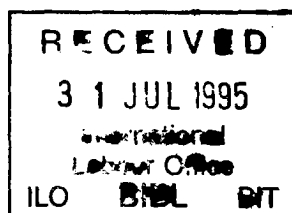
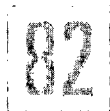


**EUROPEAN LABOUR COURTS:
INTERNATIONAL AND EUROPEAN LABOUR STANDARDS
IN LABOUR COURT DECISIONS,
AND JURISPRUDENCE ON SEX DISCRIMINATION**



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LABOUR-MANAGEMENT RELATIONS SERIES

**EUROPEAN LABOUR COURTS
INTERNATIONAL AND EUROPEAN
LABOUR STANDARDS
IN LABOUR COURT DECISIONS,
AND JURISPRUDENCE
ON SEX DISCRIMINATION**

**Proceedings of the Fifth Meeting of European Labour Court Judges
(Brussels, 6 September 1993) on the role and use of
international and European labour standards in labour court decisions,
and labour court jurisprudence on sex discrimination**

Edited by Arturo Bronstein and Constance Thomas

INTERNATIONAL LABOUR OFFICE GENEVA

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Foreword

In September 1984 the ILO-sponsored International Institute for Labour Studies (IILS) organized, in cooperation with a group of judges of European labour courts, a meeting in Szeged, Hungary. The purpose of that meeting was to allow the participants to share their experience and problems, and exchange views on a number of matters of common interest concerning the role and functioning of their institutions. Since then, the ILO has been associated with further meetings of European labour court judges, which were held respectively in Herzlia, Israel (1987), Paris (1989), Athens (1991), and Brussels (1993). The IILS or the ILO have processed and published the papers submitted to, and the proceedings of, these meetings.¹

The present volume includes the various national papers contributed by participating judges to the meeting in Brussels, held on 6 September 1993. That meeting examined the following agenda: I. The role and use of international and European labour standards in labour court judgements; and II. Labour court jurisprudence on sex discrimination.

This volume also includes two summaries of points I and II of the above agenda. They were prepared respectively by Mr. Arturo Bronstein, Head, Labour Legislation Section, ILO, and Ms. Constance Thomas, formerly of the Equality of Rights Branch, ILO.

It is our hope that the wide dissemination of this volume will be of interest and assistance to those throughout the world who are concerned with the role and function of labour courts and of similar institutions.

¹ The proceedings of the meeting in Szeged have been published by the IILS, Geneva, 1986. The proceedings of the meetings in Herzlia, Paris and Athens have been published respectively in the Labour-Management Relations Series (see W. Blenk (ed.): *European labour courts: Current issues*, Labour-Management Relations Series No. 70 (Geneva, ILO, 1989); idem: *European labour courts: Industrial action and procedural aspects*, Labour-Management Relations Series No. 77 (Geneva, ILO, 1993); A. Trebilcock (ed.): *European labour courts: Remedies and sanctions in industrial action; preliminary relief*, Labour-Management Relations Series No. 81 (Geneva, ILO, 1995).

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Address by Arturo S. Bronstein, Head, Labour Legislation Section, International Labour Office, Geneva

I have the honour to convey to you the greetings of Michel Hansenne, Director-General of the International Labour Office. As you know, the ILO's association with your work dates back to 1984, when your first meeting was held in Szeged, Hungary. The meeting in Szeged was convened by the ILO-sponsored International Institute of Labour Studies, in close cooperation with an initiating committee composed of Judge Ake Bouvin, President of the Industrial Tribunal of Sweden, and the late Zvi Bar-Niv, President of the National Labour Court of Israel, who has left us with an imperishable souvenir. Dr. Alan Gladstone, who was then the Director of the Industrial Relations and Labour Administration Department of the ILO, represented the Director-General at that meeting. Since then, Dr. Gladstone has been with you at all the other meetings: in Herzlia (1987), in Paris (1989) and in Athens (1991). He is now a very active retired ILO official and it is with great pleasure that I welcome him amongst us today.

The purpose of the present meeting, like the preceding ones, is of paramount importance to the ILO. Most ILO standards become applicable, *inter alia*, through judicial decisions. It is needless to mention that you come from countries with very different legal systems and also with very different systems of administration of justice. Whilst at times your role is to create the law, at other times your role is to interpret statutorily created rules. As can be seen from the various national reports that you have submitted to this meeting, in certain countries international standards are a source of law that is applied to resolve a dispute; in certain others, although you do not have to apply them, they serve as a point of reference in your decisions. The diversity of national legal systems and the variety of approaches and solutions contribute to the interest and richness of the exercise you will be engaging in at today's meeting, namely, that of making an international comparison. No matter what your legal system or justice administration, it is always your responsibility to help promote labour law. The International Labour Office, in its capacity as "world observer" of social policies, has the obligation to monitor the development of labour law in the world. This task would be incomplete if it was limited to taking note of legislative developments. It is only by reading your decisions that we can get a better idea of how statutory law is implemented and applied. This is why many of your "Case-Law Digests" are well known to us and why we publish, with a view to bringing them to the attention of the international community, what we consider to be worthwhile summaries of judicial decisions delivered by national jurisdictions. This is also why we ask member States, who have ratified international labour Conventions, and who must therefore report on the

measures taken to apply such Conventions, to provide us with information on judicial decisions relevant to the subjects dealt with by these Conventions.

It is therefore with great pleasure that I will follow your proceedings, and I wish, if you will allow me, to participate in the discussions on item I: The role and the use of international and European labour standards in labour court judgements. My colleague, Constance Thomas, of the Equality of Rights Branch of the ILO, will follow more particularly the debate on item II: Labour court jurisprudence on sex discrimination, which is also a subject of paramount interest to the ILO. As you know, we have already published the proceedings of three of your previous meetings. I hope we can also publish the proceedings of the fourth meeting as well as of this meeting. We would like to continue our collaboration with you. It has been a fruitful experience for the ILO, and we hope the same holds true for you. I shall be very glad to discuss the possibility of holding a sixth meeting, as well as the assistance the ILO can provide.

Last but not least, this meeting would not have been possible without the interest and the keen support of the organizers of the Fourth European Regional Congress of Labour Law and Social Security, and especially that of the Chairman of its Organizing Committee, Professor Roger Blanpain. I extend my thanks to him and through him to the team which will help us in our task. I thank you all very much for your attention and I wish you a very fruitful debate.

***The role and use of international
and European labour standards
in labour court decisions***

***Reporter: Judge Stephen Adler, Deputy President, National Labour
Court of Israel, Jerusalem, Israel***

Comparative overview

Arturo Bronstein*

The meeting had before it eight national reports dealing respectively with Finland, Germany, Hungary, Israel, Norway, Slovenia, Spain and the United Kingdom. It first discussed the bearing of international standards, especially from the European Community (EC),¹ on judicial decisions by national labour courts. The role of international instruments adopted by other international organizations, such as the United Nations and the Council of Europe, was also examined. Consideration was given to whether international standards were also directly binding on the courts, in which case the latter would be empowered to settle disputes over rights on the basis of international rather than of national law. This question is especially relevant when courts are to adjudicate disputes relating to issues insufficiently regulated or not at all regulated under national law. Whether national courts had the faculty of departing from national law in order to directly apply international law when the former contravened the latter was also discussed.

A second set of questions focused on the use of international law as a source of interpretation. The meeting discussed whether guidance could be drawn from international law in order to provide a decision with appropriate support. It exchanged views on the actual use of international law by national courts and assessed the courts' awareness of the importance of international sources of law.

The meeting considered the use by national courts of precedents of foreign jurisdictions, especially those of the European Court of Justice – ECJ (for countries belonging to the EC), and of the ILO supervisory bodies in respect of issues dealt with by international labour standards. Finally, the meeting discussed the access national courts had to international sources; this issue called for an assessment of the courts' resources in documentation and research. It also raised the issue of legal training that needed to be given to judges and practitioners in order to improve their knowledge of international law.

Provided below is a comparative analysis, derived from the national reports submitted to the meeting.

* Head, Labour Legislation Section, ILO, Geneva.

¹ Now named the European Union, following the coming into force of the Treaty of Maastricht, in 1994.

International standards as a source of law

To a large extent, the use of international standards by labour courts depends on: (a) the competence of each court; (b) the status of international law in the legal system of each country; and (c) the source of each relevant international standard (e.g. the United Nations, the ILO, the Council of Europe or the EC). The knowledge that a court may have of relevant international standards, as well as the judges' openness or reluctance to apply foreign rules, are also of paramount importance for the actual use of international law by national courts.

Competence of the courts

A distinction should be drawn between countries such as Finland, whose labour court has a narrow field of competence, and those other countries such as Germany, Hungary, Israel, Spain, Slovenia or the United Kingdom whose labour courts are empowered to settle most — if not all — labour disputes over rights. In Finland the labour court only hears claims submitted by the workers' and the employers' organizations which are a party to a collective agreement, and only handles disputes arising out of an agreement or relating to collective bargaining law. Claims by individuals relating to the application of statutory protection must be submitted to the ordinary courts. Since the major source of regulation governing a dispute submitted to a court is a collective agreement, there is very little room for international law to be taken into consideration (unless international law were to be invoked in connection with disputes relating to the validity of an agreement). Though theoretically possible,¹ invocation of international law is highly infrequent in such cases. By contrast, in countries where labour courts adjudicate individual labour disputes, international law might be regarded as a regular source of law alongside national law. International law may consequently be called upon by claimants and defendants and may be applied by the court. The relative weight of international law with respect to national law varies, for it depends upon the status that international law enjoys under the law of each country.

The position of international law in national legal systems

This issue is closely related to: (a) the solutions adopted in each country with regard to the status of international law, and (b) the source of the relevant international standard. On the one hand, conventions or covenants adopted by international organizations such as the ILO, the United Nations or the Council of Europe belong to the category of international standards; whether or not they can, after ratification, be directly applied in a Member State depends firstly, and foremost, on the solution adopted by each national legal system relating to the integration of international standards in national law (i.e. the so-called "monistic" and "dualistic" positions). On the other hand, regulations adopted by the EC in pursuance

¹ For example, the validity of a discriminatory provision of an agreement could be challenged on the ground that it contravenes a non-discrimination treaty to which Finland has adhered.

of the Treaty of Rome are supranational standards; as such, they ought to be binding on national courts in each EC Member State.

Most papers, other than that of Spain, emphasize that while ILO standards¹ have had important influence in the making of national laws or regulations, the standpoint in national laws or practices is that ratified Conventions create obligations on the Member States rather than on the judges themselves. This is why, in countries such as Germany and Israel, ratified ILO standards are not considered to be immediately applicable national law.² Consequently, ratified international labour Conventions require formal integration in the national legal system before they can be applied by a court. Unless the relevant ILO standard is self-executing (which is rarely the case),³ integration of international labour Conventions in national law is usually carried out through the enacting of legislation. ILO standards may also be given effect through collective bargaining, especially where collective bargaining can lead to the signature of binding national central agreements. As a matter of fact, this is an important feature of the industrial relations systems in the Nordic States. Hence, the report on Finland points out that a number of international labour Conventions, for example in matters relating to dismissal protection, have been made effective through collective bargaining.

Once the international law is transformed into national law (or is given effect through collective bargaining), the courts usually apply the latter rather than refer to the former. Besides, where there is the likelihood of a ratified ILO standard conflicting with an established national law, most courts attempt to find that actual conflict does not exist. In this respect, the German paper provides examples of court decisions on several issues relating, *inter alia*, to unemployment benefits covered by the Social Security (Minimum Standards) Convention, 1952 (No. 102), or concerning protection to be granted to workers' representatives pursuant to the Workers' Representatives Convention, 1971 (No. 135), or to paid leave covered by the Holidays with Pay Convention (Revised), 1970 (No. 132). In most cases, the German court has held that such international standards were not contravened by national law; therefore, it did not have to rule whether or not international law enjoyed preferential status over national law. A similar approach was followed in a case where it was argued that German law contradicted the EC Directive on transfer of undertakings. However, in a case concerning the extent to which civil servants were subject to a duty of political loyalty the court refused to derive warranties from the ILO Discrimination (Employment and Occupation) Convention, 1958 (No. 111),⁴ on the grounds that this would be contradictory to the German Constitution. A rather similar approach was followed in cases where the court was called to assess the legal bearing of provisions of

¹ As of 31 December 1993 the number of international labour Conventions in force in countries participating in the meeting was the following: Finland, 74; Germany, 66; Spain, 105; Hungary, 59; Israel, 41; Norway, 85; Slovenia, 66; the United Kingdom, 66.

² By contrast, the report on Israel points out that customary international law is automatically part of Israeli law. To date no labour or social security international convention has been recognized as customary international law, but some scholars have suggested that certain fundamental labour laws be so enshrined.

³ Of course, where existing legislation already abides by an international labour Convention it would not be necessary for a country to adopt new legislation with a view to implementing that Convention.

⁴ Convention No. 111 prohibits discrimination in employment and occupation on the basis of race, colour, sex, religion, political opinion, national extraction or social origin.

the European Social Charter relating to the right to strike. In Norway, national doctrine developed by the Supreme Court holds that the Norwegian law is presumed to be in conformity with treaties by which Norway is bound. Yet there was a case where the labour court upheld a decree freezing a strike and imposing compulsory arbitration, while noting that such decree might be considered inconsistent with the doctrine that the ILO supervisory bodies had built on the basis of the Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87). In this case, the doctrine of "presumed conformity" yielded to the principle of supremacy of national law.

Spain departs from the above approach, to the extent that binding international law is considered part of the domestic law. Once published in the Official Journal of the State, international treaties and covenants (including international labour Conventions) are to be applied by local tribunals alongside national legislation. For example, the Supreme Tribunal has directly applied the Holidays with Pay Convention (Revised), 1970 (No. 132), in connection with topics such as the amount to be paid to workers for holiday time; or the inclusion of periods of incapacity for work, resulting from sickness and injury, as part of the minimum annual holiday with pay (which is prohibited under Convention No. 132). Moreover, international standards would benefit from preferential status if national law were to collide with international law. The Spanish paper recalls, however, that in actual fact the courts rarely have to resort to applying ILO standards to settle labour disputes because national legislation happens to be more protective than international law. The Slovenian paper suggests that a similar approach is followed in that country.

European Community law

The supranational law of the European Community (EC) is immediately applicable to Member States and ranks higher than national laws, including the Constitution. In this respect, the report on Spain points out that EC regulations on social security are frequently used in Spanish courts, due to the large migration in the past of Spaniards to other EC countries. Nevertheless, apart from safety and health issues, the European Community has so far adopted few rules in the field of labour law. Moreover, EC Directives are usually not self-executing and call for enforcement through national law and regulations.¹ The Treaty of Rome is, however, in itself an important source of labour law for a court must refuse to apply national law when it feels that it contradicts basic principles of that Treaty. Indeed, when a doubt arises a national court is obliged to submit a preliminary query to the ECJ to ascertain whether national law or regulations are in conformity with EC law. Freedom of circulation, freedom to provide services and equality of rights and treatment are fundamental principles of the Treaty of Rome which have had far-reaching bearing on national labour law, as well as on decisions of both the ECJ and national court rulings on labour law issues.

¹ Case-law of the ECJ has, however, held that a State that fails to enforce an EC Directive could be made liable to respect of torts suffered by an individual as a result of non-enforcement of such Directive.

The use of international standards and principles as guidelines

Albeit not legally binding on the courts, international standards may be used as guidelines to provide support to judicial decisions. In Hungary, for example, a decision by the Supreme Court, in 1991, drew inspiration from Convention No. 87 to rule that workers' councils could enjoy trade union rights because they were workers' organizations which had been set up with the purpose of furthering and defending workers' interests. The report on Finland recalls that international standards can be, and have been, invoked as principles of interpretation, whose greater or lesser significance has depended on the situation at hand. The report on Norway recalls various cases which involved application of both the Universal Declaration of Human Rights and the European Convention on Human Rights. In still another case, ILO Convention No. 111 played an important role when an issue at stake concerned the right to question job applicants about their religious convictions. The Slovenian report underlines that Slovenian courts are getting ready to use the standards of the international organizations, and judges are studying international practices. The report on Israel refers to a number of cases in which international law was invoked to support court decisions. The National Labour Court, for example, cited the European Charter of Fundamental Social Rights of Workers while ruling against discriminatory job advertisements. In still another case it cited the European Social Charter as an indication of acceptable and desirable standards. In a landmark case relating to prevention against sex discrimination it invoked the Universal Declaration of Human Rights and Convention No. 111. More generally, the said report points out that it is an established doctrine of the National Labour Court that when interpreting national statutes the Court should refrain from an interpretation which could violate Israel's obligations under international law. The Spanish Supreme Tribunal, in dealing with a case concerning the legality of a general strike, invoked the doctrine of the Committee on Freedom of Association to conclude that the strike in question was legal. More generally, the report on Spain notes that the principles formulated by the Committee of Independent Experts, created by the Council of Europe, and those set out by the ILO Committee of Experts on the Application of Conventions and Recommendations, are cited by Spanish Tribunals, mainly to reinforce the judges' own interpretation of the particular item under discussion.

The influence of foreign jurisdictions

In general, other than the ECJ, the decisions made by foreign jurisdictions or bodies, including the ILO supervisory bodies, play a small role in building national case-law. The paper on Germany, for example, observes that the views of the ILO supervisory bodies are recorded only rarely in decisions of the labour court. In fact, the relevant international sources are hardly known to the courts and the parties to a dispute. Only in exceptional cases will the latter call upon international standards or principles, or decisions of foreign courts.

The most noteworthy exception concerns Israel, where the National Labour Court has frequently cited decisions by other nations' labour courts, especially where there is no national statutory provision or precedent relating to a particular case, or when the court wishes to compare the existing Israeli law with that of other countries. The report on Israel observes that it is convenient for its labour court to show that the conclusion it has reached on a new issue is the same, if not similar, to that reached by courts of other nations.

The paper on Finland points out that the reasoning of the labour courts in other Nordic States might have influenced, to a certain extent, the decision-making process in the Labour Court of Finland.

The decisions of the ECJ are of far greater significance to national courts of EC Member States than the decisions of foreign jurisdictions. This derives from article 177 of the EC Treaty, which provides for a procedure of preliminary decision-making by the ECJ when a case submitted to a national court happens to be regulated by a national law which is argued to be inconsistent with Community law. The preliminary procedure before the ECJ aims to ensure uniformity of interpretation in the application of Community law. In principle, the ECJ interpretation is binding on national courts only with regard to the particular case that has been submitted to the ECJ; however, ECJ interpretations actually affect other court procedures relating to similar issues.

Access to international information

While there is growing awareness of the importance of international law, several national papers point out that international sources happen to be hardly known to the courts. One reason is that judges and practitioners alike very seldom receive formal training on international law; it is also to be noted that lower courts, and sometimes even higher courts, seldom have at their disposal accurate digests of international law. In this connection the report on Germany emphasizes that "we should not fail to recognize that court libraries are normally inadequately equipped with literature and materials in the field of international labour law". Similarly, the report on Norway remarks that, apart from the superior courts in Oslo, the jurisprudence of international courts and supervisory bodies is hardly available to the other courts.

Efforts are, however, being made in certain countries to overcome such a hurdle. For example, in Finland both the authorities and the private sector have arranged for a significant amount of legal training, and the labour court has access to all the literature that has been published in Finland on the developments in integration, especially in the field of labour law. Legal databases are also made available to the labour court; one of these databases contains the international conventions in force in Finland. A second database contains summaries of the decisions of the ECJ; it also contains summaries of the decisions of the European Court of Human Rights and of the United Nations Committee on Human Rights. In Germany the Federal Labour Court is connected to the legal information system of the Federal Republic, which includes access to the relevant legal information of the EC; however, it seems that the availability of such resources is not widely known. The report on Norway states that the EC database CELEX is available to all subscribers to the national

database LOVDATA. The National Labour Court of Israel seems to be well supplied with international labour law documentation. The report on Spain states that the Spanish General Council on the Judiciary frequently organizes courses and training on European law.

The ILO databases LABORLEX and ILOLEX (the latter on CD-ROM) do not seem to be as yet in use in any court.

International and European labour standards: Summary table

Country	Are precedents of foreign courts cited?	How are international standards introduced into courts?	How judges learn about international standards	Computer database	EC binding	Are ratified ILO standards binding on courts?	Use of international standards where they do not bind courts	International standards cited
Germany	EC precedents are cited. Other international precedents are seldom cited (language problems)	Court does research	Published in <i>Official Gazette</i> . Publications, libraries	Juris, CELEX	Yes	No	When local law unsettled, international standards provide basic principles and reasoning	EC. ILO and UN not cited. Local standards higher
Hungary	—	The parties refer to them. Judicial notice. No need to submit copy	Published in <i>Official Gazette</i> . Publications, libraries, encyclopaedia, seminars, courses	No	No	No	Help to formulate national standards	ILO, UN, EC
Israel	Sometimes, for important cases, where local law is unclear	The parties sometimes refer to them. Generally they are found through court research. Copies are generally submitted	Published in <i>Official Gazette</i> . Publications, libraries, seminars	No	No	No	When local law is unsettled, they determine reasonable norms	ILO, UN, EC

International and European labour standards: Summary table (concl.)

Country	Are precedents of foreign courts cited?	How are international standards introduced into courts?	How judges learn about international standards	Computer database	EC binding	Are ratified ILO standards binding on courts?	Use of international standards where they do not bind courts	International standards cited
Norway	No	The parties refer to them. Copies not submitted to courts	Treaties published in <i>Official Gazette</i> . Publications scarce	CELEX	No	No	Interpretation. Passive transformation	European Court of Human Rights, UN, ILO
Slovenia	Not yet	—	Seminars, courses, publications	No	No	No	Provide basic principles	Not yet cited
Spain	Infrequently. EC precedents are cited	By the parties. Copies generally submitted	Seminars, courses, publications	No	Yes	Yes	Reinforce decisions	EC, UN and ILO not cited
United Kingdom	—	—	—	—	Yes	No	—	—

Source: Prepared by Sir John Wood, Reporter, Point 1.

Finland

Pekka Orasmaa, Vice-President, Labour Court

Competence of the Labour Court

The Labour Court of Finland is a special court handling and deciding disputes based on collective agreements or Acts governing such agreements when the issue in dispute concerns the validity, duration, content and scope of the agreement, or the correct interpretation of a term in the agreement, or the question of whether a certain procedure complies with the agreement or Act, or the consequences of such a procedure. When the issue concerns whether or not a procedure violates some other Act or, for example, an employment contract, the dispute must be taken to a general court of law. The labour court thus only handles collective agreements, and the parties to the proceedings are normally the parties to the collective agreement in question.

Application of international standards and covenants

Finland has been a Member of the ILO since 1920. The international labour Conventions ratified by Finland have been enforced by legislation and, to some extent, also by collective agreements. This is also the case regarding nearly all the international labour Recommendations. As a member of the Council of Europe, Finland has enforced, among other things, the European Convention on Human Rights through an Act which entered into force on 23 May 1990. From that day on, the Convention has existed as a source of law that is binding on the courts, including the labour court, just like any other Act. At the same time, Finland also adopted the control system of the Convention and agreed to be bound by the decisions of the European Court of Human Rights in national judicial decision-making.

