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Bruce Carolan

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JUDICIAL IMPEDIMENTS TO LEGISLATING EQUALITY FOR SAME-SEX COUPLES IN THE EUROPEAN UNION

Bruce Carolan*

I. INTRODUCTION

Superficially, Europe appears far more advanced than the United States in legislating for equality for sexual minorities, i.e., lesbians, gays, bisexuals, and transgendered individuals.¹ For example, the European Union ("EU")² has adopted a directive compelling its member states to adopt national legislation prohibiting employment discrimination on the basis of sexual orientation.³ The deadline for implementing this legislation was December 2, 2003.⁴

In fact, some of the member states, such as Ireland, already had in place national legislation prohibiting employment discrimination based on sexual orientation even prior to Council Directive 2000/78 mandating the adoption of

* Head of School of Social Sciences and Legal Studies, Dublin Institute of Technology, Dublin, Ireland. Bruce.carolan@dit.ie. This article developed from the inaugural lecture of the Darden Diversity Lecture Series hosted by the Department of Management and Legal Studies of the University of Florida Warrington College of Business. My thanks to Professors Virginia Maurer and Larry DiMatteo of the University of Florida. The article benefited from my participation in the Hubert Hurst Research Seminar at the University of Florida on February 10-12, 2005. My thanks to Professors Robert Thomas, Terry Dworkin, and the other participants of the Hurst Research Seminar for helpful comments. Any errors are my own.

1. The term "sexual minorities" typically includes individuals who self-identify as lesbian, gay, bisexual, and/or transgendered. For purposes of examining EU law, it is important to distinguish between individuals with a homosexual or bisexual orientation, and those who are transgendered. This distinction is necessary because, as will become apparent, the category "sexual minority" is not homogenous under EU law. EU law distinguishes between lesbian, gay, and bisexual individuals on the one hand, and transgendered individuals on the other. Compare Case C-249/96, *Grant v. South-West Trains Ltd.*, 1998 E.C.R. I-621 (holding that EU law does not prohibit discrimination based on sexual orientation), with Case C-13/94, *P. v. S. & Cornwall County Council*, 1996 E.C.R. I-2143 (holding that EU law prohibits discrimination based on transsexuality).

2. The EU has undergone a number of name changes since the 1957 EEC Treaty created the European Economic Committee. See *Treaty Establishing the European Economic Community*, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter *EEC Treaty*]. The Maastricht Treaty dropped the word "Economic" to form the European Community, and introduced the phrase "European Union." See *Consolidated Version of the Treaty on European Union*, Dec. 24, 2002, O.J. (C 325) 5, 9 (2002) [hereinafter *EU Treaty*]. The abbreviation EU will be employed in most instances for ease of reference, even when referring to the earlier European (Economic) Community.

3. Council Directive 2000/78 of 27 November 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation, 2000 O.J. (L 303) 16 [hereinafter *Council Directive 2000/78*].

4. *Id.* at art. 18.

such national laws.⁵ Ireland, and other member states with such pre-existing national legislation, will be able to rely on these laws as satisfying the obligation under EU law to adopt laws implementing the Council Directive. It is difficult to imagine similar developments in the United States at this time.⁶

However, European legislative developments obscure a deeper, philosophical query that remains unresolved at a pan-European national and supranational level. That query is: what constitutes “discrimination based on sexual orientation”? For example, if an employer refuses to extend “spousal” benefits to the same-sex partner of an employee, does that constitute discrimination based on sexual orientation? What if these employment benefits (such as free travel passes) are made available to opposite-sex unmarried couples, but not to same-sex couples in a similarly long-term, stable relationship? Would this constitute discrimination based on sexual orientation? Does it make any difference if the same-sex partnership is registered in a member state of the EU, where such registration provides many (if not most) of the benefits associated with opposite-sex civil marriage?

The answer to these questions may depend upon judicial interpretation of the relevant European and national laws, by such bodies as the European Court of Justice (“ECJ”).⁷ An early test of the meaning of the concept of discrimination based on sexual orientation may arise when member state laws purporting to

5. See *Employment Equality Act* (1998) (Ir.) [hereinafter *EEA*]. A comprehensive survey of the EU member states which have implemented Council Directive 2000/78 in a timely fashion has not yet been undertaken. It is not unusual for member states to be tardy in implementing directives. See e.g. Joined Cases C-6/90 & C-9/90, *Francovich v. Italian Republic*, 1991 E.C.R. I-5357 (referring to the fact that Italy had been subject of prior enforcement action by the European Commission for failing to implement directive at issue in case).

6. In fact, the legislative trend in the United States has been the reverse of that in Europe. For example, at least seventeen states have amended their state constitutions to define marriage as exclusively between a man and a woman. A complete listing of state laws on marriage is available at the web page for the Human Rights Campaign, *Equality in the States: Gay, Lesbian, Bisexual and Transgender Americans and State Laws and Legislation*, http://www.hrc.org/Template.cfm?Section=Your_Community&Template=/ContentManagement/ContentDisplay.cfm&ContentID=8471 (accessed Apr. 9, 2005). In the U.S. House of Representatives, a proposed constitutional amendment has been introduced that would define marriage as being exclusively between a man and a woman. H.R. Jt. Res. 56, 108th Cong. (May 21, 2003). A companion bill has been introduced in the Senate. Sen. Jt. Res. 26, 108th Cong. (Nov. 25, 2003).

7. The ECJ was established by articles 220-245 of the Treaty Establishing the European Community. *Consolidated Version of the Treaty Establishing the European Community*, Dec. 24, 2002, O.J. (C 325) 33 (2002) [hereinafter *EC Treaty*]. Among other things, the Court has jurisdiction to give “preliminary rulings” concerning “the validity and interpretation of acts of the institutions of the Community.” *Id.* at art. 234. This means that, if an individual believes that a member state has failed to properly or adequately implement a directive, such as Council Directive 2000/78, into its laws, it may ultimately be up to the Court to interpret the directive and assess whether the measures taken to implement the directive into the national law were adequate.

The European Commission (“the Commission”) also plays a role in interpreting the acts of the institution. Among other things, the Commission has a responsibility to “ensure that the provisions of this Treaty and the measures taken by the institutions pursuant thereto are applied.” *Id.* at art. 211. Article 18 of Council Directive 2000/78 requires that member states report to the Commission what steps they have taken to implement the Directive into their national law. The Commission has the power to bring an enforcement action against a member state if it feels the measures taken by the member state to implement a directive are not adequate. *Id.* at art. 226. However, as explained above, it is the ECJ that has the ultimate power to give an “interpretation of acts of the institutions.” *Id.* at art. 234.

implement the council directive prohibiting such discrimination are challenged by individuals who claim that they fail to adequately do so.⁸

In the United States, sexual minorities have turned to state and federal courts to protect themselves from discrimination based on sexual orientation. Lesbians and gays have achieved some success in these actions, resulting in United States Supreme Court decisions striking down legislation that precluded enactment of future civil rights protections for homosexuals⁹ and prohibited same-sex sodomy.¹⁰ At the state level, there have been favorable rulings on the issue of same-sex marriage, resulting in civil union legislation being adopted in Vermont¹¹ and same-sex marriage being made available in Massachusetts.¹² These judicial gains have in some instances resulted in a legislative backlash, with at least seventeen states adopting state constitutional amendments defining marriage as being exclusively between a man and a woman.¹³ Thus, a somewhat progressive judiciary has been thwarted, in some instances, by a conservative legislative backlash.

The reverse situation holds true in Europe. There, it is the ECJ that has acted as a conservative force, with decisions that may weaken progressive legislation at the national and supranational level.¹⁴ These decisions may result in a very narrow construction of the concept of discrimination based on sexual orientation in national and EU legislation, and drain such antidiscrimination legislation of any substantial impact. Ironically, the conservative decisions of the ECJ concerning discrimination based on sexual orientation stand side by side with its more progressive judgments that have prohibited discrimination based on transgendered status, even in the absence of express EU legislation prohibiting such discrimination.¹⁵ In cases brought by transsexual individuals or their partners, the ECJ has given an expansive interpretation of the demands of unwritten, general principles of EU law regarding fundamental principles of equality and nondiscrimination.¹⁶ Simultaneously, the Court has refused to grant

8. There are at least four types of legislation that can be adopted under EU law: regulations, directives, decisions, and recommendations/opinions. A regulation is binding in its entirety and becomes part of member state national law without the need for transposing national legislation. In fact, a member state is prohibited from purporting to adopt national legislation that transposes a regulation into national law. A directive specifies a particular outcome, but leaves the choice of form and methods for achieving that outcome to the member state to which it is addressed. A directive represents a means by which the national law of the member states can be harmonized while respecting the unique legal features of each member state. A directive always provides a deadline by which it must be implemented. A decision binds only the party to whom it is addressed. Recommendations/opinions are nonbinding, and are sometimes referred to as "soft law." *EC Treaty*, *supra* n. 7, at art. 249.

9. *Romer v. Evans*, 517 U.S. 620 (1996).

10. *Lawrence v. Tex.*, 539 U.S. 558 (2003).

11. *Vt. Stat. Ann. tit. 15, §§ 1201-1207* (2002); *Baker v. State*, 744 A.2d 864 (Vt. 1999).

12. *Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

13. *Supra* n. 6.

14. See e.g. *Joined Cases C-122/99P & C-125/99, D & Sweden v. Council*, 2001 E.C.R. I-4319 and *Grant*, 1998 E.C.R. I-621 (rejecting claims of entitlements to marital benefits for same-sex couples).

15. See e.g. *P. v. S.*, 1996 E.C.R. I-2143.

16. There are several sources of EU law in addition to legislation adopted by the political institutions pursuant to article 249 of the EC Treaty. These sources include the Treaty itself and

similar protection to lesbians and gay men, even in the face of express legislation prohibiting discrimination based on sexual orientation, by giving a restrictive interpretation of the concept of discrimination.¹⁷

This article contends that, notwithstanding the superficial appearance of progress in achieving equality for lesbians and gays, decisions of the ECJ that pre-date recent legislative enactments threaten to undermine legislative efforts to prohibit discrimination based on sexual orientation. This observation is true particularly with respect to claims by same-sex couples. I will explore this premise in the context of a possible judicial challenge to the express terms of the Irish legislation prohibiting discrimination based on sexual orientation. Irish legislation takes a very narrow view of what constitutes such discrimination. The issue likely to face the ECJ is whether this very conservative view satisfies the requirement under EU law to adequately implement Council Directive 2000/78.¹⁸ My conclusion is that the Court, applying its prior decisions, is likely to reject a challenge to the Irish legislation, and thus set a very low benchmark for implementing the principle of equality for sexual minorities into the national law of EU member states. The Court has changed its analysis to allow itself to reach contradictory conclusions, without expressly acknowledging the change in its approach.

This article further contends that the ECJ decisions are irreconcilable and incoherent. They represent a judicial impediment to efforts to legislate equality for sexual minorities in Europe, particularly sexual minorities in same-sex partnerships. Further legislation, particularly in the area of employment benefits for same-sex partners, may be required to redress the regressive effect of these judgments. Part III of this article provides the background of EU equality

international agreements. Another important source of law has been termed "General Principles of European Union Law," which have been announced by the ECJ. The most important of these general principles are the judicially-created "Fundamental Principles of Human Rights," which include the principles of nondiscrimination and equality. See generally Paul Craig & Gráinne de Búrca, *EU Law: Texts, Cases, and Materials* ch. 9 (3d ed., Oxford U. Press 2003).

