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NOTES

THE EFFECT OF THE *KALANKE* DECISION ON THE EUROPEAN UNION: A DECISION WITH TEETH, BUT LITTLE BITE

INTRODUCTION

On October 17, 1995, the European Court of Justice ("ECJ"), in *Kalanke v. Freie Hansestadt Bremen*,¹ determined that a Bremen, Germany positive discrimination law, which provided for the recruitment of women in employment areas where women are under-represented, violated established European "Community law."² As a result of this decision, not only is Germany now "facing the vexing question of how to improve [employment] opportunities for women without putting men at an unfair disadvantage,"³ but critics in the European Community fear that other affirmative action programs presently in place will have to be abandoned.⁴

Some observers of the European Court of Justice predict

¹ Case C-450/93, *Kalanke v. Bremen*, 1996 E.C.R. I-3051, [1996] 1 C.M.L.R. 175 (1996) (all further references are to C.M.L.R.) In *Kalanke*, the issue was whether a state law implementing a gender quota which required women to receive at least one-half of public sector jobs was consistent with a European Council Directive prohibiting discrimination based on gender. *Id.* at 177. The European Court of Justice held that the promotion of a female gardener over a male by the Bremen Parks Department was violative of the directive. *Id.*; see Robert Rice, *Women Job Quotas "Unlawful": European Court Ruling Raises Doubts About Affirmative Action*, FIN. TIMES, Oct. 18, 1995, at 20.

² *Kalanke*, [1996] 1 C.M.L.R. 195.

³ Ruth Walker, *Germany Vindicates Affirmative Action: Mostly in Theory*, CHRISTIAN SCI. MONITOR, Mar. 18, 1996, at 7.

⁴ See Brian Coleman, et al., *A Special Background Report on European Union Business and Politics*, WALL ST. J. (Europe), Mar. 28, 1996, at 1.

that significant, and even radical changes in the law governing the European Union ("EU") will follow as a result of the *Kalanke* decision.⁵ Such analysts espouse that although Bremen is a moderately populated city-state, the *Kalanke* decision could have implications for the entire EU population.⁶ Primarily at issue is whether *Kalanke* will apply only locally or instead whether its holding will extend beyond Germany's borders to all the nations of the EU.

This Note argues that institutional and practical constraints on the ECJ limit *Kalanke's* overall effectiveness.⁷ Depending upon the will of the Member States of the EU, decisions such as *Kalanke*, which invalidate such state's national laws, may or may not influence laws of the European Community.

Part I of this Note outlines the principal institutions of the EU and the fundamental principles underlying the ECJ's establishment: its structure, procedure, jurisdiction, and the preliminary ruling system. Part II discusses Community law regarding women, including the *Kalanke* decision invalidating the Bremen law. Part III explains the theory of the supremacy of Community law over the laws of the Member States of the EU. Part IV addresses difficulties pertaining to the ECJ, including its law making capacity and issues concerning compliance and enforce-

⁵ See generally Ami Barav, *Omnipotent Courts*, in II INSTITUTIONAL DYNAMICS 265 (Deirdre Curtin & Ton Heukels eds. 1994); Kevin A. Swartz, Note, *Powerful, Unique, and Anonymous: The European Court of Justice and Its Continuing Impact on the Formation of the European Community*, 3 S. CAL. INTERDISC. L.J. 687 (1994) (explaining critical role of Court of Justice in establishing legal foundation of European Community).

⁶ See Rice, *supra* note 1, at 20 (noting that decision could have far reaching impact and that most EU states have affirmative action programs); Walker, *supra* note 3. The International Labor Organization, however, urged governments not to overreact to the *Kalanke* ruling. See *id.*; Tom Buerkle, *Europe's Court Strikes Down Hiring Quota for Women*, INT'L HERALD TRIB., Oct. 18, 1995 (asserting that "ruling [will] have significant impact across Europe, particularly in countries like Austria, Denmark, Sweden, Finland, Italy, and the Netherlands that mandate various types of positive discrimination"); Suzanne Perry, *Commission Proposal Blesses Flexible Quotas for Jobs*, THE REUTER EUR. COMMUNITY REP., Mar. 27, 1996, available in LEXIS, News Library, Reuec File ("Some countries—Sweden, for example—allow 'positive discrimination' in favour of members of the under represented sex even if they are slightly less qualified than candidates of the other sex.").

⁷ "The judicial system of protection as conceived by the Treaties has, in practice, disclosed some flaws, shortcomings or even gaps." Gerhard Bebr, *Court of Justice: Judicial Protection and the Rule of Law*, II INSTITUTIONAL DYNAMICS, *supra* note 5, at 303. One such shortcoming was the lack of "protection of individuals against infringements of Community law by the member states." *Id.*

ment. Finally, Part V discusses the reactions of the Member States of the EU to the court's decision in *Kalanke*.

I. INSTITUTIONS OF THE EUROPEAN COMMUNITY

The EU was established to develop "economic and social cohesion, and economic and monetary union" amongst the Member States.⁸ Another objective was "to assert its identity on the international scene ... through the implementation of a common foreign and security policy ... which might lead to a common defence [policy]."⁹ To advance these goals, four principal institutions were created: The European Parliament, The Council of Ministers, The European Commission, and The European Court of Justice. It is important to have a basic understanding of each of these institutions in order to understand fully the workings of the ECJ.

A. *The European Parliament*

The European Parliament ("Parliament") consists of 567 members elected directly by citizens of the EU for five-year terms.¹⁰ The members of Parliament each represent their respective countries in making decisions and policies.¹¹ The number of parliamentary seats for each country is proportional to a Member State's population: Germany, the largest Member State, has ninety-nine seats while Luxembourg, the smallest state, has only six.¹²

The European Parliament "is largely consultative and is not

⁸ TREATY ON EUROPEAN UNION, art. B, Feb. 7, 1992, O.J. (C191) 1 (1992), [1992] 1 C.M.L.R. 719 (1992) [hereinafter EU TREATY]; see P.S.R.F. MATHIJSEN, A GUIDE TO EUROPEAN UNION LAW 6 (6th ed. 1995).

⁹ EU TREATY art. B; see MATHIJSEN, *supra* note 8, at 6. The need for an external identity stems from the role the Community must play in competition with the United States and Japan. See *id.* While the Community possesses this international economic status, it is still working toward gaining a political presence. See *id.* The extensive history of the development of the European Union will not be dealt with in this Note.

¹⁰ See MATHIJSEN, *supra* note 8, at 27. Elections are held "in accordance with the method of voting decided nationally." *Id.* at 26. Individuals may simultaneously serve a national Parliament and the European Parliament, unless national rules dictate otherwise. See *id.* at 27.

¹¹ See Paul H. Vishny, *European Union Law: An Introduction*, SB04 A.L.I.-A.B.A. 1, 4 (1996).

¹² See MATHIJSEN, *supra* note 8, at 27 (stating main criteria for determining number of seats in national population). Members of Parliament are affiliated with nine political groups. See Vishny, *supra* note 11, at 5.

a full legislative body as is the case with other parliaments or the United States Congress."¹³ Although the European Council must consult the Parliament on certain important matters, opinions rendered by Parliament are not binding upon the Council.¹⁴ Parliament does possess, however, a limited veto power over certain Council decisions.¹⁵ Similarly, the Council may also be required to pass a proposal that Parliament approves.¹⁶

B. *The European Commission*

The European Commission ("Commission") consists of twenty full-time public servants appointed by Member State governments for five-year terms.¹⁷ Commission members "act independently and do not take instructions from their own governments."¹⁸ They embrace neutrality in favor of acting on behalf of the EU.

The Commission has a duty to ensure "the proper functioning and development of the Common Market"¹⁹ It prepares recommendations and opinions on Community law and initiates

¹³ *Id.*; see T.C. HARTLEY, *THE FOUNDATIONS OF THE EUROPEAN COMMUNITY* 33 (3d ed. 1994) (stating that in some cases Parliament has extensive rights, while in others Parliament only has right to be consulted).

¹⁴ See MATHIJSEN, *supra* note 8, at 30. While the Council is not bound by Parliament's decisions, the acts must mention "the fact that Parliament was consulted." *Id.* The Council need not indicate, however, "whether the opinion was favourable or not." *Id.*

¹⁵ See Lisa B. White, Comment, *The Enforcement of European Union Law: The Role of the European Court of Justice and the Court's Latest Challenge*, 18 HOUSTON J. INT'L L. 833, 841 (1996) (citing GEORGE BERMANN, ET AL., *CASES AND MATERIALS ON EUROPEAN COMMUNITY LAW* 5 (1993)). The Council must adopt a "common position" and send it to Parliament. See *id.* (citing BERMANN, *supra*, at 84). The Council is obligated to pass the common position if Parliament approves of it and if Parliament disapproves, the measure can only be passed through unanimous agreement. See *id.* (citing BERMANN, *supra*, at 84).

¹⁶ See *id.* (citing BERMANN, *supra* note 15, at 84).

¹⁷ See Vishny, *supra* note 11, at 6. "The number of members may be altered by the Council." *Id.* The members of the Commission have to be nationals of the Member States and each State must have one but cannot have more than two individuals on the Commission. See D. LASOK & J.W. BRIDGE, *LAW & INSTITUTIONS OF THE EUROPEAN COMMUNITIES* 185 (4th ed. 1987).

¹⁸ Vishny, *supra* note 11, at 6. They are "full-time public servants" and represent the neutrality towards their home governments necessary to act on behalf of the Union. *Id.*

¹⁹ *Id.* (citing TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY, art. 155, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC TREATY]).

most EU legislation.²⁰ The Commission as the “‘guardian of the Treaty,’ ”²¹ is charged with guaranteeing the enforcement of the European Union treaty, “including the bringing of enforcement actions before the European Court of justice.”²² Commission members are responsible for administering Community finances, negotiating international agreements and representing the Community both inside and outside of its borders.²³ Finally, the Commission “embodies and represents the common or Community interest and is responsible for ensuring that this interest prevails when decisions are taken by Member States, the Council or natural and legal persons alike.”²⁴

C. The European Council

The European Council (“Council”) consists of representatives from the governments of each Member State.²⁵ The primary role of the Council is to “ensure co-ordination of the general economic policies of the Member States.”²⁶ As representatives of the Member States working in a Community institution, “the members of the Council act on instruction from their [respective] government[s],”²⁷ while at the same time acting in the interest of the European Community.²⁸ Council membership “varies in accordance with the subject matter to be discussed.”²⁹ Council meetings are private and meeting records are kept confidential.³⁰

The Council represents the interests of each of the Member

²⁰ See *id.*

²¹ White, *supra* note 15, at 839.

²² Vishny, *supra* note 11, at 6. “The Commission has the responsibility for investigating and initiating proceedings against member states who do not abide by EU law. This body may settle these conflicts out of court, or the member states can force the Commission to file suit in court.” White, *supra* note 15, at 839 (citations omitted).

²³ See White, *supra* note 15, at 839 (citations omitted).

²⁴ MATHIJSEN, *supra* note 8, at 67.

²⁵ See *id.* at 50 (citing TREATY ESTABLISHING THE EUROPEAN COMMUNITY, art. 146, Feb. 7, 1992, O.J. (C224) 1 (1992), [1992] 1 C.M.L.R. 573 (1992) [hereinafter EC TREATY]). Representatives from the ministerial level of government are authorized to bind the member state. See *id.*

²⁶ EC TREATY art. 145.

²⁷ MATHIJSEN, *supra* note 8, at 50.

²⁸ See *id.*

²⁹ Vishny, *supra* note 11, at 5. The Council member typically will be the “minister whose portfolio includes the subject under discussion.” *Id.*

³⁰ See *id.*

States³¹ and is the principal legislative body of the EU.³² "It acts on proposals referred to it by the Commission"³³ and "issues regulations, directives, and decisions based on [Commission] drafts."³⁴ The Council allocates votes to Member States based upon their population size: the largest state receives ten votes and the smallest state receives two.³⁵ Depending upon the nature of proposal that is before the Council, enactment may require a mere majority vote, a two-thirds majority vote, a qualified majority vote,³⁶ or a unanimous vote.³⁷ The Council may act, however, only when the Treaty of the European Union expressly provides it with the power to do so.³⁸

Directives are one of the Council's primary legislative tools. The purpose of a directive is to "lay[] down an objective" and detail a common goal to be achieved among the Member States.³⁹ Government officials of each state "are left the 'choice of form and method[]'"⁴⁰ necessary to achieve the particular objective set forth by the Council.⁴¹ The ECJ has held specifically that

³¹ See MATHIJSEN, *supra* note 8, at 51. "[T]he Commission's proposal and the opinion of Parliament should ensure that the Community's interests are sufficiently taken into consideration." *Id.* at 57-58.

³² See Vishny, *supra* note 11, at 5.

³³ *Id.*

³⁴ See White, *supra* note 15, at 838 (citing P.S.R.F. MATHIJSEN, A GUIDE TO EUROPEAN COMMUNITY LAW (5th ed. 1990)). The Council also "delegates certain powers to the Commission" and "has the power to ratify treaties after consulting the [European] Parliament." Vishny, *supra* note 11, at 5.

