

Are employers within the European Community (EC or Community) forbidden from discriminating against their employees on the basis of sexual orientation? More generally, does the prohibition of “discrimination based on sex” contained in Article 119 of the Treaty of Rome and the Community directive requiring equal pay for men and women (Equal Pay Directive)\(^1\) encompass discrimination on the basis of sexual orientation? In Grant v. South-West Trains, Ltd., the European Court of Justice (ECJ) answered both questions in the negative, rejecting a strongly worded recommendation of the Court’s Advocate General.\(^2\)

Lisa Grant was an employee of South-West Trains, Ltd. (SWT), formerly a part of British Rail. As part of its standard compensation package, SWT offered free or reduced-price travel passes to the “legal spouses” of its employees. The railway also issued passes to employees’ “common law opposite sex spouses” if the partners had declared that “a meaningful relationship has existed for a period of two years or more.”\(^3\) In 1995 Grant applied for a travel pass for her female partner, with whom she had had a meaningful relationship for more than two years. SWT refused to issue the pass, claiming that travel benefits for its employees’ unmarried partners could be granted only to partners of the opposite sex.

Grant challenged her employer’s position before an industrial tribunal, arguing that SWT’s refusal constituted sex discrimination in violation of the British Equal Pay Act 1970, Article 119 of the Treaty of Rome, and the Equal Pay Directive. Although noting that courts in the United Kingdom had repeatedly rejected the argument that discrimination on the basis of an employee’s sexual orientation is a form of sex discrimination, the tribunal reasoned that the ECJ’s 1996 decision in P v. S and Cornwall County Council\(^4\) left the issue sufficiently ambiguous to warrant a reference to the Court for an advisory ruling. In P v. S, the ECJ had held that the Community’s Equal Treatment Directive,\(^5\) which prohibits employment discrimination “on grounds of sex,” precluded the dismissal of a male-to-female transsexual because of her gender reassignment. Rejecting the arguments of the United Kingdom and the EC Commission, the Court stated that “the scope of the directive cannot be confined simply to discrimination based on the fact that a person is of one or other sex.”

Advocate General Michael Elmer’s opinion and recommendation in the Grant case interpreted P v. S as “a decisive step away from an interpretation of the principle of equal treatment based on the traditional comparison between a female and a male employee.” SWT’s benefit policy was a direct form of sex discrimination because it conditioned the granting of a rail pass both on the sex of the employee (by requiring an employee to be


\(^{3}\) Case C-949/96, para. 5 [hereinafter Judgment].


the opposite sex of his or her partner) and on the sex of the partner (who was required to be of the opposite sex of the employee). That the rail pass policy did not "refer to a specific sex as the criterion for discrimination, but lays down a more abstract criterion ('opposite sex') can . . . make no difference, since the decisive point, as laid down in P v. S is whether discrimination is exclusively or essentially based on sex." Elmer concluded that SWT could not justify its discriminatory policy on the basis of its private conceptions of morality, which disfavored same-sex partnerships, reasoning that such a stance is inconsistent with fundamental principles of Community law.\(^6\)

The ECJ rejected this reasoning. First, it concluded that SWT's rail pass policy did not classify its employees on the basis of their sex. It construed the railway's policy as merely requiring an employee to live in a stable relationship with a person of the opposite sex to receive the travel benefits. Because such a restriction "applies in the same way to female and male workers," i.e., 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," SWT's benefit requirements did not discriminate on the basis of sex.\(^7\)

Second, the Court considered whether same-sex couples in a "stable relationship" are situated similarly to married heterosexual couples or to unmarried heterosexuals in a stable relationship. It noted that, although a few EC member states regulate same-sex partnerships in a manner "equivalent to marriage," most treat such relationships as comparable to unmarried heterosexual partnerships only for limited purposes, or else they do not recognize same-sex relationships at all. It also referred to decisions by the European Commission on Human Rights holding that stable same-sex relationships do not fall within the ambit of the right to respect for family life protected by the European Convention on Human Rights,\(^8\) and that government policies granting preferential treatment to married and unmarried heterosexual couples do not violate same-sex couples' right to nondiscrimination protected by the Convention. Given this legal landscape, the ECJ concluded that employers were not required to treat homosexual and heterosexual relationships equivalently.\(^9\)

