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”Public Policy” Discrimination in the EEC: A Proposal for Assuring the Free Movement of Workers

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Abstract

This Note will examine three factors that undermine the guarantees of freedom of movement and freedom of establishment. First, the term public policy cannot be precisely defined. Second, European Economic Community (Community) law fails to substantially limit the scope of the public policy exception. Third, the Community legal system is inadequate to prevent or reverse discriminatory acts of national authorities against Community workers. This Note will suggest viable remedies for these problems. The proposals, if collectively implemented, would eliminate discrimination of Community workers on the basis of nationality.

“PUBLIC POLICY” DISCRIMINATION IN THE EEC:
A PROPOSAL FOR ASSURING THE FREE
MOVEMENT OF WORKERS

INTRODUCTION

The Treaty establishing the European Economic Community¹ (EEC Treaty or Treaty) guarantees the free movement of persons within the European Economic Community (EEC or Community).² This guarantee extends only to persons engaged in or pursuing economic activities: the EEC Treaty provides for the free movement of workers³ and the freedom of

1. Mar. 25, 1957, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II) (official English translation), 298 U.N.T.S. 3 (unofficial English translation) [hereinafter cited as EEC Treaty]. On March 25, 1957, the EEC Treaty and the Treaty establishing the European Atomic Energy Community, March 25, 1957, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II) (official English translation), 298 U.N.T.S. 169 (unofficial English translation) were signed. They are otherwise known as the Treaties of Rome. Both communities were modeled after the European Coal and Steel Community, Apr. 18, 1951, 1973 Gr. Brit. T.S. No. 2 (Cmd. 5189) (official English translation), 261 U.N.T.S. 140 (unofficial English translation). The European Economic Community (EEC) extended the European Coal and Steel Community's (ECSC) concept of a "common market," providing for the free movement not only of coal and steel but of all goods, persons, and capital. See generally I H. SMIT & P. HERZOG, *THE LAW OF THE EUROPEAN ECONOMIC COMMUNITY P-1-27* (1984). To date, ten European nations belong to the EEC. The original six nations were Belgium, Germany, France, Italy, Luxembourg, and the Netherlands. EEC Treaty, *supra*, preamble. The United Kingdom, Denmark and Ireland acceded in 1973. Treaty of Accession, Jan. 22, 1972, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-I); see SWEET & MAXWELL, *EUROPEAN COMMUNITY TREATIES* 270 (unofficial translation) [hereinafter cited as SWEET & MAXWELL]. Greece joined the EEC in 1979. Treaty of Accession of the Hellenic Republic, May 28, 1979, 22 O.J. EUR. COMM. (No. L 291) 9 (1979), 18 I.L.M. 897 (1979); see SWEET & MAXWELL, *supra*, at 335. Spain and Portugal are scheduled to become members on January 1, 1986. See *Lisbon and Madrid Agree on Entering Common Market*, N.Y. Times, Mar. 29, 1985, at 1, col. 1.

2. EEC Treaty, *supra* note 1, arts. 1, 3(c).

3. *Id.* arts. 48-51. The principle guarantee of free movement of workers is in article 48. This article provides:

1. Freedom of movement for workers shall be secured within the Community by the end of the transitional period at the latest.
2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.
3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:
 - (a) to accept offers of employment actually made;
 - (b) to move freely within the territory of Member States for this purpose;
 - (c) to stay in a Member State for the purpose of employment in accordance

establishment.⁴ Freedom of establishment encompasses the rights to take up and pursue activities as self-employed persons and to set up and manage undertakings.⁵

These guarantees are not absolute. Articles 48(3) and 56(1) permit member states to impose different treatment on nonnationals than nationals would receive under similar circumstances.⁶ Such "special treatment" must be justified on grounds of "public policy," public security, or public health.⁷

Public policy is the most vaguely defined of these three exceptions. Interpretation has been left largely to the national

with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;

(d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in implementing regulations to be drawn up by the Commission.

4. The provisions of this Article shall not apply to employment in the public service.

Id. art. 48.

4. *Id.* arts. 52-58. Article 52 contains the basic guarantee of freedom of establishment. This article provides:

Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be abolished by progressive stages in the course of the transitional period. Such progressive abolition shall also apply to restrictions on the setting up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State. Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 58, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.

Id. art. 52. According to the construction of article 52, "[t]he right of establishment dealt with in Article 52 . . . embraces all sectors of economic life; industry, commerce, finance, agriculture, public works, crafts, and the professions." 2 H. SMIT & P. HERZOG, *supra* note 1, at 2-538.

5. EEC Treaty, *supra* note 1, art. 52. In the context of this Note, "workers" will designate individuals qualifying under articles 48 and 52. "Freedom of movement of workers" will encompass the principal of "freedom of establishment" as well.

6. *Id.* arts. 48(3), 56(1). Article 56(1) provides:

The provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health.

Id. art. 56(1). For text of article 48(3), see *supra* note 3. See *infra* notes 37-42 for a discussion of exceptions to the requirement of national treatment.

7. EEC Treaty, *supra* note 1, art. 56(1); see *id.* art. 48(3).

authorities of each member state.⁸ This makes it possible for immigration officials of each state to hinder the free movement of Community nationals based upon their subjective reading of public policy.⁹

The discretion of national authorities to utilize the public policy exception must therefore be reduced. The necessity for such action has been enhanced by the recent acceptance of Spain and Portugal into the EEC.¹⁰ One issue that contributed to the delay of their acceptance concerned the free movement of workers.¹¹ The current member states feared that extending the principle of freedom of movement to Spanish and Portuguese workers would cause a great migration of foreign labor into their territories¹² because both Spain and Portugal are plagued by high unemployment.¹³ This possibility con-

8. See *van Duyn v. Home Office*, 1974 E. Comm. Ct. J. Rep. 1337, 1350, [1975 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8283, at 7227. "[T]he particular circumstances justifying recourse to the concept of public policy may vary from one country to another and from one period to another, and it is therefore necessary in this matter to allow the competent national authorities an area of discretion within the limits imposed by the Treaty." *Id.*

9. See, e.g., *Leper v. Immigration Officer, Folkestone*, No. TH/1548/76, (U.K. Imm. App. Trib. Mar. 30, 1977). The United Kingdom Immigration Appeal Tribunal ruled that the probability that an EEC national would become a charge on public funds justified refusing her entry on public policy grounds. *Id.* This ruling is suspect given the exceptional nature of the "public policy" exception. See Goodwin-Gill, *Ordre Public Considered and Developed*, 94 LAW Q. REV. 354, 357 (1978); *infra* text accompanying notes 125-26; *infra* notes 145-68 and accompanying text. *But see* Giangregorio v. Secretary of State, 38 COMMON MKT. L.R. 472 (U.K. Imm. App. Trib. 1983) (stating that such a possibility did not rise to the level of a public policy consideration on which expulsion could be justified). These cases illustrate not only the potential for abuse, but the potential for inconsistent application of Community law. EEC Treaty, *supra* note 1, art. 177; see *infra* note 177 and accompanying text.

10. See *Lisbon and Madrid Agree on Entering Common Market*, N.Y. Times, Mar. 29, 1985, at 1, col. 1.

11. *Id.* at 8, col. 1.

12. Europe, Agence Internationale d'Information Pour la Presse, No. 3458, at 6 (Oct. 4-5, 1982); see Opinion on Spain's Application for Membership, Commission of the European Communities, Bulletin of the European Communities, Supplement 9/78, at 32 (1978).

13. See *Données Conjuncturelles et Structurelles: Comparaison avec l'Espagne et le Portugal* (Special Document), Commission of the European Communities, March 1985 [hereinafter cited as *Données Conjuncturelles*]. In 1984, Spain had 2,475,000 unemployed, *id.* at 12, out of a population of 38,400,000. *Id.* at 18. This represented a change of 10.1% from the previous year. *Id.* at 12. Portugal had 245,000 unemployed, *id.*, out of a population of 10,100,000, *id.* at 18, representing a change of 19.3% from the previous year. *Id.* at 12. Spain and Portugal have particular employment problems with regard to women and young people seeking jobs for

cerned the current member states because the Community as a whole faces serious employment problems.¹⁴ Spanish and Portuguese labor competing for scarce jobs could exacerbate unemployment in the current member states. It is likely, in light of the Community's hesitance to admit Spain and Portugal, that member states will desire that job vacancies within their respective territories are filled by their own unemployed workers rather than those of Spain and Portugal. It is therefore imperative to substantially define the parameters of the public policy exception so that national authorities cannot abuse it in order to favor their own nationals.

This Note will examine three factors that undermine the guarantees of freedom of movement and freedom of establishment. First, the term public policy cannot be precisely defined.¹⁵ Second, Community law fails to substantially limit the scope of the public policy exception.¹⁶ Third, the Community legal system is inadequate to prevent or reverse discriminatory acts of national authorities against Community workers.¹⁷ This Note will suggest viable remedies for these problems.¹⁸ The proposals, if collectively implemented, would eliminate discrimination of Community workers on the basis of nationality.

I. *FREE MOVEMENT OF WORKERS*

The primary objective of the EEC is economic unity among the member states.¹⁹ Underlying objectives include the

the first time. See Opinion on Spain's Application for Membership, *supra* note 12, at 17; Commission of the European Communities, Europe Information: External Relations, annex at 1 (Apr. 1982).

