

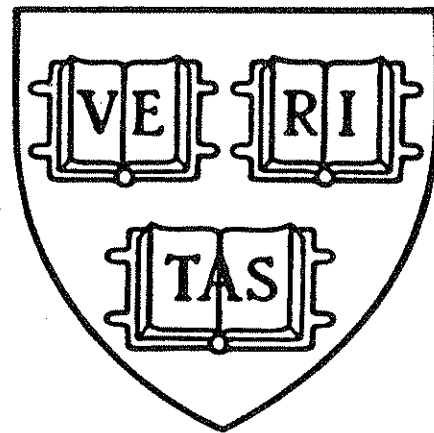
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COMMENT

FUNDAMENTAL MISCONCEPTIONS ABOUT
FUNDAMENTAL RIGHTS: THE CHANGING NATURE
OF WOMEN'S RIGHTS IN THE EEC AND THEIR
APPLICATION IN THE UNITED KINGDOM

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Fundamental Misconceptions About Fundamental Rights: The Changing Nature of Women's Rights in the EEC and Their Application in the United Kingdom

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I. AN INTRODUCTION TO THE FUNDAMENTAL RIGHT

In *Defrenne v. Sabena Airlines III*, the Court of Justice of the European Communities (ECJ)¹ proclaimed that "respect for fundamental personal human rights is one of the general principles of Community law, the observance of which [the ECJ] has a duty to ensure. There can be no doubt that the elimination of discrimination based on sex forms part of those fundamental rights."² Commentators on Community law make similar sweeping pronouncements. One author has written, "The caselaw of the European Court of Justice . . . has firmly established the fundamental nature of EEC equal treatment rights"³ Another has asserted, "EEC Directives on equal pay, opportunities and social security are . . . equivalent [to] a set of guiding constitutional principles and the European Court of Justice acts rather like the [United States] Supreme Court when it decides whether or not British statutes are adequate or defective within a European framework."⁴

Neither the literature on fundamental rights nor that on sex discrimination law explores whether these broad proclamations are mere rhetoric. This Comment will argue that the ECJ's sweeping proclamation in *Defrenne III* ignores the complex nature of the right of sexual equality and that the Community court considers sexual equality a fundamental right in only a few limited situations. It will explore the formulation of the right of sexual equality, the application of this

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1. The Treaty of Rome, which established the European Economic Community, provided for the establishment of the European Court of Justice (ECJ) to "ensure that in the interpretation and application of this Treaty the law is observed." Treaty Establishing the European Economic Community, Mar. 25, 1957, art. 164, 298 U.N.T.S. 11 [hereinafter Treaty].

2. *Defrenne v. Sabena Airlines III*, 1978 Eur. Comm. Ct. J. Rep. 1365, 1378.

3. Fitzpatrick, *The Sex Discrimination Act 1986*, 50 MOD. L. REV. 934, 934 (1987).

4. E. MEEHAN, *WOMEN'S RIGHTS AT WORK: CAMPAIGNS AND POLICY IN BRITAIN AND THE UNITED STATES* 170 (1985).

right both by the ECJ and by the courts and tribunals of the United Kingdom, and the prospects for a right of sexual equality in European law.

This section provides brief background material on both EEC fundamental rights and EEC sex discrimination measures and establishes that the ECJ recognizes the fundamental right of sexual equality. Subsequent sections will challenge whether such a broadly formulated "right" actually exists within Community law.

A. Fundamental Rights in the Community Order

Various Community declarations and resolutions acknowledge the existence of fundamental rights in the Community.⁵ Also, ECJ case law has long recognized fundamental rights.⁶ While the Treaty does not refer specifically to fundamental rights, the court has been influenced by general Treaty provisions,⁷ specific provisions of the Treaty of Rome,⁸ secondary Community law, case law,⁹ Member States' Constitutions,¹⁰ the European Convention on Human Rights (ECHR), and the European Social Charter¹¹ in developing fundamental rights

5. See, e.g., *Fundamental Rights: Joint Declaration by the European Parliament, the Council and the Commission of 5 April 1977*, reprinted in BASIC COMMUNITY LAWS 138 (B. Rudden & D. Wyatt 2d ed. 1986).

6. The first recognition came in *Stauder v. City of Ulm*, 1969 Eur. Comm. Ct. J. Rep. 419.

7. The Treaty provides the authority to uphold such general principles. See Treaty, *supra* note 1, arts. 164, 173, 215. The ECJ stated that fundamental rights are an integral part of general principles of law which it is bound to uphold. *Nold v. Comm'n of the European Communities*, 1974 Eur. Comm. Ct. J. Rep. 491, 507, para. 13.

8. See Pescatore, *The Context and Significance of Fundamental Rights in the Law of the European Communities*, 2 HUM. RTS. L.J. 295, 296 (1981).

9. See *Stauder v. City of Ulm*, 1969 Eur. Comm. Ct. J. Rep. 419 (initiating the ECJ's jurisprudence in the area of fundamental human rights).

10. Originally, the ECJ emphasized the autonomy of the Community's legal system and rejected the introduction of concepts drawn from national constitutional law. See *Geitling v. High Auth.*, 1960 Eur. Comm. Ct. J. Rep. 423; *Stork v. High Auth.*, 1959 Eur. Comm. Ct. J. Rep. 17, 26-27. Later the ECJ acknowledged that Member States' constitutions could help evaluate certain Community actions. See *Nold v. Comm'n*, 1974 Eur. Comm. Ct. J. Rep. 491, 507, para. 13. The ECJ conceded that national constitutions inspired the ECJ's protection of fundamental rights but held that "[t]he validity of [Community actions] can only be judged in the light of Community law" See *Internationale Handelsgesellschaft GmbH v. Einfuhr- und Vorratsstelle fur Getreide und Futtermittel*, 1970 Eur. Comm. Ct. J. Rep. 1125, 1134, para. 3.

11. See *Nold*, 1974 Eur. Comm. Ct. J. Rep. at 507, para. 13 ("[I]nternational treaties for the protection of human rights . . . can supply guidelines which should be followed within the framework of Community law."); accord *Johnston v. Chief Constable of the Royal Ulster Constabulary*, 1986 Eur. Comm. Ct. J. Rep. 1651; *Hauer v. Land Rheinland-pfalz*, 1979 Eur. Comm. Ct. J. Rep. 3727, 3744, para. 13; see also Petersmann, *The Protection of Fundamental Rights in the European Communities*, 23 ANNUAIRE EUROPEEN 179, 199 (1975). See generally Dausès, *The Protection of Fundamental Rights in the Community Legal Order*, 10 EUR. L. REV. 398 (1985).

The ECHR, dealing with civil and political rights, came into force on September 3, 1953. Presently, all of the EEC Member States have ratified it. The provisions relevant to sexual

in Community law. The ECJ particularly "plays a central and vital role in the interpretation and implementation of the rights" ¹²

B. EEC Sex Discrimination Provisions

Six "traditional" EEC legal provisions specifically concern sex discrimination: article 119 of the Treaty and five directives. ¹³ Article 119 of the Treaty sets forth the principle of equal pay for equal work. ¹⁴ Most provisions on sex discrimination, however, are found in the directives.

The Equal Pay Directive ¹⁵ provides that for the "same work or for work to which equal value is attributed," individuals must not be discriminated against in "all aspects and conditions of remuneration." ¹⁶

The Equal Treatment Directive ¹⁷ addresses access to employment, promotion, vocational training, working conditions, some aspects of social security, and dismissal. This directive prohibits both direct and indirect discrimination due to marital or family status. ¹⁸ It exempts occupational activities and training where the worker's sex constitutes a determining factor due to the job's nature or context. ¹⁹ But significantly, the directive permits protective provisions. ²⁰

equality are arts. 3, 13, 14, 15(1), 15(2) and Protocol No. 7 of art. 5. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222.

The European Social Charter, concerning economic and social rights, has been ratified by 13 states, although not by all of the EEC Member States. COUNCIL OF EUROPE, THE PROTECTION OF HUMAN RIGHTS 14 (1983). The European Social Charter states that, "the enjoyment of social rights should be secured without discrimination on grounds of . . . sex" European Social Charter, Oct. 18, 1961, 529 U.N.T.S. 89.

12. See Pescatore, *supra* note 8, at 295.

13. Other directives have been proposed. See, e.g., *Proposal for a Council Directive on Voluntary Part-Time Work* (submitted by the Commission to the Council on Jan. 4, 1982), 25 O.J. EUR. COMM. (No. C 62) 7 (1982), amended 26 O.J. EUR. COMM. (No. C 18) 5 (1983); *Proposal for a Council Directive on Parental Leave and Leave for Family Reasons* (submitted by the Commission to the Council on Nov. 24, 1983), 26 O.J. EUR. COMM. (No. C 333) 6 (1983), amended 27 O.J. EUR. COMM. (No. C 316) 7 (1984); *Proposal for a Council Directive Completing the Implementation of the Principle of Equal Treatment for Men and Women in Statutory and Occupational Social Security Schemes* (submitted by the Commission to the Council on Oct. 27, 1987), 30 O.J. EUR. COMM. (No. C 309) 11 (1987).

14. Treaty, *supra* note 1, art. 119 ("Each Member State shall . . . maintain the application of the principle that men and women should receive equal pay for equal work . . .").

15. Directive 75/117, *Council Directive of 10 Feb. 1975, on the Approximation of the Laws of the Member States Relating to the Application of the Principle of Equal Pay for Men and Women*, 18 O.J. EUR. COMM. (No. L 45) 19 (1975) [hereinafter *Equal Pay Directive*].

16. *Id.* art. 1.

17. Directive 76/207, *Council Directive of 9 Feb. 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*, 19 O.J. EUR. COMM. (No. L 39) 40 (1976) [hereinafter *Equal Treatment Directive*].

18. *Id.* art. 2(1).

19. *Id.* art. 2(2).

20. *Id.* arts. 2(3) (pregnancy and maternity protective provisions), 2(4).

The Social Security Directive²¹ applies the principle of equal treatment to matters of social security,²² although it also allows a number of exemptions.²³ Directive 86/378²⁴ forbids distinctions between sexes, directly or indirectly, or by reference to marital or family status, in certain areas of occupational social security schemes.²⁵ It, too, provides a number of exemptions.²⁶

Directive 86/613²⁷ applies the principle of equal treatment to self-employed men and women. The provision protects self-employed women during pregnancy and motherhood; prohibits direct and indirect discrimination in the establishment, equipment, or extension of a self-employed activity;²⁸ and prohibits more restrictive conditions for forming a company between spouses than for unmarried persons.²⁹

The United Kingdom—the Member State which provides the case study of this Comment—claims to fulfill its Community obligations regarding gender equality through the Sex Discrimination Act 1975 (SDA '75),³⁰ the Sex Discrimination Act 1986 (SDA '86),³¹ and the Equal Pay Act 1970 (EPA '70).³²

C. *The Fundamental Right of Sexual Equality*

EEC case law appears to further the substantial protections that article 119 and the relevant directives provide individuals from sex discrimination.³³ In *Defrenne III*,³⁴ the ECJ elevated freedom from sex

21. Directive 79/7, *Council Directive of 19 Dec. 1978, on the Progressive Implementation of the Principle of Equal Treatment for Men and Women in Matters of Social Security*, 22 O.J. EUR. COMM. (No. L 6) 24 (1979) [hereinafter *Social Security Directive*].

22. Specifically, there can be no discrimination in the scope of the schemes and the conditions of access to them, the obligation to contribute, the calculation of benefits including increases in respect of a spouse and for dependents, and the conditions governing the duration and retention of entitlement to benefits. *Id.* art. 4.

23. *Id.* arts. 3(2), 4(2), 7.

24. *Council Directive of 24 July 1986, on the Implementation of the Principle of Equal Treatment for Men and Women in Occupational Social Security Schemes*, 29 O.J. EUR. COMM. (No. L 225) 40 (1986). The provisions of the directive are to be implemented by January 1, 1993. *Id.* art. 8.

25. *Id.* art. 6.

26. *Id.* arts. 2, 8(2), 9.

27. *Council Directive of 11 Dec. 1986, on the Application of the Principle of Equal Treatment Between Men and Women Engaged in an Activity, Including Agriculture, in a Self-Employed Capacity, and on the Protection of Self-Employed Women During Pregnancy and Motherhood*, 29 O.J. EUR. COMM. (No. L 359) 56 (1986).

28. *Id.* art. 4.

29. *Id.* art. 5.

30. Sex Discrimination Act, 1975, ch. 65, reprinted in *Butterworths Annotated Legislation Service* (M. Beloff & H. Wilson eds. 1976).

31. Sex Discrimination Act, 1986, ch. 59, reprinted in *Butterworths Annotated Legislation Service*, Miscellaneous Acts (Butterworths Legal Editorial Staff 1987).

32. Equal Pay Act, 1970, ch. 49, reprinted in *Butterworths Annotated Legislation Service* (Butterworths Legal Editorial Staff 1970).

33. See generally D. PANNICK, *SEX DISCRIMINATION LAW* (1985).

34. See *Defrenne v. Sabena Airlines III*, 1978 Eur. Comm. Ct. J. Rep. 1365.

discrimination to the status of a "fundamental right." The case involved a flight attendant who challenged a term in her contract requiring women crew members to terminate employment when they reached forty years of age. The ECJ considered the following question:

Must Article 119 . . . be interpreted by reason of the dual economic and social aim of the Treaty as prescribing not only equal pay but also equal working conditions for men and women, and, in particular, does the . . . clause . . . constitute discrimination prohibited by the said Article 119 . . . or by a principle of community law . . . ?³⁵

Some of the intervening parties argued that the case involved a fundamental right. The Italian Government argued, *inter alia*, that "the principle that men and women shall be equal in the sphere of working conditions . . . is . . . the expression of a fundamental right."³⁶ The Commission of the European Communities suggested that the contract provision might be illegal because of "national legislation which may already have been adopted for the implementation of the directive, or the fundamental rights which the Member States must guarantee to their nationals under their constitution or international undertakings."³⁷

The ECJ held that the claim fell outside the scope of article 119, since the article prescribed equal pay and not equal working conditions:

The fact that the fixing of certain conditions of employment—such as a special age-limit—may have pecuniary consequences is not sufficient to bring such conditions within the field of application of Article 119, which is based on the close connection which exists between the nature of the services provided and the amount of remuneration.³⁸

The Court felt that widening the terms of article 119 would jeopardize its direct applicability and impinge on the discretion of the Member States, the Commission, and the Council of the European Communities, which was implicit in articles 117 and 118.³⁹ The ECJ found that the Community had yet to assume any responsibility in employer/

35. *Id.* at 1367.

36. *Id.* at 1369.

37. *Id.* at 1373.

38. *Id.* at 1377.