³⁵ *See id.*

³⁶ See MATHIJSEN, *supra* note 8, at 52-53. A qualified majority vote presently would consist of 54 of the 76 votes in the Council. *See id.*

³⁷ *See id.* at 51. Most important decisions require a unanimous vote. *See id.* Unanimity is required to enlarge the European Community or to deviate from the treaty. *See* Vishny, *supra* note 11, at 5. Additionally, all must agree on matters relating to taxes and the free movement of people within the Community. *See id.*

³⁸ See MATHIJSEN, *supra* note 8, at 57. "[T]he Council may, acting unanimously on a proposal from the Commission and after consulting Parliament, take the appropriate measures." *Id.* (citing EC TREATY art. 235).

³⁹ HARTLEY, *supra* note 13, at 210. *See* EC TREATY art. 189 ("A directive shall be binding, as to the result to be achieved, upon each member state to which it is addressed, but shall leave to the national authorities the choice of form and methods.").

⁴⁰ ELEANOR SHARPSTON, INTERIM AND SUBSTANTIVE RELIEF 8 (1993) (quoting EC TREATY at art. 189) (alteration in original).

⁴¹ *See id.* (finding that "detailed implementation remains the province of the Member States"); EUROPEAN COMMUNITY LAW AFTER 1992 4 (Ralph M. Folsom, et al. eds., 1993) ("It is then left to the Member States to implement the Directive in whatever way is appropriate to their national legal system."); HARTLEY, *supra* note 13, at 210 (noting that directive only dictates desired result while Member States

“Member States [are] free to implement Directives by means appropriate to their domestic situations.”⁴² The treaty makers intended to ensure uniformity in legislative results but also wanted to permit the states diversity in procedure so as to guarantee effective compliance with a particular objective.

Pursuant to the treaties, the Council’s directives were not meant to be “directly effective”,⁴³ that is, individuals could not rely on Community provisions when bringing actions before national courts.⁴⁴ The direct effect principle states that “certain provisions of [EU] law may confer rights or impose obligations on individuals which national courts are bound to recognise and enforce.”⁴⁵ Instead of providing for such direct effect, however, the treaty makers determined that directives would have “indirect effect.” This term, although not actually used in practice by European courts, signifies “the doctrine that Community provisions ... must be taken into account by national courts when interpreting national legislation.”⁴⁶ In essence, almost the same result under both a direct and indirect effect is achieved despite the subtle difference in their interpretations.⁴⁷

Despite the rather clear intent of the treaty makers regarding the effect of Council Directives, the ECJ has previously ruled

are free to choose particular means to reach objective).

⁴² Taline Aharonian, *Equal Value in the European Union: Fiction or Reality?*, 2 BUFF. J. INT’L L. 91, 104 (1995).

⁴³ HARTLEY, *supra* note 13, at 210.

⁴⁴ *See id.* at 195. Only when a provision is directly effective can individual rights be upheld by the Member Courts. *See id.* The definition of “directly effective” “refers to rights, rather than to obligations, and to rights enforceable by individuals, rather than by public authorities.” *Id.*; *see* SHARPSTON, *supra* note 40, at 11. Individuals can rely on the provisions “either against other private individuals or companies or against the organs of government of the Member State itself.” *Id.* “Directives cannot be enforced against another natural or legal person in private litigation.” *Id.* at 13.

⁴⁵ NEILL NUGENT, *THE GOVERNMENT AND POLITICS OF THE EUROPEAN COMMUNITY* 177 (2d ed. 1994). The principle of direct effect was first established in the 1963 case of *Van Gend en Loos*. *See id.* The Court has since expanded its scope to include most secondary legislation. *See id.*

⁴⁶ HARTLEY, *supra* note 13, at 222. Although the label is not used specifically by the ECJ, it is applied mainly to directives, which “cannot directly impose obligations on individuals.” *Id.* The distinction between direct effect of laws and directives must be understood. Direct effect means that a provision creating rights need not be re-enacted in national legislation but is accepted wholesale as governing law. *See* W. RAWLINSON & M. CORNWELL-KELLY, *EUROPEAN COMMUNITY LAW* § 2.15 (1994). In contrast, directives need “to be the subject of national legislative action to implement them.” *Id.* The distinction has blurred, however, as courts have held both to be directly applicable. *See id.*

⁴⁷ *See* HARTLEY, *supra* note 13, at 222.

that such directives can be directly effective.⁴⁸ Through a series of cases, the principle emerged that "directives may contain terms that are sufficiently precise and unconditional of themselves to create rights."⁴⁹ The Court deemed it necessary to find that directives could be directly effective because of the national governments' failure to implement various Community directives.⁵⁰ Such direct effect requires that the courts of the Member States enforce issued Community directives.⁵¹ If the ECJ instead had determined that these directives ought not be directly effective, such directives could then only be enforced "by means of an action brought in the European Court by the Commission (or by another Member State)."⁵² The direct effect doctrine for Community directives has two significant consequences; it protects the Commission from political pressure and it imposes a burden upon national courts to enforce these Community directives.⁵³ Whether national courts will meet this enforcement burden, however, is yet to be seen.

D. *The European Court of Justice*

The ECJ⁵⁴ was created by three Treaties establishing the

⁴⁸ See *id.* at 211; see also *Van Duyn v. Home Office*, 41/7, 1974 E.C.R. 1337, [1974] 1 C.M.L.R. 347 (Ch. 1974) (Eng.); SHARPSTON, *supra* note 40, at 12 ("Directives might be thought - since article 189 of the Treaty leaves their detailed implementation to the Member State - to be incapable of creating rights on which individuals may rely before the national courts.").

⁴⁹ SHARPSTON, *supra* note 40, at 12; see *Marshall v. Southampton and S.W. Hampshire Area Health Auth.*, 1986 E.C.R. 723, [1986] 1 C.M.L.R. 688 (1986). The Court in *Marshall* held that "wherever the provisions of a directive appear, as far as their subject matter is concerned, to be unconditional and sufficiently precise, those provisions may be relied upon by an individual against the state where that state fails to implement the directive in national law or where it fails to implement the directive correctly." *Id.*

⁵⁰ See HARTLEY, *supra* note 13, at 213 (stating that member states have always been negligent in implementing community directives).

⁵¹ See *id.*

⁵² *Id.*; see EC TREATY arts. 169-71.

⁵³ See HARTLEY, *supra* note 13, at 213 n.55 (detailing Netherlands study and failure of member states to comply in timely manner).

⁵⁴ The ECJ is based in Luxembourg. See NUGENT, *supra* note 45, at 220. There are two-tiers to the European court system: the Court of Justice of the European Communities and below it, the Court of First Instance. See Carl O. Lenz, *The Role and Mechanism of the Preliminary Ruling Procedure*, 18A FORDHAM INT'L L.J. 388, 390 (1994). A vital part of the EC Treaty is the cooperation between the Courts of the member states and the Court of Justice in the interpretation of Community Law in the preliminary ruling procedure. See *id.*

This Note will focus exclusively on the Court of Justice because it is solely re-

European Coal and Steel Community ("ECSC"),⁵⁵ the European Economic Community ("EEC")⁵⁶ and the European Atomic Energy Community ("Euratom").⁵⁷ The founders of the Community clearly understood the need for a centralized court, particularly "because broad areas of the Community legal order [were] decentralized."⁵⁸ The result was the ECJ, which "is the single institution exercising judicial authority within the Communities"⁵⁹

1. Fundamental Principles

The fundamental duties of the ECJ are to ensure the en-

sponsible for determining preliminary rulings. "After the court settles the disputed issue of law, the national court which requested the preliminary ruling must apply the Court's ruling to the facts of the case." Swartz, *supra* note 5, at 693.

⁵⁵ TREATY ESTABLISHING THE EUROPEAN COAL AND STEEL COMMUNITY, Apr. 18, 1951, 261 U.N.T.S. 140 [hereinafter ECSC TREATY]. The ECSC treaty was signed in Paris by Belgium, France, Germany, Italy, Luxembourg and the Netherlands (the six founding members) on April 18, 1951, creating *inter alia*, the European Court of Justice. See L. NEVILLE BROWN & TOM KENNEDY, *THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES* 1 (4th ed. 1994); NUGENT, *supra* note 45, at 449.

⁵⁶ EEC TREATY.

⁵⁷ TREATY ESTABLISHING THE EUROPEAN ATOMIC ENERGY COMMUNITY, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EURATOM TREATY]. The Treaties establishing the EEC and the Euratom, also known as the Treaties of Rome, were signed on March 25, 1957. BROWN & KENNEDY, *supra* note 55, at 1. It was determined that there should be a single Court to serve all three Communities. *Id.* at 1-2. The number of nations under three Communities was increased to include Denmark, Ireland and the United Kingdom in 1973, Greece in 1981, Spain and Portugal in 1986, *id.* at 2, and Austria, Finland, and Sweden in 1995. *The Future of Europe*, THE INDEP. (London), Mar. 28, 1996, at 14. See K.P.E. LASOK, *THE EUROPEAN COURT OF JUSTICE: PRACTICE AND PROCEDURE* 1 (2d ed. 1994) (reciting history of European treaties establishing ECJ). These treaties have been amended and supplemented by the Single European Act ("SEA"), signed on February 17th and 18th of 1986, 1987 O.J. (L 169) 1 and by the Treaty on European Union ("EU TREATY"), signed at Maastricht on February 7, 1992, 1992 O.J. (C 191) 1. This note uses the term "European Community" [EC] to refer to the political, economic and legal entity created under the EEC Treaty, as amended by the SEA and the EU Treaty.

⁵⁸ Lenz, *supra* note 54, at 391. "A supranational entity such as the Community cannot function effectively unless there is a single court with power to decide all questions of Community law." HARTLEY, *supra* note 13, at 238.

⁵⁹ BROWN & KENNEDY, *supra* note 55, at 2. In exerting its judicial authority, the ECJ has developed two doctrines which have been essential to the Community's jurisprudential development: direct effect and treaty supremacy. The doctrine of direct effect holds that rules of EC law which are clearly defined are self-executory and enforceable in the national courts of the member states. Treaty supremacy is similar to the American notion of federal preemption. The doctrine of treaty supremacy permits Community law to usurp any national law in areas governed by an EC treaty. See Steven A. Bibas, *The European Court of Justice and the U.S. Supreme Court: Parallels in Fundamental Rights Jurisprudence*, 15 HASTINGS INT'L & COMP. L. REV. 253, 257 (1992).

forcement, consistent application, and uniform interpretation⁶⁰ of Community law.⁶¹ The Court also acts as a referee between the Community's various institutions.⁶² The policy objectives of the Court focus on "the promotion of European integration" and generally include strengthening and expanding the overall powers of the Community.⁶³

2. Structure of the Court

Fifteen judges are appointed by Member States⁶⁴ to preside over the Court for staggered six-year terms.⁶⁵ The judges vote by secret ballot to elect a fellow judge to be President of the Court for a three-year, renewable term.⁶⁶ The President's duties include presiding over full sessions of the Court and directing judicial and administrative business.⁶⁷ A full court hears all of the actions brought by the Member States or Community institu-

⁶⁰ See EC TREATY art. 164 ("The Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed."). The Court is the only institution in the legal system of the Community entrusted with the duty of interpreting Community law. See Lenz, *supra* note 54, at 389.

⁶¹ Community law is made up of the three treaties, the legal acts of the institutions such as regulations, directives, and decisions "in international agreements concluded by the Community with non-Member States or external organizations, and in certain general principles of law that the Court of Justice has deduced from the treaties and the legal systems of the Member States." Lenz, *supra* note 54, at 391 n.10.

⁶² See HARTLEY, *supra* note 13, at 57.

⁶³ *Id.* at 86. Proponents of the EEC have noted that the easiest way to unify the hearts and minds of the European people is to foster their common economic interest. See Bibas, *supra* note 59, at 254 (advocating increased social activism on part of ECJ).

⁶⁴ Judges and advocates-general are elected through a "common accord," or unanimous agreement, of the member governments. See D. FREESTONE & J.S. DAVIDSON, *THE INSTITUTIONAL FRAMEWORK OF THE EUROPEAN COMMUNITIES* 133 (1988) (quoting EC TREATY art. 167). Court membership is available to any person "whose independence is beyond doubt and who possesses the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognized competence." EC TREATY art. 167.

⁶⁵ See HARTLEY, *supra* note 13, at 58. There is no age for retirement and judges are frequently re-appointed to their posts. *Id.* There is one judge for each member state—Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden, and the United Kingdom. The purpose of staggering terms is so that approximately six judges and three advocates general can be elected or replaced every third year. See FREESTONE & DAVIDSON, *supra* note 64, at 133.

⁶⁶ See HARTLEY, *supra* note 13, at 58.

