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Marshall II: Enhancing the Remedy Available to Individuals for Gender Discrimination in the EC

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Gina L. Ziccolella

Abstract

This Comment asserts that although the Court of Justice may not have employed well-defined judicial principles, Marshall II nevertheless harmonizes the application of the Equal Treatment Directive in Member State courts. Part I explores how directives are enacted by the Council and enforced by the Court of Justice. In addition, Part I discusses the Equal Treatment Directive, as well as Marshall I, the precursor to Marshall II. Part II sets forth the factual and procedural history of Marshall II and examines the opinion of the Court. Part III argues that the Court of Justice, in Marshall II, engaged in judicial activism to significantly increase the power of the Equal Treatment Directive. This Comment concludes that Marshall II promotes uniformity in the remedies that individuals receive for their Member States' violations of the Equal Treatment Directive.

COMMENT

MARSHALL II: ENHANCING THE REMEDY AVAILABLE TO INDIVIDUALS FOR GENDER DISCRIMINATION IN THE EC

*Gina L. Ziccolella**

INTRODUCTION

One of the founding tenets of the Treaty of Rome¹ ("EEC Treaty"), recently recodified in the Treaty Establishing the European Community² ("EC Treaty"), was the promotion of economic efficiency and strength within each Member State of the European Community³ ("Community" or "EC"). Part of this economic efficiency encompassed improving the standard of living and working conditions for individuals who lived within the EC Member States' boundaries.⁴ The improvement of living and working conditions included strengthening the economic inde-

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1. Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II) [hereinafter EEC Treaty], as amended by Single European Act, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741 [hereinafter SEA], in TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES (EC Off'l Pub. Off. 1987).

2. Treaty Establishing the European Community, Feb. 7, 1992, [1992] 1 C.M.L.R. 573 [hereinafter EC Treaty], incorporating changes made by Treaty on European Union, Feb. 7, 1992, O.J. C 224/1 (1992), [1992] 1 C.M.L.R. 719, 31 I.L.M. 247 [hereinafter TEU]. The TEU, *supra*, amended the EEC Treaty, *supra* note 1. The twelve current EC Member States are Belgium, Denmark, Germany, Greece, Spain, France, Ireland, Italy, Luxembourg, the Netherlands, Portugal, and the United Kingdom. *Id.* As of January 1, 1994, Austria, Finland, and Sweden will also become Member States. See Hugh Carnegie, *Sweden Gives Clear Yes to EU: Vote in Favour of Membership Keeps Enlargement Timetable on Course*, FIN. TIMES, Nov. 14, 1994, at 1 (discussing accession of new states). The enlarged Community will not include Norway, which rejected membership in the Community in November 1994. John Darton, *Vote in Norway Blocks Joining Europe's Union*, N.Y. TIMES, Nov. 29, 1994, at A1.

3. EEC Treaty, *supra* note 1, art. 2. Article 2 of the EEC Treaty stated:

It shall be the aim of the Community, by establishing a common market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increased stability, an accelerated raising of the standard of living and closer relations between its Member States.

Id. This article was amended in the EC Treaty to refer to an economic and monetary union. EC Treaty, *supra* note 2, art. 2.

4. See EEC Treaty, *supra* note 1, art. 117, which stated:

Member States agree upon the need to promote improved working condi-

pendence of women.⁵ Toward this end, Article 119 of the EC Treaty mandates equal pay for equal work.⁶

In the late 1960's, however, the Commission of the Euro-

tions and an improved standard of living for workers, so as to make possible their harmonization while the improvement is being maintained.

They believe that such a development will ensue not only from the functioning of the common market, which will favour the harmonization of social systems, but also from the procedures provided for in this Treaty and from the approximation of provisions laid down by law, regulation or administrative action.

Id.

5. *Id.* art. 119; see R. Mace Flournoy, *Gender Discrimination — European Economic Community — European Court of Justice Determines That a Non-Contributory Occupational Pension Scheme Should Not Discriminate on the Basis of Sex: Barber v. Royal Exchange Assurance Group*, 21 GA. J. INT'L & COMP. L. 257 (discussing view that equality between men and women in area of employment is founding principle of EEC Treaty); see also Cathryn L. Claussen, *Incorporating Women's Reality into Legal Neutrality in the European Community: The Sex Segregation of Labor and the Work-Family Nexus*, 22 LAW & POL'Y INT'L BUS. 787 (1991) (stating that "[o]riginally, the 1957 Treaty of Rome, with an eye toward preventing the exploitation of lower paid female labor by competing nations, mandated equal pay for women").

6. EC Treaty, *supra* note 2, art. 119; see Roger J. Goebel, *Employee Rights in the European Community: A Panorama From the 1974 Social Action Program To The Social Charter of 1989*, 17 HASTINGS INT'L & COMP. L. REV. 1 (1993). Professor Goebel characterizes Article 119 in the following manner:

Article 119 is surprising in several respects. First of all, it is a highly specific assertion of a social goal, as opposed to the much more general language of article 117. Secondly, it is one of the very few instances in the Treaty where a basic human right is expressly stated. Third, it represented a definite commitment to take action to achieve the goal by 1962, which was the end of the 'first stage' within which the Treaty was to be implemented. Finally, although article 119 is quite precise in setting out a broad definition of what constitutes pay, nonetheless it is narrow in limiting the goal of equality between the sexes to 'pay,' as opposed to work conditions generally. . . .

It is interesting to note that article 119 was requested by France, largely to ensure that its business enterprises, which were bound by the French Constitution to provide equal pay for women, should not be at a competitive disadvantage compared with firms in other Member States that did not require equality in pay. Thus, social directives adopted by article 119 have always been linked to the goal of achieving a level competitive playing field within the common market.

Id. at 29. While some of the drafters of the EEC Treaty believed that equal treatment would naturally occur as economic and social progress was made, other drafters believed that legislative measures would be necessary to fully achieve this goal. See EC Treaty, *supra* note 1, art. 117 ("Member States agree upon the need to promote improved working conditions and an improved standard of living for working conditions and an improved standard of living for workers, so as to make possible their harmonization while the improvement is being made."); see also *supra* note 3 (setting forth full text of Article 117); Goebel, *supra*, at 8 (stating that some Member States felt that economic progress in attaining common market would provide inevitable accompanying benefits to workers, so that specific social legislation would be "superfluous").

pean Communities⁷ (the "Commission") concluded that the EEC Treaty was inadequate to meet desired social policies without amplification through legislative measures.⁸ During the 1969 Hague Conference,⁹ the Commission recommended that the Community adopt a uniform social policy.¹⁰ In 1972, the Heads of State¹¹ of the EC Member States confirmed the Com-

7. See EC Treaty, *supra* note 2, art. 155. Article 155 delineates the Commission's role in the Community, stating:

In order to ensure the proper functioning and development of the common market, the Commission shall:

— ensure that the provisions of this Treaty and the measures taken by the institutions pursuant thereto are applied;

— formulate recommendations or deliver opinions on matters dealt with in the Treaty, where the latter expressly so provides or if the Commission considers it necessary;

— have its own power of decision and participate in shaping of the measures taken by the Council and by the European Parliament in the manner provided for in this Treaty;

— exercise the powers conferred on it by the Council for the implementation of the rules laid down by the latter.

Id.; see GEORGE A. BERMAN ET AL., *CASES AND MATERIAL ON EUROPEAN COMMUNITY LAW* (1993). The Commission performs tasks that are executive in nature. *Id.* at 57. The Commission formulates general legislative programs, initiates the legislative process by drafting specific pieces of legislation, and carries out the administrative duties it has been assigned, including ensuring compliance with the laws of the European Community. *Id.* at 58. One of the Commission's goals is to introduce proposals that will further the interest of the Community. *Id.*; see Utz. P Toepke, *The European Economic Community - A Profile*, 3 N.W. J. INT'L L. & BUS. 640, 646 (1981) (stating that Commission's primary task is to draw up proposals to further interests of Community).

8. Council Resolution of 21 January 1974, O.J. C 13/1, at 4, ¶ 8 (1974) (concerning Social Action Program); see LABOR, WORKING CONDITIONS, SOCIAL SECURITY, [1974] Common Mkt. Rep. (CCH) ¶ 3900, at 3153 (stating that social action program was adopted on January 21, 1974) [hereinafter WORKING CONDITIONS].

9. See WORKING CONDITIONS, *supra* note 8, ¶ 3901 (noting that Hague Conference was held to check status of Community).

10. Albert Coppe, *The Social Horizon for 1980*, 4 E.C. BULL., no. 1, at 11 (1971). Albert Coppe characterized the social action program by stating that

[t]he goal of social policy must be to promote optimal employment, to distribute more fairly the fruits of growth, to improve living and working conditions, to protect health and the environment, to ensure effective participation by all in both individual and in social progress

Id.; see WORKING CONDITIONS, *supra* note 8, ¶ 3901 (discussing Commission's findings that EEC Treaty was inadequate to achieve equal treatment of sexes without amplification through legislation); see also Margaret Foldes, *The Final Directive: Equal Social Security Benefits for Men and Women in the European Economic Community*, 12 B.C. INT'L & COMP. L. REV. 437, 439 (stating Commission found that harmonizing social policies required formal action).

11. See Goebel, *supra* note 6, at 7. Goebel explains the history of the role of the heads of government in the Community as follows:

Since 1969, when President Pompidou of France invited the other Mem-

mission's findings and proposed that the Community draft and implement a common social program.¹² In 1974, the Council Of Ministers (the "Council")¹³ adopted a Social Action Program,¹⁴ which had three main objectives:¹⁵ (1) full and better employ-

ber States' heads of government to meet to discuss major policy issues affecting the Community, these gatherings, initially called summit meetings and now referred to as meetings of the European Council, have assumed great importance in Community decision-making. . . .

[T]he 1972 Paris summit of the heads of government was one of the most significant meetings of this body in the history of the Community. Among the key decisions made at this summit meeting was the decision to initiate Community action in the sphere of social policy. The Commission in 1971 had urged a Community social action program to supplement current policies in the economic sphere.

Id.

12. COMMISSION OF THE EUROPEAN COMMUNITIES, SEVENTH GENERAL REPORT ON ACTIVITIES OF THE EUROPEAN COMMUNITIES 208 (1973); see Goebel, *supra* note 6, at 7 (stating that 1972 Paris summit meeting was one of most significant meetings in history of Community, where decision was made to initiate Community action in sphere of social policy).

13. See EC Treaty, *supra* note 2, art. 145. According to Article 145, the Council shall:

- ensure coordination of the general economic policies of the Member States;
- have power to take decisions;
- confer on the Commission, in the acts which the Council adopts, powers for the implementation of the rules which the Council lays down. The Council may impose certain requirements in respect of the exercise of these powers. The Council may also reserve the right, in specific cases, to exercise directly implementing powers itself. The procedures referred to above must be consonant with principles and rules to be laid down in advance by the Council, acting unanimously on a proposal from the Commission and after obtaining the Opinion of the European Parliament.

Id.; see BERMAN ET AL., *supra* note 7, at 58 (stating that Council's most prominent function has been coordinating Member State foreign policy).

14. Council Resolution of 21 January 1974, *supra* note 8, O.J. C 13/1 (1974). This resolution represented the first effort by the EC to promote various types of social action. Goebel, *supra* note 6, at 8 (stating that Social Action Program was designed to achieve social policies desired by Community).

15. Council Resolution of 21 January 1974, *supra* note 8, O.J. C 13/1 (1974). The Council Resolution concerning a social action program states that the Council [c]onsiders that vigorous action must be undertaken in successive stages with a view to realising the social aims of European union, in order to attain the following broad objectives: full and better employment at Community, national and regional levels, which is an essential condition for an effective social policy, improvement of living and working conditions so as to make possible their harmonisation while the improvement is being maintained; increased involvement of management and labour in the economic and social decisions of the Community, and of workers in the life of undertakings.