39. The Treaty articulates the need to promote improved working conditions and an improved standard of living for workers. Treaty, *supra* note 1, art. 117. It also directs the Commission to promote close co-operation between Member States in the social field. *Id.* at art. 118.

employee relationships for "supervising and guaranteeing the observance of the principle of equality between men and women in working conditions other than remuneration."⁴⁰ Therefore, "the situation before the Belgian courts is governed by the provisions and principles of internal and international law in force in Belgium."⁴¹

The rejection of Defrenne's claim because it lacked a basis in Community law, however, runs counter to the ECJ's strong dictum: "[F]undamental personal human rights is one of the general principles of Community law, the observance of which [the ECJ] has a duty to ensure. There can be no doubt that the elimination of discrimination based on sex forms part of those fundamental rights."⁴²

Oddly, the ECJ's *obiter dictum* contradicts the ratio of *Defrenne III*: if this fundamental right really existed in Community law, it would be part of international law to be applied in Belgium. Perhaps the ECJ could only proclaim that the right existed, but could not apply it because the fundamental right lacked direct effect⁴³ in Member States. Section two discusses this possibility. Alternatively, the ECJ, though not enforcing the right in *Defrenne III*, may have wanted to lay the groundwork for the future use and development of the right.

This last possibility is supported by *Razzouk v. Commission*⁴⁴ where the ECJ based its decision on the fundamental right. Razzouk and Beydoun, widowers whose wives had been EEC officials, were denied survivor's pensions. As the ECJ explained, the Staff Regulations "provide for two fundamentally different survivor's pension schemes, according to whether the deceased official was male or female."⁴⁵

The arguments by the applicants and, to some extent, by the Commission demonstrate the pressure on the ECJ to use the fundamental right of sexual equality. In the initial submissions, the applicants argued that the Treaty and article 79 of the Staff Regulations "must be interpreted in conformity both with the principles laid down in Article 119 . . . confirmed in judgments of the Court, and with the general principle of non-discrimination."⁴⁶ The Commission initially observed: "[T]he applicants are wrong to claim that Article 119 of the EEC Treaty . . . also applies to survivor's pensions for the dependents of deceased officials."⁴⁷ The applicants replied:

40. *Defrenne v. Sabena Airlines III*, 1978 Eur. Comm. Ct. J. Rep. at 1378.

41. *Id.* at 1379.

42. *Id.* at 1378.

43. "[I]f a legal provision is said to be directly effective, it is meant that it grants individuals rights which must be upheld by the national courts." T. HARTLEY, *THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW* 185 (1981).

44. *Razzouk v. Comm'n*, 1984 Eur. Comm. Ct. J. Rep. 1509.

45. *Id.* at 1529-30.

46. *Id.* at 1518.

47. *Id.* at 1519.

The Commission is wrong to assume that the applicants seek to have Article 119 applied to their case and they point out that the application uses the words "in conformity with the principles laid down in Article 119 of the EEC Treaty" Those principles are designed to ensure equality of treatment for both men and women and the application seeks neither more nor less than that.⁴⁸

The ECJ, preceding solely on Razzouk's application, found in his favor:

The applicant is therefore justified in his submission that these provisions are contrary to the principle of equal treatment of both sexes, a principle which as the Court held in its judgment of 15 June 1978 (. . . *Defrenne III*), forms part of the fundamental rights the observance of which the Court has a duty to ensure.⁴⁹

The ECJ's decision in *Razzouk* rested on the fundamental right itself:

[I]n relations between the Community institutions . . . and their employees . . . the requirements imposed by equal treatment are in no way limited to those resulting from Article 119 . . . or from community directives adopted in this field. The Commission's decision of 3 July 1981 must therefore be annulled on the ground that it is based on provisions of the Staff Regulations which are contrary to a fundamental right⁵⁰

The ECJ may have felt compelled to use the right to strike down the discrimination since the directives do not apply to Community institutions. Still, the ECJ's approach was undoubtedly bold. In keeping with other decisions,⁵¹ it could have affirmed the existence of the fundamental right while accepting the Commission's argument "that any change reflecting changed attitudes and practices can only be made by legislation."⁵²

Alternatively, the ECJ could have held that the discrimination infringed article 119, which applied to Community institutions by virtue of article 173. The Advocate General, Sir Gordon Slynn, saw this possibility, arguing that *Defrenne I*⁵³ did not exclude "social security schemes or benefits, in particular retirement pensions, . . .

48. *Id.* at 1520.

49. *Id.* at 1530.

50. *Id.*

51. See, e.g., *Schlieker v. High Auth.*, 1963 Eur. Comm. Ct. J. Rep. 281.

52. *Razzouk*, 1984 Eur. Comm. Ct. J. Rep. at 1539.

53. *Defrenne v. Belgian State*, 1971 Eur. Comm. Ct. J. Rep. 445.

outside a national system of social security"⁵⁴ from the scope of article 119. The Advocate General equated the scheme in *Razzouk* to consideration, albeit deferred, paid indirectly to the employee through his or her spouse.⁵⁵ While the Advocate General preferred to base Razzouk's entitlement on the fundamental right itself,⁵⁶ he admitted that "even if a narrower principle . . . has to be relied on, in my view Mr. Razzouk is entitled to rely on an analogous principle to that contained in Article 119."⁵⁷ This reasoning follows the approach taken in *Sabbatini*, in which the Staff Regulations were held to violate "a general principle of law prohibiting any discrimination on grounds of sex and, more particularly . . . Article 119."⁵⁸

Notwithstanding these options, the fundamental right appears to have substance independent of the traditional EEC measures, at least within Community institutions. The question that exists after *Razzouk* is to what extent this "right" is enforceable in Member States. In subsequent cases, the ECJ has occasionally used the right to interpret traditional EEC sex discrimination measures strongly and thereby strike down sex discrimination in the Member States.

*Marshall*⁵⁹ demonstrates the ECJ's use of the fundamental right as an interpretative tool. Marshall, a Senior Dietitian, was dismissed by a state health agency in England which had a written policy that female employees must retire at age sixty and male employees at age sixty-five, the ages at which social security pensions became payable. Marshall challenged her dismissal under the United Kingdom's Sex Discrimination Act 1975 (SDA '75)⁶⁰ and under the Equal Treatment Directive.⁶¹ The Industrial Tribunal and the Employment Appeal Tribunal dismissed her claim under the SDA '75 since the Act excluded provisions in relation to death or retirement.⁶² The tribunals differed on whether the action violated the directive. Two questions were certified for the ECJ: (1) whether the dismissal violated the Equal Treatment Directive; and (2) if so, whether Marshall could rely on the directive in the national court notwithstanding the possible inconsistency between the directive and the SDA.⁶³

54. *Razzouk*, 1984 Eur. Comm. Ct. J. Rep. at 1540.

55. *Id.*

56. *Id.* at 1538.

57. *Id.* at 1541.

58. *Sabbatini v. European Parliament*, 1972 Eur. Comm. Ct. J. Rep. 345, 350.

59. *Marshall v. Southampton and S. W. Hampshire Area Health Auth. (Teaching)*, 1986 Eur. Comm. Ct. J. Rep. 723.

60. The Sex Discrimination Act 1975 § 6(4) permits sex discrimination where it arises out of a "provision in relation to retirement." Sex Discrimination Act, 1975, ch. 65 § 6(4), reprinted in Butterworths Annotated Legislation Service (M. Beloff & H. Wilson eds. 1976).

61. *Equal Treatment Directive*, supra note 17.

62. Sex Discrimination Act 1975 '75, § 6(4) reprinted in Butterworths Annotated Legislation Service (M. Beloff & H. Wilson Eds. 1976).

63. *Marshall*, 1986 Eur. Comm. Ct. J. Rep. at 747.

As the ECJ recognized, Marshall raised a fundamental right argument. She contended that "the elimination of discrimination on grounds of sex forms part of the corpus of fundamental human rights and therefore one the general principles of Community law."⁶⁴ The Commission submitted a similar argument.⁶⁵ And the Advocate General framed his own remarks by repeating the proposition: "Before examining the two questions . . . it is right to recall that the Court has already held that the elimination of discrimination based on sex forms part of the fundamental rights the observance of which the Court has a duty to ensure (*Defrenne III*)"⁶⁶

Although the parties and the Advocate General emphasized the fundamental right, the ECJ relegated discussion of it to a single clause: "However, in view of the fundamental importance of the principle of equality of treatment, which the Court has reaffirmed on numerous occasions, Article 1(2) of Directive 76/207, which excludes social security matters from the scope of that directive, must be interpreted strictly."⁶⁷ By using the fundamental right of sexual equality to give article 1(2) a narrow interpretation, the ECJ held that Marshall's dismissal violated article 5(1) of the directive notwithstanding article 7 of the Social Security Directive.⁶⁸

Concerning the direct effect of the Equal Treatment Directive, the ECJ held that the directive "may be relied upon against a State authority acting in its capacity as employer, in order to avoid the application of any national provision which does not conform to Article 5(1)."⁶⁹ This broadened the application of the right, applying it to the state in its capacity as employer.

Marshall indicates the ECJ's approach to discrimination in Member States, as opposed to discrimination in Community institutions. The Court forsakes the bold approach in *Razzouk* for normal methods of

64. *Id.* at 743.

65. *Id.* at 744.

66. *Id.* at 726.

67. *Id.* at 746.

68. Article 5(1) reads: "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." *Equal Treatment Directive*, *supra* note 17, art. 5(1). The ECJ referred to *Burton v. British Rys. Bd.*, 1982 Eur. Comm. Ct. J. Rep. 555, in which it had given the word "dismissal" a wide meaning. Even if an age limit involved the granting of a retirement pension, an age limit on employment still fell within the scope of article 5(1). The Court acknowledged that a Member State could exclude pensionable ages for the purpose of granting old-age and retirement pensions according to article 7 of the *Social Security Directive*. See *Social Security Directive*, *supra* note 21, art. 7. Nevertheless, a strict interpretation of the exemption clause in article 1(2) of the *Equal Treatment Directive* meant that Marshall's case fell under article 5 of the *Equal Treatment Directive*, *supra* note 17, and not article 7 of the *Social Security Directive*, *supra*. *Marshall*, 1986 Eur. Comm. Ct. J. Rep. at 746.

69. *Marshall*, 1986 Eur. Comm. Ct. J. Rep. at 750.

statutory interpretation. One thus sees that the "right" has different implications in different contexts. In itself, this does not mean that the term "right" is a misnomer. Nonetheless, a more detailed examination of the fundamental right of sexual equality demonstrates that the term "fundamental right" presents a false picture of Community law relating to gender equality.

II. THE EXTENT OF THE FUNDAMENTAL RIGHT IN EUROPE

This section argues that the term "fundamental right" is an inappropriate description of the status of sexual equality in EEC law. The section demonstrates that the ECJ applies too low a level of scrutiny to sex discrimination; the fundamental right does not always lead to a strict interpretation of the exceptions contained in the traditional EEC sex discrimination measures; the fundamental right lacks any significant direct effect in Member States; it does not consistently help strengthen the remedies provided under traditional EEC sex discrimination measures in Member States; and finally, the scope of the fundamental right is no wider than traditional EEC sex discrimination measures.

A. *Fundamental Rights Defined and the Level of Judicial Scrutiny*

Examining the nature of a fundamental right indicates that the ECJ's treatment of sexual equality may not fit the "rights" label because a "fundamental right" imports a higher level of judicial scrutiny than the ECJ currently applies. Although various jurisprudential scholars have defined the meaning of "rights," this Comment adopts Dworkin's analysis.⁷⁰ Dworkin does not "defend the thesis that citizens have moral rights [of equality] against their governments" ⁷¹ Instead, he "explore[s] the implications of that thesis for those . . . who profess to accept it."⁷² Dworkin adopts the terminology of *Defrenne III*, distinguishing "fundamental rights" from other rights.⁷³ And he sees that rights are based on the concepts of dignity and equality, both essential to the defense of gender equality.⁷⁴

According to Dworkin, "In most cases when we say that someone has [a] 'right' to do something, we imply that it would be wrong to interfere with his doing it, or at least that some special grounds are

70. R. DWORGIN, *TAKING RIGHTS SERIOUSLY* (1977).

71. *Id.* at 184.

72. *Id.*

73. *Id.* at 190.

74. *Id.* at 205.

needed for justifying any interference."⁷⁵ He differentiates "fundamental rights" from rights in general: "fundamental rights" are rights "in the strong sense."⁷⁶ Mere utility cannot override them.⁷⁷ But a court may balance fundamental rights against other rights.⁷⁸ "The individual rights that our society acknowledges often conflict . . . and when they do it is the job of government to discriminate. If the Government makes the right choice, and protects the more important at the cost of the less, then it has not weakened or cheapened the notion of a right" ⁷⁹ Dworkin further argues that the majority has no "right" to work its will. Therefore, the majority's will *cannot* be weighed against a fundamental right.⁸⁰

The ECJ does not always treat the right of sexual equality in the strong sense. In *Bilka-Kaufhaus GmbH v. von Harz*,⁸¹ it let utility trump the right of sexual equality. The case involved a claim by Weber von Harz, who failed to qualify for a retirement pension from a supplementary pension scheme established by Bilka for its employees. Her employment included years she worked part-time, which did not count towards the eligibility requirement for the retirement pension. Von Harz claimed the occupational pension scheme contravened the principle of equal pay of article 119. She believed that excluding part-time employment disadvantaged women, since they were more likely to take part-time work due to family responsibilities. Bilka justified its policy by arguing that the policy furthered its goal of employing a minimum of part-time workers, which saved the company money.

The ECJ held that "if the undertaking is able to show that its pay practice may be explained by objectively justified factors unrelated to any discrimination on grounds of sex there is no breach of Article 119."⁸² Bilka's policy would be acceptable if the means chosen for achieving that objective corresponded to a real need on the part of the undertaking, were appropriate with a view to achieving the objective in question, and were necessary to that end.⁸³ And here a "real need" could include objectively justified economic grounds.⁸⁴

75. *Id.* at 188.

76. *Id.* at 190. Dworkin views U.S. Constitutional rights as fundamental rights.

77. *Id.* at 191-92.

78. See, e.g., *Comm'n v. U.K. and North. Ireland*, 1983 Eur. Comm. Ct. J. Rep. 3431 (ECJ, in line with Dworkin's model, balanced two fundamental rights, the principle of equality and the principle of respect for private life.).

79. R. DWORKIN, *supra* note 70, at 193-94.

80. *Id.* at 194.

81. *Bilka-Kaufhaus GmbH v. von Harz*, 2 Comm. Mkt. L. Rep. 701 (1986).

82. *Id.* para. 30.

83. *Id.* para. 37.

84. *Id.* para. 36.