17. See e.g. *D & Sweden*, 2001 E.C.R. I-4319; *Grant*, 1998 E.C.R. I-621.

18. After a member state has adopted national legislation that implements the objective specified in the directive, an individual relies upon the law that has implemented the directive. See e.g. Case 152/84, *Marshall v. Southampton & South-West Hampshire Area Health Authority (Teaching)*, 1986 E.C.R. 723 (noting that plaintiff initially sought to rely upon national law in support of her claim). In the event that the national court rules that the national law does not provide the remedy sought, the individual could seek to rely upon the terms of the directive itself. See *id.* (noting that plaintiff was unsuccessful on her national law claim but ultimately prevailed on her claim based on EU directive). In that case, the individual would seek to invoke a principle known as "direct effect": this principle allows an individual, in proper circumstances, to rely upon the terms of the directive in the national court. See Case 26/62, *N.V. Algemene Transport—en Expeditie Onderneming van Gend & Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 1. Supremacy and direct effect of EU law are the twin, judicially created pillars that uphold the successful operation of the European integration project. Direct effect, established by the ECJ in the landmark case of *van Gend en Loos*, 1963 E.C.R. 1, means that, in the proper circumstances, an individual who believes that his or her rights under EU law have been violated can bring an action in the national court, and that court is obliged to enforce EU law. In essence, this transforms every EU citizen into a private attorney general, and greatly enhances the effectiveness (*effet utile*) of EU law. Of course, directly effective EU law would be ineffective if it were not superior to conflicting national law. Hence, shortly after announcing the direct effect of EU law, the ECJ expressly decided that EU law was supreme to national law. See *Costa*, 1964 E.C.R. 585.

legislation. Part IV focuses on the development of human rights jurisprudence by the ECJ. Part V reviews the adoption of EU and Irish legislation prohibiting discrimination based on sexual orientation. Part VI sets forth an analysis of ECJ decisions concerning claims of discrimination based on sexual orientation. Part VII analyzes a possible challenge to Irish equality legislation under EU law. Part VIII presents a brief conclusion.

II. LAW OF THE EUROPEAN UNION—BRIEF OVERVIEW

An understanding of the premise that the decisions of the ECJ are a potential impediment to EU legislation designed to promote equality for sexual minorities (and, particularly, same-sex couples) requires a brief overview of the institutions of the EU, the law-making procedures of these institutions, and the relationship between the law of the EU and the national law of the individual member states.

A. *Institutions of the European Union*

The principal legislative institutions of the EU are the Council of Ministers, the European Commission (“the Commission”), and the European Parliament. The principal judicial institution is the ECJ and its associated court, the Court of First Instance. In many respects, the institutional structure of the EU is unique, without easy parallel to the tripartite form of government in the United States, or the parliamentary form of government in the United Kingdom.

The Council of Ministers consists of “a representative of each Member State at ministerial level, authorised to commit the government of that Member State.”¹⁹ Although the European Community Treaty (“EC Treaty”) requires that members of the Commission be chosen on the grounds of their “general competence,”²⁰ it is silent concerning the qualifications required of members of the Council of Ministers. This reflects the fact that the Council is the voice of the member states and that its members represent national, and not EU, interests.²¹ The representative to the Council of Ministers must also have the power to bind the member state that he represents.

The membership of the Council of Ministers is not static. Its makeup changes according to the issues that are being considered. For example, if an agricultural issue is under discussion, the membership of the Council of Ministers typically will consist of the Ministers of Agriculture from the member states (or, at least, representatives who have the power to bind their member states).²²

The Commission consists of a President and 25 members, chosen by common accord among the member states, whose independence “is beyond doubt.”²³ The

19. *EC Treaty*, *supra* n. 7, at art. 203. See Bruce Carolan, *EU Law for Irish Students* 21 (Gill & Macmillan 2004); Craig & de Búrca, *supra* n. 16, at 65.

20. *EC Treaty*, *supra* n. 7, at art. 213.

21. Carolan, *supra* n. 19, at 21; see also Craig & de Búrca, *supra* n. 16, at 54-65.

22. Carolan, *supra* n. 19, at 21; see also Craig & de Búrca, *supra* n. 16, at 65-71.

23. *EC Treaty*, *supra* n. 7, at art. 213.

EC Treaty provides that: "In the performance of [their] duties, they shall neither seek nor take instructions from any government."²⁴ The members of the Commission are appointed for a term of five years.²⁵ Among other things, the Commission must "ensure that the provisions of this Treaty and the measures taken by the institutions pursuant thereto are applied."²⁶ The Commission is assisted by a permanent bureaucracy that is divided into Directorates General.²⁷ These Directorates General are divided by substantive policy areas, such as Agriculture, Competition, the Internal Market, and External Relations.²⁸

The European Parliament, which consists of "representatives of the peoples of the States brought together in the Community,"²⁹ is elected by direct universal suffrage.³⁰ Representatives are elected for a term of five years.³¹ Parliament must approve the appointment of the President of the Commission and the other commissioners.³²

B. *Lawmaking Procedures of the European Union*

For many years, the catchphrase that summarized the lawmaking procedure of the EU was, "The Commission proposes, and the Council disposes."³³ In other words, the Commission drafted proposed legislation and submitted it to the Council of Ministers. The Council of Ministers then voted whether to accept or reject the proposed legislation. The voting procedures in the Council of Ministers were quite complex. Many votes were taken pursuant to a weighted voting procedure known as "Qualified Majority Voting," in which the weight assigned to the vote of each member of the Council varied according to the size of the member's home state.³⁴ The voting formula also addressed other concerns, however, such as avoiding dominance over the smaller member states by the larger states, and vice versa. The EC Treaty (on which all legislation had to be based) specified when the qualified majority voting procedure had to be used (as opposed to a simple majority vote).

The European Parliament once played little or no role in the adoption of EU legislation. When the EC Treaty required the participation of Parliament, the Council and the Commission were free to ignore any opinion that Parliament

24. *Id.*

25. *Id.* at art. 214.

26. *Id.* at art. 211.

27. *See* Craig & de Búrca, *supra* n. 16, at 66.

28. *See id.*

29. *EC Treaty*, *supra* n. 7, at art. 189.

30. *Id.* at art. 190(1).

31. *Id.* at art. 190(3).

32. *Id.* at art. 214(2).

33. *See* Carolan, *supra* n. 19, at ch. 4. This catchphrase arose from the original wording of article 189 of the EC Treaty (since re-numbered as article 249), which provided that "the Council and the Commission shall" make laws for the EU. Article 249 now provides that "the European Parliament acting jointly with the Council, the Council and the Commission shall" make laws for the EU. Parliament's role in the adoption of legislation thereby has been increased.

34. Carolan, *supra* n. 19, at 23-40; *see also* Craig & de Búrca, *supra* n. 16, at ch. 4.

might provide. This lack of participation by Parliament led to criticisms of the EU as suffering from a democratic deficit. Over the years since the first direct elections of the members of Parliament, the role of Parliament in the adoption of EU legislation has gradually increased. At present Parliament is approximately an equal partner with the Council of Ministers in the adoption of EU legislation, insofar as Parliament now has the power to "kill off" most legislation with which it disagrees.³⁵ There is a procedure whereby differences between the Council and Parliament can be reconciled, much in the manner that the two houses of the U.S. Congress seek to reconcile differences over bills before Congress. In some instances Parliament still lacks the power to kill off EU legislation, but in the case of most legislative proposals, Parliament enjoys full powers of co-decision.³⁶

C. Relationship between European Union and National Law

EU law is supreme to the law of the member states.³⁷ It is also possible for an individual to invoke EU law in his or her national courts.³⁸ The national courts are obliged to recognize EU law, even if it has not formally been transposed into the national law.³⁹ The national courts must fashion appropriate remedies if they determine that EU law has been violated.⁴⁰ They must further ensure that the remedy provided is at least as generous as the remedy provided by an analogous national law.⁴¹ The remedy must be effective, irrespective of the remedy available for violation of the analogous provision of national law.⁴²

Most of the legislation enacted in the EU takes the form of regulations or directives.⁴³ Regulations are binding in their entirety, and become part of the domestic national legal order without the need for transposing legislation.⁴⁴ A directive, on the other hand, is directed to one or more member states, and

35. *Supra* n. 33 and accompanying text.

36. Article 251 of the EC Treaty sets forth the co-decision procedure, which now applies to most legislation proposed by the EU. See Carolan, *supra* n. 19, at 72-73; Craig & de Búrca, *supra* n. 16, at 144-47. Article 251 provides that, after the Council of Ministers has adopted a common position on a proposed piece of legislation, it must send it to the European Parliament. If Parliament, acting by an absolute majority of its members, rejects the common position, "the proposed act shall be deemed not to have been adopted." *EC Treaty*, *supra* n. 7, at art. 251(2)(b). This article thus affords Parliament the power to terminate a piece of legislation in many circumstances. However, not all legislative proposals are subject to this co-decision procedure. See Carolan, *supra* n. 19, at 72.

37. See Case 6/64, *Costa v. E.N.E.L.*, 1964 E.C.R. 585.

38. See *van Gend & Loos*, 1963 E.C.R. 1.

39. See e.g. *Francovich*, 1991 E.C.R. I-5357 (discussing the existence and scope of a member state's liability for breaches of community law).

40. See e.g. Case 14/83, *von Colson v. Land Nordrhein-Westfalen*, 1984 E.C.R. 1891; see also Bruce Carolan, *Winning Isn't Everything: National Judicial Protection of Rights under European Community Law*, 5 Tulsa J. Comp. & Intl. L. 89 (1997).

41. See Case 33/76, *Rewe-Zentralfinanz eG v. Landwirtschaftskammer für das Saarland*, 1976 E.C.R. 1989.

42. See *von Colson*, 1984 E.C.R. 1891.

43. Article 249 of the EC Treaty provides: "In order to carry out their task and in accordance with the provisions of this Treaty, the European Parliament acting jointly with the Council, the Council and the Commission shall make regulations and issue directives, take decisions, make recommendations or deliver opinions."

44. Article 249 provides: "A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States."

specifies an outcome, but leaves the choice of form and method for achieving this outcome to the member state.⁴⁵ The directive sets a deadline by which the member state is meant to achieve the specified outcome—typically by adopting national legislation or regulations that achieve the goals specified.

A member state may sometimes fail to adequately implement a directive into the national law. Individuals who seek to rely upon the national law may find that it does not provide the remedy to which they believe they are entitled under the EU directive.⁴⁶ In the proper circumstances, an individual may essentially “leapfrog” over national legislation and seek to rely upon the terms of the underlying directive. Ultimately the ECJ may be asked, pursuant to the preliminary reference procedure specified in the EC Treaty, whether the member state has adequately implemented the directive.⁴⁷ That query is the likely method by which the ECJ’s interpretation of discrimination based on sexual orientation will come to a head. That query, particularly in the context of same-sex couples, is also the focus of the remainder of this article.