14. *Economic and Financial Indicators, Focus: Jobs in Europe*, Economist, Nov. 10-16, 1984, at 107; *Données Conjuncturelles*, *supra* note 13, at 12. In 1984, the total number of unemployed in the Community rose to a record 12,665,800. *Id.*

15. See *infra* notes 50-87 and accompanying text.

16. See *infra* notes 89-142 and accompanying text.

17. See *infra* notes 169-206 and accompanying text.

18. See *infra* notes 145-68, 207-09 and accompanying text.

19. See EEC Treaty, *supra* note 1, art. 2. Article 2 states:

The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it.

Id.; see L. KRAUSE, *EUROPEAN ECONOMIC INTEGRATION AND THE UNITED STATES* 4 (1968). By the 1950's, the advantages of economic integration were increasingly ap-

elimination of barriers that divide Europe and the improvement of the living and working conditions for the European people.²⁰ Free movement of workers within the Community is essential to realizing these goals.²¹ The supply and demand of labor is balanced by assuring the mobility of Community workers.²² Thus, the Treaty effectively creates a supranational labor market.²³ Additionally, the free movement of workers promotes integrated economic growth of the individual member states and enhances employment opportunities and standards of living for European nationals.²⁴

The principle of the free movement of workers is based on article 7 of the EEC Treaty, which prohibits discrimination on the basis of nationality.²⁵ Thus, a worker of a member state residing in another member state must receive the same treatment as would a national in like circumstances.²⁶ In other

parent. *Id.* Technological developments necessitated enlarging the market so that industries could operate efficiently. European firms operating in small, fragmented markets were no longer competitive with large American firms. Economic integration was therefore sought as a means of expanding markets and protecting European industries from United States products. *Id.*

20. EEC Treaty, *supra* note 1, preamble.

21. 1 H. SMIT & P. HERZOG, *supra* note 1, at 2-454; *see* Regulation No. 1612/68, 11 J.O. COMM. EUR. (No. L 257) 2 (1968), 1 COMMON MKT. REP. (CCH) ¶ 1031 (providing for the freedom of movement within the Community).

Whereas freedom of movement constitutes a fundamental right of workers and their families; whereas mobility of labour within the Community must be one of the means by which the worker is guaranteed the possibility of improving his living and working conditions and promoting his social advancement, while helping to satisfy the requirements of the economies of the Member States

Id. preamble.

22. *See* 1 H. SMIT & P. HERZOG, *supra* note 1, at 2-454; *see also* B. SUNDBERG-WEITMAN, DISCRIMINATION ON GROUNDS OF NATIONALITY: FREE MOVEMENT OF WORKERS AND FREEDOM OF ESTABLISHMENT UNDER THE EEC TREATY 128 (1977) ("from an economic point of view it seems irrational that production in one place should be hampered by a shortage of labour, when at the same time people in another region are unemployed through a lack of jobs").

23. *See* 1 H. SMIT & P. HERZOG, *supra* note 1, at 2-454.

24. *Id.*

25. EEC Treaty, *supra* note 1, art. 7. Article 7 states in pertinent part: "Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited." *Id.*

26. *Rutili v. Minister for the Interior*, 1975 E. Comm. Ct. J. Rep. 1219, 1235, [1975 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8322, at 7779; 1 COMMON MKT. REP. (CCH) ¶ 1022.13, at 1026-27; 1 H. SMIT & P. HERZOG, *supra* note 1, at 2-478.

words, he must receive national treatment.²⁷

The free movement of workers is a critical feature of the EEC that must be upheld where appropriate. It is applicable, however, only in cases involving Community law.²⁸ Therefore, member states are not precluded from restricting the movement of their own nationals in purely domestic matters.²⁹ Consequently, where the movement of national workers is restricted, the movement of nonnational workers may also be restricted in comparable situations because only national treatment is required.³⁰

27. I H. SMIT & P. HERZOG, *supra* note 1, at 2-478.

28. *See infra* note 29.

29. In *Regina v. Saunders*, 1979 E. Comm. Ct. J. Rep. 1129, 1130, [1978-1979 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8558, at 8093, a citizen of the United Kingdom pleaded guilty to a criminal charge in England. She agreed, in fact desired, to return to her native country, Northern Ireland. *Id.* She further agreed not to enter the territories of England and Wales for three years. *Id.* Saunders violated this agreement. Before the English court brought another proceeding against her, it asked the Court of Justice whether the agreement derogated her right to free movement as conferred by article 48 of the EEC Treaty. *Id.* The European Court of Justice stated that article 48 was inapplicable here. *Id.* at 1135, [1978-1979 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8558, at 8096.

The application by an authority or court of a Member State to a worker who is a national of that same State of measures which deprive or restrict the worker's freedom of movement within the territory of that State [Northern Ireland being a part of the United Kingdom] as a penal measure . . . is a wholly domestic situation which falls outside the scope of the rules contained in the Treaty on freedom of movement for workers.

Id.

The authority of a state to restrict the mobility of its own workers is not limited to criminal matters. For example, West German authorities had refused to admit one of its own nationals to a teacher training course. *Moser v. Baden-Württemberg*, 3 COMMON MKT. REP. (CCH) ¶ 14068 (June 28, 1984). The state reasoned that because the particular candidate was a member of the Communist Party, it could not be assured of the candidate's loyalty to West Germany. *Id.* The candidate argued that without this training, he would not be eligible for teaching positions in private schools in Germany or other member states. *Id.* The European Court of Justice concluded that the candidate's claim that he might be hindered was hypothetical and that it did not constitute a sufficient link with Community law. *Id.*

30. *See* I H. SMIT & P. HERZOG, *supra* note 1, at 1-60. "In many instances, . . . nationals from other Community countries must be accorded the same treatment in each Member State as that State accords its own nationals, but no more." *Id.*; *see* *Wilhelm v. Bundeskartellamt*, 1969 E. Comm. Ct. J. Rep. 1, 15-16, [1967-1970 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8056, at 7867. However, this equality of treatment presupposes that nationals and nonnationals are in a comparable situation. *See id.* *But see* *Italian Republic v. Commission of the European Communities*, 1963 E. Comm. Ct. J. Rep. 165, 177-78, [1961-1966 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8014, at 7294 (differential treatment is not necessarily discriminatory where the situations are distinguishable).

II. THE PUBLIC POLICY EXCEPTION

Under the EEC Treaty, member states must follow an open-door policy with respect to workers of other member states.³¹ This interferes with the exclusive sovereignty of each state to regulate its internal affairs.³² Prior to the drafting of the EEC Treaty, most European states implemented measures to control the influx of foreign workers.³³ National authorities adopted policies whereby they could favor their own workers over foreign workers and similarly favor foreign workers of a particular national origin over others.³⁴

Member states may no longer follow such selective practices with respect to nationals of other member states.³⁵ However, the drafters of the EEC Treaty apparently intended to reserve to the individual member states limited power to control its borders.³⁶ Articles 48(3) and 56(1) provide public pol-

31. See EEC Treaty, *supra* note 1, arts. 48(3), 52; *supra* notes 3-4.

32. See 1 COMMON MKT. REP. (CCH) ¶ 1002, at 1013; G. VAN DEN BERGHE, POLITICAL RIGHTS FOR EUROPEAN CITIZENS 24 (1982).

33. I H. SMIT & P. HERZOG, *supra* note 1, at 2-453. During the depression of the 1930's, most European nations adopted measures to protect their national labor markets against the influx of foreign workers. Such measures were maintained until after the Second World War. *Id.* As economic conditions gradually improved, nations continued to protect their own workers but adopted less restrictive policies towards foreign labor. The emphasis of national immigration policies changed from prohibiting to regulating the flow of foreign workers. *Id.* Prior to the creation of the EEC, national authorities discriminated against workers on the basis of their nationality in two ways. First national authorities would ensure priority of national over foreign labor. *Id.* This was achieved by estimating the need for foreign workers based on the level of employment in a given region. *Id.* Employers would then be authorized to hire the stated number of foreign workers. *Id.* Second, national authorities would select workers on the basis of national origin. *Id.* Authorities would direct employers to hire only a certain number of foreign workers from a particular country. *Id.*

34. See *id.*

35. See Regulation No. 1612/68, *supra* note 21, arts. 1(2), 3(1), 4(1). This regulation was created for the purpose of eliminating nationalistic selective practices. Article 1(2) states that any national of a member state "shall . . . have the right to take up available employment in the territory of another Member State with the same priority as nationals of that State." *Id.* art. 1(2). Article 3(1) provides that legal or administrative action and practices of a member state are not applicable under the regulation "where they limit application for and offers of employment, or the right of foreign nationals to take up and pursue employment or subject these to conditions not applicable in respect of their own nationals." *Id.* art. 3(1). Article 4(1) states that "[p]rovisions laid down by law, regulation or administrative action of the Member State which restrict by number of percentage the employment of foreign nationals in any undertaking, branch or activity or region, or at a national level, shall not apply to nationals of the other Member States." *Id.* art. 4(1).

36. See EEC Treaty, *supra* note 1, arts. 48(3), 56(1); *supra* notes 3, 6.

icy, public security, and public health exceptions as the means by which member states may differentiate between their nationals and the nationals of other member states.³⁷ Where such grounds exist, these exceptions allow national authorities to discriminate on the basis of nationality. These reservations do not violate article 7 of the Treaty. Article 7 states that the prohibition on discrimination is not to prejudice any special provisions contained in the Treaty;³⁸ articles 48(3) and 56(1) are such special provisions.³⁹ A host state need not impose on a nonnational the same measures that would be imposed on a national for the same conduct.⁴⁰ Member states may impose special measures even though they might be more severe than the penalty imposed on nationals for the same conduct.⁴¹ Special measures include denial of entry (exclusion), denial of issuance or renewal of residence permits, and expulsion.⁴² However, the method of treatment is the only distinction permissible based on nationality.⁴³ Public policy is not a carte

37. EEC Treaty, *supra* note 1, arts. 48(3), 56(1); *see supra* notes 3, 6.

38. EEC Treaty, *supra* note 1, art. 7.

39. *See* B. SUNDBERG-WEITMAN, *supra* note 22, at 14-15. "Article 7 cannot reasonably be held to apply where these specific provisions were consciously worded in order to restrict the scope of the nondiscrimination principle." *Id.* at 14. The grounds of public policy, public security, and public health provided for in articles 48(3) and 56(1) are escape clauses which effect the scope of article 7. *Id.* at 15.