Id. at 1-2.

ment in the Community;¹⁶ (2) improved living and working conditions;¹⁷ and (3) greater industrial democracy and worker participation.¹⁸ The goals set forth in the second objective on improved living and working conditions included steps to establish equal treatment of the sexes in the area of employment.¹⁹

Pursuant to the Social Action Program, the Council passed several directives²⁰ to ensure that men and women were treated equally in the workplace.²¹ One such Council directive was the Equal Treatment Directive²² (or "Directive"), mandating equal working conditions and dismissal policies for men and women.²³

16. *Id.*; see WORKING CONDITIONS, *supra* note 8, ¶ 3900. The Social Action Program gives the national governments and the Community the responsibility of ensuring full employment through economic and financial policies. *Id.* ¶ 3901.03. These measures include cooperation between national employment services, a vocational training program, national schemes to ensure income maintenance during periods of retraining and job search, measures to ensure equality between men and women in employment, an action program for migrant workers, a long-term program for the social reintegration of handicapped people, and better supervision of activities of temporary work agencies. *Id.*

17. *Id.* ¶ 3900. Although the Commission is not seeking a uniform EC regime or the elimination of disparities resulting from different national priorities, needs, and values, it does want to establish minimum standards of social protection that can be improved on a regular basis. *Id.* ¶ 3901.05. Furthermore, there are certain underprivileged groups within the EC that must be given social priority. *Id.*

18. *Id.* The Social Action Program recognizes the need for greater participation of labor and management in the decision-making process at the Community level. *Id.* ¶ 3901.07. Importance is also attached to the issue of worker participation in industry. *Id.*

19. *Id.* ¶ 3900. Equal pay for men and women and uniform paid holidays were deemed to be particularly important to the development of EC social policy. *Id.* The Court of Justice has ruled that the principle of equal pay has been directly applicable in the Community since January 1, 1962 for the original Member States, and since January 1, 1973 for the new Member States. *Id.*

20. EC Treaty, *supra* note 2, art. 189. Directives are legislation passed by the Council or Commission. Toepke, *supra* note 7, at 645. In effect, directives are one of the tools that form the European Community's law. *Id.* Once a directive is adopted by the Community, each Member State must implement that directive. BERMANN ET AL., *supra* note 7, at 75. Directives are binding only as to the results to be achieved, and Member States are free to choose the form or methods necessary for achieving the desired results. *Id.*

21. See, e.g., Council Directive No. 75/117, O.J. L 45/19 (1975) (stating that Equal Pay Directive gives precise requirements necessary for Member States to achieve principles set forth in Article 119); Council Directive No. 79/7, 22 O.J. L 6/24 (1979) (requiring Member States to implement social security schemes that are non-discriminatory). The institutions of the Community implemented equality directives to clarify any ambiguities that had resulted from Article 119. Flournoy, *supra* note 5, at 260.

22. Council Directive No. 76/207, O.J. L 39/40 (1976) [hereinafter Equal Treatment Directive].

23. *Id.* art. 5, O.J. L 39/40, at 41 (1976). The Equal Treatment Directive states that

The Equal Treatment Directive provides that Member States shall set up a judicial process by which individuals who claim that they have been victims of gender discrimination may pursue their allegations against their employer in their Member States' national court systems.²⁴

In *Marshall v. Southampton and South West Hampshire Health Authority*²⁵ ("Marshall I"), the Court of Justice²⁶ (or "Court") firmly established the principle that the Equal Treatment Directive entitles an individual to sue his Member State when the Member State is acting in its capacity as an employer.²⁷ The case returned to the Court through a preliminary reference from the House of Lords in *Marshall v. Southampton and South West Hampshire Health Authority II*²⁸ ("Marshall II"). In *Marshall II*, the Court held that Article 6 of the Equal Treatment Directive mandates that when monetary damages are awarded for violations of the Equal Treatment Directive, that award must be equal to the actual damages suffered, as calculated by the individual's national court.²⁹ Specifically, in *Marshall II*, the Court held that an upper statutory limit on the damages available for violations of the Equal Treatment Directive contradicted Article 6 of the

"[a]pplication 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 the grounds of sex." *Id.*

24. *Id.* art. 6, O.J. 39/40, at 41 (1976). Article 6 of the Equal Treatment 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 to them the principle of equal treatment within the meaning of Articles 3, 4 and 5 to pursue their claims by judicial process, possibly after recourse to other competent authorities.

Id.

25. Case 152/84, [1986] E.C.R. 723, [1986] 1 C.M.L.R. 688 [hereinafter *Marshall I*].

26. See EC Treaty, *supra* note 2, art. 164. Article 164 entrusts the Court of Justice to ensure that in the interpretation and application of the Treaty the law is observed. *Id.*; see BERMANN ET AL., *supra* note 7, at 69. The Court of Justice entertains legal actions both against the institutions and against the Member States for their alleged nonobservance of Community law. *Id.*

27. *Id.*

28. Case 271/91, [1993] E.C.R. ___, [1993] 3 C.M.L.R. 293 (Eur. Ct. J.) [hereinafter *Marshall II*] (Some of the written observations submitted to the court in *Marshall II* were not republished in the C.M.L.R. Until the E.C.R. version is published, those unpublished portions are available on LEXIS, Eurcom Library, Cases File.); see EC Treaty, *supra* note 2, art. 177(b) (giving Court jurisdiction to issue preliminary rulings concerning interpretation of acts of EC institutions).

29. *Id.*

Equal Treatment Directive.³⁰

This Comment asserts that although the Court of Justice may not have employed well-defined judicial principles, *Marshall II* nevertheless harmonizes the application of the Equal Treatment Directive in Member State courts. Part I explores how directives are enacted by the Council and enforced by the Court of Justice. In addition, Part I discusses the Equal Treatment Directive, as well as *Marshall I*, the precursor to *Marshall II*. Part II sets forth the factual and procedural history of *Marshall II* and examines the opinion of the Court. Part III argues that the Court of Justice, in *Marshall II*, engaged in judicial activism to significantly increase the power of the Equal Treatment Directive. This Comment concludes that *Marshall II* promotes uniformity in the remedies that individuals receive for their Member States' violations of the Equal Treatment Directive.

I. EC LEGISLATION TO ACHIEVE EQUAL TREATMENT IN THE WORKPLACE

Directives are legislative enactments the objectives of which the Community deems important.³¹ Once passed, a directive requires the Member States to implement national legislation designed to achieve the social policy set forth by the directive.³² Generally, an individual may not rely on a directive as a basis for a claim.³³ Under certain circumstances, however, even if the Member State has not yet adopted national legislation or if the Member State has adopted the directive improperly, individuals may bring a claim against their Member State, in their national court system, to enforce the directive.³⁴ This principle is termed

30. *Id.* at 293.

31. EC Treaty, *supra* note 2, art. 189. Article 189, which sets forth the binding nature of directives, states:

In order to carry out their task and in accordance with the provisions of this Treaty, the European Parliament acting jointly with the Council, and the Council and the Commission shall make regulations, issue directives, take decisions, make recommendations or deliver opinions. . . .

A directive shall be binding, as to the result to be achieved, upon each [Member State] to which it is addressed, but shall leave to the national authorities the choice of form and methods.

Id.

32. *Id.*

33. See Toepke, *supra* note 7, at 651 (discussing under what circumstances natural or legal person may bring case to Court of Justice).

34. See *Van Gend & Loos v. Nederlandse Administratie der Belastingen*, Case 26/

vertical direct effect and was first articulated with respect to the Equal Treatment Directive in *Marshall I*.³⁵ *Marshall I* held that an individual may bring a claim in her national court system against the Member State when the Member State is acting in its capacity as an employer.³⁶ The determination of damages available for violations of the Equal Treatment Directive by the Member States prior to *Marshall II*, however, had been relegated to the individual Member States.³⁷

A. EC Directives: Formulating Uniform Policies in the EC

EC institutions enact directives to forward the social agenda desired by the Community.³⁸ Directives are interpreted and enforced in the Member States through the Court of Justice.³⁹ The Court of Justice often determines, by means of a preliminary ruling, whether a Member State has violated or failed to fully implement a directive.⁴⁰

62, [1963] E.C.R. 1, 13 [1963] C.M.L.R. 105, 130-31 (holding for first time that EEC Treaty was directly applicable in all Member States regardless of whether Member State implemented legislation designed to meet requirements set forth in EEC Treaty); see also *Becker v. Finanzamt Münster-Innenstadt*, Case 8/81, [1982] 1 E.C.R. 53, [1982] 1 C.M.L.R. 499 (discussing doctrine of vertical direct effect, which allows individual to rely on provision of directive in individual's national court system if Court of Justice determines that provision of directive is sufficiently precise and individual's claim is against Member State government, rather than private citizen).

35. *Marshall I*, Case 152/84, [1986] E.C.R. 723, [1986] 1 C.M.L.R. 688.

36. *Id.*

37. *Von Colson and Kamann v. Land Nordrhein-Westfalen*, Case 14/83, [1984] E.C.R. 1891, [1986] 2 C.M.L.R. 430 (holding that individual's Member State can decide level of damages to which individual is entitled for violations of Equal Treatment Directive).

38. See BERMANN ET AL., *supra* note 7, at 75. A directive is a more distinctive measure, defined as 'binding' only as to result but not as to 'the choice of form and methods.' In theory, a directive (which takes effect when communicated to the Member States) calls upon the Member States to take the legislative and/or administrative action needed to implement the directive's purposes. Although a directive does not have to be very detailed, in practice directives are often quite specific as to how they are to be implemented.

Id.; see Toepke, *supra* note 7, at 655 (describing binding nature of directives).

39. EC Treaty, *supra* note 2, art. 164 (establishing duties of Court of Justice).

40. See *id.* art. 177. Article 177 states in part:

The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

- (a) the interpretation of this Treaty;
- (b) the validity and interpretation of acts of the institutions of the Community and of the ECB;

Articles 100⁴¹ and 235⁴² of the EC Treaty provide the governing bodies of the Community with the authority to adopt directives.⁴³ Pursuant to Article 189,⁴⁴ once a directive is passed by the Council, each Member State must pass local legislation that accomplishes the directive's goals.⁴⁵ When the Council⁴⁶ adopts a directive, the Member States must enact legislation implementing the directive into its national law, within a certain time frame.⁴⁷ Member States, however, select the form and methods for attaining the goals set forth in the directive.⁴⁸ The directive merely provides the framework for the Member States to implement legislation.⁴⁹

(c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

Id.

41. *Id.* art. 100. Article 100 states:

The Council shall, acting unanimously on a proposal from the Commission, issue directives for the approximation of such provisions laid down by law, regulation or administrative action in Member States as directly affect the establishment or functioning of the common market.

Id.; see *id.* art. 100a (allowing Council to act by qualified majority on proposal from Commission pursuant to co-decision process).

42. *Id.* art. 235. Article 235 states:

If any action by the Community appears necessary to achieve, in the functioning of the Common Market, one of the aims of the Community in cases where this Treaty has not provided for the requisite powers of action, the Council, acting by means of a unanimous vote on a proposal of the Commission and after the Assembly has been consulted, shall enact the appropriate provisions.

Id.

43. *Id.*

44. *Id.* art. 189. Article 189 defines the types of legislation that the governing bodies of the Community may adopt, including the definition of directives. *Id.*

45. *Id.* Article 189 states that "[a] directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods." *Id.* art. 189.

46. See *supra* note 13 (explaining role of Council).

47. EC Treaty, *supra* note 2, art. 189; see Toepke, *supra* note 7, at 651 (discussing Council's ability to enact legislative measures, including directives).

48. *Id.*

49. EC Treaty, *supra* note 2, art. 189. Article 189 states that "[f]or the achievement of their aims and under the condition provided for in this Treaty, the Council and Commission shall adopt regulations and directives." *Id.*

1. Vertical Direct Effect

The ability of individuals or enterprises to challenge a Member State's national law implementing a directive as inadequate or the Member State's failure to adopt national law implementing a directive reflects another major doctrinal development of the Court of Justice known as the direct effect of directives.⁵⁰ Vertical direct effect allows provisions of Community law to become legally binding in each of the Member States' national legal systems, regardless of whether the Member State has formally incorporated the EC legislation into its national law.⁵¹ Thus, if a provision of a directive is deemed to have vertical direct effect, it is self-executing, and grants citizens of the Member States certain rights.⁵² As a result, the direct effect doctrine gives private parties the ability to enforce rights, granted under Community law, against Member States in their national court systems.⁵³

50. *Van Duyn v. Home Office*, Case 41/74, [1974] E.C.R. 1337, [1974] 1 C.M.L.R. 347; *see* *Becker v. Finanzamt Münster-Innenstadt*, Case 8/81, [1982] E.C.R. 53, [1982] 1 C.M.L.R. 499 (holding that regardless of whether Member State has implemented directive, individual may rely on that directive in national court system if claim is against Member State government and directive is clear, unconditional, and sufficiently precise).

51. *See Van Duyn*, [1974] E.C.R. at 1337, [1974] 1 C.M.L.R. at 347 (holding that directives are directly applicable to Member States regardless of whether Member States formally adopted legislation to implement directive or implemented directive improperly); *see also supra* note 50 (discussing Court's holding in *Becker v. Finanzamt Münster-Innenstadt*); BERMANN ET AL., *supra* note 7, at 181 (describing doctrine of vertical direct effect and impact in Community).

52. BERMANN ET AL., *supra* note 7, at 181 (noting that doctrine of vertical direct effect gives individuals rights they would not have possessed if not for EC legislation).

53. *Id.* One commentator characterizes the doctrine of direct effect as the following:

[A] Community law rule has direct effect if it creates rights for private parties, and not merely obligations for the Member States. The practical consequence is that private parties can then enforce these rights against the Member States in their national courts, the latter guided as necessary by the Court of Justice through preliminary rulings under Article 177. To say further that certain Community law provisions have horizontal direct effect . . . is to say that they create rights and obligations as between private parties and not merely against Member States. Once again the practical consequence is that national courts are bound to provide a suitable remedy for the enforcement of such private rights and obligations.