Changes are about to take place in the international position of Finland as the European Economic Area (EEA) is likely to become a reality in the near future. By an agreement signed on 5 May 1992, Finland has, together with other EFTA countries, undertaken to enforce the existing EC provisions on the national level. The EC Regulations shall enter into force either on Finland's entry into the EEA Agreement or upon the expiration of the transitional periods provided by the EEA Agreement. The Directives shall be enforced by national provisions complying therewith. This harmonization will be carried out mainly through legislation, although, for example, in questions concerning work life, collective agreements are also, at least to a limited extent, available as a means to achieve

the goal. Principles adopted within the EC have actually influenced the reform of Finnish labour legislation, and therefore the legislative amendments necessary in connection with integration are not particularly significant.

The application of conventions that are directly binding on Finland as such, for example the European Convention on Human Rights, may, in principle, become current in the labour court as well. So far, such conventions have not been invoked or otherwise brought up. On the other hand, the provisions of the United Nations Universal Declaration of Human Rights, 1946, and the international Covenant on Civil and Political Rights have been more and more frequently applied in general courts of law, especially in criminal cases.

The use by courts of international labour Conventions

The significance of international labour Conventions and Recommendations in the labour court has been more indirect; the provisions of the Conventions and Recommendations have had an influence on the conclusion of collective agreements between the labour-market organizations. In practice, the central labour-market organizations have concluded agreements on matters governed by international labour Conventions, such as protection against dismissal, shop-steward activities and cooperation within enterprises. These matters become binding through their inclusion as terms of the collective agreements since the member associations and enterprises undertake to comply with them in their collective agreements, as part of the agreements. As the national system has already tried to take into account all the international and European standards, there has hardly been any cause, at least as far as the labour court is concerned, to invoke internationally agreed upon principles instead of, or in addition to, Finnish standards.

The direct application of international labour standards or human rights standards is not likely to become common in the labour court. When an international convention has been ratified without reservations, the starting-point has been that the national legislation is in harmony with it. There have likewise not been any claims asserting that the collective agreements concluded would be in conflict with international obligations. Instead, international standards can be, and have been, invoked as principles of interpretation, whose greater or lesser significance will depend on the situation at hand. As such cases of interpretation often require that other factors besides legal principles and principles of interpretation are taken into account, the influence of an international standard in a concrete situation being resolved may be minor or it may be totally ignored.

To conclude, we may note that international labour standards have to date not had any direct significance in the work of the labour court. Instead, they have been very significant in the development of labour legislation as well as in the contents of collective agreements.

The use of foreign sources of law

Reference to foreign sources of law is fairly uncommon both in the labour court and in general courts of law. Various foreign sources are, nevertheless, applied, but — perhaps owing to the Finnish practice of fairly scanty reasoning of the judgements — this is usually not evident in the judgement of the court. Yet, in comparison with Finland, the decisions of the labour courts in the other Nordic countries often throw significant light on the way of arriving at a decision and the reasons for a decision on the same matter in their judicial practice. As the question of the application of international labour law standards has not been raised at all, the decisions of other countries on the matters in question have hardly had any influence on decision-making in the labour court in Finland.

As a country applying almost exclusively a civil-law system, the precedents of the courts have not traditionally had the same importance in Finland as in States applying a case-law system. The European Convention on Human Rights, as well as the legal system of the EC and the EEA, mainly based on case-law, will, for their part, change the Finnish system as well. So far, the decisions of the labour court do not contain any experience of the precedents of the supervisory authorities of international organizations.

Information on international law

The integration noted above has increased the need to obtain information on international standards and their interpretation. In order to satisfy this need, both the authorities and the private sector have arranged a significant amount of training, in which the chairpersons and the lawyer-secretaries of the labour court have also participated. The labour court also has access to all the literature that has been published in Finland on the developments in integration, especially in the field of labour law.

With their own personal computers, all the employees of the labour court have access to the legal databank, FINLEX, maintained by the Ministry of Justice. One of its databases, FINTREAT, contains all the international conventions in force in Finland. As a result of Finland's membership of the EEA, new databases have also been created as part of FINLEX, containing information, for example, on the decisions and practice of the courts of the EC as well as summaries of the decisions of the ECJ and the Court of First Instance of the EC. The database likewise contains summaries of the decisions of the European Court of Human Rights and the United Nations Committee on Human Rights. The future significance of this information in the practical work of the labour court remains to be seen.

If a party, in an exceptional case, has invoked an international standard as proof of his or her view, the party must also supply the labour court with an account of the contents of the standard. In the case of a directly binding convention, the labour court is itself, like the other courts (if uncertainty exists), under an obligation to establish the contents of the convention, which includes not only finding out what the convention says but also the purpose of the convention and its application practice. In practice, it is to be assumed that in the future the parties will also present all the international material that they want to invoke in their case.

Germany

Prof. Dr. Wolfgang Leinemann, Judge President, Federal Labour Court

Introduction

Despite the large number of international agreements and supranational statutory provisions of the European Community, labour law is basically a matter of national law. So far, decisions of the labour courts have dealt with the provisions of international labour law only in certain cases. International labour Conventions, and the European Social Charter (ESC) of 18 October 1961, have been of primary consideration. Likewise, the European Convention on Human Rights of 4 November 1950 has been called upon occasionally. Against that, the supranational labour law of the EC is of greater significance in adjudication, based on the forms of regulation and the far-reaching legal effects of EC legislation on national law. This is also reflected by numerous labour court decisions that take into account subjects of EC law.

The importance of international labour law standards for the national legal system

According to article 25 of the Basic Law, 1949 (GG), general rules of the law of nations are of direct application in internal law (i.e. they can be invoked in courts). However, this covers only the universally applicable customary international law, but not international agreements on covenants, even if such an agreement or covenant has been agreed upon by a majority of States. International labour Conventions, like the European Convention on Human Rights and the ESC, are international legal agreements. They are only binding on member States so far as they are ratified by them. In order for the conventions to become binding nationally — and thereby eventually binding on employers, employees and their organizations — a transposition into national law by legislative measures is basically necessary. Solely in those — exceptional — cases where international agreements contain self-executing clauses, which accord directly enforceable rights to individuals, are the said agreements immediately applicable by the judiciary. Then, in a legal dispute, the individual can appeal to the legal positions stipulated in international agreements. If, however, the agreement needs to be transformed into national legislation, the respective provisions of that agreement may only serve as a tool for the judiciary to interpret corresponding national legislation.

Therefore, in Germany, international labour Conventions are basically not considered as immediately applicable national law. Respective discussions in regard to the various agreements or settlements are still going on. Adjudication has frequently left open the question of immediate national applicability. This has occurred because possible application of international law may contradict a well-established national rule.

Out of more than 170 international labour Conventions, Germany has ratified more than 70 of them.¹ Included are all the Conventions relating to basic workers' rights, such as freedom of association, abolition of forced labour and equality of remuneration, as well as the prohibition of discrimination in occupation and profession. The essential Conventions about social security are also binding on Germany. In a series of cases, these Conventions led to the adaptation of the national laws. More recently, ILO standards which have not been ratified by Germany include the Labour Relations (Public Service) Convention, 1978 (No. 151), the Collective Bargaining Convention, 1981 (No. 154), the Termination of Employment Convention, 1982 (No. 158), and the Workers with Family Responsibilities Convention, 1981 (No. 156). So far, because of peculiarities of the national legal and constitutional system of the Federal Republic, ratification of these Conventions has not taken place. However, the factual content of these Conventions has to a great extent already been implemented by the national law.

In the adjudication up to now, international labour standards have been called upon only in respect to specific problems:

- (a) The law of industrial dispute is not legally settled, but it has been basically worked out through adjudication. Accordingly, among others, the prerequisites of the lawfulness of a strike are that it is borne by a trade union, that it is related to controllable objects pursuant to the collective agreement, and that the principle of reasonableness is observed. In principle, in order to ward off restricted partial strikes, the weapon of lockout is available to employers. In this connection, the settlement of article 6, paragraph 4, of the ESC was called for in several decisions. In the opinion of the adjudication, it cannot be derived from this provision that an illegal strike unsupported by a union is also permissible. The same applies to political strikes against unwanted legislation, as well as strikes aimed against questions that may not be subject to collective agreements. The permissibility of a sympathy strike which, in accordance with the German legal system, is normally illegal, cannot be derived from article 6, paragraph 4, either.

During the evaluation of the lawfulness of a warning strike, the Federal Labour Court discussed in a decision the extent to which the restrictions on the freedom to strike, developed through adjudication, are compatible with article 31, ESC. For the permissibility and the limits of a ward-off lockout, an answer is not to be found either in article 6, paragraph 4, ESC, or the European Convention on Human Rights, or the ILO Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87),² which deviates from the national law. These provisions do not extend

¹ Ed. note: As of 10 November 1994, Germany remained bound by 66 international labour Conventions out of a total of 75 ratified Conventions.

² Ed. note: Germany ratified Convention No. 87 in 1957.

beyond the principles which are already guaranteed in Germany by the basic right of the freedom of association in article 9, paragraph 3, GG.

- (b) In connection with industrial disputes, the adjudication has also affirmed that the existing regulation under the national law about payments to employees immediately affected by unemployment is compatible with Article 69(i) of the Social Security (Minimum Standards) Convention, 1952 (No. 102).¹
- (c) Likewise, the bearing of the Workers' Representatives Convention, 1971 (No. 135),² was considered in several decisions: in the opinion of the adjudication, a right of access to clerical institutions for union-authorized representatives, which does not exist under national law, cannot be derived from Convention No. 135. Likewise, no right of the unions to have the elections of their representatives performed at work can be inferred from this Convention. Convention No. 135 was also called upon with regard to the question of whether the special protection from unwarranted dismissal which is granted to employee representatives becomes effective if the election of such a representative is deemed to be null and void due to severe deficiencies. The Court held that only those persons who are considered to be employee representatives in accordance with Article 3 of the Convention were to be granted protection; such a position, however, was not acquired by a void election.
- (d) With regard to the question of which prerequisites for collective bargaining are to be demanded from a workers' association, the Federal Labour Court has taken into account article 11 of the European Convention on Human Rights, article 5 of the ESC, Convention No. 87, and the International Covenant on Economic, Social and Cultural Rights. The Court stated that these provisions do not contradict the result gained from the application of international law, because they either do not provide a regulation concerning this question or do not go beyond what is guaranteed in Germany by the basic right of freedom of association, article 2, paragraph 3, of the Basic Law.
- (e) In individual labour law the Holidays with Pay Convention (Revised), 1970 (No. 132),³ has several times been the subject of decisions. In the opinion of the Federal Labour Court, the adjudication regarding the expiration of vacation entitlements after the first three months of the following year does not violate Article 9 of Convention No. 132. This provision merely outlines a time-frame which also permits the shorter periods provided for in the Federal Vacations Law. The Federal Labour Court has also denied that its adjudication contradicts the obligation of payment in lieu of vacation after termination of the employment relationship provided for in Article 11 of Convention No. 132. This provision only regulates the prerequisites of entitlement, not the consequences of impaired performance. Therefore, it is not contrary to the adjudication of the Federal Labour Court which denies the right to a claim for payment in lieu of vacation for periods in which employees who are on leave are sick and incapable of working.

¹ Ed. note: Germany ratified Convention No. 102 in 1958.

² Ed. note: Germany ratified Convention No. 135 in 1973.

³ Ed. note: Germany ratified Convention No. 132 in 1975.

- (f) Article 1 of the ILO Discrimination (Employment and Occupation) Convention, 1958 (No. 111),¹ as well as articles 10 and 11 of the European Convention on Human Rights, were discussed with regard to the question of the extent to which public officials and employees are subject to a (political) duty of common loyalty, and the legal consequences of a violation of this duty. The adjudication refused to derive warranties from these provisions, which contradict German constitutional law.
- (g) In the field of social welfare law, the ILO Equality of Treatment (Accident Compensation) Convention, 1925 (No. 19),² was called upon in a series of cases for the resolution of individual claims.

In the juristic literature, attention is increasingly paid to international labour regulations and their importance for the German legal system is discussed. In this respect there has been some criticism that our jurisprudence pays too little attention to the contents of international labour law.

The importance of the labour law standards of the European Community

The supranational law of the EC is immediately applicable in the Member States and generally ranks higher than the national law and the Constitution. National courts have to apply the provisions of the EC Treaty and the official regulations of the EC without restriction as binding Community law (article 189 of the EC Treaty). Opposing provisions of the national law are inapplicable. Directives of the EC are initially addressed to Member States and their institutions only. They require transposition into national law by the legislation of the various countries. In addition, the Directives are of importance as a guideline for the interpretation of national law. The capacity of an immediately applicable law can only be conferred on them if the Member State concerned has not (or not adequately) fulfilled the obligation contained in the Directive, and the content of the Directive is sufficiently defined.

According to the EC Treaty, the competence of the EC to legislate in the field of labour law is restricted to specific fields. Of basic significance is the principle of equality of men and women in the workplace, as enshrined in article 119 of the EC Treaty and in the appropriate Directives. A further area settled by Community law is the guaranteed freedom of movement of employees within the Community, as stated in article 48 ff. of the EC Treaty and the respective official regulations. Connected to this is the prohibition of any unequal treatment based on different nationalities.

Most of the legislative acts of the EC in the field of labour law adopt the form of Directives of the EC Council. Numerous Directives apply to the protection of the safety and health of employees. Essential Directives are RL 75/129 (concerning redundancies),

¹ Ed. note: Germany ratified Convention No. 111 in 1961.

² Ed. note: Germany ratified Convention No. 19 in 1928.

RL 80/987 (concerning the protection of employees' claims in case of the employer's insolvency), and RL 77/187 (concerning the transfer of undertakings).

The European Charter of Fundamental Social Rights of Workers, adopted by the EC, does not have normative validity. Employees cannot derive any actionable rights from it.

For the adjudication of the labour courts, article 119 of the EC Charter and the principle of equal rights for men and women at work have attained particular importance in numerous decisions. Also, the free movement of employees within the Community, guaranteed by article 48 ff. of the EC Treaty and the associated ministerial order, was the subject of a series of decisions. For example, this principle was applied to the question of whether military service fulfilled in the native country of a migrant worker must count as regards length of service with a company, whether the application of a special protection from unwarranted dismissal for severely handicapped people can be made dependent on the employee's residence in Germany, or whether an entitlement to anticipated retirement pay expires if, according to his native law, the employee can demand a partial old-age pension earlier than he can according to German law. In the field of social insurance and social security payments, numerous detailed questions were submitted to the ECJ for a preliminary decision. For the labour law, it is of importance in this connection whether or not an employer must accept a medical certificate (issued in another EC Member State) certifying disability for work in regard to his legal obligation for continuation of wage payments in case of illness. The ECJ affirmed this upon a submission by a labour court, using article 18 of Ministerial Order No. 574/72 as a basis.

EC Directive RL 77/187 concerning change of business owner has recently been important for the question of whether or not an employee can object to the legal transferral of the employment relationship to the new owner, with the consequence that no transition of the employment relationship takes place. According to the adjudication of the Federal Labour Court, the employee is entitled to make such an objection. The compatibility of this adjudication with the Directive was the subject of several submissions to the ECJ. It was decided that the adjudication of the Federal Labour Court does not conflict with the European law.

Practical problems of the application of international labour law

Regulations of supranational and international labour law are the subject of juristic training and further education to such a small extent that it is not worth mentioning. Therefore, judges and lawyers are greatly dependent on special literature for obtaining knowledge in this field. Special text collections of essential national statutory provisions of international labour and social welfare law, as well as European labour law, have recently appeared. The international agreements ratified by the Federal Republic have also been published in the *Federal Law Gazette*, Part II.

Contributions in specialist labour law journals are increasingly concerned with questions of supranational or international labour law, especially the content and effects of the progressive development of the EC for national labour law. Standard literature and manuals related to labour law increasingly present basic questions in connection with these

legal circles and provide references to up-to-date literature. However, we should not fail to recognize that court libraries are normally inadequately equipped with literature and material in the field of international labour law.

Access to the legal information system of the European Community (CELEX) exists through the juristic information system for Germany (Juris). Among other things, this data bank comprises the legislation of the EC and the adjudication of the ECJ. However, the availability of the information system Juris is not widely known and it tends only to be used in well-equipped courts and lawyers' offices. The Federal Labour Court is connected to this information system.

The difficulties of access to the regulations of international labour law and the uncertainties about its content and applicability are shown clearly by the fact that these questions are only made a subject of discussion by lawyers and courts in single decisions, and draw very little attention.

According to the German legal system, the court has independently to discover, interpret and apply binding legal standards, i.e. those legal standards which are nationally applicable. This also applies to EC law and the standards of international law which have been transformed into national law. The investigation of the law to be applied is completely up to the court. It cannot call upon or oblige the parties to the legal dispute to investigate a right. Of course, this does not hinder the parties from pointing out certain international legal standards which have been neglected in the discussion or from expressing opinions on questions of legal applicability and interpretation. In many cases, it is only upon a referral by the parties that the courts will include international labour law in their decision.

The importance of decisions and recommendations of international bodies

The adjudication of the labour courts of other countries on international labour questions has apparently not been called upon. Decisions and recommendations of the supervisory bodies of the ILO or ESC are — to the extent to which they concern Germany — only mentioned in rare, exceptional decisions of the labour court. In the opinion of the adjudication, these decisions and recommendations and the legal viewpoint expressed therein have no immediate effect which binds the national courts.

The lack of consideration of this material for the interpretation and application of international labour law has several causes.

Collections of the decisions of other national labour courts or the decisions and recommendations of international bodies are to be found in only a few libraries. Such material is not to be found in current specialist labour law journals either. References can only be taken from the literature about international labour law. In addition, this material is often not published in German. Therefore, its consideration requires a good knowledge of foreign languages.

These difficulties probably explain the fact that only in exceptional cases do the parties to a legal dispute call upon international standards and use the decisions of other national courts or international bodies in the proceedings. As far as this has actually happened, the procedural rules for the introduction of evidence have not been applied.

Rather, it deals with the legal arguments of the parties in support of which they can refer to this material.

The importance of decisions of the European Court of Justice

Decisions of the ECJ are of far-reaching significance for the national labour courts. This is above all based on the procedure for preliminary decisions stipulated in article 177 of the EC Charter, which secures the uniform interpretation and application of Community law in the Member States. Each national court is entitled to submit to the ECJ questions regarding the interpretation and validity of Community law if such questions are relevant to a decision in a legal dispute. Last-instance courts are obliged to do this. The judgement of the ECJ binds the court making the submission.

However, according to the predominant legal opinion a decision of the ECJ has no binding effect in the sense that national courts are not obliged to take it into consideration regarding pending court procedures in other lawsuits.

National courts are nevertheless entitled to apply the interpretation of Community law made by the ECJ in proceedings between other participants. The preliminary judgement will, at least in this respect, affect other proceedings related to similar legal questions.

The basic decisions of the ECJ on labour law are published in specialist labour law journals and collections of judgements. They are, as far as questions of EC law are a subject of the decision, taken into account to a large extent. The parties to a legal dispute are free to point to the decisions of the ECJ within the scope of their legal arguments. These are not brought forward in the proceedings as judicial evidence but rather serve to support the legal opinion of the parties to the proceedings.

Hungary

Justice József Radnay, Judge President, Supreme Court of Hungary

Promulgating international standards

According to Hungarian law, the contents of an international standard containing a rule of behaviour must be promulgated adequately (Law XI, 1987, paragraph 16, section 1).

According to the procedural law connected with international standards, the conformity of international standards and internal legal rules must be established through the formulation of the content of the international standard or through the issuance of an internal legal norm which is in accordance with the concluded international standard (Law-Order 27, 1982, paragraph 3).

The promulgation of an internal legal rule mostly by means of a law is, according to Hungarian law, the basis of the mandatory nature of the international standard in the internal legal order.

The promulgation of an internal legal rule makes the labour standard binding on the Hungarian courts. Examples of such standards are:

- (a) regarding labour relations: international labour Conventions Nos. 87, 98, 105, 135, 141, 142, 151, 154; the Treaty of Rome, 1950, promulgated on 7 April 1993 by Law No. XXX, 1993; and the European Social Charter, after its ratification and promulgation this year;
- (b) relating to the individual employee: international labour Conventions Nos. 100, 111, 122, 144, 158;
- (c) relating to employment conditions: international labour Conventions Nos. 26, 42, 45, 52, 95, 99, 100, 101, 106, 123, 131, 132, 140;
- (d) regarding health and safety: international labour Conventions Nos. 21, 27, 62, 77-78, 81, 101, 115, 127, 129, 136, 139, 148, 155, 159, 161, 167;
- (e) regarding migrant labour: international labour Conventions No. 21 and No. 48, later denounced.

The ratified international and European standards are promulgated in the original English text with the Hungarian translation in the *Official Gazette*. We must bear in mind that although the standard appears before the court in the form of the promulgating law, the regulation must be applied with such content as the commission, the court, etc., may attach to these rules in their decisions.

Non-ratified or non-ratifiable international standards are not binding on the Hungarian courts. However, non-ratified standards can be used differently. The texts of international labour Conventions and Recommendations can be found in the ILO official publication *International Labour Conventions and Recommendations 1919-91*, as well as in other more recent ILO publications. We may also use the *International encyclopaedia of labour law and industrial relations* (Deventer, Kluwer).

European labour standards

European labour standards are available at the Information and Documentation Centre of the Council of Europe, which is operated by the Library of the Hungarian Parliament in Budapest.

The difficulties of educating judges are made easier through seminars given by experts of the Council of Europe in Hungary and through systematic announcements in legal periodicals (for instance, in the publications of the Supreme Court of Hungary in *Birosagi Hatarozatok*, of Decisions of the Court). Most judges follow these publications with interest.

The parties can refer to these standards without actually submitting them. Judicial notice is taken of them, mostly in the context of the interpretation of the legal rules.

The use of precedent from foreign and international jurisdictions

Since international labour standards form part of the Hungarian legal order, the precedents of other nations, courts, international courts and bodies can be significant in revealing the content of the standard. In the case of non-ratification, the standard and its application can have only an indirect role.

Standards and decisions have been cited by the Hungarian Supreme Court's Labour Law Division. In the years of transition (after 1988), the Supreme Court had to decide repeatedly whether or not organizations which are not trade unions in name can exercise trade union rights. On the grounds of the Freedom of Association and Protection of the Right to Organize Convention, 1947 (No. 87), the Court held that if the aim of the organization is the furtherance and defence of workers' interests, then the organization can exercise these rights regardless of the name of the organization (the new trade unions took the name of workers' councils) (Supreme Court M.10.079/1991, M.10.908/1991, M.II.10.974/1991 — Court Decisions 1992/7/499).

The new Cooperative Law allows the formation of only one common trade union organization for members and employees at the level of the cooperative (Law I of 1992, paragraph 66). In its ruling on this regulation, the Supreme Court referred to Convention No. 87 and to the comments of the Committee of Experts for the Application of Conventions and Recommendations.

The Court learns about international standards, comments of supervisory bodies and other courts' decisions mostly through scientific research.

Israel

Judge Stephen Adler, Deputy President, National Labour Court

Which international and European standards bind your courts?

Introduction

The law binding in Israel consists of the statutes passed by the Knesset (Parliament), as interpreted by the courts. The Government is authorized to enter into treaties or other international agreements. Such treaties bind the State of Israel in its relations with other nations. However, they are not binding under Israeli internal law until they are incorporated in statutes passed by the Knesset. Thus, international treaties which have been ratified by Israel, but have not been incorporated in a statute by the Knesset, are not binding in civil court cases between individuals, or between individuals and the Government.

Whereas treaties require express incorporation by statute in order to be binding under domestic Israeli law, customary international law is automatically part of Israeli law, since it expresses universally acceptable principles. For example, the Fourth Hague Convention has been thus applied by the Israeli courts, even though the Knesset did not make it statutory law. To date, no labour or social security laws have been recognized in customary international law, but some scholars have suggested that certain fundamental labour laws be so recognized.