40. *Saunders* 1979 E. Comm. Ct. J. Rep. at 1135, [1978-1979 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8558, at 8096. "[A] worker who is a national of another Member State is subject to more severe treatment or is placed in an unfavorable situation in law or in fact as compared with the situation of a national in the same circumstances." *Id.*

41. *Id.*

42. *See* Directive No. 64/221, 7 J. O. COMM. EUR. (No. L 257) 64 (1964) (regarding the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security, or public health). Article 2(1) provides: "This Directive relates to all measures concerning entry into their territory, issue or renewal of residence permits, or expulsion from their territory, taken by Member States on grounds of public policy, public security or public health." *Id.* art. 2(1). The provision of special measures for nonnationals might be predicated upon the principle of international law which precludes a state from refusing its own nationals the right of entry or residence. *See* B. SUNDBERG-WEITMAN, *supra* note 22, at 232. For a discussion of the effect of this principle of international law on the free movement of workers, *see van Duyn*, 1974 E. Comm. Ct. J. Rep. at 1345-46, 1351, [1975 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8283, at 7225, 7228.

43. *Adoui & Cornaille v. Belgium State*, 1982 E. Comm. Ct. J. Rep. 1665, 1707, [1981-1983 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8840, at 7937.

The reservations contained in Articles 48 and 56 of the EEC Treaty permit Member States to adopt, with respect to the nationals of other Member

blanche to discriminate against nonnationals where no genuine policy has been offended.⁴⁴ An activity that is legitimate when exercised by nationals cannot be considered to adversely affect the public policy of a state merely because the individual performing it is a nonnational.⁴⁵ National authorities, as well as the European Court of Justice⁴⁶ (Court of Justice or Court), do not consistently read the exception restrictively. Member states define for themselves the meaning and scope of the public policy exception.⁴⁷ Consequently, the reservation is broader than was likely envisioned by the drafters.

Presumably, member states favor this ambiguity because it permits them greater discretion. However, on numerous occasions, national courts have requested the Court of Justice to render a Community definition of public policy.⁴⁸ This indicates that national courts need additional guidance in inter-

States and on the grounds specified in those provisions, in particular grounds justified by the requirements of public policy, measures which they cannot apply to their own nationals, inasmuch as they have no authority to expel the latter from the national territory or to deny them access thereto. Although that difference of treatment, which bears upon the nature of the measures available, must therefore be allowed, it must nevertheless be stressed that, in a Member State, the authority empowered to adopt such measures must not base the exercise of its powers on assessments of certain conduct which would have the effect of applying an arbitrary distinction to the detriment of nationals of other Member States.

Id.

44. *See id.*

45. *See Rutili*, 1975 E. Comm. Ct. J. Rep. 1219, 1225, [1975 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8322, at 7784 (observations of the Commission of the European Communities).

46. The European Court of Justice administers three bodies of Community law: those of the ECSC, the European Atomic Energy Community (Euratom), and the EEC. Convention Relating to Certain Institutions Common to the European Communities, Mar. 25, 1957, § 11, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II), 298 U.N.T.S. 269; *see SWEET & MAXWELL*, *supra* note 1, at 231. "The Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed." EEC Treaty, *supra* note 1, art. 164. *See generally id.* arts. 164-88 (outlining the structure and function of the Court of Justice).

47. *See supra* note 8.

48. *See, e.g., Adoui*, 1982 E. Comm. Ct. J. Rep. 1665, [1981-1983 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8840; *Regina v. Bouchereau*, 1977 E. Comm. Ct. J. Rep. 1999, [1977-1978 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8441; *Watson & Belmann*, 1976 E. Comm. Ct. J. Rep. 1185, [1976 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8368; *Jean Noel Royer*, 1976 E. Comm. Ct. J. Rep. 497, [1976 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8359; *Bonsignore v. Stadt Köln*, 1975 E. Comm. Ct. J. Rep. 297, [1975 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8298; *Rutli v. Minister of the Interior*, 1975 E. Comm. Ct. J. Rep. 1219, [1975

preting and applying this concept in the context of articles 48 and 56.⁴⁹

A. Interpretation of "Public Policy"

The term "public policy" is derived from the French "ordre public."⁵⁰ Translators sometimes find "public policy" to be an awkward translation. As a result, terms such as public good,⁵¹ public order⁵² and breaches of the peace⁵³ have been used interchangeably. This is not merely a matter of semantics; these terms are not equivalent.⁵⁴ Therefore, careless use can lead to inconsistent decisions.

It has been suggested that because "public policy" is frequently an inadequate translation of "ordre public," the latter should be retained in English texts.⁵⁵ While this suggestion would provide for uniformity, it would not clarify the meaning of "public policy." "Ordre public" is imprecise as well.

The scope of "ordre public" in French law is variable. In its narrowest sense, "ordre public" refers to the avoidance of disturbances affecting law and order and the preservation of

Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8322; *van Duyn*, 1974 E. Comm. Ct. J. Rep. 1337, [1975 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8283.

49. See *infra* notes 94-141 and accompanying text.

50. See *infra* notes 56-65 and accompanying text.

51. See *van Duyn*, 1974 E. Comm. Ct. J. Rep. at 1350, [1975 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8283, at 7227. "Public good" is the broadest of these terms. It encompasses all basic principles of a society. 2 H. SMIT & P. HERZOG, *supra* note 1, at 2-617; see also *infra* notes 59-62 and accompanying text (discussing the meaning of public good in French law).

52. See *Bouchereau*, 1977 E. Comm. Ct. J. Rep. at 2001, [1977-1978 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8441, at 7949. In English law, public order has a narrow meaning. It generally refers to the maintenance of peace and order. F. RIDLEY & J. BLONDEL, PUBLIC ADMINISTRATION IN FRANCE 160 (1969).

53. See *Bouchereau*, 1977 E. Comm. Ct. Rep. J. Rep. at 2001, [1977-1978 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8441, at 7949; *Bonsignore*, 1975 E. Comm. Ct. J. Rep. at 307, [1975 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8298, at 7477. This phrase also has a distinct and narrow meaning in English law. "Breaches of the peace" designate criminal offenses. *Bouchereau*, 1977 E. Comm. Ct. J. Rep. at 2024, [1977-1978 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8441, at 7965 (Opinion of the Advocate General).

54. See *supra* notes 51-53.

55. See 17 COMMON MKT. L.R. 140, 153 n.4 (1976) (editorial comment to *Rutili v. Minister for the Interior*, 1975 E. Comm. Ct. J. Rep. 1219, [1975 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8322, that 'ordre public' should be retained to avoid confusion as to the meaning of the concept and to emphasize the unique quality of it); see also Goodwin-Gill, *supra* note 9, at 354 n.1.

national security.⁵⁶ This interpretation of "ordre public" was adopted in article 224 of the Treaty.⁵⁷ In this context, "ordre public" is analogous to public security. However, it is unlikely that the drafters intended such a narrow interpretation in articles 48 and 56 because a public security alternative is provided.⁵⁸

In French jurisprudence, such a narrow interpretation is atypical. "Ordre public" is more commonly used in a broader sense. For example, in French contract law, "ordre public" is analogous to public good.⁵⁹ Courts will strike down a private agreement if the agreement is contrary to "ordre public" or "bonnes moeurs" (good morals).⁶⁰ The latter term is regarded as an integral part of the former because respect for morality is a matter of public policy.⁶¹ French courts have used these concepts to strike down contracts which were considered threatening to one's well-being or to the institution of the family.⁶² "Ordre public" is most broadly applied in the French law of conflicts.⁶³ In this context, the term is analogous to public policy.⁶⁴ Courts frequently refuse to apply foreign law on the ground that its application would violate French public policy.⁶⁵

Mere adoption of the term "ordre public" as used in French law is therefore useless for purposes of interpretation. However, reference to other international instruments con-

56. 2 H. SMIT & P. HERZOG, *supra* note 1, at 2-616 to 617.

57. *Id.*; see EEC Treaty, *supra* note 1, art. 224. Article 224 states:

Member States shall consult each other with a view to taking together the steps needed to prevent the functioning of the common market being affected by measures which a Member State may be called upon to take in the event of serious internal disturbances affecting the *maintenance of law and order*, in the event of war or serious international tension constituting a threat of war, or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security.

Id. (emphasis added).

58. 2 H. SMIT & P. HERZOG, *supra* note 1, at 2-616 to 617.

59. *Id.* at 2-617.

60. R. DAVID & H. DE VRIES, *THE FRENCH LEGAL SYSTEM* 135 (1958); 1 M. PLANIOL, *TREATISE ON THE CIVIL LAW* No. 293, at 202 (1959).

61. F. LAWSON, A. ANTON & L. NEVILLE BROWN, *INTRODUCTION TO FRENCH LAW* 169 (1967) [hereinafter cited as F. LAWSON]; 1 M. PLANIOL, *supra* note 60, at 202.

62. See F. LAWSON, *supra* note 61, at 169-72.

63. R. DAVID & H. DE VRIES, *supra* note 60, at 134.

64. 2 H. SMIT & P. HERZOG, *supra* note 1, at 2-617.

