Michigan Journal of International Law

Volume 11 | Issue 1

1989

Equal Protection- The Social Dimension of European Community Law

T. Koopmans
Court of Justice of the Wuropean Communities

EQUAL PROTECTION — THE SOCIAL DIMENSION OF EUROPEAN COMMUNITY LAW

*T. Koopmans**

There are two reasons for drawing attention to the social dimension of European Community law. First, the EEC treaty comprises different provisions on social policy whose importance is consistently underestimated: the treaty is often considered as merely establishing a "common market" and as only concerning economic problems. This approach is prominent in the United States, where the business world is primarily interested in trade with, and within, the common market, and where much literature is devoted to this subject. Second, the social provisions of the EEC treaty have given rise to an interesting evolution in the case law of the Court of Justice of the European Communities, on equal protection in particular. As a result, the Court's case law has gradually begun to show some interesting parallels with previous developments in American law.

I. THE TREATY PROVISIONS

It is true that the EEC treaty is principally concerned with establishing a common market, which is the Community's main task[1] There is no doubt, however, that it includes some important elements of social policy. According to article 3, free movement of persons within the territory of the Community is one of its aims: obstacles to freedom of movement for persons must be abolished.[2] The treaty has a separate chapter on free movement of workers: elaborate provisions deal with problems like giving access to employment, abolishing discrimination between workers on grounds of nationality, and organizing the application of social security systems to migrant workers.[3] This is a very important chapter, as it implies limitations on the member states' powers to expel aliens, to authorize or refuse residence on

* Thijmen Koopmans, a former Leyden professor of constitutional law, has been a judge at the Court of Justice of the European Communities since 1979. He is a fellow of Trinity College, Cambridge, and a member of the Royal Netherlands Academy of Arts and Sciences.

1. *See* Treaty Establishing the European Economic Community, 298 U.N.T.S. 15 [hereinafter EEC treaty], art. 2.

2. *Id.*, art. 3(c).

3. *Id.*, arts. 48-51.

their territory and, in general, to regulate immigration — powers which are often considered a central part of national sovereignty. As a result, it took about ten years to issue all of the different regulations and directives necessary for implementing these treaty provisions.

The treaty also contains a title on social policy in general, subdivided into two chapters. The title provides for cooperation in the field of labor relations, for harmonization of health and safety rules for workers, for a common system of financing new employment opportunities and for a common policy in the field of vocational training.[4] These provisions are weaker than the ones on free movement of workers in the sense that the treaty does not create a clear mechanism for ensuring their implementation. Although it gives certain powers to the Council and the Commission of the Community, the treaty does not invest them with a general jurisdiction in these matters. However, as we shall presently see, that does not alter the fact that these matters are covered by the treaty. The conclusion that these matters fall within the scope of the treaty's application may, in turn, have certain legal effects.

The same title on social policy includes a specific and clear-cut rule on equal pay for male and female workers.[5] It states that equal pay for equal work is a "principle" which is to be ensured and maintained by the member states. This provision, article 119, raised many difficulties which are only gradually being solved by the case law of the Court of Justice and the national courts. The provision also formed the basis for some important Community directives on equal treatment of men and women in the field of labor relations in general.

Article 119 may have been inserted into the treaty for economic rather than social reasons. At the time the EEC treaty was concluded, some member states, France in particular, were very anxious about "social dumping" which could disfavor their industries. This idea appears explicitly in some treaty provisions, such as the protocol on certain provisions relating to France, which includes rules on payment for overtime. The objective of the protocol was, within a certain period of time, to set a rate of additional payment for overtime in industry corresponding to the average payment being obtained in France. If this situation were not brought about by the end of the period, France would be authorized to take protective measures. The existence of this protocol suggests that similar concerns may have guided the hand of

4. *Id.*, arts. 118, 118A, 123-127, 128, respectively.

5. *Id.*, art. 119.

the drafters of article 119. In any case, the provision has developed into one of the major instruments of social policy in the Community.