Moreover, it has been suggested by some academics that the courts should declare illegal any government action which violates international treaties which the Government has signed. The courts have not yet ruled on this contention.

This paper will summarize the use of international standards in Israeli labour law. International labour standards assist the Israeli Government, Parliament and courts in determining policy and norms. While these standards are not binding under domestic Israeli law, and do not bind the labour courts, they are used as guidelines as to the applicable international norms and standards. This is especially true when a new issue arises in the labour courts, on which there is no statutory provision or case-law. The courts will be guided by the experience of other nations. Also, it is convenient for the Labour Court to show that the conclusion it has reached on a new issue is the same or similar to that reached by courts of other nations. However, it should be noted that international standards are only one factor

influencing Israeli labour law — the main influence is national policy, problems and conditions.

International Labour Organization

- (1) Israel joined the ILO on 11 May 1949, one year after becoming an independent nation. Israel has ratified 44 international labour Conventions. When a Convention is ratified, it is published in the *Official Gazette*, with a Hebrew translation.
- (2) According to article 19, paragraphs 5 (b) and 6 (b) of the Constitution of the ILO, as amended by the Instrument of Amendment, 1946, Conventions and Recommendations adopted by the International Labour Conference must be brought before the legislature of member States “for the enactment of legislation or other action”. The Israeli Government therefore brings all Conventions and Recommendations before the Knesset; every Knesset member receives a Hebrew translation of each Convention and Recommendation and the Secretary of the Knesset enters these Conventions and Recommendations into the Official Knesset Record. The Government and any Knesset member may present a draft bill to the Knesset; members have presented such proposed statutes based upon international labour Conventions and Recommendations.
- (3) Recommendations of the Freedom of Association Committee of the ILO’s Governing Body are considered part of Israel’s international law obligations; that is, such Recommendations must be given full consideration by the Government. However, these Recommendations are not a part of domestic Israeli law.
- (4) International labour Conventions and Recommendations have affected Israeli law in the following manner:
 - (i) Statutes which incorporate provisions of Conventions and Recommendations:

The Collective Agreements Law, 5717 of 1957, empowers the Minister of Labour and Welfare to extend the application of a general collective agreement to an entire industry or the entire economy, by means of an Extension Order. In this manner, the collective bargaining agreement, which applies to unionized enterprises, will also apply to non-unionized enterprises.

Section 27(2) of the Collective Agreements Law prohibits the Minister of Labour from making an Extension Order if the provisions of the collective bargaining agreement which are to be extended violate an international convention ratified by the Government of Israel.

International labour Conventions and Recommendations had an important influence on Israeli labour legislation during the first decade after Israel’s independence (1948-58). During this period, the Knesset promulgated many basic labour laws which adopted many provisions of ILO standards. Often, the Explanatory Note accompanying Bills placed before the Knesset incorporated provisions of international labour Conventions.

The Bill submitted to the Knesset for the Annual Leave Law, 5711 of 1951, included provisions of the Holidays with Pay Convention, 1936 (No. 52),¹ and also an appendix with the entire text of the Convention. The Bill submitted to the Knesset for the Hours of Work and Rest Law, 5711 of 1951, stated that it was drafted in accordance with the provisions of the 1919, 1921 and 1930 international labour Conventions on the subject,² and that the law would incorporate those Conventions into domestic Israeli law.

A recent example is the Minimum Wage Law, 5747 of 1987. During the debates in the Knesset on this law, the international labour Convention was cited by a member as a reason to support the law.

- (ii) Interpretation of statutes and collective agreements based on Conventions and Recommendations:

The National Labour Court has interpreted basic labour laws, such as the Wage Protection Law, 5718 of 1958, the Annual Leave Law, 5711 of 1951, and the Male and Female Workers (Equal Pay) Law, 5724 of 1964, as ratifications of the international labour Conventions and expressed the policy set forth by the relevant Conventions [nine Labour Court Decisions 255, 264; 10 LCD 7, 19]. The Court, therefore, determined the policy and intent of such international labour Conventions and interpreted Israeli statutes based on the Conventions accordingly.

The National Labour Court declared its policy regarding international labour Conventions and other international treaties which Israel has undertaken to observe, as follows:

An international convention does not become part of the applicable law when it is ratified by the Israeli Government. However, it shall be assumed that the State of Israel honours its obligations under international law and does not legislate statutes which violate international law . . . Therefore, when interpreting statutes this court will refrain from an interpretation which violates Israel's obligations under international law (12 Labour Court Decisions, 52, 79).

- (iii) Declarations, resolutions, observations, reports, decisions and publications of the ILO have been cited by the National Labour Court and have influenced Israeli labour and social security law. They include the following:

- (a) *Official Bulletin* of the ILO;
- (b) *International Standard Classification of Occupations* (Geneva, ILO, 1969);
- (c) *Freedom of Association*, Digest of decisions of the Freedom of Association Committee of the Governing Body of the ILO, 2nd edition, 1976;
- (d) *Equal remuneration*, General Survey, Report III, Part 4B, International Labour Conference, 60th Session, 1975.

¹ Ed. note: Ratified by Israel in 1951.

² Ed. note: These are the Hours of Work (Industry) Convention, 1919 (No. 1), the Weekly Rest (Industry) Convention, 1921 (No. 14) and the Hours of Work (Commerce and Offices) Convention, 1930 (No. 30). Israel ratified these Conventions in 1951.

European labour standards

Israel is not a member of the EC or EFTA. However, it has trade agreements with both of these communities. The main trade agreement with the EC was signed on 11 May 1975. While article 4 of the Treaty of Rome does not apply to Israel, decisions of the ECJ have been cited in labour cases [44 Sup Ct Rep 749]. The Labour Court has also cited Directives and Regulations of the EC. Similarly the European Social Charter of 1961 was cited by the National Labour Court in a 1977 decision [9 LCD 113, 130], as an indication of acceptable and desirable norms and standards. The European Charter of Fundamental Social Rights of Workers was also cited by the National Labour Court in a 1992 decision [24 LCD 65, 72] which prohibited discrimination against women in advertising for jobs involving physical labour.

United Nations

Israel has been a member of the United Nations since 1948 and is, therefore, bound by the United Nations Charter and the 1948 Universal Declaration of Human Rights. Sections 22 and 23 of the Declaration refer, albeit generally, to social welfare and the rights of workers.

On 3 October 1991, Israel ratified the United Nations International Covenant on Economic, Social and Cultural Rights, which entered into force on 19 December 1966. Article 8 of this Covenant guarantees the right to form and join trade unions and the right to strike. Article 6 relates to the right to work, equal remuneration for work of equal value, health and safety at work, equal opportunity and hours of work and leisure. However, it should be noted that ratification of this Covenant had no real effect under domestic Israeli law, under which the rights provided for under Article 8 were already protected.

On 18 August 1991 Israel ratified the 1966 United Nations International Covenant on Civil and Political Rights, Article 22 of which relates to freedom of association and the right to join trade unions. In a 1980 case [12 LCD 75], the National Labour Court cited this Covenant before Israel ratified it, as setting forth fundamental rights.

The 1979 international Convention on the Elimination of All Forms of Discrimination Against Women was ratified by Israel on 2 November 1991. Article 11 of this Convention obliged nations to take appropriate measures to eliminate discrimination against women in the field of employment. In 1979, Israel ratified the international Convention on the Elimination of All Forms of Racial Discrimination, Article 5 of which guarantees economic and social rights, including the right to form and join trade unions. Such rights are fully protected under Israeli law.

Israel also ratified, on 4 October 1991, the Convention on the Rights of the Child, Article 32 of which protects the child from economic exploitation, including a minimum age of work and regulation of hours of work. Such laws already existed in Israel.

European judges' meetings

The papers of these meetings are a source for comparisons of the labour law of the participating nations.

Examples of the use of international standards by the Israeli National Labour Court

Collective labour law cases

- (1) In a recent case, *General Federation of Labour v. Zim Shipping Company*, the National Labour Court held that a closed-shop clause in a collective agreement is not legally binding. There was no Israeli statutory law relating specifically to this question, so the Court cited the Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87), the Proceedings of the 32nd Session of the International Labour Conference, Geneva, 1951, and Principles of the Freedom of Association Committee of the Governing Body of the ILO. Also cited was the decision of the European Court of Human Rights: *Webster v. the United Kingdom*, (1981) IRLR 408.
- (2) Another recent case of the National Labour Court, *General Federation of Labour v. Besek* (to be published), related to the legality of political strikes. By a majority, the Court refused to declare unlawful a strike by employees of the government-owned telephone company, which had a monopoly of all telephone services, against the intentions of the Government to limit this monopoly. The majority of judges held that this was not a "political strike" because it concerned working conditions and was not prohibited by statute. They mentioned the situation in European nations and also the policy of the ILO Freedom of Association Committee. Decisions of European courts were cited from the International Labour Law Reports (ILLR). However, the dissenting judge regarded the strike as political and illegal, using the 1984 British court decision in *Mercury Communications v. Scott-Garner* (IRLR 375, industrial case reports 1984, p. 74) to support his position. [English summary published in the *Jerusalem Post* newspaper.]
- (3) In *United Mizrahi Bank v. Mizrahi Employees Association*, the National Labour Court refused to grant an injunction compelling the union to end a strike. The union had called the strike in order to support its demands for compensation to the workers resulting from the sale of the bank's ownership shares. The collective agreement in question did not prohibit strikes, but only required four hours' notice to the employer. The Court held that the union had to satisfy this requirement before striking. The Court held that the strike was to improve the working conditions during the transfer of ownership. Among sources cited regarding the freedom to strike and negotiate was the Right to Organize and Collective Bargaining Convention, 1949 (No. 98), ratified by Israel on 28 January 1957. [English summary published in the *Jerusalem Post* newspaper.]

Individual labour law cases

The landmark case of Israeli law regarding prevention of sex discrimination was handed down in 1973 by the National Labour Court (*Cabin Attendants Workers Committee and El-Al Airlines v. Edna Chazin and Clerks Union*, ILLR). The Court struck out as unlawful provisions of a collective agreement which discriminated against female cabin attendants.

At that time there was no statute against sex discrimination (such laws were passed in the 1980s). Among the sources cited by the Court was the United Nations Universal Declaration of Human Rights, the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), which was ratified by Israel on 12 January 1959, and the accompanying international labour Recommendation (No. 111) dealing with the same topic. These international declarations and treaties were relied upon as sources for public policy.

Methods by which international or European standards are made known in the labour court

Sources

The National Labour Court has a reasonably adequate library of international labour and social security law sources. These include: reports of labour court cases such as *ILLR, Industrial Law Journal*, All England reports, and reports of industrial cases; textbooks; books summarizing labour law in European nations, the United States and other nations; ILO publications including *Judgments of the Administrative Tribunal*; an extensive set of the American NLRB decisions; and the books and papers of the European judges' meetings. The regional labour courts have more limited libraries of international sources, generally consisting of textbooks.

The international materials in the labour court libraries are generally in English, which is understood by most judges. In the National Labour Court library there are books in French, German, Swedish and other languages, but few judges read these languages.

The labour courts have no access to the computerized information systems of the European Community or the ILO.

When a National Labour Court judge is interested in obtaining statutes relating to a specific problem, it is possible to find them in the *ILO Legislative Series*.¹ There have also been instances where judges have asked the labour attaché of a foreign embassy to obtain a specific statute of that nation.

International agreements which have been ratified by Israel are published in the *Official Gazette* in Hebrew and English (or the language used by the other party to the agreement).

University law libraries have labour and social security law materials. These libraries have access to American computerized information systems but it is very expensive to use them.

¹ Ed. note: Replaced by *Labour Law Documents* since 1989.

Admission into evidence

Israeli courts, including the labour court, require the litigants to refer to the legal sources supporting their position. However, because most lawyers' knowledge of international law is limited, the court generally has to find and interpret the international law sources.

International sources are admissible into evidence by judicial notice without submitting the actual document, when they are published in the *Official Gazette* (Conventions) or when a copy may be found in the Court library. Otherwise, the party citing the international source must submit a copy to the Court.

Learning about international sources

Judges and lawyers learn about international standards by reading books, journals and other publications, attending lectures sponsored by universities or the Society for Labour and Social Security Law and participating in international conferences.

The Institute of Judicial Training for Judges provides seminars for judges, generally lasting three to five days. Every judge participates in two seminars a year, at the expense of the Institute. In 1993 there was a seminar on EC law, which included lectures by Judge Ole Due, President of the European Court of Justice.

Computerized databases

University libraries have access to the database of American court decisions. The Institute for Work Safety and Hygiene has a database of international materials concerning health and safety at work. There is no other database of international sources available in Israel.

The ILO's LABORLEX is not available in Israel. Furthermore, to the best of my knowledge it does not include decisions of labour courts.

Recognition by judges and lawyers of international standards

The National Labour Court judges (the appellate court judges) have related to international standards since the foundation of the Court in 1969. Regional labour court judges (trial court judges) have sometimes referred directly to international standards, but generally derive such standards indirectly from textbooks on the law of various European nations. Lawyers often cite international standards in important cases which relate to rights mentioned in treaties. More often they cite textbooks summarizing the law of other nations.

Precedents of other nations' labour courts

The National Labour Court has frequently cited decisions of other nations' labour courts. This occurs when there is no statutory provision or case-law relating to the issue before the

court, or when the court wishes to compare the existing Israeli law to the law in other nations. For example, in the *Bezek* case, cited above, cases were cited from courts in the United Kingdom (*Mercury Communications v. Scott-Garner*); Norway (ARD 1988, p. 61; 8 ILLR 416); the Netherlands (*Hoge Raad, Re. Keijzer v. Peters NV*, 3 ILLR 306; Court of Appeal, *NV Netherlands Railways v. Transport Union*, 5 ILLR 61); and Italy (*the Public Prosecutor v. Antenaci*, 1 ILLR 51).

Precedents of other nations' courts are available in the ILLR. The All England law reports and the industrial law reports cite decisions of the ECJ. Textbooks cite cases from other nations, but generally do not include the full text.

Norway

Stein Evju, President, Labour Court

Application of international and European labour standards

Norwegian law maintains a *dualistic* position in relation to international (treaty) law in principle. Treaties and conventions, when ratified, are not as such binding in domestic law. Norway has no constitutional provisions on the status of international law, including treaty law, in domestic law. Nor are there general statutory law provisions on this topic. Some Acts, in particular on procedural law, contain clauses stating that their provisions should be interpreted and applied in accordance with those limitations that are recognized in international law or are embodied in treaties that are binding on Norway. The 1988 Act on Foreigners and Migrants also contains a provision to this effect, section 4, implying in particular that human rights treaty obligations will take precedence when it comes to application of the Act. None of the Acts in the field of labour law contain provisions of this kind.

Generally, international standards - treaties, conventions, etc. - must be “incorporated” or “transformed” into national law to be formally binding. “Incorporation” in this context denotes the technique whereby a special Act is made referring to an international legal instrument - normally in a straightforward, direct transaction into Norwegian - stating that it is to apply as domestic law. By “transformation” is meant the adaptation of treaty provisions, etc., into national legislation, normally in the form of amendments of existing Acts. Both techniques have been applied to some extent over the years, and recently on a larger scale in a number of fields - modestly as far as labour law is concerned - to conform with the requirements of the EEA Treaty to implement European Community law (Regulations, Directives, etc.). As the EEA Treaty has, however, not yet entered into force, nor have these new Acts and amendments. Norway is not a member of the European Community (EC). Thus, EC legislation and case-law have not yet played a part in domestic case-law.

The most common method of relating to international law obligations on the part of the legislator is, however, that of “passive transformation”, i.e. to consider that domestic law conforms with international standards and as such that no amendments to existing legislation are required. In the field of labour law this is predominantly the case, just as it is with regard to the different general instruments on human rights (the 1966 United Nations Covenants, the European Convention on Human Rights (ECHR), the European Social

Charter (ESC)). Whether international standards on human rights should be incorporated or transformed into Norwegian law is currently up for discussion. A White Paper on the subject was presented by a special committee in May 1993. Also, a number of international labour Conventions have been considered in that context.

The dualist point of departure should not be overemphasized, however. In a general statement of principle in a case report in Rt.¹ 1984, page 1175, the Supreme Court underlined that national law must be applied taking into account the consideration that Norwegian law, as far as possible, must be presumed to conform with treaties by which Norway is bound, *in casu* ECHR. This is in keeping with previous case-law and the now general approach in legal theory. International law and international standards are part of domestic law in the sense that they are relevant to, and weighty factors to be considered in, domestic judicial decision-making.

In a series of later decisions the Supreme Court has expressed and applied the point of view that not only ECHR provisions, but also the case-law of the European Court of Human Rights are relevant and must be taken into consideration under the doctrine of "presumed conformity". The labour court has adopted the same approach, specifically referring to ECHR article 6 and case-law in ARD² 1991, page 60, a decision on whether members of the court should be disqualified on the grounds of their being appointed upon nomination of a trade union asserted to be a rival of the union party to the case at hand.

Case-law on international and European standards

Domestic labour law cases in which international standards are cited are rare. They amount to nine out of the total of 46 cases reported so far (and enumerated in the above-mentioned White Paper) in which international instruments have been at issue.

Two cases, Rt. 1961, page 1350 and Rt. 1966, page 476, involved Article 4 of the ECHR on forced labour in relation to national legislation on compulsory service for dentists upon obtaining their licence to practice. The Universal Declaration of Human Rights, Article 19, and ECHR, article 10, were considered in Rt. 1980, page 598, a criminal case on violation of section 55A of the Work Environment Act. The Discrimination (Employment and Occupation) Convention, 1958 (No. 111), was not invoked in that case, but played an important role in a later case on section 55A and the right to query job applicants on religious conviction (Rt. 1986, page 1250 — annotated in *Seven international labour law reports* (1989), pages 201-208). ECHR Articles 2, 9 and 10 were involved in Rt. 1983, page 1004, a case on the dismissal of a member of the Church of Norway upon his actions in protest of legislation on abortion. In Rt. 1988, page 476, also a dismissal case, concerning American citizens working with an oil company registered in Norway, ESC Article 19, international labour Convention No. 143 and ECHR Article 13 were argued upon.

Apart from Rt 1986, page 1250, the more noteworthy case would be ARD 1990, page 118 — annotated in 10 ILLR (1992), pages 63-70. It involved Convention No. 87, as well as Conventions Nos. 98 and 154, and some selected cases of the Freedom of

¹ *Norsk Restidende* (Decisions of the Supreme Court).

² *Dommer og Kjennelser av Arbeidsretten* (Decisions of the Supreme Court).

Association Committee of the Governing Body of the ILO, in relation to a decree imposing compulsory arbitration and prohibiting the continuation of an ongoing strike in the oil industry. It might be noted that the labour court did not take an express stand on the issue of whether ILO case-law must be considered as binding international law in that context. The court upheld the decree, noting that the Government had elected to enact it in full awareness of the fact that it might not be considered to be compatible with Convention No. 87 as interpreted in the jurisprudence of the ILO supervisory bodies. That being so, the doctrine of “presumed conformity” would have to yield and the national Act (decree) must prevail. ARD 1991, page 60, has been mentioned above. Finally, Recommendation No. 119 was cited and discussed in a recent Supreme Court decision, Rt. 1992, page 1039, on preferential rights of re-hiring following economic dismissals.

Methods whereby international or European standards are made known to the courts

Generally within the field of labour law, international labour standards have played quite a modest role so far in Norwegian case-law, both in the ordinary courts and in the labour court. Argument is rarely submitted based on international labour standards, and even more rarely so on the jurisprudence of supervisory bodies and the precedents of other nations’ courts. The latter is generally held to be of minor importance, carrying little weight except as illustrations of issues and problem-solving. The former, on the other hand, are considered to be of considerable importance and are accorded considerable weight if applicable. Here, however, I might venture the point of view that in the labour law cases so far the tendency has been to find conformity not only with interpretation of national laws, but also with interpretation of the international labour standards and jurisprudence involved, somewhat along conventional national methodological lines.

A basic course on international law is part of the compulsory curriculum of legal studies. Fundamental human rights are included to some extent in the course, as well as in other compulsory courses on constitutional and procedural law. There is, however, no compulsory and, in fact, no systematic education on international labour standards. Nor is labour law a compulsory subject in law studies.

Argument based on international standards, and so on, may be — and normally will be — submitted to the court without the relevant material having been presented in writing. To the best of my knowledge, there is no example in case-law of a court citing or considering international legal materials *ex officio*, even if that may be done. As international law standards are “sources of law” from a domestic point of view, it rests with the courts to consider and apply these in its application of the law relevant to the case at hand.

Access to the material — international labour standards, jurisprudence, etc. — is, however, scarce. Basic treaties and conventions are published in the official “treaty series” and are available — but not very familiar — to most courts. Apart from the superior courts in Oslo, the jurisprudence of international courts and supervisory bodies is hardly available, except in the odd book or article that might refer to and discuss specific cases and issues. There is very little of this in the field of labour law. The situation is more or less the same for lawyers in general. To find and to assess the possible relevance of international legal

materials is often a complicated and time-consuming task. The EC database, CELEX, is available to all subscribers to the national law database, LOVDATA. Apart from that, I am not aware of any other database accessible in Norway. It rests with private initiative to take advantage of the possibilities that exist, such as the ILO CD-ROM, but I am not aware of anyone who has done so thus far.

For some time there has been concern about the need to educate not only judges, but lawyers in general, about international human rights, including to some extent international labour standards. The role of international courts and other bodies is seen as a part of this process. The above-mentioned White Paper may be seen as an offshoot. So far, some initiatives have been taken and some courses have been offered, but we are talking about rather modest and not very systematic efforts. Recently, the forthcoming entry into force of the EEA Treaty has boosted this concern as well as interest, but we are undoubtedly faced with considerable challenges in this field, with or without the dramatic changes involved by the entry into force of the EEA.

3

Slovenia

Dr. Janez Novak, Judge, Ljubljana, Slovenia

Introduction

By the Act of Notification of Succession (*Official Gazette* of the Republic of Slovenia, No. 24/92; OG RS, international agreements Nos. 9/92, 15/92) and by the two Acts Confirming the Succession (OG RS, Nos. 9/92, 15/92, international agreements and conventions), the Parliament of the Republic of Slovenia accepted the international agreements and conventions ratified by the former Yugoslavia. On the basis of article 8 of the Constitution of the Republic of Slovenia (CRS) (OG RS, No. 33/91), international instruments have become a part of Slovenian municipal law and are also relevant to the two questions which are the subject of the present meeting of judges in Brussels. These instruments are the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention on the Political Rights of Women, and international labour Conventions: the Maternity Protection Convention, 1919 (No. 3), the Underground Work (Women) Convention, 1935 (No. 45), the Night Work (Women) Convention (Revised), 1948 (No. 89), the Equal Remuneration Convention, 1951 (No. 100), the Maternity Protection Convention (Revised), 1952 (No. 103), and the Workers with Family Responsibilities Convention, 1981 (No. 156).

In the domain of substantive and procedural labour law, Slovenia is endeavouring to become a modern State governed by law and order. Up until now, this domain has seen the adoption of the Representative Trade Unions Act (OG, No. 13/93) and the Strike Act of the former Yugoslavia, to which Parliament agreed on 22 May 1991 (OG, No. 22/91). To date, 29 collective agreements have been signed: the general collective agreement on the economy, the collective agreement on non-economic activities, and 27 collective agreements of different branches of the economy. The Labour and Social Courts Act and the Act of Workers' Participation in Management are currently on their way through Parliament. A new Relations Act and a new Strike Act are in preparation and negotiations are under way on the conclusion of a social pact on a tripartite basis (the Government, the Chamber of Economy and the trade unions).

