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# COMMENTS

## National and International Sources of Women's Right to Equal Employment Opportunities: Equality in Law Versus Equality in Fact

*Jill Andrews*

### INTRODUCTION

Women's right to equal employment opportunity has been recognized virtually worldwide. In fact, one-third of the total world labor force consists of women.<sup>1</sup> As the higher echelons in employment are reached, however, the number of positions occupied by women tapers off dramatically.<sup>2</sup> Thus, while the right to equal employment opportunity is acknowledged, enforcement remains a formidable challenge. Although facially similar laws prohibiting discrimination in the recruitment, promotion and working conditions of women have been enacted by United Nations member countries, the United States, the European Community and Japan, the difference between equality in law and equality in fact lies with their implementation.<sup>3</sup>

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<sup>1</sup> Laird M. Street, *International Commercial and Labor Migration Requirements as a Bar to Discriminatory Employment Practices*, 31 How. L.J. 497, 509 (1988).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

Many countries recognize the right of women to litigate in order to bring about faithful adherence to equal employment opportunity laws, but the burden of taking on an entire legal system often proves too great for many women. For example, European Community law does not allow for a private right of action against private companies. A woman facing discrimination is therefore required to challenge national law in order to recover for such violations.

The risk of social stigmatization is another deterrent against the use of the courts in asserting the right to equal employment opportunity. In fact, in Japan, women are not even given use of the courts as a remedy for discrimination. Even if such a remedy were available, however, the social stigmatization they would face due to a cultural aversion to litigation would prevent women from litigating their right to equal employment opportunity. Thus, enforcement of equal opportunity laws is currently women's largest hurdle in asserting their rights, and while litigation is the most effective means of enforcement, many women are justifiably hesitant in using the courts as a remedy.

Part I of this comment presents the sources for the assertion of a woman's right to equal employment opportunity in the world through the United Nations, and particularly in the United States, Europe and Japan. Part II examines the problem of enforcing equal employment opportunity laws. Part III concludes with an analysis of the outlook for women seeking to assert the right to equal employment opportunity as well as an opinion as to the most effective means of asserting one's rights.

## I. SOURCES OF THE RIGHT TO EQUAL EMPLOYMENT OPPORTUNITY

### A. The United Nations

The United Nations Charter provides that all member nations "shall promote the fundamental freedoms without discrimination as to race, sex, language, or religion."<sup>4</sup> The U.N. further declares that "every person has a right to work and that nondiscrimination in employment is a goal that all nations should aspire to achieve."<sup>5</sup> The U.N. has thus created a number of treaties inspired by its vision of the importance of protection of human rights through international law.<sup>6</sup>

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<sup>4</sup> *Id.* at 498 n.1.

<sup>5</sup> *Id.* at 497.

<sup>6</sup> *Id.* at 499 n.5.

The International Covenant and the Convention on the Elimination of All Forms of Discrimination Against Women are two such treaties.

The International Labor Organization (ILO) also specifically established the principle of non-discrimination in employment in 1944.<sup>7</sup> The ILO has been instrumental in developing treaties and recommendations which define rights and establish codes of conduct in labor law.<sup>8</sup> Such world community initiatives significantly effect the socio-economic and legal status of individuals worldwide because they create a norm of equality among different groups of individuals and are considered legally binding on countries that ratify them.<sup>9</sup>

The International Covenant on Civil and Political Rights was adopted unanimously by the U.N. General Assembly as part of the international community's early efforts to give the full force of international law to the principle of human rights.<sup>10</sup> The Covenant entered into force in 1976, and 104 States have become Party to the Covenant since.<sup>11</sup> In June of 1992, the United States ratified the Covenant, which then went into effect in September of 1992.<sup>12</sup>

Under the Covenant, each party undertakes to respect and to ensure all individuals within its territory and under its jurisdiction the rights recognized in the Covenant "without distinction of any kind, such as race, color, *sex*, language, religion, political or other opinion. . ." (emphasis supplied); to adopt legislative or other measures necessary to give effect to these rights; and to provide an effective remedy to those whose rights are violated.<sup>13</sup> Article 2 and Article 4 of the Covenant also call for non-discrimination and equal protection.<sup>14</sup> Thus, parties to the covenant are required to provide equal protection for all individuals through legislation and to provide a remedy for individuals faced with discrimination. The Human Rights Committee was established to monitor compliance with this mandate.<sup>15</sup>

The issue of equal opportunity for women was specifically addressed by the U.N. in its Convention on the Elimination of All Forms of Discrimination Against Women (the "Women's Convention"). The

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<sup>7</sup> *Id.* at 499 n.5.

<sup>8</sup> *Id.* at 499 n.5.

<sup>9</sup> *Id.* at 499 n.5.

<sup>10</sup> 31 INTERNATIONAL LEGAL MATERIALS 645, 649 (1992).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 650.

<sup>14</sup> *Id.* at 650.

<sup>15</sup> *Id.* at 650.

Women's Convention is universal in its reach, comprehensive in scope and legally binding in character.<sup>16</sup> It was adopted unanimously by the U.N. General Assembly on December 18, 1979, and over 100 countries have ratified or acceded to it.<sup>17</sup> Article 1 of the Women's Convention defines discrimination against women:

the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.<sup>18</sup>

Article 2 of the Women's Convention condemns discrimination against women in all its forms and provides that states "pursue, by all appropriate means and without delay a policy of eliminating discrimination against women" by enacting constitutional, legislative and administrative measures.<sup>19</sup> In protecting the rights of women on an equal basis with those of men, states must also refrain from discriminatory acts or practices in addition to providing sanctions for discrimination against women.<sup>20</sup>

Article 11 of the Women's Convention directly addresses employment. Article 11 states in part that:

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:

- (a) The right to work as an inalienable right of all human beings;
- (b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;
- (c) The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training.<sup>21</sup>

Article 4 of the Convention and its legal implications are of paramount importance.<sup>22</sup> Not only does Article 4 acknowledge a fundamental right or freedom and provide protection to one special group,

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<sup>16</sup> Rebecca J. Cook, *Reservations to the Convention on Elimination of All Forms of Discrimination Against Women*, 30 VA. J. INT'L. L. 643 (1990).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 667.

<sup>19</sup> *Id.* at 647.

<sup>20</sup> *Id.* at 647.

<sup>21</sup> *Id.* at 696.

<sup>22</sup> Note, *Presentation of the Third Comparative Labor Law Roundtable: Unlawful Discrimination in Employment*, 20 GA. J. INT'L & COMP. L. 1, 6 (1990) [hereinafter Roundtable].

it also provides a blanket provision reflecting a unified interpretation of a general principle of law.<sup>23</sup> There are three guarantees implicit in article 4 that become entrenched in national law once the Convention is ratified: (1) where preferential treatment is granted to a person of one race or sex (i.e. affirmative action), that treatment will not be construed as an illegal derogation from the general principle of equality; (2) such measures will be adopted and will continue until the goals of equal opportunity and treatment are achieved; and (3) states will adopt positive action measures whenever necessary to achieve one of the rights enshrined in the Convention and incorporated into their domestic laws.<sup>24</sup> However, because article 4 does not provide sanctions for breach, it is not as effective as it otherwise could be.

Another weakness is created by the problem of substantive reservations to the Women's Convention. It has been claimed that the Women's Convention came into effect rapidly in part, because, under its Article 28(2), it accommodates reservations that are not "incompatible with the object and purpose" of the Convention.<sup>25</sup> Thus, while the Women's Convention may have maximized its universal application, it may have sacrificed some of its integrity through flexible accommodations of reservations.<sup>26</sup> Discrimination may therefore still exist subversive of the Convention, when states parties justify discriminatory practices by referring to reservations made under Article 28(2) of the Convention itself.<sup>27</sup>

Finally, equal employment opportunity for women has been fully recognized by the International Labor Organization (ILO). The ILO has stated that all nations will have to adopt many approaches to the question of working women.<sup>28</sup> Specifically, the ILO, in its 1985 World Labor Report, layed out three major priority areas for action. With respect to these areas, the ILO stated that: (1) women's work should be perceived as an essential component of the development process; (2) special measures should be taken to ratify and implement under national legislation ILO and United Nations standards, especially on *equal employment opportunities*, equal pay for equal work, working conditions, job security and maternity protection; and (3) there is a need to formulate national policies to accelerate the creation of productive and equal employment opportunities for women so as to en-

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<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> Cook, *supra* note 16, at 644.