III. BACKGROUND OF EUROPEAN UNION “EQUALITY” LEGISLATION

The six founding members of the then European Economic Community (“EEC”) were France, Germany, Italy, and the three Benelux countries: Belgium, the Netherlands, and Luxembourg.⁴⁸ The signing of the European Economic Community Treaty (“EEC Treaty”)⁴⁹ in 1957 represented a bold step in the history of international relations between sovereign states. The EEC was later described by the ECJ as a “new legal order” in international law, for the benefit of which the member states had surrendered a measure of their sovereignty and agreed to live under a set of rules that were supreme to their own national laws.⁵⁰

The original EEC Treaty contained a rule regarding the equal treatment of men and women in the area of pay. Article 119 (now Article 141) of the Treaty provided: “Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.” This seems a very progressive sentiment for 1957. For one thing, the Article requires that men and women receive equal pay for equal work, which was not always the case at the time.⁵¹ Second, the Article requires equal pay for work of *equal value*.

45. Article 249 provides: “A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.”

46. See e.g. *von Colson*, 1984 E.C.R. 1891 (allowing claimants who were dissatisfied with remedy provided under German law for sex discrimination to invoke underlying directive, which German law purported to implement); see also *Carolán*, *supra* n. 40.

47. *EC Treaty*, *supra* n. 7, at art. 234 (providing that a member state court may refer a matter to the ECJ for a preliminary ruling concerning treaty or statutory interpretation).

48. *Craig & de Búrca*, *supra* n. 16, at 10-12.

49. *Supra* n. 2.

50. *van Gend & Loos*, 1963 E.C.R. 1 at Grounds (II)(B).

51. See e.g. *Case 43/75, Defrenne v. Societe Anonyme Belge de Navigation Aeriennne Sabena*, 1976 E.C.R. 455 (involving female airline personnel complaining they were paid less than their male counterparts).

This exceeds the requirement of equal pay for equal work. Under this principle, it would be theoretically possible for a woman employed as a secretary, for instance, to argue that she should be paid as much as someone employed in a predominantly male field such as that of security guard, on the basis that these represented employments of equal value. One might think the EEC was ahead of its time in articulating fundamental human rights principles of equality and nondiscrimination. However, this view would be incorrect.

The EEC was primarily about "economics," as its name implies. One of the primary goals, if not the primary goal, of the EEC Treaty was the creation of a common market.⁵² A common market would guarantee, among other things, the free movement of goods, workers, services, and capital. The rationale underlying the goals of the EEC, including the creation of a common market, was that once the factors of production were free to move to their highest and best use (through the elimination of protectionist barriers represented by customs duties and quantitative restrictions) the result would be the maximization of consumer welfare.⁵³ The removal of tariffs likely would cause some local economic dislocation. Firms that had been protected by tariffs might go out of business when faced with competition from more efficient companies from other countries. However, the hope was that economic gains to consumer welfare would more than offset these economic losses.

The creation of a common market was seen as a necessary, but not necessarily sufficient, condition for this wealth maximization. It would also be necessary to ensure that all the member states were operating on a level playing field. Rules would be needed to ensure that neither private actors nor member states attempted to obtain an unfair advantage in other ways, now that customs duties, quantitative restrictions, and other restrictions on free trade had been eliminated. European antitrust laws, known as competition laws, were enacted to prevent private actors from colluding to divide markets, and thus thwart efforts to create a single European market.⁵⁴

The desire for a level playing field was also the motivation behind demanding equal pay for men and women throughout the European Community. If one member state allowed women to be paid less than men, that state would enjoy an unfair advantage in trying to attract businesses to its territory. One of

52. The goal of creating a common market would be underpinned by a strong institutional structure. The institutions of the EEC comprised the Council of Ministers, the Commission, the Assembly (later re-named the European Parliament), and the ECJ, institutions that continue, in slightly altered form, in the modern EU. See *EC Treaty*, *supra* n. 7, at arts. 189-245. For a general discussion of the development of the modern structure of the EU, see Carolan, *supra* n. 19, at chs. 2-3; Craig & de Búrca, *supra* n. 16, at ch. 1.

53. Carolan, *supra* n. 19, at 7.

54. The competition laws are set forth primarily at what are now Articles 81 and 82 of the EC Treaty. Article 81 roughly parallels section 1 of the U.S. Sherman Act (15 U.S.C. § 1 (2000)) and prohibits collusive behavior such as price fixing and market division. Article 82 roughly parallels section 2 of the Sherman Act (15 U.S.C. § 2) and prohibits "abuse" of a "dominant position," the European equivalent of monopolization. Although EU competition laws share many of the same goals as U.S. antitrust laws, the continuing creation of a single European market has caused the EU competition laws to develop certain unique traits not shared by U.S. antitrust laws.

the factors of production—labor—would be less expensive in some member states if the EEC did not require equality in pay between men and women.

Thus, human rights were not the primary motive behind the 1957 adoption of what is now Treaty Article 141. According to the ECJ, the EEC enjoyed only the limited competence specified in the treaties underpinning it⁵⁵—much like the U.S. federal government enjoys only powers enumerated in the U.S. Constitution—and that competence did not extend to human rights. The EEC was concerned only with economic matters.

Ultimately, the EEC, using powers bestowed upon it under Treaty Article 141 (formerly Article 119), adopted secondary legislation in the form of directives that imposed additional obligations on member states in the area of equal treatment for men and women.⁵⁶ The most prominent legislation was perhaps Council Directive 76/207 (“Equal Treatment Directive”),⁵⁷ adopted by the European Council of Ministers in 1976, which commanded member states to adopt national laws that would ensure equal treatment of men and women in all aspects of employment, including hiring and firing and other working conditions.

In adopting this directive, the Council of Ministers did not invoke principles of fundamental human rights to justify the equal treatment of men and women in employment. Instead, the Council invoked economic considerations. It referred to the “harmonization of living and working conditions”⁵⁸ throughout the EEC. In other words, the European Community was again not motivated by human rights considerations; rather, it was concerned with making sure there was an economically level playing field to advance the goal of creating a common market in which the factors of production could move to their highest and best use, free from artificial restraints that might be imposed by member states.

These were the foundations of the principles of equal treatment in the EU, which differ radically from the explicitly justice-based considerations behind similar U.S. legislation, such as the 1964 Civil Rights Act,⁵⁹ which, among other things, prohibits employment discrimination based on race or sex. However, human rights considerations gradually worked their way into European Community thinking. This opened up the possibility of expanding the protections contained in the existing EEC Treaty and legislation to broader categories of discrimination, such as discrimination based on sexual orientation and transsexuality. How did this transformation occur? The next section of this article traces the revolutionary discovery of human rights protections within Community law.

55. See e.g. Case 1/58, *Friedrich Stork & Cie v. High Authority*, 1959 E.C.R. 17 at ¶ 4 (stating that the Court was required to apply Community law, and not the national law of the member states).

56. See e.g. Council Directive 76/207 of 9 February 1976 on the Implementation of the Principle of Equal Treatment for Men and Women as Regards Access to Employment, Vocational Training & Promotion, & Working Conditions, 1976 O.J. (L 39) 40 [hereinafter *Council Directive 76/207*].

57. *Id.*

58. *Id.* at preamble.

59. 42 U.S.C. §§ 2000e to 2000e-16 (2000).

IV. DEVELOPMENT OF HUMAN RIGHTS JURISPRUDENCE IN THE EUROPEAN UNION

The EEC Treaty was not the first international agreement among the six original member states, although many observers regard it as the starting point of the modern EU. The decision to create a community expressly limited to economic issues followed previous unsuccessful attempts by the six original member states to cooperate in broader areas of concern, including common defense and political matters.

In 1951, the six original member states agreed to form a European Coal and Steel Community. These member states ratified the European Coal and Steel Community Treaty ("ECSC Treaty"),⁶⁰ pursuant to which the coal and steel resources of the six member states were put under the control of a central institution known as the High Authority. Essentially, the Treaty created a common market in coal and steel: member states forfeited their sovereign right to set tariffs or quotas on the import or export of steel. The success of the ECSC Treaty emboldened the six member states to propose a European Defense Community and a European Political Community. However, these efforts failed.⁶¹ The failure of these efforts convinced the member states to limit their subsequent efforts to the creation of the EEC. Hence, the EEC Treaty addressed primarily economic issues.⁶²

Initially, the ECJ rebuffed efforts of individuals who beseeched it to protect their human rights. The Court claimed that it had no competence or jurisdiction to consider human rights claims. These claims were generally brought under two arguments: either individuals sought to invoke human rights protections contained in their national constitutions, or they argued that protection of fundamental human rights was implicit in the treaties establishing the European Community. The Court rejected both arguments. It ruled that Community law was superior to national law (much in the manner that U.S. federal law is supreme when compared to the law of individual states), and, furthermore, that Community law was limited to economic matters, and provided no basis for a claimed violation of human rights.⁶³

However, the Court was forced to reconsider these issues a short time later. Some member states, such as Germany, had national constitutions that provided very strong human rights protections.⁶⁴ Perhaps out of concern for such strong

60. Apr. 18, 1951, 261 U.N.T.S. 140.

61. The efforts failed when the French National Parliament refused to debate the European Political Community Treaty, thereby effectively killing both it and the earlier European Defense Community Treaty. See Carolan, *supra* n. 19, at ch. 2.

62. See generally Carolan, *supra* n. 19, at ch. 1.

63. See e.g. *Stork*, 1959 E.C.R. 17; Cases 36, 37, 38 & 40/59, *Präsident Ruhrkolen-Verkaufsgesellschaft mbH v. High Authority*, 1960 E.C.R. 423 (rejecting claims based on national law and declining to base human rights protections on Community law).

64. Plaintiffs relied on protections in the German national constitution in *Präsident Ruhrkolen-Verkaufsgesellschaft*, 1960 E.C.R. 423. The Irish Constitution also contains strong protection of individual human rights, at articles 40.1 (equality), 40.4 (personal liberty), and 40.6 (freedoms of expression, assembly, and association).

protection of human rights by member states, the Court concluded that protection of fundamental human rights was implicit in the law of the European Community.⁶⁵ However, in the absence of any express written statement of these rights in the ECSC Treaty, it was left to the Court to elaborate on the scope of these human rights protections. In a series of decisions, the Court gave shape to the fundamental human rights that formed an unwritten part of Community law.⁶⁶ The Court drew inspiration from the human rights principles common to the member states of the European Community and from international agreements to which the member states were signatories, such as the European Convention on Human Rights.⁶⁷

The development of human rights principles in EU law broadened the scope of Court review of claims of discrimination. In other words, in evaluating claims of discrimination based on transsexuality or homosexuality, the Court would be required to interpret existing antidiscrimination legislation in light of fundamental principles of human rights. The Court could also invoke general principles of the Community law of fundamental human rights as an additional source of protection, if it so wished.

The political institutions of the European Community reacted to these developments by expressly adopting human rights principles in subsequent amendments to the treaties underpinning the Community.⁶⁸ One of the most notable developments to date has been in the EU Treaty, the so-called Maastricht Treaty, which states: "The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States."⁶⁹ Another notable development has been the adoption of a Charter of Fundamental Rights, which was proclaimed by the European Council at the Nice Summit, at the time of

65. See e.g. Case 29/69, *Stauder v. City of Ulm*, 1969 E.C.R. 419; Case 11/70, *Internationale Handelsgesellschaft mbH*, 1970 E.C.R. 1125.