65. *Id.*

taining the term "ordre public" can guide the interpreter of "public policy."

The European Convention on Establishment⁶⁶ utilizes the concept of "ordre public." Its protocol provides:

The concept of *ordre public* is to be understood in the wide sense generally accepted in continental countries. A Contracting Party may, for instance, exclude a national of another Party for political reasons, or if there are grounds for believing that he is unable to pay the expenses of his stay or that he intends to engage in a gainful occupation without the necessary permits.⁶⁷

This standard is unacceptable for the EEC Treaty. First, rather than authorizing a broad interpretation, the Court of Justice has repeatedly stated that the term is to be interpreted strictly.⁶⁸ Furthermore, the examples cited are inconsistent with Community law for purposes of expulsion, or denial of issuance or renewal of residence permits.⁶⁹ In citing these ex-

66. Dec. 13, 1955, 529 U.N.T.S. 142 [hereinafter cited as Establishment Convention].

67. *Id.* protocol § III(a).

68. *van Duyn*, 1974 E. Comm. Ct. J. Rep. at 1350, [1975 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8283, at 7227.

It should be emphasized that the concept of public policy in the context of the Community and where, in particular, it is used as a justification for derogating from the fundamental principle of freedom of movement for workers, must be interpreted strictly, so that its scope cannot be determined unilaterally by each Member State without being subject to review by the institutions of the Community.

Id.; see also *Bouchereau*, 1977 E. Comm. Ct. J. Rep. at 2013, [1977-1978 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8441, at 7957; *Bonsignore*, 1975 E. Comm. Ct. J. Rep. at 307, [1975 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8298, at 7483; *Rutili*, 1975 E. Comm. Ct. J. Rep. at 1231, [1975 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8322, at 7777.

69. The following discussion examines the applicability of the standards cited in the protocol to the EEC.

1. Exclusion for Political Reasons: Although the Court has not specifically ruled on this issue, it appears that political activity which does not pose a serious threat to a fundamental interest of society, see *Bouchereau*, 1977 E. Comm. Ct. J. Rep. 1999, [1977-1978 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8441, cannot justify an expulsion of a Community worker. If the political activity concerns the exercise of trade union rights, the state clearly cannot expel a nonnational merely on the basis of such activity. See Regulation No. 1612/68, *supra* note 21, art. 8 (prohibiting member states from adopting measures which interfere with the exercise of trade union rights); see also *Rutili*, 1975 E. Comm. Ct. J. Rep. at 1235, [1975 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8322, at 7779. The French Minister of the Interior determined that *Rutili's* presence in certain regions was "likely to disturb public pol-

icy," apparently on the basis of Rutili's political and trade union activities. *Id.* at 1228, [1975 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8322, at 7776. The Court cited a number of limitations on the powers of member states regarding the control of nonnationals, including Directive No. 64/221, *supra* note 42, arts. 2-3 and Regulation No. 1612/68, *supra* note 21, art. 8. It stated that these limitations taken as a whole "are a specific manifestation of the more general principle, enshrined in Articles 8, 9, 10 and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms . . . and in Article 2 of Protocol No. 4 of the same Convention" which permit restrictions in the interests of national security or public safety on the rights secured by the above-mentioned articles only as are necessary for the protection of democratic interests. *Rutili*, 1975 E. Comm. Ct. J. Rep. at 1232, [1975 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8322, at 7778.

Member states, however, may be empowered to regulate the political activity of nationals of other member states if unrelated to trade unionism. There is nothing in the Treaty to the contrary. *Cf.* European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 16, 213 U.N.T.S. 221 [hereinafter cited as Human Rights Convention] (expressly permitting contracting parties to impose restrictions on the political activity of nonnationals). However, restrictions that interfere with the free movement of workers would be inconsistent with Community law. *Watson*, 1976 E. Comm. Ct. J. Rep. 1185, [1976 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8368 (certain restrictions may be imposed on nonnationals which are not imposed on nationals provided that they are reasonable and do not create an obstacle to the free movement of workers); *see Rutili*, 1975 E. Comm. Ct. J. Rep. at 1226, [1975 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8322, at 7775 (observations of the Commission of the European Communities); *cf. Wooldridge, Free Movement of EEC Nationals: The Limitation Based on Public Policy and Public Security*, 2 EUR. L. REV. 190, 196 (1977) (stating that German scholars hold that special measures, that is, measures which restrict the free movement of nonnational workers, may not be taken based solely on the individual's membership in or association with an extremist political organization).

2. Exclusion for Inability to Pay Expenses of Stay: For a discussion of cases that concern EEC nationals becoming charges on the public funds of member states other than their own, *see supra* note 9; *cf.* Regulation No. 1612/68, *supra* note 21, art. 7(1) (requiring equality of treatment of EEC workers with regard to employment and dismissal); *id.* art. 7(2) (guaranteeing EEC workers residing in another member state the same social benefits as received by nationals of the host state). These rights only attach to those qualifying as workers, which, as defined by Community law, are those who perform or intend to perform an activity of an economic nature. *Levin v. Secretary of State*, 1982 E. Comm. Ct. J. Rep. 1035, 1051-52, [1981-1983 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8821, at 7723. An EEC national retains his status as a worker even if he becomes involuntarily unemployed. *See* Regulation 1612/68, *supra* note 21, art. 7(1); *see also* Directive No. 68/360, 11 J.O. COMM. EUR. (No. L 257) 13 (1968), 1 COMMON MKT. REP. (CCH) ¶ 1035 (on the abolition of restrictions on movement and residence within the Community for workers of member states and their families). However, an individual might lose his "worker" status if he becomes voluntarily unemployed. This casts considerable doubt upon the sincerity of his desire to work. *Giangregorio*, 38 COMMON MKT. L.R. at 479 (U.K. Imm. App. Trib. 1983).

3. Exclusion for Failure to Obtain Necessary Permits: This criteria might stand up under Community law if such permits were similarly required of nationals pursuing the same occupation. However, employment of a nonnational EEC worker may not be contingent upon discriminatory criteria. Regulation No. 1612/68, *supra* note 21,

amples, the protocol refers only to exclusion.⁷⁰ Concededly, such a standard is not as offensive when used for the purpose of denying entry.⁷¹ However, a standard that is not applicable to all measures would make this issue of Community law even more confusing.

The European Convention for the Protection of Human Rights and Fundamental Freedoms⁷² (Human Rights Convention) is another source that can be consulted.⁷³ Article 2 of protocol 4 of the Human Rights Convention states:

1. Everyone lawfully within the territory of a state shall, within that territory have the right to liberty of movement and freedom to choose his residence.

. . . .

3. No restrictions shall be placed on these rights other than such as are necessary in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of "ordre public," for the protection of health or morals, or for the protection of the rights and freedoms of others.⁷⁴

This provision is similar to article 48 and 56 of the EEC Treaty.⁷⁵ However, in order to derive the meaning of "ordre public" in this context, comparison need be made with the terms that appear in the body of the Human Rights Conven-

art. 6(1). Furthermore, EEC Treaty, *supra* note 1, art. 57 provides for mutual recognition of certificates of qualification for specific occupations and professions.

70. See Establishment Convention, *supra* note 66, protocol § III(a).

71. See *infra* notes 151-61 and accompanying text.

72. Human Rights Convention, *supra* note 69.

73. See *Adoui*, 1982 E. Comm. Ct. J. Rep. at 1718, 35 Common Mkt. L.R. 631, 645 (Opinion of the Advocate General); *Royer*, 1976 E. Comm. Ct. J. Rep. at 507, [1976 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8359, at 7552 (view of the Commission of the European Communities). These views assert that the Court, in determining the bounds to be observed when invoking the exception, must consider the Human Rights Convention as it is ratified by all the member states and is an integral part of Community law. However, the prevailing view is that the Human Rights Convention serves only as a guide. See *Wooldridge*, *supra* note 69, at 190; see also *Watson*, 1976 E. Comm. Ct. J. Rep. at 1207, [1976 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8368, at 7686 (Opinion of the Advocate General) (disagreeing with certain scholars who read *Rutili*, 1975 E. Comm. Ct. J. Rep. 1219, [1975 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8322, as stating that the Human Rights Convention is an integral part of Community law).

74. Human Rights Convention, *supra* note 69, protocol 4, art. 2.

75. Compare *id.* (providing for the free movement of workers under the Human Rights Convention) with EEC Treaty, *supra* note 1, arts. 48(3), 56(1) (providing for the free movement of workers under the EEC Treaty).

tion. For example, article 8(2) permits interference by a public authority where one or more of the following interests necessitates such interference: "national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."⁷⁶ Save for two points, this article and article 2 of protocol 4 are identical. The first distinction is that the latter does not provide that economic reasons may justify a derogation of the protected right.⁷⁷ The second distinction is that whereas article 8(2) of the Human Rights Convention refers to the "prevention of disorder,"⁷⁸ or stated affirmatively, the maintenance of order, article 2 of protocol 4 cites "the maintenance of 'ordre public.'" ⁷⁹ If these terms are meant to be analogous, then "ordre public" denotes public order. In fact, in article 6(1) of the Human Rights Convention, "l'ordre public" in the French version is translated as "public order" in the English version.⁸⁰ While other articles vary the form of the language somewhat,⁸¹ the notion of preserving the public order is inherent in all.⁸²

The original 1957 English version of the EEC Treaty⁸³ supports the conclusion that the literal interpretation of "ordre public" is "public order" rather than "public policy."⁸⁴ In this version, articles 48 and 56 permit derogations from the basic principle of free movement of workers and freedom of establishment when "justified by reasons of *public order*, public safety and public health."⁸⁵

The flaw in this translation is that "public order" is of far

76. Human Rights Convention, *supra* note 69, art. 8(2).

77. *See id.* protocol 4, art. 2. Such a provision would be inconsistent with Directive No. 64/221, *supra* note 42, art. 2(2), which prohibits the invocation of such grounds to service economic ends. *Id.*

78. Human Rights Convention, *supra* note 69, art. 8(2).

79. *Id.* protocol 4, art. 2.

