European Employment Law and the Gainful Employment of Women

Angela Ward, PhD., England

A written statement is unfortunately not available. The following abstract is based upon the verbal statement presented by Angela Ward, PhD, at the Conference.

As an introduction to the Conference Angela Ward looked at the aspects of European Employment Law relevant to women and at legislation which have been important to access of gainful employment for women at an European level:

Angela Ward refers to the principal of equal pay for equal work between men and women, which is embodied in Article 141 of the EC Treaty. This provision has been extensively interpreted by the European Court of Justice and covers both, direct and indirect discrimination in matters of pay.
Article 141 has also been useful to the European Court of Justice as one of the foundations on which to ground the principle of equal treatment as a fundamental or constitutional right in the European Legal Order.
Angela Ward refers to the EC directives on the implementation of the principle of equal treatment in matters both, of pay and of conditions of employment. For example the following directives have been mentioned:
The directive on equal treatment with regard to access to employment, on vocational training, promotion and working conditions, the directive on equal treatment in matters of social security, the directive to secure equal treatment for the self employed and protect self employed women during pregnancy and motherhood.
In addition a series of resolutions of the Council of Ministers is of importance, which e.g. cover a range of topics such as the promotion of equal opportunities in general, combating unemployment of women, a resolution on integration of women to working life.
The European Court of Justice has developed the equality law through a body of case law, which causes an obligation to national legislation and national jurisdiction to implement rules of the European Legal Order.
To illustrate the role of the ECJ in transforming equal opportunities from a soft law into a binding obligation for national legal systems of the member states, Angela Ward refers to one of the earliest cases and one of the most recent cases. In 1986 the Sabena Airways case led to a decision on equal pay for equal work and installed this principle in national law on the ground of Article 141 of the Treaty. Literally this Article defines a duty binding the governments of the member states. In the Sabena case the ECJ had no hesitation in opposing the obligation on the private sector actors. In 1998 the Granada Hospitality case became of special interest and inspires not to be shy to create creative arguments in order to enforce equal treatment. The sex discrimination act of the UK prohibited sex discrimination during the existing employment relationship and did not include victimisation after the employee hat left the employment relationship. The equal treatment directive only protects individuals against dismissal as a reaction to a complaint of equal treatment. And again this was a case against a private sector actor. In the ruling the ECJ regarded to the objectives of the directive, which is to arrive at equal opportunity for women and men. The Court interpreted the directive as

widely as possible and ruled that the directive includes victimisation post the employment period, and extended again its ruling towards a private sector actor. Another issue is and will be the national positive action laws and their compatibility with the principle of equal treatment between women and men. Even though the Court has been intolerant of national positive action rules in the Kalanke case, feeling that they discriminated against men, it subsequently narrowed its ruling in the Marshall case, and other cases are pending. One of the lessons of positive action issues is that we do need more substantial legislation at the European level. The issues that are currently coming to the Court are increasingly complex and increasingly difficult to deal with for traditional actors. Also in this respect more legislation is needed.

Sophia Koukoulis-Spiliotopoulos, Greece

Gender Equality: Do We Need New Community Provisions?

There is an important Community legal acquis relating to gender equality: old and new provisions of primary and secondary Community law and case law of the Court of Justice of the European Communities (ECJ). This year, law-making processes of capital importance for gender equality as well as for the future of the European Union have been set into motion:

An Intergovernmental Conference will decide on certain amendments of the Treaties. An ad hoc body ("the Convention") has been set in order to draw up a draft Charter of Fundamental Rights of the European Union.
Directive 76/207 is in the course of being amended. The Treaty of Amsterdam has added new provisions to the EC Treaty, which widen the scope of the principle of gender equality and guarantee not just formal, but furthermore substantive gender equality (new Articles 2 and 3(2) EC Treaty). In the field of employment and occupation, the Council is obligated to adopt measures to ensure the application of this principle (Article 141(3) EC Treaty) and there is a new legal basis for positive action by Member States (Article 141(4) EC Treaty). By relying on these new provisions, the ECJ can develop very important case law. It is, consequently, very important for our Congress to look into the legal acquis and to reflect on the necessity of new provisions and/or amendment of the existing ones. In spite of international, European and national gender equality rules, violations of women's human rights are still widespread. Women are reluctant to claim their rights. The reasons are e.g. lack of information, fear of victimization by the employer or prospective employer, fear of bad reputation in the labour market, difficulty or even total impossibility to prove their case. The continuing violations of women's human rights has led to the adoption by the UN General Assembly of an optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which provides for individual complaints. At European Union level, the following measures are suggested, as a minimum:

