Council Case 45/86 [1987] <i>EUR</i> 1493	214
Commission v. Council Case 247/87. Report not yet available	214
Commission v. Denmark Case 143/83 [1985] <i>EUR</i> 427	30, 63, 101-4
Commission v. France Case 312/86 [1988] <i>EUR</i> 6315	162, 171-3
Commission v. Italy Case 39/72 [1973] <i>EUR</i> 101	101
Commission v. Italy Case 163/82 [1983] <i>EUR</i> 3273	169, 170
Commission v. Luxemburg Case 58/81 [1982] <i>EUR</i> 2175	43, 88, 114, 115
Commission v. UK Case 61/81 [1982] <i>EUR</i> 2601	64, 90, 99, 100, 101, 102, 104, 105, 107, 110
Commission v. UK Case 165/82 [1983] <i>EUR</i> 3431	113, 138, 139, 163-6
Commission v. UK Case 246/89R [1989] 3 <i>CMLR</i> 601	36
Confédération Française Démocratique du Travail v. European Communities Case No. 8030/77. Decisions and Reports of the European Commission of Human Rights, vol. 13, 231	120
Costa v. ENEL Case 6/64 [1964] <i>EUR</i> 585, [1964] 2 <i>CMLR</i> 425	7-9
Cresswell v. Chief Adjudication Officer discussed in <i>The Independent</i> (14 Nov. 1990, 4) and <i>ibid.</i> (15 Nov. 1990, 2)	194
Davis v. Chief Adjudication Officer CIS/375/1990	194
De Angelis v. Commission Case 246/83 [1985] <i>EUR</i> 1253	104, 129-31
Defrenne v. Belgium Case 80/70 [1971] <i>EUR</i> 445	43, 48, 49, 50, 51, 82
Defrenne v. Sabena Case 43/75 [1976] <i>EUR</i> 455	22, 41, 42, 56, 57, 59, 62, 63, 64, 65, 66, 69, 70, 83-5, 88, 89, 90, 92, 96, 97, 114, 126, 131, 213
Defrenne v. Sabena Case 149/77 [1978] <i>EUR</i> 1365	15, 61, 90, 120, 124, 132, 133, 134
Dekker v. Stichting Vormingscentrum Voor Jonge Volwassen Plus Case 177/88 [1991] <i>IRLR</i> 27	55, 65, 75, 77, 123, 137, 138, 153, 225

Delauche v. Commission Case 111/86 [1987] ECR 5345	158, 159, 160
Devred v. Commission Case 257/78 [1979] ECR 3767	129
Dik v. College van Burgemeester en Wethouders, Arnhem Case 80/87 [1988] ECR 1601	189, 195
Drake v. Chief Adjudication Officer Case 150/85 [1986] ECR 1995	182–6
Duke v. GEC Reliance Ltd. [1988] 2 WLR 359	11, 28, 143
ECSC v. Aciaierie e Ferriere Busseni (in liquidation) Case C-221/88 [1990] (ECR page number not yet available)	25
Enderby v. Frenchay Health Authority and Secretary of State for Health [1991] IRLR 44	80
Enka BV v. Inspecteur der Invoerrechten en Accijnzen Case 38/77 [1977] ECR 2203	8, 18, 20
Economia di Porro v. Italian Ministry of Education Case 18/71 [1971] ECR 811	14
Fink-Frucht GmbH v. Hauptzollamt Munchen Case 27/67 [1968] ECR 223	14
Finnegan v. Clowney Youth Training Ltd. [1990] 2 WLR 1305	11, 28
Firma Kurt A. Becher v. Hauptzollamt Munchen-Landsbergerstrasse Case 13/67 [1968] ECR 196	87
Foster v. British Gas plc Case 188/89 [1988] IRLR 354, and [1990] IRLR 353	24, 25, 26
Fratelli Costanzo v. Commune di Milano Case 103/88 [1989] (ECR page number not yet available)	25
Frontini v. Minister of Finance [1974] 2 CMLR 372	9
Garland v. British Rail Case 12/81 [1982] ECR 359, [1982] 2 WLR 918	11, 28, 42, 97
Grad v. Finanzamt Traunstein Case 9/70 [1970] ECR 825	16, 17
Granital SpA v. Amministrazione delle Finanze (Dec 84/170) (1984) 21 CML Rev 756	9
Grimaldi v. Fonds des Maladies Professionnelles Case 322/88 [1990] IRLR 400	29
Hammersmith and Queen Charlotte's Special Health Authority v. Cato [1988] 1 CMLR 3	57, 58, 136
Handels-OG Kontorfunktionaerernes Forbund i Danmark v. Dansk Arbejdsgiverforening (acting for Aldi Marked k/s) Case 179/88 [1991] IRLR 31	123, 138, 141, 225
Handels-OG Kontorfunktionaerernes Forbund i Danmark v. Dansk Arbejdsgiverforening (acting for Danfoss) Case 109/88 [1989] IRLR 532	79, 80, 110–12, 159, 160, 161