Finally, the Court considered whether "differences of treatment based on sexual orientation are included in the 'discrimination based on sex', prohibited by Article 119 of the Treaty." Grant relied on two decisions to support this interpretation: the ECJ's two-year-old decision in P v. S, and a 1994 decision of the United Nations Human Rights Committee, which, in concluding that a criminal ban on consensual homosexual sodomy is incompatible with the International Covenant on Civil and Political Rights,\(^10\) had stated that the word "sex" in the Covenant's nondiscrimination clause includes sexual orientation.\(^11\) Without explanation, the Court limited P v. S to its facts. As for the Committee, which the Court described as "not a judicial institution and whose findings

\(^{6}\) Elmer Opinion, note 2 supra, paras. 15, 25, 35–43. See also id., para. 17 ("The delimitation of the scope of Article 119 must be kept free from conceptions of morality which may vary from Member State to Member State and change with time.").

\(^{7}\) Judgment, paras. 27–28.


\(^{9}\) Judgment, paras. 29–36.

\(^{10}\) International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171.

\(^{11}\) Toonen v. Australia, Communication No. 488/1992, UN GAOR, 49th Sess., Supp. No. 40, Vol. 2, at 226, UN Doc. A/49/40 (1994). Although its determinations are not formally binding, the Committee's recent practice has been to treat its "views" as to whether the treaty has been violated as imposing an obligation on states to implement them. See Laurence R. Helfer & Anne-Marie Slaughter, Toward a Theory of Effective Supranational Adjudication, 107 YALE L.J. 273, 338–45 (1997).
have no binding force in law," the ECJ criticized its approach as unsupported by "specific reasons" and at odds with how other human rights tribunals and review bodies had interpreted the ban on sex discrimination.

Having concluded that Community law "as it stands at present" did not offer Grant any relief, the Court observed that the Treaty of Amsterdam, signed on October 2, 1997, but not yet ratified by the member states, will authorize the EC Council, on the basis of a unanimous vote on a proposal from the EC Commission, to enact legislation to ban various forms of discrimination, including discrimination based on sexual orientation.  

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The ECJ's ruling is problematic for several reasons. First, the Court ignored the fact that SWT's policy, like any statute or regulation that classifies an individual or couple on the basis of sexual orientation, also, and at the same time, classifies on the basis of sex. The sex discrimination argument in Grant can be illuminated by shifting the focus from Grant's status as a woman in a lesbian relationship to her sex itself. As Robert Wintemute has explained, if a SWT employee wishes to receive benefits for a life partner, that employee's choice of partners is restricted on the basis of sex:

Who may choose a male partner? Only women, not men. Who may choose a female partner? Only men, not women. . . . Being attracted to men is acceptable in a woman but not in a man, and being attracted to women is acceptable in a man but not in a woman. [Under the SWT policy, a] woman with a female partner compares herself with a man with a female partner and argues that, "but for" her sex or if she were a man, her female partner would receive a particular benefit.  

The ECJ's response to this argument—that SWT treats women and men alike because neither female nor male employees receive benefits for their same-sex partners—is unpersuasive. First, such a comparison "avoids a finding of direct sex discrimination by changing not only the sex of the [employee] but also the sex of [the employee's] partner," whereas a proper sex discrimination analysis compares the sex of male and female employees and holds all other factors constant.  

Second, the ECJ's response fails to recognize that, if a decision to award a valuable benefit is made by referring to a person's sex, that decision cannot be neutral with reference to sex.  

