

January 1999

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### Recommended Citation

Heather Hunt, Diversity and the European Union: Grant v. SWT, the Treaty of Amsterdam, and the Free Movement of Persons, 27 Denv. J. Int'l L. & Pol'y 633 (1999).

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## Diversity and the European Union: Grant v. SWT, the Treaty of Amsterdam, and the Free Movement of Persons

### Keywords

Employment Discrimination, European Union, Sexuality and the Law

# DIVERSITY AND THE EUROPEAN UNION: *GRANT V. SWT*, THE TREATY OF AMSTERDAM, AND THE FREE MOVEMENT OF PERSONS

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## I. INTRODUCTION

*In the huge diversity of peoples who make up the human race, there are a number of universal constants which have always been part of the human condition. One is that people who are different inspire fear which often leads to prejudice; another is that a proportion of the human race is homosexual.<sup>1</sup>*

This reality has led to another phenomenon best summed up by George Orwell: "All animals are equal, but some animals are more equal than others."<sup>2</sup> This short and straight-forward characterization best describes the situation facing the lesbian and gay community with respect to a number of issues within the European Union ("EU"). One such issue is the free movement of persons. The EU has confronted this issue because of the recent focus on European economic unity and the rise of the gay rights movement during the last several years. This issue has an impact on economic unity because discrimination in the workplace that significantly affects one sector of the population (i.e. the homosexual population), directly inhibits the formation of the economic community the EU is attempting to build.

In the European Union, the European Social Charter promises that "[e]veryone shall have the opportunity to earn his living in an occupation fully entered upon."<sup>3</sup> Unfortunately, this promise does not universally apply. Theoretically, Community Law guarantees to all EU citizens the right to enter and to seek or take up work in any Member

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1. Peter Ashman, *Introduction*, in *HOMOSEXUALITY: A EUROPEAN COMMUNITY ISSUE: ESSAYS ON LESBIAN AND GAY RIGHTS IN EUROPEAN LAW AND POLICY* 3 (Kees Waaldijk & Andrew Clapham, eds., 1993).

2. GEORGE ORWELL, *ANIMAL FARM* 112 (1946).

3. James D. Willets, *International Human Rights Law and Sexual Orientation*, 18 *HASTINGS INT'L & COMP. L. REV.* 1, 112 (1994).

State.<sup>4</sup> This right, however, is limited by the ability of national authorities to impose restrictions on the right to work in their countries. EU Member States may base these restrictions on public policy, public security, and public health concerns.<sup>5</sup> These limitations, however, must apply equally to the nationals of the Member State, as they apply to citizens of other Member States.<sup>6</sup> Thus, in the sexual preference context, when a Member State discriminates against its own nationals, based on their sexual orientation, so long as the discrimination applies to nationals of other Member States the same as it applies to nationals of that Member State, Community law allows such discrimination. Most Member States, while not per se discriminating against homosexuals, do not prohibit discrimination based on sexual orientation. In fact, at the time of publication, only France, Ireland, and the Netherlands have laws that give legal protection against employment discrimination based on sexual orientation.<sup>7</sup> Consequently, only French, Irish and Dutch nationals, and nationals of other Member States working in France, Ireland or the Netherlands have formal protection against employment discrimination.

In the EU, a case before the European Court of Justice ("ECJ") brought the issue of discrimination based on sexual orientation to in-

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4. TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY, Mar. 25, 1957, art. 58, 298 U.N.T.S. 11 [hereinafter EEC TREATY]; see Andrew Clapham & J.H.H. Weiler, *Lesbians and Gay Men in the European Community Legal Order*, in *HOMOSEXUALITY, supra* note 1, at 39.

5. Clapham & Weiler, *supra* note 4, at 39. There are restrictions on what Member States can claim as public policy, and public policy justifications are subject to review by the European Court of Justice (ECJ). *Id.* However, when the interests involved are those of homosexuals, many justifications are allowed for limitations set by governments (i.e. denial of access to gay partners as against public policy; interference with free movement of gay workers on grounds of public health; barring homoerotic goods based on public morality). *Id.* at 20.

6. Article 6 of the EEC Treaty prohibits discrimination based on nationality, and Article 8a provides that every EU citizen has the right to move and reside within the territory of other Member States. EEC TREATY, *supra* note 4, arts. 6 and 8.