Id.

a. The Origin of the Doctrine of Vertical Direct Effect

The Court of Justice, in its landmark decision *Van Gend en Loos*,⁵⁴ set forth the principle of *l'effet utile*.⁵⁵ In *Van Gend en Loos*, the Court of Justice was asked to interpret an article of the EEC Treaty and was forced to decide whether the Court of Justice had jurisdiction to determine that a provision of the EEC Treaty should prevail over national legislation.⁵⁶ The Court of Justice

54. BERMANN ET AL., *supra* note 7, at 171 (stating that *Van Gend en Loos* remains one of Court's most forceful statements of its view on legal nature of Community).

55. *Van Gend en Loos*, [1963] E.C.R. at 1, [1963] 2 C.M.L.R. at 105; BERMANN ET AL., *supra* note 7, at 183. *L'effet utile* means "the useful effect." *Id.* The Court elaborated on the *l'effet utile* doctrine in *Van Duyn v. Home Office*, Case 41/74, [1974] E.C.R. 1337, [1974] C.M.L.R. 347, characterizing the doctrine as follows:

In particular, where the Community authorities have, by directive, imposed on Member States the obligation to pursue a particular course of conduct, the useful effect [*l'effet utile*] of such an act would be weakened if individuals were prevented from relying on it before their national courts and if the latter were prevented from taking it into consideration as an element of Community law. *Id.* at 1348, [1974] 13 C.M.L.R. at 351. *Van Gend en Loos* is often cited as an example of the Court of Justice's judicial activist philosophy. See, e.g., Mauro Cappelletti, *Is The European Court of Justice "Running Wild?"*, 12 EUR. L. REV. 3 (1987) (noting that in *Van Gend en Loos*, Court's activism created fundamental pillar of Court's subsequent case law); Detlev Vagts & Martin Shapiro, *On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policy Making*, 81 AM. J. INT'L L. 1007, 1009 (observing that in *Van Gend en Loos*, Court was "extremely judicially active in creating legal embodiments on the values of European integration, essentially filling in the gap left by the failure of other Community institutions [t]o move toward a greater integration"). Judicial activism is defined as a

philosophy which motivates judges to depart from strict adherence to judicial precedent in favor [of] progressive and new social policies which are not always consistent with the restraint expected of appellate judges. It is commonly marked by decisions calling for social engineering and occasionally these decisions represent intrusions into legislative and executive matters.

BLACK'S LAW DICTIONARY 760 (6th ed. 1990). As stated by one scholar, the thrust of the discussion concerning judicial activism

[d]eals with the protection/destruction issue in relation to the European Court's original and accumulated authority and legitimacy. . . . At stake in any powerful promotion of political integration by judicial decision is always the Court's unfettered ability to continue to promote precisely political integration. This is inevitably so because the European Court has to invent legal construction to the political problems under adjudication with which enforcement agencies on Community and national level will comply; and because non-compliance and defiance is likely to flow from a perception of the European Court as a usurper of political power.

Hjalte Rasmussen, *Between Self-Restraint and Activism: A Judicial Policy for the European Court*, 13 EUR. L. REV. 28 (1988); see Eugene C. Austin, *The European Court of Justice: Last Hope for 1992*, 1990 B.Y.U. L. REV. 1631, 1639 (arguing that "activism enables the Court to fill in the blanks and to apply the law in such a way that justice is satisfied").

56. *Van Gend En Loos*, [1963] E.C.R. at 1, [1963] 2 C.M.L.R. at 105.

held that the establishment of the EEC Treaty created a new legal order.⁵⁷ According to this new legal order, the Member States abdicated some of their sovereign rights by joining the Community and thus, community legislation must supersede national legislation.⁵⁸ For Community law to have vertical direct effect, however, its provisions must be clear and unconditional, and the individual's claim must be brought against the Member State. Otherwise, the Court of Justice will not permit the individual to proceed with the claim in the individual's Member State's national court system.⁵⁹ In *Van Duyn v. Home Office*, the Court of Justice expanded the doctrine of vertical direct effect to apply to directives.⁶⁰

In *Van Duyn*, the Court of Justice was asked to decide whether an individual could rely on a directive that the Member State had not yet implemented.⁶¹ The question arose because directives are not self-executing and the Member States are al-

57. *Id.* at 12, [1963] 2 C.M.L.R. at 139. In part, the decision states:

In addition the task assigned to the Court of Justice under Article 177, the object of which is to secure uniform interpretation of the Treaty by the national courts and tribunals, confirms that the states have acknowledged that Community law has an authority which can be invoked by their nationals before those courts and tribunals.

The conclusion to be drawn from this is that the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community.

Id.

58. *Id.*

59. *Id.* The Court of Justice said that Article 12 had direct effect — i.e., that an individual had the right to rely on that provision of the directive, because Article 12

contains a clear and unconditional prohibition which is not a positive but a negative obligation. This obligation, moreover, is not qualified by any reservation on the part of states which would make its implementation conditional upon a positive legislative measure enacted under national law. The very nature of this prohibition makes it ideally adapted to produce direct effects in the legal relationship between Member States and their subjects.

Id. at 13, [1963] 2 C.M.L.R. at 130.

60. Case 41/74, [1974] E.C.R. 1337, [1974] 1 C.M.L.R. 347.

61. *Id.*

lowed to choose the method for their implementation.⁶² The Court in *Van Duyn* held that a directive may have direct effect when that directive meets the test set forth in *Van Gend en Loos*.⁶³ Accordingly, a directive may have vertical direct effect when the provision of the directive on which the individual seeks to rely is sufficiently precise and the claim is against the individual's Member State government, and not against another private individual.⁶⁴

b. Action Must Be Against the Member State's Government

Vertical direct effect permits individuals to enforce the rights granted them by a directive⁶⁵ against a state or a state ac-

62. *Id.* The Court of Justice held that:

Article 189 of the Treaty distinguishes in fact between regulations, which are not only binding but also directly applicable in the Member States, and directives, which are also binding on the States but which have, in principle, no direct effect inasmuch as they leave to the States the choice of methods for their implementation.

Nevertheless, looking beyond formal legal categories, the Court declared . . . that, apart from regulations, other Community acts mentioned in Article 189 may have direct effect, particularly in cases where the Community authorities have imposed on Member States the obligation to adopt a particular course of conduct. The Court stated that the positive effect of these acts would be lessened if individuals were unable, in such a case, to enforce through the courts rights conferred on them by decisions of this nature, even though such decisions were not taken in the form of regulations.

Id. at 1355, [1974] 1 C.M.L.R. at 357.

63. *Id.* The Court of Justice stated that:

[A] directive, the purpose of which is to set a final date for the implementation by a Member State of a Community obligation, concerns not only the relations between the Commission and that State, but also entails legal consequences on which individuals may in particular rely whenever, by its very nature, the provision enacting that obligation is directly applicable.

When faced with a directive, it is therefore necessary to examine, in each case, whether the wording, nature and general scheme of the provisions in question are capable of producing direct effects between Member States to which the directive is addressed and their subjects.

Id. The period for implementation, however, must have expired before an individual is able to claim that the Member State violated the directive. *Pubblico Ministero v. Ratti*, Case 148/78, [1979] E.C.R. 1629, [1980] 1 C.M.L.R. 96. It is only at the end of the prescribed period that the directive is capable of having direct effect. *Id.* at 1637, [1980] C.M.L.R. at 108.

64. *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, Case 26/62, [1963] E.C.R. 1, [1963] 2 C.M.L.R. 105; *Van Duyn*, [1974] E.C.R. at 1352, [1974] 3 C.M.L.R. at 356.

65. See *Van Duyn*, [1974] E.C.R. at 1337, [1974] 1 C.M.L.R. at 347 (granting individuals right to challenge Member States' failure to implement directive). The Court's holding in *Van Duyn* was a logical progression of the Court's holding in *Van Gend en*

tor.⁶⁶ If the Member State has not created legislation to implement the directive within the prescribed period, or the Member State has not yet fully implemented the directive, under certain circumstances, individuals may seek to rely on the directive against their Member State's government.⁶⁷ For an individual to

Loos. Cappelletti, *supra* note 55, at 3. In *Van Gend en Loos*, the Court of Justice set forth the principle of *l'effet utile*. *Van Gend en Loos*, [1963] E.C.R. at 13, [1963] 2 C.M.L.R. at 109. *Van Gend en Loos* was a landmark decision in the legal nature of the Community. BERMANN ET AL., *supra* note 7, at 171. In *Van Gend en Loos*, the Court of Justice was asked to interpret an article of the EC Treaty within the context of EC law and whether the Court of Justice had jurisdiction to determine that EC law should prevail over national legislation. *Van Gend en Loos*, [1963] E.C.R., at 11, [1963] 2 C.M.L.R. at 114. Specifically, the Court of Justice stated:

The objective of the EEC Treaty, which is to establish a Common Market, the functioning of which is of direct concern to interested parties in the Community, implies that this Treaty is more than an agreement which merely creates mutual obligations between the contracting states. This view is confirmed by the preamble to the Treaty which refers not only to governments but to peoples. It is also confirmed more specifically by the establishment of institutions endowed with sovereign rights, the exercise of which affects Member States and also their citizens. Furthermore, it must be noted that the nationals of the states brought together in the Community are called upon to cooperate in the functioning of this Community through the intermediary of the European Parliament and the Economic and Social Committee.

In addition to the task assigned to the Court of Justice under Article 177, the object of which is to secure uniform interpretation of the Treaty by national courts and tribunals, confirms that the states have acknowledged that Community law has an authority which can be invoked by their nationals before those courts and tribunals.

The conclusion to be drawn from this is that the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of the Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon institutions of the Community.

Id. at 12, [1963] 2 C.M.L.R. at 129.

66. See *Marshall I*, Case 152/84, [1986] E.C.R. 723, 726, [1986] 1 C.M.L.R. 688, 689 (stating that individuals can bring claims if institution that has violated directive is organ of state).

67. See Derrick Wyatt, *The Direct Effect of Community Social Law-Not Forgetting Directives*, 8 EUR. L. REV. 241, 245 (1983) (describing Court's reasoning for giving directives vertical direct effect); see also *Van Duyn v. Home Office*, Case 41/74, [1974] E.C.R. 1337, [1974] 1 C.M.L.R. 347 (concerning binding nature of directives). In *Van Duyn*, the national court was confused over whether an individual could rely on a directive that the Member State had not yet adopted. *Id.* This confusion was due to the fact that directives are not self-implementing and that Member States are given the choice of

rely on a directive, however, the individual's complaint must be against the Member State.⁶⁸

The requirement that the individual's claim must be against the Member State is premised on the Court of Justice's holding in *Van Duyn* as well as *Becker v. Finanzamt Muenster-Innenstadt*.⁶⁹ In *Becker v. Finanzamt Muenster-Innenstadt*,⁷⁰ the Court of Justice held that when an individual is claiming that the Member State has violated an EC directive, that individual has the right to rely on the directive in the Member State's national court system.⁷¹ The Court of Justice, in *Becker*, stated that directives are enforceable against a Member State government because it would be incongruous not to allow individuals to consider a directive national law.⁷² According to the Court of Justice, any other deci-

methods for implementing directives. *Id.* In *Van Duyn*, the Court of Justice resolved this confusion with the following answer:

[A] directive, the purpose of which is to set a final date for the implementation by a Member State of a Community obligation, concerns not only the relations between the Commission and that State, but also entails legal consequences on which individuals may in particular rely whenever, by its very nature, the provision . . . is directly applicable.

When faced with a directive, it is therefore necessary to examine, in each case, whether the wording, nature and general scheme of the provisions in question are capable of producing direct effects between the Member States to which the directive is addressed and their subjects.

Id. at 1355, [1974] 1 C.M.L.R. at 349.

68. See *Becker v. Finanzamt Münster-Innenstadt*, Case 8/81, [1982] E.C.R. 53, [1982] 1 C.M.L.R. 499.

69. *Id.*

70. *Id.* In *Becker*, the Federal Republic of Germany failed to implement Directive 77/388/EEC within the prescribed period. *Id.* at 59, [1982] 1 C.M.L.R. at 504. *Becker* initiated this claim and argued that he was entitled to rely on the Directive even though the Federal Republic of Germany had not yet implemented the Directive. *Id.* at 56, [1982] 1 C.M.L.R. at 501. The Federal Republic of Germany maintained that *Becker's* claim should be adjudicated under national law until the Directive's implementation. *Id.* at 59, [1982] 1 C.M.L.R. at 504.