66. See e.g. Case 155/79, *AM & S Europe Ltd. v. Commission*, 1982 E.C.R. 1575; Case 44/79, *Hauer v. Land Rheinland-Pfalz*, 1979 E.C.R. 3727; Case 4/73, *J. Nold, Kohlen v. Commission*, 1974 E.C.R. 491. These cases identify various sources that have shaped the content of human rights protections under EU law.

67. It is difficult to overstate the significance of the Court's "discovery" of human rights principles implicit in the unwritten, general principles of EU law. It would be akin to the United States Supreme Court announcing that it had discovered the protections contained in the U.S. Bill of Rights in the absence of the first ten amendments to the U.S. Constitution. Such a dramatic "discovery" would raise numerous complications regarding the substance and scope of the newly-discovered human rights protections. These complications indeed ensued after the development of human rights principles in the jurisprudence of the ECJ. For instance, the Court has, on occasion, given an interpretation of a principle inspired by the separate European Convention on Human Rights, only to have this interpretation contradicted in a later decision of the European Court of Human Rights, a body officially charged with enforcing the Convention on Human Rights. Compare e.g. Joined Cases 46/87 & 227/88, *Hoechst AG v. Commission*, 1989 E.C.R. 2859 (rejecting claim that the right of privacy extended in the Convention on Human Rights applied to a business), with *Chappell v. United Kingdom*, 12 Eur. Ct. H.R. (ser. A) 1 (1989) (noting that the European Court of Human Rights suggested that the right of privacy extended in the Convention on Human Rights might apply to a business).

68. See e.g. *EU Treaty*, *supra* n. 2, at preamble ("CONFIRMING their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms . . .").

69. *Id.* at art. 6(1).

signing of the Nice Treaty.⁷⁰ The legal effect of this proclamation is uncertain. However, the Draft Treaty for a Constitution for Europe, currently being considered, proposes to incorporate the Charter wholesale into the Constitution.⁷¹

The creation of human rights principles in EU law was, and remains, an iterative process. The Court recognized unwritten fundamental rights as part of the general principles of EU law.⁷² The political institutions thereafter expressly incorporated human rights principles into subsequent treaty amendments and secondary legislation, thereby broadening the competencies of the EU.⁷³ In subsequent litigation involving treaty articles or legislation embodying human rights principles, the Court was called upon to interpret, and thus limit or expand, the scope of human rights protections. The Court thus plays a critical role in determining the outer boundaries of legislative powers under the limited competence attributed to the EU in the founding and amending of treaties.

The next section of this article sets forth EU legislative actions with respect to laws prohibiting discrimination based on sexual orientation, before considering the potential impact of Court decisions on the implementation of this legislation.

V. LEGISLATION PROHIBITING DISCRIMINATION BASED ON SEXUAL ORIENTATION

A. *European Union Legislation Prohibiting Discrimination Based on Sexual Orientation*

The political institutions of the EU have played a leading role in promoting legislation prohibiting discrimination on the basis of sexual orientation.⁷⁴ In some ways, at least superficially, the actions taken by these political institutions have favored the rights of lesbians, gays, bisexuals, and transsexuals much more than

70. The proclamation accompanying the Nice Treaty is officially known as the Charter of the Fundamental Rights of the European Union, Dec. 18, 2000, O.J. (C 364) 1 (2000).

71. *Treaty Establishing a Constitution for Europe*, Dec. 16, 2004, O.J. (C 310) pt. 1, art. I-1 (2004) [hereinafter *Constitution for Europe*]. The draft Constitution also proposes that the EU as an entity become a signatory to the European Convention for the Protection of Human Rights and Fundamental Freedoms, to which all of the member states of the EU already are signatories. *Id.* at art. 2. This would establish a clear legal hierarchy in the interpretation of the European Convention for the Protection of Human Rights and Fundamental Freedoms, with the European Court of Human Rights becoming the final arbiter of its meaning. It would also avoid the anomalous situation of the past, when the ECJ and the European Court of Human Rights occupied essentially equal positions with respect to the interpretation of the Convention in respect to claims arising within the EU, and at times reached conflicting interpretations of identical provisions of the Convention. See *supra* n. 66.

72. See e.g. Case 29/69, *Stauder v. City of Ulm*, 1969 E.C.R. 419 (acknowledging human rights protections as part of unwritten general principles of EU law).

73. For example, the Treaty of Amsterdam amended Article 6 (formerly Article F) of the EU Treaty. *Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities, and Certain Related Acts*, Oct. 11, 1997, O.J. (C 340) 1 (1997) [hereinafter *Amsterdam Treaty*]. Article 6(2) of the EU Treaty now provides: "The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law."

74. See e.g. *Council Directive 2000/78*, *supra* n. 3 (prohibiting, inter alia, discrimination based on sexual orientation).

actions by corresponding U.S. federal institutions.⁷⁵ In other ways, however, the laws enacted by these European political institutions may seem anemic when measured against any common-sense notions of equality or fundamental human rights. In some cases, this anemia is the result of weakened protections embodied in the European legislation.⁷⁶ In other cases, the anemia likely will result from application of the confusing and contradictory rulings of the ECJ in the interpretation and application of European equality legislation.

In amendments to the EC Treaty brought about by the Treaty of Amsterdam in 1997,⁷⁷ the European Community obtained express powers to legislate against discrimination based on sexual orientation. Article 13(1) now provides:

Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

Pursuant to the powers conferred under Article 13, the Commission proposed and the Council unanimously adopted a council directive establishing a general framework for equal treatment in employment and occupation ("General Framework Directive").⁷⁸ This directive addresses employment discrimination based on religion, disability, age, and sexual orientation. A separate directive, adopted before the General Framework Directive, addressed discrimination based on race and ethnicity.⁷⁹ (Council Directives pre-dating the adoption of Article 13 of the Treaty of Amsterdam already addressed discrimination between men and women.) With respect to discrimination based on sexual orientation, the Preamble to the General Framework Directive states:

Discrimination based on . . . sexual orientation may undermine the achievement of the objectives of the EC Treaty, in particular the attainment of a high level of employment and social protection, raising the standard of living and the quality of life, economic and social cohesion and solidarity, and the free movement of persons.

To this end, any direct or indirect discrimination based on . . . sexual orientation . . . should be prohibited throughout the Community.⁸⁰

The General Framework Directive required member states to adopt in their national laws legislation that implemented its principles of nondiscrimination based on sexual orientation. The deadline for this implementation was December

75. For instance, Congress has not amended Title VII of the Civil Rights Act of 1964 to include sexual orientation.

76. See Bruce Carolan, *Rights of Sexual Minorities in Ireland and Europe: Rhetoric versus Reality*, 19 Dick. J. Intl. L. 387 (2001).

77. *Supra* n. 73.

78. Council Directive 2000/78, *supra* n. 3.

79. Council Directive 2000/43 of 29 June 2000 Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin, 2000 O.J. (L 180) 22.

80. EC Treaty, *supra* n. 7, at preamble ¶¶ 11-12; *id.* at art. 249.

2, 2003. Thus, as of December 3, 2003, all member states were required to have in place national legislation prohibiting discrimination based on sexual orientation. The 10 states that joined the EU in May 2004—including some fairly conservative countries of Central and Eastern Europe—will be required to adopt similar legislation.⁸¹

The General Framework Directive is not the only recent development by EU political institutions addressing discrimination based on sexual orientation. The EU debated whether to adopt the Charter of Fundamental Rights ("Charter")⁸² as it prepared for the European Summit in Nice, France. The Nice Summit produced the Treaty of Nice, which provided for institutional changes necessary to accommodate expansion of the EU to include new member states from Central and Eastern Europe. The Draft Treaty for a Constitution for Europe also incorporates the Charter.⁸³ The Charter contains a number of provisions concerning sexual orientation. Article 21(1) of the Charter concerns "nondiscrimination," and provides that "[a]ny discrimination based on . . . sexual orientation shall be prohibited." It is likely that the Constitution for Europe will likewise provide that "discrimination based on . . . sexual orientation is prohibited."

Thus, on one level, the political institutions of the EU have proved themselves far more willing to adopt statements of nondiscrimination based on sexual orientation than their counterparts in the United States. However, this begs the question: What is the content of these proclamations? It is one thing to prohibit discrimination in the abstract. It is another to examine its application in a concrete situation. We can consider the issue by examining antidiscrimination laws adopted in one EU member state, Ireland, and asking if these laws satisfy the requirements of EU law. It is conceivable that an individual could argue that Irish law fails to implement EU law adequately.⁸⁴ The Irish courts may ultimately refer such a case to the ECJ for a determination of whether Irish law adequately implements the requirements of the General Framework Directive.⁸⁵

81. We can contrast this with the United States, where efforts to adopt federal legislation banning discrimination on the basis of sexual orientation have been unsuccessful. The approximate parallel to the European experience would be if the U.S. Congress amended Title VII of the 1964 Civil Rights Act to include sexual orientation as a category protected from discrimination in employment and housing. This is not likely to happen in the near future. A limited number of states has adopted antidiscrimination laws directed at sexual orientation, and a growing number of municipalities has done likewise. For a comprehensive list of states and municipalities that have adopted laws or ordinances prohibiting discrimination based on sexual orientation, see Carrie Evans, *Equality from State to State: Gay, Lesbian, Bisexual and Transgender Americans and State Legislation* (Human Rights Campaign Found. 2004) (available at http://www.hrc.org/Template.cfm?Section=About_HRC&Template=/ContentManagement/ContentDisplay.cfm&ContentID=24538). But broad federal legislation would appear to be some way off.

82. *Charter of Fundamental Rights of the European Union*, Dec. 18, 2000, O.J. (C 364) 1 (2000).

83. *Constitution for Europe*, *supra* n. 71, at pt. 1, art. I-1.

84. See e.g. Case 41/74, *van Duyn v. Home Office*, 1974 E.C.R. 1337 (noting that plaintiff claimed the U.K. failed to adequately implement a directive limiting grounds on which EU nationals could be prevented from entering the country).

85. Under the doctrine of direct effect, an individual may invoke EU law in a national court, and the national court must give effect to such law. *Supra* n. 18. However, with so many national courts interpreting EU law, this might pose a risk of inconsistent interpretations of identical provisions of EU

As mentioned, member states were required to adopt national legislation to implement the General Framework Directive by the beginning of 2004. In fact, Ireland had adopted legislation as early as 1998, in the form of the Employment Equality Act,⁸⁶ that prohibited employment discrimination based on sexual orientation. Under EU law, a member state is permitted to cite to existing law as fulfilling the obligation to implement the requirements of a later-adopted directive.⁸⁷ Ireland is certain to do so. This raises the question of whether Ireland has afforded adequate protection under national law to satisfy the obligation to implement the terms of the Directive, or whether its national law is deficient. The Commission can bring an enforcement action against a member state if it believes the member state has failed to take adequate steps to implement a directive, or if its efforts constitute mere window dressing.⁸⁸ A more likely possibility is that an individual who fails to obtain relief under national law will argue that the state has failed to implement the law adequately, leading ultimately to a decision by the ECJ. The next section considers whether the Irish legislation adequately implements the terms of the Directive.