80. *Id.* art. 6(1).

81. *See, e.g., id.* art. 9(2) ("la protection de l'ordre" translated as "the protection of public order"); *id.* arts. 8(2), 10(2), 11(2) ("la defense de l'ordre" translated as "the prevention of disorder").

82. *See supra* notes 78-81 and accompanying text.

83. 298 U.N.T.S. 3. The official English translation, republished in 1973 as 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II), substitutes public policy for public order. *Id.* arts. 48(3), 56(1).

84. *See* 298 U.N.T.S. 3, arts. 48(3), 56(1).

85. *Id.* (emphasis added).

greater scope in French law than in English law.⁸⁶ Public order in English law refers to the maintenance of the peace whereas in French law public order means the general good order of society.⁸⁷ "Public policy" might have been substituted for "public order" to avoid misinterpretation. Although "public policy" is an imprecise term, it is more akin to the meaning of the French "public order."

It is therefore implausible to uniformly and precisely define "public policy." The problem remains as to how to reduce the broad discretion left to member states in employing the public policy exception. The solution lies not in directing states how to interpret public policy, but in how to apply it.⁸⁸

B. *Application of Public Policy*

Community law provides little guidance as to how broadly the public policy reservation may be applied. Its parameters have been marginally narrowed by Council Directive No. 64/221⁸⁹ and by preliminary rulings⁹⁰ of the Court of Justice.

86. F. RIDLEY & J. BLONDEL, *supra* note 52, at 160.

87. *Id.*

88. *See infra* notes 89-168 and accompanying text.

89. Directive No. 64/221, *supra* note 42. For the principles set forth in Directive No. 64/221 limiting the scope of the public policy exception, see *supra* note 42. "Council" refers to the Council of the European Communities. It is a unified executive body of the EEC, ECSC, and Euratom. Treaty establishing a Single Council and a Single Commission of the European Communities, Apr. 8, 1965, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II). The functions of the Council are set forth in article 145.

To ensure that the objectives set out in the Treaty are attained, the Council shall, in accordance with the provisions of this Treaty:

—ensure coordination of the general economic policies of the Member States;

—have the power to take decisions.

EEC Treaty, *supra* note 1, art. 145. The Council carries out some of its tasks by issuing directives. Directives are binding, as to the result to be achieved, upon each member state to which they are addressed. The national authorities may select the form and method of implementing such directives. *Id.* art. 189. Directives are not directly applicable to member states in that they are generally not self-executing. However, even in the absence of implementing national legislation, directives have direct effect and may be relied upon by individuals before national courts. *van Duyn*, 1974 E. Comm. Ct. J. Rep. at 1348, [1975 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8283, at 7226-27. National courts must give precedence to directives where national law is incompatible with the duties imposed by such directives. *Watson*, 1976 E. Comm. Ct. J. Rep. at 1198, [1976 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8368, at 7680; *Rutili*, 1975 E. Comm. Ct. J. Rep. at 1229, [1975 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8322, at 7777.

1. Council Directive No. 64/221

The directive sets forth three rules for determining whether a given measure against an EEC national is appropriate. Article 2(2) states that such grounds shall not be invoked to serve economic ends.⁹¹ Article 3(1) states that measures taken on grounds of public policy or public security shall be based exclusively on the personal conduct of the individual concerned.⁹² Article 3(2) states that previous criminal convictions shall not in themselves constitute grounds for the taking of such measures.⁹³ These rules represent important restrictions on the use of the exception. However, they are far from comprehensive.

2. Case Law Analysis

The Court of Justice has been cautious in defining the scope of the public policy exception. The Court was first called upon to interpret article 48(3) and Directive No. 64/221 in 1978 in *van Duyn v. Home Office*.⁹⁴ Here, a Dutch national sought entry into the United Kingdom where she was offered a job as a secretary with the Church of Scientology.⁹⁵ Scientology, while not illegal, had been pronounced by the

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

(a) the interpretation of this Treaty;

(b) the validity and interpretation of acts of the institutions of the Community;

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

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgement, request the Court of Justice to give a ruling thereon. Where any such question is raised in a case pending before a court or tribunal of a Member State, against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.

EEC Treaty, *supra* note 1, art. 177.

91. Directive No. 64/221, *supra* note 42, art. 2(2). This delimitation implies that public policy grounds may be used to discriminate in furtherance of social, political or other ends.

92. *Id.* art. 3(1).

93. *Id.* art. 3(2).

94. 1974 E. Comm. Ct. J. Rep. at 1337, [1975 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8283.

95. *Id.* at 1340, [1975 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8283, at 7221.

British Government to be socially harmful.⁹⁶ In an attempt to curb the growth of this "pseudo-philosophical cult,"⁹⁷ the government adopted a policy of denying entry to aliens employed by or associated with the Church of Scientology.⁹⁸ British citizens were not similarly restricted.⁹⁹ Therefore, British subjects were given preference over non-British workers.

The Court concluded that a member state could implement administrative measures to counteract certain activities when performed by a nonnational even if such activity was lawful when performed by a national.¹⁰⁰ It is not evident whether the Court investigated the possibility of alternatives to exclusion. It did not discuss whether incidental measures could have been adopted and invoked against nationals and nonnationals alike in order to discourage the practice of Scientology. Instead, the Court readily affirmed the broad discretion of member states to invoke the public policy exception.¹⁰¹ In fact, the Court stretched such discretion beyond its permissible limits.¹⁰²

Subsequent rulings have been less lenient towards national authorities. In *Jean Noel Royer*, a French national had been prosecuted in France for several armed robberies and had been sentenced to two years imprisonment for procuring.¹⁰³ He subsequently entered Belgium unlawfully.¹⁰⁴ Bel-

96. *Id.* at 1339, [1975 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8283, at 7220.

97. *Id.*

98. *Id.* at 1339-40, [1975 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8283, at 7221.

99. *Id.* at 1340, [1975 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8283, at 7221.

100. *Id.* at 1351, [1975 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8283, at 7228.

[W]here the competent authorities of a Member State have clearly defined their standpoint as regards the activities of a particular organization and where, considering it to be socially harmful, they have taken administrative measures to counteract these activities, the Member State cannot be required, before it can rely on the concept of public policy, to make such activities unlawful, if recourse to such a measure is not thought appropriate in the circumstances.

Id. at 1350, [1975 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8283, at 7227-28.

101. *See id.*, [1975 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8283, at 7227.

102. *See supra* notes 43-45 and accompanying text.

103. 1976 E. Comm. Ct. J. Rep. 497, 499, [1976 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8359, at 7546.

104. *Id.*

gian authorities sought to deport Royer because he had failed to comply with administrative formalities concerning entry.¹⁰⁵ Here, the Court did limit the discretion of member states in applying the exception. The Court held that the mere failure to comply with certain administrative formalities is not severe enough to constitute a threat to public policy.¹⁰⁶ Consequently, such an infraction does not justify any measure which restricts a worker's movement within the Community. *Watson & Belmann*,¹⁰⁷ decided in 1976, is in accord. Italian authorities brought criminal charges against a British woman for failure to report her presence within three days of her entry into Italy, pursuant to a national regulation.¹⁰⁸ The regulation carried a possible penalty of deportation, entailing a prohibition on re-entry without special permission.¹⁰⁹ The Court held that such reporting requirements were legitimate.¹¹⁰ However, the state could not legitimately predicate a decision to expel upon the mere failure to abide by such administrative regulations.¹¹¹ Measures must be reasonable and proportionate to the gravity of the nonnational's conduct¹¹² and must not restrict the free movement of workers.¹¹³

In *Bonsignore v. Oberstadtdirektor der Stadt Köln*, an Italian worker residing in Germany bought a gun in violation of a firearms law that required the possessor of a gun to obtain a permit.¹¹⁴ Bonsignore negligently killed his brother while han-

105. *Id.* at 500, [1976 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8359, at 7546.

106. *Id.* at 514-15, [1976 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8359, at 7556.

107. 1976 E. Comm. Ct. J. Rep. 1185, [1976 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8368.

108. *Id.* at 1186-87, [1976 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8368, at 7672.

109. *Id.* at 1187, [1976 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8368, at 7672.

110. *Id.* at 1198, [1976 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8368, at 7680.

111. *Id.*

112. *Id.* at 1199, [1976 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8368, at 7680.

113. *Id.* at 1198-99, [1976 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8368, at 7680-81.

114. 1975 E. Comm. Ct. J. Rep. 297, at 298, [1975 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8298, at 7477.

dling the gun.¹¹⁵ He was convicted but the local court determined that imprisonment would not be appropriate.¹¹⁶ Bonsignore had acted negligently, not criminally and there was no reason to believe that he would cause harm in the future.¹¹⁷ Nevertheless, German authorities claimed that Bonsignore posed a serious threat to the peaceful and secure coexistence of the population.¹¹⁸ A deportation order was issued on this ground.¹¹⁹ The Court ruled that a member state could not deport an individual for the purpose of setting an example and thus deter other foreign nationals from engaging in the same conduct.¹²⁰ Nonnational treatment may not be imposed if the purpose is of a general preventive nature.¹²¹ This ruling does little more than reiterate the requirement set forth in Directive No. 64/221 that measures taken on grounds of public policy must be based exclusively on the personal conduct of the individual concerned.