7. Wilets, *supra* note 3, at 114. Article 416(3) of the French Penal Code and Article L. 122-145 of the French Code of Labor Law prohibits discrimination based on sexual orientation. Article 5 of the General Treatment Law of the Netherlands prohibits employers from making "direct or indirect distinctions based on heterosexual or homosexual orientation or civil status." Article 6 prohibits such distinctions in self-employment. *Id.* (internal quote and citation omitted). James D. Wilets, *The Human Rights of Sexual Minorities: A Comparative and International Law Perspective*, 22 Fall Hum. Rts. 22, 25 (1995). Denmark prohibits discrimination based on sexual orientation, but does not limit the prohibition to employment. In Ireland, according to the 'Prohibition of Incitement to Hatred Act 1989', it is a crime to incite to hatred on the basis of sexual orientation. *Id.* The military is one area where a number of EU members do not discriminate. Wilets, *supra* note 3, at 115. The following countries allow homosexuals to serve in their armed forces: Italy, Austria, Belgium, Denmark, Finland, France, Germany, Luxembourg, Norway and Spain. *Id.* However, Belgium, Finland, France and Germany place restrictions on homosexual citizens in the military. *Id.*

ternational attention.<sup>8</sup> In *Grant v. South West Trains, Ltd.* (“*Grant v. SWT*”), the ECJ addressed the issue of a corporation’s obligation to provide same-sex partners of employees the same benefits as those offered to heterosexual partners of employees.<sup>9</sup> The Court held that:

[t]he refusal by an employer to allow travel concessions to the person of the same-sex with whom a worker has a stable relationship, where such concessions are allowed to a worker’s spouse or to the person of the opposite sex with whom a worker has a stable relationship outside marriage, does not constitute discrimination prohibited by Article 119 of the EC Treaty or Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the

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8. See Case C-249/96 *Grant v. South-West Trains Ltd.*, 1998 A11 E.R. (E.C.) 193 [hereinafter *Grant*]. As of January 1995, the EU is comprised of fifteen (15) Member States: France, Italy, United Kingdom, Germany, Austria, Ireland, Spain, Portugal, Finland, Greece, Sweden, Denmark, Belgium, Luxembourg, and Norway. BARRY E. CARTER & PHILLIP R. TRIMBLE, STATES AND OTHER MAJOR INTERNATIONAL ENTITIES: TREATY OF ROME OF THE EUROPEAN UNION, INTERNATIONAL LAW: SELECTED DOCUMENTS 209 (1995). The EU consists of a number of institutions whose functions range from legislative and administrative to judicial: The European Parliament, which is directly elected by universal suffrage, represents the people of the EU. *What is the European Community?* (visited June 6, 1999) <<http://europa.eu.int/cj/en/pres/qce.htm>>. The European Parliament engages in lawmaking and budget setting, but has limited control over EU affairs. *Id.* The Parliament also has supervisory powers over the EU Commission. Laurence R. Helfer, *Lesbian and Gay Rights as Human Rights: Strategies for a United Europe*, 32 Va. J. Int’l L. 157, 184 (1991). The European Council, as the executive body of the EU, takes the decisions of the European Parliament and adopts Community Legislation. *Id.* The Council is composed of representatives from the fifteen Member States, and its membership depends upon the subject under consideration (i.e. it may be made up of 15 Ministers of Foreign Affairs, Transport, Finance, et cetera). *What is the European Community?* (visited June 6, 1999) <<http://europa.eu.int/cj/en/pres/qce.htm>>. The European Commission, composed of 20 independent members, proposes Community legislation for consideration by the EU Council, monitors compliance with the legislation and administers common policies. *Id.* See Helfer, *supra*, at 184. At the center of the EU’s judicial arm is the European Court of Justice (ECJ). *What is the European Community?: A Court for Europe* (visited June 6, 1999) <<http://europa.eu.int/cj/en/pres/jeu.htm>>. The ECJ is housed in Luxembourg, and the main function of the ECJ is to ensure that the EU Member States observe Community Law uniformly. *Id.* When making its decisions, the ECJ relies on “Community Law,” which is Community legislation that applies to all fifteen Member States. *Id.* EU Community Law, independent and uniform in all Member States, is superior to the national laws of Member States. *Id.* Unlike other similar institutions (i.e. the International Court of Justice), the ECJ has jurisdiction over disputes involving not only Member States and Community Institutions, but also individuals. *Id.* The ECJ has fifteen judges and nine advocate generals. *What is the European Community?: Composition and Organization* (visited June 6, 1999) <<http://europa.eu.int/cj/en/pres/co.htm>>. EU Member States appoint the judges and advocate generals by common accord. Once appointed, judges and advocate generals serve renewable six-year terms. *Id.* The advocate generals play a key role in the adjudication of ECJ cases. Prior to the Court rendering its decisions, an Advocate General delivers an opinion as to how the Court should rule on the case before it. *Id.* The opinions of advocate generals are impartial and independent of the opinions of the Court. *Id.*

9. *Grant*, 1998 A11 E.R. (E.C.) at ¶ 1.

application of the principle of equal pay for men and women.<sup>10</sup>

Due to the broad scope of ECJ decision-making power, this decision has more far-reaching implications than does a decision by a national court of an EU Member State.<sup>11</sup> One of the concerns raised by this decision is the possibility that allowing corporations within EU Member States to make discriminatory policies based on an employee's sexual orientation could infringe on that employee's right of free movement.<sup>12</sup> For example, if a national of one Member State that does not discriminate against homosexuals receives a job offer in another Member State, only to discover later that the foreign Member State allows corporations to discriminate against homosexuals, the national would be inhibited from moving to the foreign Member State, thereby defeating one main purpose of economic unity. Additionally, a significant problem arises in the EU because the right of free movement of persons is fundamental to the European Union and its underlying purposes.<sup>13</sup> As a result, for the past several years, the European Parliament has made numerous attempts to discourage the type of discrimination sanctioned by *South West Trains*.