<sup>26</sup> Cook, *supra* note 16, at 644.

<sup>27</sup> Cook, *supra* note 16, at 708.

<sup>28</sup> Street, *supra* note 1, at 498.

able them to participate more fully in economic growth and social progress.”<sup>29</sup> Although not legally binding, the ILO Labor Codes are valuable for the impact they might have on member states.<sup>30</sup>

## B. The United States

In 1964, Congress enacted the Civil Rights Act to ensure all Americans “the rights, privileges, and opportunities which are the birthright of all citizens.”<sup>31</sup> Title VII of the Civil Rights Code was enacted with the goal of eliminating employment discrimination based upon “race, color, sex, religion or national origin.”<sup>32</sup> Under Title VII, American women are clearly protected from employment discrimination in the United States. Much discussion has ensued, however, regarding the extraterritorial application of Title VII. Although persuasive arguments have been made in favor of such application, the Supreme Court struck down the extraterritorial application of Title VII once and for all in 1991.<sup>33</sup> This decision affirmed the 5th circuit’s decision in *Boureslan v. Aramco*, a decision that was hotly debated preceding the Supreme Court holding.<sup>34</sup> The practical effect of this decision is lack of protection against discrimination for U.S. women employed overseas.

Title VII of the Civil Rights Code states in part:

It shall be an unlawful employment practice for an employer- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment . . . or (2) to limit, segregate or classify his employees or applicants for employment in any way which would deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin. . . .<sup>35</sup>

Title VII prohibits employment discrimination by employers “engaged in an industry affecting commerce,” and defines commerce as “trade, traffic, commerce, transportation, transmission, or communication

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<sup>29</sup> Street, *supra* note 1, at 498.

<sup>30</sup> Street, *supra* note 1, at 499.

<sup>31</sup> Conley J. Schulte, *Americans Employed Abroad by United States Firms are Denied Protection Under Title VII: EEOC v. Arabian American Oil Co.*, 25 CREIGHTON L. REV. 351, 364 (1991).

<sup>32</sup> 42 U.S.C. § 2000e-2 (1988).

<sup>33</sup> EEOC v. Arabian American Oil Co., 111 S. Ct. 1227 (1991).

<sup>34</sup> *Boureslan v. Aramco*, 857 F.2d 1014 (5th Cir. 1988), *aff’d on reh’g en banc*, 892 F.2d 1271 (1990).

<sup>35</sup> 42 U.S.C. § 2000 e-2(a) (1988).

among the several states; or between a State and any place outside thereof.”<sup>36</sup>

However, the Supreme Court held in *Equal Employment Opportunity Commission (EEOC) v. Arabian American Oil Co.*, that Title VII does *not* apply to American employers engaged in commerce outside of the United States.<sup>37</sup> The petitioner in this case, Ali Boureslan, was a naturalized United States citizen who was born in Lebanon.<sup>38</sup> Boureslan worked for Aramco Services Company (ASC), a subsidiary company of Arabian American Oil Company (Aramco).<sup>39</sup> He originally worked in Houston, Texas, which is ASC’s headquarters.<sup>40</sup> Boureslan was then transferred Saudi Arabia to work for Aramco.<sup>41</sup> Boureslan claimed that, after his transfer to Saudi Arabia, he was subjected to a “campaign of harassment” that included racial, religious, and ethnic slurs by his supervisor, that eventually led to his termination.<sup>42</sup> He filed a Title VII action in the United States District Court for the Southern District of Texas and his case was dismissed for lack of subject matter jurisdiction.<sup>43</sup> On appeal to the Fifth Circuit, the district court decision was affirmed.<sup>44</sup>

The Supreme Court affirmed the 5th Circuit’s decision, and held that Title VII does not apply extraterritorially to regulate the employment practices of United States firms that employ American citizens abroad.<sup>45</sup> The Court stated that the language in Title VII is too ambiguous to overcome the presumption against extraterritorial application of American law.<sup>46</sup> The Court further stated that, absent clearer evidence of congressional intent, it was unwilling to ascribe to Congress a policy which would raise difficult international law issues by imposing the United States’ employment-discrimination regime upon foreign corporations in foreign commerce and that, had Congress intended extraterritorial application, it would have addressed the subject of conflicts with foreign laws and procedures.<sup>47</sup> With respect to the issue of deference to the EEOC’s interpretation of Title VII, the

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<sup>36</sup> Schulte, *supra* note 31, at 364.

<sup>37</sup> EEOC v. Arabian American Oil Co., 111 S. Ct. at 1227.

<sup>38</sup> EEOC v. Arabian American Oil Co., 111 S. Ct. at 1229.

<sup>39</sup> EEOC v. Arabian American Oil Co., 111 S. Ct. at 1230.

<sup>40</sup> EEOC v. Arabian American Oil Co., 111 S. Ct. at 1230.

<sup>41</sup> EEOC v. Arabian American Oil Co., 111 S. Ct. at 1230.

<sup>42</sup> Boureslan v. Aramco, 857 F.2d 1014 (5th Cir. 1988).

<sup>43</sup> *Id.* at 1014.

<sup>44</sup> *Id.* at 1014.

<sup>45</sup> EEOC v. Arabian American Oil Co., 111 S. Ct. 1227.

<sup>46</sup> EEOC v. Arabian American Oil Co., 111 S. Ct. at 1231.

<sup>47</sup> EEOC v. Arabian American Oil Co., 111 S. Ct. at 1234.



Court held that the EEOC interpretation was of insufficient weight to overcome the presumption against extraterritorial application.<sup>48</sup> Finally, the Court stated that Congress is aware that it needs to make a clear statement when a statute is to be applied abroad, and that it may amend Title VII if it intends legislate extraterritorially.<sup>49</sup>

The Supreme Court's decision has been widely criticized. While the Court refused to apply Title VII extraterritorially because of the possibility of a conflict of laws, it has been argued that the Court failed to inquire whether the application of Title VII to American citizens employed by United States firms abroad would interfere with the laws of foreign nations.<sup>50</sup> Further, it has been argued that the Court ignored the contention of the EEOC that applying Title VII would not create a serious potential for conflict, partly because it specifically excludes aliens from coverage outside of the United States.<sup>51</sup> For this oversight, the Court has been criticized for two reasons. First, the Court has been criticized for a flawed analysis of the alien provision in Title VII. The EEOC concluded that because Congress exempted aliens from protection under Title VII, and not all individuals, Congress must have intended American citizens to be protected abroad.<sup>52</sup> Further, the legislative history and pertinent administrative interpretations of Title VII clearly indicate that foreign employers outside of the United States are not regulated by Title VII.<sup>53</sup> As such, the Court may have erred in its interpretation of the alien provision. Second, the Court has been criticized for not giving proper deference to the EEOC interpretation.<sup>54</sup> It has been argued that the Court used a standard of deference much narrower than the "reasonableness" standard which had been previously established.<sup>55</sup> While Justice Scalia did state that the reasonable standard was the appropriate standard in his separate opinion, he ultimately concluded that the EEOC interpretation was not reasonable and he therefore concurred in the judgment.<sup>56</sup>

Ironically, the Supreme Court has held that the alien exemption provision protects aliens employed within the United States from discrimination on the basis of race, color, religion, sex, or national origin,

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<sup>48</sup> EEOC v. Arabian American Oil Co., 111 S. Ct. at 1235.

<sup>49</sup> EEOC v. Arabian American Oil Co., 111 S. Ct. at 1236.

<sup>50</sup> Schulte, *supra* note 31, at 370.

<sup>51</sup> Schulte, *supra* note 31, at 371.

<sup>52</sup> Schulte, *supra* note 31, at 372.

<sup>53</sup> Schulte, *supra* note 31, at 372.