Community institutions have been more active in some areas of social policy than in others. The European Court's case law has tended to strengthen, in particular, the prohibitions against discrimination. I shall dwell on three examples of this portion of the Court's case law, taken, respectively, from cases on free movement of workers, on sex discrimination, and on access to national education systems.

II. FREE MOVEMENT OF WORKERS

Free movement of workers, over the years, has proved to be a fertile area for the development of the Court's case law. In an early case involving social security,[6] for example, the Court took the opportunity to examine the very nature of the Community and to contrast it with traditional forms of international collaboration. In its preliminary ruling, the Court also outlined methods of interpreting Community law that diverged from those used in traditional international law.[7]

For equal protection, the point of departure is the treaty rule, in article 48, that free movement of workers implies "the abolition of any discrimination based on nationality" as regards employment, remuneration and other conditions of work.[8] The Court has held that the prohibition against discrimination not only strikes at unequal treatment based directly on nationality, but at any other standard which, though not referring to national origin, has the practical result of affecting the same category of people. In *Sotgiu v. Deutsche Bundespost*, an Italian was employed in the Federal Republic of Germany while maintaining residence in his home country. German labor law treated him differently because he did not reside within German territory.[9] The Court held that rules on equality of treatment forbid "not only overt discrimination by reason of nationality, but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result."[10] Thus, standards relating to the residence or place of origin of a worker might, "according to circumstances, be tantamount, as regards their practical effect, to discrimination on grounds of nationality." However, such would not be the case with differentiations which "took account of objective differ-

6. Unger v. Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten, case 75/63, 1964 EUR. CT. REP. 177.

7. *Id.* at 184-85.

8. EEC treaty, art. 48, § 2.

9. Sotgiu v. Deutsche Bundespost, case 152/73, 1974 EUR. CT. REP. 153.

10. *Id.* at 164.

ences which the situation of workers may involve."[11] The judgment then examines separation allowances, which, under certain circumstances, may be an example of such a differentiation founded on objective differences. The upshot of the decision is that residence has become what the U.S. Supreme Court would call a suspect classification.

The Court of Justice has, moreover, given wide scope to the nondiscrimination rule. It has held that this rule applies not only to employment and working conditions in a strict sense, but that it may also touch on living conditions in the host country. The leading case of *Netherlands v. Reed* concerned a woman who was a British citizen working and residing in the Netherlands. She was living with another British citizen without being married to him. When her employment ended, she was served with notice that she had to leave the country, as she was no longer a "worker" protected by EEC rules.[12] In her application to the Dutch courts, she relied on two arguments. First, she said, she would have been protected by EEC rules if she had been married to her British friend: she would then have had the protected status of being the "spouse" of a Community worker. Because, she argued, the concept of a spouse in marriage is evolving with current societal morality and increasingly assimilating other steady links between men and women into its definition, the concept was not to be taken so literally as to exclude this case. Second, she claimed that she would have been able to remain in the Netherlands if her friend had been a Dutch national. Indeed, there appeared to be a Dutch administrative practice that foreigners living with Dutch nationals would not be expelled, even when without a job in the country. The Dutch appeals court referred these two problems to the Court of Justice for preliminary rulings.[13] The Court's reaction was typical. On the first point, it noted that the rhythm of social evolution was not the same in the different member states and that, anyway, definitions of marriage, spouse, children, members of the family, etc. were to be determined according to the applicable (national) family law.[14] On the second point, however, the Court held that the authorities of a member state were not at liberty to expel citizens of other member states having a steady relationship with a compatriot if the same authorities would consider the relationship in a different light if it existed with a national

11. *Id.* at 165.

12. Netherlands v. Reed, case 59/85, 1986 EUR. CT. REP. 1283.

13. *See* EEC treaty, art. 177, which authorizes the Court of Justice to make preliminary decisions upon referral.

14. Netherlands v. Reed, 1986 EUR. CT. REP. at 1299-1301.

of their own country.[15] The judgment illustrates that, in some instances, general living conditions may be directly relevant to equal protection problems in the employment field.