The role and use of international and European labour standards in labour court judgements

The labour and ordinary courts in Slovenia are obliged to apply all the international standards indicated in the ratified international agreements. So far, Slovenia has ratified 65 international labour Conventions. In the Slovenian Constitution there are provisions regulating the following: equality in the protection of rights (Article 22), the right to due process of the law (Article 23), the right of assembly and association (Article 42), freedom of occupation (Article 49), the right to social security (Article 50), security of employment (article 66), participation in management (Article 75), freedom of trade unions (Article 76), and the right to strike (Article 77). This means that the right to collective agreement, the freedom of association and the right to strike are assured.

Slovenian courts are getting ready to use the standards of the international organizations, and judges are studying international practice (e.g., that of the European Court of Human Rights). Slovenia is not a member of the EC or of EFTA, and for this reason their standards are not binding on it.

Special statutes regulate the conditions and rights of individual employees, concerning employment, health and safety. Labour relationships in Slovenia are concluded on the basis of an individual contract of employment. A migrant's employment is regulated by the Foreigners' Employment Act (OG RS, No. 33/93).

The Slovenian judges learn about international standards at seminars organized by the Council of Europe, from the publications issued by the EC and at the international colloquia where they participate as members of the Slovenian Judges' Association. Records of court practice are kept by the Records Department of the Supreme Court. In recent years, progress has been made in informing judges about computer technology. A computerized database is available to all persons with a professional interest. In the beginning, there were some difficulties with data processing. Nowadays, the judges accept the use of computers without problems and have recognized their advantages.

International standards are not considered as evidence in the Slovenian legal system. They are only the basic principles to be respected in court decisions. The parties may refer to them.

Until now Slovenian courts have applied only the standards fixed in the ratified international agreements, not the precedents of foreign courts. At present, they mainly study the decisions of the ECJ. Slovenia, being a Member of the ILO, takes into consideration the jurisprudence of ILO bodies. The decisions of international institutions have not been quoted in the decisions of the Slovenian courts, as they are not a source of law. However, the courts are beginning to take them into consideration to form court practice.

Some special questions

- (1) In Slovenian court practice and in legal theory there are several common standards. In court practice the following are the most frequently quoted:

- *favor laboratoris* (*in favorem laboratoris*); and
- prohibition of abuse of the right.

The standard *favor laboratoris* means that the labour court in labour disputes interprets the legal rules in favour of the employee (with determined restrictions and under determined conditions). This principle is also applied in adopting the rules regulating labour, as well as their application and interpretation. In Slovenian law, the principle is applied first of all in security of employment, occupational safety and health, special protection of determined categories of employees, disciplinary action, transfer of workers, and so on.

The essential purpose of this standard is to protect the weaker party in the labour relationship, namely, the employee. In concrete labour disputes, it is seen in the interpretation of the provisions of the law regulating probationary employment, the change from temporary employment to an indefinite period of employment, the interpretation of gaps in the law, and so on. If, for example, the dispute to be decided concerns one of the rights indicated and a doubt arises over how to interpret the legal rule, it is interpreted in favour of the employee. It will be treated as if the labour relationship were concluded without the condition of employment on probation, or that it was concluded for an indefinite period, and so on.

- (2) In Slovenian labour law, the term "abuse of right" is most frequently quoted in connection with chicanery. Chicanery means the performance of the right contrary to its intention, or with the intention to inflict damage on another person. The most frequent cases of chicaning employees are seen in connection with disciplinary trials and the placement of employees. The essential characteristic of procedures in this domain is that the employer did in fact take into consideration the procedural regulations but then used them so as to inflict damage on the employee, in other words in a manner contrary to the principle of prohibition of abuse of the right. This is particularly common in cases where the employee's labour relationship was terminated or he or she was transferred for no reason.

In a labour dispute where the termination of the labour relationship was the subject, it was found that the employee could not successfully rely on chicanery if he or she challenged the conditions of retirement and if employment was in fact terminated on account of his or her retirement. This is also applicable in cases where employment could continue, but the EEE could not reach agreement with the enterprise. The conclusion arising from the court decision is that the employee cannot assert chicanery if his right or obligation is undoubtedly provided under the law.

Chicanery is not peculiar to Slovenia, as it is laid down in article 226 of the German Civil Code of 1896 and also in article 1295, paragraph 2, of the Austrian Civil Code.

Spain

Preliminary remarks

As background to the discussion, a summary of the court system in Spain is provided below.

In Spain the ordinary courts are divided into four branches, namely the civil, criminal, administrative and social courts. The same division exists in the Chambers of the National High Court (*Tribunal Supremo*) sitting in Madrid: such chambers are named either by an ordinal number or according to jurisdiction. There is a Civil Chamber (or first chamber), a Criminal Chamber (or second chamber), an Administrative Chamber (or third chamber) and a Social Chamber (or fourth chamber).

Spanish industrial (or social) tribunals have wider jurisdiction than the corresponding industrial tribunals existing elsewhere in Europe. Industrial tribunals in Spain have jurisdiction to decide disputes arising out of a labour contract or a labour relationship as well as disputes connected with social security matters, including supplementary or fringe benefits.

Spanish industrial (or social) tribunals are organized according to a “two-tier system” of jurisdiction. Basically, this means:

- (a) For the great majority of disputes (wage arrears, dismissals, etc.) this two-tier system relies on two jurisdictional bodies, namely: (i) what are called *juzgados de lo Social* (formerly *Magistraturas de Trabajo*), unipersonal jurisdictional bodies served by a judge which normally sit in the capital of each province; (ii) *tribunales superiores de justicia — sala de lo social* (regional high courts — social chamber) sitting in the capital of every autonomous region into which Spain is divided (Catalonia, Basque country, Galicia, etc.). The decisions of the *juzgados de lo Social* are usually revised by the social chamber of the corresponding regional high court through the so-called *recurso de suplicación*, a kind of appeal akin to the French *cassation* or Spanish *casación*. There is no appeal against the regional high court’s decisions. Exceptionally, those decisions can be revised by the *Tribunal Supremo* through an appeal called *recurso de casación para la unificación de doctrina*. This is a mechanism created to set the correct legal doctrine whenever equal disputes have been decided differently by the social chambers of two or more regional high courts or when a decision made by any of those regional high courts contradicts a previous decision stated by the *Tribunal Supremo*.
- (b) When disputes are related to collective labour law or trade unions, jurisdiction is conferred on the above-mentioned regional high courts if such disputes extend out of the territory that is covered by a *juzgado*. For example, this would cover a dispute

concerning the legality of a collective agreement that affects workers who work at different premises or establishments scattered within the geographical boundaries of an autonomous region. The decisions of those regional high courts can be challenged before the *Tribunal Supremo*. If the dispute also exceeds the territorial boundaries of an autonomous region, jurisdiction is conferred on the *audiencia nacional* (a national jurisdictional body that also sits at Madrid) in the first instance, and to the *Tribunal Supremo* by way of appeal (*casación*).

Disputes related to constitutional rights are referred to the Constitutional Tribunal. Any social judge or tribunal can refer to the Constitutional Tribunal the so-called *cuestión de constitucionalidad* (constitutional question). The request ought to be referred whenever a judge or tribunal in the course of proceedings finds that its own decision in the case relies on a Parliamentary Act (but not a Royal Decree or Administrative Order) which in the judge's or tribunal's opinion is contrary to the Constitution. The judge or tribunal then requests that the Constitutional Tribunal submit a ruling on the constitutionality of such legal norm.

On the other hand, any citizen may challenge a judicial decision before the Constitutional Tribunal through the *recurso de amparo* if he or she thinks that such decision is against a fundamental right. Usually constitutional proceedings are based on section 14 of the Spanish Constitution (which forbids discrimination) or section 24 (which enshrines the right of any citizen to be effectively protected by judges and tribunals).

I. The use by labour courts or general courts of international and European labour standards¹

(a)-(b) *Labour and social standards are binding in Spain in so far as the corresponding treaty, covenant or convention can be considered as self-executing. When we speak of labour and social standards, we mean the following:*

(1) Standards adopted within the United Nations

- Universal Declaration of Human Rights, 1948 (enshrined by section 10.2 of the Spanish Constitution as a qualified criterion for the interpretation of fundamental rights).
- International Convention on the Elimination of All Forms of Racial Discrimination, 1966 (ratified in 1969).
- International Covenant on Civil and Political Rights, 1966 (ratified in 1977).
- International Covenant on Economic, Social and Cultural Rights, 1966 (ratified in 1977).
- Convention on the Elimination of All Forms of Discrimination Against Women, 1979 (ratified in 1983).

¹ Ed. note: The remainder of this contribution replies to the questions in "Guidelines for national papers (Part I)", pp. 57-58.

(2) Standards adopted within the Council of Europe

- Convention for the Protection of Human Rights and Fundamental Freedoms, 1959 (ratified in 1979).
- European Social Charter, 1961 (ratified in 1980).

(3) Standards adopted within the ILO

- As of 31 December 1992 Spain had ratified 123 international labour Conventions, of which 104 were in force in the country.¹

(4) EC standards

- Spain has been an EC Member State since 1 January 1986 and is therefore bound by the “*acquis communautaire*”.

International treaties and Spanish law

International treaties, if validly ratified, are part of domestic law from the time of their publication in the Official Journal (*Boletín Oficial del Estado*): from then on they ought to be applied by judges and tribunals (Spanish Constitution, section 96; Civil Code, section 1.5).

Direct applicability of EC law is guaranteed by the Spanish Constitution (section 93 provides that Parliament can authorize the ratification of a treaty that confers upon an organization competence that limits sovereign rights). Obviously, Community Regulations do not need to be published in the *Boletín Oficial del Estado*.

Use of international and European labour standards by the Spanish social tribunals

International standards (adopted within the United Nations, the ILO or the Council of Europe) are not normally used by Spanish tribunals because Spanish legislation as a rule confers a higher level of social protection than those provided by international labour standards. European labour standards (EC Directives) are not frequently used for the same reason.

By contrast, EC regulations on the application of social security schemes to employed persons, self-employed persons and to members of their families moving within the Community (EC Regulations 1408/71 and 524/72) are certainly of frequent application by tribunals owing to the important migratory movements of Spanish workers that have taken place in the past. The social security rights of those workers (pension schemes, family allowances, etc.) are now linked with the European countries (Germany, France, the Netherlands, etc.) where they formerly worked.

We should underline that Spanish tribunals have not been reluctant to accept the position developed by the ECJ on the effects of Community law. They accept that Community law has supremacy over national law, and is directly applicable, that is, may

¹ Ed. note: As of 10 November 1994 Spain had ratified 124 international labour Conventions, of which 105 Conventions were in force in the country.

be invoked by individuals and enterprises before national judges and tribunals. As a result of the late date at which Spain became a Member State of the EC (1986), Spanish judges have not had to suffer the difficulties, even the trauma, that judges from other European countries have experienced in accepting such principles derived from European law; for example, the cases of France (due to the position held by its *Conseil d'Etat*), Germany or Italy (due to the position adopted by their respective Constitutional Tribunals).

Within the series of standards asked for by the Reporter, Judge Adler, we can actually find only a few of which we could say that those standards (whether international or European) are or have been effectively used by our tribunals. We underline some relevant decisions from our tribunals on those standards below.

ILO standards

Right to strike. Reference is made to the decision of 21 April 1987 (among others), from the former *Tribunal Central de Trabajo* (Central Labour Tribunal that sat in Madrid and had national jurisdiction; since 1989 its jurisdiction has been assumed by the regional high courts). The claim decided in the case was concerned with the legality of a general strike that had been called on 20 June 1985 and which aimed to protest against a pensions statute at the time being discussed in Parliament (the current Pensions Act 1985). As that statute actually increased the contribution periods required to be awarded a retirement pension, the tribunal held that the claim "affected directly the professional interests of workers"; thus the strike was to be deemed as being in furtherance of a trade or labour dispute, and therefore legal. The social tribunal founded its decision on express reference to the doctrine held by the Committee on Freedom of Association of the Governing Body of the ILO (*Boletín Oficial del Estado* No. 139).

Dismissal. By 1985, when Spain ratified the Termination of Employment Convention, 1982 (No. 158), a large amount of litigation had arisen. Claimants asked for the nullity of dismissals that took place without a previous verbal communication from the employer of the reasons for such dismissal. Spanish tribunals held that Convention No. 158 did not impose upon employers such an obligation. In their view, such communication aimed to provide a suitable opening for conciliation when a dismissal occurred. This aim is satisfactorily fulfilled in Spanish law which imposes two conciliation attempts in any case of dismissal, one before an administrative body (or eventually before a joint council created by collective agreement) and the other before the judge that hears the case. In fact, judges were aware that the procedure for dismissal in Spain differs from other systems and therefore do not oblige employers to have the "*entretien préalable*" that exists, for example, under French law.

Holidays. The Holidays with Pay (Revised) Convention, 1970 (No.132), is of frequent application by Spanish tribunals, especially in relation to two topics: first, the amount of remuneration that employees ought to be paid for holidays and, secondly, the effect that any period of illness suffered by a worker during the previous year could have on his or her right to enjoy an annual period of paid holiday.

On the first topic, the *Tribunal Supremo*, in its decision of 21 January 1992, held that workers ought to be paid their "normal or average remuneration" during holidays, as stated

by Convention No. 132. Nevertheless, the court allowed that collective agreements could flexibly determine the precise amount of payment.

On the second topic, Convention No. 132 is of frequent application, although decisions from Spanish tribunals on this topic differ from each other according to the special circumstances of each case.

EC standards

Social tribunals in Spain, as we have already said, very frequently apply EC Regulations on the social security of workers moving within the Community on account of the large number of Spanish workers who have formerly worked in other EC countries. Frequently those workers, when they return to Spain, claim before tribunals the totality of their contribution periods. We note that in Spain those claims fall within the jurisdiction of the social tribunals, which is not the general rule in other European systems where such claims are decided by other bodies (e.g. *Conseil des Prud'hommes* in France; *Arbeitsgerichte* in Germany).

Regarding labour law, the heart of the EC standards is contained in four well-known Directives, namely:

- (1) Collective dismissals (Directive 75/129/EEC of 17 February 1975, recently revised by Directive 92/56/EEC of 24 June 1992);
- (2) Transfer of undertakings (Directive 77/187/EEC of 14 February 1977);
- (3) Employers' insolvency (Directive 80/987/EEC of 20 October 1980); and
- (4) Information to employees of the conditions applicable to the contract or employment relationship (Directive 91/533/EEC of 14 October 1991).

Although there are slight differences between the texts of some of these Directives and Spanish domestic law, generally speaking Spanish labour law conforms to the European Social Directives.

Directive 80/987/EEC: Employers' insolvency. One of the slight differences between European and domestic law has given rise to some doubts for Spanish social tribunals and continues to do so. Directive 80/987 aims to provide that in all European Community Member States workers benefit from bodies or instruments that effectively guarantee within certain limits that arrears of wages should be paid to them in the case of insolvency of their employer. In Spain, only "domestic servants" are excluded from such protection (Directive 87/164/EEC amending Directive 80/987/EEC). Nevertheless, in Spanish labour law, highly qualified employees who sit on companies' boards of directors (as managing directors) have labour contracts, even though their labour relationship is deemed to be "special". When an employer employing such workers becomes insolvent, those high-ranking employees claim for the benefits ensured by directive 80/987. They refer their claims to the Wages Guarantee Fund (*Fondo de Garantía Salarial*) which exists in Spain. As the Wages Guarantee Fund refuses to pay to those employers any arrears of wages that the employer might owe to them, they claim in appeal before the social tribunals. Such appeals are founded on two grounds. First, they claim that they have a labour contract, albeit a special one. Secondly, they argue that Spanish law does not exclude them from the benefits awarded

by Directive 80/987, as this law has only excluded from that Directive those who work as domestic servants. The position adopted by our tribunals is far from clear.

Some regional high courts (e.g. those from La Rioja or Catalonia) decided that Directive 80/987 is of direct application in Spain and therefore invocable by individuals; consequently, these courts decided that high-ranking employees who sit on boards of directors ought to be deemed as protected by the Directive. Some other regional high courts nevertheless decided the opposite.

Contradictory decisions from different high regional courts have allowed an appeal to the *Tribunal Supremo* for the unification of legal doctrine (*recurso de casación para unificación de doctrina*). The *Tribunal Supremo*, in its decision of 13 June 1991, held that Directive 80/987 had not been duly implemented and therefore was not directly applicable in Spain. The decision also stated that, according to domestic law and in so far as the Directive was not duly implemented, those workers qualified as high-ranking special employees ought not to be awarded the benefits ensured by the Directive. The *Tribunal Supremo* insisted on the negative view in a new decision of 30 December 1992 even after the ECJ's decision of 19 November 1991 (cases *Francovich/Bonifacci*) had clearly stated the liability of the Italian Government precisely for not having implemented the Directive (we must remember that the limited scope of the Italian *Cassa Integrazioni Guadagni* prevents any plain comparison with the *Spanish Fondo de Garantía Salarial*).

Due to the position of the *Tribunal Supremo*, some regional high courts have decided to refer a request to the ECJ for a preliminary ruling pursuant to section 177 of the Treaty of Rome. Two critical remarks have to be made with reference to this point. First, some Spanish judges believe that the request for a preliminary ruling should have been referred to the Court of Justice by the *Tribunal Supremo* itself. Secondly, the very special configuration of the "*recurso de unificación de doctrina*" prevented the *Tribunal Supremo* from deciding whether high-ranking employees might be awarded damages (Who ought to pay them, the State or the Guarantee Fund? Before which tribunals should the claims be brought? What would be the appropriate procedure?).

The regional high courts (social chambers), being a second and final degree of jurisdiction in social disputes, are not only authorized but are obliged, in the case of any doubt in the course of a decision on the interpretation of EC law, to refer the request for a preliminary ruling to the ECJ.

(c) *Methods by which international or European standards are made known to Spanish courts*

(1) How do judges learn about these standards? What materials are available to them regarding these standards without relying on the parties to submit evidence or materials?

We must make special reference to the help provided by the Spanish General Council of the Judiciary (*Consejo General del Poder Judicial (CGPJ)*). This body frequently organizes courses and meetings for judges to learn about Community law whether in its wider, general scope or in relation to relevant social topics. Furthermore, the CGPJ, through its department for international relations, provides judges with such Community instruments as they might require for deciding a case, especially unpublished decisions from the ECJ. Judges frequently seek required information in university

law faculties, and especially libraries in their labour law or international law departments.

- (2) How do lawyers learn about international labour standards?

They use books and periodicals which specialize in such topics. They usually subscribe to such periodicals. They may also use the libraries of their professional associations (*Colegios de Abogados*).

- (3) Do judges or lawyers have access to a computerized database containing such information?

For the time being judges do not have such a database. Lawyers have, in general, better facilities of this type.

- (4) What has been the reaction of judges and lawyers to the difficulties of learning about international labour standards?

At present, judges do not seem to be discouraged. They insistently request from the Department of Justice (*Ministerio de Justicia*, the administrative body in charge of providing material and economic means to properly develop tribunals' activities) a reasonable increase in economic means for acquiring books, subscribing to specialized periodical publications or to gaining access to a computerized data system.

- (5) Are these standards presented as evidence? If so, how are they presented? Is judicial notice taken of them? What weight is given to them? May the parties refer to them without submitting them?

It is normal practice that legal counsellors (*abogados, graduados sociales*) representing the parties at first-level social tribunals (*Juzgados de lo Social*) bring to the hearing photocopies of the statutes, administrative rules, collective agreements or tribunal decisions that have been used as a basis for the defence of the parties' interests. Such a practice has extended to cases in which the matter being discussed refers to international or Community law. Thus, counsellors bring, where appropriate, the texts of the relevant international labour Convention or Recommendation, the reports from the ILO Committee on Freedom of Association, the texts of the corresponding EC Regulations or Directives, or even decisions from the ECJ. Generally speaking, such documents are brought merely to facilitate the judge's task in finding the law applicable to the case being discussed. Obviously the parties or their counsellors may rely on a rule or a judicial decision without bringing a copy of it.

II. The use by labour courts or general courts of:
(1) the precedents of other nations' labour courts on international labour standards;
(2) decisions of the ECJ; (3) comments on the supervisory body set up under the European Social Charter; and (4) jurisprudence of supervisory bodies under the ILO Constitution

We shall group the preceding questions and answer them as follows:

- (a) *Have such decisions been cited by your labour courts or general courts? What weight are they given?*

Precedents of other nations' labour courts are not usually cited by Spanish courts (whether labour tribunals or general courts). In any case, citation by Spanish tribunals or courts of such precedents would only be made as an authoritative reference intended merely to reinforce the tribunal or court's own legal reasoning, never as a foundation of the decision. Decisions from the ECJ are cited in cases involving the application of Community law, especially by the regional high courts or the *Tribunal Supremo*. A decision from the ECJ shall bind a Spanish tribunal or court provided there is an identity between the case decided by the ECJ and that to be decided by the Spanish tribunal or court. Comments from the Committee of Independent Experts created by the European Social Charter or that emanating from other committees within the ILO (especially the Committee on Freedom of Association) are cited by our tribunals, although they are given slight value, being used only as a way to reinforce the judge's own interpretation of the particular legal topic under discussion.

- (b) *How is your court made aware of such decisions? (1) Materials available to your court. (2) Materials which have been submitted to your courts. (3) How do the parties submit such evidence? (4) What has been the reaction of the profession to these materials? Does it find it difficult to understand them? How does it learn about them?*

We shall equally group the preceding questions and answer them as follows:

Materials accessible to Spanish tribunals (such as books, periodicals, etc.) are at present very scarce. Usually they have at their disposal only essential Community law instruments; some periodicals give notice of new rules or recent decisions from the ECJ; high courts usually have a compilation of the reports of such decisions sent to them from Luxembourg. Decisions from the ECJ have been published in Spanish since 1986. The last available volume of such reports extends up until the decision of 29 July 1991 (case Hauptzollamt, Karlsruhe). As we have already said, such a scarcity of materials is compensated for by the CGPJ which, through its department of international relations, gives to judges and tribunals any required information. By

contrast, documentation from the different committees operating within the ILO or the Council of Europe is difficult to get except in the university libraries.

As already mentioned, the litigants or their counsellors frequently bring to the hearings photocopies of the rules or judicial decisions on which they seek to rely.

Legal professionals (judges, lawyers) place great value on all these materials, although the precise understanding of many international rules and decisions is often very difficult, not only for obvious linguistic reasons, but more importantly because of conceptual differences with the legal terms normally used in Spain.

United Kingdom

Sir John Wood, President, Employment Appeal Tribunal, London

I fear that my contribution to this part of our deliberations is extremely brief. Let me explain.

In the United Kingdom, the industrial tribunals and the Employment Appeal Tribunal (EAT) as the appellant court are all creatures of statute and their jurisdiction is purely statutory. They do not include issues involving injuries to health at work. Basically, collective agreements are not enforceable in the law of the United Kingdom and any claims for personal injury are brought in the ordinary common law courts. The two main causes of action are, firstly, for negligence and, secondly, for breach of statutory duty to take care, which duty is owed to the plaintiff and the breach of which causes damage, whether personal injury or financial loss.

There are numerous regulations, some in more general form, some very specialized, covering many aspects of industrial activity. One of the major interests of the trade unions is in the health and safety of its members when at work.