B. Irish Legislation Prohibiting Discrimination Based on Sexual Orientation

In 1997, a subdivision of the U.S. Department of State issued a report entitled "Country Report on Human Rights Practices for 1996 for Ireland."⁸⁹ This report noted that Irish law did not prohibit discrimination based on disability, race, sex, religion, language, or social status,⁹⁰ but failed to even note the concept of discrimination based on sexual orientation. However, since this report issued, there has been a flurry of legislative activity in Ireland directed toward employment discrimination, including discrimination based on sexual orientation.

The most significant of these activities was the adoption of the Employment Equality Act of 1998 and the Equal Status Act of 2000. Among other things, these acts expressly forbid discrimination based on sexual orientation in employment

law. EU law includes a mechanism for ensuring uniform interpretation of EU law by national courts of the member states. Article 234 of the EC Treaty provides that any national court or tribunal may make a reference to the ECJ seeking interpretation of EU law, where that law is necessary to give a decision. The highest national court must make such a reference. The ECJ provides an interpretation of the relevant law and returns the case to the national court, which enters judgment in accordance with the interpretation provided by the ECJ.

86. *EEA, supra* n. 5.

87. See e.g. *Marshall*, 1986 E.C.R. 723 (noting that the U.K. relied upon provisions of its Sex Discrimination Act 1975 as implementing requirements imposed by the EU Equal Treatment Directive of 1976).

88. The Commission, among other responsibilities, acts as guardian of the treaties. Articles 226 and 228 of the EC Treaty outline the steps that the Commission can take to bring an enforcement action against a member state for its alleged failure to fulfill its obligation under EU law. These failures include the outright refusal to implement a directive into national law as well as the inadequate implementation of a directive into national law. An enforcement action by the Commission against a member state ultimately can result in a fine being imposed upon the member state by the ECJ.

89. U.S. Dept. of St., Bureau of Democracy, Human Rights, & Labor, *Ireland Country Report on Human Rights Practices for 1996* (Jan. 30, 1997) (available at http://www.state.gov/www/global/human_rights/1996_hrp_report/ireland.html).

90. *Id.* at § 5.

and public accommodation. On the one hand, it may be surprising to learn that conservative, Catholic Ireland has had national legislation prohibiting discrimination against homosexuals since 1998 (the national legislature repealed laws criminalizing homosexual acts in 1993).⁹¹ On the other hand, there is the question of the substance of this protection.

Take, for example, a common complaint by homosexuals—that of denial of employee “spousal” benefits for same-sex couples, i.e., benefits provided to the opposite-sex spouse of a heterosexual employee. Does the Irish Employment Equality Act provide a remedy for this complaint? Could a lesbian bring a claim against her employer if she sought and was denied, for example, health insurance for her same-sex partner? Would this be a prohibited form of sexual orientation discrimination under Irish law?

The answer is no. Section 34 of the Irish Employment Equality Act is entitled “Savings and exceptions related to the family, age or disability.” This section expressly provides that nothing contained in the Employment Equality Act makes it unlawful for an employer to provide “a benefit to or in respect of a person as a member of an employee’s family.”⁹² Could the lesbian employee successfully argue that her same-sex partner is a member of her “family”? In other words, could she ask an Irish court to give a broad interpretation to the word “family” so as to include a same-sex partner?

The answer, again, is no. Section 2 of the Act provides that “member of the family” for the purposes of the Act means “that person’s spouse,” or “a brother, sister, uncle, aunt, nephew, niece, lineal ancestor or lineal descendant of that person or that person’s spouse.”⁹³ Although Irish law does not provide a statutory definition of “spouse,” it is extremely unlikely that an employee could argue that her same-sex partner was her “spouse.”

91. Laws prohibiting male-male sexual acts in Ireland were repealed as the result of the decision of the European Court of Human Rights in *Norris v. Ireland*, 13 Eur. Ct. H.R. 186 (1988).

92. *EEA*, *supra* n. 5, at § 34(1)(b).

93. The Irish Constitution contains exceptionally strong language regarding the family, the role of a woman within the family, and the state’s obligation to the family. This language could be viewed as strongly conservative and resistant to an expansive interpretation of “family.” Article 41 of the Irish Constitution, known in the Irish language as *Bunreacht Na hÉireann*, provides, *inter alia*, “The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.” It goes on to provide:

[T]he State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved.

The State shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home.

Id. With respect to marriage, Article 41 provides: “The State pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack.”
Id.

Furthermore, if we assume hypothetically that the lesbian employee is fired from her job in response to the request for employee benefits for her same-sex partner (perhaps because her employer did not realize she was in a same-sex relationship when she was hired), it is not clear that there would be a remedy under the Irish Employment Equality Act. This could be portrayed as not constituting discrimination based on sexual orientation, but rather discrimination based on the fact that the employee is cohabiting. Discrimination based on cohabitation is not prohibited under Irish law.⁹⁴ Marital status discrimination is prohibited, but "marital status" is defined as "single, married, separated, divorced or widowed."⁹⁵

In Senate debates over amendments proposed to the Act, the Irish Minister for Justice, John O'Donoghue, essentially conceded that discrimination against a lesbian or gay man for living with a person of the same sex would not constitute direct discrimination based on sexual orientation.⁹⁶ In light of the Minister's remark, we can hypothesize that it would be open to a defendant to argue that the discrimination at issue was not sexual orientation discrimination, but discrimination based on cohabitation, which is not prohibited by Irish law.

Senator David Norris, an openly-gay Irish senator, complained of this anomaly in his usual colorful language when he said: "[I]f I were an employer, I would say I did not discriminate against you because you are single, married, separated, divorced or widowed, but because you are a pair of fairies living together and I did not like it."⁹⁷ If Senator Norris is correct, the issue becomes whether, in a subsequent lawsuit brought under Irish law, the ECJ will determine that the Irish legislation fails to adequately implement the terms of the EU General Framework Directive into the Irish national law. To answer this question, we must consider previous judgments of the Court concerning discrimination based on sexual orientation. The following section reviews these judgments and suggests that EU law on this issue will be found lacking.

There are four cases relevant to this inquiry, *P. v. S. and Cornwall County Council*,⁹⁸ *Grant v. South-West Trains Ltd.*,⁹⁹ *D. & Sweden v. Council*,¹⁰⁰ and *K.B. v. National Health Service Pensions Agency*.¹⁰¹ The following section deals with each of these cases in turn.

94. *EEA*, *supra* n. 5, at § 6(2)(b).

95. *Id.*

96. 154 Seanad Deb. col. 371 (Feb. 18, 1998), at col. 379.

97. *Id.* at col. 380.

98. Case C-13/94, 1996 E.C.R. I-2143.

99. Case C-249/96, 1998 E.C.R. I-621.

100. Joined Cases C-122/99P & C-125/99, 2001 E.C.R. I-4319.

101. Case C-117/01, 2004 E.C.R. I-00000 (case has not been officially reported yet) (available at http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=62001J0117).

VI. DECISIONS OF THE COURT OF JUSTICE CONCERNING CLAIMS OF DISCRIMINATION BY SEXUAL MINORITIES

A. *P. v. S. and Cornwall County Council*¹⁰²

In *P. v. S. and Cornwall County Council*, the ECJ considered whether the law of the EU—which, by this time, embraced general principles of fundamental human rights law—prohibited employment discrimination against transsexuals. There was no express law of the EU that protected transsexuals from discrimination. Instead, there was Article 119 of the EC Treaty (since re-numbered as Article 141), which prohibited discrimination between men and women in matters of pay. In addition, the European Community had adopted the Equal Treatment Directive, which prohibited discrimination between men and women in other matters affecting employment, such as termination.¹⁰³ There were also the general principles of equality and nondiscrimination, which the ECJ had declared to be implicit in the unwritten law of the Community.¹⁰⁴ The issue was: could any of these various sources of law offer protection to a person claiming employment discrimination based on transsexuality? In other words, could discrimination against a transsexual also be discrimination based on sex, and thus a violation of Community law prohibiting discrimination between men and women? Or, could the principles of fundamental human rights announced by the Court be broad enough to embrace a claim of transsexual discrimination?

The facts of the case were as follows: P worked as a manager in an educational institution operated by the Cornwall County Council. S was Executive Director of the institution and P's superior. At the time P began working for the County Council, P was biologically male. In April of 1992, S noticed that P's work performance was deteriorating and counseled P. S invited P to tell S about anything in P's personal life that might be affecting P's performance at work. P responded by telling S that P was a woman trapped in a man's body, and that P intended to undergo sex reassignment surgery.

The following September, after P had undergone minor sex reassignment surgery, her¹⁰⁵ employer gave her three months' notice of termination. P brought an action for wrongful termination before the Employment Tribunal, the British body charged with deciding cases of wrongful dismissal. P argued that she had been discriminated against by reason of sex. The Tribunal concluded that the true reason for P's dismissal was her intention to undergo gender reassignment. It also concluded, however, that P's situation was not covered by the United Kingdom's

102. Case C-13/94, 1996 E.C.R. I-2143.

103. Council Directive 76/207, *supra* n. 56.

104. See e.g. *Stauder*, 1969 E.C.R. 419.

105. The Advocate General, in his recommendation to the ECJ, and the Court, in its decision, adopted the convention of referring to P in the female gender, even when describing events that occurred when P presented as biologically male. By adopting this convention, both the Advocate General and the Court arguably refused to privilege biology over all other factors—such as psychology—in determining gender. See *Advoc. Gen. Op., P. v. S.*, 1996 E.C.R. I-2143 (available at 1995 WL 1564729). This article also follows this convention in referring to P.

Sex Discrimination Act of 1975, which was the national legislation that had purported to introduce into U.K. national law the obligations imposed upon member states under the European Community Equal Treatment Directive.

However, the Tribunal was uncertain whether the U.K. had properly implemented the requirements of the Equal Treatment Directive into national law. That is, the Tribunal queried whether or not Community law might provide broader protection against discrimination than the national law that purported to implement it. If this were the case, then the national court would be obligated to apply Community law, and rule in favor of the transsexual employee, P. In order to determine whether a prohibition on transsexual discrimination was covered by the Equal Treatment Directive, the Industrial Tribunal referred the question to the ECJ.

In the ECJ, P based her claim on the Equal Treatment Directive. The Advocate General, an officer of the Court who makes a non-binding recommendation to the Court as to how it should rule, gave his opinion.¹⁰⁶ He emphasized that the Equal Treatment Directive represented merely a specific manifestation of a broader, general principle of European Community law, namely, the principle of equality. The Advocate General recommended that the Court rule that the Equal Treatment Directive precluded the dismissal of a transsexual due to her sex.¹⁰⁷

The Court delivered a terse judgment. It ruled that the Equal Treatment Directive "is simply the expression, in the relevant field, of the principle of equality, which is one of the fundamental principles of Community law."¹⁰⁸ Accordingly, the Court further stated:

[T]he scope of the directive cannot be confined simply to discrimination based on the fact that a person is of one or other sex. In view of its purpose and the nature of the rights which it seeks to safeguard, the scope of the directive is also such as to apply to discrimination arising, as in this case, from the gender reassignment of the person concerned.¹⁰⁹

In other words fundamental principles of human rights influenced the Court's interpretation or construction of the Equal Treatment Directive. Against the backdrop of human rights, it can be suggested that the Court gave a broad interpretation to one phrase of the Directive so that it could be understood to

106. The office and responsibilities of the Advocate General are set forth in Article 222 of the EC Treaty. The Advocate General does not have counterpart in a common law system such as that of the United States. According to Article 222, the function of the Advocate General is "to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the ECJ, require his involvement." In other words, the Advocate General gives a non-binding, independent opinion to the Court, based on the submission of the parties to the case. There are several reasons why an Advocate General is useful. Most cases reach the ECJ without a full-blown trial court record. The Advocate General can therefore sharpen the issues for the Court, as a trial court record might. The Advocate General also can summarize and critique submissions made by parties with a right to intervene in cases before the ECJ, such as the member states and institutions of the EU.