⁶⁷ See *id.* The President may not vote in decisions, which are reached by a majority vote. See *id.*

tions.⁶⁸ The ECJ will also hear actions if a Member State or Community institution is a party to, or an intervenor in, a proceeding, or has submitted a reference for a preliminary ruling.⁶⁹

In order to foster the sense of "Europeanism" and independence from Member States sought throughout the EC, judges are required to free themselves from allegiance to their respective countries and be neutral participants in the judicial process⁷⁰ and must also promise to uphold the secrecy of any Court deliberations.⁷¹ To further protect the judges from various national pressures, the Court issues only one judgment and does not submit any concurring or dissenting opinions.⁷²

The Court has six Advocates-General⁷³ whose duties include making reasoned submissions⁷⁴ to assist the ECJ in deciding those matters brought before it.⁷⁵ The Advocate-General represents neither the Community nor any individual states when making an opinion. Rather, the Advocate-General speaks for the overall public interest in order to reflect the principles of impartiality and independence upon which the Court is founded.⁷⁶ The

⁶⁸ *Id.* The quorum for a full Court is seven. *See id.*

⁶⁹ HARTLEY, *supra* note 13, at 59.

⁷⁰ *See* EC TREATY art. 167; ECSC TREATY art. 32(b); EURATOM TREATY art. 139. In fact, "the Court is generally regarded as one of the most 'European-minded' institutions in the Community." HARTLEY, *supra* note 13, at 59. "Though they may be influenced by the different traditions of their respective legal systems, they have never been accused of taking national advantage into account" *Id.*

⁷¹ *See* HARTLEY, *supra* note 13, at 58.

⁷² *See id.* at 59. In addition to these steps, judges are "sworn not to discuss any proceedings which take place outside of the public's view." Swartz, *supra* note 5, at 692.

⁷³ *See* HARTLEY, *supra* note 13, at 60. The function of the Advocates-General "has no parallel in the English legal system, though it is similar to that of a *commissaire du gouvernement* in the French *Conseil d'Etat*." *Id.*

⁷⁴ The Advocate-General is not limited to the arguments made by the parties. *See id.* at 62.

⁷⁵ *See* EC TREATY art. 166 ("It shall be the duty of the Advocate-General, acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases brought before the Court of Justice, in order to assist the Court"); ECSC TREATY art. 32(s); EURATOM TREATY art. 138.

⁷⁶ FREESTONE & DAVIDSON, *supra* note 64, at 136 ("[T]he advocate-general's opinion ... is purely personal and does not represent the views of either the Community, the Member States or the Court"); *see* HARTLEY, *supra* note 13, at 60. It should be noted, however, that an Advocate-General may be susceptible to political pressure exerted by their home countries. The opinions submitted by the advocate-general are signed, unlike the Court's opinions which are anonymous. This absence of secrecy has led some to speculate that Advocates-General may entertain favoritism for their home countries on this issue, particularly when re-election occurs every three years. *See, e.g.,* Swartz, *supra* note 5, at 692.

opinion of the Advocate-General, which is not binding on the Court, is presented after the parties have completed their own submissions. The judges seriously consider the Advocate-General's opinion, which is printed along with the Court's holding in the law reports.⁷⁷

3. Procedure⁷⁸

Since the European Union is a multilingual organization, Community institutions must be capable of meeting the communication needs of all the Member States.⁷⁹ Judgments and other legal documents of the ECJ are translated by a Translation Directorate into each of the Court's official languages.⁸⁰ Court proceedings are conducted in the "language of the case,"⁸¹ which, in preliminary rulings, is the language of the national court or tribunal that made the original reference.⁸²

The ECJ typically does not attempt to determine the actual subjective intent of legislators when interpreting Community Treaties and legislation.⁸³ This decisionmaking process is based

⁷⁷ HARTLEY, *supra* note 13, at 61. The duty of the advocate-general is to summarize the arguments of the parties and suggest their own solution to the matter. This solution is to be based on the jurisprudence of the Court and is, of course, required to be impartial. See JOXERRAMON BENGOTXEA, *THE LEGAL REASONING OF THE EUROPEAN COURT OF JUSTICE* 13 (1993).

⁷⁸ "The procedure in the European Court is laid down partly in the Statutes of the Court ... and partly in the Rules of Procedure. The latter are drawn up by the Court itself, but have to be approved by the Council They were originally modeled on those of the International Court of Justice." HARTLEY, *supra* note 13, at 69 (citations omitted).

⁷⁹ See *id.* at 75.

⁸⁰ See *id.* at 63. Interpreters are not allowed into the deliberation room in order to maintain the secrecy of the judges' discussions. *Id.* at 80. Therefore, to facilitate communication, the ECJ unofficially has adopted French as the working language of the court. *Id.* There are nine official Court languages derived from the Member States—Danish, Dutch, English, French, German, Greek, Italian, Portuguese, and Spanish. HARTLEY, *supra* note 13, at 78. Irish is recognized by the Court, but not as an official Court language. See BROWN & KENNEDY, *supra* note 55, at 19.

⁸¹ HARTLEY, *supra* note 13, at 78. The "language of the case" may be selected from one of the official court languages. In theory, this choice is left to the applicant. "However, if the defendant is a member state or a person or corporation subject to a member state the procedural language will be the official language of that state." See LASOK AND BRIDGE, *supra* note 17, at 90. The Court may permit the use of an official language that is foreign to both parties if they both make such a request. *Id.*

⁸² See HARTLEY, *supra* note 13, at 78; LASOK AND BRIDGE, *supra* note 17, at 90.

⁸³ See HARTLEY, *supra* note 13, at 85. Due to various legislative backgrounds and legal traditions of the member states, attempts to find a consensus regarding Community law have proven elusive. See LASOK AND BRIDGE, *supra* note 17, at 75-83. This reality has led to an attempt by the Court to apply a comparative approach

on the fundamental belief that after arduous negotiations by the legislators, there may exist a consensus only as to the actual words used and not necessarily to their meaning.⁸⁴ Finally, although no official doctrine of *stare decisis* exists in the ECJ, the Court almost always follows its previous decisions.⁸⁵

4. Jurisdiction

The treaties grant the ECJ only limited jurisdiction⁸⁶ over the fifteen states in the European Union including: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden, and the United Kingdom. The ECJ also maintains jurisdiction over those states in the European Economic Area ("EEA").⁸⁷

The Court "has jurisdiction to give binding interpretations on Community law" and "has exclusive jurisdiction to declare Community acts invalid."⁸⁸ An action may come before the Court in one of two ways: 1) a direct action—those begun in the European Court, and 2) those actions begun in national courts from

to legal issues, demonstrating the Court's autonomous nature. *Id.* at 149-50.

⁸⁴ See HARTLEY, *supra* note 13, at 85; see *id.* at 80 (noting that "[i]t is almost impossible for even the best translator to find a form of words with exactly the same meaning as the original" and that "translations ... can never be exact"). Some even argue that the Court "prefers to interpret texts on the basis of what it thinks they should be trying to achieve; it moulds the law according to what it regards as the ends of the Community." *Id.* at 85.

⁸⁵ See *id.* at 83; see also Lenz, *supra* note 54, at 403 (noting that judgment of Court of Justice constitutes precedent which Court will follow in analogous case). However, the Court considers itself free to decide in a different way the same legal point if it arises between different parties and in a different context. LASOK AND BRIDGE, *supra* note 17, at 126-31. This may be a reflection of the civil law heritage of some member states, most notably France, whose legal system expressly prohibits the reliance upon precedent. This view is based upon the belief that "judicial decisions are not a formal source of law at all." See BROWN & KENNEDY, *supra* note 55, at 343.

⁸⁶ EC TREATY art. 4; EURATOM TREATY art. 3. The European Court shall only "act within the limits of the powers conferred on it by this Treaty." *Id.*

⁸⁷ See Gerard O'Dwyer, *Court Voids Law to Aid Women*, CHI. TRIB., Jan. 28, 1996, at 1. "The EEA was created in 1993 as a medium to foster closer trade links between states in the European Union and those of the European Free Trade Association" *Id.* The EEA agreement "was signed in 1993 by which the internal market of the EU was extended to Austria, Finland, Iceland, Norway and Sweden." Vishny, *supra* note 11, at 4.

⁸⁸ Lenz, *supra* note 54, at 392 [emphasis omitted]. Article 173 of the EC Treaty empowers the court to review and set aside community acts. See EC TREATY art. 173. "[N]ational courts do not have the power to declare acts of the Community institutions invalid." Lenz, *supra* note 54, at 392 (citation omitted).

which a reference for a preliminary ruling is made to the ECJ.⁸⁹ The Court will, for direct actions, grant a non-appealable judgment and any appropriate remedies.⁹⁰ For preliminary rulings however, the Court renders a ruling to the national court, and it is the national court which ultimately decides the case. This ECJ ruling is solely, however, a decision of an abstract legal issue, despite the fact that it is both binding and not subject to appeal.⁹¹

5. Preliminary Rulings

The ECJ, if requested by a national court,⁹² will provide a preliminary ruling regarding a question of Community law that is relevant to a genuine dispute.⁹³ The Community treaties provide that all national courts and tribunals have the option to request a preliminary ruling by the ECJ, and those courts from which there is no judicial appeal are required to solicit such rulings.⁹⁴ Furthermore, only a national court may bring a reference

⁸⁹ HARTLEY, *supra* note 13, at 66.

⁹⁰ *See id.* at 61. This procedure has received criticism. *Id.*

⁹¹ *Id.* at 66. "The national court decides any relevant questions of fact and then applies the law—including relevant provisions of Community law as interpreted by the European Court—to the facts; it also exercises any discretion it may have as to the remedy to be given." *Id.*

⁹² The number of references made to the Court has been regularly increasing. Lenz, *supra* note 54, at 407. By the end of 1993, over 2700 references had been made to the Court for a preliminary ruling. *Id.* There is, however, a substantial backlog of cases before the court. SHARPSTON, *supra* note 40, at 26.

⁹³ *See* Lenz, *supra* note 54, at 397. The court will not issue advisory opinions. *Id.*; *see also* Case 338/85, *Fratelli Pardini SPA v. Ministero del Commercio con L'estero and Banca Toscana*, 1988 E.C.R. 2041, 2975. In *Fratelli Pardini*, the Court held that:

[a] national court is not empowered to bring a matter before the Court by way of a reference for a preliminary ruling unless a dispute is pending before it in the context of which it is called upon to give a decision capable of taking into account the preliminary ruling. Conversely, the Court of Justice has no jurisdiction to hear a reference for a preliminary ruling when, at the time it is made, the procedure before the court making it has already been terminated.

Id.

⁹⁴ *See* EC TREATY art. 177 ("Where any such question is raised in a case pending before a court or tribunal of a member-State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice."); *see also* NUGENT, *supra* note 45, at 228 (recognizing that preliminary rulings now constitute largest category of cases that come before ECJ); Lenz, *supra* note 54, at 393-94 (noting that "all courts and tribunals ... are entitled to make references, so that a decision at the European level may take place even at first instance"). Typically, the national court will stay the proceedings while making

before the ECJ; the parties involved in the case are precluded from doing so.⁹⁵ In fact, parties may not even request a revision or an interpretation of the ECJ's final judgment. A national court however, may bring a second reference before the Court in order to clarify its ruling on a particular matter.⁹⁶

Typically, three different types of issues come before the Court: (1) issues regarding the interpretation of Community law; (2) effects of various provisions on national legal systems; and (3) issues involving the validity of Community measures.⁹⁷ Guaranteeing uniformity of Community law among the Member States is the primary goal of the preliminary ruling system.⁹⁸ The Court's judgment regarding any questions concerning Community law is conclusive.⁹⁹ Once the ECJ makes a reference, the Member State court must abide by the Court's ruling on both the validity and interpretation of the Community law question,¹⁰⁰ even though the function of the ECJ in making preliminary rulings is merely to assist the national court in making judg-

the reference to the ECJ. See *Lenz*, *supra* note 54, at 399.

⁹⁵ See SHARPSTON, *supra* note 40, at 16-17 (noting that parties do not have right to request preliminary ruling, nor may they stop court from requesting one); HARTLEY, *supra* note 13, at 73 (commenting that "since strictly speaking, there are no parties ... the proceedings are not regarded as non contentious").

⁹⁶ See SHARPSTON, *supra* note 40, at 16-17.

⁹⁷ See EC TREATY art. 177. The Court of Justice is to have "jurisdiction to give preliminary rulings concerning: (a) the interpretation of this Treaty; (b) the validity and interpretation of acts of the institutions of the Community and of the ECB; (c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide." *Id.*

⁹⁸ See *id.* at 97 (noting that ECJ is competent to pronounce authoritatively on questions of Community law and procedure not only enables it to ensure uniform interpretation and application of Community law in all member states but also allows national courts to seek and obtain authoritative guidance on such points before deciding disputes); See NUGENT, *supra* note 45, at 228 (finding that preliminary rulings "help to ensure that national courts make legally 'correct' judgements [sic] ... [and] promote the uniform interpretation and application of EU law in the member states").