In June 1997, in an attempt to inter alia avoid future problems in the area of discrimination based on sexual orientation, the European Council passed the Treaty of Amsterdam ("Amsterdam Treaty"). The Amsterdam Treaty amended the Treaty on European Union, the treaties establishing the European Communities and Certain Related Acts.<sup>14</sup> The Amsterdam Treaty prohibits, among other things, discrimination based on sexual orientation.<sup>15</sup> In light of this new treaty, the *Grant v. SWT* decision may not have the far reaching consequences first anticipated. However, as discussed more fully below, there are still a

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10. *Id.* at ¶ 51.

11. Decisions of the ECJ affect all EU Member States and are binding on such Member States with respect to Community Law. *What is the European Community?* (visited June 6, 1999) <<http://europa.eu.int/cj/en/pres/qce.htm>>.

12. EEC TREATY, *supra* note 4, arts. 3 and 48. In the EU context, free movement of persons means that each Member State must abolish nationality discrimination, between workers of Member States with regard to employment, remuneration and other work and employment conditions. *Id.* art. 48. This right also means that EU citizens can accept offers of employment; move within the Member States in order to accept employment; stay within a Member State for the purpose of employment; and remain in the territory of a Member State after having been employed in the State. *Id.* This article does not apply to public service employment. *Id.* Prohibitions on employment discrimination have extended to sex as well as nationality. *Id.* art. 119.

13. *See id.* arts. 3 and 48.

14. *See* EUROPEAN UNION: CONSOLIDATED VERSION OF THE TREATY ON EUROPEAN UNION AND CONSOLIDATED VERSION OF THE TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Oct. 2, 1997, 37 I.L.M. 56 [hereinafter *Amsterdam Treaty*]. The Amsterdam Treaty amended the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts. *Id.*

15. *Id.* at pt. 1, art. 13.

number of hurdles the gay and lesbian community must overcome before the prohibition on discrimination based on sexual orientation becomes a reality.

This paper addresses and focuses on the impact the Amsterdam Treaty will have on EU Member States, concentrating particularly on the provisions relating to discrimination based on sexual orientation, and its affect on the free movement of persons. This paper also analyzes how the Amsterdam Treaty affects the *Grant v. SWT* decision because *Grant v. SWT* will continue as the controlling Community Law until the European Council – utilizing the provisions of the Amsterdam Treaty - changes the law relating to discrimination based on sexual orientation.

Part II of this paper discusses the various laws of EU Member States regarding same-sex partnerships. Part III analyzes the *Grant v. SWT* opinion and its impact on European Community Law. Part IV of this paper examines the provisions of the Amsterdam Treaty and the potential affect this Treaty will have on discrimination based on sexual orientation and the free movement of people.

## II. MEMBER STATE LAWS REGARDING RECOGNITION OF SAME SEX RELATIONSHIPS

Attempts at fighting discrimination based on sexual orientation gained momentum as early as the late 1800's in Germany, and the early 1900's in England and America.<sup>16</sup> Unfortunately, the movement in Europe has only recently, as late as 1989, made definitive strides toward recognizing same-sex relationships and prohibiting discrimination based on sexual orientation. Consequently, due to the different social, political and economic views of the various EU countries, the laws of EU countries regarding recognition of same-sex relationships vary widely. For example, a number of Member States recognize same-sex partnerships and afford people in those relationships many of the same rights afforded heterosexual couples.<sup>17</sup> While some Member States rec-

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16. Robert P. Cabaj, *History of Gay Acceptance and Relationships in ON THE ROAD TO SAME-SEX MARRIAGE: A SUPPORTIVE GUIDE TO PSYCHOLOGICAL, POLITICAL AND LEGAL ISSUES 11* (Robert P. Cabaj & David W. Purcell eds., 1998).