107. *Advoc. Gen. Op., P. v. S.*, 1996 E.C.R. I-2143.

108. *P. v. S.*, 1996 E.C.R. I-2143 at ¶ 18.

109. *Id.* at ¶ 20.

include transsexuals. That phrase is contained in Article 2 of the Directive, and it provides that: “[T]he principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex”¹¹⁰ One interpretation of the Court’s ruling is that it interpreted the prohibition against sex discrimination to include discrimination based on a sex change; another possible interpretation is that sex discrimination includes adverse treatment for any reason related to sex and not simply the division of people into male and female genders.

The Court might have stopped with its broad construction of the Equal Treatment Directive. Nothing more was required to prohibit discrimination against transsexuals. It did not, however, stop at this point. Instead, it provided an alternate basis for its ruling. The Court ruled that the discrimination at issue was a form of direct sex discrimination.¹¹¹ That is, it concluded that P had been discriminated against, even before undergoing the surgery to become anatomically female, because she was a woman. This was a dramatic step—supported by an analysis that the Court would later be forced to abandon—and it may have reflected the sentiments expressed by Advocate General Tesauro, who had written in his recommendation to the Court as follows:

[I]t is necessary to go beyond the traditional classification and recognize that, in addition to the man/woman dichotomy, there is a range of characteristics, behaviour and roles shared by men and women, so that sex itself ought rather to be thought of as a continuum. From that point of view, it is clear that it would not be right to continue to treat as unlawful solely acts of discrimination on grounds of sex which are referable to men and women in the traditional sense of those terms, while refusing to protect those who are also treated unfavourably precisely because of their sex and/or sexual identity.¹¹²

Although the Advocate General did not suggest to the Court that this sentiment form the express basis of its ruling, the Court’s ruling is consistent with this view.

In order to formally support its conclusion that the discrimination of which P complained was in reality a form of discrimination based directly on biological sex, the Court offered a method for analyzing a claim of sex discrimination in a situation such as one involving a transsexual. The proper analysis of the claim, the Court said, involved comparing P’s treatment when she was perceived to be a man with her treatment as a woman: “Where a person is dismissed on the ground that he or she intends to undergo, or has undergone, gender reassignment, he or she is treated unfavourably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment.”¹¹³ Thus, in *P. v. S.*, the Court proposed that the proper analysis by which to conclude whether discrimination based on sex had occurred was to ask whether a difference of treatment would result from a change of the complainant’s sex.

110. Council Directive 76/207, *supra* n. 56, at art. 2.

111. *P. v. S.*, 1996 E.C.R. I-2143 at ¶ 21.

112. Advoc. Gen. Op., *P. v. S.*, 1996 E.C.R. I-2143 at ¶ 17.

113. *P. v. S.*, 1996 E.C.R. I-2143 at ¶ 21.

This analysis differs radically from the analysis in U.S. cases involving discrimination against transsexuals. In the United States, transsexuals have attempted to bring lawsuits under Title VII of the Civil Rights Act of 1964,¹¹⁴ which, among other things, prohibits discrimination based upon sex. However, U.S. courts have held that Title VII's provisions prohibit discrimination based on biological sex (i.e., discrimination based on the fact that a person is biologically male or female), and are not available to support a claim of discrimination based on transsexuality.¹¹⁵

The analysis on which this conclusion rests depends upon a different type of comparison than that made in *P. v. S.* In U.S. cases, courts typically ask whether a male-to-female transsexual and a female-to-male transsexual would be treated equally by their employer. The answer to this is invariably: Yes—both would be fired. Thus, there is equality of treatment, albeit unpleasant treatment. However, although there may be discrimination involved, that discrimination is not based on the “sex” of the terminated employee—that is, on whether the employee is (or was) a male or a female. The discrimination is based on something else, i.e., transsexuality, which is not protected under the express terms of Title VII.

One could argue that the holding in *P. v. S.* had potentially far-reaching implications with respect to treatment by the ECJ of claims of discrimination based on sexual orientation. That is, if under European Community fundamental principles of human rights, the phrase “discrimination based on sex” should be interpreted as including transsexuals, then, surely, the phrase should be construed to include lesbians and gay men. Furthermore, if discrimination against transsexuals constitutes a form of direct sex discrimination because they are treated differently upon a change of their sex, then the same analysis might support a claim by homosexuals that discrimination against them constitutes a form of direct sex discrimination. The discrimination against a male in a relationship with another male, for example, would vanish if one (hypothetically) changed the sex of the victim of such discrimination to female.

Fueling this optimism on the part of the European lesbian and gay community was some of the language contained in the recommendation of Advocate General Tesouro and the judgment of the Court itself. For example, the Advocate General wrote, as concerns transsexuals:

The discrimination of which women are frequently the victims is not of course due to their physical characteristics, but rather to their role, to the image which society has of women. Hence the rationale for less favourable treatment is the social role which women are supposed to play and certainly not their physical characteristics. In the same way it must be recognized that the unfavourable treatment suffered by transsexuals is most often linked to a negative image, a moral judgment which has nothing to do with their abilities in the sphere of employment.¹¹⁶

114. See e.g. *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984) (holding that Title VII does not apply to claims of discrimination based on transsexuality).

115. See *id.*

116. Advoc. Gen. Op., 1996 E.C.R. I-2143 at ¶ 20.

These heady words were echoed by the Court when it stated: "To tolerate such discrimination [against a transsexual] would be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled, and which the Court has a duty to safeguard."¹¹⁷

Lesbians and gays in Europe had reason to be optimistic that, in light of *P. v. S.*, they would be successful in seeking protection from employment discrimination under the law of the European Community. In the case of *Grant v. South-West Trains Ltd.*, they had the opportunity to test this optimism. As it turned out, their optimism was misplaced.

B. *Grant v. South-West Trains Ltd.*¹¹⁸

Grant v. South-West Trains Ltd. presented the ECJ with a claim of employment discrimination based on sexual orientation. The Court had to decide whether existing Community legislation, interpreted in light of principles of equality and nondiscrimination embedded in fundamental human rights—guarantees implicit in Community law—included a prohibition on discrimination against lesbians and gays. The Court had the opportunity to rule that, despite the lack of express legislative provisions, fundamental protection of human rights implicitly prohibited discrimination based on sexual orientation.

The facts were as follows: Lisa Grant was employed by South-West Trains. Her employment contract provided that travel concessions were available to a "common law opposite sex spouse."¹¹⁹ South-West Trains had granted travel concessions to the unmarried female partner of the man who had previously been employed in Grant's position. However, South-West Trains denied Grant's application for travel concessions for her female partner on the ground that they were available only to a common law opposite sex spouse.

Grant brought an application before the Employment Tribunal. She claimed the denial of travel concessions to her partner violated Article 119 (now Article 141) of the EC Treaty. The Tribunal made an Article 177 (now Article 234) reference to the ECJ. In her arguments before the Court, Grant claimed that the refusal to grant travel concessions to her female partner constituted direct sex discrimination in violation of Article 119. Alternatively, Grant argued that the refusal to grant travel concessions to her female partner constituted discrimination based on sexual orientation, and that such discrimination should be considered "discrimination directly based on sex."¹²⁰

The Commission, along with the governments of France and the U.K., submitted written observations to the Court. The Commission accepted that discrimination due to sexual orientation constituted discrimination based on sex within the meaning of Article 119.¹²¹ However, it argued that the discrimination of

117. *P. v. S.*, 1996 E.C.R. I-2143 at ¶ 22.

118. Case C-249/96, 1998 E.C.R. I-621.

119. *Id.* at ¶ 5.

120. *Id.* at ¶ 16.

121. *Id.* at ¶ 23.

which Grant complained was not based on her sexual orientation. Instead, it was due to the fact that she was not living as part of a "couple" or did not have a "spouse" as those terms were understood according to the laws of most member states, the European Community, and the European Convention on Human Rights.¹²² The type of discrimination of which Grant complained was therefore outside Article 119, since it was not based on sexual orientation at all.

Advocate General Elmer argued that *P. v. S.* represented a "decisive step away from an interpretation of the principle of equal treatment based on the traditional comparison between a female and male employee,"¹²³ and that the principle announced in *P. v. S.* should apply to Article 119. That is, sex discrimination should not be limited solely to discrimination based on the sex of the claimant, that is, whether the claimant was male or female. He found support for his interpretation in the wording of Article 119, which mandated "equal pay without discrimination based on sex."

Furthermore, as an alternative basis for his recommendation, Advocate General Elmer concluded that direct sex discrimination was present in this case, that is, that Grant had been discriminated against solely on the fact that she was a woman. The policy regarding travel concessions, he argued, was not gender-neutral. The sex of the employee and of the employee's partner was critical in deciding whether to grant the concessions. Travel concessions were available to a female employee only if her partner was male and vice versa. Therefore, discrimination was based on sex within the terms of Article 119. The Advocate General recommended that the Court conclude that the policy in question violated Article 119.

Advocate General Elmer also proposed "opening up" the express prohibitions of Article 119 to embrace situations where the sex of the employee was not directly implicated in the decision whether or not to grant employee benefits, and to allow a wider range of claims to be brought based on an argument that unlawful sex discrimination had occurred. In the Advocate General's words, Article 119 must be interpreted as "precluding forms of discrimination against employees based exclusively, or essentially, on gender,"¹²⁴ even if it was not the gender of the employee that was the critical factor. The Article must be understood "as prohibiting discrimination against employees not solely on the basis of the employee's own gender but also on the basis of the gender of the employee's child, parent or other dependent."¹²⁵ As an example, the Advocate General stated that the Article must prohibit an employer from "denying a household allowance to an employee for sons under 18 living at home when such an allowance in otherwise equivalent circumstances was given for daughters living at home."¹²⁶

122. *Id.*

123. *Advoc. Gen. Op., Grant*, 1998 E.C.R. I-621 at ¶ 15 (available at 1997 WL 1704998).

124. *Id.* at ¶ 16.

125. *Id.* at ¶ 16.

126. *Id.*

How did the Court sort out these various arguments, and what did it rule? The Court concluded that the discrimination at issue did not constitute direct sex discrimination.¹²⁷ It rejected Grant's analysis of her claim of sex discrimination: that "but for" her sex as a female (that is, if she herself were male), she would have obtained travel concessions for her female partner.¹²⁸ According to the Court, her situation had to be compared with that of a similarly-situated male: in this case, a male who sought travel concessions for a male partner. There was no sex discrimination when such a comparator was chosen, because "travel concessions are refused to a male worker if he is living with a person of the same sex, just as they are to a female worker if she is living with a person of the same sex."¹²⁹ Hence, there was no direct sex discrimination.