When a national court determines whether sufficient justification exists,⁸⁵ the ECJ's test allows it to balance the fundamental right against a mere utilitarian concern, such as a company's profits.⁸⁶ Moreover, "objectively justified factors" provide a weak standard of judicial scrutiny compared to a standard such as "compellingly justified factors." Leaving scrutiny to national courts may lead to inconsistent results. It could be argued that the ECJ wrongly treated "objectively justified factors" as a question of fact rather than a question of law,⁸⁷ making "objectivity" hard to guarantee, as Section three's discussion of the United Kingdom's application of the test demonstrates.

Dworkin helps reconcile the ECJ's test in *Bilka* with its proclamation in *Defrenne III*. He says that two models exist which explain the weight a moral right may have in law: the government either balances the public interest against personal rights or it limits personal rights only when presented with a compelling reason.⁸⁸ The balancing approach is "indefensible";⁸⁹ government fails to take rights seriously when it uses the balancing model, unless it is balancing two rights. The second model "stipulates that once a right is recognized in clear-cut cases, then the Government should act to cut off that right only when some compelling reason is presented, some reason that is consistent with the suppositions on which the original right must be based"⁹⁰ On this analysis, the ECJ has either mislabeled the right of sexual equality as "fundamental," or the ECJ has mistakenly followed the balancing model and failed to take this right seriously enough. This Comment proceeds upon this second assumption.

B. Application of the Fundamental Right in Member States

The discussion of *Razzouk*⁹¹ in section one demonstrated that the ECJ recognizes and uses the fundamental right of sexual equality to

85. *Id.*

86. Economic profitability, which may constitute a "real need," justifies many forms of discrimination, including paying part-time workers less for doing the same job. One could argue that economic profitability is itself a "right": "The Treaty shall in no way prejudice the rules in Member States governing the system of property ownership." Treaty, *supra* note 1, art. 222. If economic profitability is a form of a property right, then the ECJ is balancing rights, as allowed in Dworkin's model. But as the Council and Commission have adopted reasonable limits on the "right" to economic profitability in the form of traditional sex discrimination measures, the ECJ should reflect this legislative intent in its decision. The ECJ in *Bilka*, however, failed to indicate when the fundamental right of sexual equality outweighs the property rights. *Bilka-Kaufhaus GmbH v. von Harz*, 2 Comm. Mkt. L. Rep. 701 (1986).

87. *Bilka*, 2 Comm. Mkt. L. Rep. 701, at para. 36.

88. R. DWORKIN, *supra* note 70, at 197-204.

89. *Id.* at 199. Some rights advocates would disagree. See, e.g., BRIT. INST. OF HUM. RTS., AN INTRODUCTION TO HUMAN RIGHTS 5 (1987).

90. R. DWORKIN, *supra* note 70, at 200.

91. *Razzouk v. Comm'n*, 1984 Eur. Comm. Ct. J. Rep. 1509.

strike down discrimination in Community institutions. But the ECJ rarely applies the fundamental right of sexual equality directly within a Member State. "The general principles of Community law are not normally binding on the Member States and the question of their direct effect will arise only rarely."⁹² Three situations exist where the fundamental right might be used to bind a Member State: where a traditional EEC sex discrimination measure has an exception clause; where a Community measure is being challenged in the Member State; and where a Member State's action or inaction is being challenged in that state. In all three situations the ECJ has either not applied the fundamental right or has applied it but still reached a result contrary to the spirit of the fundamental right.

The fundamental right of sexual equality may apply in Member States if "the national authorities rely on an 'escape clause' (such as public policy proviso under article 48(3) of the Treaty of Rome) to derogate from a right granted by the Community."⁹³ Article 119, however, contains no such exception. The ECJ held in *Johnston v. Chief Constable of the Royal Ulster Constabulary (RUC)*⁹⁴ that a general exception clause cannot be read into the Treaty articles.

In *Johnston*, the RUC had employed the plaintiff since 1974 but refused her a further contract of full-time employment in 1980. This refusal was based on a decision by the Chief Constable that contracts of female full-time RUC Reserve officials would be renewed only where the duties performed could be undertaken solely by a woman. This was based on a firearm policy allowing only male officers to carry firearms in the regular course of their duties. As no appropriate position was available, although RUC full-time Reserve members were needed for general police duties, the RUC employed Johnston in the RUC Reserve on a part-time basis and her salary was proportionately reduced.

The relevant legislation, the Sex Discrimination (Northern Ireland) Order 1976, permitted discrimination where it was for "the purposes of safeguarding national security or of protecting public safety or order."⁹⁵ The Secretary of State's certification was conclusive evidence for these purposes.⁹⁶ In this case, the Secretary of State issued such a certificate. As this deprived Johnston of a remedy before the Industrial

92. T. HARTLEY, *THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW* 218 (1981).

93. *Id.* Treaty article 48 addresses the free movement of workers. Article 48(3) allows exceptions justified on grounds of public policy, public security or public health. See *Pubblico Ministero v. Tullio Rutili*, 1 Comm. Mkt. L. Rep. 96, at para. 35 (1980).

94. *Johnston v. Chief Constable of the Royal Ulster Constabulary*, 3 Comm. Mkt. L. Rep. 240 (1986).

95. Treaty, *supra* note 1, art. 53.

96. *Id.* art. 53(2).

Tribunal, she based her claim on the EEC Equal Treatment Directive. The ECJ rejected the RUC's contention that a general public policy exception existed in the Treaty: "the only Articles in which the Treaty provides for derogations applicable in situations which may involve public safety are Articles 36, 48, 56, 223 and 224 which deal with exceptional and clear defined cases."⁹⁷

Unlike article 119, directives have exceptions, which the ECJ sometimes uses the fundamental right to interpret. But the ECJ does not always interpret the exceptions strictly. When it does interpret them strictly, it often allows weak justifications to satisfy its strict construction. Generally, the ECJ acknowledges that exceptions in directives should be interpreted strictly. In *Johnston*, for example, it asserted, "[Article 2(2) of Directive 76/207], being a derogation from an individual right laid down in the directive, must be interpreted strictly."⁹⁸ Although interpreting the exception strictly, *Johnston* also shows how the EEC can apply a low level of scrutiny to its application. In *Johnston*, the ECJ readily accepted the Chief Constable's argument that the RUC's policy fell within article 2(2) of the Equal Treatment Directive:⁹⁹

[T]he possibility cannot be excluded that in a situation characterised by serious internal disturbances the carrying of firearms by police women might create additional risks of their being assassinated and might therefore be contrary to the requirements of public safety. In such circumstances, the context of certain policing activities may be such that the sex of police officers constitutes a determining factor for carrying them out¹⁰⁰

In *Commission v. United Kingdom*,¹⁰¹ the ECJ also accepted a rather weak justification for allowing the United Kingdom to apply the exception contained in article 2(2) of the Equal Treatment Directive.¹⁰² The ECJ upheld an exemption to the United Kingdom's Sex Discrimination Act 1975,¹⁰³ which restricted men's access to the occupation of midwife. The ECJ held that it must

97. *Johnston*, 3 Comm. Mkt. L. Rep. 240, 264 (1986).

98. *Id.* at 266.

99. *Equal Treatment Directive*, *supra* note 17, art. 2(2) ("The Directive shall be without prejudice to the right of Member States to exclude from its field of application those occupational activities and, where appropriate, the training leading thereto, for which, by reason of their nature or the context in which they are carried out, the sex of the worker constitutes a determining factor.").

100. *Johnston*, 3 Comm. Mkt. L. Rep. 240, 266 (1986).

101. *Comm'n v. U.K.*, 1983 Eur. Comm. Ct. J. Rep. 3431.

102. *Equal Treatment Directive*, *supra* note 17.

103. Sex Discrimination Act 1975, ch. 65, sched. 4 para. 3, *reprinted in* Butterworths Annotated Legislative Service (M. Beloff & H. Wilson eds. 1976).

be recognized that at the present time *personal sensitivities* may play an important role in relations between midwife and patient. In those circumstances, it may be stated that by failing fully to apply the principle laid down in the Directive, the UK has not exceeded the limits of the power granted to the Member States by Articles 9(2) and 2(2) of the directive.¹⁰⁴ (emphasis added).

Sometimes, however, the ECJ fails to interpret an exception clause strictly in the first place. In *Hofmann v. Barmer Ersatzkasse*¹⁰⁵ the fundamental right of sexual equality did not aid in construing section 2(3) of the Equal Treatment Directive¹⁰⁶ strictly. At issue was whether the German "Mutterschutzgesetz" violated articles 1, 2, and 5(1) of the Equal Treatment Directive and, if so, whether those articles were directly effective. The German law provided mothers with a remunerated compulsory convalescence of eight weeks leave after childbirth, an additional allowance up until the child reaches six months of age, and a guarantee of job security upon her return. Hofmann, a man, claimed compensation for the time he spent with his child, a claim the German courts repeatedly refused.

The Commission, siding with Hofmann, argued that

[t]he directive . . . seeks to give effect to the principle of equal treatment as regards access to, and pursuance of, employment including matters of social security. The principle at issue is a particular form of the general principle of equality and shares the character, status and importance of a fundamental right at the Community level Article 2(2) to (4) provides certain exceptions to the principle of equal treatment, which should nevertheless be recognized as such and accordingly be interpreted restrictively.¹⁰⁷

The ECJ acknowledged this argument,¹⁰⁸ yet found that "the directive is not designed to settle questions concerned with the organization of the family, or to alter the division of responsibility between parents."¹⁰⁹ Article 2(3) permitted the more favorable treatment accorded to mothers than to fathers.

104. *Comm'n v. U.K.*, 1983 Eur. Comm. Ct. J. Rep. 3431, 3449.

105. *Hofmann v. Barmer Ersatzkasse*, 1984 Eur. Comm. Ct. J. Rep. 3047.

106. Section 2(3) reads: "This Directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity."

107. *Hofmann v. Barmer Ersatzkasse*, 1984 Eur. Comm. Ct. J. Rep. 3047, 3061-62.

108. *Id.* at 3072.

109. *Id.* at 3075.

First, it is legitimate to ensure the protection of a woman's biological condition during pregnancy and thereafter until such time as her physiological and mental functions have returned to normal after childbirth; secondly, it is legitimate to protect the special relationship between a woman and her child over the period which follows pregnancy and childbirth, by preventing that relationship from being disturbed by the multiple burdens which would result from the simultaneous pursuit of employment.¹¹⁰

Moreover, "it is only the mother who may find herself subject to undesirable pressures to return to work prematurely."¹¹¹

The ECJ's concern for mothers superseded its concern for the fundamental right. Apart from the stereotypes implicit in the ECJ's reasoning,¹¹² it did not address Hofmann's submission that the length of the maternity leave is unjustified.¹¹³ By allowing the states "a reasonable margin of discretion as regards . . . the nature of the protective measures and the detailed arrangements for their implementation,"¹¹⁴ the ECJ failed to treat the "right" seriously.¹¹⁵

C. Direct Effect

A fundamental right may be directly effective when used to challenge a Member State's legislation or inaction.¹¹⁶ This would be the most powerful application of the right and would demonstrate its truly fundamental nature. But the right has not been applied in this manner. To date, currently the fundamental right of sexual equality has only applied in Member States to challenge national legislation or inaction where it overlaps with article 119 or a directly effective directive. This

110. *Id.*

111. *Id.*

112. *Cf.* *Comm'n v. Italy*, 1983 Eur. Comm. Ct. J. Rep. 3273, 3288.

113. Hofmann contended that "[t]he return to normal of physical functions and the physical readjustments are for the most part completed within four to seven weeks, and the mother is then normally quite capable of working." *Hofmann v. Barmer Ersatzkasse*, 1984 Eur. Comm. Ct. J. Rep. 3047, 3054.

114. *Id.* at 3076.

115. *Cf.* D. PANNICK, *SEX DISCRIMINATION LAW* 130 (1985).

116. One situation in which a fundamental right may be directly effective is when, as Hartley explains,

a general principle of Community law might be invoked in a national court . . . [and] a party to proceedings claims that a Community act ought not to be applied on the ground that it is invalid. Here a general principle of law may furnish the ground of invalidity.

T. HARTLEY, *supra* note 72, at 214-15. This Comment does not address this aspect of the direct effect of the fundamental right other than to acknowledge its existence, because there is no decision in which the fundamental right of sexual equality was used to challenge a Community Act. Theoretically, one would expect the ECJ to apply strongly the right and invalidate Community acts which violated it. The ECJ has invalidated Community acts on a more general principle of equality. *See Ferriere di Roe Volciano*, 1983 Eur. Comm. Ct. J. Rep. 3921.

regulates the idea of a separate fundamental right, independently enforceable in Member States. The need for overlap also means that if an EEC sex discrimination measure has been held not to have direct effect, it precludes the fundamental right from imposing obligations on the Member State in that area.

The watershed case of *Van Gend en Loos*¹¹⁷ established that the Treaty itself can have direct effect. Thirteen years later, *Defrenne v. Sabena II*¹¹⁸ held specifically that article 119 was directly effective and could be used before national courts by individuals alleging direct and overt discrimination,¹¹⁹ but not "indirect and disguised discrimination." The latter "can only be identified by reference to more explicit implementing provisions of a Community or national character" and not by the criteria of equal work and equal pay.¹²⁰ The ECJ rejected the argument that the word "principle" in article 119 made it a vague declaration, incapable of conferring specific rights. "[I]n the language of the Treaty, this term . . . indicate[s] the fundamental nature of certain provisions" ¹²¹ The ECJ also held that although the article addressed Member States, it conferred rights on individuals.¹²²

Although it has been suggested that directives—since they do not designate the exact measure to be used by Member States—were not meant to have direct effect,¹²³ it is now clear that they can have direct effect in certain circumstances.¹²⁴ As the ECJ stated in *Ratti*,¹²⁵

Particularly in cases in which the Community authorities have, by means of directive, placed Member States under a duty to adopt a certain course of action, the effectiveness of such an act would be weakened if persons were prevented from relying on it in legal proceedings and national courts prevented from taking it into consideration as an element of Community law.¹²⁶

The general rule is that a directive can have direct effect, but only if it imposes "clear, unconditional and non-discretionary" requirements.¹²⁷

117. *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, 1963 Eur. Comm. Ct. J. Rep. 1.

118. *Defrenne v. Sabena II*, 1976 Eur. Comm. Ct. J. Rep. 455.

119. *Id.* at 473.

120. *Id.*

121. *Id.* at 474.

122. *Id.* at 475.

123. See T. HARTLEY, *supra* note 43, at 204.

124. See *id.* at 204-05.

125. *Pubblico Ministero v. Ratti*, 1 Common Mkt. L. Rep. 96 (1980).

126. *Id.* at 110.

127. See *Van Duyn v. Home Office*, 1974 Eur. Comm. Ct. J. Rep. 1347.

Directives contain implementation dates and, as *Ratti* also held, "[u]ntil that date is reached the Member States remain free in that field."¹²⁸ As the Directive on Equal Treatment in Occupational Social Security Schemes¹²⁹ has an implementation date of January 1, 1993, it does not yet have direct effect. The *Ratti* rule prohibits the ECJ from applying the fundamental right in areas where a directive has been held not have direct effect. Essentially, the rule means that the "right" is only fundamental in certain prescribed areas.

