

## Poor Laws, Poor Judgment: Gay Rights and Sex Equality before the European Court of Justice

*Petra Jeney*

Petra Jeney is an SJD candidate at the Legal Studies Department of the Central European University (CEU).

The principles of equality and non-discrimination in European Community law are critical to the fight for gay and lesbian rights. Yet, so far it has proved difficult to invoke this principle to substantiate these rights in the EU court, the European Court of Justice (ECJ). Two problems can be identified. First, in keeping with the Community's original economic mandate, the right not to be discriminated against long applied only in the field of employment. Today, this remains far the most elaborate area of EU anti-discrimination legislation. Second, legislation on the possible grounds for discrimination remains undeveloped - detailed legislation has been introduced only to challenge grounds of gender and race. Sexual orientation, although a recognised ground, has been practically ignored. Gay rights cases have nevertheless appeared before the court, but in the absence of more detailed legislation, the court's rulings have been pointedly conservative.

### **Fundamental rights under Community Law**

The EU's basic agreement, the Treaty Establishing the European Community (TEC), contains no express provision on fundamental rights, and the Community lacks anything like a "bill of rights". [1] It is only in the course of its jurisprudence that the ECJ has gradually recognised fundamental rights in its interpretations of the Treaty.

To begin with, in *Nold v. Commission*, the court declared that the protection of fundamental rights form an integral part of the general principles of Community Law. [2] In safeguarding these rights, according to the court, a number of sources are relevant, including the constitutional traditions of member states and those international treaties to which EU member states are party.

The court then reviewed Community measures and member state legislation in the light of fundamental rights. At first it refused to consider cases falling outside the material scope of Community law, [3] but this shortcoming was later eliminated in the Treaty of Amsterdam (1998). The same treaty provided (in Article 13) for more extensive anti-discrimination legislation and action on various grounds, including, for the first time, "sexual orientation". [4]

As yet, little legislation has resulted from Article 13, and none concerning discrimination on grounds of sexual orientation. On the other hand, Article 141, which prohibits discrimination between men and women, has led to significant and extensive legislation. [5] As a result, the ECJ has come to regard non-discrimination on grounds of gender as a general principle of law, and has developed an enormous body of case law reviewing both Community and member states' measures accordingly. [6] Moreover it has extended the principle to areas of Community *policy*, finding unequal treatment between two individuals arbitrary and unjustifiable, even in areas of the Community's competence where the Treaty makes no specific reference to non-discrimination. [7]

### **The record on equal rights**

The court's approach to discrimination in such circumstances is well illustrated in a case involving sexual reorientation - *P v S and Cornwall*. [8] The case concerned the application of Directive 76/207 (on equal treatment of men and women with regard to working conditions) to the dismissal of a transsexual employee, whose contract was terminated when he commenced gender reassignment surgery. The court ruled in the applicant's favour but adopted a conservative approach to discrimination in its judgment, defining it rather circumspectly as: "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 in comparison with persons of the sex to which he or she was deemed to belong before undergoing the gender reassignment." [9]

This fascinating decision can be regarded as a blind application of gender discrimination law - where the treatment of a man is compared to that of a woman in order to determine the existence of differential treatment. This convoluted interpretation appears to have been necessary to allow the court to avail of the protection of Community legislation, which is construed to apply exclusively to discrimination between men and women. Despite the fortunate outcome, the ruling apparently ignores the fact that the applicant was dismissed *because* of the decision to undergo gender reassignment. The court did not examine whether there is an *autonomous* right not to be discriminated against, a right substantially broader than the principle of non-discrimination.

A predictable result of the court's fixation with gender discrimination, assessed according to male/female differentiation, is to prevent claims of discrimination involving a single sex, i.e. those affecting gays and lesbians. An example is the *Grant v South-West Trains* case. [10] This concerned an employer's failure to grant travel concessions to a female employee's lesbian partner. At issue was whether the employer had breached the TEC and Directive 75/117 on equal treatment. The court first examined whether the applicant's same sex partner qualified as a spouse under the directive. Since the directive is silent on this issue, and there is no consensus among member states, the court had to resort to the employer's regulations in order to evaluate whether theirs was a stable relationship between two persons of opposite sexes lasting for two years, as required. [11] Unsurprisingly, the court found that the relationship did not qualify, and went on to say that the measure was not discriminatory, as the couple would have been similarly refused if they had been two men. Rather than ruling on the differential treatment between this and other couples, the court chose to focus on an imputable - but surely irrelevant - gender differential.