Case law on equal protection also helped to define the rights of children of migrant workers and, more generally, of "second generation" immigrants. The treaty provisions are completely silent on their position and, curiously enough, the implementing regulations are not very elaborate either; they do not reveal that their drafters really considered the possibility that workers from other member states might simply prefer to remain in the host country with their family.[16] But this category of migrants, forgotten by the drafters of the treaty and only occasionally remembered by the implementing measures, benefitted from the way in which the Court applied the non-discrimination rule to them. It held, for example, that Belgian authorities could not refuse a scholarship to attend arts school in Germany to a young art teacher who happened to be an Italian national. The teacher had been born in Belgium to an Italian worker and had had her entire education in Belgium.[17] The Belgian government argued that, because of a bilateral agreement on cultural exchanges between Belgium and the Federal Republic of Germany which made scholarships available only to nationals of those two countries, the Belgian authorities had no choice but to refuse. The Court's dry response was that a bilateral arrangement between member states cannot relieve them of the obligation to observe Community law.

III. SEX DISCRIMINATION

Cases on sex discrimination — or, as American terminology has it nowadays, discrimination based on gender — show similar problems and comparable solutions.[18]

Sex discrimination has soon been found to exist in covert forms. The first case before the Court of Justice involved hourly wage rates in the clothing industry. A British company applied a lower hourly rate to part-time workers.[19] The national court which referred the matter to the Court had established that all part-time workers in the company

15. *Id.* at 1304.

16. *Regulation No. 1612/68 on freedom of movement for workers within the Community*, 1968II O.J. EUR. COMM. (Special Edition) (No. L 257) 477-78 (1968) (act of the Council).

17. Matteucci v. Communauté francaise de Belgique, case 235/87, judgment of Sept. 1988 (not yet reported).

18. *See* N. BURROWS & S. PRECHAL, GENDER DISCRIMINATION OF THE EUROPEAN COMMUNITY ch. 1 (1989).

19. Jenkins v. Kingsgate Clothing Productions, case 96/80, 1981 EUR. CT. REP. 911.

were female, the only exception being a man who had retired but whose help was still necessary for limited technical operations. The Court of Justice found that under these circumstances, the lower rate for part-timers, in reality, represented discrimination based on gender, unless the company could show that it had objective reasons unrelated to gender for introducing lower pay for part-timers. Such objective reasons could include economic justifications. This approach was confirmed some years later in a German case regarding an occupational pension scheme which excluded part-time workers. The scheme had been instituted for workers in department stores, and it was not difficult to see that the exclusion of part-timers amounted in practice to excluding female shop assistants.[20] In Europe, married women are still the main contenders for part-time jobs. The Court insisted again that differentiations of this kind could only be justified by objective reasons regardless of sex. Its attitude is generally interpreted to mean that an employer's mere demonstration of his intent to achieve some policy objective, like the encouragement of full-time employment, is not sufficient.[21] Economic aims which are proper to the enterprise in question may constitute an objective justification, provided, however, that the measures chosen to attain these ends are appropriate and not disproportionate to the problems they purport to solve.

Sex discrimination issues also gave rise to cases on the scope of equal protection. In one case, for example, the Court held that non-discrimination, under the equal pay rule, has relevance not only for wages and salaries, but also for other benefits workers may claim because of having, or having had, a certain job.[22] Therefore, British Rail could not refuse certain benefits to its retired female workers once the same benefits had been granted to retired male workers. This case was, in a way, typical of the clash between, on the one hand, traditional ways of looking at family life and, on the other, the requirement of non-discrimination on the basis of sex. The railway company in the case gave free travel to all its retired workers. Only for men, however, did the arrangement include free travel for members of the former employee's family.

Exceptions to equal protection rules are narrowly construed by the Court. The Community directive on equal access to employment allows for some exceptions to the general principle of equal treatment, for instance, if the "nature" of the job necessarily requires either a

20. Bilka-Kaufhaus v. Karin Weber von Hartz, case 170/84, 1986 EUR. CT. REP. 1607.

21. *See* D. CURTIN, IRISH EMPLOYMENT EQUALITY LAW 164 (1989).