A directive may also have direct effect if a Member State implements it poorly.¹³⁰ Directives may also be directly effective in part. For example, article 5(1) of the Equal Treatment Directive¹³¹ was held to be sufficiently precise and unconditional to confer on individuals rights to equal treatment in conditions governing dismissal.¹³² But article 6 of the same directive, on sanctions to be imposed for discrimination, was determined not to be directly effective.¹³³

Wyatt and Dashwood argue that fundamental rights should be binding on the activities of Member States: "Since Community law can hardly require Member States to derogate from the fundamental principles of its own legal order, it can hardly require one Member State to treat nationals of another on a par with its own, if par falls below minimum standards required by the general principles of Community law."¹³⁴ They then argue:

Article 5 of the Treaty requires Member States to take all "appropriate" measures to fulfill the obligations arising out of the Treaty or the acts of the institutions It would seem to follow that whenever a Member State takes action in fulfillment of a Community obligation, its action must . . . conform with those fundamental rights which find expression in the general principles of Community law.¹³⁵

This Comment offers three more reasons why fundamental rights should have direct effect. First, it is the only way in which the

128. *Pubblico Ministero v. Ratti*, 1 Comm. Mkt. L. Rep. 96 (1980). Legal certainty, "probably the most important general principle of Community law," T. HARTLEY, *supra* note 43, at 129, underpins the *Ratti* rule.

129. Directive 86/378, *Directive on Equal Treatment in Occupational Social Security Schemes*, 29 O.J. EUR. COMM. (No. L 225) 40 (1986).

130. See *Johnston v. Chief Constable of the Royal Ulster Constabulary*, 3 Comm. Mkt. L. Rep. 240, 269 (1986).

131. *Equal Treatment Directive*, *supra* note 17, art. 5(1).

132. *Marshall v. Southampton and S.W. Hampshire Area Health Auth. (Teaching)*, 1 Comm. Mkt. L. Rep. 688, at para. 52 (1986).

133. See *Von Colson v. Land de Nordrhein-Westfalen*, 1984 Eur. Comm. Ct. J. Rep. 1891; *Harz v. Deutsche Tradax GmbH*, 1984 Eur. Comm. Ct. J. Rep. 1921.

134. D. WYATT & A. DASHWOOD, *SUBSTANTIVE LAW OF THE EEC* 50 (1980).

135. *Id.* at 51.

fundamental right will touch an area that is already covered by a directive without direct effect, given *Ratti*. Second, if the ECJ is sincere in its attempt to uphold the fundamental right of sexual equality, it seems contrary to its attempt to hold back in applying the right. Third, while the fundamental right may not be a sufficiently precise obligation to have direct effect without the adoption of secondary Community legislation, the requirements for direct effect were developed in relation to directives and Treaty articles. These requirements should not apply to fundamental rights, which are by their very nature, broader statements of principle. Fundamental rights could never satisfy the existing direct effect requirements.

D. Horizontal Effect: A Right for Everyone

Where an EEC measure binds Member States, it has "vertical effect." Where it binds private parties as well, it is said to have "horizontal effect." Currently, some traditional EEC sex discrimination measure lacks horizontal effect, leaving individuals' rights to depend on the status of their employer. If the fundamental right were given horizontal direct effect, its application would be greatly expanded.

Article 119 has direct effect for "direct and overt discrimination,"¹³⁶ whether or not an individual works in a public or private establishment. In *Defrenne II*, Defrenne argued that the principle of equal pay "represents the application of a general principle of equality which forms part of the philosophy common to the Member States."¹³⁷ The ECJ, in holding that article 119 applied horizontally, relied on article 119's economic and social aims and did not mention the general principle of equality. Therefore, *Defrenne II* indicates that the fundamental right concept may be unnecessary for applying traditional EEC sex discrimination measures horizontally.

The ECJ addressed the question of the horizontal direct effect of directives in *Marshall*.¹³⁸ The ECJ held that Marshall's dismissal by the State Health Agency, solely because she had attained the qualifying age for a state pension, constituted discrimination contrary to the Equal Treatment Directive.¹³⁹ The Court strictly interpreted article 1(2) of the Equal Treatment Directive because of "the fundamental

136. *Defrenne v. Sabena Airlines II*, 1976 Eur. Comm. Ct. J. Rep. 455, at para. 18; see *Jenkins v. Kingsgate*, 1981 Eur. Comm. Ct. J. Rep. 991, at para 17; *Worringham v. Lloyds Bank Ltd.*, 1981 Eur. Comm. Ct. J. Rep. 767, at para. 23; *Macarthys Ltd. v. Smith*, 1980 Eur. Comm. Ct. J. Rep. 1275, at para. 10; Arnall, *Article 119 and Equal Pay for Work of Equal Value*, 11 EUR. L. REV. 200, 207 (1986).

137. *Defrenne II*, 1976 Eur. Comm. Ct. J. Rep. 455, 458.

138. *Marshall v. Southampton and S.W. Hampshire Area Health Auth. (Teaching)*, 1 Comm. Mkt. L. Rep. 688 (1986); see *supra* section I, text accompanying notes 59-69.

139. *Id.* at 709.

importance of the principle of equality of treatment."¹⁴⁰ Therefore, article 5(1) on dismissal applied. Then the ECJ held that article 5(1) was directly effective against the State, either as an employer or public authority, but not against a private employer.

[I]t must be emphasised that according to Article 189 of the EEC Treaty the binding nature of a directive, which constitutes the basis for the possibility of relying on the directive before a national court, exists only in relation to "each Member State to which it is addressed." It follows that a directive may not of itself impose obligations on an individual and that a provision of a directive may not be relied upon as such against such a person.¹⁴¹

This holding leaves the issue still unresolved. First, it is *obiter dictum* since the Health Authority was held to be a state organ.¹⁴² Further, the decision contradicts dicta in *Commission v. Germany*¹⁴³ where the ECJ held the principle of equal treatment applied to the public service, as well as to the private sector: "Like Article 119 of the EEC Treaty, those directives [Equal Pay and Equal Treatment] are of general application, a factor which is inherent in the very nature of the principle which they lay down."¹⁴⁴ Moreover, the ECJ's reasoning in *Marshall* appears rather weak. Wyatt and Dashwood, for example, argue:

The Court avers that directives bind the State, and therefore cannot be invoked against individuals. Yet this very argument failed in *Defrenne #1* to prevent Article 119 of the Treaty being held to bind private parties as well as the State. What is true of the Treaty should also, it might be thought, be true of directives, for the obligation to comply with a directive is itself a treaty obligation¹⁴⁵

Thus, the ECJ could have reached a different decision in *Marshall* on horizontal effect. Given the ECJ's proclamations on "the fundamental right," it should have applied the Directive horizontally. As one author has argued:

In *Marshall*, the Court dealt with this point [horizontal direct effect] in a rather facile manner by asserting that any such arbitrariness could be avoided if the member state fulfilled its Treaty

140. *Id.*

141. *Id.* at 711.

142. *Id.* at para. 50.

143. *Re Sex Discrimination Laws: Comm'n v. Germany*, 2 Comm. Mkt. L. Rep. 588 (1986).

144. *Id.* at 610, para 16.

145. D. WYATT & A. DASHWOOD, *supra* note 134, at 46.

obligations by promptly and properly transforming the provisions of the directive at issue into domestic law. But this reply is little more than a pious aspiration and it conveniently sidesteps the real issues: given the poor record of member states in implementing directives on time, why should private sector employees be penalised because of the procrastination of their own government?¹⁴⁶

Marshall, then, may in fact work towards gender inequality.

A real danger . . . is that national courts will be compelled to formulate their own criteria for drawing the distinction, criteria which are likely to be conditioned by national legal concepts that may produce an attenuated version of the state sector for the purposes of enforcement of directives by individuals.¹⁴⁷

The experience of the United Kingdom confirms this fear, with serious consequences for individuals rights.

Currently, the fundamental right, as far as it overlaps with article 119, will apply between individuals when the discrimination is "judicially determinable."¹⁴⁸ As far as it overlaps with a directly effective directive, the fundamental right will not apply between private individuals for reasons of legal certainty. In uncharted areas, it will only be held to have horizontal effect after it overcomes the first hurdle of having direct effect in Member States.

E. Remedies

H.W.R. Wade frankly stated that, "Rights depend upon remedies."¹⁴⁹ *Von Colson*¹⁵⁰ and *Harz*¹⁵¹ establish that, theoretically, remedies uphold the EEC fundamental right of sexual equality. In *Harz*, the German Labour Court determined that there had been sex discrimination in the selection procedure for a position buying and selling agricultural raw materials. According to German law, however, the court could only award a penalty for expenses actually incurred in reliance on the expectation that there would be no discrimination.

146. Morris, *The Scope of Direct Effect: Marshall Confirmed*, 1987 PUB. L. 338, 342.

147. *Id.* at 341.

148. See Arnall, *supra* note 136, at 207.

149. H. WADE, ADMINISTRATIVE LAW 513 (5th ed. 1983).

150. *Von Colson v. Land de Nordrhein-Westfalen*, 1984 Eur. Comm. Ct. J. Rep. 1891.

151. *Harz v. Deutsche Tradax GmbH*, 1984 Eur. Comm. Ct. J. Rep. 1921.

That amounted to DM 2.31.¹⁵² The German court requested a preliminary ruling, asking whether the Council Directive implies a specific remedy which is directly effective in Germany.

The ECJ interpreted article 6 of the Equal Treatment Directive¹⁵³ to mean that the "directive does not prescribe a specific sanction; it leaves Member States free to choose between the different solutions suitable for achieving its objective."¹⁵⁴ The ECJ then set guidelines for national remedies: "Although . . . full implementation of the directive does not require any specific form of sanction for unlawful discrimination, it does entail that that sanction be such as to guarantee real and effective judicial protection."¹⁵⁵ Hence, the right turns on Community law and the remedy turns on national law. But EEC law maintains that the national remedy cannot negate the Community right.

On the direct effect of article 6, the ECJ ruled that article 6 was not sufficiently concrete and precise to give von Colson and Harz the specific remedies sought.¹⁵⁶ Subsequently, in *Johnston*,¹⁵⁷ the ECJ held article 6 had direct effect regarding an individual's right to an effective judicial remedy.

Apart from the interesting implications for the doctrine of direct effect,¹⁵⁸ the ECJ's ruling may reflect a general EEC principle that all remedies for EEC rights must be effective.¹⁵⁹ If so, then any directly

152. In *von Colson*, the two applicants were denied social worker positions at Werl prison for reasons relating to their sex. As a remedy, the applicants requested a contract of employment or damages amounting to six months salary. A second claim in the alternative requested reimbursement for traveling expenses incurred while applying for the post. This amounted to DM 7.20. The German Labour Court held that under German law it could only allow the claim for DM 7.20.

153. Article 6 of the Directive states:

Member States shall introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged by failure to apply 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.

Equal Treatment Directive, *supra* note 17, art. 6.

154. *Von Colson*, 1984 Eur. Comm. Ct. J. Rep. 1891, 1907.

155. *Id.* at 1908.

156. *Von Colson v. Land de Nordrhein-Westfalen*, 1984 Eur. Comm. Ct. J. Rep. 1891, 1907.

157. *Johnston v. Chief Constable of the Royal Ulster Constabulary*, 3 Comm. Mkt. L. Rep. 240 (1986).

158. See Morris, *supra* note 146 (courts may now be required to explore the nature of the legal claim to which the directive applies to see if it is directly effective in that factual context). Morris has also suggested that, taken together, *von Colson*, *Harz*, and *Johnston* imply a "novel doctrine of partial direct effect in relation to directives." *Id.* at 340.

159. The enunciated test of "effectiveness is a higher standard than Article 6 of the Directive seems to require." See Curtin, *Effective Sanctions and the Equal Protection Directive: Von Colson and Harz Cases*, 22 COMM. MKT. L. REV. 505, 511 n.9 (1985). The "effectiveness" requirement may be part of a general requirement that all remedies in EEC law be "effective." See Oliver, *Enforcing Community Rights in the English Courts*, 50 MOD. L. REV. 881, 894 (1987).

effective portion of the fundamental right, as embodied in traditional measures, should have an effective national remedy.¹⁶⁰ At a minimum, *von Colson* and *Harz* clearly establish that remedies must be effective for violations of the Equal Treatment Directive. Section three examines the remedies under the Sex Discrimination Act 1975,¹⁶¹ the United Kingdom's legislation for implementing the Equal Treatment Directive, and argues that the UK's remedies fail to meet this requirement.

Significant to the discussion of remedies is the issue of prospective and retrospective ruling. On its face, prospective ruling seems to make otiose the principle that remedies must not negate the right. In *Defrenne II*, where the ECJ held article 119 to have direct effect, it ruled that its holding applied only prospectively, except for legal proceedings already brought.¹⁶² Arguably, a fundamental right approach should have prevented the ECJ in *Defrenne II* from ruling prospectively. As some have emphasized, "The Court seems to have been moved by pleas of Ireland and the United Kingdom that claims to back pay based on article 119 could have disastrous economic effect in those countries."¹⁶³ In Dworkin's model, the ECJ could not balance this utilitarian concern against the fundamental right.

Perhaps, the prospective ruling in *Defrenne II* is defensible, even while assuming a fundamental right of sexual equality. The ECJ balanced the right of sexual equality against another right, that of legal certainty.¹⁶⁴ In cases where legal certainty has not been an issue, the ECJ is more willing to apply remedies retrospectively.¹⁶⁵

Finally, the ECJ may not expect much for a remedy to be effective in the context of the fundamental right of sexual equality. In *Razzouk*,¹⁶⁶ the fundamental right was used as a basis for striking down an Commission decision not to grant a widower's pension. The ECJ ordered the claim for a survivor's pension to be reexamined by the Commission, applying the relevant Staff Regulations dealing with widows' pensions, and to pay an interest rate of 6% from the date on which the pension would become payable. Razzouk, however, re-

160. Oliver, *supra* note 159, at 885.

161. Sex Discrimination Act 1975, ch. 65, reprinted in Butterworths Annotated Legislation Service (M. Beloff & H. Wilson eds. 1976).

162. *Defrenne v. Sabena Airlines II*, 1976 Eur. Comm. Ct. J. Rep. 455, 481. For a critical discussion of this aspect of the decision, see Teitgen, *The Temporal Effect of the Judgment of the European Court of Human Rights and the Court of Justice of the European Communities*, 1 HUM. RTS. L.J. 36 (1980).

163. D. Wyatt & A. Dashwood, *supra* note 134, at 35.

164. *Defrenne II*, 1976 Eur. Comm. Ct. J. Rep. 455, 480-81.