A substantial portion of the Department of Employment is concerned with the supervision, updating and consequential amendment of regulations. Inspectors are numerous and some breaches of the regulations can give rise to prosecution as a criminal offence.

I am sure that those responsible draw from the experience of all parts of the world and not just from Europe. Not only are the regulations comprehensive but they are strictly enforced.

Appendix

Guidelines for national papers (Part I)

- I. How do your labour courts or general courts use international and European labour standards?
 - (a) Which international and European labour standards bind your courts? What makes these standards binding in your courts?
 - (b) Which international and European labour standards, while not binding in your courts, are nevertheless cited and/or applied?
 - (1) Please relate to international labour Conventions and Recommendations, European Community standards, European Free Trade Association (EFTA) standards, other treaties containing labour standards (e.g. European Social Charter).
 - (2) Please relate to standards:
 - (a) regarding labour relations, such as the collective agreement, freedom of association, right to strike, etc.;
 - (b) relating to the individual employee, such as the right to work, individual employment contract, termination, etc.;
 - (c) relating to employment conditions, such as hours of work, annual vacation, sick leave, etc.;
 - (d) regarding health and safety;
 - (e) regarding migrant labour.
 - (c) What are the methods in which international or European standards are made known to your court?
 - (1) How do judges learn about these standards? What is the material available to you regarding these standards, without relying on the parties to submit evidence or materials?
 - (2) How do lawyers learn about international labour standards?
 - (3) Do the judges or lawyers have access to a computerized database containing such information?
 - (4) What has been the reaction of the judges and lawyers to the difficulties of learning about international labour standards?

- (5) Are these standards presented as evidence? If so, how are they presented? Is judicial notice taken of them? What weight is given to them? May the parties refer to them without submitting them?
- II. In your labour courts or general courts, what is the use of:
 - (1) the precedents of other nations' labour courts on international labour standards;
 - (2) decisions of the European Court of Justice;
 - (3) comments of the supervisory body set up under the European Social Charter; and
 - (4) jurisprudence of supervisory bodies under the ILO Constitution?
- (a) Have such decisions been cited by your labour courts or general courts? What weight are they given?
- (b) How is your court made aware of such decisions?
 - (1) Materials available to your courts.
 - (2) Materials which have been submitted to your courts.
 - (3) How do the parties submit such evidence?
 - (4) What has been the reaction of the profession to these materials? Does it find it difficult to understand them? How does it learn about them?

*Labour court jurisprudence on sex
discrimination*

*Reporter: Sir John Wood, President, Employment Appeal Tribunal,
London, United Kingdom*

Comparative overview

Constance Thomas *

The session on this second topic was chaired by the Reporter. In preparation for this discussion the judges had each been asked to supply a paper on the legal provisions and judicial decisions dealing with sex discrimination in their own country, the extent to which a public or private body is responsible for addressing discrimination in their own country, and the extent to which decisions of the European Court of Justice (ECJ) have a material effect upon the national sex discrimination law.

Based on the discussions in the meeting and the information contained in the country papers, aspects of the following topics were selected for highlighting in this summary report: special procedures, burden of proof, remedies and sanctions, types of case, special bodies, and the impact of the ECJ on national law. For more detailed information on these topics and on the specific contents and scope of the national laws prohibiting sex-based discrimination and promoting equal opportunity and treatment in employment, the country papers which follow should be consulted.

Special procedures applied to discrimination cases

Leaving aside the question of procedural rules governing the burden of proof, the judges agreed that ordinary civil procedures are usually followed in sex discrimination cases in their countries. The sufficiency of such procedures for discrimination cases was felt to depend largely on the type of case and the level of sensitive information involved. The most notable exception to ordinary civil procedures was the use of closed court (or in camera) hearings to provide friendlier or more protective surroundings for litigants, or in some cases to protect the identity of both claimant and respondent. For example, it was pointed out that sexual harassment cases may benefit from the availability of such protective sessions.

Closed court hearings and other protective measures are possible in most countries, although in some countries there appears to be a reluctance to resort to them. In the United Kingdom, under the 1993 Trade Union and Employment Rights Act, regulations can now be made which prevent the identification of any person either making or affected by the allegation being decided, and reporting of the case can be restricted until after the final decision has been given. A breach of either of these two rules can be a criminal offence. In

* Formerly of the Equality of Rights Branch, ILO.

Slovenia, it is possible to bar the public from the court if this is necessary for official, business or personal secrecy, for public order or for reasons of public decency (Code of Civil Procedure, Article 307).

Spain is one example of a country where special procedures may be applied in discrimination cases. Generally, the ordinary procedure for labour disputes will be followed, but there is the option of a special, accelerated procedure in the ordinary courts where the complainant alleges violation of a fundamental right (as set out in the Constitution) which includes sex discrimination.

Another example of a special procedure favoured by some countries is the appointment by the court of technical experts. In Spain, this can be done in all kinds of claims, and the expert may be from an "appropriate public institution". This is similar to the situation in Finland, where an opinion may be sought from the Equality Board. Normally, a Spanish judge will use an expert in order to be informed of facts, which are considered to be already proven, imply sex-based discrimination; it was noted in this context that no transferral of judicial authority is involved. The United Kingdom, at present, requires resort to an expert in equal remuneration claims. Israeli courts may also appoint an expert in equal remuneration claims, and a judge may base his or her judgement on the expert's opinion.

A broader issue relating to the types of procedure used in discrimination cases was pointed out by the Spanish representative; namely, the general nature of court hearings as a whole. They tend to be inquisitorial and adversarial, and thought needed to be given to the effect this approach has on the handling of discrimination cases. Further, it was noted that the attitudes of court staff and judges may not be sympathetic to claimants. In this regard, many judges could benefit from improving their understanding of issues involved in discrimination cases.

Special rules regarding the burden of proof

Reference was made to the proposed European Directive on the burden of proof. The approach of each country seems to vary slightly. The general approach at present follows the normal procedure for civil matters. At the end of the case for the plaintiff/complainant, the court or tribunal will consider whether the evidence thus far provided — if accepted *in toto* — is sufficient to show a *prima facie* case of discrimination or any other cause of action. If it does, the defendant/respondent will need to provide evidence to the contrary. Unless that party does so, the plaintiff/complainant will succeed. However, when the evidence for both sides is ultimately completed, it is for the plaintiff/complainant to prove his or her case on the balance of probabilities, the civil burden of proof being "more likely than not".

The burden of proving a case, in its true legal sense, never shifts. In the United Kingdom, the Court of Appeal has recently considered this point. The court considered it unhelpful to use such expressions as "shifting burden of proof". These tend to muddle juries and perhaps also lay members of tribunals. The consideration of the issue of "prima facie case" is quite separate from the ultimate and true burden of proving the case on the *whole* of the evidence.

There are certain variations on the general rule. In Germany, for example, if a system of remuneration is lacking in transparency, then the employee need only show, on the basis of a relatively large number of employees, that the average remuneration of female

employees is lower than that of male employees. The employer must then show that the system is not discriminatory. In all German discrimination cases, neither party has the burden of furnishing absolute proof; the decision is made on the basis of a prevailing probability.

In Slovenia, the principle of *favor laboratoris* applies, which means that the labour courts are to interpret legal rules in favour of the employee, especially where there is any doubt (certain restrictions and conditions are placed on this general rule). The burden of proof shifts to the employer as described above.

Remedies and the use of criminal sanctions

The discussion on this matter showed that the law of the countries represented at the meeting was not uniform: some countries use criminal sanctions and others seek to rely instead on purely civil or administrative remedies. It was noted that while there is doubtless a need for effective enforcement to give weight to the relevant legal provisions, there is a body of opinion which questions the use of criminal sanctions as the best way to attain this goal. Nevertheless, several countries have recently amended or are in the process of amending their legislation to add criminal penalties in discrimination cases.

The Spanish representative pointed out that criminal sanctions may be useful but theoretically should only be applied as a last resort or safeguard, and that preventive measures are also necessary to address the social situations which often trigger discrimination. It was also noted that the nature of discrimination seems to be changing and is increasingly indirect, which makes it harder to address through the use of criminal penalties. It was agreed that it would be most effective to have available a wide range of possible penalties and sanctions to apply in discrimination cases.

Criminal sanctions are not applied in the United Kingdom, Germany, Hungary or Norway. In Finland, only the offence of discriminatory advertising currently incurs a criminal sanction (in the form of a fine), although there is a new criminal law in preparation which will make sex discrimination in recruitment or during employment a criminal offence. In Slovenia, for example, it is a criminal offence to violate the fundamental rights of workers (OG RS, No. 12/77-5/90, article 86). Article 60 of the same Act makes a violation of the equality of rights a criminal offence where the discrimination in question has been expressly prohibited.

In Israel, failure to comply with the Employment (Equal Opportunities) Law, 1988, incurs criminal liability; the person discriminated against also has a right to seek civil remedies (which include punitive damages). Spanish law, through the 1991 version of the Penal Code, imposes criminal sanctions on those who make any kind of severe discrimination in employment on the basis of sex. The Social Infringements and Sanctions Act, 1988, includes as a "very severe infringement" any measures adopted by an employer which imply sex discrimination. The sanction to be applied in case of such an infringement is a fine ranging from 500,001 to 15 million pesetas.

The countries which do not use criminal sanctions rely on civil or administrative remedies (particularly damages), or a combination of the two (as is the case in Norway, for example), to ensure effective enforcement and redress of complaints. In Spain, it was reported that most progressive judges think that the interlocutory injunctions which apply

to union cases also apply to procedures regarding sex discrimination. In Israel, labour courts have special powers to issue an injunction requiring the employer to employ a person who was refused employment or dismissed on account of discrimination.

Most common types of case

Discussion on this point revealed that not every country compiles accurate statistics on the types of case brought. Nevertheless, it was clear from discussions that the number of discrimination cases brought, on whatever grounds, is quite low, although in some countries the number is rising. The reason why so few cases are filed was discussed, and one that emerged clearly was a fear of victimization on the part of potential claimants. It seems that not every country has provisions for dealing with this problem, though some do. In the United Kingdom, for example, it is unlawful, by statute, for an employer to treat a person less favourably than he treats or would treat other persons in those circumstances because the person being victimized has, for instance, brought proceedings against the employer for discrimination, or even given evidence in such proceedings. Another main reason cited for the small number of claims was the difficulty of proving discrimination. In this regard cases involving equal pay claims were singled out as being particularly difficult for litigants and judges alike.

Of the sex discrimination cases that are brought, it appears that the success rate is small. In the United Kingdom, 1,078 cases were brought before the Industrial Tribunals in the administrative year 1990-91, of which 78 were successful and 188 were not (the other cases were either dismissed because of lack of jurisdiction or settled out of court).

For Germany it was said that most of the cases brought were concerned with equal pay (which in Germany includes all monetary payments provided as a result of an employee's performance of his or her work obligations). It was pointed out that there are many cases of indirect discrimination in this area. The Spanish participant also said that the most common cases were those concerned with discrimination in remuneration.

The Norwegian experience was that equal pay is the area where discrimination occurs most frequently, but that there is in fact only a small number of cases. Discrimination in working life (i.e. hiring, firing, promotion, etc.) is the most common cause for actual complaint. The judge from the United Kingdom reported that the most common cases deal with discrimination in promotion, along with recruitment, sexual harassment and dismissal. In Hungary it was reported that discrimination based on pregnancy was the most common ground of discrimination against women.

General bodies or administrative organs

Most of the countries represented have some sort of special supporting body which deals with discrimination. A common administrative organ is the Office of the Ombudsman. Hungary, Spain, Norway and Finland all have Ombudsmen who are empowered to deal with questions of discrimination, and a bill is currently before the Parliament in Slovenia

to introduce such a scheme. However, a distinction must be drawn between the authority (and possibly the effectiveness) of an order from an Ombudsman and a judicial order.

In Norway, for example, the Equal Status Ombudsman has permanent administrative responsibility for the promotion of equal rights and opportunities, and for monitoring compliance with the Equal Status Act. The office may receive complaints and issue recommendations (and, exceptionally, orders), and take a case further to the Complaints Board, which has limited authority to make orders (and none at all in matters of hiring and firing). One clear advantage of this system is that the employee who makes use of it incurs no costs. In Finland there is a similar system, but on the initiative of the Equality Ombudsman, the Equality Board may issue an injunction to stop discriminatory behaviour in violation of the Equality Act.

The United Kingdom participant described the Equal Opportunities Commission, which is not an emanation of the Crown (the United Kingdom does have an Office of the Ombudsman but its duties are different from those described above). This body has three general duties: to work towards the elimination of discrimination, to promote equality of opportunity and to keep the functioning of the 1970 and 1975 Acts under review. It has investigative functions, it may issue non-discrimination notices and in cases of persistent discrimination it may ask for an injunction or request a declaration from a tribunal. The Commission may also provide individual claimants with legal assistance. In Spain there is a specialized body for government employees which may impose administrative sanctions.

In Israel, no special bodies have been set up, but problems of this nature are dealt with by women's organizations, particularly the women's branch of Histadrut (the largest trade union in Israel). Questions of discrimination in retirement are the concern of the Israeli Citizens' Rights Movement. Under the Employment (Equal Opportunities) Law, women's groups are permitted to present their position in the labour courts, though they may not themselves file claims (this can only be done by the individual and his or her union). Also in Germany, no special administrative body has been set up to deal with complaints of discrimination, although public institutes have been established to promote equality for women.

Influence of the decisions of the European Court of Justice

The German view was that the decisions of the European Court of Justice (ECJ) have had a significant influence on the national law of sexual discrimination, especially in relation to indirect discrimination and the burden of proof which makes such claims easier to bring. It was noted, however, that the reports of the ECJ's decisions should include more detail on the legal reasoning that went into the decision.

The United Kingdom representative reiterated this point, stating that only by knowing the arguments for and against a decision is it possible to see the jurisprudential evolution, and that reports of European decisions should therefore include the dissenting opinions, or the view of the minority of the court. He went on to say that the ECJ's decisions would be far more helpful if they were to lay down general principles, or rules of interpretation,

instead of always dealing with the particular set of facts at hand. He pointed to the fact that there is not a single case which clearly defines indirect discrimination.

The Spanish opinion was that ECJ decisions are influential, and that the jurisprudence of the Court is more advanced than in the national courts of many countries and adds momentum to the development of this law (although it was added that it should be possible to go further still, and that there is a danger of development in the law levelling off).

Finland

Olli Huopaniemi, President, Labour Court

Legal provisions dealing with sex discrimination

Sex discrimination in Finland is governed by the Act on equality between women and men (the Equality Act). The legislative Bill completed in 1981 considered that the ratification of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women required the enactment of the Equality Act. The starting-point of the Bill was that the decisive factors in the interpretation of the Convention are the standards set by the State itself, and that it was also appropriate to employ the interpretation adopted by the European, and especially the Nordic, States concerning the level of legislation needed.

In spite of strong opposition, the Equality Act entered into force on 1 January 1987. Finland was the last Nordic country and one of the last in Western Europe to enact an equality Act. However, since 1970 the Employment Contracts Act has contained a provision forbidding the unfounded placing of workers by an employer in different job positions on the basis of sex.

The purpose of the Equality Act is to prevent sex discrimination and to promote equality between men and women and, for this purpose, to improve the position of women, especially in working life. The Act forbids sex discrimination against both women and men. It does not cover religious worship, the relationships between family members or other areas of private life, or certain positions in the defence forces and the frontier guard.

The policy provisions of the Equality Act oblige the authorities, educational institutions and employers to work towards promoting equality. The policy provisions are goal oriented and are aimed not only at preventing discrimination, but also at promoting equality. No sanctions have been enacted to enhance the policy provisions. New legislation being prepared aims at enhancing the obligations of the employer to promote equality.

The general prohibition of discrimination in the Equality Act forbids discrimination based on sex. The Finnish Act differs from the Acts in many other countries in that it is not restricted to working life. Discrimination is forbidden in all social activities and all walks of life. Discrimination denotes the placing of women and men in different job positions on the basis of sex. A procedure actually resulting in a clear difference between the job positions of men and women is also considered discrimination. The general prohibition is supplemented by a list of procedures that are not considered as constituting discrimination even if they involve the differential placement of men and women on the basis of sex. These include the special protection of women due to pregnancy and childbirth,

military conscription for men only, the acceptance of only women or men as members of an association on the basis of its by-laws and procedures promoting equality.

The special prohibition of the Equality Act forbids discrimination in working life. Under the provision, the activities of the employer shall be deemed to constitute discrimination if the employer:

- (a) in recruitment or choice of workers for training bypasses a person with more merits than the person of the other sex who is in fact chosen;
- (b) fails to employ a person otherwise than by a procedure referred to in point (a) or limits the duration or continuance of an employment relationship on the basis of the sex of the worker;
- (c) applies a less advantageous salary or other terms to a worker than those applied to a worker of the opposite sex employed by the same employer in similar or equal work;
- (d) supervises the work, distributes the work assignments or otherwise organizes the working conditions so that a worker is placed in a position clearly worse than that of a worker of the opposite sex (for this reason the employer must, among other things, undertake measures to prevent a worker from being subjected to sexual harassment); and
- (e) gives notice, cancels or otherwise terminates an employment relationship, or transfers or lays off a worker on the basis of his or her sex.

Both the general prohibition and the special prohibition are considered to be violated if a worker is placed in a different position because of pregnancy, childbirth, parenthood, family responsibilities or any other reason indirectly related to his or her sex. This means that if a person of the same sex is placed in a better position, this can also be deemed discrimination if it is caused by one of the factors mentioned. Under the provision of the Equality Act concerning the burden of proof, however, the action of the employer is not deemed to constitute discrimination if he or she can prove an acceptable reason for his or her action caused by the nature of the work or task and not due to the sex of the worker. Of course, this does not concern the termination of the employment relationship on the basis of sex referred to in point (e).

The general prohibition and the special prohibition of the Equality Act are supplemented by the prohibition of discriminatory advertising. A job or training post must not be advertised by inviting applications from only men or women unless this is due to a weighty and acceptable reason caused by the nature of the work or task, or unless the procedure promotes equality. The violation of this prohibition is subject to a criminal sanction. As a result of the Act, discriminatory advertising in Finland has ceased completely. Other acts prohibited by the Equality Act are not subject to criminal sanctions.

A new criminal law is under preparation which will make sex discrimination in recruitment or during employment a criminal offence. An employer who violates the general prohibition of the Equality Act can be ordered to pay damages to the party discriminated against. The amount of damages ranges from 12,400 to 39,200 marks (these amounts are reviewed at three-yearly intervals to ensure that they correspond to changes in the value of the currency).

Damages are claimed in a general court of law. Thus the labour court does not have jurisdiction to decide the case. The procedure applied to the complaint is the procedure

normally applied to a civil dispute. The court may request an opinion from the Equality Board. No other special procedural provisions exist to handle an equality issue.

Compliance with the Equality Act

Compliance with the Equality Act, and especially the prohibition of discrimination and discriminatory advertising, is supervised by the Equality Ombudsman. The Equality Ombudsman may assist the person discriminated against in safeguarding his or her interests. Upon the initiative of the Equality Ombudsman, the Equality Board may issue an injunction to stop a procedure from violating the Equality Act.

Each year, the courts of law handle a couple of dozen complaints for damages under the Equality Act. The number of cases is fairly stable. Since the entry into force of the Act, the Supreme Court has examined about ten cases dealing with equality and the Supreme Administrative Court about 30 cases, some of which have concerned appointment to office.

In 1991, the Equality Ombudsman handled 171 cases, 85 of which concerned employment relationships. Of these 85 cases, 62 concerned discrimination in recruitment, ten concerned salary and wage discrimination, six concerned discrimination relating to working conditions and seven related to discrimination upon the termination of an employment relationship. As recruitment to jobs has considerably decreased owing to the present recession, most of the cases submitted to the Equality Ombudsman at present concern alleged discrimination upon the termination of an employment relationship. The largest number among these are cases of alleged discrimination relating to pregnancy and childbirth, as well as to family responsibilities.

The equality complaints handled by the general courts of law are likely to correspond in nature to those handled by the Equality Ombudsman. The cases dealing with equality often involve both legal problems and problems of proof, so that they can, on average, be considered fairly complicated.

The labour court has jurisdiction to examine whether the provisions of collective agreements violate the Equality Act (for example, so that the remuneration of women and men with the same or similar work assignments is different under the collective agreement). No complaints of this type have been filed with the labour court since the enactment of the Equality Act.

Finland is not yet a member of the EC. Finnish equality legislation has been considered to comply with the requirements of EC judicial practice. The prohibition against discrimination on the basis of pregnancy, childbirth and family responsibilities was added to the Act as a result of the application by Finland for membership in the EC.

Germany*

Dr. Friedrich Heither, Judge President, Federal Labour Court

1. *Legal provisions dealing with sex discrimination*

(a) *When and under what circumstances were they introduced?*

Several legal provisions are intended to prevent discrimination on the grounds of sex.

The Constitution of Germany (Basic law, *Grundgesetz*) contains two provisions which deal with discrimination based on sex. According to article 3, paragraph 3 GG, a person must not be discriminated against or preferred because of his or her sex. Sex must not be used as a basis for unequal legal treatment. Different treatment of men and women is permitted only if the biological or functional difference characterizes the living conditions so decisively that common elements cannot be recognized. Factual reasons alone cannot justify unequal treatment.

Furthermore, article 3, paragraph 2 GG, stipulates: "Men and women have equal rights." This provision overrides the provisions in article 3, paragraph 3 GG. It contains an order of equality of rights and is aimed at social reality. The provision is not only intended to remove and prevent discriminatory legal standards but will ensure equal rights for future generations. It is also aimed at harmonizing living conditions. Official measures should not lead to a higher burden or other drawbacks for women. Factual drawbacks which typically affect women may be equalized by favourable regulations because of the order of equality of rights (see judgement of the Federal Constitutional Court/Bundesverfassungsgericht, BvG of 28 January 1992 — 1 BvR 1025/82 and others — NZA 1992, 270).

The provisions of the Constitution are immediately applicable only in the relationship between citizens and the State. However, a general principle of equal treatment related to labour law is derived from the Constitution. This principle of equal treatment is characterized by article 3, paragraph 3 GG. The same, strict equal treatment is also demanded in labour law related relationships — the same as that required by article 3, paragraph 3 GG.

This general labour law related principle of equal treatment is expressed in new, simple legal stipulations. It deals with legal regulations in the field of law relating to employment contracts (section 611(a), paragraph 1, section 611(b), section 612, paragraph 3 of the Code of Civil Law (*Bürgerliches Gesetzbuch* (BGB))). In the workplace,

* Ed. note: This contribution provides replies to the questions in "Guidelines for national papers (Part II)", p. 111.

differential treatment because of their sex of persons working in the business does not take place (section 75, paragraph 1 of the Works Constitution Act (*Betriebsverfassungsgesetz*)).

National legal sources are joined by international legal sources. Article 119 of the EC Treaty is immediately applicable just as it is in other Member States of the EC. The ECJ designates the EC Treaty as "constitutional-law-like" foundation acts of the community (see also EuGHE 1963, 1 and continued). All the legal standards of the Community must have the same immediate effect in all Member States. These Community standards must also have priority when it comes to conflicting national law.

Community law cannot be applied with different content in the various Member States. The national law must not be applied by national authorities and courts if its application is not compatible with Community law. The courts of Germany have accepted this procedural aspect of Community law (see BVG 73, 339).