- Hasley v. Fair Employment Agency [1989] IRLR 106 63, 68
- Hauer v. Land Rheinland-Pfalz Case 44/79 [1979] ECR 3727 117, 119
- Hayes v. Malleable Working Men's Club [1985] ICR 703 74, 75
- Hayward v. Cammell Laird Shipbuilders (No. 2) [1988] 2 WLR 1134 61, 80
- Helga Nimz v. Freic und Hansestadt Hamburg Case C-184/89 (Report not yet available) 92, 113, 140
- High Authority v. Collotti and the ECJ Case 70/63 *bis* [1965] ECR 1275 88
- Hofmann v. Barmer Ersatzkasse Case 184/83 [1984] ECR 3047 170-3
- Horsey v. Dyfed District Council [1982] IRLR 395 74
- Humblet v. Belgium Case 6/60 [1960] ECR 559 31
- Huppert v. UGC, *EOR* 8 (July/Aug. 1986), 38 130
- Hurley v. Mustoe [1981] IRLR 208 74
- Internationale Handelsgesellschaft GmbH v. Einfuhr-und Vorratsstelle fur Getreide und Futtermittel Case 11/70 [1970] ECR 1125, [1974] 2 CMLR 540 9, 117, 126
- Jackson v. Chief Adjudication Officer discussed in *The Independent* (14 Nov. 1990), 4 and (15 Nov. 1990), 2 194
- James v. Eastleigh Borough Council [1990] 3 WLR 55 74
- Jenkins v. Kingsgate (Clothing Productions) Ltd. Case 96/80 [1981] ECR 911, [1981] IRLR 388 43, 63, 64, 66, 67, 69, 70, 71, 72, 78, 89, 90, 96, 97, 98, 104, 115
- Johnston v. Chief Constable of the RUC Case 222/84 [1986] ECR 1651 23, 25, 119, 135, 138, 141, 155, 156, 162, 163, 166, 167, 169, 172
- Kowalska v. Freie und Hansestadt Hamburg Case 33/89 [1990] IRLR 447 72, 88, 92, 113, 140
- Leonesio v. Italian Ministry of Agriculture and Fisheries Case 93/71 [1972] ECR 287 5, 15
- Leverton v. Clwyd County Council [1989] 2 WLR 47 63
- Liefing v. Directie van het Academisch Ziekenhuis bij Universiteit van Amsterdam Case 23/83 [1984] ECR 3225 44, 45, 74, 90
- Litster v. Forth Dry Dock and Engineering Co. Ltd. [1989] ICR 341 11, 27
- Lorenz v. Germany Case 120/73 [1973] 2 ECR 1471 31
- Lutticke v. Hauptzollamt Sarrelouis Case 57/65 [1966] ECR 205 14
- Macarthys Ltd. v. Smith Case 129/79 [1979] 3 CMLR 44 [1980] ECR 1275, [1980] IRLR 209 11, 12, 62, 63, 64, 65, 70, 77, 89, 93, 97, 98, 99