165. See, e.g., *Hans Just I/S v. Danish Ministry for Fiscal Affairs*, 1980 Eur. Comm. Ct. J. Rep. 501, 532 (opinion of Advocate-General Reischl) (emphasizing the differences between reimbursement of unlawfully levied taxes and the awarding of back pay to victims of discrimination in *Defrenne II*).

166. *Razzouk v. Comm'n*, 1984 Eur. Comm. Ct. J. Rep. 1509.

quested 9% interest payable from May 1, 1981. The Court adjusted this *downwards* to 6% interest payable from July 27, 1981, the date the Commission received his complaint under article 90(2) of the Staff Regulation or from the date on which the pension became payable, *whichever was later*.¹⁶⁷ These subtle points may reveal an attitude about the level of remedy that the fundamental right actually imposes.

F. Scope of the Fundamental Right of Sexual Equality

The ECJ determines the scope of the fundamental right of sexual equality as it is embodied in traditional EEC measures on a case-by-case basis.¹⁶⁸ Some authors discuss the substantive scope of these traditional measures.¹⁶⁹ Nonetheless, whether the fundamental right's scope exceeds the scope of traditional measures, and, if so, the implications of such application need examination.¹⁷⁰

The traditional EEC sex discrimination measures are limited in content. In *Defrenne III*, the EEC ruled "Article 119 of the EEC Treaty cannot be interpreted as prescribing, in addition to equal pay, equality in respect of the other working conditions applicable to men and women."¹⁷¹ The ECJ has similarly limited the content and scope of directives. For instance, *Jenkins*¹⁷² established that article 1 of the Equal Pay Directive "in no way alters the content or scope of that principle as defined in the Treaty."¹⁷³ The content of the fundamental right itself, then, has important implications for gender equality: a wider content would prohibit more types of sex discrimination than the traditional measures by themselves. Many of the EEC resolutions to be discussed in section four speak as if the right abolishes all sex discrimination and is not merely limited to the context of employment.¹⁷⁴

167. *Id.* at 1531.

168. See, e.g., the ECJ's approach to the Equal Treatment Directive: Re Sex Discrimination Laws, 2 Comm. Mkt. L. Rep. 588 (1986); Hofmann v. Barmer Ersatzkasse, 1984 Eur. Comm. Ct. J. Rep. 3047, 3075.

169. See, e.g., the excellent account in D. PANNICK, SEX DISCRIMINATION LAW (1985); see also Laredo, *Case Law Relating to Equal Pay in the Court of Justice of the European Communities*, in 1 EQUALITY IN LAW BETWEEN MEN AND WOMEN IN THE EUROPEAN COMMUNITY (M. Verwilghen ed. 1986); Treu, *Case Law at Community and National Levels Relating to Equal Treatment*, in *id.*

170. But see Pescatore, *supra* note 8, at 295 ("At the present stage of development of Community law the problem of establishing a legal basis of the protection of fundamental rights . . . [which] in other words [is] the problem of the sources of law in this matter, is paramount in comparison to the questions raised as to the substance of these rights.").

171. *Defrenne v. Sabena Airlines III*, 1978 Eur. Comm. Ct. J. Rep. 1365, 1379.

172. *Jenkins v. Kingsgate*, 1981 Eur. Comm. Ct. J. Rep. 911.

173. *Id.* at 927.

174. See, e.g., Resolution on Discrimination against Immigrant Women in Community Legislation and Directives, proposed to the European Parliament by the Committee on Women's Rights in Committee on Women's Rights, *Report on discrimination against immigrant women in*

In practice, however, the fundamental right of sexual equality reflects only the content and scope of the traditional EEC sex discrimination measures.¹⁷⁵ *Newstead*¹⁷⁶ illustrates this point. As the Advocate General summarized, "under Community law as it now stands the member-States are not obliged to apply the principle of equal treatment for men and women to the obligation to contribute to a fund for survivors' pensions."¹⁷⁷ The ECJ held that Community law as it then stood did not prohibit this discrimination.¹⁷⁸ In referring to "the Community rules which may be applicable,"¹⁷⁹ neither the Advocate General nor the ECJ mention the fundamental right.

*Bilka*¹⁸⁰ also implied that the fundamental right has no scope beyond the traditional EEC sex discrimination measures. The German court asked: "Is the undertaking under a duty to structure its pension scheme in such a way that appropriate account is taken of the special difficulties experienced by employees with family commitments in fulfilling the requirements for an occupational pension?"¹⁸¹ The ECJ responded: "[T]he imposition of an obligation such as that envisaged by the national court in its question goes beyond the scope of Article 119 and has no other basis in Community law as it now stands."¹⁸²

Section two demonstrated that the label "fundamental right" does not comport with reality. The "right" in fact has no scope beyond traditional EEC sex discrimination measures; it lacks direct effect; it does not consistently broaden the application of traditional measures by widely interpreting their scope; it sometimes fails to achieve strict interpretations of exceptions in traditional EEC measures; and it allows weak justifications for discrimination. Section three, focusing on the case of the United Kingdom, further challenges the existence of a "fundamental right."

III. THE CASE OF THE UNITED KINGDOM

While the fundamental right of sexual equality does not have direct effect in the United Kingdom, this section argues that the British courts do not even voluntarily uphold the right and that many decisions violate its spirit. These decisions demonstrate that the British

Community legislation and regulations, Eur. Par. Doc. (COM No. A2-133/87) 5 (Rapporteur: Mrs. Heinrich, July 28, 1987).

175. Some authors would argue that the fundamental right should not extend beyond the scope of traditional EEC sex discrimination measures. See, e.g., Petersmann, *supra* note 11.

176. *Newstead v. Dep't of Transport*, 1 Comm. Mkt. L. Rep. 219 (1988).

177. *Id.* at 235 (per the Advocate General).

178. *Id.* at 241.

179. *Id.* at 223.

180. *Bilka-Kaufhaus GmbH v. von Harz*, 2 Comm. Mkt. L. Rep. 701 (1978).

181. *Id.* para. 8.

182. *Id.* paras. 41, 42.

courts and tribunals at times narrowly interpret EEC sex discrimination measures, apply lower levels of scrutiny than allowable by EEC law, narrowly interpret the United Kingdom's own sex discrimination legislation, and award remedies inconsistent with EEC requirements. Furthermore, because the EEC's sex discrimination measures lack direct effect, several obstacles inhibit the application of the fundamental right of sexual equality in the United Kingdom. These obstacles include Parliamentary Sovereignty, *stare decisis*, the problem of sources, and jurisdictional restraints.

A. Narrow Interpretation of EEC Measures

The interpretation of "state" by the Employment Appeal Tribunal (EAT) in *Rolls-Royce Plc. v. Doughty*¹⁸³ illustrates how the judiciary of the United Kingdom may interpret and apply EEC guidance inconsistently with the spirit of a fundamental right. In *Rolls-Royce* the question was whether Rolls-Royce was part of the state, and thereby subject to the Equal Treatment Directive. Applying *Marshall*, in which the ECJ had held that the Equal Treatment Directive would be directly effective when the state was involved as an employer or a public authority,¹⁸⁴ the Industrial Tribunal found that, since the state was a 100% shareholder of the company, Doughty should be considered to be a state employee.¹⁸⁵ But, on appeal, the EAT held that the Tribunal had misunderstood the law by certifying for appeal the question of whether the company was an "emanation of the state."¹⁸⁶ To the contrary, it felt "that the correct approach is to ask whether the body concerned can be said to be an organ or agent of the state carrying out a state function."¹⁸⁷

This requirement that the entity perform a state function, as opposed to being merely an agent of the state, severely restricts the application of the Equal Treatment Directive by placing a great number of state enterprises beyond the scope of the Equal Treatment Directive.¹⁸⁸

183. *Rolls-Royce plc v. Doughty*, 1987 I.C.R. 932 (Employment Appeals Tribunal); see also *Foster v. British Gas, plc*, 2 Comm. Mkt. L. Rep. 697 (C.A. 1988) (U.K.).

184. *Marshall v. Southampton and S.W. Hampshire Area Health Auth. (Teaching)*, 1 Comm. Mkt. L. Rep. 688 (1986).

185. *Rolls-Royce plc v. Doughty*, 1987 I.C.R. 932, 937 (Employment Appeals Tribunal).

186. *Id.* at 934.

187. *Id.* at 943.

188. While section 2 of the Sex Discrimination Act 1986 now makes it unlawful for any employer to impose discriminatory retirement ages, this decision may still restrict application of the Equal Treatment Directive in other areas.

B. Level of Scrutiny

The EEC fundamental right of sexual equality allows a rather low level of scrutiny. Furthermore, *Bilka*¹⁸⁹ let national courts determine whether discrimination is a necessary and appropriate means of achieving a legitimate end.¹⁹⁰ Leaving scrutiny to national courts, however, creates inconsistencies and undermines the already weak standard of "objectively justified factors." In the United Kingdom, the House of Lords decision in *Rainey*¹⁹¹ and the decision of the Industrial Tribunal in *Simpson*¹⁹² confirm suspicions that the level of scrutiny in a Member State may fall below that allowed by EEC law.

In *Rainey*, a woman prosthetist hired directly by the Scottish National Health Service (NHS) received a lower salary than a male prosthetist recruited from the private sector although she had similar qualifications and experience. Invoking the "employers defense" in section 1(3) of the Equal Pay Act of 1970,¹⁹³ the NHS claimed its policy was developed to ensure that enough qualified prosthetists from the private sector would enter the new NHS prosthetic service. *Rainey* argued that section 1(3) only applied to the personal circumstances of employees, such as their respective skill, experience, or training.¹⁹⁴

A unanimous House of Lords rejected *Rainey's* reasoning as too narrow a reading of section 1(3). Instead, it held that "[c]onsideration of a person's case may well go beyond what is not very happily described as 'the personal equation.'"¹⁹⁵ It continued, "where there is no question of intentional sex discrimination whether direct or indirect (and there is none here) a difference which is connected with economic factors affecting the efficient carrying on of the employer's business or other activity may well be relevant."¹⁹⁶ The court saw no reason to read section 1(3) as conferring greater rights than article 119 of the treaty.¹⁹⁷

Rainey made it easier for employers to justify discrimination by expanding the factors which can justify discrimination:

189. *Bilka-Kaufhaus GmbH v. von Harz*, 2 Comm. Mkt. L. Rep. 701, 721 (1986).

190. *Id.* at 723.

191. *Rainey v. Greater Glasgow Health Bd.*, 1987 I.C.R. 129 (H.L.); see also *Leverton v. Clwyd County Council*, 1 Comm. Mkt. L. Rep. 574 (H.L. 1989) (U.K.).

192. *Simpson v. Secretary of State for Employment*, July 1 & 2, 1987, unreported decision of the Industrial Tribunal (at the London (South) Regional Office).

193. This section reads: "An equality clause shall not operate in relation to a variation between the woman's contract and the man's contract if the employer proves that the variation is genuinely due to a material difference (other than the difference of sex) between her case and his." *Rainey v. Greater Glasgow Health Bd.*, 1987 I.C.R. 129, 137.

194. *Rainey* relied on *Clay Cross (Quarry Serv.) Ltd. v. Fletcher*, 1979 I.C.R. 1 (C.A.).

195. *Rainey*, 1987 I.C.R. at 140.

196. *Id.*

197. *Id.* at 143.

Although the European Court at one point refers to "economic" grounds objectively justified, . . . I consider that read as a whole the ruling of the European Court would not exclude objectively justified grounds which are other than economic, such as administrative efficiency in a concern not engaged in commerce or business.¹⁹⁸

The House of Lords found the NHS's actions "good and objectively justified":¹⁹⁹ paying private contractors more money allowed the new prosthetic service to be established within a reasonable period. Paying Rainey the higher rate would have been administratively inconvenient because it would subject prosthetists to different negotiatory machinery than other National Health Service employees.²⁰⁰

Simpson further weakened the *Bilka* test. In *Simpson*, the Manpower Services Commission justified its discrimination against married women by claiming it targeted available places to those who would benefit most and were in greatest need. While recognizing that the facts in *Bilka* and *Rainey* involved commercial enterprises, the Industrial Tribunal adopted *Rainey's* dictum that "read as a whole the ruling of the European Court would not exclude objectively justified grounds . . . other than economic, such as administrative efficiency, in a concern not engaged in commerce."²⁰¹ It also extended the test from the EPA '70 to the SDA '75 and expanded the factors justifying discrimination beyond "administrative efficiency."²⁰²

The Tribunal then used the three-part test in *Bilka*, interpreting each clause broadly. First it examined "[w]hether the measures chosen correspond to a 'real need' of the 'undertaking.'" "Undertaking" was held not to be the Community Program run by the Commission, as the applicants submitted, but "the Government."²⁰³ The applicants then argued that a "real need" referred to the stated aim of the Community Programme literature: "help to long-term unemployed," rather than the need to target the young. But the Tribunal held a real need existed "whether or not other sections did have or could have had an equal or better claim"²⁰⁴

With regard to the second clause of *Bilka*, which required a measure "appropriate with a view to achieving the objectives pursued," the Tribunal held that "the respondents will be on the road to success if

198. *Id.*

199. *Id.* at 144.

200. *Id.*

201. See *Simpson v. Secretary of State for Employment*, July 1 & 2, 1987, unreported at 12.

202. *Rainey v. Greater Glasgow Health Bd.*, 1987 I.C.R. 129, 144; see *Simpson*, July 1 & 2, 1987, unreported at 12.

203. *Id.* at 13.

204. *Id.*

they show that for good reason a particular group or sub-group was chosen for preferment (without regard for sex within that group)."²⁰⁵ And regarding the third test, which required that the discrimination be "necessary to that end," the Tribunal equated "necessary" with "workable" and asserted that "careful consideration was given to the criteria to be chosen and that they were chosen precisely because they could achieve what was desired."²⁰⁶

Both the House of Lords and the Tribunal widely interpreted the EEC guidance on the level of scrutiny. Had the ECJ based its definition of justifiability on a strong concept of a "fundamental right" and kept determination of the issue for itself, there would be less room for interpretations like that in *Simpson*.²⁰⁷

C. Narrow Interpretation of United Kingdom Statutory Provisions

The British courts and tribunals have also narrowly interpreted the SDA '75 and the EPA '70, contrary to the spirit of the fundamental right.²⁰⁸ As one commentator has suggested: "Again and again our courts have been narrowly restrictive even when the constraints of Parliamentary sovereignty did not preclude a more liberal judicial approach."²⁰⁹

For example, the plaintiff in *Haughton*²¹⁰ tried to bring a claim to the Industrial Tribunal for a violation of the SDA '75, but jurisdiction was declined.²¹¹ Employed by an English company under a contract governed by English law and subject to British income tax, Haughton worked on a German-registered ship and spent 58.8% of her working hours outside British territorial waters. The Court of Appeal found that sections 6 and 10 of the SDA '75 unambiguously exempted the respondent's cross-Channel ferry.²¹² The Court of Appeal refused to use the Equal Treatment Directive to interpret the meaning of the

205. *Id.* at 14.