71. *Id.*

72. *Id.* Precisely, the Court of Justice stated:

It would be incompatible with the binding effect which Article 189 ascribes to directives to exclude in principle the possibility of the obligations imposed by them being relied on by persons concerned. Particularly in cases in which the community authorities have, by means of a directive, placed member states under a duty to adopt a certain course of action, the effectiveness of such a measure would be diminished if persons were prevented from . . . taking it into consideration as an element of community law.

Id. at 70, [1982] 1 C.M.L.R. at 512; see *Van Duyn*, [1974] E.C.R. at 1337, [1974] 1 C.M.L.R. at 347 (discussing direct effect of directives, also referred to as *l'effet utile doctrine*). *Van Duyn* was the precursor to *Becker* and employed the same reasoning in hold-

sion would diminish the directive's effectiveness and would deprive the Member State of any incentive for implementing directives of which they disapproved.⁷³

A private actor, however, does not have a duty to conform to a directive that the Member State has not yet incorporated into its national law, and therefore, a private individual may not sue another private individual for the violation of this directive.⁷⁴ Article 189 does not give the Council the authority to enact a directive that is binding on one individual as against another individual.⁷⁵ Once the Member State adopts the directive into its national law, however, an individual may bring a claim against another individual, in the national court system, for failure to adhere to the adopted legislation.⁷⁶ Thus, the individual relies on the Member State's national law that was enacted to imple-

ing the Member State liable for the failure to fully implement the directive. *BERMANN ET AL.*, *supra* note 7, at 183.

73. *Becker*, [1982] E.C.R. at 53, [1982] 1 C.M.L.R. at 499. The Court of Justice, in *Becker*, articulated this by stating that

[w]herever the provisions of a directive appear, as far as their subject matter is concerned, to be unconditional and sufficiently precise, those provisions may in the absence of implementing measures adopted within the prescribed period, be relied upon as against any national provision which is incompatible with the directive or in so far as the provisions define rights which individuals are able to assert against the State.

Id. at 71, [1982] 1 C.M.L.R. at 512; *see* *Marshall I*, Case 152/84, [1986] E.C.R. 723, [1986] 1 C.M.L.R. 688. In *Marshall I*, the Court of Justice held that

[w]here a person involved in legal proceedings is able to rely on a directive as against the State he may do so regardless of the capacity in which the latter is acting, whether employer or public authority. In either case it is necessary to prevent the State from taking advantage of its own failure to comply with Community law.

Id. at 725, [1986] 1 C.M.L.R. at 702.

74. *See* EC Treaty, *supra* note 2, art. 189.

75. *See id.* (setting forth the types of legislation that Council may use); *see also Marshall I*, [1986] E.C.R. at 723, [1986] 1 C.M.L.R. at 688. In *Marshall I*, the Court of Justice held that:

With regard to the argument that a directive may not be relied upon against an individual, it must be emphasized 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 itself impose obligations on an individual and that a provision of a directive may not be relied upon as such against such a person. It must therefore be examined whether, in this case, the respondent must be regarded as having acted as an individual.

Id. at 727, [1986] C.M.L.R. at 702.

76. *See Marshall I*, [1986] E.C.R. at 749, [1986] 1 C.M.L.R. at 711 (holding that

ment the EC directive.⁷⁷

c. Provisions of a Directive Must Be Sufficiently Precise

For an individual to rely on a directive in an action against a Member State, the Court of Justice must also determine that the directive is "clear, unconditional and non-discretionary."⁷⁸ The Court of Justice decides this on a case-by-case analysis.⁷⁹ If the Court of Justice determines that the directive is sufficiently clear, the Member State is presumed to have been fully aware of the directive's requirements.⁸⁰ Where the Court finds that a directive is precise, the Member State will not be excused by the Court for the Member State's failure to fully or adequately implement the directive.⁸¹

If the Court of Justice holds that one provision of a directive is sufficiently clear, but other provisions in the same directive suffer from ambiguity, the entire directive cannot meet the test for vertical direct effect.⁸² Nonetheless, if the Court of Justice finds that a specific provision in the directive on which the individual seeks to rely is sufficiently precise, the individual can still bring a claim, relying on that specific provision of the directive.⁸³ Thus, the Court has frequently found that only one article of 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").

77. *Id.*

78. *See* Van Duyn v. Home Office, Case 41/74, [1974] E.C.R. 1337, [1974] 1 C.M.L.R. 347. The Court of Justice stated that "[t]hese provisions impose on Member States a precise obligation which does not require the adoption of any further measure on the part either of the Community institutions or of the Member States and which leaves them, in relation to its implementation, no discretionary power." *Id.* at 1347, [1974] 1 C.M.L.R. at 352.

79. *Id.*

80. *See, e.g.,* *Marshall I*, [1986] E.C.R. at 723, [1986] 1 C.M.L.R. at 688 (holding that Article 5(1) of Equal Treatment Directive was sufficiently precise and therefore United Kingdom could not claim that it was unaware that its national legislation regarding dismissal policies violated Equal Treatment Directive).

81. *See id.* (arguing that Member State was not fully aware of directives requirements will not be accepted by Court); *see also* Becker v. Finanzamt Münster-Innestadt, Case 8/81, [1982] E.C.R. 53, [1982] 1 C.M.L.R. 499 (holding that Germany's failure to implement directive correctly made it liable, regardless of whether Germany, at the time of implementation, believed it had done so properly).

82. *See* Von Colson and Kamann v. Land Nordrhein-Westfalen, Case 14/83, [1984] E.C.R. 1891, [1986] 2 C.M.L.R. 430 (holding that German law applied concerning damages for violations of Equal Treatment Directive).

83. *See, e.g.,* *Marshall I*, [1986] E.C.R. 723, [1986] 1 C.M.L.R. 688; Foster v. British Gas, Plc., Case 188/89, [1990] 7 E.C.R. 3313, [1990] 2 C.M.L.R. 833 (allowing female

directive has vertical direct effect, but the entire directive does not.⁸⁴

B. *The Equal Treatment Directive*

Article 119 of the EC Treaty requires equal pay for equal work for the sexes.⁸⁵ The Court of Justice, however, has not construed Article 119 so broadly as to require equal treatment between men and women in general working conditions.⁸⁶ The governing bodies of the Community, therefore, felt it was necessary to take legislative action to achieve this goal.⁸⁷

The Equal Treatment Directive (or "Directive") ensures that male and female employees are treated equally in the Member States' workforces.⁸⁸ By adopting the Equal Treatment Directive, the Community attempted to create equal working conditions.⁸⁹ The Court's jurisprudence has also been required to properly apply the principles of the Directive. Notwithstanding proper implementation by the Member States, the Equal Treatment Directive lacks a specific provision regarding the damages an individual is entitled to receive in the event that his Member State has violated an Equal Treatment Directive provision having vertical direct effect.⁹⁰

employee to bring claim against statutorily created monopoly, which Court of Justice deemed emanation of State, allowing employee to rely on Equal Treatment Directive).

84. See, e.g., *Marshall I*, [1986] E.C.R. at 723, [1986] 1 C.M.L.R. at 688. In *Marshall I*, the Court of Justice interpreted Articles 1, 2, and 5 of the Equal Treatment Directive and determined that, although Article 2 did not have vertical direct effect, this did not mean that Article 5 could not be given direct effect. *Id.* at 751, [1986] 1 C.M.L.R. at 713.

85. EC Treaty, *supra* note 2, art. 119; see *supra* notes 14-19 and accompanying text (discussing Social Action Program adopted by Council); see also Council Resolution of 21 January 1974, *supra* note 8, O.J. C 13/1 (1974) (discussing rationale for Social Action Program).

86. See *Defrenne v. Société Anonyme Belge de Navigation Aérienne Sabena*, Case 149/77, [1978] E.C.R. 1365, [1978] 3 C.M.L.R. 312 [hereinafter *Defrenne III*]. In *Defrenne III*, Ms. Defrenne challenged her employer's involuntary retirement policy, which required female flight attendants to retire at the age of 40 while men could continue working past the age of 40. *Id.* at 1366, [1978] 3 C.M.L.R. at 314. The Court of Justice held that Article 119 did not prohibit discriminatory working conditions. *Id.*

87. See *supra* note 10 and accompanying text (discussing need for common social program).

88. See Equal Treatment Directive, *supra* note 22, art. 1(1), O.J. L 39/40, at 41 (1976).

89. Equal Treatment Directive, *supra* note 22, art. 5(1), O.J. L 39/40, at 41 (1976).

90. See *Von Colson and Kamann v. Land Nordrhein-Westfalen*, Case 14/83, [1984] E.C.R. 1891, [1986] 2 C.M.L.R. 430.

1. The Equal Treatment Directive Generally

Because the Council had some doubts that equal treatment in working conditions could be considered as an appropriate scope for harmonization under Article 100, the Equal Treatment Directive is one of the rare directives adopted by the Council using the implied powers of Article 235.⁹¹ Passed to eradicate sexual discrimination in the workplace,⁹² the Equal Treatment Directive attempts to achieve equal access to employment, promotion, vocational training, working conditions, and some aspects of social security, as well as equal application of dismissal policies.⁹³ The Directive prohibits both direct and indirect discrimination⁹⁴ due to marital or family status.⁹⁵ In addition, the Equal Treatment Directive allows Member States to adopt measures to obtain gender equality beyond those articulated in the directive.⁹⁶

2. Article 5(1) and Article 6 of the Equal Treatment Directive

Article 5(1) of the Equal Treatment Directive is the most

91. EC Treaty, *supra* note 2, art. 235. The Council or Commission can act in the social field under Article 235, where no other provision of the Treaty authorizes the Community institutions to take adequate action. Goebel, *supra* note 6, at 37. When directives are adopted pursuant to Article 235, the directives are still treated the same as if the directive had been adopted pursuant to Article 189. *Id.* Goebel characterizes the use of Article 235 as follows:

From a constitutional point of view, this use of article 235 is quite important because it represents the first time that social action legislation was deemed to be appropriate as a concern of the Community even though some form of economic or other justification related to the attainment of the common market appeared to be lacking.

Id.

92. Equal Treatment Directive, *supra* note 22, art. 1(1), O.J. L 39/40, at 40 (1976). The purpose of this Directive is to put into effect in the Member States the principle of equal treatment for men and women as regards access to employment, including promotion, and to vocational training as regards working conditions and . . . social security. This principle is hereinafter referred to as "the principle of equal treatment."

Id.

93. *Id.* art. 5(1), O.J. L 39/40, at 41 (1976).

94. *Id.* art. 2, O.J. L 39/40, at 41 (1976). Article 2(1) prohibits any legislation, whether discriminatory or neutral on its face, that adversely affects a disparate number of women rather than men because of their marital status. *Id.*

95. *Id.*

96. *Id.* art. 2(4), O.J. L 39/41, at 41 (1976) (stating that "this Directive shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities").

widely used article relied on by individuals who claim they have been the victim of gender discrimination.⁹⁷ This is due to the fact that substantively, Article 5 contains express prohibitions concerning how employees must be treated in the workplace.⁹⁸ Prior to *Marshall II*, however, Article 6 had not been widely relied on because it had been thought to be only a general provision requiring Member States to create a judicial process whereby individuals who felt aggrieved by gender discrimination could pursue their claim judiciously.⁹⁹

Article 5(1) of the Equal Treatment Directive has vertical direct effect,¹⁰⁰ and therefore, is only enforceable by an individual against that individual's Member State's government.¹⁰¹

97. See, e.g., *Von Colson and Kamann v. Land Nordrhein-Westfalen*, Case 14/83, [1984] E.C.R. 1891, [1986] 2 C.M.L.R. 430; *Foster v. British Gas Plc.*, Case 188/89, [1990] 7 E.C.R. 3313, [1990] 2 C.M.L.R. 833; *Marshall I*, Case 152/84, [1986] E.C.R. 723, [1986] 1 C.M.L.R. 688 (all relying on Article 5(1) of Equal Treatment Directive).

98. Equal Treatment Directive, *supra* note 22, O.J. L 39/40, at 41 (1976). Article 5 states:

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

2. To this end, Member States shall take the measures necessary to ensure that
(a) any laws, regulations and administrative provisions contrary to the principle of equal treatment shall be abolished;

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

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

Id.

99. Equal Treatment Directive, *supra* note 22, O.J. L 39/40, at 41 (1976). Article 6 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 to them the principle of equal treatment within the meaning of Articles 3, 4 and 5 to pursue their claims by judicial process after possible recourse to other competent authorities.

Id.