17. *Analysis: Gay Rights: Coming Out of the Shadows*, THE GUARDIAN, Oct. 9, 1997, at 17. Deborah M. Henson, *A Comparative Analysis of Same-Sex Partnership Protections*, in SAME-SEX MARRIAGE: PRO AND CON: A READER 42-43 (Andrew Sullivan, ed., 1997). One of the significant rights denied same-sex couples is the right to adopt children. *Id.* at 43. See *infra* notes 20-31 and accompanying text. The laws in some EU countries are more progressive than in other nations of the world, most notably the United States, where, in 1996 Congress and President Clinton signed the Defense of Marriage Act, which defines marriage as the "union between a man and a woman," and allows states to pass laws refusing to recognize same-sex marriage. David W. Purcell, *Current Trends in*

ognize same-sex marriages, others do not recognize same-sex partnerships at all, let alone marriages.<sup>18</sup> In the future, however, individual Member States' recognition of same-sex relationships may be irrelevant in light of the passage of the Amsterdam Treaty.<sup>19</sup> Nevertheless, until that time, the laws of the Member States in which they live confine homosexual citizens in the EU, and their rights.

The following is a representation, by country, of the various provisions relating to same-sex relationships.

**Denmark:** Denmark was the first country to legally recognize same-sex partnerships.<sup>20</sup> On October 1, 1989, the Danish Parliament passed a law allowing "registered partnership for two persons of the same-sex."<sup>21</sup> Public registration allows registered same-sex couples to enjoy the same legal rights enjoyed by married couples,<sup>22</sup> with the exception of adopting children, in vitro fertilization, artificial insemination, and church weddings.<sup>23</sup> One limitation is that at least one of the registrants must be a Danish citizen and live in Denmark.<sup>24</sup> In 1997, the State Lutheran Church approved same-sex marriage in the church, but the ceremony must be different from heterosexual marriage.<sup>25</sup>

**Norway:** In 1993, Norway passed partnership legislation modeled on the Danish example.<sup>26</sup> The Norwegian legislation offers same-sex couples national insurance benefits, pensions, inheritance rights, and mandates that same-sex couples must be mutually responsible to support each other financially.<sup>27</sup>

**Sweden:** Sweden decriminalized homosexuality in 1994.<sup>28</sup> On January 1, 1995, the Swedish Registered Partnership Law became effective.<sup>29</sup> This law granted same-sex couples virtually the same rights afforded to heterosexual married couples.<sup>30</sup> However, as other Registered Partnership Acts, this law denies same-sex couples access to adoption, artificial insemination, in vitro fertilization, and church wed-

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*Same-Sex Marriage*, in ON THE ROAD, *supra* note 16, at 34.

18. *No Bias In Same-Sex Ban on Travel Perk*, TIMES (London), Feb. 23, 1998, at 41.

19. *Id.* See Amsterdam Treaty, *supra* note 14, at pt. 1, art. 13.

20. Leslie Goransson, *International Trends in Same-Sex Marriage*, in ON THE ROAD, *supra* note 16, at 167.

21. *Id.* at 171.

22. *Id.* at 170. Those rights include inheritance, insurance benefits, employment benefits, financial support obligations, and so on. *Id.* at 174.

23. *Id.* at 171.

24. *Id.*

25. *Id.* at 173.

26. Goransson, *supra* note 20, at 173.

27. *Id.* at 174.

28. *Id.*

29. *Id.*

30. *Id.*



dings.<sup>31</sup> Sweden also has a domestic partner law for those couples who choose not to register.<sup>32</sup> The domestic partner law provides many of the same rights as the Registered Partner Act, but a domestic partner does not automatically inherit a deceased partner's assets, whereas a registered partner does.<sup>33</sup>

European Union: In 1994, the European Parliament passed a resolution calling for Member States to pass legislation giving homosexual couples access to marriage, or a similar institution.<sup>34</sup> The resolution also encouraged Member States to allow homosexual partners to adopt and/or foster children.<sup>35</sup>

France: In France, the civil status of homosexuals will come closer to married status under the proposed Civil Solidarity Pact law.<sup>36</sup> This law allows unmarried couples to sign civil solidarity pacts at police stations thereby giving homosexuals rights they do not currently enjoy.<sup>37</sup>

Spain: Several cities have passed a "register of civil actions."<sup>38</sup> On a local level, these registers give unmarried couples rights commensurate with those enjoyed by married couples. However, these registers do not afford rights to homosexual couples on a regional or national level.<sup>39</sup> In June 1997, the Parliament of the region of Catalonia voted to allow partnerships between homosexuals, giving them rights identical to those given married couples, except adoption.<sup>40</sup>

Italy: The cities of Pisa and Florence allow homosexuals to record their partnerships.<sup>41</sup> Country-wide legislation has not been passed.<sup>42</sup>

United Kingdom ("UK"): The UK is one of the most hostile EU nations with respect to recognizing homosexual relationships. For example, the UK still makes a distinction between the age of consent for heterosexual relationships (age 16), and homosexual relationships (age 18).<sup>43</sup> However, the UK has made strides. For instance, homosexual

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31. *Id.*

32. Goransson, *supra* note 20, at 174.

33. *Id.* at 176.

34. *Id.*

35. *Id.* Finland has been working on Registered Partner legislation, but as of October 1998, it still had not passed such legislation. *From Marriage Rights to Murder: How the World Treats Gays*, AGENCE FR.-PRESSE, Oct. 7, 1998, in 1998 WL 16614115.