McDermott and Cotter v. Minister for Social Welfare and the Attorney General Case 286/85 [1987] ECR 1453	188
Marleasing SA v. La Comercial Internacional de Alimentacion SA Case C-106/89 (Report not yet available)	28
Marshall v. Southampton and South-West Hants Area Health Auth- ority Case 152/84 [1986] ECR 723	22, 23, 25, 27, 131, 135, 142, 143, 144, 146, 197-9, 201
Marshall v. Southampton and South-West Hants Area Health Auth- ority (No. 2) [1988] IRLR 325, [1989] IRLR 459, and <i>The Inde- pendent</i> (14 Aug. 1990), <i>The Times</i> (4 Sept. 1990)	154, 155
Ministère Public v. Even Case 207/78 [1979] ECR 2019	48
Molkerei-Zentrale Westfalen/Lippe GmbH v. Hauptzollamt Paderborn Case 28/67 [1968] ECR 143	7, 14, 15, 31
Murphy v. Bord Telecom Eireann Case 157/86 [1988] 2 CMLR 753, [1988] ECR 673	66-8, 91, 97
Mutualités Chrésiennes v. Rzepa Case 35/74 [1974] ECR 1241	31
National Panasonic (UK) Ltd. v. Commission Case 136/79 [1980] ECR 2033	119
Netherlands v. Federatie Nederlandse Vakbeweging Case 71/85 [1987] 3 CMLR 767	186-8
Newstead v. Department of Transport Case 192/85 [1987] ECR 4753	45, 97
Nold KG v. Commission Case 4/73 [1974] ECR 491	118, 119
O'Brien v. Sim-Chem Ltd. [1980] 1 WLR 734	91, 98
Ogilvey-Stuart v. Cryor, <i>EOR</i> 23 (Jan./Feb. 1989), 5 and 33	58
Parsons v. East Surrey Health Authority [1986] ICR 837	12
Pickstone v. Freemans plc [1987] 3 WLR 811 and [1988] 2 All ER 803	11, 12, 91, 93
Politi Sas v. Minister of Finance Case 43/71 [1971] ECR 1039	8, 15
Price v. Civil Service Commission [1977] IRLR 291	130
Pubblico Ministero v. Ratti Case 148/78 [1979] ECR 1629	20, 21, 22, 117
Public Prosecutor v. Kolpinghuis Nijmegen BV Case 80/86 [1987] ECR 3969	27, 28
R. v. Birmingham City Council, Ex p. the Equal Opportunities Com- mission [1989] AC 1155	74
R. v. Bouchereau Case 30/77 [1977] ECR 1999	17
R. v. CAC, Ex p. Hy-Mac Ltd. [1979] IRLR 461	113
R. v. Commission for Racial Equality, Ex p. Westminster City Council [1985] ICR 827	74
R. v. Kent Kirk Case 63/83 [1984] ECR 2689	9, 119