The Court made its first significant attempt to restrict the discretion of national authorities in applying the public policy exception in *Regina v. Bouchereau*.¹²² A French worker was convicted of unlawful possession of drugs.¹²³ The local court made a recommendation for deportation.¹²⁴ The Court of Justice asserted that the mere perturbation of the social order is not enough to trigger the public policy exception.¹²⁵ Recourse

115. *Id.*

116. *Id.* at 299, [1975 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8298, at 7477.

117. *See id.* at 310, [1975 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8298, at 7482.

118. *Id.* at 300-01, [1975 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8298, at 7478-79.

119. *Id.* at 299, [1975 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8289, at 7477.

120. *Id.* at 307, [1975 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8298, at 7483. "Directive No. 64/221 prevents the deportation of a national of a Member State if the deportation is ordered for the purpose of deterring other aliens, i.e., if it is based . . . on reasons of a 'general preventive nature.'" *Id.*

121. *Id.*

122. 1977 E. Comm. Ct. J. Rep. 1999, [1977-1978 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8441.

123. *Id.* at 2001, [1977-1978 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8441, at 7949.

124. *Id.*

125. *Id.* at 2015, [1977-1978 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8441, at 7957.

to this concept by a national authority presupposes the existence of a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society.¹²⁶

The most recent case concerning the application of public policy is *Adoui & Cornaille v. Belgian State*.¹²⁷ Two French women were employed in Belgium as barmaids.¹²⁸ They were suspected of engaging in prostitution.¹²⁹ Belgian authorities sought to expel them on the ground that their conduct was harmful to the public policy of the state.¹³⁰ However, prostitution was legal in Belgium.¹³¹ The scenario is similar to that in *van Duyn*.¹³² In *Adoui*, the Court of Justice ruled that a member state could not justify special treatment of nonnationals in the absence of a genuine public policy.¹³³ The existence of a genuine public policy necessitated that the state similarly impose repressive measures upon nationals engaging in the same activity.¹³⁴ This conclusion is opposite to that reached in *van Duyn*.¹³⁵ Nonetheless, the cases do not conflict. *Van Duyn* states that *where appropriate*, a member state can impose measures on nationals of other member states even though no restrictions are imposed on its own nationals.¹³⁶ The underlying theory was that the practice of Scientology could not be regu-

126. *Id.*

127. 1982 E. Comm. Ct. J. Rep. 1665, [1981-1983 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8840.

128. *Id.* at 1668-69, [1981-1983 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8840, at 7912.

129. *Id.*

130. *Id.*

131. *Id.* at 1706, [1981-1983 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8840, at 7937.

132. 1974 E. Comm. Ct. J. Rep. 1337, [1975 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8283; *see supra* notes 94-102 and accompanying text.

133. 1982 E. Comm. Ct. J. Rep. at 1707-08, [1981-1983 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8840, at 7937-38.

134. *Id.*

135. 1974 E. Comm. Ct. J. Rep. at 1351, [1975 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8283, at 7228.

[A] Member State, for reasons of public policy, can, where it deems, necessary, refuse a national of another Member State the benefit of the principle of freedom of movement for workers in a case where such a national proposes to take up a particular offer of employment even though the Member State does not place a similar restriction upon its own nationals.

Id.

136. *See id.*

lated by other means because the legislature lacked the authority to prohibit it.¹³⁷ The Court did not expound upon what would be required of a member state where the circumstances enable the member state to ban the activity. Such was the situation in *Adoui*.¹³⁸ Here, the Belgian Government had authority to prohibit prostitution, yet it did not. However, certain incidental activities such as solicitation and exhibition in shop windows were prohibited.¹³⁹ These prohibitions were applicable to Belgian and foreign prostitutes.¹⁴⁰ If the plaintiffs had engaged in such activities, an attempt to expel them on such grounds might have been justified.¹⁴¹

In none of the above cases has the Court substantially limited the scope of the public policy reservation. Individual states retain broad discretion to determine the circumstances in which this exception may be invoked.¹⁴² Member states nev-

137. *Id.* at 1339, [1975 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8283, at 7221.

138. 1982 E. Comm. Ct. J. Rep. 1665, [1981-1983 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8840.

139. *Id.* at 1706, [1981-1983 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8840, at 7937.

140. *See id.* at 1707, [1981-1983 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8840, at 7937.

141. However, such was not the case in *Adoui*. The Court of Justice concluded that Belgium's decision to expel the French prostitutes was inappropriate. *Id.* at 1708-09, [1981-1983 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8840, at 7938. Belgium argued that it sought to expel the women because it considered their presence harmful to public policy based on their possible contact with the French underworld. The Court held that the national authorities must establish an actual link between French criminals and each prostitute sought to be expelled. *Id.* No such links were established. Belgium's policy against French prostitutes therefore constituted a measure of a general preventive measure within the meaning of Directive No. 64/221, *supra* note 42. *Adoui*, 1982 E. Comm. Ct. J. Rep. at 1708-09, [1981-1983 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8840, at 7938.

142. One might speculate that the Court is reluctant to go any further than the questions referred to it necessitate because of the traditional view that this concept is best left to the discretion of national authorities. *See supra* note 8. However, there is some indication that the member states themselves would not be adverse to limiting their discretion to interpret and apply "public policy." In *Rutili*, 1975 E. Comm. Ct. J. Rep. at 1222-23, [1975 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8322, at 7772, the Italian Government submitted observations to the Court stating that it considered it "desirable that rules of a general and abstract nature adopted in the Member States of the EEC should specify the grounds of public policy" *Id.*; *see Bonsignore*, 1975 E. Comm. Ct. J. Rep. at 316, [1975 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8298, at 7490 (Opinion of the Advocate General).

A more efficient solution, and one which would lead to better protection for those workers referred to in Article 48 would clearly consist not in transfer-

ertheless have a duty not to abuse the "public policy" exception. Although articles 48 and 56 do not expressly state so, a good faith duty may be implied by analogy to article 36.¹⁴³ Article 36 provides that "such restrictions shall not be used as a means of arbitrary discrimination." Furthermore, article 5 requires member states to "abstain from any measure which could jeopardise the attainment of the objectives of this Treaty."¹⁴⁴ The existence of this duty is not sufficient to assure that member states do not abuse the public policy exception. The situations in which national authorities may invoke the reservation must be limited. The first principle in limiting the scope of public policy is that the policy must be actual. A particular public policy cannot be arbitrarily adopted whenever a national authority seeks to rid itself of an alien it considers undesirable.¹⁴⁵ The policy must be duly promulgated¹⁴⁶ and the activity against which such policy is aimed must be equally reprehensible when performed by a national.¹⁴⁷ Member states must demonstrate a genuine commitment to discouraging the offensive activity. Outlawing the activity or conduct is strong evidence of a state's commitment but states need not always go that far.¹⁴⁸ Alternatively, a member state could prohibit or regulate activities incidental to the undesirable activity. This course of action might discourage individuals from engaging in the undesirable activity. Whatever means a state em-

ring to the Community institutions the security powers which the States wished to retain and of which there is no question of depriving them, but in strengthening the directive and rendering it more specific, in such a way that the grounds for deportation would have to be based on Community criteria which would be uniformly applicable.

Id.

143. EEC Treaty, *supra* note 1, art. 36; see B. SUNDBERG-WEITMAN, *supra* note 22, at 232-33.

144. EEC Treaty, *supra* note 1, art. 5.

145. See *supra* notes 43-45 and accompanying text; cf. Directive No. 64/221, *supra* note 42, art. 3(2) (special measures may not be invoked against a national of another member state merely because he has a criminal record).

146. See *van Duyn*, 1974 E. Comm. Ct. J. Rep. at 1350, [1975 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8283, at 7228 (this is true "where the competent authorities of a Member State have clearly defined their standpoint" on the given policy). *Id.*

147. See *Adoui*, 1982 E. Comm. Ct. J. Rep. at 1707-08, [1981-1983 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8840, at 7934.

148. See *van Duyn*, 1974 E. Comm. Ct. J. Rep. at 1350, [1975 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8283, at 7228.

ploy to curtail a particular activity, performance of such must be punished or repressed regardless of who the actor is.¹⁴⁹ The form and severity of the sanctions, however, may vary based on national status.¹⁵⁰

The exception should be limited to the measure of denial of entry into the territory of a member state, save for extraordinary circumstances. Two points militate against permitting expulsion of Community nationals. First, such a measure would presumably cause greater hardship to an individual who has already established residence and has become assimilated in the host state.¹⁵¹ Second, expulsion is inconsistent with the objectives of the EEC. Expulsion is a weapon of self-defense possessed by every sovereign state.¹⁵² It is available to oust nonnationals but not nationals.¹⁵³ As a general rule, however, no national distinction is drawn between workers of member states.¹⁵⁴ Persons seeking or engaging in economic activities may be regarded as losing their member state identity and acquiring Community nationality.¹⁵⁵ For economic purposes, their "nation" becomes the territory of the Community, which ideally, contains no internal barriers dividing the European states.¹⁵⁶ Therefore, expulsion of a Community national is inappropriate. Expulsion can only be applied in the interests of the Community as a whole.¹⁵⁷ Local law is adequate in most

149. See *Adoui*, 1982 E. Comm. Ct. J. Rep. at 1708, [1981-1983 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8840, at 7937.

150. See *supra* notes 40-42 and accompanying text.

151. The distinction between expulsion and denial of entry might further explain why the Court was less bothered by the decision of the national authority in *van Duyn* (denial of entry) than by the decision in *Adoui* (expulsion).