22. Eileen Garland v. British Rail Eng'g Ltd., case 12/81, 1982 EUR. CT. REP. 359.

male or a female worker.[23] The standard illustration of this derogation is the soprano needed for a Verdi opera; but one could also think of Cinderella's very ugly sisters in the English pantomime who have to be, according to the English theatre tradition, male actors. The Court had to consider the problem in a French police case.[24] The case did not come from a national court for a preliminary ruling, but on a direct action by the Commission against a member state for failing to comply with its treaty obligations.[25] The French police (or, at least, the five national police corps which form the main police force) had two different ways of recruiting new police officers, one for male and one for female candidates. Both groups were submitted to the same entry test, but the police authorities then fixed the percentage of women to be enlisted in the course of every recruitment process. This might, to American readers, look like a quota system, but it was not: there was no fixed number or percentage of females to be employed. The Commission considered the system as discriminatory and as having no justification under Community directives. The French government argued, however, that many, or at least some, police jobs necessarily require persons who are able to exert physical force and who are not afraid of others who do the same. This reliance on the requirement of physical force (the "Rambo-argument") is frequently used in sex discrimination cases. The argument claims that only men have these abilities and that, therefore, the nature of the job requires male workers.

The Court was careful in its assessment of the case. It accepted that "some" police jobs could require the kind of physical force that is expected from men, and could therefore be reserved to male officers. However, it held that this particular situation could not justify a differentiation between male and female officers over the whole range of police careers and for all police jobs. The dual system of recruiting was "disproportionate" with regard to the legitimate aim it could pursue, or, as the U.S. Supreme Court would put it, "overbroad." Consequently, the "nature" of the job which may justify differential treatment must relate to specific jobs, not globally to a number of activities to be performed by a certain institution or a certain employer.

23. *Council Directive 76/207*, 19 O.J. EUR. COMM. (No. L 39) 40 art. 2, § 2, (1976) (on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions).

24. Commission of the European Communities v. French Republic, case 318/86, judgment of June 30, 1988 (not yet reported).

25. EEC treaty, art. 169.

IV. ACCESS TO EDUCATION

A recent jurisprudential development concerns access to national systems of education, an area that confirms the emphasis the Court of Justice has been putting on equal treatment.

This particular extension of non-discrimination rules started with a case on tuition fees for access to state schools of higher education.[26] It appeared that Belgium levied fees on foreign students only, including nationals of other member states. A French girl who was in Liege to study cartoon drawing (a Belgian specialty) had been ordered to leave the country. Since she had refused to pay the tuition fee, she could no longer be considered a student. Alleging Belgian practice to be discriminatory, she commenced an action. The Belgian government defended its case rather weakly, arguing merely that the Community was an economic community and that it had nothing to do with education, an area that remained completely governed by national law. The Court, however, found this statement to be overbroad. It is true, it said, that matters such as the organization of the educational system and curricular planning remain entirely subject to national control. On the other hand, some provisions in the treaty chapter on social policy explicitly refer to a common policy on vocational training.[27] The implementing measures highlight the necessity of providing access to vocational training for citizens of other member states. Regulations on free movement of workers already tend to promote access of migrant workers to this form of schooling. Thus, the Court arrived at the conclusion that access to vocational training is within the scope of the EEC treaty. Consequently, it held that the general rule of article 7 of the treaty applied, according to which, within the field of application of this Treaty and without prejudice to the special provisions mentioned therein, any discrimination on the grounds of nationality shall be prohibited.