206. *Id.*

207. See generally EQUAL OPPORTUNITIES COMM'N, UNITED KINGDOM REPORT UNDER THE UN CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN 24 (1987) (endorsing the *Bilka* and *Rainey* tests).

208. See *Shields v. E. Coomes (Holdings) Ltd.*, 1978 I.C.R. 1159 (C.A.) (U.K.); *Hayward v. Cammell Laird Shipbuilders Ltd.*, 2 Comm. Mkt. L. Rep. 528 (H.L. 1988) (U.K.). But the House of Lords in *Hayward* commented *obiter* that any regulations promulgated under the European Communities Act 1972 extending greater rights than conferred by Community Law might be *ultra vires*. *Id.* at 535.

209. Lester, *Fundamental Rights in the United Kingdom: The Law and the British Constitution*, 2 HUM. RTS. REV. 49, 56 (1976 - 77).

210. *Haughton v. Olau Line (UK) Ltd.*, 1986 I.C.R. 357 (C.A.).

211. *Id.* at 359. The Employment Appeals Tribunal upheld the Industrial Tribunal's decision and thus the entire Court of Appeal proceedings related to the jurisdictional issue.

212. *Haughton*, 1986 I.C.R. at 362 (per Sir John Donaldson, M.R.).

clauses, although it acknowledged that the meaning it attributed to the provisions was probably inconsistent with the Directive.²¹³

Although the Equal Treatment Directive is silent on whether it applies "extraterritorially,"²¹⁴ the ECJ held in *von Colson* that Member States should take "all the measures necessary"²¹⁵ for its implementation. Moreover, article 1(1) of the directive applies the principle of equal treatment to "access to employment," which Haughton was denied. Also, although the statute was unambiguous,²¹⁶ Sir John Donaldson, MR admitted that the drafting was unusual²¹⁷ and that his statutory interpretation was "at the price of a major loss of intelligibility."²¹⁸ His approach seems in conflict with the statement of Lord Justice Orr in *Shields v. E. Coomes (Holdings) Ltd.*: "[B]oth Acts [the EPA and SDA] should be construed and applied . . . in such a way that the broad principles which underlie the whole scheme of legislation are not frustrated by a narrow interpretation or restrictive application of particular provisions."²¹⁹ This approach also conflicts with the spirit of the fundamental right.²²⁰

D. Remedies

As discussed in section two, remedies are nationally determined, though they must not negate the EEC rights conferred. In a fundamental rights framework, one should not limit remedies by a prospective ruling unless a competing fundamental right exists. While various potential remedies exist in the United Kingdom for breaches of the right to sexual equality, this discussion limits itself to the statutory remedies available under the SDA '75.

Section 65 of the SDA '75 specifies remedies a tribunal may award when an individual brings enforcement proceedings for a discriminatory act in the employment field.²²¹ And section 66 specifies the remedies available for an individual who brings an action in a nonem-

213. *Id.* at 326.

214. *Id.* at 362.

215. *Von Colson v. Land de Nordrhein-Westfalen*, 1984 Eur. Comm. Ct. J. Rep. 1891, 1906.

216. *Haughton*, 1986 I.C.R. 359, 362.

217. *Id.*

218. *Id.*

219. *Shields v. E. Coomes (Holdings) Ltd.*, 1978 I.C.R. 1159, 1178-79. (C.A.).

220. The Equal Opportunities Commission's words ring somewhat hollow: "The courts have adopted a broad interpretation of the legislation to make it workable in practice. European law has also had a considerable influence on the courts in their interpretation of the statutes pursuing subsequent claims." EQUAL OPPORTUNITIES COMM'N, *supra* note 207, at 9.

221. These remedies are a declaration, recommendation, or compensation. See generally HOME OFFICE, SEX DISCRIMINATION: A GUIDE TO THE SEX DISCRIMINATION ACT 1975, at 44 (1985).

ployment case.²²² The Act also gives the Equal Opportunities Commission powers to enforce the law.²²³

The Equal Opportunities Commission reviewed the remedies and concluded:

In relation to systemic discrimination, the tribunals and courts have not so far had any major effect. This is due to their general role . . . to decide individual disputes between two parties. Their powers and procedures are . . . generally inappropriate for dealing with systems and practices in a wider framework.²²⁴

In individual instances of discrimination, each remedy by itself seems insufficient to protect the EEC right. For example, Steiner has suggested, a declaration, "as a non-coercive remedy . . . depends for its efficacy on voluntary compliance by the parties concerned."²²⁵

As regards compensation, awards for sex discrimination are "currently too low." Almost 75% of the claims from April 1, 1985, to March 31, 1986, and 60% of the claims from April 1, 1986, to March 31, 1987, received less than £750.²²⁶ One has to question the "effectiveness" of compensation when there are "examples of £100 being awarded to people who have lost their jobs through being victimised."²²⁷ In his dissent in *Coleman v. Skyrail Oceanic Ltd.*, Lord Justice Shaw commented, "I would have substituted a thousand pence for the thousand pounds the Industrial Tribunal awarded."²²⁸

A significant decision which sought to fulfill the ECJ's mandate of effective remedies is *Marshall*.²²⁹ The Industrial Tribunal had to decide whether it could award compensation in excess of that permitted by the Sex Discrimination Act 1975. Assuming jurisdiction to apply

222. Awards can include a declaration, an injunction, or compensatory damages. Also, under § 77(5) of the Social Discrimination Act '75, the court has the power in various circumstances to remove or modify a discriminatory clause in a contract.

223. The Social Discrimination Act '75 gives the Equal Opportunities Commission power, *inter alia*, to conduct formal investigations (§ 57), issue nondiscrimination notices where it finds discrimination (§ 67), and institute legal proceedings for an injunction (§ 71).

224. EQUAL OPPORTUNITIES COMM'N, LEGISLATING FOR CHANGE? REVIEW OF THE SEX DISCRIMINATION LEGISLATION, A CONSULTATIVE DOCUMENT 30 (1986); see also Lester, *Fundamental Rights in the UK: The Law and the British Constitution*, *supra* note 209, at 60).

225. Steiner, *How to Make the Action Suit the Case. Domestic Remedies for Breach of EEC Law*, 12 EUR. L. REV. 117 (1987).

226. *Industrial Tribunal Statistics* 95 EMPLOYMENT GAZETTE 496, 500 (1987). Nonetheless, the amount of awards under £300 fell from 42.8% during the period of April 1, 1985, to March 31, 1986, to only 10.8% during the period of April 1, 1986, to March 31, 1987.

227. EQUAL OPPORTUNITIES COMM'N, *supra* note 224, at 35 (such awards "utterly fail to reflect the gravity of the matter.").

228. *Coleman v. Skyrail Oceanic Ltd.*, 1981 I.R.L.R. 398 (C.A.). The Court of Appeal lowered a £1000 compensation judgment for injury to feelings to £100.

229. *Marshall v. Southampton S.W. Hampshire Area Health Auth.*, 3 Comm. Mkt. L. Rep. 389 (Industrial Tribunal, Southampton, 1988).

Community law, the Tribunal relied on the ECJ's decision in *von Colson* and article 189, maintaining that it could award £19,405 rather than the statutory limit of £8500. The Tribunal admitted a "direct conflict" between Community law and that of the United Kingdom, but believed that the British remedy was inadequate.²³⁰ Quoting the Master of the Rolls in *E. Coomes (Holdings) Ltd. v. Shields*, it affirmed the primacy of Community law.²³¹

While this decision represents an important step in establishing the fundamental right, its significance should not be overemphasized. First, *Marshall* may be a mere exception to a long line of decisions awarding inadequate compensation. Second, the House of Lords in *Duke v. G.E.C. Reliance Ltd.* implies that the adoption of effective remedies was the concern of Parliament.²³² Third, the ability to award more compensation than the statutory limit is restricted to cases where violation of an EEC provision has occurred that has vertical direct effect.

Article 189 recommendations also have limitations. First, recommendations are not orders.²³³ Second, "the recommendation is restricted to remedying the specific act of discrimination and cannot be more wide-ranging."²³⁴ Third, the tribunal cannot recommend positive action. In *Ministry of Defence v. Jeremiah*,²³⁵ the Industrial Tribunal, the Appeals Tribunal, and the Court of Appeal all found a discriminatory practice contrary to section 6(2)(b) of the Social Discrimination Act '75 where men volunteers for overtime work were required to make color bursting shells and women volunteers were not.²³⁶ Lord Denning, M.R., stated, "It will be the duty of the Ministry to find out their own means of eliminating the discrimination."²³⁷

Other problems exist with the United Kingdom's remedies for sex discrimination. The Equal Opportunities Commission, for example, fails to use much of its own enforcement powers. By its own records, it has "carried out ten Formal Investigations and two joint exercises

230. *Id.* at 400.

231. *Id.* at 401.

232. *Duke v. G.E.C. Reliance Ltd.*, 2 W.L.R. 359, 372 (H.L. 1988).

233. But if the respondent does not respond within a reasonable period of time, the Tribunal may increase the compensation awarded.

234. J. BOWERS, A PRACTICAL APPROACH TO EMPLOYMENT LAW 100 (1986).

235. *Ministry of Defense v. Jeremiah*, 1980 I.C.R. 13.

236. This was very messy work and Lord Denning's description of the women's attitude towards it deserves notice:

A woman's hair is her crowning glory, so it is said. She does not like it disturbed: especially when she has just had a "hair-do." The women at an ordnance factory in Wales are no exception. They do not want to work in a part of the factory—called a "shop"—which ruins their hair-do.

Id. at 22-23.

237. *Id.* at 25.

in its first ten years."²³⁸ In addition, a three-month deadline for filing claims, a more severe deadline than in the other Member States, causes "a substantial number" of complaints to miss the deadline.²³⁹ Finally, the low representation of women on Tribunals only adds to the potential for imbalances in outcome.²⁴⁰

Basically, remedies in the United Kingdom may still fall short of what EEC law requires. Atkins is correct in asserting that "[e]ven where women are successful in bringing cases and having their claims upheld, the ways in which courts are prepared to enforce their rights indicate the importance with which courts regard those rights."²⁴¹ The British courts seem generally unwilling, or perhaps unable, to provide effective remedies. A narrow interpretation of British and EEC sex discrimination measures, a low level of scrutiny applied to sex discrimination, and inadequate remedies all demonstrate that the British judiciary does not voluntarily and consistently uphold the right. If the United Kingdom is typical of other Member States, the "fundamental right" may have little use other than in Community institutions.

E. Obstacles to the Application of the Fundamental Right in the United Kingdom

The peculiarities of British law pose a further obstacle to the application of the fundamental right of sexual equality. The United Kingdom has no written constitution, nor does its unwritten constitution embody individual rights *per se*. British law respects the liberty of the individual to do all that is not prohibited, an orientation which poses an immediate obstacle for British courts in applying EEC fundamental rights. In addition to this, a range of British legal concepts also inhibit the application of the fundamental right.

1. Parliamentary Sovereignty

The constitutional doctrine of Parliamentary Sovereignty hampers the application of the fundamental right. Currently, fundamental

238. EQUAL OPPORTUNITIES COMM'N, *supra* note 207, at 13. Under section 75, the Commission has been more active; during its first ten years, the Equal Opportunities Commission received over 16,000 inquiries about various aspects of the legislation and began over 5000 cases, of which over 2000 went through the formal hearing. *See id.* at 9.

239. Leonard, *Judging Inequality*, 16 EQUAL OPPORTUNITY REV. 17, 19 (1987) The Industrial Tribunal, however, has the power to extend the limit if it considers it just and equitable. Social Discrimination Act 1975, ch. 65, § 76(5), *reprinted in* Butterworths Annotated Legislation Service (M. Beloff & H. Wilson eds. 1976).

240. *See* EQUAL OPPORTUNITIES COMM'N, *supra* note 207, at 27; *see also* J. McMULLEN, RIGHTS AT WORK 189 (1983).

241. Atkins, *Women's Rights*, 1986 PUB. INTEREST L. 333, 344.

rights have no special protected status in English law. While British courts interpret Parliamentary acts in light of "fundamental rights," especially when they are enshrined in the European Convention on Human Rights,²⁴² they do not use these rights to strike down Acts of Parliament.²⁴³

It is submitted that the fundamental right of sexual equality differs from other fundamental rights. Unlike the ECHR, it is incorporated directly into the law of the United Kingdom. The European Community Act '72 (ECA '72)²⁴⁴ incorporates the United Kingdom's Community law obligations into its municipal law. Sections 2(4) and 3(1) imply the supremacy of Community law. In particular, the ECA '72 § 3(1) directs British courts to decide cases "in accordance with the principles laid down by and any relevant decisions of the European Court."²⁴⁵

Under the traditional understanding of Parliamentary Sovereignty, Community law prevails over Parliamentary measures enacted before January 1, 1973, the date when the ECA '72 entered into force. The ECA '72 implicitly repealed any earlier inconsistent legislation, as it is the latest expression of Parliament's will. A problem would occur if Parliament passed legislation that explicitly, or by irreconcilable interpretation, conflicted with Community law.²⁴⁶ But British courts have managed to avoid such a conflict either by construing statutes in line with EEC obligations, holding that only a clear repudiation of an obligation could represent Parliament's will, or by upholding inconsistent national legislation, on the grounds that the relevant EEC measure to lack direct effect.

*Pickstone v. Freemans plc.*²⁴⁷ illustrates the view that only a clear denial of an EEC obligation in national legislation would serve to negate an EEC obligation. In *Pickstone*, a woman who received the same pay as a man in the same job lodged a claim to be compared instead with a man in a job of equal value receiving higher pay. The Court of Appeal found Section 1(2) of the EPA '70 unambiguous:²⁴⁸

242. See, e.g., *R. v. Miah*, 1 W.L.R. 683, 694 (C.A. 1974); *Birdi v. Secretary of State for the Home Dep't* (C.A. Feb. 11, 1975, unreported) (decision per Lord Denning, M.R.).

243. See *R. v. Jordan*, 1967 Crim. L.R. 483 (Q.B. Div'l Ct.) (Parliament is supreme and the courts have no power to question the validity of an Act of Parliament because it conflicts with a right).

244. European Communities Act 1972 as Amended, reprinted in *BASIC COMMUNITY LAWS* 291 (B. Rudden & D. Wyatt, 2d ed. 1986).

245. *Id.* § 3(1).

246. See, e.g., Ellis, *Supremacy of Parliament and European Law*, 95 L.Q. REV. 511 (1980); Jaconelli, *Constitutional Review and Section 2(4) of the European Communities Act 1972*, 28 INT'L & COMP. L.Q. 65 (1979); Winterton, *The British Grand Norm: Parliamentary Supremacy Re-examined*, 92 L.Q. REV. 591 (1976).