This analysis is arguably inconsistent with the Court's prior ruling in *P. v. S.* Recall that in that case P had essentially been allowed to act as her own comparator. That is, the Court inquired how P had been treated as a man, and then asked how P had been treated when she was perceived as a woman or as someone who wished to become a woman. Finding that P had been treated less well as a woman than as a man, the Court ruled that there had been direct sex discrimination based on sex.

If we apply the analysis from *P. v. S.* to Grant's situation, a different conclusion is required. There is no disputing that if Grant's sex were male, she would have been treated more favorably—that is, she would have obtained travel concessions for her female partner. Indeed, the man who had previously occupied Grant's position had received travel concessions for his unmarried female partner. In Grant's view, "but for" her female sex, she would not have suffered discriminatory treatment. Hence, in her view, there was direct sex discrimination. However, the Court reverted to the "traditional" comparison, and one with which we are familiar in U.S. cases: it compared the situation of a gay woman with that of a gay man. Since both a gay woman and a gay man would be denied travel concessions for their same-sex partner, there was no discrimination based on sex. The discrimination, if at all, is based on something else.

The Court also had to consider whether that "something else" was sexual orientation, and, if so, whether Community law prohibited discrimination based on sexual orientation. These were the only issues remaining in the case, and they were dispositive: if sexual orientation discrimination was involved and Community law prohibited such discrimination, then Grant would win her case. If sexual orientation discrimination was not involved—or if Community law did not prohibit such discrimination—then Southwest Trains would prevail.

However, the Court took a detour and offered its opinion on same-sex partnerships, in a way that is relevant to current debates about same-sex marriage

127. *Grant*, 1998 E.C.R. I-621 at ¶ 23.

128. In fact, the male employee whom Grant had replaced had himself received travel benefits for his female partner, to whom he was not married, strengthening Grant's argument that "but for" her (female) sex, she would have obtained these benefits for her female partner. *Id.* at ¶ 17.

129. *Id.* at ¶ 27.

in the United States and has implications for future judicial interpretation of recent equality legislation in Europe. The Court considered whether “persons who have a stable relationship with a partner of the same sex are in the same situation as those who are married or *have a stable relationship outside marriage with a partner of the opposite sex*.”¹³⁰ The Court stated that most member states did not consider such relationships as equivalent, that Community law had not adopted laws providing for such equivalence, and that the Commission of Human Rights had held that stable homosexual relationships do not fall within the scope of the right to respect for family life under Article 8 of the European Convention on Human Rights.¹³¹ Thus, the Court concluded, “in the present state of the law within the Community, stable relationships between two persons of the same sex are not regarded as equivalent to marriages or *stable relationships outside marriage between persons of opposite sex*.”¹³² Therefore, an employer did not violate Community law if it did not treat such relationships as equivalent to relationships between persons of the opposite sex.

Finally, the Court rejected the argument that Community law covered discrimination based on sexual orientation, which was the only issue that truly remained. The statement in *P. v. S.*, that Community law prohibiting sex discrimination was not limited to whether a person was of one sex or another, applied only to the case of transsexuals and had no application in the case of sexual orientation.¹³³ “Community law as it stands at present,” the Court wrote, “does not cover discrimination based on sexual orientation, such as that in issue in the main proceedings.”¹³⁴

Thus, after the two cases of *P. v. S.* and *Grant*, one could argue that EU law was inconsistent or incoherent. It was unlawful to discriminate in employment against transsexuals, or those who announced their intention to undergo sex reassignment surgery. However, it was legal to discriminate in employment against homosexuals, because European Community law did not prohibit anti-gay discrimination. As inconsistent as the rulings in *P. v. S.* and *Grant* seemed, it was the language of the *Grant* Court concerning same-sex partnerships, and the submission by the Commission—the EU institution charged with enforcing EU law—that had broader implications on the issue of the rights of same-sex couples under legislation purporting to prohibit discrimination based on sexual orientation.

Modern antidiscrimination laws are based on an Aristotelian notion of equality—that like situations must be treated alike. Hence, laws prohibiting discrimination forbid like situations from being treated differently, absent some justification for the difference in treatment. Usually, a party is complaining of some adverse treatment when compared to another party in a similar situation.

130. *Id.* at ¶ 29 (emphasis added).

131. *Id.* at ¶ 22.

132. *Grant*, 1998 E.C.R. I-621 at ¶ 35 (emphasis added).

133. *Id.* at ¶ 42.

134. *Id.* at ¶ 47.

However, the success of such a claim depends upon a determination that the situations being compared are similar. If the situations are not similar, then the claim fails at the outset. It is not against the law to treat different situations differently. If the situations being compared are not similar, then a finding of discrimination does not result from treating one situation less favorably than the other.

We can compare the analysis of the ECJ with that of the Massachusetts Supreme Judicial Court in *Goodridge v. Department of Public Health*.¹³⁵ In *Goodridge*, the Massachusetts Supreme Judicial Court ruled that there was, essentially, no legally significant difference between an opposite-sex couple and a same-sex couple that would justify denial of the right to marry (and the benefits accompanying civil marriage) to a same-sex couple. The court implicitly regarded the situations as similar when it effectively ruled that denial of the right to marry to same-sex partners relegated them to a form of second-class citizenship inconsistent with the guarantees of equal protection contained in the Massachusetts Constitution.

But what if, as the ECJ has concluded, the situations are not similar? What if a same sex couple is somehow not like an opposite-sex couple? Then differences in treatment between the two situations cannot be described as discriminatory.

The analysis of the Massachusetts case differs radically from that of the ECJ decisions. The Massachusetts Court concluded that same-sex partnerships are sufficiently similar to opposite-sex partnerships to require access to the rights afforded by marriage under a guarantee of equal treatment.¹³⁶ The ECJ, on the other hand, has concluded that "stable relationships between two persons of the same sex are not regarded as equivalent to marriages or stable relationships outside marriage between persons of the opposite sex."¹³⁷ Thus, treating same sex partners adversely—by denying benefits available to opposite-sex partners, for example—does not constitute a form of unequal treatment. The cases are not similar; thus differences in treatment are allowed.

The Court did not justify its conclusion that the situations are inherently different. However, as the next case, *D & Sweden v. Council*, demonstrates, the Court's opinion has had a profound effect on decisions concerning recognition of same-sex partnerships.

135. 798 N.E.2d 941 (Mass. 2003).

136. The Massachusetts legislature subsequently asked the Supreme Judicial Court whether a separate civil status for same-sex couples that provided benefits virtually identical to same-sex marriages would satisfy the obligation to allow same-sex couples to marry. The Court rejected this approach, stating that in the history of the United States, "separate is seldom, if ever, equal." *In re Op. of the JJ. to the Sen.*, 802 N.E.2d 565, 569 (2004).

137. *Grant*, 1998 E.C.R. I-621 at ¶ 35.

C. *D & Sweden v. Council*¹³⁸

The case of *D & Sweden v. Council* brought the issue of the rights and privileges, if any, accompanying same-sex partnerships under EU law into sharper focus. However, the ECJ showed itself unwilling to develop such rights, in the absence of legislation from the political institutions of the EU.

D, the plaintiff, was a member of a same-sex partnership that had been registered under the laws of Sweden. According to Sweden, which intervened in the case on behalf of D, a same-sex registered partnership enjoyed virtually all of the same benefits that accompanied heterosexual marriage. D was employed by the Council of Ministers. The Council of Ministers had a set of employee regulations. These regulations provided that married employees would receive a supplemental payment but made no provision for payment of such a supplement to unmarried partners, same-sex or otherwise. Nor did the regulations expressly contain language prohibiting anti-gay discrimination, although such a rule was adopted during the course of the lawsuit. D applied for the supplemental benefits available to married Council employees.

In the ECJ, the Advocate General recommended that the Court rule against D.¹³⁹ Although the EU had by this time adopted the Charter of Fundamental Rights, the Advocate General did not believe it required a ruling in favor of D. In fact, he cited an explanatory memorandum accompanying the draft Charter as supporting the denial of the benefits.¹⁴⁰

The ECJ followed the recommendation of the Advocate General. By the time of the appeal, Sweden, Denmark, and the Netherlands, all of which give same-sex couples benefits very similar to marriage, had intervened to support D. They argued that the denial of benefits violated the general principle of equality that formed part of the fundamental principles of human rights of EU law. The Court rejected this argument, largely by noting that opposite-sex unmarried couples also did not receive the benefits. Thus, in the Court's view, there was no discrimination based on sexual orientation. As the Court stated:

[A]s regards infringement of the principle of equal treatment of officials irrespective of their sexual orientation, it is clear that it is not the sex of the partner which determines whether the household allowance is granted, but the legal nature of the ties between the official and the partner.¹⁴¹

The Court did not consider the fact that same-sex couples could not marry while opposite-sex couples could. From the perspective of those hoping to advance the situation of those who choose same-sex partnerships, the case is disappointing for several reasons. First, unlike the situation in *Grant*, where the ruling would have immediately impacted national laws (albeit laws designed to

138. Joined Cases C-122/99P & C-125/99, 2001 E.C.R. I-4319.

139. Advoc. Gen. Op., *D & Sweden*, 2001 E.C.R. I-4319.

140. *Id.* at ¶ 97. The explanatory memorandum made clear that in prohibiting discrimination based on sexual orientation, the Charter of Fundamental Rights was not intended to compel member states to offer same-sex marriage.

141. *D & Sweden*, 2001 E.C.R. I-4319 at ¶ 47.

implement a European Community directive), the *D & Sweden* case involved the interpretation of employee guidelines for an institution of the EU. The Court was less vulnerable to an accusation that it was engaging in social experimentation at the expense of a member state. Nevertheless, the Court chose to give a conservative interpretation to the Council regulations.

Secondly, the official had the support of his own member state, which regarded his partnership as essentially equivalent to that of opposite-sex marriage. The European Community has no competence within its range of limited competence to define the term "marriage" for the member states and, upon a submission from Sweden that its form of registered partnership was essentially equivalent to marriage, the Court should have been willing to require that supplemental grants for "married" officials be provided to D. This would have left the ECJ with the ability to rule against a Community employee from a member state with a strong public policy against same-sex marriage, while granting benefits if the employee came from a member state that allowed such marriages.

Furthermore, the Court seems to be selective in recognizing the increasing acceptability of providing some form of recognition and/or benefits to same sex partners at the national level. As the case of *P. v. S.* demonstrated, the Court is willing to take a dynamic approach to extending rights in situations where a survey of the general attitudes in the member states would justify doing so. A good faith survey of attitudes in the EU might have led the Court to take a more progressive stance on the interpretation of the relevant employee regulation. Laws criminalizing homosexuality had been struck down many years ago in Europe.¹⁴² Some member states, such as Ireland, had adopted laws prohibiting anti-gay discrimination.¹⁴³ The EC Treaty had been amended to allow the Community to compel member states to adopt laws protecting sexual minorities from discrimination.¹⁴⁴ In addition, as the submissions from several member states demonstrated, national governments have granted increasing rights to same-sex couples under national law. In light of these considerations, *D & Sweden* would have seemed a perfect case for a limited extension of recognition of same-sex partnerships under Community law. However, this was not to be.