R. v. Minister of Agriculture and Fisheries, Ex p. Agegate Ltd. Case C-3/87 [1990] 2 QB 151	36
R. v. Minister of Agriculture and Fisheries, Ex p. Jaderow Ltd. Case C-216/87 [1990] 2 QB 193	36
R. v. Secretary of State for Education, Ex p. Schaffter [1987] IRLR 53	12, 76, 137
R. v. Secretary of State for Home Affairs, Ex p. Santillo Case 131/79 [1980] ECR 1585	14, 21
R. v. Secretary of State for Social Security, Ex p. Smithson Welfare Rights Bulletin (Oct. 1990), no. 98, 4	202
R. v. Secretary of State for Transport, Ex p. Factortame Ltd. Case C-213/89 (1989) 139 NLJ Part I, 540, [1989] 2 WLR 997, and [1990] 3 WLR 818	12, 13, 32, 33, 34, 35
Rainey v. Greater Glasgow Health Board [1986] 3 WLR 1017	76, 77, 78, 137
Razzouk and Beydoun v. Commission Cases 75 and 117/82 [1984] ECR 1509	46, 47, 50, 56, 126, 127
Re the Application of Wunsche Handelsgesellschaft [1987] 3 CMLR 225	9
Re Severe Disablement Allowance [1989] 3 CMLR 379	163, 199, 200
Re Sex Discrimination in the Civil Service, Commission v. France Case 318/86 [1988] ECR 3559	54, 159, 160, 167-9
Reed Packaging Ltd. v. Boozer [1987] IRLR 26	80
Rewe-Zentralfinanz eG and Rewe-Zentral AG v. Landwirtschaftskammer fur das Saarland Case 33/76 [1976] 2 ECR 1989	31, 32, 85
Rinner-Kuhn v. FWW Spezial-Gebaudereinigung GmbH Case 171/88 [1989] IRLR 493	59, 60, 71, 72, 73, 81, 146, 192
Roberts v. Tate and Lyle Ltd. Case 151/84 [1986] ECR 703	144, 145, 146, 197, 198
Roland Rutili v. Minister of the Interior Case 36/75 [1975] ECR 1219	17, 19, 119
Roquette v. Commission Case 26/74 [1976] ECR 677	31
Rummler v. Dato-Druck GmbH Case 237/85 [1986] ECR 2101	105-8
Russo v. AIMA Case 60/75 [1976] ECR 45	31
Ruzius-Wilbrink v. Bestuur van de Bedrijfsvereniging voor Overheidsdiensten Case C-102/88 (Report not yet available)	92, 192
Sabbatini v. European Parliament Case 32/71 [1972] ECR 345	43, 127, 128, 132
SACE v. Italian Ministry of Finance Case 33/70 [1970] ECR 1213	16, 17
Salgoil SpA v. Italian Ministry of Foreign Trade Case 13/68 [1968] ECR 453	14, 31

Secretary of State for Employment v. Levy [1989] IRLR 469	58
Sgarlata v. Commission Case 40/64 [1965] ECR 215	126
Shields v. Coomes (Holdings) Ltd. [1978] ICR 1159	93
Sirena Srl v. Eda Srl Case 40/70 [1979] ECR 3169	87
Snoxell v. Vauxhall Motors Ltd. [1977] IRLR 123	93
State v. Royer Case 48/75 [1976] ECR 497	17, 30
Stevens v. Bexley Health Authority [1989] ICR 224	31, 57, 93
Teuling v. Bedrijfsvereniging voor de Chemische Industrie Case 30/85 [1987] ECR 2497	190–2, 194, 195
Thomas v. Adjudication Officer and Secretary of State for Social Security [1990] IRLR 436	142, 200–202
Toepfer v. Commission Cases 106 and 107/63 [1965] ECR 405	125
Transocean Marine Paint Association v. Commission Case 17/74 [1974] ECR 1063	118
Turley v. Allders Department Stores Ltd. [1980] IRLR 4	74
Van Den Broeck v. Commission Case 37/74 [1975] ECR 235	129
Van Duyn v. Home Office Case 41/74 [1974] ECR 1337	14, 15
Van Gend en Loos v. Nederlandse Tariefcommissie Case 26/62 [1963] ECR 1	6, 7, 9, 10, 13, 14
Van Landewyck Sarl v. Commission Joined Cases 209 to 215 and 218/78 [1980] ECR 3125	119
Verbond v. Inspecteur der Invoerrechten en Accijnzen Case 51/76 [1977] ECR 113	18
Von Colson and Kamann v. Land Nordrhein Westfalen Case 14/83 [1984] ECR 1891	26, 27, 28, 92, 152, 153, 154, 155, 158
Walrave and Koch v. Association Union Cycliste Internationale Case 36/74 [1974] ECR 1405	22
Walt Wilhelm v. Bundeskartellamt Case 14/68 [1969] ECR 1	9
Webb v. EMO Air Cargo (UK) Ltd. [1990] ICR 442	75
Wells and Others v. Smales Ltd. EOR 2, (July/Aug. 1985), 24	68
Worringham v. Lloyds Bank Ltd. Case 69/80 [1981] ECR 767	44, 45, 46, 49, 50, 57, 67, 70, 75, 85, 89, 90, 91, 97, 104
Worsdorfer v. Raad van Arbeid Case 9/79 [1979] ECR 2717	179

