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

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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 States[3] 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 Commission[6] 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).