<sup>54</sup> Schulte, *supra* note 31, at 373.

<sup>55</sup> Schulte, *supra* note 31, at 373.

<sup>56</sup> EEOC v. Arabian American Oil Co., 111 S. Ct. 1227.

but not from discrimination based on citizenship.<sup>57</sup> Therefore, a non-American woman working in the United States is protected from discrimination based on sex, but may still be subject to discrimination based upon her non-citizenship. American women, however, are not even afforded this much protection when working for an American corporations overseas.

As a result of the Supreme Court's decision, American women face the dilemma of taking a foreign assignment and forfeiting the protections of Title VII or rejecting the foreign assignment and limiting their opportunities for advancement.<sup>58</sup> Even worse, it is now possible for an employer with a discriminatory motive to relocate an employee overseas for the sole purpose of firing that employee.<sup>59</sup>

The only hope for American women is that Congress will recognize the error that has been committed by the courts and amend or clarify Title VII in order to ensure that an American woman employed by an American corporation will not be left without legal recourse against discrimination simply because she is transferred to an overseas office.

### C. The European Community

In 1957, the Council of Organizations for European Economic Cooperation began negotiations for the establishment of a free trade area.<sup>60</sup> Negotiations led to the Treaty of Rome, which was originally signed by France, West Germany, Italy, Belgium, the Netherlands and Luxembourg.<sup>61</sup> In 1973, Ireland, Denmark and the United Kingdom obtained membership; Greece joined in 1979; and Spain and Portugal joined in 1986.<sup>62</sup> The Treaty of Rome established the European Economic Community (EEC) and set forth principles regarding the free flow of capital, people and goods among the Community's members.<sup>63</sup>

The Treaty of Rome established four principle European Community institutions.<sup>64</sup> The *Commission* is responsible for proposing and enforcing legislation; the *Council of Ministers*, composed of mem-

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<sup>57</sup> *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86 (1973).

<sup>58</sup> Michelle J. Ledina, *The Multinational Enterprise and Title VII: Equal Employment Opportunities for Americans at Home and Abroad*, 4 EMORY INT'L. L. REV. 373, 380 (1990).

<sup>59</sup> Schulte, *supra* note 31, at 375.

<sup>60</sup> *Employment Regulation in a United Europe: A Survey of Expectations in the European Community*, Bureau of National Affairs Daily Labor Report, June 22, 1990, Special Report S-1, S-18, [hereinafter Daily Labor Report].

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

bers from the 12 EC states, has the ultimate authority to implement EC law; the *European Parliament* reviews proposed legislation and acts as a public forum; and the *European Court of Justice* (ECJ) is the EC supreme court.<sup>65</sup>

Article 119 of the Treaty of Rome mandates equal pay for men and women for "equal work" and was included for economic reasons.<sup>66</sup> In 1957, only one Member State had implemented equal pay, and did not want unfair competition from other Member States in which cheaper female labor was used.<sup>67</sup> Further, articles 46, 52 and 60 of the Treaty require equal treatment of Community citizens with regard to the right of work, freedom of establishment, and freedom to provide services.<sup>68</sup> While such equal rights policies were originally economically based, the European Court of Justice has added a human rights dimension, and has characterized these rights as "fundamental."<sup>69</sup> Despite these provisions, however, the Treaty of Rome does *not* include provisions regarding access to employment.<sup>70</sup>

For this reason, in 1976, the Council of Ministers adopted Council Directive 76/207, the Equal Treatment Directive, in order to enhance the status of working women with regard to entry opportunities in the labor market.<sup>71</sup> The equal treatment directive applies to access to employment, promotions, vocational training, and working conditions.<sup>72</sup> It requires Member States to implement the principle of equal treatment, meaning that "there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status."<sup>73</sup> The directive further requires Member States to provide judicial remedies for the persons alleging an infringement of the equal treatment principle.<sup>74</sup>

As such, the directive mandates that all jobs at all levels of the occupational hierarchy be open to both women and men, and applies

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<sup>65</sup> *Id.*

<sup>66</sup> Roundtable, *supra* note 22, at 14-21.

<sup>67</sup> Roundtable, *supra* note 22, at 21.

<sup>68</sup> Roundtable, *supra* note 22, at 10.

<sup>69</sup> Roundtable, *supra* note 22, at 21.

<sup>70</sup> *See generally* Roundtable, *supra* note 22, at 14-21.

<sup>71</sup> George Argiros, *Sex Equality in the Labour Market and the Community Legal Order: An Attempt at an Appraisal*, 11 LIVERPOOL L. REV. 161, 164-65 (1989).

<sup>72</sup> Harvey, *Equal Treatment of Men and Women in the Work Place: The Implementation of the European Community's Equal Treatment Legislation in the Federal Republic of Germany*, 38 AM. J. COMP. L. 31, 37 (1990).

<sup>73</sup> *Id.* at 36.

<sup>74</sup> Argiros, *supra* note 71, at 165.

to subtle as well as overt forms of discrimination.<sup>75</sup> Subtle discrimination refers to gender neutral legislation or employer practices that have a discriminatory effect, as well as to discrimination by reference to marital or family status.<sup>76</sup> However, while the directive provides judicial recourse for women faced with discrimination, it does not provide any criterion regarding the appropriate sanctions and remedies when discrimination is found to have occurred.<sup>77</sup>

Further, the directive is limited by three exceptions which leave some room for inequality. Under these exceptions, Member States may distinguish between men and women if: (1) sex is a determining factor in ability to perform the work; or (2) the provision protects women; or (3) the provision promotes equal opportunity for men and women.<sup>78</sup> The first and second exceptions have been extensively used to uphold otherwise discriminatory legislation. For example, particularly in Germany, extensive legislation designed to protect women, usually during pregnancy, has been upheld under the second exception.<sup>79</sup> Thus, the second exception excludes women, regardless of their wishes, from activities which the Member State has determined are dangerous for women or their offspring.<sup>80</sup> Other exceptions to the directive have been implied. Case law has demonstrated that indirect discrimination, expressly prohibited by the Directive, may be justified if shown to be the consequence of some policy followed for other reasons which amount to a "real need" of the employer or a priority consideration of social policy for the State.<sup>81</sup> Because of the express exceptions and the broad language of the directive permitting implied exceptions, the equal treatment directive does not provide particularly clear guidance to the EC Member States.

Finally, the EC has the power to pass initiatives promoting equal employment opportunity for women. In July of 1990, the Commission adopted three initiatives to develop new qualifications and opportunities for employment in the Community from 1990 to 1993.<sup>82</sup> The second initiative, the NOW programme, was developed to "improve the

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<sup>75</sup> Harvey, *supra* note 72, at 37.

<sup>76</sup> Harvey, *supra* note 72, at 37.

<sup>77</sup> Argiros, *supra* note 71, at 165.

<sup>78</sup> Harvey, *supra* note 72, at 37.

<sup>79</sup> Harvey, *supra* note 72, at 50-53.

<sup>80</sup> Harvey, *supra* note 72, at 38.

<sup>81</sup> Roundtable, *supra* note 22, at 20.

<sup>82</sup> *Human Resources: 600 Million Ecus for Three New Community Initiatives*, EUROPEAN REP., July 21, 1990, § IV at 6.

level of equality between men and women in the domain of employment, training and professional education.”<sup>83</sup>

Women’s right to equal employment opportunity may be significantly expanded under a unified Europe. The European Community program to create a “single market” was scheduled for January of 1993.<sup>84</sup> As part of its single market program, the EC is standardizing “social policy” throughout its 12 member states.<sup>85</sup> Again, the justification is economic: standardized working conditions minimize the possibility that some countries will be able to attract industry merely because their pay and working conditions are below those of other countries.<sup>86</sup> This phenomenon has been referred to as “social dumping.”<sup>87</sup>

In 1989, the Commission issued a “Social Charter” along with an implementing document called the “Social Action Program” as an addition to the Single European Act, which, until that time, had addressed only trade matters.<sup>88</sup> The Social Action Program specifically outlines how the EC plans to implement worker rights.<sup>89</sup> The Social Charter guarantees twelve rights to all EC workers, the seventh right being the Right to Equal Treatment Between Men and Women.<sup>90</sup> The Charter seeks to outlaw sex discrimination in part by guaranteeing the “principle of equality” in “access to employment, remuneration, working conditions, social protection, education, vocational training, and career development.”<sup>91</sup> The Charter also states that measures should be developed enabling men and women to reconcile occupational and family obligations, and, in its third proposal, requires a minimum period for maternity leave.<sup>92</sup> It is the responsibility of Member States in accordance with national practices, notably through legislation, to guarantee the fundamental rights in the Charter.<sup>93</sup> United States employers operating in the EC would also be subject to these

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<sup>83</sup> *Id.*

<sup>84</sup> Daily Labor Report, *supra* note 60, at S-3.