100. See *supra* notes 60-64 and accompanying text (discussing definition of vertical direct effect).

101. See *supra* notes 60-64 and accompanying text (discussing definition of vertical direct effect).

Prior to *Marshall II*, however, the Court of Justice held that the Equal Treatment Directive did not contain a sufficiently precise provision concerning the availability of damages for a Member State's violation of the Equal Treatment Directive.¹⁰² This precluded individuals from claiming that they were entitled to a specific remedy for a Member State's violation of the Equal Treatment Directive.¹⁰³

C. Marshall I: *Defining State Entity*

An individual can rely on the Equal Treatment Directive in a suit commenced against the Member State.¹⁰⁴ Prior to 1986, a distinction was made between the state acting in a government capacity, and the state acting as an employer.¹⁰⁵ In 1986, however, the Court abandoned this distinction.¹⁰⁶

In *Marshall v. Southampton Health Authorities (Marshall I)*, the United Kingdom's national court submitted a request for a preliminary ruling¹⁰⁷ to the Court of Justice.¹⁰⁸ The United King-

102. Von Colson and Kamann v. Land Nordrhein-Westfalen, Case 14/83, [1984] E.C.R. 1891, [1986] 2 C.M.L.R. 430.

103. See *supra* notes 78-84 and accompanying text (noting that if provision is not precise, party cannot bring claim).

104. See *supra* notes 81-82 (citing holdings of cases where Court has found that Equal Treatment Directive has vertical direct effect); see also *supra* note 26 and accompanying text (discussing direct effect of Equal Treatment Directive).

105. *Marshall I*, Case 152/84, [1986] E.C.R. 723, 731, [1986] 1 C.M.L.R. 688, 711.

106. *Id.*

107. *Id.* If a directive is not adopted within its allotted time, or is improperly implemented, the usual recourse is a Commission proceeding, under Article 169, to compel the Member State to implement the appropriate legislation to conform to the objectives of the directive. EC Treaty, *supra* note 2, art. 169. In addition, a directive can be the subject of interpretation to ensure its proper implementation through the preliminary ruling procedure of Article 177. *Id.* art. 177.

A Member State's court or tribunal may request a preliminary ruling from the Court of Justice when an individual claims to have suffered from a violation of a provision of an EC directive and has initiated a claim in the individual's national court system. *Id.* The Member State's tribunal may request a preliminary ruling when an individual seeks to rely on a directive and the Member State is uncertain whether the individual has the right to rely on that directive. *Id.* This uncertainty can arise in one of two ways. *Id.*

First, the national court will submit a case for a preliminary ruling where the national tribunal suspects that the Member State's national law conflicts with a directive. Von Colson v. Land Nordrhein-Westfalen, Case 14/83, [1984] E.C.R. 1891, [1986] 2 C.M.L.R. 430. This occurs when a Member State adopts a directive, but because of the discretion afforded to the Member States as to the means and methods of implementing that directive, the Member State's national law arguably violates a provision of the directive. *Id.* In this case, the Member State's national court will ask the Court of Jus-

dom asked the Court of Justice to determine whether the Member State, acting in its capacity as an employer, can be held liable for its violations of the Equal Treatment Directive.¹⁰⁹ The Court of Justice held that a Member State, acting in its capacity as an employer, is in violation of the Equal Treatment Directive when the Member State's employees are treated in a discriminatory manner.¹¹⁰

In *Marshall I*, a sixty-two year old woman was forced to retire from the United Kingdom's Health Authority,¹¹¹ while her male co-workers were allowed to continue working until the age of sixty-five.¹¹² Ms. Marshall brought suit, alleging that her forced retirement contradicted the Equal Treatment Directive.¹¹³ The Court of Justice held that the right of an individual to rely on the Equal Treatment Directive encompassed situations in which the

tice to issue a preliminary ruling to determine whether the citizen has the right to rely on the directive, and if the citizen does have that right, if the Member State's national law is in derogation of the directive. EC Treaty, *supra* note 2, art. 189. If the Court of Justice determines that the Member State's national law conflicts with the directive, the Court of Justice will instruct the national court to resolve the citizen's claim. *Id.* art. 164. The Court of Justice's guidance is binding on the Member State. *Id.*

A Member State may also request a preliminary ruling from the Court of Justice where the Member State has not adopted a directive at all, and a citizen claims that the directive is binding on the Member State. *Marshall I*, [1986] E.C.R. at 725, [1986] 1 C.M.L.R. at 700. In this situation, the Court of Justice will determine if the individual's complaint is within the purview of the directive. BERMANN ET AL., *supra* note 7, at 57. If the Court of Justice determines that the individual's complaint is within the scope of the directive, the Court of Justice instructs the national court to resolve the individual's claim in accordance with the directive. *Id.*

108. Case 152/84, [1986] E.C.R. 723, [1986] 1 C.M.L.R. 688.

109. *Id.* at 735, [1986] 1 C.M.L.R. at 701.

110. *Id.*

111. Employment Appeal Tribunal Rules 1980, § 3 (Eng.) (amending Employment Protection (Consolidation) Act 1978 sch. 11(7) (Eng.)). The Health Authority was created by the National Health Authority Act of 1977. *Id.* The Health Authority was delegated the responsibility of providing health care for all United Kingdom citizens. *Id.*

112. *Id.* at 726, [1986] 1 C.M.L.R. at 691.

113. Equal Treatment Directive, *supra* note 22, art. 5(1), O.J. L 39/40, at 41 (1976). Article 5(1) is the provision of the Equal Treatment Directive that Ms. Marshall claimed the Health Authority violated when they forced her to retire at the age of 62, three years before a male would be forced to retire. *Marshall I*, [1986] E.C.R. at 735, [1986] 1 C.M.L.R. at 701. Article 5(1) of the Equal Treatment Directive states that "[a]pplication 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 the grounds of sex." Equal Treatment Directive, *supra* note 22, art 5(1), O.J. L 39/40, at 41 (1976).

state acted in its capacity as an employer.¹¹⁴ Thus, *Marshall I* expanded the number of state actors that could be held liable for violations of the Equal Treatment Directive.¹¹⁵

The Court of Justice determined that Ms. Marshall could rely on the Equal Treatment Directive because Article 5(1) of the Equal Treatment Directive, which prohibits discriminatory practices regarding dismissals, including retirement policies, was sufficiently precise.¹¹⁶ In addition, the Court of Justice held that the Health Authority was an entity of the United Kingdom's government.¹¹⁷ Therefore, the Health Authority was a crown body, and their employees were crown servants.¹¹⁸

In *Marshall I*, the United Kingdom argued that if the Court of Justice expanded the Equal Treatment Directive to include the state acting in its capacity as an employer, the state would be held to a higher standard than private employers.¹¹⁹ According to the United Kingdom, the Court of Justice would be creating an arbitrary and unfair distinction between the rights of state employees and those of private employees.¹²⁰ The Court of Justice, however, rejected this argument, holding that if an individual is allowed to rely on a directive against the state, it is irrelevant in which capacity the state is acting, whether as an employer or as a public authority.¹²¹

The Court of Justice expressly rejected the United King-

114. *Marshall I*, [1986] E.C.R. at 751, [1986] 1 C.M.L.R. at 713.

115. *Id.*

116. *Id.* at 750, [1986] 1 C.M.L.R. at 711-12. The Court of Justice stated that:

Article 5(1) of [the Equal Treatment Directive,] which prohibits any discrimination on grounds of sex with regard to working conditions, including the conditions governing dismissal, may be relied upon as 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).

Id. at 748, [1986] 1 C.M.L.R. at 710.

117. *Id.* at 749, [1986] 1 C.M.L.R. at 711. The Health Authority had been created by the National Health Authority Act of 1977 (Eng.). *Id.*

118. *Id.* at 748, [1986] 1 C.M.L.R. at 710.

119. *Id.* at 747-48, [1986] 1 C.M.L.R. at 710.

120. *Id.* at 749, [1986] 1 C.M.L.R. at 711.

121. *Id.* In particular, the Court of Justice stated that

where a person involved in legal proceedings is able to rely on a directive as against the state he may do so regardless of the capacity in which the latter is acting, whether as employer or public authority. In either case it is necessary to prevent the state from taking advantage of its own failure to comply with Community law.

Id.

dom's argument that government employers should not be held to a higher standard than private employers.¹²² As the Court of Justice explained, any inequities that could arise if a state employer were held to a higher standard than a private employer would be rectified once the Member State implemented the Equal Treatment Directive.¹²³ The Court of Justice noted that if the state was concerned with the disparate policies that may arise between a private employer and a public employer, the state could rectify the disparity by incorporating the directive into national law.¹²⁴ Once incorporated into national law, private employers would also be held liable for violations of the Equal Treatment Directive.¹²⁵ Thus, after *Marshall I*, an individual has the right to rely on the Equal Treatment Directive against his Member State or any organ of the state that is acting in as an employer.¹²⁶

D. Remedies Available for Member States' Violations of the Equal Treatment Directive Prior to *Marshall II*

Regardless of whether a Member State implements the Equal Treatment Directive, an individual may rely on the Equal Treatment Directive if the individual's claim is against the Member State and the provision of the Equal Treatment Directive on which the individual relies is sufficiently precise.¹²⁷ Prior to *Marshall II*, individuals were not guaranteed that the damages they sought would be granted,¹²⁸ even if they proved that the Member State had violated a provision of the Equal Treatment Direc-

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 751, [1986] 1 C.M.L.R. at 713. The Court of Justice's holding, that the state, acting in its capacity as employer, could be held liable for the failure to fully implement the Equal Treatment Directive, was expanded further in *Foster v. British Gas Plc.*, Case 188/89, [1990] 7 E.C.R. 3313, [1990] 2 C.M.L.R. 833. In *Foster*, the Court of Justice held that a statutorily created monopoly, in this case a gas company, was an organ of the state. *Id.* at 3348-49, [1990] 2 C.M.L.R. at 857. The Court of Justice reasoned that the Equal Treatment Directive envisaged a broad definition of a state entity. *Id.*

127. See *supra* note 78 and accompanying text (noting that for individual to receive judicial relief, provision of directive must be "clear, unconditional, and non-discretionary").

128. See *Von Colson v. Land Nordrhein-Westfalen*, Case 14/83, [1984] E.C.R. 1891, 1908-09, [1986] 2 C.M.L.R. 430, 452-53 (holding that damages must have deterrent effect but do not have to be equal to damage actually sustained).

tive.¹²⁹ This was due to the Court of Justice's holding that the Directive did not include a provision that sufficiently addressed damages for violations of the Equal Treatment Directive.¹³⁰

In *Von Colson and Kamann v. Land Nordrhein-Westfalen*,¹³¹ the Court of Justice addressed the remedies available to individuals for a Member State's violation of a provision of the Equal Treatment Directive.¹³² In *Von Colson*, two female social workers alleged that a German state employer violated a sufficiently precise provision of the Equal Treatment Directive.¹³³ The plaintiffs, at the trial level, successfully established that the defendant, an administrator of the Federal Republic of Germany's prison system, did not hire them because they were female.¹³⁴ The two women proved that the prison administrator's behavior was discriminatory, and therefore had violated Article 5(1) of the Equal Treatment Directive.¹³⁵ The plaintiffs demanded that the defendants either offer an employment contract or pay six months salary.¹³⁶ The German trial court, however, denied both remedies¹³⁷ because under German law, the only damages that could be granted were the costs associated with the plaintiffs' application for the prison position.¹³⁸

On the appellate level, the Federal Republic of Germany, uncertain that its national law conformed with the Equal Treatment Directive regarding remedies, asked the Court of Justice to issue a preliminary ruling on this issue.¹³⁹ The Court of Justice determined that the Equal Treatment Directive did not include sufficiently precise remedies for the victims of a discriminatory practice.¹⁴⁰ The Court held that while more than purely nomi-

129. *Id.*

130. *Id.*

131. Case 14/83, [1984] E.C.R. 1891, [1986] 2 C.M.L.R. 430.

132. *Id.*

133. *Id.* at 1893, [1986] 2 C.M.L.R. at 432-33.

134. *Id.*

135. *Id.* at 1902, [1986] 2 C.M.L.R. at 448.

136. *Id.* at 1893, [1986] 2 C.M.L.R. at 432-33.

137. *Id.* at 1894, [1986] 2 C.M.L.R. at 433.

138. *Id.* at 1892, [1986] 2 C.M.L.R. 431.

139. *Id.* at 1894, [1986] 2 C.M.L.R. at 433; *see supra* note 105 (discussing circumstances under which preliminary ruling is issued).

140. *Von Colson*, [1984] E.C.R. at 1910, [1986] 2 C.M.L.R. at 454. The Court of Justice held:

[A]s regards sanctions for any discrimination which may occur, the directive does not include any unconditional and sufficiently precise obligation which,

nal damages must be awarded, it is for the national court to decide what remedies, adequate in relation to the damages sustained, individuals may receive for a Member State's violation of the Equal Treatment Directive.¹⁴¹ In sum, the *Von Colson* decision delegated the responsibility of determining what damages an individual should receive to the Member State.¹⁴²

II. MARSHALL v. SOUTHAMPTON-SOUTH WEST HAMPSHIRE HEALTH AUTHORITY II

In *Marshall II*, the Court of Justice, provided the Member States with guidelines to be followed for the proper implementation of the Equal Treatment Directive.¹⁴³ The Court considered whether Article 6 of the Directive barred Member States from imposing a monetary limit on the damages available for a Member State's violation of the Equal Treatment Directive.¹⁴⁴ The Court of Justice answered this question in the affirmative and held that where a Member State chooses to provide monetary damages for violations of the Equal Treatment Directive, a component of that award must include an award of interest.¹⁴⁵

in the absence of implementing measures adopted within the prescribed time limits, may be relied on by an individual in order to obtain specific compensation under the directive where, that is not provided for or permitted under national law.