247. *Pickstone v. Freemans plc.*, 1987 I.C.R. 867 (C.A.).

248. *Id.* at 882 (per Nicholls L.J.).

if one came within section 1(2)(a) dealing with like work in the same employment or 1(2)(b) dealing with equivalent work in the same employment, one could not turn—as the plaintiff attempted—to the equal value comparison under section 1(2)(c). The court asserted that “[t]o construe the exclusionary words in § 1(2)(c) as having the meaning I have stated above does not encroach upon any directly enforceable rights . . . under Article 119.”²⁴⁹

In *Duke*, the House of Lords indicated that an Act of the United Kingdom may not need to repudiate the Community obligation, as long as the obligation lacks direct effect. The House of Lords held,

Section 2(4) of the European Communities Act 1972 does not . . . enable or constrain a British court to distort the meaning of a British statute in order to enforce against an individual a Community directive which has no direct effect between individuals. Section 2(4) applies and only applies where Community provisions are directly applicable.²⁵⁰

Consequently, the fundamental right presently has no claim in the United Kingdom against inconsistent United Kingdom legislation, unless it is embodied in a traditional, directly effective, EEC sex discrimination measure.

2. *Stare Decisis*

In *Duke*, the Court of Appeal's adherence to *stare decisis* further indicates the weakness of a fundamental right without direct effect. The court held that *Duke's* employer did not violate the SDA '75 when it required her to retire at sixty. The employers had relied on section 6(4), which excludes “provisions in relation to death or retirement.”²⁵¹ The case turned on whether those words meant “consequent upon death or retirement” or “about death or retirement.”²⁵² The former made the action discriminatory, but the court followed *Roberts v. Cleveland Area Health Authority*²⁵³ in which it had held the phrase to mean “about death or retirement.” The court did not consider the EEC Equal Treatment Directive, presumably because it had gone into effect months after the passage of the SDA. Although the *Roberts* court did not have Community law brought to its attention, the *Duke* court

249. *Id.*

250. *Id.* at 371. (per Lord Templeman).

251. *Duke v. G.E.L. Reliance Ltd.*, 2 W.L.R. 1225, 1227 (C.A. 1987).

252. *Id.*

253. *Roberts v. Cleveland Area Health Auth.*, 1 W.L.R. 74 (1979).

still felt obliged to follow *Roberts* and rejected any *per incuriam* characterization.²⁵⁴

On appeal, the House of Lords unanimously dismissed *Duke*.²⁵⁵ As a Court of Appeals decision, *Roberts*²⁵⁶ did not bind the House of Lords. The Court of Appeal's judgment, however, demonstrates that past restrictive rulings may require a litigant to reach a court not bound by the previous authority. Clearly, this poses quite an obstacle for litigants.

The refusal to label *Roberts per incuriam* violates the spirit of a fundamental right, especially since Sir John Donaldson emphasized that *Roberts* would be *per curiam* only if the omitted material must have made a difference.²⁵⁷ *Duke* would contend that it did make a difference; *Roberts* involved the same issue of interpretation. While not all cases follow the narrow approach of *Duke*,²⁵⁸ a directly effective fundamental right might minimize the use of *stare decisis* to negate the EEC fundamental right.

3. Sources of the Fundamental Right

The sources of the fundamental right for British courts must be an EEC directly effective traditional measure or an ECJ judgment applying the right, since the right itself is not directly effective. The right's heavy dependence on case law hampers its application and extension in the United Kingdom. Practical difficulties arise. As Atkins has suggested, "Where a case depends upon the extension of previous case law women may not find it as easy to persuade lawyers to take their case to court."²⁵⁹ And here a vicious circle is introduced: If courts do not apply the fundamental right, lawyers are less likely to rely upon it.²⁶⁰ Furthermore, "if a case is conceded, the claimant cannot get her case to court or to a level of court which could influence precedent."²⁶¹

While section 3(1) of the ECA '72 allows a British court to take account of EEC case law and thereby the fundamental right itself, sections 2(1) and 2(4) do not provide for application of the fundamental right in the United Kingdom. Section 2(1) applies only to "an enforceable community right," which the fundamental right currently is not, as demonstrated by *Amies v. Inner London Education Authority*.²⁶²

254. *Duke*, 2 W.L.R. 1225, 1228.

255. *Duke v. G.E.L. Reliance Ltd.*, 2 W.L.R. 359 (H.L. 1988).

256. *Roberts v. Cleveland Area Health Auth.*, 1979 I.C.R. 558 (C.A.).

257. *Duke v. G.E.L. Reliance Ltd.*, 2 W.L.R. 1225, 1228 (C.A. 1987).

258. See, e.g., *Pickstone v. Freemans plc*, I.C.R. 867 (C.A. 1987).

259. Atkins, *supra* note 241, at 340.

260. See *id.* at 342.

261. *Id.*

262. *Amies v. Inner London Educ. Auth.*, 1977 I.C.R. 308 (Employment Appeals Tribunal).

In *Amies*, the Inner London Education Authority appointed a man to head an art department instead of Amies, the deputy head, thus giving rise to a charge of sex discrimination. Amies argued that sources such as the United Nations Charter, the Universal Declaration of Human rights of 1948, the EEC Treaty, and section 2(1) of the European Communities Act of 1972 gave a fundamental right to sexual equality and created a cause of action.

The Employment Appeals Tribunal held that although the ECA '72 incorporated the Treaty of Rome into English municipal law, the treaties and declarations mentioned by Amies "d[id] not confer upon individuals in England any legal right for the infringement of which the English courts and tribunals, whether their jurisdiction arises from the common law or from statute, have any power or duty to give redress."²⁶³ Section 2(1) of the ECA '72 referred to "enforceable community rights," which involved "a right intended to be given legal effect in member states without further enactment."²⁶⁴

The EAT rejected the idea that article 119 embodied "a fundamental principle" of equal treatment and nondiscrimination on the grounds of sex broader than equal pay.²⁶⁵ It held that the article did not imply a wider right.²⁶⁶ *Amies* indicates that the fundamental right of sexual equality is limited by its reliance on particular ECJ decisions and directly effective secondary Community legislation. And *Duke* demonstrated that article 2(4) could not be used to apply a fundamental right which lacked direct effect in the United Kingdom.

The courts of the United Kingdom might apply the fundamental right of sexual equality more readily if the Treaty expressly enunciated it or if the ECJ held it to be directly effective. Still, the right's "source" should not pose an insurmountable obstacle to its present application in the United Kingdom, since British courts constantly develop the common law. Jowell and Lester argue that "there are clear signs that in administrative law cases English judges are beginning to abandon their traditional preference for dealing with the technicalities of remedies rather than the principles governing official action and individual rights."²⁶⁷ These rights include the right of nondiscrimination.²⁶⁸ Even if the fundamental right itself does not become a "substantive principle," some plaintiff might be able to use the "un-

263. *Id.* at 311.

264. *Id.* at 312.

265. *Id.* at 313.

266. *Id.*

267. Jowell & Lester, *Beyond Wednesbury: Substantive Principles of Administrative Law*, PUB. L. 368 (Autumn 1987).

268. *Id.* at 377-78.

reasonableness" concept developed in *Wednesbury*.²⁶⁹ Basically, if it is unreasonable to fire a teacher simply because she has red hair,²⁷⁰ it would be unreasonable to dismiss her simply because of her sex.

The traditional requirements for a public law remedy may, however, restrict this approach.²⁷¹ And in *Walsh*, Lord Justice May specifically indicated an adverseness to judicial review applications for "matters of principle,"²⁷² which should include the fundamental right of sexual equality.²⁷³

A British court could also justify applying the fundamental right as upholding the United Kingdom's international obligations, whether with reference to the EEC or the ECHR.²⁷⁴ Or it could justify its application on "public policy" grounds.²⁷⁵ In short, the British courts have a number of options to encourage common law development of the right in the United Kingdom, albeit in the public law area.

4. Jurisdictional Problems

So long as the fundamental right lacks direct effect, an Industrial Tribunal may not have jurisdiction to consider it. In *Amies*, the EAT held that Industrial Tribunals, unlike the High Court, cannot exercise powers other than those conferred by statute.²⁷⁶ The Employment Appeals Tribunal applied *Amies* in *Snoxell v. Vauxhall Motors Ltd.*, but in *Albion Shipping Agency v. Arnold*²⁷⁷ it modified the jurisdictional issue slightly. There it quoted the "strong obiter dictum" of Lord Denning, M.R.²⁷⁸ in *Shields v. E. Coomes (Holdings) Ltd.*²⁷⁹ that industrial tribunals, the EAT, and the High Court should equally apply Community law.²⁸⁰ Still, the EAT felt the jurisdictional issue might depend on whether the applicant's claim fell under the EPA '70 as amended by article 119 or under article 119 alone, and, finally, left this unanswered.²⁸¹

269. *Associated Provincial Picture Houses Ltd. v. Wednesbury Corp.*, 1 K.B. 223 (C.A. 1948).

270. *Id.* at 229 (per Lord Green M.R.).

271. See generally H. WADE, *ADMINISTRATIVE LAW* 577-622 (5th ed. 1982).

272. *Ex parte Walsh*, 1 Q.B. 152, 170 (C.A. 1985).

273. And this contrasts with the Court of Appeals approach in *Ex. p. Herbage II*, in which a breach of a fundamental right was held to be sufficient basis to invoke relief under Order 53 of the Rules of the Supreme Court. *Ex parte Herbage II*, 1 All E.R. 226 (C.A. 1987).

274. Cf. *Amies v. Inner London Educ. Auth.*, 1977 I.C.R. 308, 311.

275. The Court of Appeal took this approach, albeit before the "fundamental right" existed, in *Nagle v. Feilden*, 2 Q.B. 633 (C.A. 1966).

276. *Amies*, 1977 I.C.R. 308, 311-12.

277. *Albion Shipping v. Arnold*, 1982 I.C.R. 22 (Employment Appeals Tribunal).

278. *Id.* at 30 (per Browne-Wilkinson J.).

279. *Shields v. Coomes (Holdings) Ltd.*, 1978 I.C.R. 1159 (C.A.).

280. *Id.* at 1166-67.

281. *Albion Shipping*, 1982 I.C.R. 22, 30.

In *Norwich Union Insurance Group v. Association of Scientific Technical and Managerial Staffs*,²⁸² a claim existed under EEC law but not the statute. The Central Arbitration Committee thus based its jurisdiction on the EEC right, concluding that it was

governed by Article 119, which clearly applies to the situation before us and which must be treated as having extended the jurisdiction granted to us by section 3 of the EPA which would otherwise fall short of EEC law in that respect. We note that section 6 of the Sex Discrimination Act 1986 will partially remedy this shortcoming and that, when that takes effect, our jurisdiction will have ceased.²⁸³

This case, however, is not weighty authority. It is only an Arbitration Committee decision and the case concerned a directly effective provision of Community law, article 119. Drawing optimistic generalizations for a fundamental right without direct effect is more dubious.

IV. THE FUTURE OF THE FUNDAMENTAL RIGHT

Traditionally, the ECJ has turned to the constitutions of the Member States and to the European Court of Human Rights for inspiration to expand the content of fundamental rights.²⁸⁴ These sources, however, do not guarantee an improvement in the right's substance. This section suggests that the most hopeful future for the fundamental right lies with other Community institutions, whether by resolution, directive, or a Treaty amendment under article 236.

A. *Re Wunsche*

The case of *Re Wunsche*²⁸⁵ deserves special attention, since it sets the tone for the ECJ's future approach to all fundamental rights. In the past, the ECJ was probably guided in its development of fundamental rights by a fear that the German courts might find an EEC provision inconsistent with the German Constitution and therefore inapplicable in Germany. Such a holding would have jeopardized the

282. *Norwich Union Insur. Group v. Ass'n of Scientific Technical and Managerial Staffs*, Award No. 87/2 (unreported decision of January 30, 1987) (C.A.C.).

283. *Id.* at 9.

284. See Petersmann, *supra* note 11, at 197.

285. *Re the Application of Wunsche Handelsgesellschaft*, 3 Comm. Mkt. L. Rep. 225 (1987).

supremacy of Community law.²⁸⁶ But *Re Wunsche* must alleviate the prior fears of the ECJ.

After an ECJ ruling in *Re Wunsche*, the applicant argued before the German courts that the ECJ's judgment could not be applied in Germany because it violated the German constitution. The Federal Constitutional Court held inadmissible any challenge to an ECJ ruling or an EEC Regulation on the basis that it infringed a fundamental right protected by the German Constitution.²⁸⁷ The German Court further held that the German Constitution allowed Community regulations to take precedence over domestic law,²⁸⁸ unless it would "undermine essential structural parts of the Constitution, [including] . . . fundamental rights."²⁸⁹ The German Court declared the level of Community law protection for human rights satisfactory.²⁹⁰ Despite the gaps that existed, the German Court considered further review of the ECJ's rights-oriented attitude unnecessary.²⁹¹ It concluded that it would "no longer review [EEC] legislation by the standard of the fundamental rights contained in the Constitution"²⁹²

After *Re Wunsche*, the ECJ may slow down or halt its development of fundamental rights in Community law since the threat to Community supremacy by the German courts and the pressure on the ECJ to recognize and protect human rights no longer exists to the extent that it once did. The future will reveal whether the ECJ has a genuine commitment to the protection and development of Community-based fundamental human rights. If the ECJ opts to strengthen the fundamental right of sexual equality, it may look for inspiration to the sources mentioned in *Re Wunsche*: Member States' constitutions and the ECHR.²⁹³

B. Member States' Constitutions

Although a comparative law analysis of constitutional protection of gender equality by the Member States is beyond the scope of this Comment, two observations are appropriate. First, any examination of national constitutions and their potential to expand the content of the EEC fundamental right of sexual equality must consider the in-

286. Petersmann, *supra* note 11 (Italy and West Germany are the only original Member States which maintain constitutional courts with judicial review over legislative bodies). See T. HARTLEY, *supra* note 43, at 232.

287. *Re Wunsche*, 3 Comm. Mkt. L. Rep. at 265 (1987).

288. *Id.* at 257.

289. *Id.* (referring to article 24(1) of the Grundgesetz).

290. *Id.* at 259.

291. *Id.* at 262.

292. *Id.* at 265.