152. G. GOODWIN-GILL, *INTERNATIONAL LAW AND THE MOVEMENT OF PERSONS BETWEEN STATES* 310 (1978); 8 M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 620 (1967).

153. See *van Duyn*, 1974 E. Comm. Ct. J. Rep. at 1351, [1975 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8283, at 7228 (citing a principle of international law which precludes a state from refusing its own nationals the right of entry or residence).

154. See *supra* notes 25-27 and accompanying text.

155. See G. VAN DEN BERGHE, *supra* note 32, at 3. "Terms such as 'Community citizen,' 'European citizen,' 'Market citizen' are . . . increasingly being used. All these expressions are employed to describe individuals as being subjects of Community law; all underline a certain relationship which exists between the nationals of the Member States and European Communities as such." *Id.* at 3.

156. See *supra* note 20 and accompanying text.

157. G. GOODWIN-GILL, *supra* note 152, at 309.

cases to punish or control the undesirable conduct.¹⁵⁸ Given the EEC Treaty's emphasis on national treatment for Community nationals¹⁵⁹ and the availability of effective sanctions,¹⁶⁰ the validity of expulsion is questionable.¹⁶¹

Availability should furthermore be restricted to employment related cases. In most of the cases referred to the Court of Justice, the conduct at issue was not employment related.¹⁶² The public policy exception is more appropriately aimed at the activity and not the individual. An individual who is engaged in a legitimate economic activity plays an integral role in the economic growth of the Community.¹⁶³ He should be permitted to remain in the territory of the host state and incur the same restrictions or penalties as would be imposed on a national.¹⁶⁴ This restriction on the use of the derogation would better serve the principles and objectives of the European Economic Community.¹⁶⁵

Finally, the exception must be invoked only in extraordinary circumstances where national treatment would not be adequate.¹⁶⁶ For instance, a member state should not be able to

158. *Id.*

159. *See supra* notes 25-27 and accompanying text.

160. *See supra* text accompanying note 158.

161. G. GOODWIN-GILL, *supra* note 152, at 309-10. Compare the approach used with respect to the public health exception. Disease or disability may justify initial refusal of entry but may not justify expulsion. Directive No. 64/221, *supra* note 42, art. 4(1) states: "The only diseases or disabilities justifying refusal of entry into a territory or refusal to issue a first residence permit shall be those listed in the Annex to this Directive." *Id.* Directive No. 64/221, *supra* note 42, art. 4(2) states: "Diseases or disabilities occurring after a first residence permit has been issued shall not justify refusal to renew the residence permit or expulsion from the territory." *Id.* This restrictive approach should likewise be made applicable to the ground of public policy.

162. In fact, only in *van Duyn* and *Adoui* did national authorities attack the activities of the individuals in their capacities as "workers."

163. *See supra* notes 21-24 and accompanying text.

164. *See supra* notes 25-27 and accompanying text; *supra* text accompanying note 158; *infra* note 166 and accompanying text.

165. *See supra* notes 19-20 and accompanying text.

166. *See Watson*, 1976 E. Comm. Ct. J. Rep. at 1193, [1976 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8368, at 7677 (observations of the Commission of the European Communities).

In general terms, it is not sufficient that a measure is justified on grounds of public policy; it must, in addition, be impossible for public policy to be safeguarded effectively other than by a discriminatory measure. This is the case, for example, where the different treatment applied to a foreign national as compared with a national of the State concerned corresponds to a real difference in their factual situation.

expel a national of another member state simply because he commits a crime.¹⁶⁷ Sanctions provided by local law will generally be effective. Furthermore, other provisions in the Treaty which enable member states to implement protective measures in derogation of the objectives of the Treaty, stress that "such measures shall cause the least possible disturbance in the functioning of the common market and must not be wider in scope than is strictly necessary."¹⁶⁸

III. *INADEQUACY OF LEGAL REMEDIES*

Neither national nor Community law can be relied upon to prevent or reverse the discriminatory acts of national authorities.¹⁶⁹ An individual against whom an order of expulsion is sought, or who is refused entry, or the renewal or issuance of a residence permit, has the same legal remedies as are available to nationals challenging other acts of the administration.¹⁷⁰ However, the fact that the individual is afforded national treatment does not guarantee that he will receive equitable treatment.¹⁷¹

Articles 6 through 9 of Council Directive No. 64/221 set forth minimal procedural safeguards for EEC nationals.¹⁷² Where the national law of a member state does not provide a right to judicial review of administrative decisions, such a decision against a national of another member state may not be implemented before an opinion is obtained from a competent authority of the host state.¹⁷³ A commonly utilized procedure

Id.

167. See Directive No. 64/221, *supra* note 42, art. 3(2).

168. EEC Treaty, *supra* note 1, art. 109 (concerning the balance of payments); see also *id.* art. 73 (concerning movement of capital); *id.* art. 226 (permitting member states facing difficulties to apply to the Commission in order to implement protective measures).

169. See *infra* notes 173-206 and accompanying text.

170. Directive No. 64/221, *supra* note 42, art. 8.

171. See *infra* notes 172-78 and accompanying text.

172. Directive No. 64/221, *supra* note 42, arts. 6-9.

173. *Id.* art. 9. Article 9 provides:

1. Where there is no right of appeal to a court of law, or where such appeal may be only in respect of the legal validity of the decision, or where the appeal cannot have suspensory effect, a decision refusing renewal of a residence permit or ordering the expulsion of the holder of a residence permit from the territory shall not be taken by the administrative authority, save in cases of urgency, until an opinion has been obtained from a competent au-

is to permit the individual concerned to appear before an advisory committee,¹⁷⁴ which serves as the competent authority.¹⁷⁵ This procedure is suspect, however, as the appointment and membership of such committees remains in the hands of the state authorities.¹⁷⁶

Nor is the individual in a substantially better position where the national law does provide a right of appeal. National courts have exclusive jurisdiction to apply Community law within their own legal system.¹⁷⁷ The Court of Justice lacks jurisdiction to review national court decisions.¹⁷⁸

On the other hand, the Court of Justice has exclusive authority to interpret Community law.¹⁷⁹ It interprets the Treaty and secondary legislation of the Community by issuing preliminary rulings.¹⁸⁰ Only national courts may request preliminary

thority of the host country before which the person concerned enjoys such rights of defence and of assistance or representation as the domestic law of that country provides for. This authority shall not be the same as that empowered to take the decision refusing renewal of the residence permit or ordering expulsion.

2. Any decision refusing the issue of a first residence permit or ordering expulsion of the person concerned before the issue of the permit shall, where that person so requests, be referred for consideration to the authority whose prior opinion is required under paragraph 1. The person concerned shall then be entitled to submit his defence in person, except where this would be contrary to the interests of national security.

Id.

174. G. GOODWIN-GILL, *supra* note 152, at 304.

175. Directive No. 64/221, *supra* note 42, art. 9. "[T]he directive does not define the expression 'a competent authority.' It refers to an authority which must be independent of the administration, but it gives Member States a margin of discretion in regard to the nature of the authority." Regina v. Santillo, 1980 E. Comm. Ct. J. Rep. 1585, 1600, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8677, at 8017.

176. G. GOODWIN-GILL, *supra* note 152, at 304.

177. 2 COMMON MKT. REP. (CCH) ¶ 4656.02, at 3854.

178. See EEC Treaty, *supra* note 1, arts. 173-82 (setting forth the jurisdiction of the Court of Justice); 2 COMMON MKT. REP. (CCH) ¶ 4656.01-.03, at 3854-56.

179. Simon & Dowrick, *Effect of EEC Directives in France: The Views of the Conseil D'etat*, 95 LAW Q. REV. 376, 384 (1979); 2 COMMON MKT. REP. (CCH) ¶ 4656.01, at 3854. The Court alone may interpret Community law in order to assure uniformity. If this function was left to the individual member states, the highest court of each might interpret questions of Community law variedly. *Id.* "Diversity in interpretation would defeat the Treaty objective of establishing uniform norms for the entire territory of the Community." *Id.*

180. See *supra* note 90 (discussing the Court of Justice's jurisdiction to issue preliminary rulings).

rulings.¹⁸¹ A national court may do so when it considers that a Court decision on a particular question of Community law is necessary in order to decide the case pending before it.¹⁸²

Where such a question is presented before a lower or intermediate court, the national court has the option of referring it to the Court of Justice.¹⁸³ Where the question is before a national court of last resort, referral to the Court of Justice is mandatory.¹⁸⁴ However, this obligation is difficult to enforce.

Where the Court has not yet ruled on a particular question of Community law, a national court can avoid its obligation to refer such question by invoking the doctrine of *acte clair*. Under this doctrine, a national court may claim that referral is unnecessary because the answer to the question to be referred is clear.¹⁸⁵ If the answer is in fact uncertain, member states are likely to interpret the issue of Community law variedly.¹⁸⁶ This would frustrate the aim of article 177 to provide uniform definitions of Community law.¹⁸⁷

Where the Court has previously ruled on the question, such as in the case of the public policy exception, a national court need not refer the question for reconsideration.¹⁸⁸ However member states are not bound by every ruling of the Court

181. See 2 COMMON MKT. REP. (CCH) ¶ 4656.04, at 3856.

182. EEC Treaty, *supra* note 1, art. 177; see *supra* note 90 for the text of article 177.

183. EEC Treaty, *supra* note 1, art. 177.

184. *Id.* In either case, the national court proceeding is stayed pending the Court of Justice ruling. Thereafter, the national court must decide the matter in light of the Court's interpretation. The Court of Justice is not authorized to apply its interpretation to the facts of the case. 2 COMMON MKT. REP. (CCH) ¶ 4656.03, at 3855. The state referring the question is bound by the Court's interpretation in deciding that particular case. See *Milch-, Fett-, & Eierkontor v. Saarbrücken*, 1969 E. Comm. Ct. J. Rep. 165, 180, [1967-1970 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8096, at 8373. However, Community law does not specify whether the ruling is binding in future cases in the national courts of all member states. See *infra* notes 189-90 and accompanying text.