⁹⁹ See LASOK AND BRIDGE, *supra* note 17, at 89. Technically, the ECJ is supposed to make a determination on points of Community law that are unclear to the member states. Having settled the point of law, the national court will then apply the rule to the facts of the case. In practice, however, this process is not so clearly demarcated. The ECJ often "becomes quite involved in the facts of the case and makes it clear how the national court should finally decide the case." See Swartz, *supra* note 5, at 693.

¹⁰⁰ LASOK AND BRIDGE, *supra* note 17, at 136-37. In fact, "[a] preliminary ruling made at the request of a court of first instance binds national courts with appellate jurisdiction and is sufficient reason for any other national court faced with the same issue of community law to decide it in the same way." *Id.* at 107. Its decision is binding on the referring court regarding the issues raised for adjudication. *Id.*

ments.¹⁰¹ When the ECJ renders a final judgment on a "reference for a preliminary ruling, the court that made the reference and all other courts that are to rule on the same matter are bound by the operative part of the judgment."¹⁰² Some argue, however, that the preliminary reference system has caused the ECJ to maintain a weaker position than a typical supreme court in a federation. National courts are deemed to be "not subordinate to the European Court, but co-equal: the relationship is not one of hierarchy, but of co-operation."¹⁰³ This statement further suggests that the ECJ may not be as powerful as other supreme courts.

II. COMMUNITY LAW REGARDING WOMEN

A. *Economic Reality of Women in the European Union*

Two important objectives of the European Union are to promote improved working conditions and to increase the standard of living among Community members.¹⁰⁴ These intentions include the goal of "strengthening the economic independence of women."¹⁰⁵ Article 119 of the EC Treaty, mandating "equal pay for equal work," was enacted to help achieve this end.¹⁰⁶

¹⁰¹ See HARTLEY, *supra* note 13, at 73. There are no "parties" before the court in preliminary rulings and "the proceedings are not regarded as contentious." *Id.*

¹⁰² Lenz, *supra* note 54, at 403. "The national court[, however,] is not obliged to apply Community law—it may eventually decide the case on other grounds—but if it does apply it, it is bound by the European Court's ruling." HARTLEY, *supra* note 13, at 301. See Deirdre Curtin & Kamiel Mortelmans, *Application and Enforcement of Community Law by the Member States: Actors in Search of a Third Generation Script*, in II INSTITUTIONAL DYNAMICS 425 (noting that "national courts are ... regarded as 'partners in the battle for judicial review' as well as partners in the battle for truly effective national remedies").

¹⁰³ HARTLEY, *supra* note 13, at 266. See also LASOK AND BRIDGE, *supra* note 17, at 97 (noting that "[d]ivision of competence between the ECJ and the referring court or tribunal is not based ... on any hierarchical superiority of the Court but rather on a mutual exclusivity of their respective jurisdictions"). Some commentators, however, believe the ECJ considers itself superior to the courts of the member states. See Swartz, *supra* note 5, at 702. "[T]he Court sees its role ... as a version of a supreme court whose function is to standardize the interpretation of Community legislation among Member States." *Id.*

¹⁰⁴ EC TREATY art. 2.

¹⁰⁵ Gina L. Ziccolella, Comment, *Marshall II: Enhancing the Remedy Available to Individuals for Gender Discrimination in the EC*, 18A FORDHAM INT'L L.J. 641, 641-42 (1994).

¹⁰⁶ EC TREATY art. 119. France proposed Article 119, "largely to ensure that its business enterprises, which were bound by the French Constitution to provide equal

After its enactment, however, Member States failed to apply Article 119 in a uniform and consistent manner.¹⁰⁷ Thus, the Commission enacted the "Equal Pay Directive"¹⁰⁸ requiring Member States to implement measures that eliminate unequal pay for women holding the same job position as men.¹⁰⁹ On its face, the Equal Pay Directive appeared to be a progressive measure which would help improve the economic reality and inequality women face. However, it soon became apparent that in order for this directive to be effective, women would also have to obtain the opportunity to gainfully compete in the European

pay for women, should not be at a competitive disadvantage compared with firms in other Member States that did not require equality in pay." See Ziccolella, *supra* note 105, at 642 n.6; see also Aharonian, *supra* note 42, at 96 (finding that "[i]nitial Member States who already had pay equity laws in their legislations feared that they would be at a competitive disadvantage to potential future Member States without such laws").

¹⁰⁷ Elena Noel, *Prevention of Gender Discrimination Within the European Union*, Vol. 9, No.2, N.Y. INT'L L. REV. 77, 80 (1996).

¹⁰⁸ Council Directive 75/117, 1975 O.J. (L 45) 19. The Directive states, in part, that:

Whereas implementation of the principle that men and women should receive equal pay contained in Article 119 of the Treaty is an integral part of the establishment and functioning of the common market;

Whereas it is primarily the responsibility of the Member States to ensure the application of this principle by means of appropriate laws, regulations and administrative provisions ...

Whereas differences continue to exist in the various Member States despite the efforts made to apply the resolution of the conference of the Member States of December 30, 1961 on equal pay for men and women and whereas, therefore, the national provisions should be approximated as regards application of the principle of equal pay. HAS ADOPTED THIS DIRECTIVE:

Article 1: The principle of equal pay for men and women outlined in Article 119 of the Treaty, hereinafter called 'principle of equal pay', means, for the same work or for work to which equal value is attributed, the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration.

In particular, where a job classification system is used for determining pay, it must be based on the same criteria for both men and women and so drawn up as to exclude any discrimination on grounds of sex.

Article 2: Member States shall introduce into their national legal systems such measures as are necessary to enable all employees who consider themselves wronged by failure to apply the principle of equal pay to pursue their claims by judicial process after possible recourse to other competent authorities.

Id.

¹⁰⁹ See Noel, *supra* note 107, at 81. Member States were given one year to comply. *Id.* at 82.

workforce.¹¹⁰ Women's economic independence could not strengthen simply by ensuring them equal pay at the workforce's lowest echelon. Rather, there needed to be equal access to all levels of employment for men and women.¹¹¹

In response to the Equal Pay Directive's ineffective method of fostering equal access to employment for women, the Council of Ministers developed a Social Action Program.¹¹² The Council passed several directives to facilitate this equal access process, including Council Directive No. 76/207, the "Equal Treatment Directive" ("ETD"),¹¹³ which mandates equal working conditions and dismissal policies for the sexes.¹¹⁴ The ETD also requires that Member States develop a judicial process through which alleged victims of gender discrimination may pursue their claims.¹¹⁵ Moreover, Member States are allowed "to adopt meas-

¹¹⁰ *Id.* at 84.

¹¹¹ JOHN A. USHER, *CASES AND MATERIALS ON THE LAW OF THE EUROPEAN COMMUNITIES* 369 (3d. ed. 1993) (stating that "[n]o treaty article provides expressly for the application of the principle of equal treatment of men and women, save in relation to pay").

¹¹² Ziccolella, *supra* note 105, at 644.

¹¹³ Council Directive 76/207, 1976 O.J. (L 39/40) (acting pursuant to art. 235 of EC Treaty). The Directive was designed to give effect to Article 119 (equal pay) of the EC Treaty.

¹¹⁴ Ziccolella, *supra* 105, at 645. See Council Directive 76/207, art. 5, 1976 O.J. (L39/40). Article 5 provides that:

1. Application of the principle of equal treatment with regard to working conditions, including the conditions governing dismissal, means that men and women shall be guaranteed the same conditions without discrimination on grounds of sex.

2. To this end, Member States shall take the measures necessary to ensure that:

(a) any laws, regulations and administrative provisions contrary to the principle of equal treatment shall be abolished;

(b) any provisions contrary to the principle of equal treatment which are included in collective agreements, individual contracts of employment, internal rules of undertakings or in rules governing the independent occupations and professions shall be, or may be declared, null and void or may be amended;

(c) those laws, regulations and administrative provisions contrary to the principle of equal treatment when the concern for protection which originally inspired them is no longer well founded shall be revised; and that where similar provisions are included in collective agreements labour and management shall be requested to undertake the desired revision.

Id.

¹¹⁵ See Council Directive 76/207, art. 6, 1976 O.J. (L 39/40). Article 6 provides that:

Member States shall introduce into their national legal systems such

ures to obtain gender equality beyond those articulated" in the Equal Treatment Directive.¹¹⁶

Although the principle of "equal pay for equal work" was established almost twenty years ago, it appears that Member States are still far from achieving the Community's goal of equality among the sexes in the workplace. Typically, European working women are not treated the same as their male counterparts:

the rate of unemployment amongst women is higher than amongst men in most parts of the Community. Women still account for the majority of the long-term unemployed, they often have low-skilled, poorly paid and insecure jobs and there are still gaps in pay between men and women. There are also still not enough women to whom decision-making posts and a full share in political and economic life are open.¹¹⁷

The statistics regarding women in the workplace are not very promising; for example, "in the European Union today, a woman employed in the manual labor sector of the manufactur-

measures as are necessary to enable all persons who consider themselves wronged by failure to apply to them the principle of equal treatment within the meaning of Articles 3, 4, and 5 to pursue their claims by judicial process after possible recourse to other competent authorities.

Id. Member-States may be sued under the ETD when acting as an employer. See Ziccolella, *supra* note 105, at 646; Case 152/84, *Marshall v. Southampton and S.W. Hampshire Area Health Auth.*, E.C.R. 723, [1986] 1 C.M.L.R. 688 (1986) (finding that employer's policy requiring compulsory retirement of females at age 60 while males could continue working until age 65 amounts to "dismissal" within meaning of Article 5(1) and violates Equal Treatment Directive). The most widely relied upon part of the ETD for victims of gender discrimination is article 5. Ziccolella, *supra* note 105, at 659.

¹¹⁶ *Id.*; see also Council Directive 76/207, art. 2, 1976 O.J. (L 39/41) 4. Article 2 states in pertinent part that:

4. This Directive shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect womens' opportunities in the areas referred to in Article 1 (1).

Id.

¹¹⁷ *Communication on the Kalanke Ruling*, EUR. INDUS. REL. REV., June 1996. In the European Union today "[w]omen's work is segregated, with the majority of women being concentrated in a few, low-paying professions." See Aharonian, *supra* note 42, at 92. Additionally, more women "work in temporary or part-time jobs which hold little or no promise for advancement." *Id.* Finally, women are "disproportionately represented on the employment rolls—throughout Europe, the unemployment rate for women averages 3 percent more than that for men." Society for Human Resources Management, *Issues Management Program*, (visited Aug. 28, 1997) <<http://www.shrm.org/issues/196aa.html>> [hereinafter SHRM Issues Management Program].

ing industry still earns[] an average of 25% less per hour than her male counterparts."¹¹⁸ Further, "[a]lthough statistics vary among the ... Member States, the salaries of women range from 60% to 85% of that of men, and the gap widens proportionally with age."¹¹⁹

B. *Judicial Interpretation of Community Law Regarding Women*

1. Fundamental Right

The ECJ recognizes that the principle established by Article 119—"equal pay for equal work"—constitutes a fundamental right.¹²⁰ In *Defrenne v. SABENA*,¹²¹ the Court determined that "the elimination of discrimination based on sex" is a fundamental right based on general principles of Community law "the observance of which [the Court] has a duty to ensure."¹²²

In *Defrenne*, the ECJ determined that "Article 119 was in part directly effective, thereby allowing a woman to claim her right to equal pay directly in any national court" and that "equal pay was enforceable against both private and public employees."¹²³ In this decision, the ECJ also expressed its frustration with the failure of Member States to implement directives created to ensure that discriminatory laws were in place within the Member States' borders.¹²⁴

2. Limits on the Equal Treatment Directive

The concept of equal treatment for men and women is not

¹¹⁸ Aharonian, *supra* note 42, at 91. This statistic holds true in other industries as well. *Id.*

¹¹⁹ *Id.* According to a study from the International Labor Organization (ILO), "the pay differential between men and women in Europe ranges from 20 percent to 50 percent depending on the job category and location." SHRM Issues Management Program, *supra* note 117. The survey notes that in France "women receive an average of 30 percent less for performing the same work as men." *Id.*

¹²⁰ *Communication on the Kalanke Ruling*, *supra* note 117.

¹²¹ *Gabrielle Defrenne v. Societe Anonyme Belge de Navigation Aeriennne (SABENA)*, Case 149/77, [1978] 3 C.M.L.R. 312 (holding that national airline that forced female stewardesses to retire at younger age than male counterparts did not violate principles of community law prohibiting sex discrimination).

¹²² *Id.* at 329.

¹²³ Aharonian, *supra* note 42, at 99.