Id.

141. *Id.* at 1910-11, [1986] 2 C.M.L.R. at 454-55. Specifically, the Court of Justice stated:

Although [the Equal Treatment Directive], for the purpose of imposing a sanction for the breach of the prohibition of discrimination, leaves the Member-States free to choose between the different solutions suitable for achieving its objective, it nevertheless requires that if a Member-State chooses to penalize breaches of that prohibition by the award of compensation, then in order to ensure that it is effective and that it has a deterrent effect, that compensation must in any event be adequate in relation to the damage sustained and must therefore amount to more than purely nominal compensation.

Id.

142. *Id.*

143. *Marshall II*, Case 271/91, [1993] E.C.R. ___, [1993] 3 C.M.L.R. 293. For more information on the factual background of *Marshall II*, as well as a detailed analysis of the holding, see Deidre Curtin, *Case C-271/91, Marshall v. Southampton and South West Hampshire Health Authority*, ["*Marshall II*"], 31 COMMON MKT. L. REV. 631 (1994).

144. *Marshall II*, [1993] 3 C.M.L.R. at 299.

145. *Id.*

A. Procedural and Factual History of Marshall II

Following the Court of Justice's judgment in *Marshall I*,¹⁴⁶ the case was remitted to the United Kingdom's Industrial Tribunal.¹⁴⁷ The Industrial Tribunal considered what damages Ms. Marshall would receive as a result of the Health Authority's violation of the Equal Treatment Directive.¹⁴⁸ The Industrial Tribunal awarded Ms. Marshall damages that exceeded the statutory limit, which had been imposed by the United Kingdom's Sex Discrimination Act.¹⁴⁹

The Industrial Tribunal awarded Ms. Marshall £18,405, which included a sum of £7700 for interest, as well as £1000 for Ms. Marshall's emotional injuries.¹⁵⁰ The £7700 award of interest, however, exceeded the United Kingdom's national legislation, which imposed an upper statutory limit on the award of damages available for persons adjudicated victims of gender discrimination.¹⁵¹ The Industrial Tribunal found that despite the Sex Discrimination Act's statutory limit, Article 6 of the Equal Treatment Directive demanded that Ms. Marshall be given an award of interest as a component of her compensatory damages.¹⁵² The Industrial Tribunal held that Article 6 of the Equal

146. *Marshall I*, Case 152/84, [1986] E.C.R. 723, [1986] 1 C.M.L.R. 688; see *supra* notes 104-26 and accompanying text (discussing *Marshall I*).

147. See Sex Discrimination Act, 1975, ch. 65, § 65(1) (granting Industrial Tribunal jurisdiction to adjudicate employment discrimination cases). The Industrial Tribunal is the United Kingdom's national adjudicator of labor disputes. *Id.* Pursuant to Section 65(1)(b) of the Sex Discrimination Act, where an Industrial Tribunal finds that the complaint is well founded, it shall, if it considers it to be just and equitable to do so, make an order requiring respondent to pay compensation to the complainant. *Id.* § 65(1)(b). Most tribunals in the United Kingdom deal with cases in which an individual citizen is at issue with a government department or other public body concerning his rights or obligations under a statutory scheme. 1 DOCUMENTS ON CONTEMPORARY BRITISH GOVERNMENT: BRITISH GOVERNMENT AND CONSTITUTIONAL CHARGE (Martin Minogue ed., 2d ed. 1977). In most cases, there is an appeal to an appellate tribunal, a minister, or the courts. *Id.*

148. *Marshall II*, [1993] 3 C.M.L.R. at 299.

149. *Id.*; see Sex Discrimination Act, 1975, ch. 65, § 65(1)(b) (Eng.) (setting upper statutory limit on damages available for victims of gender discrimination).

150. *Marshall II*, [1993] 3 C.M.L.R. at 299.

151. *Id.* The Sex Discrimination Act establishes an upper statutory limit for compensation payable for violations of the Sexual Discrimination Act. Sex Discrimination Act, 1975, ch. 65, § 65(2) (Eng.). Section 65(2) of the Sex Discrimination Act states that "[t]he amount of compensation awarded to a person under subsection 1(b) shall not exceed the amount for the time being specified in paragraph 20(1)(b) of Schedule 1 to the Trade Union and Labour Relations Act 1974." *Id.*

152. *Marshall II*, [1993] 3 C.M.L.R. at 299.

Treatment Direct had vertical direct effect even though the Court of Justice, in *Von Colson*, held that Article 6 of the Equal Treatment Directive did not have vertical direct effect.¹⁵³

The Health Authority appealed the Industrial Tribunal's award of interest.¹⁵⁴ The Employment Appeal Tribunal¹⁵⁵ reversed the Industrial Tribunal's holding and opined that because of the Sex Discrimination Act's statutory limit, Ms. Marshall had no right to receive the interest awarded to her.¹⁵⁶ The Court of Appeal dismissed Ms. Marshall's appeal of the Employment Appeal Tribunal.¹⁵⁷ Ms. Marshall then appealed to the House of Lords.¹⁵⁸

The House of Lords then submitted a preliminary question to the Court of Justice¹⁵⁹ of whether the upper limit imposed by the Sex Discrimination Act governed Ms. Marshall's case, thus precluding her from collecting the full amount the Industrial Tribunal had awarded her.¹⁶⁰ Specifically, the House of Lords asked the Court of Justice a three part question. These questions were: (1) whether a Member State is guilty of failing to implement the Equal Treatment Directive when that Member State imposes an upper statutory limit on the amount of compensation available to a victim of gender discrimination; (2) when such a statutory limit does exist, whether it is essential that the limit not be less than the amount of loss found to have been sustained and whether there must be an award of interest on the principal amount lost from the date of discrimination to the date compensation is paid; and (3) whether, if an individual has been the subject of unlawful discrimination, that individual is entitled to rely on Article 6 of the Equal Treatment Directive against an authority that is an emanation of the Member State, thereby overriding the statutory limit imposed by the Member

153. *Id.* at 325; see *supra* notes 50-53 and accompanying text (discussing direct effect of directives).

154. *Marshall II*, [1993] 3 C.M.L.R. at 300.

155. Employment Appeal Tribunal Rules 1980, § 3 (Eng.) (amending Employment Protection (Consolidation) Act 1978, sch. 11(7) (Eng.)). The Employment Appeal Tribunal is the appellate court of the Industrial Tribunal. *Id.*

156. *Marshall II*, [1993] 3 C.M.L.R. at 301.

157. *Id.*

158. *Id.*

159. *Id.*; see *supra* note 107 (describing preliminary ruling procedures).

160. *Marshall II*, [1993] 3 C.M.L.R. at 321-22.

State's national legislation.¹⁶¹

B. The Arguments Submitted to the Court of Justice

The parties to the action, as well as the United Kingdom, the Republic of Germany, and the Commission, submitted written observations to the Court of Justice.¹⁶² Ms. Marshall and the Commission urged the Court of Justice to find that the upper statutory limit, imposed by the United Kingdom's Sex Discrimination Act, violated the Equal Treatment Directive.¹⁶³ Conversely, the Health Authority, the United Kingdom, and the Republic of Germany urged the Court of Justice to find that the statutory limit imposed by the Sex Discrimination Act conformed to Article 6 of the Equal Treatment Directive, as well as the holding in *Von Colson*, because the award of damages provided a deterrent effect.¹⁶⁴

161. *Id.* The House of Lords submitted the following questions to the Court of Justice:

1. Where the national legislation of a Member State provides for the payment of compensation as one remedy available by judicial process to a person who has been subjected to unlawful discrimination of a kind prohibited by Council Directive 76/207/EEC of 9 February 1976 ('the Directive'), is the Member State guilty of a failure to implement Article 6 of the Directive by reason of the imposition by the national legislation of an upper limit of £6,250 on the amount of compensation recoverable by such a person?
2. Where the national legislation provides for the payment of compensation as aforesaid, is it essential to the due implementation of Article 6 of the Directive that the compensation to be awarded:
 - (a) should not be less than the amount of the loss found to have been sustained by reason of the unlawful discrimination, and
 - (b) should include an award of interest on the principal amount of the loss so found from the date of the unlawful discrimination to the date when the compensation is paid?
3. If the national legislation of a Member State has failed to implement Article 6 of the Directive in any of the respects referred to Questions 1 and 2, is a person who has been subjected to unlawful discrimination as aforesaid entitled as against an authority which is an emanation of the Member State to rely on the provisions of Article 6 as overriding the limits imposed by the national legislation on the amount of compensation recoverable?

Id. at 322.

162. See BERMANN ET AL., *supra* note 7, at 246. Once a preliminary ruling has been requested by a Member State's national court, the Registrar of the Court of Justice will notify all Member States, the Commission, and the Council. *Id.* Each of the Member States, as well as the Commission and the Council may then submit written observations to the Court as well as appear at an oral hearing. *Id.*

163. *Id.*

164. *Id.*

1. Ms. Marshall's Argument

Ms. Marshall contended that the preliminary questions submitted to the court raised the following issues.¹⁶⁵ First, Ms. Marshall, pursuant to Article 5(1) and 6 of the Equal Treatment Directive, had the right to an effective remedy against the state.¹⁶⁶ Second, the damages that the Sex Discrimination Act provided her were inadequate in relation to the injury she suffered.¹⁶⁷

Ms. Marshall argued that Article 5 of the EC Treaty¹⁶⁸ embraces not only procedural rights but also substantive guarantees such as effective remedies for the Member State's violation of directives.¹⁶⁹ Thus, because the Sex Discrimination Act mandated that she be awarded less than the damages she actually suffered, and hence failed to restore her to the position she would have been in had the tortious act not been committed, the objectives of the EC Treaty were not being fulfilled by the Health Authority.¹⁷⁰ Specifically, according to Ms. Marshall, the upper statutory limit jeopardized the EC's objective to attain equal treatment of the sexes in the EC workforce.¹⁷¹

In connection with this argument, Ms. Marshall stressed that the purpose of the Equal Treatment Directive is to eliminate gender discrimination in the EC workforce.¹⁷² The effectiveness of the sanctions for Member States' violations of that directive must, therefore, be equal to the damage actually sustained by the victim of gender discrimination.¹⁷³ Thus, if national legislation provided that the remedy could be less than the monetary damage actually suffered, the objective of the

165. *Id.*

166. *Id.*

167. *Id.*

168. EC Treaty, *supra* note 2, art. 5. Article 5 states:

Member States shall take all appropriate measures, whether general or particular, to ensure fulfillment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks.

They shall abstain from any measures likely to jeopardise the attainment of the objectives of this Treaty.

Id.

169. *Marshall II*, [1993] E.C.R. at ___ (LEXIS).

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

Equal Treatment Directive would not be met.¹⁷⁴ Likewise, the requirement that the damages received for Member States' violations of the Equal Treatment must be effective, proportionate, and dissuasive would also not be met.¹⁷⁵ According to Ms. Marshall, the principle that a deterrent effect must be provided, coupled with the purpose of the Equal Treatment Directive, demanded that the Court of Justice find that the upper statutory limit imposed by the Sex Discrimination Act violated the Equal Treatment Directive.¹⁷⁶

2. The Commission Sides with Ms. Marshall

The Commission argued that although the preliminary questions asked whether Article 6 of the Equal Treatment Directive granted Ms. Marshall the right to an effective remedy, including an award of interest, the Court of Justice should rely not on Article 6 of the Equal Treatment Directive specifically, but rather the Court should rely on the inherent right of the Community to impose remedies for the infringement of rights derived from Community law.¹⁷⁷ The Commission argued that Article 5 of the EC Treaty compelled Member States to take all "appropriate measures" to ensure fulfillment of EC legislation.¹⁷⁸ This obligation embraces the duty of a Member State to create pecuniary remedies that are adequate in relation to the damage sustained.¹⁷⁹

174. *Id.*

175. *Id.* Ms. Marshall argued that the sanctions for breaches of Community rights must be effective, proportionate, and dissuasive (the effectiveness principle). *Id.* In particular, the sanctions must punish breaches under conditions, both procedural and substantive, that are analogous to those applicable to breaches of national law of similar nature and importance (the comparability principle). *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.* Specifically, the Commission argued that although the preliminary questions refer to Article 6 of the Directive, the obligation on a Member State to provide remedies for the infringement of rights derived from Community law does not depend on the inclusion of Community legislation of an express obligation such as Article 6 but is an obligation inherent in the system of Community law. The Commission considers that the obligation to provide effective remedies for the infringement of rights derived from Community law is no more than the concrete application of the general requirement of the results to be achieved and the obligation set out in Article 5 of the Treaty, that Member States are to take 'all appropriate measures' to ensure fulfillment of their Treaty obligation. In that connection, [the Com-

The Commission's argument differed from the other written observations submitted to the Court, because the Commission did not concentrate on whether Article 6 of the Equal Treatment Directive was sufficiently precise to confer on it vertical direct effect.¹⁸⁰ Rather the Commission contended that the obligation to provide an effective judicial remedy does not flow from Article 6 of the Equal Treatment Directive,¹⁸¹ but from Article 5 of the EC Treaty, which confers upon an individual the substantive right to an adequate and effective remedy in the event of a breach of the Directive by the Member State.¹⁸² This substantive right, according to the Commission, obligates Member States to restore the individual to the position in which he would have been had the discriminatory act not occurred.¹⁸³ The Commission urged the Court that any other decision would not provide a sufficient deterrent effect.¹⁸⁴

3. The Health Authority Argues that an Upper Statutory Limit Conforms to the Equal Treatment Directive

The Health Authority argued that Article 6 of the Equal Treatment Directive did not preclude a Member State from im-

mission] deduces that Member States remain free to determine the nature of the redress to be provided. If a Member State opts for a sanction in the form of compensation it must in any event be adequate in relation to the damage sustained and have a real deterrent effect.