<sup>85</sup> Donald C. Dowling, Jr., *Worker Rights in the Post-1992 European Communities: What “Social Europe” Means to United States-Based Multinational Employers*, 11 Nw. J. INT’L L. & Bus. 564 (Winter 1991).

<sup>86</sup> Daily Labor Report, *supra* note 60, at S-3.

<sup>87</sup> Daily Labor Report, *supra* note 60, at S-3.

<sup>88</sup> Dowling, *supra* note 85, at 582.

<sup>89</sup> Dowling, *supra* note 85, at 582.

<sup>90</sup> Dowling, *supra* note 85, at 604.

<sup>91</sup> *Community Charter of Fundamental Social Rights of Workers* (COM 89), 568 final (1990).

<sup>92</sup> *Id.*

<sup>93</sup> Dowling, *supra* note 85, at 604.

requirements and would need to ensure that their employment practices kept up with the EC's emerging regulations.<sup>94</sup>

However, the Social Action Program is not binding on the Member States and must be approved in the form of individual pieces of legislation by the Council of Ministers.<sup>95</sup> Much of the legislation has been argued heatedly and has met with much opposition, especially from the United Kingdom. Many feel that the competitive gains from a single market will be outweighed by the increased costs of employing EC workers, and of doing business in the EC.<sup>96</sup> However, the right to equal treatment should not radically affect those employers which already strive for sex-neutral hiring, pay, promotion, benefits and training programs.<sup>97</sup> The United Kingdom, in particular, has refused to agree to elements of the Social Action Program. Margaret Thatcher, and now John Major, have opposed much of the Social Action Program on the grounds that it will damage the competitiveness of British companies within the Community.<sup>98</sup>

The Treaty of European Union was signed at Maastricht in the Netherlands on February 7, 1992.<sup>99</sup> While the Social Action Program was not adopted by the Treaty, the Treaty implements the social policy of the Treaty of Rome with minor limitations.<sup>100</sup> The Treaty also strengthens the Community's capacity to ensure that its common policies are effectively and properly implemented.<sup>101</sup> Under the Treaty, if the Court of Justice finds that a Member State has failed to fulfill an obligation, the State is required to take the necessary measures to comply and the Court is allowed to impose sanctions in the form of a lump sum or penalty payment.<sup>102</sup>

Support for the Treaty was less than enthusiastic, however. In June 1992, Denmark rejected the Treaty, and France approved it by only a slim margin in September 1992.<sup>103</sup> Further, Britain opted out of certain aspects of the European social policy outlined in the Maas-

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<sup>94</sup> Dowling, *supra* note 85, at 605.

<sup>95</sup> Daily Labor Report, *supra* note 60, at S-3.

<sup>96</sup> Dowling, *supra* note 85, at 619.

<sup>97</sup> Dowling, *supra* note 85, at 616.

<sup>98</sup> Ivan Owen, *Major Promise Over EC Social Action Proposals; Prime Minister's Questions*, FIN. TIMES, Dec. 4, 1991, at 12.

<sup>99</sup> Peter Ludlow, *The Maastricht Treaty and the Future of Europe*, 15 WASH. Q. 119 (1992).

<sup>100</sup> Wolfgang Munchau, *The Auf Wiedersehen Pet Factor in Britain's Opt-out at Maastricht*, TIMES (London), March 13, 1992, at 25.

<sup>101</sup> Ludlow, *supra* note 99, at 126.

<sup>102</sup> Ludlow, *supra* note 99, at 127.

<sup>103</sup> Simon Alterman, *EC Union Plans Severely Wounded by French Vote*, REUTER LIBRARY REP., Sept. 21, 1992.

tricht Treaty, specifically, an agreement to extend the EC's powers in certain limited areas.<sup>104</sup> Further, although the Maastricht Treaty went into effect in November 1993 (despite the January 1993 deadline), Great Britain ratified the Treaty *excluding* its social policy. Thus, while a unified Europe could significantly enhance the right to equal employment opportunity, the limitations imposed upon the social aspects of the Treaty weakens the effect it might otherwise have had on equal employment opportunities for women.<sup>105</sup>

#### D. Japan

Primarily due to international pressure, the Japanese legislature passed the Equal Employment Opportunity Law (EEOL) in 1985, which calls for equality in job recruitment, training and promotion.<sup>106</sup> However, because Japan was not entirely ready for this step, the Japanese law takes a gradualistic approach, and enforcement is by non-coercive means.<sup>107</sup>

Image problems and international criticism were direct stimuli to the passage of the EEOL.<sup>108</sup> The United Nations claimed the years 1976 through 1985 as the Decade for Women, and in 1980, Japan signed the U.N. Convention on Elimination of All Forms of Discrimination Against Women.<sup>109</sup> Japan responded sluggishly, however, due to its discomfort with the idea that a change was necessary.<sup>110</sup> Upon signing the Convention, Japan was required to undertake "all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination."<sup>111</sup> With the passage of the EEOL in 1985, Japan was able to ratify the Convention, although some doubted that the EEOL was sufficient to fulfill its obligation as a ratifier.<sup>112</sup> Japan felt additional

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<sup>104</sup> Munchau, *supra* note 100.

<sup>105</sup> The Maastricht Treaty suffered many setbacks due to economic hardship and political strife such as that in Yugoslavia. While the Maastricht Treaty was eventually ratified, it is not likely to encompass a unified social policy in the near future. The Treaty has been modified in this area due to member states' fears of losing sovereignty to the "Brussels" bureaucracy. As such, the prospects for an immediate impact are much better for a unified currency rather than a unified social policy under the Maastricht Treaty. *See generally*, Goldstein, *Europe After Maastricht: A Premature Treaty*, Council on Foreign Relations, December 1992 at 117.

<sup>106</sup> Loraine Parkinson, *Japan's Equal Employment Opportunity Law: An Alternative Approach to Social Change*, 89 COL. L. REV. 604 (1989).

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 614.

<sup>109</sup> *Id.* at 616.

<sup>110</sup> *Id.* at 616.

<sup>111</sup> *Id.* at 616.

<sup>112</sup> *Id.* at 616.

pressure to pass the EEOL due to its economic dependence on other nations, both as a source of natural resources and as a market for the export of its manufactured goods.<sup>113</sup>

Domestic forces also played a part in speeding up the passage of equal opportunity legislation in Japan.<sup>114</sup> Domestic pressure was created as a result of Japan's rapid economic development and the large-scale entry of women into the labor market.<sup>115</sup> As women came to play a larger role in the Japanese workforce, work outside the home came to play a larger role in the lives of Japanese women.<sup>116</sup> However, this fact alone would have been insufficient to cause the passage of the EEOL because neither Japanese women nor Japanese men were entirely ready for the law.<sup>117</sup> Male-dominated business was not prepared to receive women as full equals partly due to the fact that Japanese employment customs require a total commitment to the firm, and the combination of family and career is incompatible with this custom.<sup>118</sup> Nor were women fully prepared to qualify for equal treatment, as the majority of women continued to see marriage and home as their central role in life, with career being secondary.<sup>119</sup> The Japanese judgment, therefore, was that a change of such great magnitude could best be achieved not through imposition of force, but through incremental change on a voluntary basis.<sup>120</sup>

As such, the EEOL was structured under the principles of voluntarism and gradualism.<sup>121</sup> The EEOL was officially entitled the Law to promote the Welfare of Female Workers by Providing for Equality of Opportunity and Treatment in Employment for Women.<sup>122</sup> It divides employment into five categories and establishes generalized standards for equality of treatment in each of them. The five areas of employment are: (1) recruitment and hiring; (2) job assignment and promotion; (3) education and training; (4) employee benefits; (5) mandatory retirement age, retirement and dismissal.<sup>123</sup>

In the areas of recruitment/hiring and job assignment/promotion, employers must "endeavor" to give equal opportunity and treat-

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<sup>113</sup> See generally Street, *supra* note 1, at 508.