36. *From Marriage to Murder*, *supra* note 35.

37. *Id.* See Ray Moseley, *French Debating Legal Status of Unwed Couples: Coalition Opposes Government-Backed Bill to Extend Rights, Labeling it as Way to Legalize Vice*, CHI. TRIB., Feb. 12, 1999, at 5.

38. Goransson, *supra* note 20, at 184.

39. *Id.* at 183-84.

40. *From Marriage Rights to Murder*, *supra* note 35.

41. *Id.*

42. *Id.*

43. *Id.*

relationships were decriminalized in 1967.<sup>44</sup> In 1996, a homosexual was allowed to adopt a child.<sup>45</sup>

Ireland: In 1993, homosexuality was decriminalized for people seventeen and older.<sup>46</sup> Ireland and the UK do not have any laws giving homosexual cohabiting couples rights commensurate with those offered married couples (i.e. inheritance, insurance benefits, employment benefits, financial support obligations, and so on).

The above serves merely as an overview of the differences the European Parliament, Council and Commission face in attempting to pass legislation prohibiting discrimination based on sexual orientation. Difficulties in passing legislation will continue to exist regardless of the theoretical ability to pass community-wide legislation as provided for in the Amsterdam Treaty.

### III. *GRANT V. SWT*

This section addresses the *Grant v. SWT* decision, and its impact on the EU as a whole. One main function of the ECJ is to give preliminary rulings on the interpretation of treaties and other secondary legislation of the EU.<sup>47</sup> EU Member States, when unsure of the interpretation of Community Law, may present a case to the ECJ and request a preliminary ruling on the matter.<sup>48</sup> When the ECJ renders a ruling, the Member State requesting such ruling must enforce the ECJ decision without modification.<sup>49</sup> Preliminary rulings may serve as guides for all Member States faced with the same or similar issues.<sup>50</sup> This further ensures uniformity in the interpretation of Community Law. Once the ECJ renders a decision, EU citizens, as well as Member States, may seek to have their national laws officially superseded if they contradict Community Law.<sup>51</sup> In *Grant v. SWT*, the Industrial Tribunal South Hampton referred the case to the ECJ for a preliminary ruling.<sup>52</sup>

In 1995, Lisa Grant petitioned her employer, South-West Trains Ltd. ("SWT") for travel benefits for her lesbian partner Jillian Pacey.<sup>53</sup>

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44. *Id.*

45. *From Marriage Rights to Murder*, *supra* note 35.

46. *Id.*

47. *What is the European Community?: Jurisdiction* (visited June 6, 1999) <<http://europa.eu.int/cj/en/pres/comp.htm>>.

48. *Id.*

49. *Id.*

50. *Id.*

51. *What is the European Community?: The Court of Justice and European Integration* (visited June 6, 1999) <<http://europa.eu.int/cj/en/pres/cieu.htm>>.

52. *Grant*, 1998 A11 E.R. (E.C.) at ¶ 11.

53. *Id.* at ¶ 7.

SWT provides travel benefits to "one common law *opposite sex* spouse of staff . . . subject to a statutory declaration being made that a meaningful relationship has existed for a period of two years or more."<sup>54</sup> SWT extended this provision to include opposite sex cohabiting partners of employees.<sup>55</sup> At the time of her request, Ms. Grant had lived with Ms. Pacey for over two years.<sup>56</sup> SWT denied Ms. Grant's request, asserting that based on SWT's policies, benefits for unmarried couples are only given to opposite sex partners.<sup>57</sup> Ms. Grant then went to the Industrial Tribunal South Hampton, asserting that SWT's action constituted discrimination based on sex, contrary to the Equal Pay Act of 1970, Article 119 of the EC Treaty and/or Directive 76/207/EEC.<sup>58</sup> Ms. Grant's claim was supported by the fact that one of her colleagues had obtained travel benefits for his live-in girlfriend.<sup>59</sup> The Tribunal then referred the case to the ECJ for a preliminary ruling regarding discrimination based on sexual orientation and its relation to Article 119 of the EC Treaty and/or Council Directive 75/117/EEC of 10 February 1975.<sup>60</sup>

Prior to the ECJ rendering its decision in this case, the Advocate General issued an opinion. The Advocate General's opinion suggested to the Court that it should decide in favor of Ms. Grant because SWT's policy regarding travel concessions for same-sex couples violates Article 119 of the EC Treaty.<sup>61</sup> The Advocate General's opinion analyzed the

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54. *Id.* at ¶ 5 (emphasis added) (quotes omitted).

55. *Id.* at ¶ 8.

56. Paul L. Spackman, Note and Comment, *Grant v. South-West Trans: Equality for Same-Sex Partnerships in the European Community*, 12 AM. U.J. INT'L. L. & POL'Y, 1063, 1102 (1997).