Nevertheless, the court did refer to "modern attitudes towards homosexuality", noting that in a majority of member states gay relations are treated on an equal footing with heterosexual cohabitation only in a limited number of rights areas. The court went on to distinguish this case from *P v S and Cornwall*, which concerned discrimination for belonging to a particular sex, as opposed to "different treatment based on a person's sexual orientation" in the present instance. The court submitted that prohibiting discrimination on grounds of sexual orientation is a task for the Community legislature. That said, the court made clear that it could not rule otherwise unless the Community institutions adopted specific legislation.

More ominously, the court firmly rejected the existence of an independent principle of equality as submitted by the applicant. The court ruled out the idea that such a right, or any right, could be inferred from the International Covenant on Civil and Political Rights, arguing that this would have the effect of extending the scope of Treaty provisions beyond the competence of the Community.

In another similar case, *D v Council of the European Union*, [\[12\]](#) the court again emphasised the Community's legislative responsibility. The claimant was a Community staff member, who been refused household allowance for his same-sex partner. He complained of discrimination, noting that although his partnership was registered under Swedish law, he had been denied benefits equivalent to his married colleagues. The court noted that EC Staff Regulations do not differentiate as to the sex of the partner, but on the legal nature of the relationship. The court then stated that equal treatment can apply where situations are comparable, but that this is not the case with regard to registered partnerships vis-à-vis marriages. The court once again referred to the diversity of national laws with regard same-sex partnerships, and concluded that the issue lay with the Community legislature.

#### **A better future?**

The court's findings in each of these cases appear rigid - blinded by a too-narrow focus on discrimination on the grounds of gender. This presumably results from the comparatively broad legislation in this area, as against the paucity of directives concerning sexual orientation. However, it is in precisely areas such as these that the court could, in principle, affirm the general applicability of the principle of non-discrimination in Community law. One factor which may discourage such action is the diversity of member state practices in the absence of clear guidance in Community law. In this respect, two recent legislative changes give cause for hope. One, as mentioned previously, is Article 13 of the Treaty of Amsterdam which places discrimination on grounds of sexual orientation under the Community's constitutional remit. This has empowered the Community to take action without requiring an economic basis as justification. The provision does not confer an autonomous right of equality on all subjects of Community law, but it does represent a first step in developing a universally applicable principle of equality in Community law. With regard to gay rights, Community institutions now possess the legislative power to adopt legislation providing equal rights to gay and lesbian persons.

The second innovation, deriving from the first, was the adoption by the Council of the European Union, on 27 November 2000, of Directive 2000/78 establishing a general framework for equal treatment in employment. [\[13\]](#) This is the first directive explicitly to prohibit discrimination on grounds of sexual orientation, although it is restricted to the field of employment.

As yet, the ECJ has not ruled on cases involving gay or lesbian persons resulting from this most recent directive, but it is at least empowered to rule favourably should such cases arise - albeit only in the field of employment - and to prise open the door to fuller equality in future.

Footnotes

- [1] The EU Charter of Fundamental Rights, endorsed by the Council of the European Union at Nice in 2001, which would fulfil this role, is not legally binding. See Praesidium CHARTE 4473/00.
- [2] 4/73 *Nold v Commission* [1974] ECR 491.
- [3] References in the Preamble of the TEC to the respect of fundamental rights, were not considered justiciable. Cf. 144/95 *Maurin* [1996] ECR I-2909.
- [4] See in particular, Treaty Establishing the European Community Article 13[ex 6a], and Articles 39, 43 49-50, 141 [ex 48,52, and 59-60] respectively.
- [5] There are nine EC directives on the issue of gender discrimination. See, *inter alia*, Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions OJ L 039 14.02.1976 p.40; Council Directive 86/613/EEC on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood OJ L 359 19.12.1986, p.56; Council Directive 97/80/EC on the burden of proof in cases of discrimination based on sex OJ L 014 20.01.1998, p.6; Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation.
- [6] Central themes of this case law are: direct and disguised discrimination, adequate justification, positive discrimination.
- [7] See case 117/82 *Razzouk and Beydoun v Commission* [1984] ECR 1509.
- [8] 13/94 *P v S and Cornwall* [1996] ECR I-2143.
- [9] *Ibid.* para 21.
- [10] 249/96 *Grant v South-West Train* 17 February 1998.
- [11] Staff Travel Facilities Privilege Ticket Regulations cl. 8.
- [12] 122/99P and 125/99P [2001] I-4319.
- [13] OJ 2.12.2000 L 303/16.