293. *Id.* at 259.

tegrative effect of Community law.²⁹⁴ Second, such an examination must acknowledge that not all Member States agree on the scope of a such a fundamental right.²⁹⁵

The ECJ would face a complex task if it attempted such a comparative law exercise. Contrast, for example, the Danish Constitution which "contains no equality-specific provisions regarding employment"²⁹⁶ with article 37 of the Italian Constitution: "The working woman has the same rights and, for equal work, the same remuneration as the man. Working conditions should permit the fulfillment of her essential family function and ensure the mother and her child a special, adequate, protection."²⁹⁷ Or try to reconcile article 3(2) of the German Grundgesetz which specifies "Men and women shall have equal rights"²⁹⁸ with the Spanish and Portuguese Constitutions, which bind the state only in respect to the classical fundamental rights.²⁹⁹ There is no guarantee that the ECJ would choose a constitution embodying a high standard of protection, although most commentators predict that the ECJ would adopt the highest standard among the Member State constitutions.³⁰⁰

C. European Convention on Human Rights

The ECHR provides one possible avenue for expanding the scope and content of the fundamental right of sexual equality.³⁰¹ Article 14 of the ECHR stipulates that the Convention's rights are guaranteed

294. See Dausen, *supra* note 11, at 408.

295. See Edeson & Wooldridge, *European Community Law and Fundamental Human Rights: Some Recent Decisions of the European Court and of National Courts*, 1 LEGAL ISSUES EUR. INTEGRATION 1, 2 (1976).

296. Nielsen, *Equality Between Women and Men in Danish Labour Law*, in 2 EQUALITY IN LAW BETWEEN MEN AND WOMEN IN THE EUROPEAN COMMUNITY: RECORDS OF THE PROCEEDINGS OF THE EUROPEAN CONFERENCE ORGANIZED AT BRUSSELS AND LOUVAIN-LA-NEUVE BY THE COMMISSION OF THE EUROPEAN COMMUNITIES 61, 62 (M. Verwilghen ed. 1986) [hereinafter EQUALITY IN LAW].

297. Ballestrero, *Equality between Male and Female Workers in Italian Law*, in EQUALITY IN LAW, *supra* note 296, at 259.

298. Bertelsmann & Rust, *Equal Opportunity Regulations for Employed Women and Men in the Federal Republic of Germany*, in EQUALITY IN LAW, *supra* note 296, at 84.

299. Starck, *Europe's Fundamental Rights in Their Newest Garb*, 3 HUM. RTS. L.J. 103, 115 (1982).

300. The Legal Committee of the European Parliament in Decision 297/72 recommended the protection of fundamental human rights in accordance with the most stringent legal provisions in force in the Member States. See Edeson & Wooldridge, *supra* note 295, at 33; see also Jolowicz, *The Judicial Protection of Fundamental Rights Under English Law*, in THE CAMBRIDGE-TILBURG LAW LECTURES 79 (1980); cf. Sorensen, *The Enlargement of the European Communities and the Protection of Human Rights* 1971 EUR. Y.B. 3, 9 (Council of Eur.).

301. See *Johnston v. Chief Constable of the Royal Ulster Constabulary*, 3 Comm. Mkt. L. Rep. 240 (1986); *Nold v. Comm'n of the European Communities*, 1974 Eur. Comm. Ct. J. Rep. 491, 507.

without discrimination on the basis on sex.³⁰² Article 14 is always read in conjunction with other Convention articles.³⁰³ Article 3 of the ECHR reads: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."³⁰⁴ ECHR case law initially indicated that article 3 might be used for discriminatory treatment falling outside the Convention's articles³⁰⁵ and, therefore, it would reach beyond article 14's scope.

More recent decisions, however, cast doubt on the usefulness of article 3 for gender equality. While sex discrimination challenges have been admitted under article 3's "degrading treatment" clause,³⁰⁶ the Director of the Human Rights Council of Europe maintained, "[n]o case law exists in Strasbourg where it was found that sex discrimination has equaled degrading treatment."³⁰⁷ In fact, the European Court's unanimous judgment in *Abdulaziz*³⁰⁸ suggests that article 3 offers little hope for combating sex discrimination.

The strict standard of scrutiny adopted by the European Court for article 14 in *Abdulaziz* may influence the ECJ to adopt a stricter standard of scrutiny than the *Bilka* test. In *Abdulaziz*, the European Court said that "very weighty reasons" must be given to justify different treatment on the basis of sex.³⁰⁹ But the European Court's level of scrutiny may not influence the ECJ, since "[p]roblems of access to profession and career, working conditions and issues related to Article 119 of the EEC Treaty do not fall as such within the ambit of the Convention provisions."³¹⁰ Even if article 3 extends the right of sexual equality beyond the rights found in the Convention, it may be accompanied by a low level of scrutiny.³¹¹

302. See *Abdulaziz, Cabales & Balkandali v. United Kingdom (Immigration Rules)*, 94 Eur. Ct. H.R. 471 (ser. A) (1985).

303. See *id.* at para. 71.

304. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222.

305. See *East African Asians v. United Kingdom*, 3 Eur. Comm'n H.R. 76 (1981) (race discrimination could constitute an article 3 violation).

306. See, e.g., *Mrs. X. and Miss X. v. United Kingdom*, Case 9471/81, (UK), Judgment of March 13, 1984. But see *The Tyrer Case*, 26 Eur. Ct. H.R. (ser. A) (1978). See generally Buquicchio-de Boer, *Sexual Discrimination and the European Convention on Human Rights*, 6 HUM. RTS. L.J. 1 (1985).

307. Address by Dr. Peter Leuprecht, Director of Human Rights at the Council of Europe, British Institute of Human Rights Seminar: Human Rights Litigation in Europe (Oct. 23, 1987).

308. *Abdulaziz, Cabales & Balkandali v. United Kingdom (Immigration Rules)*, 94 Eur. Ct. H.R. (ser. A) at para. 71, 91 (U.K.'s immigration rules making it easier for a man than a woman settled in the U.K. to obtain permission for a nonnational spouse to enter or remain in the U.K. violated articles 14 and 8).

309. *Id.* at para. 78 (rejecting the "objective and reasonable" test).

310. Buquicchio-de Boer, *supra* note 306, at 16.

311. In *Abdulaziz*, the European Court accepted the U.K.'s justification to defeat the article 3 claim, while rejecting these reasons as sufficient to defeat the article 14 claim. *Abdulaziz*, 94 Eur. Ct. H.R. (ser. A) at para. 91.

D. The European Social Charter and Other Council of Europe Measures

Although the ECJ refers to the ECHR in its judgments, it does not refer to the European Social Charter or other Council of Europe measures.³¹² The European Council, however, is currently considering "extending the scope of the Human Rights Convention to cover some of the rights enumerated in the Social Charter"³¹³

Until that occurs, interaction between the Council of Europe and the EEC representatives may provide the most promising avenue for strengthening the fundamental right of sexual equality. For example, in preparing the Committee of Ministers' Recommendation, *Legal Protection Against Sex Discrimination*,³¹⁴ experts from the EEC Commission "attended the five meetings of the committee of experts and prepared the texts of the draft"³¹⁵ Arguably, the Council of Europe's broad understanding of gender equality may influence the EEC.³¹⁶

E. The Expansion of the Fundamental Right by Other EEC Institutions

The Council, Commission, and European Parliament can enact legislation codifying the ECJ's statements about a fundamental right of sexual equality, relying on various Treaty articles to justify support for a broad fundamental right. Article 117 states that Member States agree upon the need "to promote improved working conditions and an improved standard of living for workers."³¹⁷ Article 118 dictates that "the Commission shall have the task of promoting close cooperation between Member States in the social field"³¹⁸ Some have

312. See, e.g., *Johnston v. Chief Constable of the Royal Ulster Constabulary*, 3 Comm. Mkt. L. Rep. 240 (1986); *Hauer v. Land Rheinland-pfalz*, 1979 Eur. Comm. Ct. J. Rep. 3727; *Nold v. Comm'n*, 1974 Eur. Comm. Ct. J. Rep. 491. The ECJ probably does not look at these sources because "[u]nlike the Human Rights Convention which derives its vitality and potential for development from its interpretation by national courts and by the European Commission and Court, the supervisory machinery of the Charter is less highly developed and effective." See COUNCIL OF EUROPE, *THE PROTECTION OF HUMAN RIGHTS IN EUROPE* 15 (1983).

313. COUNCIL OF EUROPE, *supra* note 312, at 15.

314. COMM. OF MINISTERS, COUNCIL OF EUROPE, *LEGAL PROTECTION AGAINST SEX DISCRIMINATION*, (Recommendation No. R 85(2)) 5 (1985).

315. *Id.* at 9.

316. See, e.g., Resolution (77) 1 (women's employment, preparation for working life, the reconciliation of family responsibilities with occupational activities); Resolution (75) (social security for women at home); Resolution (78) (decision-making in the family); Recommendation No. R (84) 4 (parental responsibilities); Recommendation No. R (81) 15 (occupation of the family home and household contents); Resolution (72) 1 (standardization of the legal concepts of "domicile" and of "residence"); Resolution (78) (changing one's family name on upon marriage); Resolution (77) 12 (conditions to acquiring nationality); Resolution (77) 13 (nationality of children born in wedlock); Resolution (72) 22 (political rights); Resolution (77) 1 (education of young about sexual equality).

317. Treaty, *supra* note 1, art. 117.

318. *Id.*

suggested that "action by the Council under the powers granted to it by Article 235 of the EEC Treaty might be taken to secure the protection of fundamental human rights . . . in order to further the objects of the Treaty which are stated in Article 2."³¹⁹

In legislating, the Community institutions might look to many sources for the content of the fundamental right.³²⁰ In addition, the Council and Commission could adopt more directives to give the right more substance and scope. The Commission has submitted to the Council of Ministers various Draft Directives which would make a fundamental right of sexual equality³²¹ more concrete.

Resolutions of the European Parliament may also influence the development of the right. Some resolutions call for the enactment of future directives,³²² while others call for various non-legal measures.³²³ Although most resolutions address areas of discrimination covered by directives or proposed directives³²⁴ and relate largely to questions of employment, other resolutions break new ground,³²⁵ often weaving a connection to employment.³²⁶ Resolutions are sometimes sent to the ECJ,³²⁷ which may indirectly influence case law. In any event, resolutions are recognized as having an important function in the relationship between the Community and Member States.³²⁸ As stated by the Equal Opportunities Commission:

EEC initiatives relating to sex equality can play an important role in stimulating and directing Member States' thinking on equal opportunities between women and men. Not all of these initiatives have, like the . . . "equality" Directives, the force of law.

319. Edeson & Wooldridge, *supra* note 295, at 53; cf. Arnall, *Article 119 and Equal Pay for Work of Equal Value*, 11 EUR. L. REV. 200, 202 n.12 (1986).

320. See, e.g., 1987-1988 EUR. PARL. DOC. (COM No. A2-133) 5 (1987).

321. See, e.g., *Proposal for a Council Directive on Parental Leave and Leave for Family Reasons*, 26 O.J. EUR. COMM. (No. C 333) 6 (1983), amended 27 O.J. EUR. COMM. (No. C 316) 7 (1984); *Proposal for a Council Directive on Voluntary Part-Time Work*, 25 O.J. EUR. COMM. (No. C 62) 7 (1982), amended 26 O.J. EUR. COMM. (No. C 18) 5 (1983).

322. See, e.g., *Commission Communication to the Council, transmitted on December 20, 1985 on the Medium-Term Community Programme on the Promotion of Equal Opportunities for Women (1986-1990)*, BULL. EUR. COMM. (Mar. 1986) [hereinafter *Community Programme Communication*].

323. See, e.g., 1987 - 88 EUR. PARL. DOC. (COM No. A2-133) 8 (1987).

324. See, e.g., *Community Programme Communication, supra* note 322.

325. See, e.g., 1987-1988 EUR. PARL. DOC. (COM No. A2-133) 8 (1987) (resolution on discrimination against immigrant women).

326. See, e.g., 1987-88 EUR. PARL. DOC. (COM No. A2-32) 5 (1987) (Report drawn up on behalf of the Committee on Women's Rights on women in sports).

327. See e.g. COMM. ON WOMEN'S RIGHTS, EUROPEAN PARLIAMENT, DRAFT REPORT ON THE FAILURE TO COMPLY WITH THE DIRECTIVES ON EQUAL TREATMENT FOR MEN AND WOMEN 5 (1987).

328. See *Re Application of Wunsche Handelsgesellschaft*, 3 Comm. Mkt. L. Rep. 225, 262-63 (1987).

They nevertheless combine to have the status and influence of a Community-wide social policy³²⁹

Finally, the Treaty could be amended under article 236 to make the right directly effective.

The ECJ may not strengthen the fundamental right of sexual equality after *Re Wunsche*. Even if the ECJ strives to improve gender equality, its traditional sources of inspiration will offer less help than in the past when the ECJ merely enunciated the right. Thus, developing a true EEC fundamental right of sexual equality will depend upon other Community institutions.

V. CONCLUSION

Although the ECJ has recognized a fundamental right of sexual equality in the EEC, it has not consistently applied that fundamental right in its cases. Neither have British courts consistently applied such a fundamental right. And, contrary to the assertions of various authors and the ECJ itself, the fundamental right of sexual equality is not firmly established.³³⁰ Specifically, the ECJ has failed to apply strict judicial scrutiny to violations of the right. At various times, the ECJ has restricted the application of traditional EEC sex discrimination measures by interpreting provisions narrowly and exceptions widely and by placing obligations on states and not private parties. While the ECJ's judgments theoretically ensure that adequate remedies exist for violation of the right, such remedies may not exist in practice. And as the fundamental right lacks direct effect, it does not provide a wide measure of protection.

The United Kingdom serves as an example of a Member State which has not applied the right voluntarily. British courts and tribunals often interpret both British and EEC sex discrimination measures narrowly and apply lower levels of remedy and scrutiny than EEC law seems to require. So long as the right lacks direct effect, more traditional British legal concepts, such as Parliamentary sovereignty, *stare decisis*, and jurisdictional limitations, impede its application. Moreover, the right's heavy dependence on ECJ case law imposes practical difficulties for applicants and makes British courts reluctant to recognize it.

Apart from the need for effective remedies and a higher level of judicial scrutiny, it is essential that the fundamental right become directly effective. Only then will it acquire the content, scope, and application appropriate to a fundamental right. Despite the ECJ's admirable past role in developing fundamental rights, one cannot rely

329. EQUAL OPPORTUNITIES COMM'N, BRIEFING ON EEC "EQUALITY" INITIATIVES 1 (1985).

330. See, e.g., Fitzpatrick, *supra* note 3.

on the ECJ to ensure direct effect. Instead, other EEC institutions have to enact provisions with direct effect.

Advocates of gender equality can only hope that the right's present infirmities are not obstacles to its future development. The ECJ's acknowledgment of the right, its application of the right openly to Community institutions, and its use of the right to interpret narrowly traditional EEC sex discrimination measures' exceptions suggest a more optimistic trend. Yet, the ECJ's proclamation in *Defrenne III* that a fundamental right to sexual equality exists in Community law may mask the realities of gender equality and could promote a complacency which assumes the existence of a fundamental right, when in reality much less than a fundamental right exists.