An express and clearly worded provision of direct, vertical and horizontal effect guaranteeing substantive gender equality and prohibiting gender discrimination in all fields should be introduced in both the Charter and the Treaty.

Such a provision will render unnecessary the reference to sex in Article 13 EC Treaty and in the general anti-discrimination clause of the Charter, the more so as gender discrimination, which mostly affects women, is of a particular nature and sex differs fundamentally from the other grounds of discrimination.

A guarantee of effective judicial protection in all its aspects - e.g. effective access to court, effective judicial control, fair trial, effective sanctions, execution of any final judgment - should be included in both the Charter and the Treaty.
Directive 76/207 and all the other gender equality directives should be modified so as to take into account substantive gender equality, as proclaimed by the new Treaty provisions, and include provisions corresponding to those of the Article 13 Directives (the race directive and the framework directive on equal treatment), which reflect either the ECJ case law on gender equality or the experience from the application of the gender equality provisions. - e.g. extension of the scope of the Directive, abolishment of the provision on derogations or stricter conditions for allowing them, improvement of the definition of indirect discrimination included in Directive 97/80 on the burden of proof, improvement of maternity protection, express prohibition of sexual harassment, effective judicial protection.
In addition to that, a 5th Community Action Programme on gender equality, of wider scope than the previous ones, should be adopted and supported by a substantive budget.
The full text of this paper will be shortly published in an updated form, in which important recent developments on the subjects dealt with will be taken into account.

Ina Sjerps, PhD, Netherlands

A written statement is unfortunately not available. The following abstract is based upon the verbal statement presented by Angela Ward, PhD, at the Conference.

Ina Sjerps, PhD, is a member of the "Network of Equality Experts at the European Commis-sion" which is an independent legal network of sex equality lawyers. She summarised her experiences of work within this group questioning if sex equality is achieved in the European Union and its member states. Sex discrimination is prohibited in the European Community. This rule is transformed into national law in the member states. The European Court of Justice created case law on the grounds of more than one hundred cases and interpreted the EC rule not just by looking at the letters of the directives but by reading the goal of sex equality into the text. Many people, men and women, believe that equality is achieved. The lack of women in top management positions is widely understood as just a question of time till women will have had the necessary education and training. If women shall not have made it to the top in the future it might just proof that women prefer other priorities.
Ina Sjerps is arguing against this ideology:

- the European Sex Equality Law is not completed,
- the directives in question, especially the directive on social security, content exceptions which still allow sex discrimination,
- the directives are not fully and not correctly implemented in national law,
- the employers do not fully and correctly follow the legislation,
- there is still a pay gap of an average of thirty percent between men and women,
- the employers still recruit men and women following different, gendered role-models and expectations upon women and men,

- women do not get equality but get pregnant and do the unpaid caring work,
- while men get the insight knowledge of the labour market,
- women structurally remain being outsiders (gendered division of labour),
- and, most important, the prohibition of sex discrimination is not the same as achieving equality.