¹²⁴ *See id.* at 101. "Indeed, in *Defrenne II*, the ECJ noted that the absence of infringement actions against Member States by the Commission was likely to reinforce the impression that Article 119 was in fact a limited provision." *Id.* at 101-02.

without limits. For example, Member States are allowed to derogate "from equal treatment in situations where specific duties, not merely general activities, create a justified exception to necessitate different treatment of men and women."¹²⁵ The legislative ability to foster equal treatment of the sexes has also been curtailed by the recent ECJ decision in *Kalanke v. Freie Hansestadt Bremen*.¹²⁶

a) Background and Proceedings Below

On October 17, 1995, the ECJ determined that laws giving automatic preference to women with the same qualifications as men, and who are applying for identical positions in employment areas where women are under-represented, violate Community law. In *Kalanke v. Freie Hansestadt Bremen*, Kalanke, a male horticulturist from Bremen, Germany, applied for a promotion in the Parks Department where he was employed since 1973.¹²⁷ Heike Glišman, a female landscaper, who worked in the Parks Department since 1975, also applied for the position.¹²⁸ The two candidates had similar credentials¹²⁹ and both were "shortlisted" during the final stage of recruitment.

The management of the Parks Department recommended that Kalanke be promoted, but the reviewing staff committee refused to give its consent.¹³⁰ The issue was sent to an arbitration committee which also recommended Kalanke for the position.¹³¹ Instead of hiring Kalanke, however, the staff committee declared the arbitration process a failure and appealed to the Conciliation Board for a binding decision. Finding the candidates to be equally qualified, the Conciliation Board determined that priority should, therefore, be given to Ms. Glišman in accordance with the Bremen Act on Equal Treatment for Men and Women in the

¹²⁵ Noel, *supra* note 107, at 85-86. The courts, however, strictly construe the power to derogate. *Id.*; see also JOSEPHINE STEINER, TEXTBOOK ON EEC LAW 263 (3d ed. 1992).

¹²⁶ [1996] 1 C.M.L.R. 175.

¹²⁷ *Id.* at 179.

¹²⁸ *Id.*

¹²⁹ Kalanke had a diploma in landscape gardening and horticulture and had worked as permanent assistant to the Section Manager in the Parks Department. *Id.* at 191. Glišman had a diploma in landscape gardening and was employed as a horticultural employee. *Id.*

¹³⁰ *Id.* at 179.

¹³¹ *Id.*

Public Services ("Bremen Act").¹³²

The Bremen Act provides that in the case of appointment, assignment, or promotion to an official post or position, "women who have the same qualifications as men applying for the same post are to be given priority in sectors where they are under-represented."¹³³ Under-representation is deemed to exist when "women do not make up at least half of the staff in the individual pay, remuneration and salary brackets in the relevant personnel group within a department."¹³⁴

Mr. Kalanke brought his case before the Bremen Labour Court arguing, *inter alia*, that the Bremen Act was incompatible with German constitutional law.¹³⁵ His application was dismissed and he appealed to the Regional Labour Court. After again being denied relief, Mr. Kalanke appealed to the *Bundesarbeitsgericht*, the German national court. The national court not only re-examined the issues raised in the trial court, but also found it appropriate to attempt to reconcile the Bremen Act with the principle of equal treatment codified by Council Directive 76/207¹³⁶ as well as various Community provisions.¹³⁷

Regarding national law, the *Bundesarbeitsgericht* found the

¹³² *Id.* at 193.

¹³³ The Bremen Act on equal treatment for men and women, the *Landesgleichstellungsgesetz* of November 20, 1990 provides, in part, that:

(1) In the case of an appointment (including establishment as a civil servant or judge) which is not made for training purposes, women who have the same qualifications as men applying for the same post are to be given priority in sectors where they are under-represented.

(2) In the case of an assignment to a position in a higher pay, remuneration and salary bracket, women who have the same qualifications as men applying for the same post are to be given priority if they are under-represented. This also applies in the case of assignment to a different official post and promotion.

(3) ...

(4) Qualifications are to be evaluated exclusively in accordance with the requirements of the occupation, post to be filled or career bracket. Specific experience and capabilities, such as those acquired as a result of family work, social commitment or unpaid activity, are part of the qualifications within the meaning of subparagraphs (1) and (2) if they are of use in performing the duties of the position in question.

Id. at 191.

¹³⁴ *Id.* (quoting from paragraph five of Bremen Act).

¹³⁵ *Id.* at 192. Kalanke argued that the Bremen Act quota system violated the Bremen Constitution, German Basic Law (*Grundgesetz*) and the German Civil Code.

Id.

¹³⁶ 1976 O.J. (L 39) 40.

¹³⁷ *Id.* at 180.

Bremen Act to be compatible with the German Constitution and statutory law. The court, however, was unsure whether the "positive discrimination" law violated Community law.¹³⁸ Although the national court determined that there were a number of factors suggesting that the Bremen Act did not clash with Council Directive 76/207, the court nevertheless stayed the proceedings and sought a preliminary ruling from the ECJ on the issue of whether the Bremen Act violated Council Directive 76/207.¹³⁹

b) Proceedings Before the European Court of Justice

Council Directive 76/207 requires Member States to adhere to the principle of equal treatment for men and women regarding access to employment as well as promotion.¹⁴⁰ Discrimination on the basis of sex shall be impermissible either directly or indirectly.¹⁴¹ Measures designed to promote equal employment opportunity for men and women, especially those created to remove "existing inequalities which affect women's opportunities," are lawful under the directive.¹⁴²

In support of the Bremen Act, the German court noted that the quota system at issue may, in fact, contribute to the elimination of current disadvantages which women face as it will increase the presence of women in senior employment posts.¹⁴³ The *Bundesarbeitsgericht* noted that the reality among city employees in Bremen is that there exists only a small proportion of women in the upper echelon of positions and salaries in numerous careers.¹⁴⁴ Moreover, the German court stated that the concentration of women in lower career brackets is "contrary to the

¹³⁸ *Id.*

¹³⁹ *Id.* at 192. The European Court of Justice determined that the national court was essentially asking whether "the Directive precludes national rules such as those in the present case, where candidates of different sexes shortlisted for promotion are equally qualified, automatically give priority to women in sectors where they are under-represented" *Id.* at 193.

¹⁴⁰ 1976 O.J. (L 39) 40.

¹⁴¹ See *Kalanke*, [1996] 1 C.M.L.R. at 193.

¹⁴² *Id.* (quoting Article 2(4) of the directive). The Court noted that the directive was created to allow for measures "which, although discriminatory in appearance, are in fact intended to eliminate or reduce actual instances of inequality which may exist in the reality of social life." *Id.* at 193-94 (citations omitted).

¹⁴³ See *id.*

¹⁴⁴ See *id.* The German court also noted that careers in which the presence of women is established, such as education, are excluded from preferential hiring practices. See *id.* at 193-94.

equal rights criteria applicable today."¹⁴⁵

The European Court of Justice found that national rules giving women automatic priority over equally qualified men in sectors where women are under-represented involve unwelcome sex discrimination.¹⁴⁶ The Court noted that although Directive 76/207 does allow for measures "which give a specific advantage to women with a view to improving their ability to compete on the labour market and to pursue a career on an equal footing with men,"¹⁴⁷ it prohibits rules that give women automatic and absolute priority, and "go beyond promoting equal opportunities and overstep the limits" of the directive.¹⁴⁸

Advocates for the Bremen Act argued that it did not provide women automatic priority; rather, they argued that the law stated that women would receive preference only in those sectors of employment where they were under-represented and only after they satisfied certain qualifications.¹⁴⁹ The ECJ disagreed with this line of reasoning, however, and held that the Bremen Act did, in fact, give women absolute and automatic priority, and therefore, was precluded by directive 76/207. This decision, which ultimately determined that certain types of positive discrimination are violative of Community law, is simply a limitation on the Equal Treatment Directive.

Although the Community has not legislated an official definition of "positive action,"¹⁵⁰ the Commission has embraced an expansive view of what this phrase means. In 1984, the Commission proposed "a recommendation on the promotion of positive action," which the Council ultimately adopted.¹⁵¹ Under the

¹⁴⁵ *Id.* at 193.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 194.

¹⁴⁸ *Id.*

¹⁴⁹ The national court noted that "the case does not involve a system of strict quotas reserving a certain proportion of posts for women, regardless of their qualifications, but rather a system of quotas dependent on candidates' abilities. Women enjoy no priority unless the candidates of both sexes are equally qualified." *Id.* at 192.

¹⁵⁰ See *Communication on the Kalanke Ruling*, *supra* note 117. Some in the Community espouse the view that "the concept of positive action embraces all measures which aim to counter the effects of past discrimination, to eliminate existing discrimination and to promote equality of opportunity between women and men, particularly in relation to types or levels of jobs where members of one sex are significantly under-represented." *Id.* This idea appears to be consistent with the view of the European Commission and Council.

¹⁵¹ *Id.*

Commission's recommendation, Member States are encouraged to enact positive action programs with the goal of eliminating existing inequalities affecting women in the workplace and "promot[ing] a better balance between the sexes in employment ... or seeking employment which arise from existing attitudes, behavio[r] and structures based on the idea of a traditional division of roles in society between men and women."¹⁵²

Presumably, the *Kalanke* decision did not declare all positive action programs to be violative of Community law. The broadest reading of *Kalanke* would merely eliminate sex quota programs in all facets of employment. Member States, however, are still allowed to use other types of programs designed to accomplish the goals maintained by the Equal Treatment and Equal Value Directives.

III. SUPREMACY OF COMMUNITY LAW

An autonomous legal system has emerged from the development of the EU, imposing rights and obligations on individuals and Member States.¹⁵³ According to the ECJ, membership in the EU "entails limitation of the Member States' sovereign rights no longer in 'limited' but in 'ever wider' fields."¹⁵⁴

The EEC Treaty does not specify what happens in a situation in which Community law conflicts with the laws of the Member States.¹⁵⁵ The ECJ has determined that since membership in the Community entails a partial transfer of sovereign powers, it is only logical that Community legislation supersede

¹⁵² *Id.*

¹⁵³ See NUGENT, *supra* note 45, at 176-77. This system has been created through the use of three concepts: direct effect, primacy and direct applicability. *Id.* at 177-78. For discussion of direct effect, see *supra* notes 1143-53 and accompanying text. See *infra* notes 152-78 and accompanying text for explanation of primacy. A law is directly applicable if national measures do not have to be enacted for the law to be binding within the member states. See NUGENT, *supra* note 45, at 177. Regulations are always directly applicable and according to several ECJ judgments, other legal acts which meet certain criteria may be directly applicable as well. *Id.* at 177-78.

¹⁵⁴ Barav, *supra* note 5, at 270 (citing Case 26/62, *Van Gend en Loos v. Nederlandse Administratie Der Belastingen*, 1963 E.C.R. 1, 12 (1963) ("limited") and Opinion 1/91, [1991] E.C.R. I-6102, consid. 21 (1991) ("ever wider")). In *Van Gend en Loos*, the ECJ determined that "the establishment of the EEC Treaty created a new legal order." Ziccolella, *supra* note 105, at 652. As member states joined the Community, they gave up part of their national sovereignty. See NUGENT, *supra* note 45, at 177.

¹⁵⁵ See SHARPSTON, *supra* note 40, at 6.

national legislation.¹⁵⁶ In a landmark decision, *Costa v. ENEL*,¹⁵⁷ "the doctrine of the supremacy, or primacy, of Community law" was developed.¹⁵⁸ The ECJ held, in part, that the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.

The transfer by the Member States from their domestic legal system to the Community legal system of the "rights and obligations arising from the Treaty, carries with it a clear limitation of their sovereign right upon which a subsequent unilateral law, incompatible with the aims of the Community, cannot prevail."¹⁵⁹

The Court's decision in *Costa* established that Community law was the supreme law of the land, creating rights which individuals could rely upon even if national law dictated otherwise.¹⁶⁰ As a result of the *Costa* decision, national courts must apply EU law in the event of a conflict between EU law and national law, even if the national law is part of the Member State's constitution.¹⁶¹ The doctrine of the supremacy of Community law over national law is one which the ECJ "has upheld with the greatest vigour."¹⁶² For the most part, national courts have accepted this doctrine although some doubts have been raised.¹⁶³

For example, German attorneys have expressed concern as to whether Community law trumps the provisions of the German Constitution (*Grundgesetz*), "especially those concerning funda-

¹⁵⁶ Ziccolella, *supra* note 105, at 652.

¹⁵⁷ Case 16/64, *Costa*, [1964] 3 C.M.L.R. 425 (1964) ENEL [1964] C.M.L.R. 425.

¹⁵⁸ SHARPSTON, *supra* note 40, at 6; *see also* Case 92/78, *Simmenthal Sp. v. Commission*, 1979 E.C.R. 777, [1980] 1 C.M.L.R. 25 (1980) (concluding that "every national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule").

¹⁵⁹ *Costa*, [1964] 3 C.M.L.R. at 456.

¹⁶⁰ *See* Tamara L. Joseph, *Preaching Heresy: Permitting Member States to Enforce Stricter Environmental Laws than the European Community*, 20 YALE J. INT'L L. 227, 234 (1995).

¹⁶¹ *See* NUGENT, *supra* note 45, at 176-78. This met with opposition until the European Court announced it would "annul any provision of Community law contrary to human rights." HARTLEY, *supra* note 13, at 140.