Finally, *D & Sweden* represents a further development of the argument that same-sex and opposite-sex relationships are fundamentally different, even where

142. See *Dudgeon v. United Kingdom*, 5 Eur. Ct. H.R. (ser. A) 573 (1983).

143. See e.g. *EEA*, *supra* n. 5, at § 6. Section 6(1) and (2)(d) of the Act provides:

(1) For the purposes of this Act, discrimination shall be taken to occur where, on any of the grounds in subsection (2) (in this Act referred to as "the discriminatory grounds"), one person is treated less favourably than another is, has been or would be treated.

(2) As between any 2 persons, the discriminatory grounds (and the descriptions of those grounds for the purposes of this Act) are—

(d) that they are of different sexual orientation (in this Act referred to as "the sexual orientation ground").

144. See *EC Treaty*, *supra* n. 7, at art. 13.

the same-sex relationship is registered under national law. However, as shown above, in the area of transsexuality, the Court has been willing to expand rights and privileges, even against contrary national law. The next section explores a case that further demonstrates the seeming incoherence of the rulings by the Court in the area of sexual minorities.

D. *K.B. v. National Health Service Pensions Agency*¹⁴⁵

In this case, KB, a nurse working for the U.K. National Health Service brought an action before the British Employment Tribunal alleging pay discrimination based on sex. She failed in both the Employment Tribunal and the Employment Appeals Tribunal, and, on appeal to the U.K. Court of Appeal, that court made a preliminary reference under Article 234, inquiring whether U.K. had violated Community law.

KB claimed that a pension plan that limited survivor benefits to the "spouse" of an employee constituted sex discrimination against her. KB was in a long-term relationship with a female-to-male transsexual. They could not marry because British law only allowed a marriage between a man and a woman. Furthermore, British law did not allow a transsexual to amend a birth certificate in order to reflect the sex to which he or she belonged after sex reassignment surgery. Therefore, in the eyes of the British law, KB was in a relationship with another woman, and, as such, was not able to marry her partner.

This case took place against the backdrop of a pair of decisions in the European Court of Human Rights, *Goodwin v. United Kingdom*¹⁴⁶ and *I. v. United Kingdom*,¹⁴⁷ in which the Court ruled that it was a violation of a transsexual's right to marry under Article 12 of the European Convention on Human Rights to forbid a transsexual to marry a person of the sex to which the transsexual previously had belonged. Although the EU is not yet a party to the European Convention on Human Rights (though the Draft Constitution for Europe now being considered proposes that the Union accede to membership in the Convention), the European Convention on Human Rights is one of the sources from which the ECJ draws inspiration in determining the scope of fundamental human rights under EU law.

The *K.B.* Court noted that the U.K., in reaction to its ruling in *P. v. S.*, had amended its sex discrimination laws to provide that discrimination against transsexuals was a form of prohibited sex discrimination. The Court also noted that, in light of the decision in *Goodwin*, it was likely that the U.K. would allow transsexuals to amend their birth certificates to reflect their altered sex. The Court held that it was a violation of EU law to refuse to pay a survivor's pension to the female-to-male transsexual partner of an employee in a private pension

145. Case C-117/01, 2004 E.C.R. I-00000 (case has not been officially reported yet) (available at http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=62001J0117).

146. 35 Eur. Ct. H.R. 18 (2002).

147. 36 Eur. Ct. H.R. 53 (2002).

plan. The refusal was a violation of the principle of equal pay for men and women. The Court noted that the U.K. law forbidding a change to a birth certificate to reflect the new post-operative sex of the transsexual made it impossible for a transsexual to marry a partner of the opposite sex.

In making his recommendation, Advocate General Colomer noted that 13 of the 15 member states allowed transsexuals to legally change their designated sex, and thereby to marry a person of the sex opposite to the transsexual's acquired sex.¹⁴⁸ Only the U.K. and Ireland did not permit transsexuals to legally change their designated sex and thereby marry. The implication is that the Advocate General and Court concluded that it would not violate EU law to deny a survivor's pension to the same-sex partner, despite the fact that the law prevents the same-sex partner from marrying.¹⁴⁹ Therefore, in the U.K., at the moment, it is possible for a male-to-female transsexual, although remaining legally designated as male, to obtain spousal survivor's benefits for a male partner; soon it will be possible for a male-to-female transsexual to change her designated sex and therefore legally marry, acquiring, among other things, survivor benefits for her spouse.

However, under the same principles of fundamental human rights that have established the foregoing rules, it will not be possible for a lesbian or gay employee to obtain employee benefits, including spousal survivor benefits, for his or her same-sex partner. Furthermore, the denial of such benefits will not be seen as a form of discrimination based on sexual orientation, since the basis for the denial is not the sex of the partner, but the nature of the relationship—even though the employee is prevented from entering into a marriage relationship precisely because of the sex of the partner.

VII. CHALLENGES TO THE ADEQUACY OF IRISH ANTIDISCRIMINATION LEGISLATION

A. *Introduction*

Ireland has adopted legislation that purports to prohibit discrimination in employment based on sexual orientation. Ireland will rely upon this legislation as adequately implementing the terms of Council Directive 2000/78. This is permitted under the law of the EU, even though the Irish legislation was adopted before the Directive mandating that national laws be adopted to prohibit employment discrimination based on sexual orientation.

If an Irish employee believes she has been discriminated against by reason of her sexual orientation, she will rely upon the Irish national legislation rather than the EU directive, which it implements. However, if she fails to obtain relief under the national law, it is open to her to argue that the national law fails to adequately implement the terms of the EU directive. Under the doctrine of direct effect, she

148. *Advoc. Gen. Op., K.B.*, 2004 E.C.R. I-00000 at ¶ 28.

149. *Id.*

can seek to rely directly upon the greater protection afforded by the EU directive. If she is unable, for technical reasons, to rely upon the principle of direct effect, she may be able to seek damages against Ireland for its failure to comply with its obligations under EU law to adequately implement the directive into the national law.¹⁵⁰

Irish legislation prohibiting discrimination based on sexual orientation expressly precludes a claim of sexual orientation discrimination resulting from the denial of "family" benefits to the same-sex partner of an employee. This is regardless of whether the partnership has been recognized in another EU jurisdiction, such as the Netherlands, which permits couples of the same sex to marry. If an employee brought a claim under Irish equality legislation over the failure to grant benefits to a same-sex partner, that claim would fail in the Irish courts.

It would then be open to the Irish employee to argue that the Irish legislation fails to adequately implement the requirements of the EU directive, and to rely directly upon the terms of the EU directive. The Irish courts would ultimately be required to make a reference to the ECJ to seek a ruling on whether the Irish law, with its express exception for "family benefits," adequately implements the terms of the EU directive. The employee would also be able to complain to the Commission that Ireland had failed to meet its obligations under EU law by inadequately implementing the terms of the EU directive. In theory, the Commission could bring a prosecution against Ireland in the ECJ for its failure to adequately implement the directive.

The issue facing the Commission and/or the ECJ would initially be whether the discrimination complained of constituted discrimination based on sexual orientation. If it was a form of sexual orientation discrimination, and if the Irish employee could not obtain a remedy under national law for this discrimination, then she might be able to rely directly upon the underlying directive to obtain relief, or pursue a claim of damages against Ireland for its failure to adequately implement the directive. The Commission could bring an action with a view toward compelling Ireland to amend its legislation to permit this type of claim. The next section looks at the likely position of the Commission in considering a claim that the Irish law fails to adequately implement the terms of the directive.

B. European Commission Position

The Commission is likely to conclude that the discrimination of which the Irish employee complains is not a form of sexual orientation discrimination. Instead, it is a form of discrimination based upon not being part of a traditional marriage as that term generally is understood throughout the EU. The Commission adopted this position in *Grant*, where, contrary to the ultimate ruling of the ECJ, the Commission argued that general principles of EU law forbid

150. The ability to obtain damages for a member state's failure to implement adequately the terms of a directive is an extension of the principle of direct effect and reflects the ECJ concern to assure the effectiveness of EU law.

discrimination based on sexual orientation, but that denial of same-sex partner benefits (even where such benefits were available to opposite-sex unmarried couples) did not constitute a form of sexual orientation discrimination. Thus, it is unlikely that the Commission will take any action to require Ireland to amend its national laws to allow a claim of denial of partner benefits as a form of sexual orientation discrimination.

Irish law prohibits discrimination based on marital status. However, marital status is defined in such a way as to preclude a claim of discrimination based on being part of a cohabiting relationship, including a same-sex relationship. The EU directive does not address claims of marital status discrimination. Once again, this would preclude a demand by the Commission that Ireland amend its national laws to provide a remedy for a claim of marital status discrimination by a same-sex couple.

Therefore, one route available to an Irish employee who believes that Irish law is deficient is foreclosed. The stance taken by the Commission in a previous case before the ECJ rules out an argument to the Commission that denial of partner employee benefits to an employee in a same-sex relationship constitutes a form of sexual orientation discrimination. Of course, the Commission is not the ultimate arbiter of the meaning of EU law. Ultimately, it will be for the ECJ to determine whether denial of same-sex partner benefits to an employee constitutes a form of sexual orientation discrimination under EU law.

C. *Likely Position of the European Court of Justice*

Our hypothetical Irish employee is not likely to fare any better with the ECJ. The Court's decision in *Grant*, underscored in its later decision in *D. & Sweden*, appears conclusive on this point. The Court sidestepped the issue of whether the discrimination complained of amounts to discrimination based on sexual orientation. Instead, the Court examined the nature of the relationship and compared it with traditional, opposite-sex relationships. The Court has offered little or no analysis in support of its conclusion that stable same-sex relationships are inherently different from opposite-sex relationships, even unmarried opposite-sex relationships. The Court has focused on the obligation of an employer relative to a same-sex couple, and concluded that the employer need not "assimilate"¹⁵¹ the same-sex relationship to that of an opposite-sex marriage, or even to an opposite-sex unmarried relationship.

The Court's position conflicts with the letter and spirit of its rulings in the area of transsexuals, *P. v. S.* and *K.B.* The analysis of the legal claim of direct sex discrimination in the former case, if applied consistently in a situation of denial of benefits in a same-sex relationship, likely would result in a finding of direct sex discrimination under EU laws guaranteeing equal pay irrespective of sex. The latter case shows a dynamic approach to claims of discrimination by transsexual

151. *D & Sweden*, 2001 E.C.R. I-4319 at ¶ 38.

individuals that is sorely lacking in considering claims by individuals in same-sex relationships.

VIII. CONCLUSION

There have been dramatic EU legislative changes in employment rights for lesbians and gays in Europe—changes that are unthinkable in the United States in the current political environment. However, contrary to the experience of lesbians and gays in the U.S., the ECJ likely stands as an impediment to the realization of equal rights under legislation purporting to prohibit employment discrimination based on sexual orientation. Decisions of the ECJ have narrowly construed the concept of discrimination based on sexual orientation and gratuitously foreclosed claims of sexual orientation discrimination based on denial of family benefits to same-sex partners of lesbian and gay employees. These rulings of the Court are made more difficult to comprehend due to the Court's extremely liberal treatment of transsexual individuals. Further legislative change is needed to address the concerns of same-sex couples under the EU law.