We are addressing today what has been recognised by the Court as one of the fundamental principles of the European Community. In implementing that fundamental principle, the institutions of the Community of which the Lord President spoke include the national courts and tribunals of the member states. These are an essential part of the machinery of justice, encompassing not only those who sit on the bench but those who appear for, and advise, litigants and others. Advocates, solicitors and other representatives are therefore themselves an important part of the machinery of Community justice, as indeed are those who teach those who plead.

My task is to tell you what is the essence of the Court's case law. We begin with a provision in the Treaty of Rome, Article 119, which was put there in order to avoid what is known nowadays as social dumping. The government of France, in the mid-1930s, had introduced the principle of equal pay for equal work, and the French delegation in particular were concerned not to be placed in a position where other member states - or their industries and businesses - could profit from a situation in which women workers were paid less than men and French industries and businesses were disadvantaged. That was the origin of Article 119 but, as the Court has said, its intention goes considerably further.

What does it say? Here, a fundamental health warning has to be given. Remember that this Treaty was not drafted in English; it was translated initially in the 1960s and finally in the early 1970s perhaps without a full awareness of what some of the words meant. I give you the text inserting new words where appropriate:

'Each member state shall, during the first stage (by the end of 1962), ensure and shall subsequently maintain application of the principle that men and women should receive equal consideration for equal work.'

The word used in the English text is 'pay', but the appropriate word is more probably 'consideration'. The text itself then goes on to say:

'Consideration means the ordinary or basic minimum wage or salary and any other advantage or recompense, whether in cash or in kind, which the worker receives directly or indirectly in respect of his employment from his employer.'

The essence of the provision is that where there is equal work, then that which the employee receives - directly or indirectly - for that work shall be equal. Added to that have been a series of Directives which are legislation enacted by the Council of Ministers in all material cases unanimously (therefore including the United Kingdom). There are essentially five important Directives - 75/117 (The Equal Pay Directive); 76/207 (The Equal Treatment Directive); 79/7 (Equal Treatment in Social Security); 86/378 (Equal Treatment in Occupational Social Security Schemes); and 86/613 (Equal Treatment of the Self-employed).
Let me draw attention to certain features of that legislation. The Equal Pay Directive, the first one, introduces something more than the idea of equal pay for equal work. In English, it says that the principle of equal pay means, for the same work, or for work to which equal value is attributed, the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration. The Directive contains three other notable features. Firstly, it says that member states shall introduce such measures as are necessary to enable employees who consider themselves wronged by failure to apply the principle of equal pay to pursue their claims by judicial process. That is a specific requirement. Secondly, it says that member states shall take the necessary measures to protect employees against dismissal by employers if they assert this right. And thirdly, they are required to see that effective means are available to ensure that the principle is observed. Putting together the requirement of access to judicial process and the principle that there shall be effective means of ensuring that the principle is observed, one explains some of the Court’s case law which is widely misunderstood in this country.

'The Equal Treatment Directive goes on to require equal treatment particularly as regards access to employment, selection criteria and other aspects of employment. It provides specifically that there shall be no discrimination whatever on grounds of sex, either directly or indirectly and in particular by reference to marital or family status - and without prejudice to provisions concerning the protection of women as regards pregnancy and maternity. Finally, the Directive is without prejudice to measures to promote equal opportunity.

'These are the texts which it is important to understand. Without going in detail into the contents of other Directives, it is a great deal easier, if you know what these texts say, to understand what the Court made of them. What did the Court make of them? First of all, what is equal pay for equal work? You may think it surprising, but the Irish argued at one time that where women were doing a job which was of greater value than men, they were not doing equal work, so they did not have to be paid the same as men. The Court did not go along with that argument (Murphy v A Burrell & Son, 1978). More particularly, however, the Court held that the requirement that member states should introduce the principle of equal pay for equal work by 1962, and thereafter maintain it, meant that the Treaty intended to confer directly on people who felt themselves discriminated against the ability to take advantage of the Treaty in their national courts - the principle of Direct Effect. (Defrenne II)

'The Court has had occasion at various stages to interpret what is included in the notion of 'pay' or 'consideration'. Pure social security schemes aside, it is any consideration passing from the employer to the employee in respect of the employment and includes any advantage or recompense which comes directly or indirectly in cash or in kind. So, the advantage given to male railway workers of having cheap rail travel is unquestionably an advantage which also had to be given to women (Garland v British Rail Engineering, 1982). More controversially, it has been thought surprising that pensions should be included in the notion of 'pay' but, if we look at the definition of what 'pay' or 'consideration' means in the Treaty, it becomes clear that if an employer provides a pension to his employee then it is part of the consideration for that employment.