57. *No Bias in Same-Sex Ban on Travel Perk*, *supra* note 18, at 41.

58. Grant, 1998 A11 E.R. (E.C.) at ¶ 9. Ms. Grant relied on these provisions because Article 119 provides that "[e]ach Member State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work." EEC TREATY, *supra* note 4, art. 119. Ms. Grant asserted that denying her the travel benefits requested constituted discrimination based on sex in violation of this provision. Grant, 1998 A11 E.R. (E.C.) at ¶ 9. Ms. Grant also relied on Council Directive 76/207/EEC because it is a social policy directive that provides: "The purpose of this Directive is to put into effect in the Member States the principle of equal treatment for men and women as regards access to employment, including promotion, and to vocational training and as regards working conditions . . ." Council Directive 76/207/EEC, art. 1, 1976 O.J. (L 39) at 40-42 [hereinafter Council Directive 76/207]. The Directive provides further that "[a]pplication of the principle of equal treatment means that there shall be no discrimination whatsoever on grounds of sex . . ." *Id.* art. 3. Together these provisions should have provided Ms. Grant the relief she requested.

59. Grant, 1993 A11 E.R. (E.C.) at ¶ 9.

60. *Id.* at ¶ 11. See EEC TREATY, *supra* note 4, art. 119. Council Directive 75/117/EEC of 10 February 1975 provides: "The principle of equal pay for men and women outlined in Article 119 of the Treaty . . . means, for the same work or for work to which equal value is attributed, the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration." Council Directive 75/117/EEC, art. 1, O.J. (L 45) at 19-20 [hereinafter Council Directive 75/117].

61. Grant, Opinion of Advocate General, 1998 A11 E.R. (E.C.) at ¶ 50.

case from the perspective that SWT's policy constituted discrimination based on gender, thereby violating previous laws established by the ECJ in gender reassignment cases.<sup>62</sup> Specifically, the Advocate General stated:

[w]hether the requirement for obtaining the concessions is satisfied accordingly depends on the gender both of the employee and of the cohabitee. Travel concessions for a male cohabitee may only be obtained if the employee is a woman. Travel concessions for a female cohabitee may only be obtained if the employee is a man. The fact that cl. 8 of the ticket regulations does not refer to a specific sex as the criterion for discrimination, but lays down a more abstract criterion ('opposite sex') can, in my view, make no difference, since the decisive point as laid down in *P v. S* is whether discrimination is exclusively or essentially based on sex.<sup>63</sup>

The Advocate General submitted this opinion to the ECJ. The ECJ, however, made its own ruling and disregarded the opinion of the Advocate General.<sup>64</sup> This action was unusual because in approximately seventy-five percent of cases, the ECJ relies heavily on the Advocate General opinions, and in some instances the Advocate General opinion gives insight as to how the ECJ will eventually rule on a case.<sup>65</sup>

In *Grant v. SWT*, the ECJ first determined that Directive 76/207/EEC did not apply to Ms. Grant's case because travel concessions are "pay," as such term is defined in Article 119 of the EC Treaty.<sup>66</sup> This distinction has significance because Directive 76/207/EEC, which prohibits employment discrimination based on sex, does not cover pay benefits, and thus, is inapplicable when a complaint involves pay benefits.<sup>67</sup>

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62. *Id.* See Case C-13/94, *P v. S & Cornwall County Council*, 1996 A11 E.R. (E.C.) 397, 2 C.M.L.R. 247 (1996) [hereinafter *P v. S*]. In *P v. S*, the ECJ held that employers could not dismiss people who have gender reassignments because such discrimination is based on the sex of the person, and thus directly prohibited by the relevant provisions of the EEC Treaty. Grant, Opinion of Advocate General, 1998 A11 E.R. (E.C.) at ¶¶ 24-25.

63. Grant, Opinion of Advocate General, 1998 A11 E.R. (E.C.) at ¶¶ 24-25.

64. See Grant, 1998 A11 E.R. (E.C.) at ¶ 50.

65. Terence Shaw, *Lesbian Couple Lose Fight Over Rail Perks: Setback for Gay Rights Campaigners in Sex Discrimination Case*, DAILY TELEGRAPH (LONDON), Feb. 18, 1998, at 13. Some people did rely on the Advocate General's opinion as insight into how the ECJ would rule. See, e.g., Spackman, *supra* note 56, at 115-19.

66. Grant, 1998 A11 E.R. (E.C.) at ¶ 14.

67. Grant, Opinion of Advocate General, 1998 A11 E.R. (E.C.) at ¶ 11. See Case C-342/93, *Gillespie & Others v. Northern Health & Soc. Serv. Bd. & Others*, 1996 A11 E.R. (E.C.) 284, 2 C.M.L.R. 969, at ¶ 37 (1996) [hereinafter *Gillespie*]. "[T]he underlying rationale of [Directive 76/207/EEC] is clearly set out in the preamble thereto . . . It forms part of the social action programme . . . Its aim is to extend the principle of equal treatment for men and women to access to employment and to working conditions other than pay." *Gillespie*, 1996 A11 E.R. (E.C.) at ¶ 37.