Id.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.* Specifically the Commission urged the Court of Justice to answer the questions as follows:

1. General principles of Community law require that, where a Member State chooses to implement Directive 76/207/EEC by providing for the payment of compensation to individuals where their rights under the Directive are infringed by their employer, the amount of compensation to be awarded should be adequate in relation to the loss sustained by reason of the unlawful discrimination and should not be significantly limited in its measure, quantum or otherwise in such a way as to impair the effectiveness of the award of compensation as a remedy for the loss sustained.

2. If the legislation implementing Directive 76/207/EEC has failed to implement fully the above requirement, a person who has suffered loss as a result of a breach of a directly effective provision of the Directive by an employer which is an emanation of the State has a right to be compensated on the terms set out above by the State.

Id., [1993] 3 C.M.L.R. at 321.

posing an upper statutory limit on damages available to victims of gender discrimination.¹⁸⁵ Rather, the Health Authority argued that the United Kingdom's Sex Discrimination Act met the obligations imposed by Article 6 of the Equal Treatment Directive by providing mechanisms that provided individuals with real and effective judicial protection, as well as providing individuals who are adjudicated victims of gender discrimination compensation.¹⁸⁶ Specifically, the Health Authority argued that the statutory limit imposed by the Sex Discrimination Act was sufficient to impose a deterrent effect on employers.¹⁸⁷ Further, according to the Health Authority, the statutory limit conformed to the Court of Justice's ruling in *Von Colson*¹⁸⁸ by providing "adequate compensation in relation to the damages sustained."¹⁸⁹

The Health Authority stressed that the Equal Treatment Directive has no provision setting forth the amount of compensation to be awarded in cases of unlawful gender discrimination.¹⁹⁰ Nor does the Directive provide any standard by which the adequacy of the award of damages is adjudged.¹⁹¹ Rather, the provisions of the Equal Treatment Directive are completely discretionary. Thus, because the Equal Treatment Directive contains no such provision, the only workable standard is that the judicial protection afforded to individuals who are the victims of gender discrimination must be an effective sanction with a dissuasive effect.¹⁹² Applying this standard, the Health Authority

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.* The Health Authority argued that it was clear from the *Von Colson* judgment that the requirement that the sanction chosen by the Member State should be such as to guarantee real and effective judicial protection and have a real deterrent effect. *Id.*; see *Von Colson and Kamann v. Land Nordrhein-Westfalen*, Case 14/83, [1984] E.C.R. 1891, [1986] 2 C.M.L.R. 430. It cannot be said that the remedies available under the Sex Discrimination Act are not a form of real and effective judicial protection and it cannot be said that the compensation available is limited to a purely nominal amount, as it was in the *Von Colson* case. *Marshall II*, [1993] 3 C.M.L.R. at 321.

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.* The Health Authority relied on *Von Colson* to support its view that Article 6 of the Equal Treatment Directive has no direct effect, in that Article 6 does not contain any unconditional and sufficiently precise obligation that may be relied on by an individual for discrimination sanctions. *Id.* According to the Health Authority, the scope of the *Von Colson* judgment was limited to upholding the principle that Article 6 imposes on the Member States no obligation to apply a specific form of sanction. *Id.*

urged the Court of Justice to find that the Sex Discrimination Act, whose upper limit is increased frequently, conforms to the Equal Treatment Directive.¹⁹³

4. The United Kingdom Argues that the Sex Discrimination Act Adequately Implements the Equal Treatment Directive

The United Kingdom argued that the sole issue to be determined by the Court of Justice was whether Ms. Marshall was entitled to the sum of interest that the Industrial Tribunal awarded her.¹⁹⁴ According to the United Kingdom, because the Sex Discrimination Act provided for the payment of compensation of a victim of gender discrimination, it necessarily conformed to Article 6 of the Equal Treatment Directive.¹⁹⁵ Because Article 6 does not require national legislation to include an award for interest in respect of the relevant earnings lost, the United Kingdom may so limit the amount of compensation awarded to a person aggrieved by gender discrimination.¹⁹⁶

The United Kingdom argued that Article 6 of the Equal Treatment Directive provided the Member States with an element of discretion when establishing the level of damages available for an infringement of rights specified by the Equal Treatment Directive.¹⁹⁷ Thus, as long as the national legislation concerning the award of damages conformed to the decision in *Von Colson* by providing an adequate remedy, the Member State had effectively implemented Article 6 of the Equal Treatment Directive.¹⁹⁸ The United Kingdom maintained that the upper limit

Rather, *Von Colson* illustrates the lack of direct effect in the Equal Treatment Directive to recover compensation other than as provided by national law. *Id.* Accordingly, any other approach would deny the United Kingdom (and other Member States) the discretion conferred upon them for the implementation of the Equal Treatment Directive. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.* Specifically, the United Kingdom argued that "Community law defines the rights which it considers worthy of protection, whilst the national legal systems ensure the protection of those rights within the framework of the procedural law and remedies which secure protection of similar rights of purely national character." *Id.*

198. *Id.* Relying on the foregoing consideration, the United Kingdom observed that Article 6 of the Equal Treatment Directive did not lay down a uniform law of remedies or a uniform system of compensation, but allowed the Member States a margin of

provided by the Sex Discrimination Act provided Ms. Marshall with substantial, and not merely nominal, compensation in respect of the monetary damages that she suffered as a result of the Health Authority's discriminatory policy.¹⁹⁹ Thus, the United Kingdom urged the Court of Justice to hold that Article 6 of the Equal Treatment Directive has direct effect only where the national legislation completely excludes a remedy for the unlawful discrimination.²⁰⁰

5. The Federal Republic of Germany Agrees with the United Kingdom

The German Government's argument concerning the direct effect of Article 6 of the Directive was essentially the same as the United Kingdom's.²⁰¹ Germany argued that *Von Colson* gave Member States the freedom to choose between different solutions.²⁰² The only nondiscretionary requirement imposed on the Member States, therefore, is to provide a remedy that has a real deterrent effect.²⁰³ Germany contended that the Sex Discrimination Act does provide for an effective remedy with a dissuasive effect, and therefore, the Health Authority did not violate any provision of the Equal Treatment Directive.²⁰⁴

discretion regarding the range and nature of the judicial remedies to be made available in order to sanction breaches of Article 3, 4, and 5 of the Equal Treatment Directive. *Id.* That margin must nevertheless be in conformity with the criteria laid down by the court in *Von Colson* and *Kamann v. Land Nordrhein-Westfalen*, Case 14/83, [1984] E.C.R. 1891, [1986] 2 C.M.L.R. 430. *Id.* In other words, any sanction imposed must guarantee real and effective judicial protection; it must also guarantee real deterrent effect on the employer; and the compensation must in any event be adequate in relation to the damage sustained. *Id.*

199. *Id.*

200. *Id.* The United Kingdom proposed that

Article 6 [of the Equal Treatment Directive] does not have direct effect regarding the specific sanction to be applied by a national court. It has direct effect only where the legal protection for which it provides is totally excluded. It follows that a person may not rely on Article 6 of the Equal Treatment Directive against an emanation of a Member State to override limits imposed by national legislation on the amount of compensation recoverable, where the limit is no less favourable than that imposed on comparable claims of a purely national character and where the limit does not amount to a total exclusion of judicial protection.

Id.

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

In support of its argument, the German Government pointed out that if the Court of Justice had considered that full indemnification for the damages suffered was necessary in order to implement the Equal Treatment Directive, the Court of Justice would have stated this in its *Von Colson* judgment.²⁰⁵ Thus, the Court of Justice's prior determination that the compensation awarded must only be "adequate in relation to the damage sustained" instead of delineating what compensation must be given, compelled the Court of Justice to hold that Article 6 of the Equal Treatment Directive did not have vertical direct effect and, additionally, the Sex Discrimination Act's remedies were sufficient.²⁰⁶

C. The Court of Justice's Holding

In *Marshall II*, the Court of Justice held that the imposition of a statutory upper limit of an award of damages violated Article 6 of the Equal Treatment Directive. The Court opined that the Sex Discrimination Act's imposition of a statutory limit, which was considerably less than the actual damages suffered by Ms. Marshall, violated the Equal Treatment Directive.²⁰⁷ The Court

205. *Id.*

206. *Id.* In part, the German government argued that the force of the deterrent effect of a sanction may depend on the circumstances of the individual case and, in particular, on the employer's financial means. *Id.* The legislature, however, cannot take account of all circumstances of every conceivable case. *Id.* Accordingly, a generalized approach must be adopted in determining the amount of the sanction, so that the compensation awarded will deter an employer with normal awareness of the cost of doing so from discriminating on the basis of sex. *Id.* Compensation such as that awarded in the present case certainly would have a sufficient dissuasive effect to achieve the objectives of the Equal Treatment Directive. *Id.*

207. *Id.* at 321. Specifically, the Court of Justice answered the questions as follows:

1. The interpretation of Article 6 of Council Directive 76/207/EEC of 9 February 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 must be that reparation of the loss and damage sustained by a person injured as a result of discriminatory dismissal may not be limited to an upper limit fixed a priori or by excluding an award of interest to compensate for the loss sustained by the recipient of the compensation as a result of the effluxion of time until the capital sum awarded is actually paid.
2. A person who has been injured as a result of discriminatory dismissal may rely on the provisions of Article 6 of the Directive as against an authority of the State acting in its capacity as an employer in order to set aside a national provision which imposes limits on the amount of compensation recoverable by way of reparation.

Id.

held that Article 6 of the Directive does have vertical direct effect, and is violated when an individual receives less than the actual damages suffered as a result of gender discrimination.²⁰⁸

In reaching its decision, the Court of Justice looked to the objectives of the Equal Treatment Directive. According to the Court, Member States, in order to conform to the Directive, must effectively implement the principle of equal treatment for men and women in various aspects of employment, including policies governing dismissal.²⁰⁹ To this end, Article 6 imposes on the Member States a duty to enable all persons who consider themselves wronged by discrimination to pursue their claims via the judicial process.²¹⁰ This obligation, according to the Court of Justice, implies that the measures in question be sufficiently effective to achieve the objective of the Equal Treatment Directive.²¹¹ The Court of Justice held that because this obligation is nondiscretionary, Article 6 of the Equal Treatment Directive has vertical direct effect.²¹² The Court opined that Article 6 of the Equal Treatment Directive is an essential factor for attaining the fundamental objective of the Equal Treatment Directive.²¹³ Ac-

208. *Id.* at 321. Advocate General Van Gerven stated that while Article 6 of the Directive does have vertical direct effect, the imposition of an upper statutory limit on the monetary damages available is not of itself unlawful. Opinion of Advocate General Van Gerven, Marshall II Case 271/91, [1993] E.C.R. ___, [1993] 3 C.M.L.R. 293, 311. Regarding the direct effect of Article 6, Advocate General Van Gerven observed that

Article 6 has direct effect, on the ground that 'that article, construed in the light of a general principle which it expresses,' is sufficiently precise and unconditional to be capable of being relied upon 'as against a member-State which has not ensured that it is fully implemented in its internal legal order'. . . . [The] requirement to impose sanctions laid down by Article 6 . . . now also has direct effect as against the member-States, on the ground that the principles of Community law on which that requirement is based, has in the meantime likewise been defined sufficiently precisely in the Court's case law

Id. at 306-07. Concerning the upper statutory limit, Advocate General Van Gerven stated that

to lay down national upper limits on compensation is, as Community law stands, not unlawful. However, the precondition is that the limit should be pitched high enough in order not to deprive the sanction of its 'effective, uniform, and deterrent' nature and does not prevent its being 'adequate in relation to the damage' normally sustained as a result of an infringement.