The Court had recognized precisely this point in P v. S when it rejected the employer's claim that dismissing a male-to-female transsexual was not an act of sex discrimination because a female-to-male transsexual would also have been fired.  

Finally, by failing to recognize discrimination on the basis of sexual orientation as a form of sex discrimination, the ECJ overlooked the ways in which antigay animus reinforces the inequality of the sexes and women's subordinate position in society by entrenching the stereotypes associated with traditional sex roles. The Court thus missed an important opportunity to further the underlying goals of the EC's sex discrimination legislation and to promote the equality of treatment that is a fundamental principle of Community law.

15 See Andrew Koppelman, Three Arguments for Gay Rights, 95 Mich. L. Rev. 1696, 1661 (1997). Indeed, the ECJ's view of neutrality is the same as that adopted by courts in 19th-century America to uphold antimiscegenation laws. Id.
16 Case C-13/94, supra note 4, para. 7.
17 For a detailed discussion, see Koppelman, note 13 supra, at 234–72.
Two further arguments, however, can be advanced to defend the ECJ's ruling. First, it might be asserted that the drafters of the EC Treaty and its sexual equality directives never intended to include discrimination against lesbians and gay men within the protections of Community law. Yet the ECJ has been an ardent proponent of a purposive, teleological method of interpretation that seeks to achieve the basic objectives of the Treaty and Community legislation even if the drafters did not envision the Court's response to a particular problem.\textsuperscript{18} If the drafters' intent to bar discrimination between men and women did not deter the Court in \textit{P v. S} from invoking the Community's goals of promoting equality and eradicating gender stereotyping as a justification for extending the EC's sex discrimination ban to transsexuals, then those same objectives justified a decision in favor of Lisa Grant, notwithstanding the drafters' failure to provide express legal protections for lesbians and gay men.\textsuperscript{19}

Second, the ECJ's decision might be justified by recent amendments to the Community's foundational international agreement. For the first time in the Community's history, the 1997 Treaty of Amsterdam provides a specific mechanism for the EC political bodies to enact legislation to ban discrimination against lesbians and gay men. The Court might have been reluctant to interpret existing Community laws to prohibit discrimination based on sexual orientation, when the member states had so recently provided other means for addressing this issue. Yet in the past it has not hesitated to extend the sex discrimination ban to situations that the EC political bodies were simultaneously addressing through specific legislation.\textsuperscript{20} It must also have been aware that the time-consuming process of ratifying the new Treaty and the unanimous vote required before any legislation could be adopted meant that the competence granted to the Community "may not be exercised for many years, if ever."\textsuperscript{21}

Even assuming, however, that the Court wanted to extend the protections of Community law to lesbians and gay men, the options before it were stark. Had it chosen to rule in Grant's favor, in a single stroke it would have brought a ban on discrimination based on sexual orientation into the heartland of Community legal norms to be applied at all levels of its competence: acts by Community institutions themselves, acts by member states and their political subdivisions, and acts by private parties bound by the Community's sexual equality rules under the principle of direct effect. Moreover, the stringent standards that the ECJ applies to direct gender discrimination would have made it difficult to justify any differential treatment of homosexuals. Had the ECJ adopted Grant's argument, lesbians and gay men would have moved from being legal outcasts within the Community to being the beneficiaries of discrimination protections not afforded to racial and religious minorities and the disabled.\textsuperscript{22} The widespread and


\textsuperscript{19} In \textit{P v. S}, the Advocate General stated that "in Community law there is no precise provision specifically and literally intended to regulate the problem" of workplace discrimination against transsexuals, and that the drafters' "purpose" in enacting the Equal Treatment Directive was to bar "discrimination between men and women." Case C-13/94, supra note 4, paras. 24, 21. Neither fact deterred the Court from relying on the Community's fundamental "principle of equality" to extend the directive to bar adverse employment actions against transsexuals.