The law of the EC also affects the interpretation of national provisions. National provisions must be interpreted in such a manner that their content is compatible with European law. Associated with the provisions, which must be taken into account when interpreting the national law, are the EC Directives. To be taken into consideration are: the Directive on equality of wages (No. 76/207 EWG of 9 February 1976), the Directive concerning access (No. 75/117 EWG of 10 February 1975), and the Directive concerning social security (No. 36/378 EWG).

The provisions of the Constitution have been valid since it came into force in 1949. The personal labour law related principle of equal rights, therefore, is a pre-constitutional law; but it has been characterized as a constitutional provision since 1949.

The labour law related regulations in the BGB (Code of Civil Procedure) were promulgated by Germany in 1980, with the intention of implementing the contents of Directives 75/117 EWG and 76/207 EWG.

(b) How is sex discrimination defined?

The Constitution (article 3, paragraph 3 GG) and the provisions under the labour contract law stipulate that "no employee must be discriminated against because of his or her sex". Accordingly, any form of discrimination is prohibited. German labour law distinguishes between direct and indirect discrimination (agreements and measures of the employer which are directly tied to sex, and hidden discrimination). Indirect discrimination deals with discrimination where qualities are called for which are indeed sex-independent, but can only be met by one sex or the other, e.g. size or body weight requirements. Indirect discrimination is defined according to the adjudication of the EuGH. The objective statement of facts of indirect discrimination exists if, by a standard which has been sex-neutrally formulated, obviously more persons of one sex are affected than of the other sex. The ratio between the employees who are favoured and those who are discriminated against must be ascertained for the class of employees to which the regulation is to be applied in each case. Under the law, these are the employees to whom the law must be applied according to the personal scope of applicability. (Under a collective agreement, these are the employees who are covered by the scope of the agreement. Under a business agreement, these are the employees of a business.) As a further prerequisite for the existence of the objective statement of facts of indirect discrimination, it must be checked whether the discriminatory consequences of the regulation are based on the sex or the traditional role of generations of the discriminated group. Once the objective statement of facts giving rise to indirect discrimination has been shown, the originator of the standard must explain

and prove that the differentiation serves an actual need of the enterprise, and that it is suitable and necessary for reaching that objective. A primary example of indirect discrimination occurs in the case of part-time work, which is done mainly by women.

(c) To whom do they apply and what areas of activity do they cover?

The provisions against discrimination are applicable throughout the entire range of the labour law; they cover all labour law related relationships. Consequently, they are applicable to workers or trainees, either full or part time. They are also applicable to those employed in small enterprises and households.

(d) What is the substantive scope of the law?

The legal provisions intended to prevent discrimination on the grounds of sex cover every agreement between employers and employees, and all measures of a legal or actual nature adopted, taken or imposed by the employers. They are also valid for determining the employment relationship and for agreements made and measures taken in the course of the employment relationship. Specific aspects of the law relating to employment contracts are emphasized.

According to section 611 (b), BGB, the employer shall offer jobs neither in public nor within the business for only men or women. There is only one exception, that is, if, for the desired activity, a defined sex is an unavoidable prerequisite.

The employer must not discriminate against an employee at the engagement of the employment relationship because of his or her sex (section 611(a), paragraph I, sentence 1, BGB). The same applies to occupational promotion (occupationally qualifying measures and promotions) and to the employer's orders when enforcing the employment relationship (e.g. the assignment of workplaces and tasks).

According to section 612, paragraph 3, BGB, for equal or equivalent work, no remuneration must be agreed upon which, because of the sex of the employee, is lower than that of an employee of the other sex. Agreement to lower remuneration is not justified by the application of special protective provisions based on the sex of the employee.

Section 611(a), paragraph 1, sentence 1, BGB, prohibits discrimination in matters of dismissal. No special regulations for the protection of employees from sexual harassment are contained in German labour law. Sexual harassment by the employer towards an employee is normally considered to be a violation of the employment contract. The same applies to sexual harassment of an employee towards another employee. In serious cases, violation of the contract can be followed by a notice of dismissal. According to section 104 of the Employees' Representation Act, the works council can require the employer to dismiss or transfer an employee who behaves unlawfully and who seriously and repeatedly disturbs the peace of the workplace.

(e) Special rules regarding the burden of proof

Effective enforcement of the prohibition of discrimination also requires facilities for discriminated employees to enforce their rights. According to section 611(a), paragraph 1, sentence 3, and section 612, paragraph 3, sentence 3, BGB, the employee must first of all explain and prove that he or she has been treated differently from members of the other sex. Then, the employee who has been discriminated against can explain and prove facts which allow the presumption of sex discrimination. Neither party must fully prove their case. Rather, the court must be convinced of a prevailing probability of the facts. For example, facts to be taken into consideration may include a sex-specific offer, a

proportionate share of women in the business or enterprise which is below average, or a discriminatory remark by the employer or his or her deputy referring to the sex of the employee. The employer must prove, if there is a certain probability of discrimination, that factual reasons not related to sex justify different treatment, or that sex is an unabandonable prerequisite for the activity to be carried out.

The ECJ has supplemented these rules of evidence. If a remuneration system is applied which is lacking any transparency, the burden of explanation is lightened for the female employee. She only needs to prove, on the basis of a relatively large number of employees, that the average remuneration of the female employees is lower than that of the male employees. If she is successful in doing so, the employer must prove that his or her wage policy is not discriminatory (ECJ judgement of 17 October 1989 — EuGHe 1989, 3220).

(f) *Remedies imposed by labour courts when sex discrimination is proven*

Discrimination by the employer does not entitle the applicant concerned to employment. The employee may only be indemnified. According to German law, the cost of applying for the post can be awarded as damages.

According to EC law, damage awards must not be merely symbolic. The sanction must operate to render the prohibition of discrimination practically effective. German law does not meet this requirement.

If employees are discriminated against on questions of remuneration or other conditions of work, then they are entitled to the same remuneration or conditions as the favoured employees. Only in this way can equal treatment actually be established. In this respect, the EuGH and the Federal Labour Court (*Bundesarbeitsgericht*, BAG) are in agreement.

(g) *Sex discrimination as a criminal offence*

Sex discrimination is not, in and of itself, an element of an offence. German labour law basically imposes sanctions only in the field of civil law.

II. The influence of judicial decisions

German labour law has undergone change, especially under the influence of European law as defined by the ECJ. On the one hand, this applies to the principle of direct discrimination, developed by the ECJ and based on the Directives. The ECJ inquires into the effect on social reality that the regulation to be evaluated will have. It is only by answering this question that the discriminatory effect of a given regulation becomes obvious. For example, this applies to the exclusion from sick pay of workers who work few hours, and the exclusion of part-time workers from benefits and from the corporate pension plan.

European law has also supplemented German regulations in regard to the distribution of the burden of proof in a legal dispute. The German regulation on indemnification for discrimination in recruitment still needs to be adapted to European standards.

Previously, German labour courts objected to open discrimination in employment contracts and contracts related to a collective agreement as being incompatible with the national prohibitions against discrimination.

(a) *Volume of cases alleging sex discrimination*

The number of cases of women fighting against sexual discrimination has clearly increased.

Only a few cases concern discrimination at the time of recruitment and corresponding actions for damages. In most of the cases, the concern was discrimination in terms of remuneration. Included in the concept of remuneration are all monetary payments which are paid as a result of an employee's performance or other work obligations (on the grounds of work performance owed by an employee). Therefore, not only wages but also additional payments and promises of payment by corporate pension plans are considered as remuneration. In particular, the prohibition of indirect discrimination led to a large number of decisions of the Federal Labour Court. Generally, these actions were successful. The Federal Constitutional Court has rejected constitutional complaints against decisions of the Federal Labour Court. Indirect discrimination was prohibited in the field of continued payment, in the field of special payments related to a collective agreement, and in payments under the corporate pensions plan.

Within the scope of these procedures, comprehensive investigations into ratios (for example, of average earnings) were normally required. In order to justify the differential treatment, employers brought forward arguments in abundance.

III. Supporting bodies

German labour law does not establish any institutions which are especially aimed at supporting women who bring claims related to the labour law. Women — normally the group of employees discriminated against because of their sex — must pursue their claims against the employer (indemnification for discrimination in recruitment and pay claims for the amount promised to the favoured group of employers) before the labour court. They can utilize the support of the unions recognized under German labour law if they are members of these organizations. Some public law corporations have created institutions for the promotion of equality between men and women. Women may ask for advice at these institutions.

IV. The role of the European Court of Justice (ECJ)

Decisions of the ECJ have had — as explained before — a significant influence (material effect) on the law of sex discrimination. The most important effect has been caused by the prohibition of indirect discrimination. The ECJ-developed stipulations about the burden of explanation and proof during claims concerning wage systems have also contributed to a better system of enforcement.

To my knowledge, so far the Federal Labour Court has not cited any decisions of other courts with regard to sexual discrimination. However, in the decisions of one court, the decisions of the EuGH (as well as the structure of the case on which they are based) are also reported, and hence the inquiries of the courts of other nations.

(a) *Difficulties of integrating ECJ decisions into German jurisprudence*

In Germany, European law is increasingly taught at the universities. Understanding of European law is growing. The special consideration of the prohibition of sex-based discrimination developed by the ECJ presents an enriching source for many lawyers. On the other hand, such adjudication is criticized by employers, their organizations and teachers at the universities, who are intimately connected with them, because the possibilities of structuring (*Gestaltungsmöglichkeiten*) are restricted. The Federal Court itself consequently applies the decisions of the ECJ to the underlying cases. The Court is striving for an interpretation of national provisions in conformity with the EC Directives.

(b) *In what way, if any, do you think the ECJ decisions could be made more helpful in developing EC law?*

According to German tradition, the decisions of the courts are reasoned in great detail. Moreover, the decision always includes the objections brought forward against the solution. These objections must be disproved. We believe this lends greater authority to the court's reasoning. The decisions of the ECJ frequently exclude the details of this kind of argument.

Hungary*

József Radnay, President of the Supreme Court of Hungary

1. Legal provisions dealing with sex discrimination

Paragraph 5, section 1, of the third Labour Code states: "In relation to employment it is forbidden to discriminate against employees on the grounds of sex . . . as well as any other circumstances unconnected with employment. Discrimination following unequivocally from the character or nature of the work does not qualify as detrimental discrimination."

- (a) The third Labour Code has been in force since 1 July 1992. The first Labour Code, which came into force on 1 February 1951, did not have any special provisions relating to discrimination; the Code stated only that women were to work under the same conditions as men. On 20 June 1961 Hungary ratified the Discrimination (Employment and Occupation) Convention, 1958 (No. 111); consequently, the second Labour Code, which came into force on 1 January 1968, already contained regulations on this matter (paragraph 18, section 3).
- (b) Sex discrimination has been defined by Ruling No. 97 of the Supreme Court as existing where a woman is employed or is working with different (prejudicial) working conditions to those of a man without an essential and just cause.
- (c) The provision can be applied to nearly every employed person. The provision must be applied in particular to:
 - blue and white-collar workers and employees (Labour Code, paragraph 1);
 - public servants (Law XXIII of 1992, paragraph 71, section 2);
 - public employees (Law XXXIII of 1992, paragraph 3);
 - the armed forces (4/1993/IV.30/HM order);
 - the police (11/1992/VIII.3/BM order);
 - frontier guards (11/1992/VIII.3/BM order);
 - firefighters (11/1992./VIII.3./BM order);
 - law enforcement agents (14/1992/IX.26/IM order);
 - customs and finance guards (26/1992/XI.12/PM order); and
 - members of cooperatives in respect of working conditions (Law I, 1992, paragraph 65).

* Ed. note: This contribution provides replies to the questions in "Guidelines for national papers (Part II)", p. 111.

Special provisions are in force with regard to other activities, for example, Law I of 1985 on the subject of education.

- (d) The substantive scope of the law is very wide. The Constitution contains a similar rule (paragraph 66, section 1). Consequently, the rule applies not only in employment cases, but in other respects too (education, etc.). However, in practice few cases are actually dealt with. Those that are dealt with are mostly in connection with pregnancy.
- (e) A closed court hearing can be imposed if this is necessary from a moral point of view (Code of Civil Procedure, paragraph 7, section 1). According to the third Labour Code, paragraph 5, section 2 — which provision was included in the Code of Civil Procedure — the burden of proof rests on the employer.
- (f) The discriminatory behaviour of the employer is deemed to be void and the court compels the employer to continue employing the employee without the discriminatory condition of work, and so on.
- (g) According to Hungarian law, sex discrimination is not a criminal offence, but a summary or administrative offence (17/1968/IV.14/Korm, order, paragraph 76), and can be sanctioned with a fine.

II. The influence of judicial decisions

- (a) The law has developed through judicial decisions, especially in cases dealing with non-renewal of fixed-term employment of pregnant women and in the case of termination of employment. Therefore, if the parties modify the employment contract after the fact has come to their notice that the employee is pregnant, and they transform the contract from one for an indefinite period to one for a fixed term, then the modifying agreement is usually null and void (Supreme Court M.10.204/1975 — Labour Law Decisions I/26, M.II.10.038/1978 — Court Decisions 1978/12/538).

Another typical case occurs where the parties agree on a reasonable term and constitute an employment contract for a fixed period, then extend it several times. The employer then refuses further extension when he learns of the woman's pregnancy. In this case the judge will consider the contract as being one for an indefinite period, which cannot be terminated because of pregnancy.

- (b) The volume of cases alleging sex discrimination is low and decreasing. In difficult economic times, the employees tend to accept discrimination if it means they will keep their job.

III. Supporting bodies

There is no special public body to support women who submit claims. The recently promulgated law LIX, 1993, makes it the duty of the Ombudsman to redress cases connected with constitutional rights. Private associations exist which aim to support applicants and lobby for changes in the law.

IV. The role of the European Court of Justice

- (a) The integration of ECJ decisions into national jurisprudence is not without difficulty. The organs of the Council of Europe are systematically helping us to become acquainted with and to understand the law of the Community and international standards. Librarian help is available and seminars are under way, though the former seems to be inadequate.

Israel

Menachem Goldberg, President, National Labour Court

General background and legislation

When the State of Israel was founded in 1948, it adopted the legislation which was in force under the British Mandate. The terms of the British Mandate and subsequent mandatory legislation are devoid of any provision prohibiting discrimination. The first reference to non-discrimination is to be found in the Israeli Declaration of Independence, which states that "The State of Israel . . . will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex". The Declaration of Independence has no binding legal force, although the Israeli courts — including the Labour Courts — have been guided by it when interpreting statutes and executive acts.

Whereas the State of Israel has an ever-growing body of entrenched legislation in the form of "Basic Laws", it has as yet no all-embracing Constitution or Bill of Rights. However, the Israeli courts have recognized certain "basic rights", including the principles of equality and non-discrimination. Though unwritten, these rights are protected by the courts and have an important place in the legal system.

The first comprehensive legislation dealing with women's rights was enacted in 1951. The Women's Equal Rights Law, 5711-1951, provides:

1. Equality before the law:

A man and a woman shall have equal status with regard to any legal proceeding; any provision of law which discriminates, with regard to any legal proceeding, against women as women, shall be of no effect.

In parentheses, it should be noted that this law does not apply to matters of personal status which in Israel are governed by the particular religion of the citizens concerned, depending on whether they are Jews, Muslims, Christians or Druse. It goes without saying that the Jewish and Muslim religions do not recognize equal rights for women.

The first labour legislation to include, amongst other things, an operative provision concerning the prevention of discrimination against women was enacted in 1959. The Employment Service Law introduced regulation in the field of work placement, imposing the requirement that placements for many occupations be made by State Employment Bureaux. At the same time, the law proscribed the operation of private employment bureaux. The Employment Service Law states:

- 42(a) In assigning work placements, the Employment Service Bureau shall not discriminate against a person on account of his age, sex, race, religion, ethnic group, country of origin, views or party affiliation, and a person requiring an employee shall not refuse to engage a person for work on account of any of these whether or not that person has been assigned work placement by the Employment Service.
- (b) It shall not be considered as discriminating if the character or nature of the task or considerations of State security prevents or prevent the placement or engagement of a person in relation to some particular work.

The law was later amended so as to include placement other than by means of an Employment Bureau. This amendment included the following provision concerning recruitment advertising:

- 42(a) A person requiring employees shall publish no such advertisement offering employment, as is discriminatory within the meaning of section 42.

In 1991 the "monopoly" of the State Employment Bureaux was abolished. However, the provisions in the Employment Service Law prohibiting discrimination remain in force.

In 1964 the Male and Female Workers (Equal Pay) Law was enacted. The operative section provides:

1. An employer shall pay to a female worker a wage equal to the wage paid to a male worker at that place of employment for the same or substantially the same work.

The sanction for failing to comply with this provision is civil, i.e. the payment of substantial punitive damages for delay in remitting the relevant difference in pay. These punitive damages are part of an overall policy of Israeli employment law, whereby heavy penalties are imposed upon delayed payment of wages or severance pay. In contrast with some European countries, the Israeli Male and Female Workers (Equal Pay) Law deals with equal pay for the "same work" and does not deal with equal pay for "work of equal value".

In 1987, the Male and Female Workers (Equal Retirement Age) Law was enacted. Contrary to the impression that the title of this law might give, the law does not fix an equal retirement age, but rather gives female employees the option to retire at various ages. The relevant section provides:

2. When a collective agreement prescribes for a female worker a retirement age lower than that prescribed therein for a male worker, then, notwithstanding anything provided in that collective agreement, the female worker shall have the right to retire from employment at any age between her retirement age and the retirement age prescribed for the male worker.

The background to the enactment of this law was the fact that most collective agreements provided different retirement ages for male and female employees — 65 for a man, and 60 for a woman. It was primarily for this reason that different pensions were paid to women, from the age of 60, and then to men from the age of 65; this was also the situation for old-age pensions paid by the National Insurance Institute by virtue of statutory provisions and for pensions paid by the union pension funds. The situation was different in the civil service and local authorities, where, by virtue of legislation, there had always been an equal retirement age of 65 for men and women.

The most comprehensive law regarding discrimination, the Employment (Equal Opportunities) Law, was enacted in 1988. This Law instituted a "prohibition against discrimination" in a variety of areas. The Law also prohibits sexual harassment at work, and gives men rights equal to those of women to be absent from work on account of children's illness or for the purpose of taking care of a new-born child (so-called "paternity leave").

The relevant provisions of this law are:

- 2(a) An employer shall not discriminate between his employees or between persons seeking employment on account of their sex, their sexual tendencies, personal status or their being parents, in respect of any of the following:
- (1) engagement for work;
 - (2) terms of employment;
 - (3) advancement in employment;
 - (4) vocational training or supplementary vocational training;
 - (5) dismissal or severance pay.
- (b) For the purposes of subsection (a), the making of irrelevant conditions shall be regarded as discrimination.
- (c) Differential treatment necessitated by the character or nature of the assignment or post shall not be regarded as discrimination under this section.
- ...

4. Where, under the terms of employment applying at her place of employment, a female employee is entitled to absence from work by reason of illness of her child, such right shall also vest in a male employee employed at a place where terms as aforesaid apply if he meets one of the following requirements:

- (1) his spouse is an employee and is not absent from work by virtue of entitlement as aforesaid;
 - (2) he has sole custody of the child.
- ...

8. Under this law a person requiring an employee shall not publish an advertisement offering employment or referral to vocational training unless the offer is expressed in both the masculine and the feminine gender, whether in the singular or in the plural, except for an offer of employment to which section 2(c) applies.

There are two prime features which are singular to this law:

- (1) Failure to comply with the law is a criminal offence, in addition to the right of the injured person to file a civil suit to enforce his or her rights.
- (2) The labour courts are empowered to issue an injunction requiring the employer to employ an employee whom he or she refused to hire on account of discrimination, or to reinstate an employee who was dismissed on account of discrimination. The mandatory injunction is exceptional, because the labour courts have no power, in general, to enforce employer-employee relations and, with the exception of the civil service and local authorities, the sole relief which the labour courts may grant in cases of breach of employment contracts is damages.

Shortly before the Employment (Equal Opportunities) Law was enacted, two further provisions were added to the Penal Law, by way of amendment:

- 346(b) A person who has unlawful sexual intercourse with a woman who has reached the age of eighteen, by means of taking advantage of a position of authority in labour relations or service or as a result of a false promise of marriage by means of purporting to be unmarried despite his being married, is liable to imprisonment for three years.
- 348(e) A person who commits an indecent act upon the person of another who has reached the age of eighteen, by means of taking advantage of a position of authority in labour relations or service, is liable to imprisonment for two years.

The Employment of Women Law was enacted in 1954. The essential features of this law are the protection of female employees against dismissal during pregnancy and maternity leave and the prohibition against employing women at night and in dangerous

jobs. The Employment of Women Law has undergone a series of radical amendments, which are worth mentioning. Originally, the law comprised an absolute prohibition against night employment of women, with the exception of work in hospitals, journalism and a number of other occupations. In 1961 the law was amended, so as to permit the employment of women at night in industries operating in shifts, subject to obtaining permission of the Chief Employment Officer (an official of the Ministry of Labour and Social Welfare). As of 1988 it is no longer prohibited to employ women at night, although a woman is entitled to refrain from working at night where she informs her employer upon being hired that she does not agree to night work for family reasons: when a woman has informed her employer of her refusal to work at night, she cannot be refused work or dismissed for this reason.

The types of work in which it is prohibited to employ women have also undergone significant change. Originally, the Employment of Women Law adopted the corresponding provisions of legislation which had survived from the period of the British Mandate, and which prohibited women from engaging in hard, physical work or dangerous work (construction, work with lead, metal processing plants and so on). From 1979 the types of work barred to women are those where she is in contact with toxic material or ionizing radiation. These types of work are only prohibited to women who are able to give birth or those who are pregnant or breastfeeding.

A survey of Israeli legislation affecting discrimination would not be complete without noting that there has always been complete equality between the sexes in the field of education. This applies to the provision of free education (to the age of 18), compulsory education (to the age of 15) and the prohibition of employing youths (up to the age of 15).

Military service is by law compulsory for men and women, although the period of compulsory service for men (three years) is longer than it is for women (two years).

Discrimination claims in the labour courts

The labour courts were established in 1969. Prior to that date, regular courts had jurisdiction in matters of labour law. Prior to the establishment of the labour courts no claim was filed on account of sexual discrimination in the engagement, employment or dismissal of employees. Since the establishment of the labour courts, the number of claims filed on account of discrimination of various kinds has not been large. One reason for this is an increasing awareness of the need to prevent discrimination, resulting in a decrease in discrimination to the extent that it existed beforehand. The main reason for the small number of discrimination claims is, however, the difficulty of proving discrimination. For example, as far as equal pay is concerned, wages are generally equal for men and women employed at the same level. In many cases, however, the level of most female employees will be lower than that of male employees and men often receive greater fringe benefits, such as a car expenses allowance, which are not recognized as "wages". A bill is currently before the Knesset proposing that the term "wages" in the Male and Female Workers (Equal Pay) Law be given a wider definition which would include all the components in the employee's pay package.

III. Case-law of the labour courts

Equal pay for female and male employees

One case involved a female employee in a chocolate factory. She was transferred from her regular job as a machine packer to working as a machine operator. A machine operator's job (at that factory) included some 13 different functions. It was found that a male operator performed all 13 functions, whereas a female operator performed only eight functions in full, and a further three functions in part. The question which the labour court had to decide was whether the work of the male and female operators was "substantially the same" in accordance with the Male and Female Workers (Equal Pay) Law. In this case, the labour court dealt with two questions, the first being when work will be regarded as "substantially the same" and the second being that of the burden of proof. As for the first question, it was held that the court can base its decision on the opinion of an expert in the field of production engineering, and that the court may even appoint such an expert to advise on its behalf. Furthermore, one of the tests relevant to the question of whether work is "substantially the same" is the difference in terms of the work costs in relation to the product. When this difference stems from the experience which comes with seniority in the job concerned, the difference will be immaterial.