<sup>114</sup> Parkinson, *supra* note 106, at 620.

<sup>115</sup> Parkinson, *supra* note 106, at 620.

<sup>116</sup> Parkinson, *supra* note 106, at 620.

<sup>117</sup> Parkinson, *supra* note 106, at 627.

<sup>118</sup> Parkinson, *supra* note 106, at 627.

<sup>119</sup> Parkinson, *supra* note 106, at 627.

<sup>120</sup> Parkinson, *supra* note 106, at 605.

<sup>121</sup> Parkinson, *supra* note 106, at 605.

<sup>122</sup> Parkinson, *supra* note 106, at 605.

<sup>123</sup> Parkinson, *supra* note 106, at 606.



ment.<sup>124</sup> Specific standards are set up in the form of "guidelines."<sup>125</sup> In the first area, the guidelines state that employers must not set up classifications in recruitment and hiring that eliminate women from consideration, use job names connoting maleness, or establish age ranges, marital status or residence with parents as preconditions to employment.<sup>126</sup> With regard to job assignment and promotion, employers must not eliminate female workers from consideration for assignment to a given post, or single out female workers for assignment to disadvantageous or undesirable positions.<sup>127</sup> Further, employers must not eliminate women from consideration for advancement to positions beyond a certain level because they are women, nor may employers set higher standards for women than for men.<sup>128</sup>

In the last three categories of education and training, employee benefits, and retirement and dismissal, employers are "prohibited" from discriminating against women on the basis of sex, and specific standards are set out in the form of Ministerial Ordinances, as opposed to the "guidelines" set out for the first two categories of employment.<sup>129</sup> In none of the five categories does the law provide for enforcement by a private right of action, however.<sup>130</sup>

There are three explanations for the Japanese legislature's refusal to provide a private right of action. The first is the fact that legal suit in Japan is not a favored means of dispute resolution and does not enjoy the full approval of society.<sup>131</sup> Secondly, legal suit is emotionally and financially burdensome.<sup>132</sup> Finally, Japan felt that because it was first necessary to create a social consensus that the change was necessary, a more gradualistic approach would better foster this consensus.<sup>133</sup>

The EEOL thus provides three other mechanisms to carry its provisions into effect. The first mechanism is a provision for the voluntary resolution by employers of complaints relating to equality of opportunity and treatment after hiring; the second provides for mediation or other assistance in dispute resolution by the Ministry of Labor (MOL) if voluntary efforts at resolution are ineffective; and the

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<sup>124</sup> Parkinson, *supra* note 106, at 606-607.

<sup>125</sup> Parkinson, *supra* note 106, at 607.

<sup>126</sup> Parkinson, *supra* note 106, at 610.

<sup>127</sup> Parkinson, *supra* note 106, at 611.

<sup>128</sup> Parkinson, *supra* note 106, at 611.

<sup>129</sup> Parkinson, *supra* note 106, at 607.

<sup>130</sup> Parkinson, *supra* note 106, at 607.

<sup>131</sup> Parkinson, *supra* note 106, at 637.

<sup>132</sup> Parkinson, *supra* note 106, at 637.

<sup>133</sup> Parkinson, *supra* note 106, at 628.

third mechanism involves investigations by, and advice, guidance and recommendations from, the Minister of Labor or the Director of the Prefectural Office of Women's Affairs to employers.<sup>134</sup> All three of these mechanisms use a non-coercive means to enforce, and there are no sanctions for recalcitrant employers.<sup>135</sup>

Progress has been very slow under the EEOL, partly due to lack of enforcement and partly due to the fact that women are not yet demanding equal employment opportunity.<sup>136</sup> Many women are satisfied with the status quo, perhaps because there are certain prerogatives and privileges associated with a dependent, subordinate status.<sup>137</sup> Women may fear that they could end up losing more than they could gain by enforcing the EEOL, family being one such loss.<sup>138</sup> However, some changes have resulted since the enactment of the EEOL. First, help wanted ads have changed by eliminating gender specification.<sup>139</sup> Also, female university graduates, previously excluded from the workplace, have been given increased opportunity.<sup>140</sup> Further, starting salaries have equalized and companies have revised some of their rules of employment.<sup>141</sup> Lastly, a two-track employment structure has been developed for women.<sup>142</sup> Women are now given the choice of the "standard track" in which they continue in the traditional role as assistants with no opportunities for promotion and the expectation of retirement at a marriageable age, or the "management trainee" track in which they are subject to the same requirements as men regarding extensive overtime work, transfers, and total commitment to the firm.<sup>143</sup>

On the other hand, there are still some significant problems with the EEOL. First, progress has only been made on entry level employment.<sup>144</sup> Also, it is unclear whether changes at the recruitment stage will actually result in an increase in the number of female employees.<sup>145</sup> Thirdly, only a tiny percentage of women actually enter the management trainee track, partly because employers have painted an

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<sup>134</sup> Parkinson, *supra* note 106, at 639.

<sup>135</sup> Parkinson, *supra* note 106, at 639.

<sup>136</sup> Parkinson, *supra* note 106, at 649.

<sup>137</sup> Parkinson, *supra* note 106, at 633.

<sup>138</sup> Parkinson, *supra* note 106, at 633.

<sup>139</sup> Parkinson, *supra* note 106, at 645.

<sup>140</sup> Parkinson, *supra* note 106, at 645.

<sup>141</sup> Parkinson, *supra* note 106, at 647.

<sup>142</sup> Parkinson, *supra* note 106, at 646.

<sup>143</sup> Parkinson, *supra* note 106, at 647.

<sup>144</sup> Parkinson, *supra* note 106, at 649.

<sup>145</sup> Parkinson, *supra* note 106, at 649-50.

overly harsh picture of the demands that will be made.<sup>146</sup> Again, the most significant problem with the EEOL, however, is the fact that it does not punish violators.

## II. EQUALITY IN LAW VERSUS EQUALITY IN FACT: THE PROBLEM OF ENFORCEMENT.

Despite the worldwide policy of providing equal employment opportunity for women, enforcement of this right remains a very real problem, and women have little recourse when faced with discriminatory practices. Forcing an employer to provide equal employment opportunity often requires use of the courts. Litigation is extremely burdensome and usually requires blatant discrimination before a woman is willing to take on a company, or, even more formidable, her entire country.

### A. The United Nations

The United Nations' Human Rights Treaties apply only to member nations, and there are no sanctions for a nation's failure to implement legislation.<sup>147</sup> Further, even though many states have ratified the Women's Convention and are thereby required under Article 24 to adopt all necessary measures aimed at achieving the full realization of the rights recognized in the Convention, many have ratified the treaty with substantial reservations.<sup>148</sup> Article 28(2) allows states to ratify the Treaty if their reservations are not incompatible with the object and purpose of the Convention.<sup>149</sup> However, such reservations tend to compromise the integrity of the Convention's principles.<sup>150</sup>

Although Article 24 of the Convention does not require member states to provide for a private right of action for women, states are required to provide sanctions for discriminatory practices.<sup>151</sup> Further, article 17 establishes a monitoring body called the Committee on the Elimination of Discrimination Against Women (CEDAW), whose task is to continually observe states parties' behavior and performance.<sup>152</sup> Members of CEDAW have closely questioned states regarding their reservations to the treaty, and have encouraged them to review and

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<sup>146</sup> Parkinson, *supra* note 106, at 650.

<sup>147</sup> See Cook, *supra* note 16.

<sup>148</sup> See Cook, *supra* note 16.