\textsuperscript{20} Wintermute, note 13 supra, at 352 (citing Dekker v. Stichting Vormingscentrum voor Jong Volkseensen (VJV-Centrum) Plus, 1990 ECR 1–3941, as interpreting the Equal Treatment Directive to protect pregnant workers notwithstanding a pending proposal to adopt a specific directive on discrimination against pregnancy).

\textsuperscript{21} Wintermute, note 13 supra, at 351–52.

\textsuperscript{22} These minority groups do not currently enjoy discrimination protection under EC law but, like lesbians and gay men, may be the subject of future Community legislation under the competence granted to the EC Council in the 1997 Treaty of Amsterdam.
pervasive discrimination against sexual minorities throughout European society.\textsuperscript{23} Certainly justified such a ruling as furthering the Community's commitment to equality. But faced with a choice between comprehensive legal protection or none at all, the Court chose to defer to the member states and adopt the latter, politically safer course.

The ruling that equal treatment of same-sex and opposite-sex couples is not a part of the human rights principles protected by the Community is also problematic. As the Court correctly noted, the decisions of international tribunals and the laws of most member states do not currently treat the two groups equivalently. However, a trend toward greater legal protections for lesbians and gay men is emerging, particularly as regards discrimination against individuals.\textsuperscript{24} The ECJ overlooked this trend, concluding from its survey of the current legal landscape that EC law "as it stands at present does not cover discrimination based on sexual orientation" and that the issue "is for the legislature alone" to address.\textsuperscript{25} This suggests that the Court may decline in a future case to recognize and incorporate into its human rights jurisprudence the development of widespread discrimination protection for lesbians and gay men in Europe, a result at odds with its prior case law.\textsuperscript{26}

What does the Grant decision portend for future litigation and advocacy of lesbian and gay legal issues in the European Community? Most immediately, it means that the ECJ will not hear a pending challenge to the United Kingdom's ban on gays in the military under the Equal Treatment Directive. The British judge who referred the case to the ECJ has "reluctantly" withdrawn the reference for a preliminary ruling in light of Grant.\textsuperscript{27} In a future case of sexual orientation discrimination, however, the Court may exhibit greater sympathy for the argument that the principle of equality, as shaped by evolving European human rights standards, bars discrimination against lesbians and gay men in areas falling within the Community's competence.\textsuperscript{28} But for more comprehensive legal protections,

\textsuperscript{23} See HOMOSEXUALITY: A EUROPEAN COMMUNITY ISSUE 71–178 (Kees Waaldijk & Andrew Clapham eds., 1993) (detailed studies of legal, social and economic discrimination against lesbians and gay men in the Community).

\textsuperscript{24} Three EC members (Denmark, the Netherlands, and Sweden) recognize same-sex partnerships or grant benefits to same-sex couples analogous to those granted unmarried heterosexuals. Eight (Denmark, Finland, France, Ireland, Luxembourg, the Netherlands, Spain and Sweden) bar sexual orientation discrimination in employment or the provision of public goods and services. In a 1994 resolution, the European Parliament urged member states to abolish all laws that discriminate against lesbians and gay men. Resolution on equal rights for homosexuals and lesbians in the European Community, 1994 O.J. (C 61) 40. In July 1997, the European Commission on Human Rights reversed two decades of settled jurisprudence and ruled that Britain's 18-year age of consent for gay men, as compared to a 16-year age of consent for heterosexuals and lesbians, violated the prohibition under the European Convention on Human Rights of discrimination on the basis of "sex" and "other status." Sutherland v. United Kingdom, App. No. 25186/94 <www.dhcommhr.coe.fr/eng/25186R31.E.html>.

\textsuperscript{25} See Andrew Clapham & J. H. H. Weiler, Lesbians and Gay Men in the European Community Legal Order, in HOMOSEXUALITY, supra note 23, at 7, 37 (arguing that the ECJ can impose "more progressive standards than those common to all the Member States or contained in international instruments" when interpreting the principle of equality in EC law).