Next, the ECJ had three questions to answer: 1) whether SWT's travel concession policy constituted discrimination based on sex; 2) whether Community Law requires employers to regard same-sex relationships the same as heterosexual marriage or other heterosexual relationships; and 3) whether discrimination based on sexual orientation is discrimination based on sex.<sup>68</sup>

In answering the first question, the ECJ determined that the regulations were not discriminatory based on sex because SWT would have treated a male co-worker living with a person of the same-sex exactly the same as it treated Ms. Grant.<sup>69</sup> As to the second question, the ECJ acknowledged that although the European Parliament has declared that it deplors all discrimination based on sexual orientation, the European Commission, as well as the Parliament, have not yet adopted rules prohibiting discrimination based on sexual orientation.<sup>70</sup>

When addressing the third question, Ms. Grant attempted to invoke the provisions of various international treaties such as the International Covenant on Civil and Political Rights ("ICCPR"),<sup>71</sup> and the findings of the Human Rights Commission to support her argument that discrimination based on sex includes sexual orientation.<sup>72</sup> In response, the Court held that although international instruments comprise an integral part of Community Law, they cannot be used to extend the scope of the EC Treaty (i.e. to prohibit discrimination based on sexual orientation).<sup>73</sup> In addition, the Court stated that the findings of the Human Rights Commission do not have the binding force of law because the Human Rights Commission is not a judicial institution.<sup>74</sup> Consequently, the Human Rights Commission's interpretation of the ICCPR that "sex" in Article 2 paragraphs 1 and 26 includes sexual orientation, does not require the ECJ to extend the EC Treaty provisions to include such an interpretation.<sup>75</sup>

The ECJ relied on the fact that despite modern attitudes toward homosexual relationships, the European Human Rights Convention does not recognize stable homosexual relationships as within scope of a key fundamental right: i.e. the right to respect for family life.<sup>76</sup> The

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68. Grant, 1998 A11 E.R. (E.C.) at ¶¶ 11-12.

69. *Id.* at ¶¶ 27-28. The ECJ made it clear that the discrimination involved in Grant was based on sexual orientation, not sex, and therefore, no provision under existing Community law could protect Ms. Grant.

70. *Id.* at ¶¶ 31-32.

71. *Id.* See International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, . . . I.L.M. . . . [hereinafter ICCPR].

72. Grant, 1998 A11 E.R. (E.C.) at ¶ 43.

73. *Id.* at ¶ 45.

74. *Id.* at ¶ 46.

75. *Id.*

76. *Id.* at ¶ 33. See European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 8, 213 U.N.T.S. 221, [hereinafter Human

ECJ based its findings on the fact that the European Court of Human Rights has held that Article 12 of the Human Rights Convention only applies to traditional heterosexual marriages.<sup>77</sup> Article 12 provides: "Men and women of marriageable age have the right to marry and found a family, according to the national laws governing the exercise of this right."<sup>78</sup> Furthermore, the ECJ concluded that although Article 14 of the Human Rights Convention prohibits discrimination based on sex, in the interests of protecting family interests, and particularly procreation, more favorable treatment is afforded to heterosexual couples than homosexual couples.<sup>79</sup> From this the Court determined that Community Law does not require equivalent treatment for homosexual and heterosexual relationships, and thus employers do not have to treat same-sex relationships the same as heterosexual relationships.<sup>80</sup> Having made that determination, the Court deferred to the legislatures of the various EU Member States, as well as the European Parliament, to pass legislation prohibiting discrimination based on sexual orientation, thereby retaining the status quo.<sup>81</sup>

Ironically, and in contravention with the analysis of the ECJ, in 1990, the European Parliament recognized that the Community (at least up to that point) did not have the power to intervene in cases of discriminatory practices by Member States against sexual minorities.<sup>82</sup> However, despite this, the Parliament took solace in the fact that:

[t]he fundamental rights of sexual minorities are protected by other international instruments. Since all the Member States are members of the Council of Europe and signatories to the European Convention on Human Rights, the Commission and the Court of Human Rights are best able to guarantee the protection of sexual minorities against discrimination.<sup>83</sup>

The ECJ decision in the *Grant v. SWT* case greatly undermined this position taken by the European Parliament.

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Rights Convention].

77. See Human Rights Convention, *supra* note 76, art. 12.

78. *Id.*

79. Grant, 1998 A11 E.R. (E.C.) at ¶ 33. Article 14 of the Human Rights Convention provides: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status." Human Rights Convention, *supra* note 76, art. 14.

80. Grant, 1998 A11 E.R. (E.C.) at ¶ 35.

81. *Id.* at ¶ 36.