¹⁶² *Id.*

¹⁶³ *See id.*

mental human rights."¹⁶⁴ Since every law in Germany is deemed to be subordinate to the Constitution, some members of the German legal community believe that "Community law could not apply in Germany if it violated the fundamental human rights provisions of the *Grundgesetz*."¹⁶⁵ Other members of the European Union agree with the German attorneys, arguing that the constitutional rights of individual states may not be infringed upon by the Community. In support of this contention, authorities believe that "Community law owes its existence to a partial transfer of sovereignty by the Member States to the Community ... [and that] a Member State cannot be regarded as having included in that transfer the power to legislate contrary to rights protected by its constitution"¹⁶⁶ However, the ECJ has not accepted this argument.¹⁶⁷

The Commission supervises the execution of ECJ decisions.¹⁶⁸ Member States are not allowed to review ECJ judgments and are required to enforce the Court's decisions, even if the application of national law would have led to a different result.¹⁶⁹ Generally, enforcement of ECJ decisions has not been problematic; some situations have arisen, however, in which states have not complied with the Court's rulings.¹⁷⁰

¹⁶⁴ *Id.*; see NUGENT, *supra* note 45, at 220 ("A few problems do still remain—notably in relation to fundamental rights guaranteed by national constitutions—but for the most part the authority and binding nature of Community law is fully established.")

¹⁶⁵ HARTLEY, *supra* note 13, at 140 n.17 (noting that "strong attachment of German lawyers to the concept of fundamental law, and especially fundamental human rights, is ... understandable in the light of recent German history").

¹⁶⁶ *Id.* at 143 n.17 (citing *per* Advocate General Warner, Case 7/76, IRCA, 1976 E.C.R. 1213, 1237).

¹⁶⁷ However, on controversial or complicated issues, the Court may develop a hands off mentality. For example on the abortion issue, the Court has "accepted that abortion clinics perform a service ... if their activities are legal in the Member State where they are located." HARTLEY, *supra* note 13, at 145. States such as Ireland, with a strong history of constitutional prohibition of abortion, would assuredly not allow the imposition of the constitutional right to have an abortion of other states.

¹⁶⁸ HENRY G. SCHERMERS & DENIS WÆLBROECK, *JUDICIAL PROTECTION IN THE EUROPEAN COMMUNITIES* 312 (5th ed. 1992) (citing ECSC TREATY art. 88, and EEC TREATY art. 169 as controlling).

¹⁶⁹ *Id.* at 506. Only the ECJ may suspend a judgment. *Id.*

¹⁷⁰ *Id.* at 505 (For exceptions, see Case 48/71, *Re Export Tax on Art Treasure* (No. 2): *Commission v. Italy*, [1972] C.M.L.R. 699 and Case 97/80, *Second Mutton and Lamb case*, [1981] 3 C.M.L.R. 43). "It is well known that Member States do not always comply with Treaty provisions or with directly applicable secondary Community legislation." Rolf Wägenbaur, *How to Improve Compliance with European Community Legislation and the Judgments of the European Court of Justice*, 19

Member States are granted a "reasonable period" to execute the decisions of the ECJ.¹⁷¹ If a State is slow to comply, however, the Commission may exert pressure to "encourage" compliance.¹⁷² The Court may also pressure a State by threatening to make a second, more severe condemnation. Due to adverse decisions against several Member States and other cases pending "for not respecting judgments of the Court," the need to use this second condemnation method has increased considerably.¹⁷³

It is assumed that national courts generally acquiesce and apply the preliminary ruling issued by the ECJ. Although a national court's decision "to refer questions to the Court of Justice" may imply "a willingness to give effect to the rulings,"¹⁷⁴ voluntary compliance is by no means guaranteed. For example, "[p]roblems may arise ... when the Court of Justice render[s] a more extensive ruling than was requested."¹⁷⁵

If a Member State fails to rectify a breach of Community law, the ECJ is powerless to enforce specific measures required to end the breach.¹⁷⁶ The Court is only empowered to find that the Member State has failed to fulfill its obligations, and to suggest measures that are needed to cure the breach.¹⁷⁷ Ultimately, it is the individual Member State that must initiate the steps needed to comply with the judgment of the Court.¹⁷⁸

FORDHAM INT'L L.J. 936, 936 (1996).

¹⁷¹ SCHERMERS & WAELBROECK, *supra* note 168, at 505.

¹⁷² For example, during the 43 months that Italy took to comply with the Court decision in *First Art Treasures Case*, "[t]he Commission exerted considerable pressure on Italy to comply with the Court judgment" *Id.* at 312. In fact, the Commission "opened a new procedure under Article 169, this time for breach of Article 171, which requires the State to take the necessary measures to comply with the judgment rendered under Article 169." *Id.*

¹⁷³ *Id.* at 312-13. *But see* L. NEVILLE BROWN, *THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES* 78 (3d ed. 1989) ("To date, almost every judgment against a Member State has been complied with, although in a few instances only after considerable delay.")

¹⁷⁴ SCHERMERS & WAELBROECK, *supra* note 168, at 440.

¹⁷⁵ *Id.* at 440; *see* Barav, *supra* note 5, at 272 (noting Court's "proclivity to re-draft the questions put to it").

¹⁷⁶ *See* BROWN, *supra* note 173, at 234 (noting that ECJ has no power to enforce judgments).

¹⁷⁷ *Id.* at 234-35 (stating that "[t]he ECJ] has no criminal jurisdiction whatsoever, nor does it have the power to commit for contempt").

¹⁷⁸ *See* SCHERMERS & WAELBROECK, *supra* note 168, at 312. If a directive has not been implemented within the required time period, an individual may, under certain circumstances, use the directive against the state government. Ziccolella, *supra* note 105, at 654. "[T]he effectiveness of Community law is almost entirely dependent on the quality of the legal solutions adopted in the national context."

The ECJ and the Community as a whole have continued to face problems enforcing ECJ directives.¹⁷⁹ It seems that the unique nature of the directive system has created the enforcement and compliance problem because directives only establish broad objectives and have no direct legislative impact. As a result, Member States must enact legislation individually to achieve those objectives.¹⁸⁰ In fact, "an unwilling Member State can avoid its Community legal obligations by adopting legislation and procedures which comply only in form, but not in substance, with the objectives of a given Community Directive."¹⁸¹ Although theoretically Member States must "construe domestic legislation in any field covered by a Community Directive so as to accord with the interpretation of the Directive as laid down" by the ECJ,¹⁸² in practice, directives have been implemented poorly.¹⁸³

Curtin & Mortelmans, *supra* note 102, at 437.

¹⁷⁹ See James D. Pagliaro & Brady L. Green, *E.C. Directive Proposal is Based on CERCLA*, NAT'L L.J., Feb. 10, 1992, at 27. Although "[t]here is a perception that the 'Southern European' countries are less diligent at both implementation and enforcement of E.C. legislation' The problem is not limited ... to southern countries." Thomas R. Mounteer, *Proposed European Community Directive for Damage to the Environment Caused by Waste*, 23 ENVTL. L. 107, 136 (1993) (quoting TREVOR ADAMS, ENVIRONMENTAL LAW IN GREAT BRITAIN AND THE EUROPEAN COMMUNITY 32, in PRACTICAL IMPLICATIONS OF ENVIRONMENTAL LAW IN THE EUROPEAN COMMUNITY (Apr. 18, 1991) (unpublished course material, available from the ABA section of Natural Resources, Energy, and Environmental Law)); see also NUGENT, *supra* note 45, at 373 (noting that "national courts have occasionally sought to assert national rights and interests against the Community").

¹⁸⁰ Pagliaro & Green, *supra* note 179, at 27.

¹⁸¹ See Aharonian, *supra* note 42, at 112-13 (noting that "[w]hether purposefully, for lack of strong commitment, or because of genuine difficulties encountered in the process of implementation, Member States have not carried out the objectives of the Equal Value Directive eradicating-wage discrimination").

¹⁸² Leslie Braginsky, Comment, *How Changes in Employer Identity Affect Employment Continuity: A Comparison of the United States and the United Kingdom*, 16 COMP. LAB. L.J. 231, 254 (1995) (citing *Webb v. Emo Air Cargo Ltd.*, 1993 I.C.R. 175, 186D (Eng.)).

¹⁸³ See Mounteer, *supra* note 179, at 135 (noting that directives pertaining to environmental matters have been most poorly implemented because member states are delinquent in adopting own legislation). In fact, the Commission has noted that "the present situation is 'far from satisfactory' and that 'only a sustained effort over a number of years will bring about a marked improvement'" *Id.* at 136 (quoting Commission of the European Community, Eighth Annual Report to the European Parliament on Commission Monitoring of the Application of Community Law, 1991 O.J. (C338) at 205,221). *But see* Wägenbaur, *supra* note 170, at 937 ("Delayed implementation of a directive or implementation that does not always comply with the content or spirit of the directive can at times be blamed on Community institutions. If Community texts were simpler and clearer, Member States would have less difficulties implementing them or would be likely to make fewer errors of interpretation

Not only have Member States failed to implement directives within the stipulated time period, but they have also failed to enact provisions that "comply with the text or the spirit of the directive."¹⁸⁴

IV. PROBLEMS WITH THE EUROPEAN COURT OF JUSTICE SYSTEM

The main purpose behind the establishment of the EU was to bring about a common market.¹⁸⁵ The Member States, however, "differ widely in their histories, customs and social and cultural values."¹⁸⁶ Therefore, in creating the Community, it was never expected or desired that uniformity would be established in all these matters.¹⁸⁷ In fact, "national laws and customs which did not constitute obstacles to the establishment of such a market" were not intended to be interfered with.¹⁸⁸ Many aspects of Community law, however, may be construed in a more expansive or stricter manner than originally intended.¹⁸⁹ As the English High Court has stated "[a]ccording to the way [the Community laws] are interpreted, they may have more or less of an impact on questions of social policy which in member-States are strongly felt to be matters for national decision."¹⁹⁰

The ability of the ECJ to alter the social policy of Member States depends on numerous factors including, *inter alia*, its law-making ability, compliance by Member States, and its enforcement powers. These factors are crucial in determining whether a decision of the Court will have any real effect on members of the Community. If the national courts do not apply Community law, or if there are no mechanisms within the Member countries to implement the rulings, Community law will remain an abstract legal theory and not a concrete part of citizens' lives.¹⁹¹

of Community texts.")

¹⁸⁴ Wägenbaur, *supra* note 170, at 937. This is a result of member states being responsible for adapting their existing legislation or establishing new legislation to conform to the directives. *Id.*

¹⁸⁵ See EEC TREATY art. 2 ("The Community shall have as its task, by establishing a common market ... to promote ... a harmonious development of economic activities"); *Stoke-on-Trent City Council v. B & Q*, [1990] 3 C.M.L.R. 897,34.

¹⁸⁶ *Stoke-on-Trent*, [1990] 3 C.M.L.R. 897,34.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ See Curtin & Mortelmans, *supra* note 102, at 423.

Application and enforcement of Community law must be considered as the "low-politics" flip-side of the institutional coin. In the application and en-

A. Law Making Capacity

A limitation on the power of the ECJ is that the Court itself cannot initiate actions, but instead must wait to receive cases which have been referred to it.¹⁹² Moreover, once cases have been referred, the ECJ is not overly anxious to usurp national interests.¹⁹³ In addition, when the Court does challenge such policies, it moves with caution.¹⁹⁴ One way the Court can "sweeten the pill" is to introduce a new doctrine gradually.¹⁹⁵ For example, the Court could establish the doctrine as a general principle, subject to various qualifications and perhaps suggest reasons why it should not apply to the case at hand.¹⁹⁶ Once the Court has spoken on the matter, however, the principle becomes established, and as long as "there are not too many protests, it will be reaffirmed in later cases."¹⁹⁷ However, countries that disagree with the ECJ directives may appeal its rulings or enact new statutes to protect their national laws.¹⁹⁸

It is debatable whether the Court creates new law when rendering preliminary rulings since the courts of the Member States disagree as to whether the rulings are binding in other factually similar cases. It seems as if "[b]inding force will only be attributed to [preliminary rulings] if the national courts see fit to do so."¹⁹⁹

forcement of Community law, market operators and public authorities have concrete, real-life contacts. National authorities enforce regulations on working hours on (Clapham) buses or they deliver plaice quotas to Basque fishermen. Employers apply the equal treatment principle or an environmental directive.

Id.

¹⁹² See NUGENT, *supra* note 45, at 222.

¹⁹³ See SCHERMERS & WAELBROECK, *supra* note 168, at 440 (citations omitted). The ECJ often leaves delicate matters to be determined by national courts. *Id.* This can put national courts in a difficult position, having to choose between encroaching on the province of another branch of the State and ignoring Court rulings. "In its interpretation of the Treaty, the European Court has tried to tread a careful line which permits both boldness in advancing the [objectives] of the Community and sensitivity to the domestic interests of member-States." *Stoke-on-Trent*, [1990] 3 C.M.L.R. 897,35. National courts are sensitive to domestic separation of powers and despite a Court ruling, will not trespass in areas which are reserved for other branches of government. *See id.*

¹⁹⁴ HARTLEY, *supra* note 13, at 87.