<sup>149</sup> See Cook, *supra* note 16, at 644.

<sup>150</sup> See Cook, *supra* note 16, at 644.

<sup>151</sup> See Cook, *supra* note 16, at 647.

<sup>152</sup> See Cook, *supra* note 16, at 647.

amend their laws and policies in compliance with the Convention in order to facilitate withdrawal of reservations.<sup>153</sup>

Private individuals may complain to a Human Rights Committee only if their nation has accepted the Optional Protocol under the Political Covenant.<sup>154</sup> Thus, only where provisions of the Women's Convention coincide with those of the Political Covenant, may issues related to their enforcement be adjudicated by the Human Rights Committee.

When member nations have a dispute, they may request adjudication by the International Court of Justice.<sup>155</sup> The International Court of Justice (ICJ) has also held that the General Assembly is competent to both request the Court's opinion and enforce that opinion.<sup>156</sup> This is important as follows: first, the CEDAW monitors observance and implementation of the Women's Convention; the CEDAW then reports its findings to a body called the ECOSOC; the ECOSOC acts subject to the General Assembly.<sup>157</sup> Thus, the General Assembly may request and then enforce an ICJ opinion regarding principles articulated in the Women's Convention. This may seem, and is, a complicated process and therefore not very effective in implementing Convention principles. Thus, use of the United Nations' Convention as a source for asserting the right to equal employment opportunity is unrealistic and unlikely to effect much change.

## B. The United States

It seems ironic that in a country thought to have led the Civil Rights movement, there is no remedy for a citizen faced with discriminatory practices overseas. Because the right to equal employment opportunity has been widely recognized, however, the practical effect may not be as harsh as it seems. For example, American corporations operating in Europe are subject to the European labor laws. It is therefore unlikely that a corporation that is required to give equal treatment to its European employees will refuse such treatment to its American employees.

Conversely, in countries which have not yet adopted appropriate measures to eliminate discrimination against women, Americans have no recourse. For example, Japan still has a long way to go in enforcing

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<sup>153</sup> See Cook, *supra* note 16, at 708.

<sup>154</sup> See Cook, *supra* note 16, at 709.

<sup>155</sup> See Cook, *supra* note 16, at 709.

<sup>156</sup> See Cook, *supra* note 16, at 711.

<sup>157</sup> See Cook, *supra* note 16, at 711.

non-discrimination legislation. Companies that can get away with discriminating against Japanese citizens will have no reason to treat American citizens any differently.

The only true way for American women to be assured of their right to work free of discrimination is an amendment by Congress to apply Title VII of the Civil Rights Code extraterritorially. Congress has taken this step before with the Age in Discrimination in Employment Act (ADEA).<sup>158</sup> Because of the inequities of denying the age discrimination rights to U.S. citizens abroad, Congress responded by amending the ADEA in 1984 to make it applicable to U.S. citizens employed abroad by American companies.<sup>159</sup> An analogous argument may be made both for and against applying Title VII extraterritorially. On the one hand, since gender discrimination has received more protection as a "suspect classification" than age discrimination within the United States, it only makes sense that Congress also amend Title VII to apply extraterritorially. On the other hand, since Congress has not yet amended Title VII, it may be stating its intention to apply the Act within the United States only. However, Congress' inaction may be due to lack of proof of inequities overseas, or to lack of awareness by Congress of this extraterritorial anomaly.

### C. The European Community

The European Community enforces its policies mainly through the European Court of Justice (ECJ).<sup>160</sup> The ECJ interprets and applies the law of the EEC Treaties when disputes arise, acting to eliminate differences that exist between EC laws and the national laws of member states.<sup>161</sup> The ECJ has the authority to interpret EC law and apply it to specific cases.<sup>162</sup> National courts may also call upon the ECJ to interpret Community law.<sup>163</sup> Once the ECJ has issued a judgment, courts in member states must then assure that the judgment is properly carried out, there are no avenues for appeal from ECJ decisions.<sup>164</sup> However, because this obligation is not backed up by any specific legal, as opposed to political, sanctions, enforcement is not always assured.<sup>165</sup>

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<sup>158</sup> Street, *supra* note 1, at 500 n.9.

<sup>159</sup> Street, *supra* note 1, at 500 n.9.

<sup>160</sup> Hemphill, *European Court of Justice: 1990 Cases*, 4 TRANSNAT'L. LAW 123, 124-25 (1991).

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 125.

<sup>163</sup> *Id.* at 125.

<sup>164</sup> *Id.* at 125.

<sup>165</sup> Roundtable, *supra* note 22, at 24.

Cases brought to the ECJ fall into two categories. The first category consists of actions against member states.<sup>166</sup> The ECJ has exclusive jurisdiction over allegations that a member state has failed to fulfill its obligations under the EC.<sup>167</sup> The second category of cases brought before the ECJ consist of actions against Community institutions.<sup>168</sup>

ECJ decisions have the effect of superseding national law.<sup>169</sup> Moreover, Community provisions that have a "direct effect" before national courts must be applied over any contradictory national rule.<sup>170</sup> Individuals may *not*, however, rely on provisions of directives as against other individuals.<sup>171</sup> This means that a woman cannot invoke Community provisions against a private employer.

### *1. Enforcement of Community Directives*

The Community Directives on sex discrimination have been enforced in two ways. First, the European Commission, responsible for proposing and enforcing legislation, may take proceedings before the ECJ against a member state which has failed to bring its law in line with Community law.<sup>172</sup> If the action is successful, the Court issues a judgment in the form of a declaration that the member state has failed to comply with its obligations.<sup>173</sup> This declaration is binding on the member state to put an end to the infringement.<sup>174</sup> Again, however, the sanction is purely "international," not legal, and only remedies matters for the future.<sup>175</sup> Thus, this is not a private remedy, and women subjected to discrimination prior to the decision do not recover as a result.

The second method of enforcement of Community directives allows individuals a private right of action.<sup>176</sup> Individuals may rely upon Community provisions before national courts if one of two conditions are met. First, an individual may rely upon a Community provision if the terms of the regulation impose an obligation upon public bodies,

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<sup>166</sup> Hemphill, *supra* note 160, at 125-26.

<sup>167</sup> Hemphill, *supra* note 160, at 125.

<sup>168</sup> Hemphill, *supra* note 160, at 125.

<sup>169</sup> Hemphill, *supra* note 160, at 126.

<sup>170</sup> Roundtable, *supra* note 22, at 21.

<sup>171</sup> Roundtable, *supra* note 22, at 24.

<sup>172</sup> Roundtable, *supra* note 22, at 24.

<sup>173</sup> Roundtable, *supra* note 22, at 24.

<sup>174</sup> Roundtable, *supra* note 22, at 24.

<sup>175</sup> Roundtable, *supra* note 22, at 24.

<sup>176</sup> Roundtable, *supra* note 22, at 24.

individuals, or both.<sup>177</sup> Second, if the provision is an article of the Treaty or of a directive which has been interpreted by the Court as having a direct effect and is "unconditional and sufficiently precise" so as to create an enforceable obligation, an individual may invoke the Community provision.<sup>178</sup> Such individual actions are effective against existing discrimination, without waiting for national law to be modified, if the alleged discriminator is one against whom the provision may be invoked.<sup>179</sup> However, the Community directives on sex discrimination may only be invoked against member states, not private employers. Thus, women may not rely on the Community provisions as against a private employer. Both methods of enforcement have been addressed by the ECJ.

## 2. *Specific ECJ Decisions*

The Court has allowed national courts wide discretion in interpreting their own social policies, and has resorted to strict construction of the equal treatment principle.<sup>180</sup> As a result, when issues are not explicitly addressed in the directives, the Court has been unwilling to apply and enforce them.<sup>181</sup>

In two 1984 cases, the ECJ addressed the issue of whether remedies provided by the Federal Republic of Germany for discrimination in hiring complied with the Equal Treatment Directive.<sup>182</sup> In the first case, *Van Colson v. Nordrhein-Westfalen*,<sup>183</sup> two women applied for positions as social workers at a prison.<sup>184</sup> Both had completed internships at the prison and sought full time positions, but were rejected because they were women.<sup>185</sup> In *Harz v. Deutsch*,<sup>186</sup> the plaintiff, Harz, applied for a management trainee position with a multinational firm and was also rejected on the basis of her sex.<sup>187</sup> The plaintiffs in both cases brought an action requesting that they be offered contracts of employment, or, in the alternative, damages for six months wages.<sup>188</sup> Their final plea was for damages under national law.<sup>189</sup>

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<sup>177</sup> Roundtable, *supra* note 22, at 24.