Contents

<i>Table of Cases</i>	ix
-----------------------	----

1. Introduction	1
The Importance of EC Law in the Member States of the Communities	1
Forms of EC Law	3
The Nature and Effects of EC Law	6
The Supremacy of EC Law	7
Direct Enforcement of EC Law by Individuals	13
The Constitutional Scope of EC Law	36
2. Article 119 and Equal Pay for Equal Work	38
The Origins and Purposes of Article 119	38
The Meaning of 'Pay'	42
Are Pensions 'Pay' within Article 119?	46
The Occupational Social Security Directive	52
Other Statutorily Regulated Payments Made by Employers to their Employees	57
Are All Employment Benefits 'Pay'?	60
The Meaning of 'Equal Work'	62
Work of Equal Value	66
The Article 119 Concept of 'Discrimination'	68
Defences to a Discrimination Claim	77
The Effects of Article 119 and the Remedies for its Breach	82
3. The Equal Pay Directive	95
The Background to the Equal Pay Directive	95
The Relationship between the Directive and Article 119	96
The Content of the Equal Pay Directive	98
4. Equal Treatment	117
The General Principle of Equal Treatment	117
The Nature of General Principles of EC Law	117
The Role Played by General Principles of EC Law	124

The Equal Treatment Directive	134
Background to the Instrument	134
Substantive Rights Conferred by the Directive	135
Exceptions to the Principle of Equal Treatment Permitted by the Directive	162
The Directive on Equal Treatment of the Self-Employed	175
5. Social Security	179
The Social Security Directive	179
Scope of the Social Security Directive	179
Substantive Rights Conferred by the Directive	181
Exceptions to the Social Security Directive	196
The Proposed Third Directive on Social Security	203
6. Future Developments	206
The Direction of Future Developments	206
Practical Prospects for Future Developments	212
Treaty Bases for Future Legislation	212
The Social Charter	214
<i>Bibliography</i>	227
<i>Index</i>	233

1

Introduction

The Importance of EC Law in the Member States of the Communities

Anybody who writes a book about sex equality, it would seem reasonable to suppose, believes that the subject is of great importance. The present writer is no exception. The right to equality of opportunity irrespective of sex is as fundamental to a civilized society as freedom of speech, freedom of religion or of political creed, or the right to equality notwithstanding race. Without the right to equality irrespective of sex, the individual remains unable to exploit his or her talents to the full and cannot make the most of what life has to offer: inequality is simply unfair. The community at large suffers too since valuable resources go untapped and potential gifts remain unrealized. The law and the apparatus by which it is administered, of course, play a vital part in sustaining the notion of equality as between the sexes; the law cannot do the whole job, since peoples' attitudes and cultural influences will always overlay it, but it is highly instrumental in shaping behaviour and expectations.¹

For a number of reasons which will be discussed in the present Chapter, European Community law provides an ideal vehicle for upholding the principle of sex equality; it has embraced the notion of non-discrimination between the sexes, as least as regards pay, ever since the Common Market first came into existence. One reason why this is of the utmost significance to the citizens of the Member States of the Communities is because of its undoubted potential for growth. It is well known that when the European Coal and Steel Community (ECSC) Treaty was concluded in 1951, and the Treaties establishing the European Economic Community (EEC) and European Atomic Energy Community (Euratom) were concluded in 1957, their chief instigators intended their immediate end to be economic welfare but their long-term goal to be political integration amongst the states of Europe.² The architects of the European Communities had personally witnessed the destructive forces of nationalism; many had seen their countries overwhelmed and occupied

¹ See also Byre, 'Applying Community Standards on Equality', in Buckley and Anderson (eds.), *Women, Equality and Europe* (Macmillan, London, 1988).