A difficulty arose quite recently concerning the actuarial valuation of pension rights. It arose
because a man claimed that he was discriminated against because the value of his pension rights was less than that of a woman - the reason being that, in the funding of pension schemes, since women tend to live longer than men, the actuarial value of a weekly, monthly or annual pension payment is greater for a women than for a man. The argument was that there was discrimination between men and women because men were able to take out of the pension scheme less than women. On the other hand, there was no doubt that if the mobility of pensions is taken into account, where a woman is transferring from one employment to another or wants to take out the value of her pension entitlements for the purpose of buying at more favourable rates, then under the present arrangements she will normally get more for her pension rights than a man because actuarially her expectation of life is longer. If women were given the same capital sum as men, they would actually be able to buy less pension. Or, if they were transferred from one employment to another, their pension right would be less because the second employer’s pension scheme would give less value to a woman’s capital transfer than to a man’s.

'The Court was therefore faced (Neath v Hugh Steeper Ltd. 1994) with the situation of deciding whether, on the one hand, equal pay and equal treatment required absolutely equal treatment actuarially or, on the other, whether equality required that you simply look at what the employer is saying he will give in terms of actual pension and treat the actuarial valuation of that right as an incident of the right rather than part of the right itself. The Court decided for the latter solution; that the actuarial capital value of a future periodical right was, so to speak, a derivative of the principal right rather than part of the right itself. The Court decided for the latter solution; that the actuarial capital value of a future periodical right was, so to speak, a derivative of the principal right rather than part of it - the principal right of the employee being to derive from the employer, at a certain stage, a weekly, monthly or annual payment by way of pension. This decision has been widely criticised. But I think the critics not fully appreciate that it was a case brought by a man which was claiming a right which, if accorded, would have devalued the pecuniary value of womens’ pension rights.

'This illustrates a problem with which the Court is increasingly faced - the difference between what is called formal equality and substantive equality. The argument is that it not enough to ensure formal equality alone; substantive equality must be ensured. In Neath, the argument was that it must be ensured that every incident of the right is equal. That is classically illustrated now by a case which is pending and on which the Advocate General has just delivered his opinion on an equal opportunities question. Broadly, the job of Head of the Parks Department at the City State of Bremen fell vacant; the (male) Deputy had been in that job for some 20 years and had a reasonable expectation of succeeding to it. However, there was a female applicant and the City State of Bremen has a law which says that, all other things being equal, where there are fewer women than men in any grade of employment, the job must go to the woman. As a pending case, I cannot comment further, but it is an interesting example of a case where the Advocate General has referred to a tract of United States constitutional law as being against the idea that you should have automatic preference for woman; equal opportunities cannot be automatic.

'Another feature of the Court’s case law which has been misunderstood is that which led to the award of substantial sums of compensation to those who had been dismissed from the Armed Forces because they became pregnant. How did that happen? Firstly, there was never really any question that employment in the Armed Forces fell within the principles of the Treaty. Indeed, I do not think that, except rather tentatively, the UK ever contested that
proposition. So there was never any dispute that female members of the Armed Forces were entitled to be treated equally. The question was - were the Armed Forces entitled to have a rule which allowed them to dismiss women if, in that wonderful phrase, they fell pregnant. The Court observed that the Directive stated, on the one hand, that there shall be no discrimination on grounds of marital or family situation; but that women may be protect in cases of pregnancy. The United Kingdom argument was that pregnancy was to be treated in the case of a woman like illness in the case of a man; that if, in a particular situation, you would dismiss a man because illness rendered him incapable of performing his duties, the same thing could apply to a woman when she became pregnant. Further, it was argued that the Armed Forces were entitled to have such a rule. The Court held that the Directive did not admit of the right to dismiss a woman simply on the grounds of pregnancy and has repeated that in a series of cases, most recently that of Webb v Emo Air Cargo (1994).