As to the second question concerning the burden of proof, the court decided that the female employee must produce *prima facie* evidence that her work is the same or "substantially the same" as the work of a male employee in the same workplace. Once she has proved this, the burden of proof shifts to the employer, who has to show that, although the job or occupation is the same, there are other factors as a result of which the job or occupation is not in fact the same, or not substantially the same.

Equal retirement age for male and female employees

As discussed above, most collective agreements set different retirement ages for male and female employees. In a claim brought before the labour court, prior to the enactment of the Male and Female Workers (Equal Retirement Age) Law, a female employee claimed that a provision in the collective agreement forcing her to retire at the age of 60 was contrary to public policy. The union, which was a party to the collective agreement, joined the employer in opposing the claim.

The labour court dismissed the claim, both at first instance and on appeal, on the following grounds: (a) the norm prescribed by the National Insurance Law and other pieces of social legislation was earlier retirement ages for women; (b) special weight is attributed to the terms of collective labour agreements, over and above the terms of individual employment contracts. At the same time, the National Labour Court suggested that the legislature consider the issue of retirement ages for men and women; and indeed, a few weeks after the judgement of the National Labour Court was given, the Male and Female Workers (Equal Retirement Age) Law was enacted. Despite this, the female employee petitioned the High Court of Justice (the Supreme Court, sitting as the High Court of Justice, has limited jurisdiction to exercise judicial review over decisions of the National Labour Court). Basing its decision on the principle of equality and the prohibition against improper

discrimination, the High Court decided that the relevant provisions of the collective agreement were contrary to public policy and thus void.

Discrimination in relation to promotion at work

A collective agreement governing the employment of flight attendants employed by a particular airline provided two different promotion tracks, one for stewards and the other for stewardesses. The collective agreement also provided that stewardesses shall be dismissed upon termination of maternity leave. These two provisions in the collective agreement were held to be invalid by the National Labour Court, on the basis of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111). The National Labour Court further held that any distinction, preference or disqualification would only be valid if based on the job itself and not on differences in the work performed.

Discrimination in relation to recruitment

A commercial concern advertised in a newspaper for candidates for the job of "sales representative". The job description in the advertisement was couched in the male gender only (there is a difference in Hebrew between job descriptions for men and for women). The company was charged with violating the relevant provisions of the Employment (Equal Opportunities) Law. The company claimed that the job at times demanded the delivery of the product, which weighed about 50 kg, to the customer, and thus women were not able to perform this job. The National Labour Court held that: (a) in the light of the law's objectives, a narrow interpretation was to be given to the exceptions which allowed sex discrimination; (b) the law prohibits direct and indirect discrimination alike. Indirect discrimination occurs where importance is attached to factors which are not relevant to the job itself: even though such factors might appear to be objective, they effectively bar the performance of the job to members of one sex.

Legislation concerning discrimination on grounds other than sex

As discussed above, the Employment Service Law has been amended so as to prohibit discrimination in the engagement and recruitment of staff on grounds of religion, race, ethnic group or country of origin.

Organizations dealing with the protection of women against discrimination

No special organizations have been set up in Israel to deal with the protection of women from discrimination in the workplace. Problems of this nature are dealt with by women's

organizations and in particular the women's branch of the Histadrut, which is the largest workers' union in Israel. Problems related to equal retirement ages for women have been dealt with by the Israel Citizens' Rights Movement.

The Employment (Equal Opportunities) Law provides that in claims relating to violations of this law, the labour courts may grant organizations dealing with women's rights the opportunity to present their position. Such organizations do not have the right, however, to file claims with the court — this right is reserved to the employee alleging discrimination and to her union.

The influence of the European Community on Israeli case-law

Israel is not a member of the EC and is therefore not bound by decisions of the European Court of Justice (ECJ). Nevertheless, in many instances the labour courts, and in particular the National Labour Court, avail themselves of the experience and case-law of the ECJ, just as they are guided by international treaties and the case-law of other countries. In the cases referred to above, the National Labour Court was guided by the case-law of the ECJ and Community law concerning equal retirement ages and sex discrimination in recruitment.

Norway*

Stein Evju, President, Labour Court

1. Legal provisions dealing with sex discrimination

(a) In Norway, the basic legal provisions on sex discrimination are those of the 1978 Equal Status Act (ESA). In addition, some general provisions on equal pay and equal treatment are contained in central collective agreements. The latter were first introduced in the 1961 Framework Agreement on Equal Pay between the Norwegian Confederation of Trade Unions (LO) and the Confederation of Norwegian Business and Industry (NAF) in conjunction with Norway's ratification of the Equal Remuneration Convention, 1951 (No. 100). As a consequence of that ratification, a public Equal Pay Council was established in 1959. This was a permanent tripartite council whose task was to promote the equal pay principle. Its tasks were taken over in 1972 by the Equal Status Council, also a tripartite body, encompassing the promotion of equal status in various areas of family life, schools, business and community life. The ESA should be seen as part of this development and of the growing political awareness and concern in the early 1970s about the discrepancy in the respective situations of women and men in so many areas.

A first Bill on an Equal Status Act was put forward in the winter of 1975. Following a very divided report in 1976 by the parliamentary committee, a revised Bill was introduced in June 1977. The Act was passed in June 1978 and entered into force on 15 March 1979.

(b)-(d) The Act has general scope. It is not limited to labour relations or working life: the Act applies to "discrimination between women and men in all areas", except "internal conditions in religious communities". In addition, it is not to be enforced by the statutory authorities in respect of family life and purely personal relationships (section 2). Consequently, the Act covers all areas of activity with regard to labour law.

Section 3, the General clause, states at the outset that "discrimination between women and men is not permitted" and defines discrimination as "treatment differentiating between women and men because they are of different sexes". Discrimination furthermore includes, explicitly, treatment (acts and omissions) that in practice works in a manner whereby one sex is placed at an unreasonable disadvantage as compared with the other. Positive discrimination to improve the situation of women is allowed, in keeping with the objectives of the Act.

* Ed. note: This contribution provides replies to the questions in "Guidelines for national papers (Part II)", p. 111.

In addition to the General clause, the Act contains a number of specific provisions, such as on equality in recruitment, equal pay, and equal rights to education. These specific provisions are to be construed and applied in light of the General clause; the latter and the former mutually complement one another. Issues that are not dealt with explicitly in the specific provisions still fall within the scope of section 3.

Section 4 applies to advertising, recruitment, hiring, promotion, dismissals and temporary lay-offs, stating that "no difference must be made between women and men" in contravention of section 3, nor may advertisements "give the impression that the employer expects or prefers one of the sexes for the position". This applies to full-time and part-time jobs as well as to all forms of temporary work.

Under section 5 "pay" is defined as "ordinary remuneration" as well as all other supplements, bonuses and benefits given by the employer. Women and men shall receive "equal pay for work of equal value". The requirement and the comparison are here restricted to *within the same undertaking* (to employees having the same employer) and refer to the pay-setting mechanism at the outset.

Section 6 deals with education (i.e., vocational training, further education and leave of absence for the purpose of education) and requires an employer to "consider women and men on equal terms" (e.g. no special procedures apply in sex discrimination cases in the courts). Expert witnesses may be called upon by the parties as in civil proceedings in other matters. The issue of burden of proof is a moot point (see below). The courts may to some extent declare acts or agreements violating the statutory provisions null and void, otherwise one is limited to the sanction of damages relying on the ordinary law of damages (section 17). Sex discrimination in itself is not a criminal offence; however, the violation of orders made by the enforcement bodies (section 18) is (see section III, below).

II. The influence of judicial decisions

One could hardly say that sex discrimination law in Norway has developed through judicial decisions. The number of court decisions is negligible. So far, merely ten or 11 decisions addressing ESA issues within the sphere of labour law are registered. No case has gone to the Supreme Court (with the exception of Rt. 1986, page 879, annotated in 6 ILLR (1987), a dismissal case in which ESA section 4 was touched upon); three cases have been decided by the Labour Court. The more notable of the latter would be ARD 1990, page 148. A local wage-setting arrangement, concluded within the framework of general wage scale provisions in a central collective agreement, was declared null and void, whereas the central agreement provisions were not. At issue was the remuneration of a select number of female biochemists and male engineers working in a laboratory at a county hospital. The central agreement allowed for local adjustments of pay levels, and local bargaining had resulted in the engineers being placed in a higher pay bracket than the biochemists. This was found to violate section 5, cfr. section 3, of the ESA.

It follows from the above that one cannot say that there has been any increase or decrease in the number of court cases over the years. Out of the 11 registered cases, ten have concerned section 4 (eight on hiring, two on dismissals) and merely one (ARD 1990, page 148) has dealt with equal pay and section 5.

The number of cases raised with the enforcement bodies has been fairly stable over the last few years. The Ombudsman has received approximately 300 complaints per year since 1989, and the Complaints Board some ten to 15 cases. There has been a gradual decrease in the number of complaints filed with the Ombudsman, from a total of 746 in 1980 and 803 in 1981. Approximately half of all complaints are related to working life. The majority of these complaints refer to section 4 matters, hiring and promotion in particular, whereas equal pay issues have been more scarce. The latter are, however, often discussed informally with the Ombudsman prior to a possible complaint, so that there is more of an advance "selection" of cases on this matter.

III. Supporting bodies

The ESA established the Equal Status Ombudsman and the Equal Status Complaints Board.

The Ombudsman is vested with the task of seeking to ensure that the provisions of the ESA are observed, which will include seeking to establish and disseminate sound practices as well as to suggest changes in the law. In complaint cases, the formal authority of the Ombudsman is normally restricted to seeking amicable settlements and issuing statements of opinion. If a statement of opinion is not lived up to, the Ombudsman may bring the case before the Complaints Board for a formal decision, as may the individual concerned.

The Complaints Board is a tripartite body empowered to make formally binding decisions, issue orders and impose measures to counteract violations of the Act. Its competence, however, is restricted in respect of administrative law. Nor may the Board make decisions on the validity, interpretation or existence of a collective agreement as such; these are issues that fall solely within the jurisdiction of the Labour Court. Decisions by the Board may be challenged in the ordinary courts pursuant to the general rules of administrative law.

The enforcement bodies — the Ombudsman and the Board — have through their practice developed certain norms and approaches to burden of proof and indirect discrimination matters, to the effect that, put briefly, a "presumption of unlawful discrimination" applies if there is a discriminatory result. These "in-house" norms have so far not been put to a test in judicial decisions.

IV. The role of the European Court of Justice

As Norway is not a member of the EC, ECJ decisions have as of yet not had any effect on domestic sex discrimination law. This may certainly change if and when the agreement on the European Economic Area (EEA) enters into force. As far as EC law on equal pay and equal treatment is concerned, the relevant articles of the Treaty of Rome are repeated in the EEA agreement which is incorporated into domestic law as a Statute (Act). Beyond this, one has been content to rest with "passive transformation", considering that no amendments to the ESA are required. Some doubts have been raised, however, in particular to the law on equal pay. Some issues in this field were addressed in a White Paper discussed — with

no explicit reference to EC law — in Parliament this spring (e.g. whether to amend section 5 to render it “more precise” and to introduce “job evaluation methods” for the purpose of work value comparisons).

Pursuant to the EEA agreement as incorporated in domestic law, national courts will have a responsibility to interpret and apply domestic legislation in accordance with the adopted EC statutory law and the relevant ECJ case-law. In the field of sex discrimination law as well as in other fields one can easily foresee difficulties not only in understanding and integrating ECJ decisions, but also with regard to ensuring adequate knowledge of, and access to, all relevant cases in practical terms.

Slovenia

Dr. Janez Novak, Judge, Ljubljana, Slovenia

Legal provisions dealing with sex discrimination

The Constitution lays down equality in law. It explicitly provides that everybody shall be guaranteed equal rights, irrespective of his or her sex (article 14). All legal standards, including labour law standards, shall be applied on an equal footing to both men and women. So far, there have been only a very few disputes which expressly referred to sex discrimination. In the practice of labour relations there are, it is true, reported cases of lesser opportunities for the employment of pregnant women or of women having several children, for example, but such questions have not been the subject of court decisions. The subjects of labour disputes are indicated below.

It is possible to bar the public from the court if necessary for official, business or personal secrecy, public order or for reasons of public decency (article 307 of the Civil Procedure Act). The statutes do not lay down special procedures for the protection in court of equality based on sex. Special decisions are not given in such disputes; the courts make their decisions by the same procedure as in other types of dispute. The Slovenian Criminal Act (OG RS, No. 12/77-5/90) includes a special 19th chapter concerning criminal acts against labour relationships and social security. Article 86 regulates the criminal act of violation of the fundamental rights of workers. It also provides for the special protection of women. The domain of gender equality also includes a criminal act of violation of the equality of rights (article 60), where the sex discrimination in question has been explicitly prohibited.

The legislation takes into consideration the findings and decisions of the courts; however, in the domain of sex discrimination, special considerations are not applicable.

Regarding the position up until now of Slovenia in Europe, the labour courts have not dealt with such questions. The Ministry of Labour, Family and Social Affairs is competent in these matters. The present position of Slovenia in Europe requires a negative answer to the question of whether the decisions made by the ECJ have a material effect in the country.

Labour legislation on sex discrimination

Slovenian labour legislation does not separately regulate sex discrimination, as it is regulated by other rules (e.g. the Constitution, the Criminal Code). The status of women in labour relationships is especially protected by some provisions of the Labour Relationships Act (OG RS, No. 14/90, 5/91: LRA). In particular, this statute regulates the following with regard to women:

- annual holidays;
- maternity leave;
- the protection of children up to the age of 3 years (in connection with maternity protection);
- the prohibition of strenuous labour;
- the limitation of overtime and night work (articles 51, 76 to 86).

The collective agreements of single branches of the economy contain special provisions including a prohibition against placing women in certain conditions. This concerns such things as the distance of a woman's residence from, and the time it takes her to travel to, her place of work, as well as factors such as whether or not she has children under the age of 3 years. Night work is prohibited, and an additional annual holiday is granted to those with small children. These are the so-called special social conditions.

Practical case examples

The subjects of labour disputes indirectly or directly connected with sex discrimination are:

- education;
- placement of workers;
- salaries and wages;
- surplus workers;
- annual holiday and maternity leave;
- termination of employment.

In the domain of education, there are in practice no known cases which have directly referred to sex discrimination. There is a decision of the court concerning the placement of a female employee who had not, within a fixed time, gained the necessary professional education. She was, therefore, transferred to a workplace with a lower level of remuneration. The LRA lays down the conditions for the displacement of workers. The courts decided that a workplace to which a worker was transferred must correspond to his or her education and sex. In transferring a worker to another place, the conditions connected with being a mother for both the worker and her child shall be considered. The time of a mother's travel to her workplace in her new post is limited as to time. The employee, who had been employed for 35 years (the full term of employment for women) and had continued

working, had the same rights as the other workers. Therefore, the court decided that the reduction in her wages was not in accordance with the principle of equality of the sexes.

As a result of the recession in Slovenia, there have recently been numerous labour disputes connected with a surplus of workers. These are the consequence of the liquidation of enterprises, economic difficulties in general, transferral of ownership of enterprises, and so on. In judgements, it has been held that in determining the criteria for deciding which employees shall be considered surplus, no discrimination shall be permitted. The grounds of this court decision may be interpreted to mean that sex discrimination is also not permitted.

The rights of female employees were also considered in connection with annual holidays; here, the question is, above all, that of the relation between annual holiday and maternity leave. The court decided that a woman employee is entitled, in each calendar year, to a full annual holiday if she has met the necessary conditions (at least six months of continuous work). Under article 58, paragraph 1, of LRA, a worker, after taking maternity leave, may take and spend her annual holiday in the next calendar year, not later than 30 June.

With reference to termination of employment, the courts decided that pregnancy is not a circumstance important to the conclusion of an employment contract. Therefore, the employment of a worker who was pregnant at the time of concluding the agreement but who did not mention it to her employer, shall not be terminated on account of her withholding that fact.

Spain*

1. Legal provisions dealing with sex discrimination

(a) When and under what circumstances were they introduced?

There is a pre-constitutional law which comprises, basically, the period that starts with the Civil War of 1936-39. The fundamental law of this period was the *Fuero de los Españoles*; section II prescribed that the State would “forbid women working at night” and would “liberate married women from the workshop and the factory”. The general atmosphere of discrimination was worsened with this law, as it excluded married women from work, and it was included in most work regulations; it was in force until 1961.

The 1978 Constitution established in Spain a social-democratic *Estado de derecho* (state of law). It declares that the principle of equality (article 1) is one of the superior values of our legal system; the public powers will promote a “real and effective equality between individuals” (article 9). The fundamental rights are enunciated from article 10 onwards. We consider here the following points:

1. All the rules about fundamental rights will be interpreted in compliance with the Universal Declaration of Human Rights, and with the international treaties that Spain may have ratified on this issue (article 10);

2. One of the basic fundamental rights is that of equality in law, and article 14 prohibits any sort of discrimination due to sex, among other reasons;

3. All Spanish people — men and women — have the right to work, to choose their profession, to be promoted through work and to be paid adequately; “in no case can there be any sex discrimination” (article 35).

Article 35 of the Constitution foresaw that a special law would regulate the status of workers. The law, *Estatuto de los Trabajadores* (Workers’ Statute), was promulgated on 10 March 1980; it has undergone many alterations, particularly in 1980, in order to increase the protection of women and ban all sex discrimination. Article 4 enumerates the workers’ basic rights, which include:

- the right not to be discriminated against at work because of sex, etc.;
- respect for workers’ privacy and dignity, including “protection against physical or verbal offences” (this was introduced on 3 March 1989).

* Ed. note: This contribution provides replies to the questions in “Guidelines for national papers (Part II)”, p. 111. For information about the present organization of the Spanish labour courts, please refer to the discussion in Part I of this book, “Spain” (pp. 45-53).

Article 17 enunciates, as one of the contractual rights of workers, the right not to suffer sex discrimination at work; if the contract implies discrimination, the whole contract, or the contractual clause, or the clause of the collective agreement is void.

Article 24, included in the section on promotion at work, provides that work categories and promotion rules must be the same for men and women.

Finally, article 28, in the section about payment, provides that the same sort of work must receive the same pay, and states that there should be no difference in pay because of sex.

For pregnancy and childbirth, the *Workers' Statute* provides three protective measures:

- At childbirth, the mother has the right to a 16-week paid leave, of which six weeks at least must be taken after the birth; her husband can be on leave for this period if his wife dies in labour; he can also be on leave for four weeks of the six permitted, instead of his wife, if she agrees to this. When a child is adopted, the worker has a right to be on leave for a shorter period (article 49.4, introduced in 1989).
- If a mother is breastfeeding her baby, she may absent herself from work for an hour every day, or leave work half an hour earlier (article 37.4, 1989).
- To look after small children, including adopted children, men or women can take unpaid leave for a year and have the right to keep their job; they can then take leave for a further two years, after which time they lose their post; but they have the right to be readmitted when the employer has a vacancy (article 46.3, 1989).

The 1989 Act, mentioned above, is one of the measures included in the so-called "Plan for equality of opportunity for women", prepared by the *Instituto de la Mujer* (Institute for women) (Social Ministry) and passed by the Council of Ministers in 1987. Both the law and the Plan state in their introduction that "women are subject more than others to sexual harassment from fellow workers and from superiors". This is still the case today.

As we have seen, Spanish legal provisions dealing with sex discrimination meet international and European standards: international labour Conventions Nos. 100 and 111; EC Directives 75/117; 76/297; 79/7; 86/378; 92/85).

• (b) *How is sex discrimination defined?*

Spanish laws contain have no definition of sex discrimination, but doctrine and judicial decisions admit two kinds of sex discrimination: direct (or traditional) and indirect (recently admitted). Following North American ideas, we distinguish between intentional discrimination (disparate treatment) and indirect discrimination (disparate impact), which relates to the disparate impact which apparently neutral behaviour has on women workers. We will see some examples of this later on.

(c) *To whom do they apply and what areas of activity do they cover?*

They apply to all workers and employers, without exception, even when the employer is the public administration. Exactly the same provisions apply to public officials (civil servants). They also apply to all fields of activity, including the police and the armed services; in the latter, as we will see, the Constitutional Court had a hand.

(d) *What is the substantive scope of the law?*

The law covers the work relation as a whole. Nevertheless, (the possible) irregularities at the recruitment stage are more difficult to control and remedy; our labour courts usually deal with competitions for public appointments, especially for public officials, in which direct or indirect sex discrimination appears.

(e) *Do any special procedures apply in cases alleging sex discrimination?*

The labour procedure, at the lower court, follows a very simple scheme:

- the plaintiff brings an action and presents a brief in which he or she makes a request and describes the facts (he or she does not have to mention the laws that apply to the request);
- the contenders appear in court on the day appointed by the judge within the following ten days; they can make whatever pleas they consider necessary, and offer any proof they may have;
- the judge pronounces sentence within the next five days, and in some cases he or she may pronounce sentence *in voce* at the end of the appearance.

It is a simple scheme, but according to the *Ley de Procedimiento Laboral* (Labour Proceedings Act, 27 April 1990), we must bear in mind the difference between:

- the ordinary procedures which follow the pattern described above and can be used for all kinds of labour claims;
- special procedures, which are variations of the ordinary one, and usually include more steps according to the substance of the claim: dismissals, social security or holidays. One of these special procedures is the one that applies to protection of trade union freedom and other fundamental rights, and this includes the right to equal treatment in employment without discrimination.

In the ordinary procedure there are two rules regarding the burden of proof:

1. The labour judge can ask for expert reports for all kinds of claims; if the case is about sex discrimination, he can be informed by "appropriate public institutions", such as the *Instituto de la Mujer*, and this has happened more than once: usually the judge wants to be informed if facts, which he considers to have been already proven, imply sex discrimination (LPL, article 95).

2. When the plaintiff (usually the worker) states evidence of sex discrimination, the defendant (normally the employer) must prove that there is a sufficient and objective reason for his behaviour that has nothing to do with sex discrimination (LPL, article 96). This does not mean an alteration of the rule about the burden of proof. But if anyone asserts discrimination, he must give some evidence from which sex discrimination may be presumed; then it is the defendant's turn to prove the facts that destroy the presumption.

The special procedures include the one that protects union freedom, and also applies to the protection of other fundamental rights, such as discrimination (LPL, article 174-181). This procedure has an urgent character. It is very short: after the brief, the court appearance takes place within the following five days. The judge pronounces sentence within the next three days; the procedure is given preference over all the rest, which is very important, considering that our labour courts are usually overloaded with work. The rules that apply

to this procedure are exactly the same as those we have already seen concerning the burden of proof. The most progressive judges think that the interlocutory injunctions that apply to union cases also apply to procedures regarding sex discrimination.

The appearance before the labour court is public, according to the Constitution and the laws of the proceedings. As an exception, it could be considered necessary to have a private appearance to protect the "rights and liberties of the citizens", but it seldom occurs.

(f) *What remedies may and do your labour courts impose when sex discrimination is proven?*

The employer's decision that implies sex discrimination is void; the discriminatory action must stop immediately. They also foresee the compensation of all damages, including an indemnity fixed by the judge as he or she finds appropriate.

Discriminatory behaviour of the employer may appear:

- at recruitment for vacancies;
- in the course of the work relationship. In both cases the above-described remedies may be adopted.