² See in particular Ionescu, *The New Politics of European Integration* (Macmillan, London, 1972), and Kitzinger, *The Politics and Economics of European Integration* (Greenwood Press, Westport, Conn., 1963).

during the Second World War. They were increasingly aware of the rise of the Super Powers and of the threat of Communism in the East. The Schuman Declaration of 9 May 1950, which preceded the formation of the ECSC, made very clear its author's ultimate political aspirations. Robert Schuman, the French Minister for Foreign Affairs, proposed that the whole of the French and German coal and steel production industries be placed under a common 'high authority', within the framework of an organization open to participation by the other countries of Europe. He went on to explain:

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

His overall plan was to build a united Europe 'through concrete achievements, which first create a "de facto" solidarity'. The Coal and Steel Community was to be just a first step in an ever-tightening web of economic, and thus political, integration. It was believed that the integration of the coal and steel industries would create common spheres of interest as between the French and the West Germans, which would encourage greater political friendship between those nations; further common economic and social issues would then begin to present themselves and a political framework would have to be established to deal with them. Gradually, the process would gather momentum. This scheme for what might today be termed 'rolling interdependence' between the states of Europe is clearly echoed in all the three founding Treaties. In particular, the first recital of the Preamble to the EEC Treaty begins with the words: 'Determined to lay the foundations of an ever closer union among the peoples of Europe'. To what extent, and at what speed, Europe will actually make progress towards such a political union of course remains to be seen, especially in the remaining years of the twentieth century.

The federalist concept which thus underpins the European Communities is vital to an understanding of the real significance of EC sex equality law. The Treaties and their present provisions are in no sense an end in themselves. They are no more than a staging-post in the ultimate design. The social provisions, in common with the rest of the Treaties, were intended to grow and develop as the linkage between the Member States became closer. Indeed the means for their development was specifically provided in the Treaties. The Treaties also, of course, provide for the accession of new Member States³ and, since the original Schuman Declaration, the Communities have doubled

³ EEC Treaty, Art. 237; ECSC Treaty, Art. 98, Euratom Treaty, Art. 205.

in size from the original 'Six' to the present 'Twelve'.⁴ Other States will undoubtedly gain membership in the future. What this means in practical terms is that a continuously developing body of sex equality laws is now able to reach a very large, and potentially expandable, group of people. An element of dynamism is contained within this formula which is almost always lacking in any wholly domestic context.

Forms of EC Law

Crucial to the concept of federation is the existence of a distinct legal system, belonging exclusively to the federation itself. This means that the federation must be able both to create its own laws and to enforce them effectively through its own system of courts or tribunals. The drafters of the European Community Treaties, eager as they were to create the germ from which a federation would grow, were aware of these needs and therefore provided for a system of Community law, together with appropriate lawmaking powers, enforceable through the medium of the European Court of Justice (ECJ) and the local courts. Essentially, they made provision for both primary and secondary tiers of Community law. Interestingly, the Treaties stop short of the use of the actual word 'legislation' in describing the legal system which they create, presumably for the political and psychological reason that this might have proved unacceptable to national parliaments at the time of accession to the European Communities.

The main primary source of Community law, and the only type which is relevant in the field of sex equality, is the founding Treaties, together with the amendments which have been made to them over the years. Of the three founding Treaties, the only one to make specific reference to sex equality is the EEC Treaty and it is with this Treaty that this book is therefore mainly concerned. The EEC Treaty in fact contains two sorts of provisions which are relevant in this field. First, there is Article 119 itself which enunciates the principle of equal pay for equal work irrespective of sex. This is the only explicit mention anywhere in the Treaty of the principle of sex equality and so it has provided the springboard for all the subsequent developments in this area. Second, there are those articles which provide the legal authorization for further, secondary legislation. The Treaty makes absolutely clear the need for specific authorization for particular measures of secondary legislation in Article 189;⁵ this enables the Council and the Commission⁶ to make secondary

⁴ The UK, Ireland, and Denmark became members of the Communities from 1 Jan. 1973; Greece acceded as of 1 Jan. 1981, and Spain and Portugal as of 1 Jan. 1986.

⁵ Henceforth, unless otherwise stated, all Treaty references will be to the EEC Treaty.

⁶ For general discussion of the powers and functions of the main institutions of the Communities, in particular the Council, Commission, and Court of Justice, see Hartley, *The Foundations of European Community Law*, 2nd ed. (Clarendon Press, Oxford, 1988).