¹⁹⁵ *Id.* at 87-89.

¹⁹⁶ *Id.* at 88.

¹⁹⁷ *Id.*

¹⁹⁸ See O'Dwyer, *supra* note 87, at 1.

¹⁹⁹ SCHERMERS & WAELBROECK, *supra* note 168, at 440; *see also European Union Court Ruling Limits Job Preference for Women*, N.Y. TIMES, Oct. 18, 1995, at 11

B. Compliance

1. Bringing Actions

The role of the ECJ has been compared to that of the U.S. Supreme Court in the early years of its development in America. As one author noted, "[b]oth are constitutional courts charged with the preservation and the development of the law in a new society."²⁰⁰ However, it seems that the disparity between the "legal" power of the ECJ and its actual effectiveness is greater than some organizations and members of the Community would like to admit.

a) Determining whether a reference is required

Some observers of the ECJ argue that a gap in legal protection "exists when a national court does not share a party's conviction that a preliminary reference on a question of Community law is necessary to reach a decision."²⁰¹ The ECJ is careful to avoid interfering with the process through which national courts decide which matters to refer.²⁰² Instead, these decisions are "left entirely to the discretion of the national judge."²⁰³ A nation's failure to observe the duty to refer undermines the Community's interest in compliance of Community law,²⁰⁴ and infringes upon individual legal protections created by Community law.²⁰⁵ However, if the reference has been omitted deliberately, the only legal sanction available is to set aside the decision.²⁰⁶

b) Acte Clair

Article 177 of the EC Treaty states that a national court

(asserting that ECJ's rulings are not necessarily binding over national and local laws).

²⁰⁰ SCHERMERS & WAELBROECK, *supra* note 168, at 1; *see also* Fred Barbash, *Little-Known Court Voids Laws of Europe's Nations*, WASH. POST, Oct. 25, 1995, at A25 (noting that ECJ authority over EU members has been compared to U.S. Supreme Court's authority over United States of America).

²⁰¹ Lenz, *supra* note 54, at 394; *see* JOSEPHINE STEINER, TEXTBOOK ON EEC LAW 304 (3d ed. 1993) (noting that no matter how important issue may be to individual, litigant cannot compel national court to refer).

²⁰² *See* STEINER, *supra* note 201, at 288.

²⁰³ *Id.* (noting that separation of powers is simultaneously strength and weakness of Article 177).

²⁰⁴ *See* Lenz, *supra* note 54, at 394.

²⁰⁵ *See id.*

²⁰⁶ *Id.*

from which there is no appeal, "shall" bring a reference in cases where the outcome is dependent upon the interpretation of a provision of Community law.²⁰⁷ Despite this seemingly mandatory language, the Court has developed the somewhat contradictory doctrine of "acte clair." The word "shall" has not been interpreted by the Court as obliging a Member State always to refer a Community law question; rather, the concept of "acte clair" applies "if the answer to the question under Community law is so completely clear and obvious that it would merely be a waste of time and money to make a reference, even a 'final court' need not refer."²⁰⁸

The effect of this doctrine "may be unfortunate, both for the individual and for the uniform application of Community law."²⁰⁹ If a final court refuses to make a reference to the ECJ because it determines that an issue is "acte clair," the individual is deprived of Community law rights. Since individuals are not allowed to bring references before the ECJ, the litigant is therefore denied a remedy. While the Commission may later issue a communication indicating that the ruling of the national court deprived the litigant of procedural protection guaranteed under Community law, it is of little comfort to the aggrieved individual denied justice.²¹⁰

2. Remedies

Theoretically, Member States should all apply Community law in a uniform manner, however, it is possible that this will not always be the case.²¹¹ Judgments of the national courts

²⁰⁷ EC TREATY art. 177.

²⁰⁸ SHARPSTON, *supra* note 40, at 17. In *C.I.L.F.I.T. v. Minister of Health*, the ECJ determined that a national court must bring a reference unless the question raised is irrelevant or that the Community provision in question has already been interpreted by the Court or that the correct application of Community law is so obvious as to leave no scope for any reasonable doubt. The existence of such a possibility must be assessed in light of the specific characteristics of Community law, the particular difficulties to which its interpretation gives rise and the risk of divergences in judicial decisions within the Community. [1983] 1 C.M.L.R. 472, 491 (1983). Before resolving the case, the national court must also be convinced that the matter is obvious to the courts of the member states and the ECJ.

²⁰⁹ SHARPSTON, *supra* note 40, at 19-20; *see* STEINER, *supra* note 201, at 297 (noting that "[w]here a disappointed party does not have the means or the stamina to appeal it may result in a misapplication of EEC law").

²¹⁰ SHARPSTON, *supra* note 40, at 21.

²¹¹ *Lenz*, *supra* note 54, at 390-91. This is why the founders of the Community afforded the Court of Justice exclusive power to interpret questions of Community

which incorrectly apply Community law "are irrevocable and accepted with disapproval by the legal system."²¹² Because "Member States are primarily responsible for the application of Community law,"²¹³ the goal of creating a powerful central court in the European legal system is potentially threatened. Member States are empowered to determine what kind of remedy an individual should receive.²¹⁴ However, they must at least "ensure that there is an *effective* remedy for the enforcement of Community rights."²¹⁵ If a situation arises in which there may be doubt as to the effectiveness or appropriateness of a remedy, the ECJ may, on rare occasion, take action.²¹⁶

These characteristics reveal both the strengths and weaknesses of the Court. It is able to initiate changes which can alter the law of the individual Member States, but, can only go as far as the states will allow. Therefore, if a policy is too firmly rooted in national identity, or if a policy is simply too political, the protests will be loud and the Court's decision-making capabilities will be stymied.

V. COMMUNITY REACTION TO THE *KALANKE* DECISION

The European Court of Justice's ruling in the *Kalanke* decision theoretically affects the twenty-two European states in its jurisdiction.²¹⁷ At a minimum, these states are barred from using affirmative action quota programs which give women an absolute right to a position when competing with equally qualified men in

law. *Id.*

²¹² *Id.* at 397. Such inability to escape incorrect applications of law raises the question of whether other tiers of review should be established. *Id.* Such interference is troubling, however, because it represents "a fundamental interference in the Member States' legal system." *Id.*

²¹³ *Id.* at 390.

²¹⁴ Ziccolella, *supra* note 105, at 665-66. This principle was established by the ECJ in *Van Colson and Kamann v. Nordrhein-Westfalen*, Case 14/83, 1984 E.C.R. 1981, 1910-11, [1986] 2 C.M.L.R. 430, 454-55.

²¹⁵ HARTLEY, *supra* note 13, at 231. Member states "often drag their feet in complying with court decisions." Barbash, *supra* note 200 (noting Court of Justice is alternative avenue of redress for plaintiffs).

²¹⁶ For example, in *Marshall II*, the ECJ ruled that "there can be no *a priori* limit to the amount of damages recoverable" in a case in which the claim was created by Community law but national law set a limit on the remedy allowed. HARTLEY, *supra* note 13, at 233.

²¹⁷ *But see* O'Dwyer, *supra* note 87 (explaining that while Norway's membership in the European Economic Area ("EEA") gives ECJ jurisdiction, Norway contends that *Kalanke* should only apply to fifteen EU Member States).

a field where women are under-represented.²¹⁸ In fact, the decision has raised concerns that other affirmative-action programs, particularly in the Scandinavian countries, would be abandoned in compliance with the ECJ directive.²¹⁹ By examining the actual impact of the decision on certain groups affected by the ECJ ruling, it is clear that the effect of ECJ rulings is anything but certain. Some groups will be able to reject the *Kalanke* ruling, or at least justify a reason for not following it.²²⁰ This does not mean, however, that the court is powerless to cause any lasting changes in the law of the Member States; its rulings certainly will be complied with by some national courts.

The court's decision in *Kalanke* can legitimately be interpreted in two ways: "either the Court dismissed the possibility of justifying any quota system, even one containing a safeguard clause which allows the particular circumstances of a case to be taken into account, or the Court restricted itself to the 'rigid' quotas provided for in the Bremen law and applied to Mr. Kalanke, that is in an automatic manner."²²¹

A. *The European Commission*

The reaction within the Commission to the *Kalanke* ruling has not been one of overwhelming support. Pdraig Flynn, the European Commissioner with responsibility for Employment and Social Affairs, has expressed concern that the judgment is contrary to his belief that the Equal Treatment Directive allowed Member States to choose between a wide variety of actions to achieve equality in the workplace.²²² Prior to *Kalanke*, the Commissioner was not aware that any specific model used to achieve equality among the sexes in the job arena would violate Community law.²²³ While acknowledging disappointment with the ruling, Flynn was also careful to point out that the ECJ has

²¹⁸ See *id.*

²¹⁹ Coleman et al., *supra* note 4, at 1. See *Commission to Amend Affirmative Action Legislation*, AGENCE FR.-PRESSE, Nov. 23, 1995, available in 1995 WL 11475122 (noting EU Commissioner Pdraig Flynn's plans to amend legislation to remove any ambiguity).

²²⁰ See *Bonn Queries EU Court Powers to Rule on Quotas*, ANP ENG. NEWS BULL., Oct. 26, 1995 (noting that Germany is investigating whether ECJ had power to make *Kalanke* ruling or if ruling infringed on "principle of subsidiarity").

²²¹ *Communication on the Kalanke Ruling*, *supra* note 117.

²²² *Flynn Remarks to Equal Protection Women's Committee on Court Judgment*, Press Release, RAPID, Oct. 18, 1995.

²²³ *Id.*

been responsible in the past for progressive decisions regarding equal opportunity.²²⁴

The Commission's response has been two-fold: it has attempted to minimize the import of the court's ruling, and it has proposed changes in Community law to reflect a more permissive rule of law. The official position of the Commission has been to interpret *Kalanke* as narrowly as possible. "The Commission considers that the Court has only condemned the automatic quota system of the Land of Bremen."²²⁵ It has focused on the language of the Court regarding the "absolute and unconditional' nature of the preference" given to the Bremen women.²²⁶ In fact, the Commission "takes the view that quota systems which fall short of the degree of rigidity and automacity provided for by the Bremen law have not been touched by the Court's judgment" and are still lawful.²²⁷

Despite the narrow interpretation of *Kalanke*, the Commission believes that Article 2(4) of the directive should be rewritten to permit positive action measures that are unaffected by the judgment.²²⁸ In March of 1996, Pdraig Flynn "persuaded the Commission to issue a communication clarifying the ruling and amending the 1976 directive on the equal treatment of women

²²⁴ *Id.* The Commissioner concluded an address to the European Parliament's Women's Committee that "[w]e should not add to the venom which is sometimes directed against the Court just because we have been disappointed once. The cause of women is well served by having a Community of law, and tomorrow there may be another positive judgment for women." *Id.* Flynn has publicly reacted to the decision with the hope of defusing "the growing animosity of representatives of women," who still feel threatened by the decision despite political support in their favor. *Commission Defines Scope of Positive Discrimination in Favour of Women*, EUR. SOC. POL'Y, Apr. 12, 1996.

²²⁵ *Communication on Kalanke Ruling*, *supra* note 117.

²²⁶ *Id.* The Commission acknowledged that "the Court refers to the problem of 'substituting for equality of opportunity ... the result which is only to be arrived at by providing such equality of opportunity.'" *Id.* It noted however, that this reference was only added as a rider to the main idea of the Court being the absolute nature of the preference. *Id.* It appears as if the Commission regards some parts of the Court's rulings as more influential than others.

²²⁷ *Id.* However, not all members of the European government are critical of the decision. For example, Mrs. Kjier-Hansen, a member of the European Parliament, asserts that *Kalanke* is "[a] victory for equal opportunities." Nevertheless, Kjier's view is in the minority of most women in the Parliament, who see the *Kalanke* decision as a "sharp setback." *Discrimination of Women Continues* (on file with author).

²²⁸ *Positive Action Measures on Equal Opportunities "Still Possible,"* EUR. INDUS. REL. REV., May, 1996.

and men."²²⁹ The directive was to be amended so that Member States could enact non-mandatory quotas or other measures aimed at decreasing the imbalance of the genders in the workplace. The communication was also issued with the hope of protecting existing laws in the Nordic countries and Germany.²³⁰ The Commission's position is that "systematic discrimination in favour of women is not allowable." Rather, it supports "systems that provide for flexibility in individual cases."²³¹ The European Commission has recommended to the Council that Article 2, section 4 of the Equal Treatment Directive be modified to reflect a position of flexibility.²³²

Narrow construction by the Commission, however, does not necessarily mean narrow construction by the court. Moreover, it is quite possible that the measure will not gain the unanimous vote needed for enactment because states such as England publicly oppose quotas. The Commission has stated that a proper construction of the limited ruling permits a broad spectrum of measures to reduce discrimination in the workplace. It is unclear, however, exactly whose interpretation of the ruling is the "correct" one. Moreover, although the Commission has expressed its desire that "the controversy to which the Kalanke case has

²²⁹ Patrick Smyth, *EU to Amend its Equality Directive*, THE IRISH TIMES, Mar. 28, 1996.