'That principle is one element. Then there was the principle established by the case of Marshall v Southampton & South-West Hampshire Area Health Authority (1993). Miss Marshall, a doughty fighter for the rights of women, was a dietician employed by the Southampton Health Authority who objected to being made to retire at an earlier age than her male colleagues. Over a period of some 13/14 years, she took her case through the Industrial Tribunals and the English judicial system to the Court of Justice. By the time she won her case, her claim was worth about double the maximum amount which Industrial Tribunals are entitled to award. The question was whether she was then entitled to claim that there should be no capping on her compensation. Here we come to another item which I mentioned earlier from the Directive: there must be effective judicial protection and there must be an effective means to ensure that the principle of equal pay is observed. The Court said that to have a situation in which the total compensation which a woman - or man - might get could be capped was contrary to the principles of the Directive. It was on that basis that the Industrial Tribunals in England began to award enormous sums to the ladies who were dismissed from the Armed Forces, but it is to be noted that the Employment Appeal Tribunal said that they were under no obligation whatever to make these awards; all that had been said was that the UK was not entitled to cap absolutely the amount of compensation.

'In conclusion, let me repeat what the basic principles are. Firstly, they is the principle of equality - of all consideration passing from the employer to the employee in respect of the employment, but not necessarily equality in every incident which flows from the principal obligations of the employer. Secondly, there is the principle of equal treatment - that you cannot treat men and women differently as regards access to employment, terms of employment, conditions of employment or circumstances of dismissal. In that respect, pregnancy is not a proper ground of dismissal. And thirdly, the person who feels that he or she has been discriminated against must have an effective remedy before a judicial tribunal - that includes the Industrial Tribunals in this country - which not only ensures effective compensation for discrimination but also ensures that employers are not tempted to practice discrimination, ie. it must be both compensation and a deterrent. Those are in very broad terms the keynote ideas of the case law of the Court of Justice; as I have tried to show, they come from the texts of the Treaty and from the legislation enacted by the Council of Ministers in which the United Kingdom government participated as well as others.
Discussion

The unavailability of Legal Aid before Industrial Tribunals was arguably indicative of a lack of commitment by the UK to the access to justice principles of European equal opportunities legislation: the question was asked whether member states should offer legal assistance before the equivalent of Industrial Tribunals; and a right to expenses, if successful. Judge Edward could not comment in detail but felt this would be difficult to establish as a general principle of Community law. He stated that in many other member states there was no effective legal aid, where individuals were often represented in the labour courts by trade unions, and where the equivalent of a CAB representative was quite common. Further, the 'loser pays' concept does not apply in many member states.

It was commented that it seemed implicit in what Judge Edward had said that in certain circumstances the Industrial Tribunals should award punitive damages. However, Judge Edward repeated that all the Court has said is that the remedy must be effective both as compensation and as a deterrent; a capped upper limit did not comply with that requirement. The Court had not gone further to say that there must be a power to award punitive damages, a concept which again was not widely shared in other member states.

Advocating Sex Equality before the European Court of Justice:
Some Personal Reflections
Lord Lester of Herne Hill

"The title of my address suggests a dangerously tantalizing invitation to be self-indulgent, indiscrete and even honest. First, perhaps I might make one or two observations about advocating sex equality in English courts - essential, as Judge Edward reminded us, to the proper operation of the machinery of European justice.

'I had the good fortune to argue many of the test cases in the late 1970s and early 1980s, assisted by the EOC, especially in Lord Denning’s Court of Appeal. The task was daunting, because it fell to me to persuade an older generation to discard lifelong feelings of chivalry and paternalism, sometimes including downright prejudice, for new modern principles of sex equality without direct or indirect discrimination. It was essential as an advocate to be able to understand those traditional attitudes, and not to dismiss them - and to use humour and imagination in an attempt to soften and alter those attitudes. In two equal pay cases, Shield & A. Coomes (Holdings) Ltd and Minister of Defence v Jeremiah (1978 and 1979), my task was to persuade Lord Denning and his colleagues that women and men should be treated equally in the brave new world; that women should be allowed to do dangerous work such as acting as security guards in betting shops. I was gratified that my attempt to convince the Master of the Rolls that one should not act on over-broad stereotypes based on gender succeeded. As he explained in one judgement, clearly with me in mind, 'he may have been a small nervous man who could not say boo to a goose; she may have been fierce and formidable as a battle-axe'. My wife was not amused and, after his retirement, Lord Denning disagreed with his own judgements on sex equality, disowning them in his memoirs. Luckily, judicial memoirs do not have the force of legal precedent. For two years between 1974 and 1976,