The new case law is founded on the concept of "vocational training," an expression which is somewhat ambiguous. Most schools serve, in one way or another, to prepare pupils and students for jobs or professions, but they also have non-vocational aims, such as inculcating children and young adults with cultural values, or simply broadening students' knowledge and sharpening their minds. The frontier between the two is uncertain and vague. In one recent case, the Court held that the term "vocational training" does not exclude university education, as most forms of it prepare students for participating in

26. Françoise Gravier v. City of Liege, case 293/83, 1985 EUR. CT. REP. 593.

27. *See, e.g.*, EEC treaty, art. 128.

professional life.[28]

A further issue is whether equal access to vocational training has consequences not only for the level of tuition fees but also for the liberty of public authorities to refuse scholarships to foreigners. The Court has made a distinction between scholarships intended to cover tuition and those intended to offset costs of living.[29] Most developed systems of subsidizing students, however, involve both elements, as the Court has since discovered.[30] Case law on this point has not yet found an appropriate balance.

V. CONCLUDING REMARKS

Taken together, the three lines of case law examined here suggest that the treaty's scattered provisions on non-discrimination gradually begin to amount to a general principle of equal protection. It is to be recalled, in this respect, that the treaty includes not only rules forbidding discrimination on grounds of nationality or sex, such as articles 7, 48 and 119, but also prohibitions against discriminating between producers or between consumers, for example, in its provisions on the common agricultural policy and on antitrust law.[31] It is interesting to note that the evolution of the Court's case law reveals a certain affinity between this branch of European law and American case law on equal protection. It attempts to meet the same problems and, sometimes, puts forward similar solutions, albeit in different conceptual clothing. The American reader will have noticed how standards developed by the U.S. Supreme Court for "suspect classifications," "adverse impact," "penalizing immigration," and "overbroadness" have found counterparts in the European Court's decisions.

The same observation applies to other American terms, like "state action" or "job-related requirements," which are shorthand for problems the European Court has also encountered on its way. The "state action" problem arose in a somewhat peculiar manner. According to the treaty, Community directives are, unlike regulations, only binding on the member states as to the result to be achieved; they leave the national authorities free in their choice of form and methods.[32] Normally, directives are transposed into national law. Community

28. Vincent Blaizot v. University of Liege, case 214/86, 1988 EUR. CT. REP. 379.

29. Steven Brown v. Secretary of State for Scotland, case 197/86, judgment of June 21, 1988 (not yet reported).

30. Echternach and Moritz v. Minister van Onderwijs en Wetenschappen, joint cases 389-390/87, judgment of Mar. 15, 1989 (not yet reported).

31. EEC treaty, art. 40, § 3, art 85, § 1, and art. 86(c).

32. *Id.* art. 189.

norms thus reach the citizen by way of national rules issued in order to implement the directive. In a long line of decisions, the Court held that provisions of a directive which are "unconditional and sufficiently precise" may be relied upon by an individual against a member state whenever the state failed to implement the directive. A different approach, said the Court, would be incompatible with the binding nature of the directive.[33] However, this binding nature exists only with regard to the member state, not with regard to private citizens. The Court has deduced from this premise that a directive cannot impose obligations on a private individual and that a provision of a directive may not be relied upon against such a person. As a result, female workers may rely on equal treatment directives when involved in litigation with public authorities, but not when their employer happens to be a private business corporation.[34]

The growing law of equal protection in the Community also shows that the process of economic integration cannot be pursued in isolation. It elicits social problems which only the courts can settle if the political institutions are slow — as they often are — in adjusting to new realities and to new views. The process thus shows a second parallel with experience in the United States, although judicial developments have not been quite so dramatic in Europe. Perhaps decisions on discrimination for reasons of nationality or sex do not have the same emotional intensity as those involving race. In thinking about this aspect of equal protection, one finds that our theme may also enable us to look, in a general way, at the role of courts in the evolution of legal principles.

The practical implementation of the principle of equal protection has been the work of courts rather than of constitution makers, legislative bodies, or executives. This conclusion implies that very important social issues have been decided by the judiciary when the other arms of government failed to act, or were still pondering what to do. The U.S. Supreme Court never hesitated to assume this role, and it would seem that the European Court of Justice has been following the same course.

33. Ursula Becker v. Finanzamt Münster-Innenstadt, case 8/81, 1982 EUR. CT. REP. 53.

34. Marshall v. Southampton and South West Hampshire Area Health Auth., case 152/84, 1986 EUR. CT. REP. 723.