<sup>178</sup> Roundtable, *supra* note 22, at 24.

<sup>179</sup> Roundtable, *supra* note 22, at 24.

<sup>180</sup> Harvey, *supra* note 72, at 58.

<sup>181</sup> Harvey, *supra* note 72, at 58.

<sup>182</sup> Harvey, *supra* note 72, at 58-59.

<sup>183</sup> Case 14/83, *Von Colson v. Land Nordrhein-Westfalen*, E.C.R. 1891 (1984).

<sup>184</sup> *Id.* at 1893.

<sup>185</sup> *Id.* at 1893.

<sup>186</sup> Case 79/83, *Harz v. Deutsche Tradax, GmbH*, 1984 E.C.R. 1921, 2 C.M.L.R. 430 (1986).

<sup>187</sup> *Id.*

<sup>188</sup> Harvey, *supra* note 72, at 59.

The national courts in both cases held that the plaintiffs were entitled to recover only the costs of their application.<sup>190</sup> For Harz, this was just DM 2.31, the cost of the bus ride to the interview.<sup>191</sup> The national courts did, however, refer to the ECJ the question of whether the statutory remedy of cost of application implemented the equal treatment directive adequately.<sup>192</sup> The ECJ held that it did not.<sup>193</sup> The Court concluded that the equal treatment directive requires each member state to provide effective sanctions for violation of the directive.<sup>194</sup> The Court further held that the sanctions must fulfill two requirements: the sanctions (1) must be such so as to guarantee "real and effective judicial protection"; and (2) must also have a real deterrent effect on the employer.<sup>195</sup> The practical effect of this decision is that, while member states are required to provide sanctions for discriminatory practices, the victim of sex discrimination is entirely dependent upon her national law with respect to the award of compensation as well as to the choice of suitable remedies.<sup>196</sup> Further, member states are not required to impose a sanction upon an employer that would force the employer to enter into an employment contract with the victim.<sup>197</sup> National courts are thus given wide discretion in interpreting their own social policies.

The Court addressed enforcement of the equal treatment directive through an action by the European Commission, rather than by an individual, against a member state in *Commission v. Federal Republic of Germany (FRG)*.<sup>198</sup> In this case, the Commission maintained that FRG law regarding gender neutral advertising was inadequate because it did not provide a legal remedy for violations.<sup>199</sup> The ECJ, however, held that the failure to provide a remedy did not violate the equal treatment directive.<sup>200</sup> Although the Court agreed that advertising was closely connected with access to employment, it balanced this concern against the fact that the directive does not require member states to enact a specific provision regarding advertising

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<sup>189</sup> Harvey, *supra* note 72, at 59.

<sup>190</sup> Harvey, *supra* note 72, at 59.

<sup>191</sup> Harz v. Deutsche Traday GmbH, 1984 E.C.R. 1921.

<sup>192</sup> Harvey, *supra* note 72, at 59-60.

<sup>193</sup> Harvey, *supra* note 72, at 60.

<sup>194</sup> Harvey, *supra* note 72, at 60.

<sup>195</sup> Harvey, *supra* note 72, at 60.

<sup>196</sup> Argiros, *supra* note 71, at 166.

<sup>197</sup> Argiros, *supra* note 71, at 166.

<sup>198</sup> Case 248/83, Commission v. Federal Republic of Germany, 1985 E.C.R. 1459 (1984).

<sup>199</sup> *Id.* at 1487.

<sup>200</sup> *Id.* at 1488.



and thus concluded that the provision is not covered by the directive.<sup>201</sup> This decision clearly demonstrates the Court's unwillingness to extend the directive beyond what was originally intended by the Community.<sup>202</sup>

Another issue arose in *Commission v. FRG* regarding whether the Federal Republic of Germany was justified in exempting certain occupations from the principle of equal treatment.<sup>203</sup> The equal treatment provision requires member states to assess whether they are justified in maintaining existing exclusions from equal treatment.<sup>204</sup> The Commission complained that the FRG did not do this, nor did it provide the Commission with the list of exempted occupations as required.<sup>205</sup> In this regard, the ECJ held that the FRG was in derogation of its duties.<sup>206</sup> The Court then laid out a two-step process for assessing the continued validity of exclusions: member states first must regularly thoroughly review exclusions to determine if they are warranted, and, second, member states must forward these results to the Commission.<sup>207</sup> The Commission must then determine if the exceptions are in compliance with the directive.<sup>208</sup> In this regard, the ECJ decision expanded Community authority over member states by holding that exceptions to the principle should be minimized.<sup>209</sup>

Finally, the Court further narrowed the effect of the equal treatment directive in *Marshall v. Southampton and South-west Hampshire Area Health Authority*.<sup>210</sup> In this case, the Court rejected a "horizontal effect" of the equality directive, meaning that the binding nature of the directive existed only in relation to the member state; the directive could not be relied upon against a private employer.<sup>211</sup> An individual may, however, rely upon the directive against her member state, regardless of the capacity in which the state is acting, whether as an employer or a public authority.<sup>212</sup> This decision has been criticized for making an arbitrary and unfair distinction between state employees

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<sup>201</sup> *Id.* at 1488.

<sup>202</sup> Harvey, *supra* note 72, at 61.

<sup>203</sup> Harvey, *supra* note 72, at 62.

<sup>204</sup> Harvey, *supra* note 72, at 62.

<sup>205</sup> Harvey, *supra* note 72, at 62.

<sup>206</sup> Harvey, *supra* note 72, at 62.

<sup>207</sup> Harvey, *supra* note 72, at 62.

<sup>208</sup> Harvey, *supra* note 72, at 62.

<sup>209</sup> Harvey, *supra* note 72, at 62.

<sup>210</sup> *Marshall v. Southampton and Southwest Hampshire Area Health Authority*, 1986 E.C.R. 723, 736.

<sup>211</sup> Argiros, *supra* note 71, at 181.

<sup>212</sup> Argiros, *supra* note 71, at 181.

and private employees.<sup>213</sup> Under this decision, state employees may rely on the directive directly as against their employer, private employees, without an implementing measure created by national law, may not.<sup>214</sup>

Thus, while the ECJ provides a means for enforcement of the Community directive, significant problems remain. First, there are no specific sanctions for discriminatory practices in the directive itself, the plaintiff is at the mercy of national law for her remedy. Second, the Court has been unwilling to apply the directive to areas not explicitly addressed by the directive, which allows for different amounts of protection afforded in different member states.<sup>215</sup> Finally, women faced with discrimination may not bring an action against a private employer unless there is a national prohibition. If there is no national prohibition, a woman must take on her nation.

#### D. Japan

Japan's use of the principle of voluntarism in its Equal Employment Opportunity Law to eliminate discrimination against women provides little recourse for a woman faced with discriminatory practices. Further, because the EEOL does not provide either sanctions for noncompliance or a private right of action, enforcement of the right to equal employment opportunity is virtually impossible.

Possible recourse may be had under Japan's Civil Code article 90. This article has an all purpose provision stating that "a juridical act undertaken for any purpose contrary to the public order or good morals is null and void."<sup>216</sup> Article 90 was used as the legal basis for relief from sex discrimination in the areas of pay and retirement.<sup>217</sup> The EEOL may also have broadened the areas of discrimination covered by "public order or good morals" so as to cover the areas of recruitment, hiring, job assignment and promotion.<sup>218</sup> The problem, however, is determining what constitutes a juridical act.

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<sup>213</sup> Argiros, *supra* note 71, at 182.

<sup>214</sup> Harvey, *supra* note 72, at 182.