185. 5 H. SMIT & P. HERZOG, *supra* note 1, at 5-479.

186. See *supra* note 179.

187. 5 H. SMIT & P. HERZOG, *supra* note 1, at 5-479 to 480.

188. 2 COMMON MKT. REP. (CCH) ¶ 4656.06, at 3857. However, the Court of Justice has stated that there is nothing to prevent a national court from referring a question to the Court even though the same question has already been addressed in a similar case. *Id.*; see *Da Costa en Schakke N.V. v. Netherlands Fiscal Administration*, 1963 E. Comm. Ct. J. Rep. 31, 38, [1961-1966 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8010, at 7239.

of Justice.¹⁸⁹ Some states voluntarily bind their authorities to observe every Court ruling.¹⁹⁰ But where a state does not bind itself to prior rulings, the potential for abuse of discretion exists. The Court has ruled, albeit cautiously, on the meaning and scope of public policy on several occasions.¹⁹¹ A national court which requires an interpretation of public policy in order to render a judgment might refuse to refer the matter to the Court. Technically, the national court does not violate Community law by so refusing.¹⁹² However, unless the member state binds its authorities to all prior rulings of the Court of Justice, the national court may ignore prior rulings.¹⁹³ The national court can thereby render its own interpretation of Community law to serve the particular ends of the member state.¹⁹⁴

Moreover, article 177 fails to provide sanctions against delinquent member states where a national court clearly disregards its obligation to seek an authoritative ruling from the Court. In this situation, as well as those previously discussed, the individual concerned is left without legal recourse because access to the Court of Justice is controlled by the national courts.¹⁹⁵

189. See Simon & Dowrick, *supra* note 179, at 381. Article 177 is silent on whether all member states and their authorities are bound by all preliminary rulings of the Court of Justice. *Id.*

190. *Id.* at 382.

191. See *supra* notes 94-141 and accompanying text.

192. See *supra* note 188 and accompanying text.

193. See *supra* note 189.

194. Even if the national court interprets the exception too broadly in order to serve its own needs or prejudices, it is doubtful that such abuse would fall under article 169. See *infra* note 195 and accompanying text.

195. 2 COMMON MKT. REP. (CCH) ¶ 4656.04, at 3856. Article 177 provides for a preliminary ruling concerning the interpretation of Community law only at the request of the national court. Member states, Community institutions, and natural or legal persons do not possess a similar right. *Id.* However, the Commission might choose to pursue the matter on behalf of the aggrieved individual, or the proceedings might be initiated by a single member state. See EEC Treaty, *supra* note 1, art. 170. Under article 169, if the Commission determines that a member state has failed to fulfill its Treaty obligations, "it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice." *Id.* art. 169. Under article 171, if the Court does find that the member state has failed to fulfill its obligations, it may require the member state to take the necessary measure to comply with the Court's judgment. *Id.* art. 171. A particular judicial action or inaction on the part of a national court might constitute a failure by a member state to fulfill a Treaty obligation. Compare *Bouchereau*, 1977 E. Comm. Ct. J. Rep. at 2020,

Community nationals may also be denied full protection of their Community rights where a member state refuses to recognize the precedence of Community law over national law.¹⁹⁶ In *Cohn-Bendit v. Minister of the Interior*, Cohn-Bendit, a German citizen residing in France, had participated in a student revolt.¹⁹⁷ French authorities concluded that his presence threatened the "ordre public" and consequently deported him.¹⁹⁸ Cohn-Bendit subsequently sought reentry into France in order to accept an offer of employment.¹⁹⁹ His request was denied and Cohn-Bendit instituted proceedings.²⁰⁰ The Paris Tribunal²⁰¹ referred questions regarding Council Directive No. 64/221 to the Court of Justice.²⁰² However, the Conseil d'Etat²⁰³ claimed that neither directives nor regulations have direct effect in matters of public policy.²⁰⁴ It held that the Paris Tribunal was incorrect in referring this matter to the Court

[1977-1978 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8441, at 7961 (Opinion of the Advocate General) (stating that it would be incorrect to hold that particular action or inaction on the part of a national court could never constitute a failure of a state to fulfill a Treaty obligation) with Mertens de Wilmars & Verougstraete, *Proceedings Against Member State for Failure to Fulfil Their Obligations*, 7 COMMON MKT. L. REV. 385, 389-90 (1970) (concluding that a particular judicial action by a national court can never constitute a failure of a member state to fulfill a Treaty obligation but conceding that such a failure might be found where a national court refuses to refer to the Court of Justice where required to do so).

However, in order for article 169 to be invoked against a member state on the basis of wrongdoing on the part of one of its courts, the national court must have deliberately disregarded Community law. "Judicial error, whether due to the misapprehension of facts or to misapprehension of the law, is not a breach of the Treaty." *Bouchereau*, 1977 E. Comm. Ct. J. Rep. at 2020, [1977-1978 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8441, at 7962 (Opinion of the Advocate General).

196. See G. van den Berghe, *supra* note 32, at 24. Germany, France, and Italy are still resistant to the supremacy of Community law. *Id.*; see Rutili, 1975 E. Comm. Ct. J. Rep. at 1229, [1975 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8322, at 7777.

197. Dec. 22, 1978, Conseil d'Etat, Fr., 1979 Dalloz-Sirey, *Jurisprudence* 155. For a rendition of the facts of this case in English, see Simon & Dowrick, *supra* note 179, at 376-79.

198. Simon & Dowrick, *supra* note 179, at 376.

199. *Id.*

200. *Id.* at 376-77.

201. The Paris Tribunal is a regional administrative court. See *id.* at 377.

202. *Id.* "[B]y submitting these questions to the European Court of Justice, the Paris Tribunal had implicitly recognized the right of Community nationals to invoke Community Directive provisions before a national court and therefore acknowledged their self-executing character." *Id.* at 377-78.

203. The Conseil d'Etat is the supreme administrative court in France. See *id.* at 376.

204. *Id.* at 378-79; see 5 H. SMIT & P. HERZOG, *supra* note 1, at 5-618.

and consequently annulled the judgment.²⁰⁵ The judgment of the Conseil d'Etat was in fact erroneous as it disregarded prior Community law which held directives to be directly applicable to member states.²⁰⁶

A situation such as *Cohn-Bendit* where a national authority blatantly disregards the superiority of Community law is rare. Nevertheless, the Community judicial system allows national courts too much discretion and thereby fails to fully safeguard the rights of Community nationals.²⁰⁷

The legal protection of Community nationals can be substantially and simply enhanced. In order to assure that public policy is properly and uniformly interpreted and applied by national authorities, the Court of Justice should be given limited jurisdiction to review cases involving this concept.²⁰⁸ The right of member states to invoke this reservation could be conditioned upon consent to submit to the appellate jurisdiction of the Court if the state's action is challenged.²⁰⁹ The highly discretionary and potentially discriminatory nature of this reservation warrants review by the Court of Justice.²¹⁰ However, this limited grant of jurisdiction should extend to no other areas of Community law.

CONCLUSION

The principles of free movement of workers and freedom of establishment are essential to achieve the objectives of the European Economic Community. These principles infringe upon the traditional right of a sovereign state to control its domestic state of affairs. The public policy exception provided

205. Simon & Dowrick, *supra* note 179, at 379.

206. *Rutili*, 1975 E. Comm. Ct. J. Rep. at 1229-30, [1975 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8322, at 7777; *van Duyn*, 1974 E. Comm. Ct. J. Rep. at 1348, [1975 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8283, at 7226; Simon & Dowrick, *supra* note 179, at 379-82.

207. *See generally* H. SCHERMERS, JUDICIAL PROTECTION IN THE EUROPEAN COMMUNITIES (1976) (comprehensive study of the Community judicial system).

208. *Cf.* Case Concerning the Application of the Convention of 1902 Governing the Guardianship of Infants (*Neth. v. Swed.*) 1958 I.C.J. 55, 100 (Judgement of Nov. 28) (Separate opinion of Judge Sir Hersch Lauterpacht) (addressing whether Sweden, a party to the Convention Governing the Guardianship of Infants could impose on foreign guardians restrictions based on "ordre public" as defined in Swedish law).

209. *See id.*

210. *See id.*

in articles 48 and 56 reserves to the individual member states some control over its borders. Due to its ambiguity, the exception gives member states broader discretion than was intended. National authorities could abuse this ambiguity in order to discriminate against workers of other member states. This possibility is enhanced by the fact that Community nationals are inadequately protected by Community law.

Because it is implausible to precisely define public policy in the context of the free movement of workers, the discretion of member states must be reduced by limiting the scope of the public policy exception. Of primary importance is that the policy be genuine and be directed at nationals and nonnationals alike. Furthermore, the application of the exception should be limited to the refusal of entry, to employment related cases, and to exceptional circumstances where national treatment would not suffice.

By narrowing the scope of the public policy exception as well as granting limited appellate jurisdiction to the Court of Justice, unauthorized discrimination against Community nationals would be eliminated within the Community. Furthermore, the Court would not be unduly burdened since relatively few cases would involve the exception if the suggested restrictions were adopted.

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