If the worker has been dismissed for a discriminatory motive, he or she must be reinstated. If there has not been a dismissal, the worker can choose one of two remedies:

- he or she may resign and receive an indemnity equal to the one received in case of unjust dismissal (45 days per year of work, up to an amount of 45 months of salary); or
- he or she can demand an order for the employer to cease the discriminatory treatment, as well as the payment of an indemnity fixed by the judge. If discrimination comes from a fellow worker, including sexual harassment, the employer can dismiss him, and he has no right to severance pay.

(g) *Do your laws make sex discrimination a criminal offence?*

The *Codigo Penal* (Criminal Code) has been in force since 1973; it has suffered many alterations. It does not make sex discrimination a criminal offence. Some of its sections, nevertheless, have some connection with this issue:

- article 161 and 181bis: it is a criminal offence when a private person in charge of a public service or a public official refuses to provide a service for reasons of sex (or others such as religion, race, etc.);
- articles 434 and 436: it is a criminal offence when a person, taking advantage of his superiority, has sexual intercourse or commits any kind of sexual aggression; such a superiority can be due to the fact of being an employer or one of the directors of the company.

The *Codigo Penal*, Bill of the Democracy, 1991 version, declares as criminally liable those who perpetrate any kind of severe discrimination at work due to sex (or other reasons such as religion or race).

The Social Infringements and Sanctions Act 1988 includes as a "very severe infringement" measures adopted by employers that imply sex discrimination (or other kinds of discrimination); the punishment provided for is a fine between 500,001 and 15 million pesetas. The labour inspector initiates the proceedings.

II. *The influence of judicial decisions*

The laws that have been passed to protect women's rights and ban discrimination have been applied by Spanish courts many times. Yet discrimination still appears, and sometimes in subtle ways. The decisions of the Constitutional Court are very important in this field, especially when resolving *recursos de amparo* against decisions of the public administration or of ordinary judges. We shall see some examples.

A. *Constitutional Court. Its decisions have followed various lines of interpretation, as described below.*

1. One main line adopted at the beginning was that discrimination is the opposite of equality. For this reason, claims based on inequality used to be successful. Thus, widowers had the right to a pension on the same terms as widows; the same applies to male orphans (S.68/1991); men can retire in advance at the same age as women (35-40 years) in the airline Iberia (S.207/87); during the probationary period, the employer may dismiss the worker without any particular reason, but he cannot do so when his decision is taken because the woman worker is pregnant (S.166/1988); women can be admitted into the armed forces (S.216/199); they can also work in mines (S.229/92). (For this reason, Spain denounced in 1991 the European Social Charter, article 8.4.b).

2. Nearly all Constitutional Court decisions have dealt with direct discrimination cases. In sentence 145/1991, the Court adopted the doctrine of indirect discrimination: the case started with an apparently neutral factor: women were usually included in the "cleaner" category, superior to the category assigned to men ("unskilled workers"): the work was similar, but men's total wages were higher than women's.

3. As we have seen, the Constitutional Court used to define discrimination as the opposite of equality. In the 128/1987 decision, it begins a new line of reasoning, and admits that in some cases women should not be treated in the same way as men. This did not mean discrimination; on the contrary, it was the way to abolish their historical situation of inferiority — the decision was that men should be denied the money that women received to pay for day nurseries for small children. In the 19/1989 decision, the rules that apply to women's early retirement, granted by the social security (textile branch), do not apply to men, and in the 28/1992 decision, men are denied the allowance for transport which women on night shift receive, to avoid the danger of an assault.

B. *Ordinary courts. The following judicial provisions should be mentioned:*

- Supreme Court, S.13 October 1989, admits the dismissal of a worker, who was found guilty of sexual harassment, for the infringement of women's liberty and dignity at work.
- Superior Court of Castilla — La Mancha, S. 15 April 1991, states that the injuries inflicted on a woman worker, who was the victim of sexual harassment, which included a severe depression, are to be described as a work accident.

There are many cases, but we do not have reliable statistics. The rate is low, according to our reports of judicial decisions, but it seems to be growing. The most commonly filed claims relate to differences in pay and dismissal (in cases of dismissal, discrimination because of trade union association is alleged more often than on grounds of sex). With

regard to the question of the complexity of the cases, difficulties usually appear in connection with the burden of proof. Although it rests to a large extent on the employer, the employee must first of all provide some evidence of discrimination.

III. Supporting bodies

The most important public body is the *Instituto de la Mujer* previously mentioned, created in 1983. The basic scope of its activities is to: study the situation of women, collect information, make reports, and promote the adoption of measures against discrimination; verify the level of application of the law; and receive and direct women's complaints of discrimination. Labour judges have already used the reports prepared by this institute to inform themselves about the discriminatory significance of certain facts.

In the Autonomous Regions similar institutions can be found.

IV. The role of the European Court of Justice

International standards (especially those of the ILO) and EC laws have influenced the evolution of our laws; the opinions of the ECJ have also had an effect. Our labour courts rarely cite ECJ decisions, and then only for questions of interpretation, and if EC law applies. We must consider that it is difficult for labour judges to know the complete text of ECJ decisions. Court decisions of other nations are not cited at all, except on very rare occasions.

- (a) *Does the legal profession find it difficult to understand or integrate ECJ decisions into your country's jurisprudence?*

It is quite easy to understand an ECJ decision, much easier than understanding EC laws. Our judges are not opposed to integrating ECJ decisions when necessary. Our Constitutional Court has not objected to it, not even when fundamental rights were at issue (the opposite to what happened years ago with the German Constitutional Court, Solange case, num. I and II, and analogous). What our judges find really difficult is gaining knowledge of ECJ decisions, especially the most recent ones. We must emphasize in this matter the training activities promoted by the *Consejo General del Poder Judicial* through specialized publications and courses for judges.

- (b) *In what way, if any, do you think that ECJ decisions could be made more helpful in developing EC law?*

We consider, like most EC jurists, that ECJ decisions have been and still are decisive in developing EC law. Nevertheless, we must not forget that ECJ decisions have been recently criticized, and considered to be "abstract, dogmatic and unsatisfactory". Criticism has come from Germany (Kohl, "Euro-Forum", Bonn, 8 October 1992); and recent Ministry of Labour cases dealing with this topic can be found, such as C-49/50, *Paletta and others v. Brennet AG*, S. 3, June 1992. (This case concerned Italian workers who went to Italy on holiday and tried to extend their holiday with the excuse of an illness, certified by a local doctor.) In Spain this has not yet happened. (Information taken from *European Industrial Relations Review*, No. 227, Dec. 1992.)

*United Kingdom**

Sir John Wood, President, Employment Appeal Tribunal, London

1. Legal provisions dealing with sex discrimination

(a) The Sex Discrimination Act 1975 came into force on 29 December 1975, on the same day as the Equal Pay Act 1970. There have been two amending Acts, 1986 and 1989, which were introduced in order to bring United Kingdom law into line with EC directives. I shall refer to the 1975 Act as amended.

I have spoken of United Kingdom law, because although the Common Law of England and Wales has different roots from the law of Scotland, the provisions of employment law with which the Employment Appeal Tribunal (EAT) is concerned extend to cover the whole of the United Kingdom — less Northern Ireland.

The 1970 Act is confined to the employment field and to a particular kind of sex discrimination within that field, namely discrimination in the terms and conditions of employment. The 1975 Act, on the other hand, extends to other forms of discrimination in the employment field and to many forms of sex discrimination outside that field, especially to education and to the provisions of goods, services, facilities and premises.

Part II of the Act covers discrimination in the employment field and, apart from employers as individuals or companies, it deals with partnerships, trade unions, professional qualifying bodies that grant degrees, such as the General Medical Council, vocational training employment agencies, and the Manpower Services Commission. Special sections provide for the police, prison officers, ministers of religion, midwives and mine-workers.

Part III deals with discrimination in education and in the provision of goods, facilities, services and premises.

(b)-(e) Part IV deals with discriminatory practices, discriminatory advertisements, instructions to discriminate and pressure to discriminate. An important section then deals with the liability of employers as principals and for aiding and abetting unlawful acts. Generally speaking, charities, sport, insurance, communal accommodation and other specific institutions are omitted. It is a long and complicated Act covering almost every aspect of British life. Sex discrimination is not a criminal offence.

The discrimination to which the Act applies is defined in Part I in general terms, and can be said to be of four types:

* Ed. note: This contribution provides replies to the questions in "Guidelines for national papers (Part II)", p.111.

- direct discrimination;
- indirect discrimination;
- discrimination against a married person of either sex;
- victimization.

First, a person discriminates directly against a woman, in any circumstances which are relevant for the purposes of any provision of the Act, if on the ground of her sex he treats her less favourably than he treats or would treat a man. This is direct discrimination — less favourable treatment which she has suffered and would not have suffered but for being a woman.

Secondly, a person discriminates against a woman, in any circumstances relevant to the Act, if he applies to her a requirement or condition which he applies or would equally apply to a man but —

- which is such that the proportion of women who can comply with it is considerably smaller than the proportion of men who can comply with it;
- which he cannot show to be justifiable irrespective of the sex of the person to whom it is applied; and
- which is to her detriment because she cannot comply with it.

This is indirect discrimination.

Thirdly, similar provisions apply defining discrimination against married people.

Fourthly, victimization takes place where the discriminator treats a person less favourably than he treats or would treat other persons in those circumstances, and does so because the person being victimized has, for example, brought proceedings against the discriminator or any other person under the 1975 Act or the 1970 Act. Other things are included, such as giving evidence.

There are also provisions that comparisons must be made of like with like.

(f) In the field of employment, the remedy is by way of complaint to an Industrial Tribunal. The only qualification is that in the case of a statutory appeal against the decision of a qualifying body, such as the General Medical Council, then the complainant must follow a special statutory procedure instead of proceeding by way of complaint to an Industrial Tribunal. An Industrial Tribunal may make a declaration of right and/or an order for monetary compensation, or a recommendation to an employer of steps which should be taken to obviate or reduce the adverse effect upon the complainant. The measure of damages is the ordinary measure of damage in the Common Law Courts, but in addition the Tribunal is entitled to make an award for injury to feelings. In cases of indirect discrimination, a money award may not be made unless there was an intention to discriminate. The maximum limit of compensation in employment cases is £10,000.

If an action is brought in the Common Law Courts against a local authority or other authority, then there is no upper limit.

In the Trade Union and Employment Rights Act 1993, which has just received Royal Assent, provisions have been made for the conduct of hearings before Industrial Tribunals where sex discrimination or sexual harassment is alleged. Regulations can now be made which prevent the identification of any person affected by or making the allegation. An Industrial Tribunal also has the power to restrict the reporting of the case until after the final

written decision has been given. A breach of these regulations can amount to a criminal offence under the new provisions. Similar provisions can be brought into force relating to appeals at the EAT. It is hoped that these new provisions will make it less difficult for complainants to bring forward cases of sexual harassment.

The whole realm of discrimination in employment law and in the other facets of our society has now become extremely complicated, and practitioners in this field are regarded as specialists. The law is unfortunately full of technicalities and feelings run high on many occasions. The standard textbook now runs to some four volumes of a loose-leaf encyclopaedia, with many thousands of pages. I propose to take an example of how the law is working in detail.

Section 6(1) and (2) reads as follows:

- (1) It is unlawful for a person, in relation to employment by him at an establishment in Great Britain, to discriminate against a woman:
 - (a) in the arrangements he makes for the purpose of determining who should be offered that employment, or
 - (b) in the terms on which he offers her that employment, or
 - (c) by refusing or deliberately omitting to offer her that employment.
- (2) It is unlawful for a person, in the case of a woman employed by him at an establishment in Great Britain, to discriminate against her:
 - (a) in the way he affords her access to opportunity for promotion, transfer or training, or any other benefits, facilities or services, or by refusing or deliberately omitting to afford her access to them, or
 - (b) by dismissing her, or subjecting her to any detriment.

Section 7 provides a defence "where sex is a genuine occupational qualification". Section 7(2) is a long subsection and I propose only to deal in detail with subsection 7(2)(e) — see II, below. The opening words of section 7(2) are: "Being a man is a genuine occupational qualification for a job only where . . .".

Section 7(2)(a) deals with dramatic performances and the necessity of having a male character. 7(2)(b) concerns the situation where it is necessary to preserve decency or privacy, including where, when living in a private home, the job needs to be held by a man because objection might be taken to allowing a woman physical or social contact with a person, or allowing her the knowledge of intimate details. Section 7(2)(c) deals with the situation where the nature or location of an establishment makes it impracticable for the holder of the job to live elsewhere. Section 7(2)(d) deals with the nature of an establishment requiring a man, for instance, in a hospital or prison or other establishment where special care is needed for persons who are all men, and it is reasonable (having regard to the essential character of that establishment) that the job should not be held by a woman.

Section 7(2)(e) thus reads as follows: "being a man is a genuine occupational qualification for a job only where . . .

- (e) the holder of the job provides individuals with personal services promoting their welfare or education, or similar personal services and those services can most effectively be provided by a man . . .".

II. *The influence of judicial decisions*

The Sex Discrimination Act 1975 and the Race Relations Act 1976 are, under United Kingdom law, to be read as one so far as interpretation is concerned, and the above wording is also to be found in the Race Relations Act.

The phrase "personal services" was considered in connection with an advertisement case under the Race Relations Act, *Lambeth London Borough v. Commission for Racial Equality* 1990 RLR 231(CA). In that case, the Council advertised managerial vacancies in their housing department and sought to justify restricting application to Asians or Afro-Caribbeans on the basis of this wording. The Commission for Racial Equality (CRE) brought proceedings alleging discrimination. The Industrial Tribunal in its decision, which was upheld by the EAT, found that the Council had failed to establish a genuine occupational qualification defence. The phrase "personal services" was held to envisage circumstances where direct contact is likely, mainly face to face, and where language or a knowledge and understanding of cultural and religious background were of material importance. To read that wording as covering any services which ultimately affected an individual was too wide. The Court of Appeal upheld the decision of the EAT and "personal" was said to indicate that the identity of the giver and the recipient of the service was important. This was a narrow view of the wording and restricted the defence in that way.

In an earlier case, *Tottenham Green Under 5s Centre v. Marshall* (1989 ICR 214 EAT), it was held that a playgroup catering for a wide variety of ethnic groups was entitled to advertise specifically for an Afro-Caribbean worker to fill a vacancy created by another Afro-Caribbean who had left. The "personal services" provided included maintaining the cultural links of the children, dealing with the parents, reading and talking in dialect, and looking after skin and hair. On the first appeal hearing the EAT held that whether or not the conditions of the defence were made out in any particular case was an issue of fact, but that a fairly generous approach should be taken. On remission to the Industrial Tribunal, the Tribunal found against the Centre; the employers had failed to establish the defence of genuine occupational qualification. At the second hearing before the EAT that decision was reversed, and it was held that once again it had been established that a relevant duty to provide personal services did exist as part of the job in question. It was not for the Industrial Tribunal to disregard that aspect of the job because in its opinion the duty was relatively unimportant compared to other aspects of the job. There was here a requirement to be able to talk and read in West Indian patwah, and that was a relevant personal service which could not according to the facts be said to be a sham or a trivial matter. Once this much was established, said the EAT, it was not for the Industrial Tribunal to disregard the duty, and the genuine occupational defence therefore became relevant. The Industrial Tribunal was held to have erred in finding that the defence had not been made out.

These cases indicate one small corner of the law in which advertising is very carefully examined to ascertain whether discrimination is taking place.

Statistics show that sex discrimination cases brought before Industrial Tribunals have steadily increased (table 1).

Table 1. Outcome of sex discrimination cases, 1986-87 to 1990-91

	1986-87	1987-88	1988-89	1989-90	1990-91
Cases	612	691	935	1 046	1 078
Successful	48	46	78	86	78
Unsuccessful	129	142	152	176	188

The disparity in the totals can be explained by the fact that in some cases a complaint would be dismissed because there was no jurisdiction to hear the complaint (e.g. because of time-limits), and in others the complaint may have been withdrawn after settlement between the parties or as a result of a conciliated settlement.

Table 2 shows that the number of appeals do not seem necessarily to have varied in proportion to the number of cases heard before Industrial Tribunals.

Table 2. Sex discrimination appeals to the EAT (set down for hearing), 1986-87 to 1990-91

1986-87	1987-88	1988-89	1989-90	1990-91
33	17	34	19	25

The statistics of equal pay claims (1970 Act) show a somewhat different picture. The total number of cases brought before Industrial Tribunals in the relevant years are shown in table 3. As with the sex discrimination cases, a substantial number of these cases were settled with or without the help of conciliation.

Table 3. Equal pay claims cases, 1986-87 to 1990-91

	1986-87	1987-88	1988-89	1989-90	1990-91
Cases	517	1 043	813	397	508
Successful	44	7	14	33	10
Unsuccessful	55	14	47	24	19

We have no statistics subdividing the heads under which sex discrimination is alleged, but based on my own experience I take the view that the most common complaints are in connection with the granting of employment, dismissal from employment, and promotion, i.e. the selection process.

III. Supporting bodies: The Equal Opportunities Commission

The Equal Opportunities Commission (EOC) was established under the 1975 Act and its functions follow very closely those of the Race Relations Board under the former Race Relations Acts of 1965 and 1968. It is a corporate body with perpetual succession. It is not an emanation of the Crown, nor is it a servant or agent of the Crown. There are 15 Commissioners, some full time, some part time, and a Chairman and Deputy Chairman. The Commissioners normally serve for a maximum of five years. There is a staff of about 100 who are effectively civil servants, managed by a Chief Executive. The EOC must prepare an annual report to be placed before Parliament.

The EOC has three general duties:

- to work towards the elimination of discrimination;
- to promote equality of opportunity;
- to keep under review the working of the 1975 Act and the 1970 Act.

The EOC can propose amendments to legislation and may also publish codes of practice in order to give practical guidance on ways to eliminate discrimination in the field of employment or to promote equality of opportunity in employment. It has investigative functions in connection with these duties. It is also an enforcement agency and may issue non-discrimination notices. It can ask for an injunction to restrain persistent discrimination and in such connection can seek a declaration from a Tribunal that there has been unlawful discrimination. It may also assist individual claimants or prospective claimants. The EOC has a budget which in 1991 was £5 million.

The United Kingdom also has a Commission for Racial Equality with a budget some three times greater, and with a far more extensive spread of staff across the country. There is no indication — of which I am aware — that Brussels is likely to introduce directives dealing with racial discrimination in the same way as that of sex discrimination. I and many others in the United Kingdom feel that this is an unfortunate failure to follow the enlightened lead given by the United Kingdom, in accordance with our historic tolerance of ethnic minorities, in this important social sphere. Failure to do so could be said to be an act of discrimination by the European Commission, of which it can scarcely be proud.

For the year 1991, when the last report was made, the EOC dealt with 17,363 inquiries, an increase of 900 on the previous year. The biggest increase in inquiries was in the employment field. There was a sharp reduction in inquiries about education, training and advertising. This would tend to show that gradually the task of giving guidance and education in those particular fields is beginning to gain ground. Of the 3,552 inquiries made in connection with employment, 427 concerned sexual harassment and 1,130 concerned maternity.

The Commission has the power to support proposed litigants, and in 1991 received 448 requests for help. It granted legal assistance in 150 cases. Sixty-eight assisted cases reached the Industrial Tribunal or the EAT. Of these, 27 were settled, 23 were successful and 18 were dismissed.

IV. *The role of the European Court of Justice*

The views which are expressed on this topic are entirely my own.

Decisions of the ECJ have indeed affected our employment law enormously over the past three or four years. This is particularly true in the sphere of pensions, equal pay and the Transfer of Undertakings Protection Regulations. The European decisions are frequently cited at the EAT.

The functions of an appellate court of law can perhaps be broadly defined as being:

- to understand and explain the law; and
- in so doing, to seek to discern and to state principles upon which lower courts can base their decisions;
- in default of perversity — findings of fact for which there was no evidence — to apply facts so found by the lower court to the principles stated by the appellate court.

I remain, myself, dissatisfied with the way in which the law has been developed. It is not so much in the substance, although I find this difficult, but rather in the practice of the ECJ.

First, the judgement is the judgement of the Court. I understand that this is said to be more effective than if dissenting judgements were given, but it does nothing to advance the jurisprudence of Europe. It is only by seeing the arguments for and against a decision that one can see the evolution of the jurisprudential process. It has been suggested that individual judgements are not given because the ECJ is in essence a political court. However, the fact remains that for whatever reason the development of European law is not assisted by the way in which the decisions are pronounced.

Secondly, the Court does not lay down principles but deals with a particular set of facts, and on that set of facts decides whether the Directive or Treaty has been breached or not. Let me test that. Where in a European Court is there a definition of direct discrimination? Where in a decision is there a definition of the principle of indirect discrimination? In a case called *Enderby v. Frencham Health Authority*, 1991 ICR 382, I was set the task of seeking to analyse and to pronounce upon the principles of indirect discrimination in Europe. It was possible to go back to the American sources and look at American cases and it was possible to see where some development had taken place in United Kingdom law, but it was impossible to take the European cases and to discern a clear thread of *principle* running through them which gave the answer to the question put.

Too often the questions which are sent to the ECJ are phrased thus: "On this set of facts, is there a breach of a Directive or the Treaty?"

My own view is that a greater service would be done to Member States, first, if dissenting judgements were given so that the reasoning on either side of the issues could be ascertained, and, second, if statements of the principles of the rules which are to be laid down for the interpretation of the Directives or the Treaty could be clearly defined. Indeed, it would be useful to have a definition in connection with discrimination, both direct and indirect. It is almost impossible in most cases to forecast with any degree of certainty the result of any litigation were it to arrive in Luxembourg. I find this a grave disappointment.

The delays are inevitably considerable, for which no one can be blamed, but there is also the enormous cost both to employers and to trade unions, or such bodies as the EOC, which should be considered. It is often the absence of stated principle which causes an approach to the ECJ. Give us the principles, and we will find the facts and apply them to those principles.

Appendix

Guidelines for national papers

- I. What are the legal provisions dealing with sex discrimination in your country?
 - (a) When and under what circumstances were they introduced?
 - (b) How is sex discrimination defined?
 - (c) To whom do they apply (which workers and employers) and what areas of activity do they cover (education, professional appointments, armed services, police . . .)?
 - (d) What is the substantive scope of the law? Describe the protection against sex discrimination granted by laws and court decisions in relation to advertising for employment, recruitment, hiring, terms and conditions of employment (including pay), dismissal, sexual harassment, etc.?
 - (e) Do any special procedures apply in cases alleging sex discrimination, such as a closed court hearing, the use of experts or special rules regarding the burden of proof?
 - (f) What remedies may and do your courts impose when sex discrimination is proven?
 - (g) Do your laws make sex discrimination a criminal offence?
- II. Has the law developed through judicial decisions, and if so, in what way? Please discuss examples.
 - (a) What is the approximate volume of cases alleging sex discrimination? Has it increased or decreased? What are the most commonly filed claims (e.g. discrimination in hiring)? How complex do the cases tend to be?
- III. Is there a public or private body which is responsible for addressing discrimination? Supporting applicants? Lobbying for changes in the law? Seeking to establish and disseminate sound practices?
- IV. Have decisions of the European Court of Justice (ECJ) in Luxembourg had a material effect upon the law of sex discrimination in your country? If so, in what way? Have your courts cited court decisions of other nations on this topic?
 - (a) Does the legal profession find it difficult to understand or integrate ECJ decisions into your country's jurisprudence?
 - (b) In what way, if any, do you think that ECJ decisions could be made more helpful in developing EC law?

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