<sup>215</sup> These first two problems may be solved by the implementation of unified labor laws under a single European market. However, many Europeans are unwilling to entrust what has always been seen as national social policy to the technocrats that run the European Community from Brussels. In fact, objections to the Maastricht Treaty have been specifically based on this complaint.

<sup>216</sup> Parkinson, *supra* note 106, at 656.

<sup>217</sup> Parkinson, *supra* note 106, at 656.

<sup>218</sup> Parkinson, *supra* note 106, at 656.

Further, courts may recognize a private right of action when the social consensus in Japan recognizes an absolute right in women to be free from discrimination in employment. Still, the personal costs of litigation will probably remain too great for most Japanese women.

Presently, Japanese women may only request assistance in resolving disputes, or, through complaints, invoke one of the mediation mechanisms provided by the EEOL. The prospect of litigation as a remedy remains non-existent.

### III. ANALYSIS: OUTLOOK FOR WOMEN ASSERTING THE RIGHT TO EQUAL EMPLOYMENT OPPORTUNITIES

It has been demonstrated that enforcement of the right to equal employment opportunity is a formidable challenge. Litigation is the quickest and most effective means of bringing about change. However, because of the burden that litigation places on a woman, change will only be effected by the bravest or most severely discriminated against. As such, change is not likely to, and has not, occurred overnight. The implementation of legal remedies was a gradual process, and enforcement of such remedies will continue to be gradual.

#### A. The Use of Litigation

Litigation has provided the quickest means for bringing a discriminatory employer into compliance with the principle of equal opportunity. Sanctions are also an effective means of forcing compliance because of their deterrent effect. The enforcement of such sanctions almost always occurs through litigation, however, as demonstrated by the ECJ decisions. As such, the combination of litigation and sanctions is effective in bringing discriminatory employers into compliance when those employers see that sanctions are being enforced by the courts. Japanese law provides neither for litigation nor for sanctions. Therefore, it is impossible to study the effect of sanctions in the absence of litigation.

Litigation occurs both on the national and international level. Thus, in the United States and the EC countries, an individual may assert her rights against a private employer in the national courts. If the national law does not provide an adequate remedy, a European woman may challenge her national law in the ECJ. Because ECJ decisions are binding, national law must be modified to comply and change is thus effected. While this may not be adequate for the actual victim of discrimination, such action creates a national forum in which

women in the future can assert their right to equal employment opportunity.

Japan has chosen not to provide litigation as a remedy for women who have been discriminated against. As a result, change has occurred very slowly. While this may be appropriate in a country which is not entirely ready to treat women as equals, it certainly is not ideal for those women who are ready to assert their right to equal opportunity.

### B. Burdens of Litigation

Litigation can be extremely burdensome, however. Even in the United States, where the courts have been extensively used as a means for fighting discrimination, a woman has much to lose by filing a lawsuit. Lawsuits can be very expensive, and many women do not have the means to bring a successful action against a much wealthier and powerful employer. Further, while there is not the same cultural aversion to litigation as in Japan, an American woman faces the risk of being labeled as a troublemaker if she decides to use the courts to enforce her rights. This label may even prevent her from obtaining other employment. A woman may also lose the friendship of her co-workers when she decides to file suit. Finally, the emotional toll that a lawsuit takes on a woman is far from insignificant. A long, drawn out confrontation is inherently stressful. Due to crowded dockets, employer foot dragging, and long discovery periods for discrimination suits, a woman must bear an extremely extended period of stress and possible unemployment. It is no surprise then that many women, even in the United States, decide that an expensive, drawn out, and stressful law suit just is not worth the trouble.

Women in Europe face all of these same problems with respect to litigation. European women are additionally faced with challenging their country if national law does not offer adequate protection from discrimination. Not only is this prospect daunting, but the chances of a suit successfully reaching the ECJ are slight. Finally, because of the deference the ECJ affords national law and because of the Court's narrow construction of EC directives, a favorable opinion is unlikely.

Even if litigation were an available remedy to women in Japan, the social stigma attached to bringing a lawsuit would be unbearable for the majority of women. As such, little change would be effected through litigation in Japan.

C. Outlook for women asserting the right to equal employment opportunity

Women in Japan are in the weakest position to assert their right to equal employment opportunities. Unlike women in the United States and Europe, Japanese women do not seem ready to assert their right to equal employment opportunity. This is due in part to the cultural aversion to litigation. As such, there is no real forum for Japanese women to claim protection from discrimination, and because litigation creates the greatest impetus for change, it is not likely that Japanese women will gain the right to equal opportunity in the near future. Based on availability of remedies, European women are in the strongest position to assert their right to equal employment opportunity. First, the EC has mandated that all member states provide such a right. While much international law suffers from ineffectiveness, EC law has a strong effect both because it can be directly applicable to individual citizens and because it supersedes national law.<sup>219</sup> Second, European women may assert their rights both in national courts and the European Court of Justice. Moreover, European women are protected from discrimination based on sex when working for American corporations in the United States due to the alien exemption provision in Title VII of the Civil Rights Code. Finally, women in the EC may avoid a lawsuit altogether by filing a complaint with the Commission, who then takes action against the member state if it feels that the member state is not fulfilling its duties under the directive. Again, this does not provide an individual remedy, but it is a means of effecting change for the future.

Women in the EC may be in an even better position to claim the right to equal employment opportunity under the new, single European market. Under a unified Europe, all women in the EC should be protected to the same extent, in whatever member state they choose to work. This is similar to the protection American women are afforded in the United States. However, it is too soon to gauge the actual effect of the unified social policy contained in the Maastricht Treaty. The Social Charter and Social Action Program have enjoyed the least support, especially in Great Britain.<sup>220</sup> As unlikely as it is, if the Social Action Program were able to gain acceptance, the provision calling for the abolishment of sex discrimination requires that discriminatory employers be liable for damages.<sup>221</sup> Although the EC cur-

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<sup>219</sup> Roundtable, *supra* note 22, at 3.

<sup>220</sup> Dowling, *supra* note 85, at 614.

<sup>221</sup> Dowling, *supra* note 85, at 614.

rently requires that sanctions be imposed for discriminatory practices, such sanctions are uniform under the Social Action Program, and women are not forced to rely on national law for appropriate damages as in the past. While women in the EC have the most legal remedies available to them, however, the difficulty of enforcement makes equality in fact only a hope for the future.

American women have had a longer recognized right to equal employment opportunity within the United States, but lack the ability that EC women have of asserting that right abroad. Within the EC, American women may not be at too much of a disadvantage because corporations are required to offer equal employment opportunity and, based on ECJ decisions, must be sanctioned if they do not. Thus, there is no reason to think that corporations will treat its American employees any differently than its European employees with respect to discrimination. In less progressive countries, however, the outlook is dim for American women unless Congress amends Title VII as it amended the Age Discrimination in Employment Act.

The ADEA was amended within the reauthorization of the Older Americans Act in 1984.<sup>222</sup> The Act was amended by specifying that the term "employee" under the Act includes any individual who is a citizen of the United States employed by a United States employer in a workplace in a foreign country.<sup>223</sup> It further specified, however, that it is *not* unlawful for an employer to take any action prohibited by the Act when such practices involve an employee in a foreign workplace and where compliance with the ADEA would cause the employer to violate the laws of the country in which the workplace is located.<sup>224</sup> It would thus seem that the best way to address an amendment to Title VII is within a new Civil Right Rights Act. Although legislation has been introduced to amend Title VII, it would be even more effective to place such legislation in the same context as the ADEA amendment, as one part of a broader Act. The Amendment should be patterned after the 1984 ADEA amendment so as to accentuate the arbitrary application of protection for United States citizens. As such, a provision exempting employers operating in countries whose laws would be violated by the amendment must be included. This would meet the Supreme Court's concern of a conflict of laws problem, and would probably have little effect upon women's rights, since even a country like Japan has its own Equal Employment Opportunity Law.

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<sup>222</sup> S. Rep. No. 467, 98th Cong., 2d Sess. 4 (1984) *reprinted in* 1984 U.S.C.C.A.N. 2974, 3037.

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*