²³⁰ See *id.* Cabinet member Kare Banks has indicated that she feels confident the amendment will be unanimously accepted since it is "permissive rather than prescriptive." *Id.*

²³¹ See *Commission Defines Scope of Positive Discrimination in Favour of Women*, *supra* note 224. The Commission found that a permissible program for the advancement of women would indicate "the proportion of women expected to rise to a particular rank within a certain timeframe ... as long as the individual decisions involved take account of particular circumstances." *Id.*

²³² The Commission has proposed that Article 2 of the Directive be replaced as follows:

This Directive shall be without prejudice to measures to promote equal opportunity for men and women in particular by removing existing inequalities which affect the opportunities of the under-represented sex Possible measures shall include the giving of preference, as regards access to employment or promotion, to a member of the under-represented sex, provided that such measures do not preclude the assessment of the particular circumstances of an individual case.

Equal Treatment Between Men and Women: European Commission Clarifies the Kalanke Ruling, Press Release, RAPID, Mar. 27, 1996. The Commission wants to make it clear that "positive action measures short of rigid quotas are permitted by Community law." *Id.* Finally, an amendment would "ensure that the text of the Directive reflects more clearly the true legal position which results from the judgment of the Court." *Id.*

given rise should be ended definitively," it is questionable whether the opinion of the Commission ultimately will affect the Court's interpretation of the law.²³³

B. Germany

Following the ECJ decision in *Kalanke*, Mr. Kalanke requested the city of Bremen to re-examine his original application for the landscaping post currently held by Ms. Glißman.²³⁴ The Bremen court denied the request and Mr. Kalanke subsequently notified the Commission with the hope of reversing the decision of the city administration.²³⁵ The Commission has not yet issued a statement.²³⁶

Officials in Bremen who expressed satisfaction in the fact that Ms. Glißman has remained in her post, have nonetheless denounced the ECJ's decision in *Kalanke* and the overall response of the Community institutions. For example, Christine Wishcher, Bremen's Senator for Women, "expressed 'shock'" at the Court's ruling and has predicted that it will "worsen 'the already poor acceptance of the European Union' among the citizens of Germany."²³⁷ Likewise, Urlike Hauffe, the head of Bremen's Equal Opportunities Board, believes that employment quotas are valuable instruments in preventing sex discrimination and has stated that the *Kalanke* ruling was "regrettable."²³⁸ Ms. Hauffe has also asserted that the "principle of quotas under the German law would not be amended and that the Federal Labor Court ... 'has no intention' of acting in a way that runs counter to other provisions prescribing quotas for women."²³⁹ Additionally, Hauffe has criticized the draft amendment of the 1976 Directive, arguing that the proposal would not improve the condition of Euro-

²³³ *Id.* Indeed, "a deep split has opened up on this subject between most of the [social affairs] Council Ministers and the European Commission." See *Social Affairs Council: Broad Agreement on Burden of Proof Directive*, EUR. REP., Dec. 4, 1996.

²³⁴ *Social Policy: Experts Call for EU Treaty to Address Equal Opportunities*, EUR. REP., May 7, 1996.

²³⁵ *Id.*

²³⁶ *Id.* The Commission was notified on February 1, 1996. *Id.*

²³⁷ *European Union's Court Ruling on Gender-based Affirmative Action*, THE WEEK IN GERMANY, Oct. 20, 1995, at 4, located in wolfh@osuunx.ucc.okstate.edu (on file with author).

²³⁸ *Social Policy: Experts Call for EU Treaty to Address Equal Opportunities*, *supra* note 234.

²³⁹ *EU:EP/Social Affairs*, AGENCE EUR., May 15, 1996.

pean women in the workplace.²⁴⁰

C. Spain

According to Lucie Ruano Rodrigues, a member of Spain's Economic and Social Committee, the ECJ "lacked valid legal motivations."²⁴¹ She asserts that instruments such as quotas are effective in achieving equality between the sexes and challenges the court's finding that the Bremen quota system was "absolute and unconditional."²⁴² Finally, declaring that the opinion is "easily attackable" and lacking in any legal basis, she questions whether the court may have had political motivations behind the judgment.²⁴³

D. Norway

The Norwegian government, although subject to the jurisdiction of the ECJ as a member of the European Economic Area, "has declared its intention to ignore" the *Kalanke* decision and maintain its regulations.²⁴⁴ "In rejecting the ECJ's ruling, Norway is essentially sending a message that it will not accept external court rulings significantly at odds with the country's core gender laws, which are regarded as the most progressive of any Western nation."²⁴⁵ The Norwegian government, although legally compelled to follow the Court's decisions, has tried to justify its rejection of the decision by contending that only the fifteen Member States of the European Union are required to accept the ruling.²⁴⁶ Citizens in Norway do not believe that the government should adjust their progressive gender laws²⁴⁷ simply to comply with a ruling from the ECJ.²⁴⁸ The belief of many is that

²⁴⁰ *Id.* Ms. Hauffe has noted that only 2 to 8% of women occupy senior positions and that even fewer women have high positions such as judges. *Id.* She argues that rather than being a progressive change, the amended Directive hinders the principle of quotas and is a step backwards. *Id.*

²⁴¹ *Id.*

²⁴² *EU:EP/Social Affairs*, *supra* note 239. Rodrigues also notes that the ruling fails to take account of indirect discrimination. See also *Social Policy: Experts Call for EU Treaty to Address Equal Opportunities*, *supra* note 234.

²⁴³ *EU:EP Social Affairs*, *supra* note 239.

²⁴⁴ O'Dwyer, *supra* note 87.

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ Norway's Gender Equality Act requires employers to "favor women when men and women candidates have the same qualifications." *Id.*

²⁴⁸ *Id.* (quoting Norwegian government official stating that "[a]s a woman I am

"Norway is not about to undo years of hard work by bending its knee to an external court."²⁴⁹

E. The United Kingdom

The *Kalanke* decision has not been met with such hostility in other Member States. In England for example, Mr. Jepson, a member of the Labour Party, saw an advertisement inviting females to be candidates in two new constituencies of the Labour Party. He applied for the two positions, but was rejected because both positions had women-only shortlists.²⁵⁰ Mr. Jepson sought relief in an industrial tribunal and used the *Kalanke* decision to argue that the Labour Party's policy violated the law.²⁵¹ Ruling against the Labour Party, the tribunal found that if the positive discrimination found in the Bremen Act was unlawful, "then a 'total block' on men, as in Labour's policy, would also be against European law."²⁵²

The British reaction to the *Kalanke* decision may be the

happy with Norwegian law in this area There is certainly no reason to change our law to adjust with the court's ruling and I doubt if any Scandinavian country will do so This sort of directive is far behind the times It hasn't kept up with developments in gender legislation") (internal quotations omitted).

²⁴⁹ O'Dwyer, *supra* note 87. Several members of the Norwegian government were quoted as stating

In Norway, we regard the ECJ's ruling as a purely European Union matter We feel that Norway's national laws are more progressive and should always rule against external legal changes.

....

Norwegians would not stand for outside interference on this issue, especially since the laws we have in this area are fair and work very well.

....

It would be entirely absurd if Norway were forced to change its laws just to suit the whims of a court in Luxembourg We will retain our national laws on affirmative action quotas, and there can be no question of not doing so. To do otherwise would be tantamount to the State abandoning Norway's women.

Id. (internal quotations omitted). Moreover, the expectation is that the other Scandinavian countries (Sweden, Denmark, and Finland) will not support the ruling or any attempt by the ECJ to enforce it. *Id.*

²⁵⁰ John Rentoul & Donald Macintyre, *The Battle for a Principle*, THE INDEP., Jan. 9, 1996, at 2.

²⁵¹ *Id.* (Dyas-Elliot & Jepson v. Labour Party).

²⁵² *Id.* The tribunal did note, however, that Directive 76/207 was not "directly applicable since the respondents were not emanations of the State." *Putting a New Spin on Applications for Silk*, THE LAW., Feb. 13, 1996, at 13. The tribunal, citing the *Kalanke* decision, also rejected the Labour Party's argument that the women-only shortlists were covered by the Directive which allows for certain "positive action" measures. *Id.*

most interesting one to observe. Although in this specific instance the British judiciary has been amenable to the court's decision, on the whole, it wishes to restrict the powers of the ECJ.²⁵³ In fact, the British government has recently stated that it is "prepared to ignore a European law."²⁵⁴ Government officials have explained that recent interpretations of the Court went "beyond what governments intended when laws were framed" and were "absurd."²⁵⁵ The Prime Minister has "attacked the European court for beginning to become a European 'supreme court'" and has "left open the possibility that Britain might disobey its rulings if the social chapter is forced upon" Britain.²⁵⁶ Many British feel powerless in the European law-making process, yet are aware that "there are no Euro-police to enforce the law against either [the] Government or the subjects of the Queen."²⁵⁷

It is submitted that the British use decisions of the ECJ when such rulings fit within Britain's desired social programs. If the decisions are controversial or conflict with its desired social policy, it is not difficult for the courts and the government to ei-

²⁵³ See *The Future of Europe*, *supra* note 57 ("Britain wants to restrict the role of the European Court of Justice and to ensure that judicial matters remain the province of national governments acting in unanimity. Other countries want to give the Commission a wider role and do more to harmonise judicial systems."); see also Rebecca Smithers, *IGC Debate Reopens Tory Wounds*, *THE GUARDIAN*, Mar. 22, 1996 (noting that while other EU countries have ignored European legislation, in past England has been scrupulous in upholding European law as its own).

²⁵⁴ Nicholas Budgen, *EU Law Must Be Disobeyed*, *THE TIMES OF LONDON*, Mar. 20, 1996 (noting however, that other EU countries have turned "a blind eye to European legislation" but that in past "British have been scrupulous in treating European law with the same importance as domestic law").

²⁵⁵ Smithers, *supra* note 253 (internal quotations omitted). See also Barbash, *supra* note 200 (calling ECJ decision "an outrage" and asserting "I am not aware that a decision was ever made by the British people" that "a bunch of foreign judges and not ... the elected representatives of the British people" should be making such choices).

²⁵⁶ Budgen, *supra* note 254; see also Barbash, *supra* note 200 (noting that notion of "international judiciary empowered to overrule acts of Congress may be unimaginable to Americans" but that "such a court--a supreme court of Europe--is increasingly active within the European Union ..."); Smithers, *supra* note 253 (quoting government official that ECJ's "powers are excessive and need to be cut back if Parliament is to do its job and speak for the British people").

²⁵⁷ Budgen, *supra* note 254 (noting that there is no fear of enforcement). At least one subject of the Queen believes that "[t]he EU is at present a half-formed federal structure. It offers neither sovereignty to the member state, nor a system of defined roles and checks and balances. If we cannot change the treaty, we can at least defy the judicial messengers." *Id.*

ther simply dismiss the ruling, or publicly justify a reason why the ECJ ruling does not affect British law. It is further asserted that the British are not alone in doing so.

CONCLUSION

It is clear that the concept of positive discrimination is a controversial topic. Many citizens of the Community believe that positive discrimination in the form of quotas is an effective way to eliminate the unequal status of women in both rank and remuneration in the workplace. They feel that without such programs, women will be indefinitely relegated to low-level, poorly paid positions. Finally, they note that since Member States are allowed to implement directives as appropriate to their domestic situation, they ought to be able to adopt positive discrimination programs in the form of quotas. On the other hand, some citizens of the Community feel just as strongly that positive discrimination programs simply discriminate against groups not included within the programs. A decision as to whether to legislate positive discrimination procedures goes to the very root of a nation's social policy.

The basic issue that faces the Member States of the EU is whether together, they are committed to establishing a uniform social policy. The original purpose of the Community was to establish a common market. Issues such as equal treatment for men and women in the workplace do affect issues dealing with the establishment of a Common Market; however, they are also deeply rooted in social programs, culture, and basic politics of Member States. If Member States decide that it is desirable to unify such programs, then the Court must be made truly independent, with the power and authority to ensure that its decisions are followed.²⁵⁸ It is possible, however, that Europeans are not ready for a supranational entity to dictate what a Member State's social policy may or may not be. If it is determined that the future of a Common Market should not include an homogenization of social programs, then the limited powers of the Court to rule on such issues should be curtailed. The present situation is not ideal and undermines the integrity of the Court and the EU

²⁵⁸ One of the basic problems with the ECJ is that it is not truly an independent court. See David Howell, *The Right Referendum Strategy for Britain*, WALL ST. J. (Europe), Mar. 25, 1996, at 10.

as a whole.

The *Kalanke* decision will certainly have a direct effect on the candidates for the job in the Bremen Parks Department since both applicants must reapply for the position. Moreover, it is possible that the ruling may influence the courts of the Member States.²⁵⁹ As of now, however, it is not only unclear what the citizens of the Member States will do with the decision, it is also unclear as to what the small city of Bremen will do.

Laura Molinari

²⁵⁹ *Justice Reversed: European Union*, THE ECONOMIST, Mar. 23, 1996, at 52.