Those directives, which aim at real equality like e.g. the directive on paternal leave, are rather week. To achieve real equality a new Momentum is needed in the European Community for improving Human Rights. Ina Sjerps refers to Article 13 of the Treaty, Article 137 of the Am-sterdam Treaty and the Charter of Fundamental Rights and refers for more details to the statement by Sophia Koukoulis-Spiliotopoulos presented in the context of this panel. She agrees with Sophia Koukoulis-Spiliotopoulos that more legislation is needed in the EC which then will need to be implemented on a national level in the member states. Ina Sjerps demands an early expert-involvement of the European Women Lawyers Associa-tion in co-operation with the already existing independent legal "Network of Equality Experts at the European Commission" to launch initiatives towards such legislation and to create strategies to bring test cases to the European Court of Justice. However, it will be of importance to realise that legal experts do not always agree on what is best for women. Different concepts of sex equality in Europe have to be taken in account as well as different legal traditions of the different member states as well as different types of social welfare conceptions. For example, while the European Court of Justice interprets the written law broadly, as this is also a legal tradition in Germany, it seems as if e.g. the Anglo legal tradition takes a legal text by the letters. For example, the term and understanding of positive action is much more accepted in some legal and political national traditions than it is in others. The different concepts of the welfare state create differences in how to deal with unpaid work and the gendered division of labour in different member states. In the Netherlands the (parental) concept of part time work for both, fathers and mothers, is strictly favoured while part time work in other member state so-cieties is understood as marginalized work. In Europe some women favour specific legal ini-tiatives which other women want to ban. It is necessary to know about and understand these differences in order to understand equality law better and to present test cases to the European Court of Justice which do not divide women in implacable fractions. Knowing about the differences can also help to argue and to give reasons for cases. If e.g. the germans presenting the Kalanke case had known better of the legislation in the Netherlands it might have increased the chances at court. The question if women have achieved equality has to be answered negatively. So is the ques-tion of equal opportunities. Nevertheless, women and a European Women Lawyers Associa-tion have the opportunity to achieve a better legislation and better cases at the European Court if the differences among the member states will be understood and will be taken in account.

Prof. Dr. Ninon Colneric, Germany

The Social Dialogue between Management and Labour at E.U. Level

In her conference contribution, Ninon Colneric illuminates the tasks and possibilities of a `social dialogue´ between both sides of industry at E.U. level. The dialogue between man-agement and labour has a key function and is seen as a chance in economic and in social de-velopment to precipitate change through co-operation rather than through conflict. The concept of `social dialogue´, however, has a different meaning at different institutional levels, and the differences must be taken into consideration - as well as the differences in dialogue within individual sectors and at a level including several sectors. It is implied that the participants in processes of discussion and negotiation are acting in so-cial partnership, i.e. at the European level between employers and trade unions. These social partners have a counselling function for the Commission. The most important social partners at the European level are the European Trade Union Fed-eration (EGB) and the two employers federations, the Union of the Industry and Employers Federation (UNICE) and the European Central Federation of the Public Economy (CEEP). The representatives of both sides form a standing committee for employment questions, con-sisting of ten representatives respectively from the employers side and employees side. Not only to address the Commission but also for the partnership between management and labour the social dialogue is of increasing importance. Political authorities have to intervene less - in respect of legislation as well as of politics - , if both sides of industry draw up their own agreed settlements (subsidiary principle). The three above mentioned organisations established the Committee "Social Dialogue". Due to Committee initiatives public hearings are established through the Amsterdam Treaty as well as procedures to draw up settlements between management and labour on an EC level. Until now three directives resulted from such settlements between EGB, UNICE, and CEEP:

- In 1996 the directive on parternal leave,
- the directive on part-time work (1997), and
- the directive on time-limited contracts.

All three directives are connected with the specific situation of women in the labour market. The (only) progressive directive on paternal leave makes the chances plain which can result from settlements between both sides of industry. It is also of interest to observe in which areas management and labour avoid to enter a social dialogue. In respect of establishing European work committees they have not been interested in negotiations among themselves. They did not intervene in the debate of ruling the shifting of burden of proof in cases of sex discrimination. They did not engage in the discussions of sexual harassment. The social partners left these topics to the political bodies and authorities of the EC. Ninon Colneric emphasises the conflict of interests between management and labour. There-fore their possibilities to take influence by agreed settlements are limited. However, if the Commission takes action in the field of management and/or labour the Committee "Social Dialogue" might working successfully again. Therefore it is of importance to demand a ade-quate participation of women on both sides - management and labour - in the Committee. Since the number of delegates is

strictly limited it will need creative fantasy to increase the number of women. Finally, Ninon Colneric draws attention to the training centre UNCE. CEEP and EGB have founded in Florence, Italy, with the aim to research on the different work relations and work conditions in Europe. Women lawyers who are members of unions or members of employers associations should make use of this centre as well.