Id. at 311.

209. *Id.* at 323.

210. *Id.* at 324.

211. *Id.*

212. *Id.*

213. *Id.*

cordingly, the Court of Justice held that the combined provisions of Article 5(1) and 6 of the Equal Treatment Directive give rise to rights that an individual must be able to rely upon when bringing a discrimination suit before his national court system.²¹⁴

The Court of Justice held that in order for Member States to conform adequately to the objectives in the Equal Treatment Directive, the Member States must take the appropriate measures to restore equality in those instances where discrimination has taken place.²¹⁵ This restoration of equality requires that either the victims of the discrimination be reinstated to their previous positions, or be granted financial compensation for the loss and damage sustained.²¹⁶ Where, however, financial compensation is the measure adopted, it must adequately recompense for the loss and damage actually sustained as a result of the discriminatory practice and must be made in full accordance with the applicable national rules.²¹⁷

Full compensation, therefore, for the loss and damage sustained as a result of the discrimination, cannot exclude factors, such as the passage of time, that may reduce the award's value.²¹⁸ The Court set forth several factors that the national courts must follow when computing the damage sustained by an individual.²¹⁹ Consequently, the award of interest is an essential component of compensation for the purposes of restoring real

214. *Id.*

215. *Id.* at 325.

216. *Id.* The Court of Justice reached this decision by reading Article 6 of the Equal Treatment Directive in conjunction with Article 5(1) of the Directive. *Id.* In part, the Court of Justice reasoned:

Such requirements necessarily entail that the particular circumstances of each breach of the principle of equal treatment should be taken into account. In the event of discriminatory dismissal contrary to Article 5(1) of the Directive, a situation of equality could not be restored without either reinstating the victim of discrimination, or in the alternative, granting financial compensation for the loss and damage sustained.

Where financial compensation is the measure adopted in order to achieve the objective indicated above, it must be adequate, in that it must enable the loss and damage actually sustained as a result of the discriminatory dismissal to be made good in full in accordance with the applicable national rules.

Id. at 324.

217. *Id.*

218. *Id.* at 325.

219. *Id.*

equality of treatment.²²⁰

III. MARSHALL II STRENGTHENS THE IMPACT OF THE EQUAL TREATMENT DIRECTIVE

The Court of Justice's decision in *Marshall II* was a surprisingly liberal interpretation of Article 6 of the Equal Treatment Directive. While the Court of Justice may have departed from judicial principles and prior precedent, the granting of vertical direct effect of Article 6 will greatly improve the efficacy of the Equal Treatment Directive. The Member States now have specific guidelines concerning the amount of damages to which a victim of gender discrimination is entitled as a result of unlawful discrimination.

A. *The Court of Justice Ignored the Requirement that Articles of Directives Must Be Sufficiently Precise to Have Direct Effect*

Article 6 of the Equal Treatment Directive provides that Member States shall construct a process whereby a person who claims to be aggrieved by a discriminatory practice can have his claim adjudicated.²²¹ There is no mention of the damages that an individual is entitled to receive if a Member State does violate the Equal Treatment Directive.²²² In *Marshall II*, however, the Court of Justice held that Article 6 was sufficiently precise, giving it vertical direct effect, and thereby allowing Ms. Marshall to rely on it in her national court.²²³ Specifically, the Court of Justice held that the actual damages sustained must be equal to the award of damages, or the Member State will be in violation of Article 6 of the Equal Treatment Directive.²²⁴

The Court of Justice's ruling is surprising for two reasons. First, the Court of Justice appears to have completely ignored the requirement that in order for a directive to have vertical direct effect its wording must be clear, unconditional, and nondis-

220. *Id.* at 324.

221. Equal Treatment Directive, *supra* note 22, art. 6, O.J. L 39/40, at 41 (1976); *see supra* note 24 (quoting Article 6 of Equal Treatment Directive).

222. Equal Treatment Directive, *supra* note 22, art. 6, O.J. L 39/40, at 41 (1976); *see supra* note 24 (quoting Article 6 of Equal Treatment Directive).

223. *Marshall II*, Case 271/92, [1993] E.C.R. —, [1993] 3 C.M.L.R. 293; *see supra* notes 207-20 and accompanying text (discussing holding of *Marshall II*).

224. *Marshall II*, [1993] 3 C.M.L.R. 293; *see supra* notes 218-20 and accompanying text (discussing inclusion of interest in damage awards).

cretionary.²²⁵ Second, the Court of Justice rescinded Member States' authority to provide for the damages available for discrimination, an authority which had been expressly delegated to them less than a decade ago.²²⁶

Regarding the abandonment of the requirement that the directive provision be sufficiently precise, the Court of Justice held that because Article 5(1) of the Equal Treatment Directive was sufficiently precise, so too was Article 6.²²⁷ By its very terms, Article 6 of the Equal Treatment Directive is discretionary. It provides that a judicial process, which is vested with the ability to impose sanctions, shall be set up in the Member States' national court system. Thus, the United Kingdom complied with the only non-discretionary component of Article 6.²²⁸

The Court of Justice's prior decision, in *Von Colson*,²²⁹ was a more well-reasoned judicial interpretation of Article 6 of the Equal Treatment Directive. The Court of Justice held that although the damages paid must be more than a nominal amount, the Equal Treatment Directive did not have a provision regarding remedies that was sufficiently precise to create vertical direct effect.²³⁰ *Von Colson*, however, did not provide the strength that the Equal Treatment Directive needed, and thus Member States could still profit from discriminatory practices. The Court remedied this defect in *Von Colson* by stating that not only must the damages received be adequate in relation to the damage sustained but rather, the damages received must be equal to the damage sustained.²³¹

The *Marshall II* decision, however, is troubling because it may cause uncertainty among the Member States concerning the adequacy of the legislation that they must implement to satisfy

225. See *supra* notes 78-84 and accompanying text (discussing "sufficiently precise" requirement for directive provision to have vertical direct effect).

226. *Von Colson and Kamann v. Land Nordrhein-Westfalen*, Case 14/83, [1984] E.C.R. 1891, [1986] 2 C.M.L.R. 430; see *supra* notes 131-42 (discussing holding of *Von Colson*).

227. See *supra* note 209-14 (discussing Court of Justice's reading of Article 5(1) and Article 6 of Equal Treatment Directive together).

228. Sex Discrimination Act, 1975, ch. 65, § 63(1) (Eng.); see *supra* note 162 (setting forth Sex Discrimination Act's judicial procedure).

229. Case 14/83, [1984] E.C.R. 1891, [1986] 2 C.M.L.R. 430.

230. *Id.*; see *supra* notes 131-42 and accompanying text (discussing Court of Justice's holding in *Von Colson*).

231. *Von Colson*, [1984] E.C.R. at 1891, [1986] 2 C.M.L.R. at 430; see *supra* note 207 (discussing Court of Justice's holding in *Marshall II*).

the Equal Treatment Directive. The United Kingdom enacted the Sex Discrimination Act to conform to the Equal Treatment Directive. The United Kingdom did afford individuals judicial protection, as well as sanctions for those who unlawfully discriminate, but the British Act was still held to be in violation of the Equal Treatment Directive. The practical consequence of this decision is that each provision of a directive will have to be submitted to the Court of Justice, possibly several times, for the Court to issue its binding interpretation.

Marshall II is an excellent illustration of this arduous process. The Equal Treatment Directive has been interpreted several times and each time the reach of the Equal Treatment Directive has increased. Thus, Member States, more than fourteen years after the Council passed the Equal Treatment Directive, are uncertain as to what legislative measures are adequate to conform with the Equal Treatment Directive.

B. *Marshall II's Contribution to the Equal Treatment Directive*

The Court of Justice's ruling in *Marshall II* will enhance the force of the Equal Treatment Directive. Member States will no longer be able to employ discriminatory practices without incurring financial penalties. Prior to *Marshall II*, an employer could have a discriminatory policy without incurring a financial hardship if found guilty of discrimination. For instance, in the case of Ms. Marshall the Health Authority may have found it more profitable to dismiss her at sixty years of age, pay the sanction circumscribed by the Sex Discrimination Act, and hire another employee at a lesser wage. Thus, by requiring Member States to reinstate the individual who has been a victim of discrimination or repay that individual for lost wages, plus interest, employers will be compelled to institute policies that guarantee the equal treatment of the sexes.

The Court's most surprising articulation in *Marshall II* is that a Member State will no longer be able to award compensatory damages which are simply "adequate."²³² Rather, the Member States must provide for damages that are equal to the dam-

232. *Marshall II*, Case 271/91, [1993] E.C.R. —, [1993] 3 C.M.L.R. 293; see *supra* note 207 (explaining that damages in gender discrimination cases must be equal to actual damages sustained, as determined by Member States' national court).

ages sustained.²³³ This pronouncement is surprisingly specific. Each Member State's national court system, when awarding damages to the adjudicated victim of gender discrimination, must now consider three enumerated factors before awarding the damages. These three factors are: (1) the loss of physical assets; (2) the loss of income; and (3) the damage accrued as a result of the effluxion of time.²³⁴ This specificity will create greater uniformity in the damages awarded to individuals aggrieved by gender discrimination. Further, *Marshall II* mandates that Member States create a system whereby an adjudicated victim of gender discrimination is awarded damages that are calculated on a case-by-case analysis. This burden on the Member States' national court systems, coupled with the financial penalties employers may suffer, is a great impetus for Member States to implement stricter gender discrimination laws. Consequently, a more level playing field for the sexes in all of the Member States will be achieved.

C. *The Court of Justice's Commitment to Eradicating Gender Discrimination Continues with the Marshall II Decision*

The inclusion of Article 119 in the EEC Treaty was a surprising articulation of a fundamental right,²³⁵ which the Court of Justice has, throughout the Community's history, been committed to enforcing. In *Defrenne v. Societe Anonyme Belge De Navigation Aeriennne Sabena*²³⁶ the Court of Justice articulated its firm commitment to granting individuals the right to sue other private individuals for violations of Article 119.²³⁷ This dedication to the elimination of gender discrimination has continued, most notably in *Marshall I*, where the Court noted that gender equality forms part of the "corpus of fundamental human rights."²³⁸ The Court's wide interpretation of equality legislation, and

233. *Marshall II*, [1993] 3 C.M.L.R. at 293; see *supra* note 207 (explaining that damages in gender discrimination cases must be equal to actual damages sustained, as determined by Member States' national court).

234. *Marshall II*, [1993] 3 C.M.L.R. at 325. The Court of Justice stated that "full compensation for the loss and damages sustained as a result of discriminatory dismissal cannot leave out of account factors, such as the effluxion of time, which may in fact reduce its value." *Id.*

235. See *supra* note 6 (discussing inclusion of Article 119 in original EEC Treaty).

236. Case 149/77, [1978] E.C.R. 1365, [1978] 3 C.M.L.R. 312.

237. *Id.* at 1372, [1978] 3 C.M.L.R. at 313.

238. *Marshall I*, Case 152/84, [1986] E.C.R. 723, 743, [1986] 1 C.M.L.R. 688, 707.

hence its protection of this fundamental right, continues in *Marshall II*.

There is no doubt that the Court of Justice engaged in judicial activism to reach its conclusion in *Marshall II*.²³⁹ *Marshall II* illustrates that the Court of Justice not only interprets the laws of the Community, but also that the Court will enforce that legislation through its rulings. Prior to *Marshall II*, the Court of Justice had restrained itself from imposing sanctions for Member States' violations of a directive. The Court of Justice has now barred the Member States from setting arbitrary limits on awards for violations of the Equal Treatment Directive. Thus, the Court has essentially taken all discretion away from the Member States in determining what measures are necessary for the complete and adequate implementation of the Equal Treatment Directive. The Court's ruling that the Industrial Tribunal was obligated to disregard national law in awarding damages is a principle the Court of Justice had never articulated prior to *Marshall II*. This pronouncement will have far reaching effects not only in gender equality cases, but also may be extended to cover other fundamental rights areas.

CONCLUSION

The Court of Justice, in *Marshall II*, engaged in judicial activism to create a uniform application of the Equal Treatment Directive by the national courts of the Community. The Court's dedication to the elimination of gender discrimination is apparent and the Court's actions should be applauded for providing Member States with concrete guidelines concerning the sanctions that must be applied against employers who engage in discriminatory policies. The effect of the Court's specific guidelines concerning damages is that individuals who feel they have been the victim of gender discrimination will more likely pursue their claim. This incentive for plaintiffs to sue, coupled with the deterrent effect of the *Marshall II* decision, ensures that Member States will be more attentive when examining whether their employment policies are gender neutral.

239. See *supra* note 55 (defining judicial activism and discussing Court's history of employing judicial activist philosophy).