\textsuperscript{26} In The Netherlands v. Reed, 1986 ECR 1283, 1300, the ECJ stated that it could give a "broad" or "dynamic" interpretation of Community legislation based on legal and social developments that "take into account the situation in the whole Community, not merely in one Member State." In P v. S, Case C-13/94, note 4 supra, the Court acted notwithstanding the Advocate General's conclusion that member states' laws concerning rights of transsexuals were in flux. See also Andrew Clapham & J. H. H. Weiler, Lesbians and Gay Men in the European Community Legal Order, in HOMOSEXUALITY, supra note 23, at 7, 37 (arguing that the ECJ can impose "more progressive standards than those common to all the Member States or contained in international instruments" when interpreting the principle of equality in EC law).

\textsuperscript{27} Regina v. Secretary of State for Defence ex parte Perkins, 2 C.M.L.R. 1116 (1998) (drawing reference to ECJ). At present, nine EC members do not bar gays from military service (Austria, Belgium, Denmark, Finland, France, Ireland, the Netherlands, Spain and Sweden). Wintemute, note 15 supra, at 352 n.79.

\textsuperscript{28} A challenge to a discriminatory policy of a Community institution itself may provide the most promising opportunity for such a claim. See Clapham & Weiler, note 26 supra, at 36–37. Although the EC Staff Regulation was recently amended to prohibit discrimination against Community employees on the basis of their sexual orientation, see 1998 O.J. (L 119) 4, the Community has refused to treat its employees' same-sex partnership contracts as equivalent to marriage contracts for purposes of awarding a household allowance. A challenge to that policy, supported by the Swedish Government, was rejected by the EC Court of First Instance on January
lesbians and gay men will need to lobby member states to ratify the Treaty of Amsterdam and then to support antidiscrimination legislation consistent with the powers granted to the EC political bodies by the new Treaty.

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A. RACKE GMBH & CO. V. HAUPTZOLLAMT MAINZ. Case C–162/96.
Court of Justice of the European Communities, June 16, 1998.

The German Bundesfinanzhof (Federal Finance Court) asked the Court of Justice of the European Communities\(^1\) whether an EEC Council regulation\(^2\) suspending the trade concessions provided for by the 1980 Cooperation Agreement between the European Economic Community and the Socialist Federal Republic of Yugoslavia\(^3\) was valid. The Court answered in the affirmative, holding that, in adopting the regulation, the Council had not acted contrary to the rules of customary international law concerning termination and suspension of treaty relations because of a fundamental change of circumstances.

These questions were originally raised in litigation between the German company A. Racke GmbH & Co. (Racce) and the Hauptzollamt Mainz (Mainz customs office). The Hauptzollamt, backed by the Finanzgericht (Finance Court of first instance), demanded that customs duties be paid for imports of wine from Kosovo after the entry into force of the EEC regulation on November 15, 1991. Racce claimed that the preferential rates laid down in Article 22(4) of the 1980 Cooperation Agreement still applied. It argued that the Agreement had been concluded, according to its Article 60, for an unlimited period and could be denounced only upon six months’ notification. Since the Council had denounced the Agreement on November 25, 1991,\(^4\) the preferential treatment had to be granted until May 26, 1992. Thus, the immediate suspension of the Agreement by the regulation violated the principle of \textit{pacta sunt servanda}. Racce further contended that the reasons put forward in the regulation did not satisfy the conditions of the \textit{clausula rebus sic stantibus}\(^5\) and claimed that the regulation was null and void because the Community had violated customary international law.

The Court examined the validity of the regulation in three steps. First, it recalled its established jurisprudence that a provision of an agreement concluded by the Community with non-member countries is capable of conferring rights directly upon individuals if, when consideration is given to its wording and the nature and purpose of the agreement itself, the provision is seen to contain a clear and precise obligation that is not subject,