82. Clapham & Weiler, *supra* note 4, at 28. Now, in light of the Amsterdam Treaty, the European Council has a mechanism through which to intervene and prohibit Member States from discriminating based on sexual orientation. See Amsterdam Treaty, *supra* note 14, at pt. 1, art 13.

83. Clapham & Weiler, *supra* note 4, at 28 n.42 (emphasis added).

In addition to the above arguments, Ms. Grant attempted to compare her case to cases involving discrimination based on gender reassignment.<sup>84</sup> The ECJ, in previous decisions, prohibited discrimination based on gender reassignment.<sup>85</sup> In his opinion, the Advocate General attempted to point this out in reference to Ms. Grant's situation.<sup>86</sup> The Advocate General argued that the travel benefits afforded to heterosexual married couples and cohabittees were based on gender insofar as the employee must be the opposite sex of the cohabitee.<sup>87</sup> Thus, "[w]hether the requirement for obtaining the concessions is satisfied . . . depends on the gender both of the employee and of the cohabitee. Travel concessions for a male cohabitee may only be obtained if the employee is a woman,"<sup>88</sup> and vice versa. Therefore, according to the Advocate General, SWT's "opposite sex" requirement is based on sex, and the Court should not tolerate such a policy.

The ECJ, however, distinguished Ms. Grant's case from others involving gender reassignment stating that discrimination based on gender reassignment is based "essentially, if not exclusively, on the sex of the person concerned,"<sup>89</sup> whereas, in the opinion of the Court, SWT based its discriminatory policies on sexual orientation, not the sex of the individual.<sup>90</sup> This distinction is analogous to that made by some American courts when they hold that although same-sex marriage is prohibited, so long as people have gone through the process of changing their sex, they can marry another who is technically their same sex.<sup>91</sup>

In addition to its other arguments, the Court pointed out that even Member States that recognize same-sex partnerships do not afford

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84. Grant, 1998 A11 E.R. (E.C.) at ¶ 37.

85. See *P v. S*, 1996 A11 E.R. (E.C.) at Decision. Gender reassignment means individuals who have had sex change operations. The discrimination in *P v. S* did not involve pay, and thus the ECJ invoked the provisions of Council Directive 76/207/EEC to protect transsexual individuals.

86. Grant, Opinion of Advocate General, 1998 A11 E.R. (E.C.), at ¶¶ 24-25.

87. *Id.* at ¶ 24.

88. *Id.*

89. Grant, 1998 A11 E.R. (E.C.) at ¶ 42.

90. *Id.*

91. See *M.T. v. J.T.*, 355 A.2d 204 (N.J. Super. Ct. App. Div., 1976). Some American courts allow couples who are technically of the same-sex, to marry if one of them has a sex change operation (i.e. a man marries another man who has become a woman). *Id.* However, the sex change has to take place before the marriage occurs. *Id.* According to some courts, this does not constitute same-sex marriage. *Id.* Some people base their opinions regarding sexual orientation on their perceptions of homosexuality. Some believe that homosexuality is a changeable characteristic that people choose, whereas characteristics such as sex, race, and disability are characteristics people have no control over. Relying on this argument, people can justify making a distinction between protecting classes based on race, sex and disability, and refusing to protect sexual minorities. However, this argument begs the question, if sexual orientation is a choice, and thus excepted from protection, why do we protect people from religious persecution? Furthermore, modern technology has proven that sex is no longer an unchangeable characteristic.

those partnerships all the same rights enjoyed by heterosexual couples, and, thus, allow at least some level of discrimination based on sexual orientation.<sup>92</sup> Impliedly, the Court recognized that in the nations that recognize homosexual partnerships, such partnerships are recognized in the form of "Registered Partnerships," not marriages. In addition, the court pointed out that in these nations, homosexual couples do not have all the rights heterosexual couples have, most significantly, homosexual citizens are denied the rights to a church marriage, to adopt a child, and to have artificial insemination. Thus, some level of discrimination is tolerated even by nations recognizing homosexual relationships as partnerships.<sup>93</sup>

The *Grant v. SWT* decision by the ECJ surprised many, especially in light of the Advocate General's opinion. The Court may have based its decision on social mores that frown upon same-sex partnerships, but more likely, the Court tried to avoid "trespassing on the role of European legislators."<sup>94</sup> Unfortunately, in its effort to allow Member State legislatures to pass laws regarding discrimination based on sexual orientation, the ECJ failed to ensure uniformity of interpretation of Community Law regarding discrimination based on sexual orientation. Consequently, the laws regarding discrimination remain varied. The impact is most likely temporary in light of the Amsterdam Treaty, but temporary may consist of a long period of time. The next section addresses the affect the Amsterdam Treaty may have on prohibiting of discrimination based on sexual orientation and the impact on the free movement of persons.

#### IV. THE TREATY OF AMSTERDAM & ITS AFFECT ON DISCRIMINATION BASED ON SEXUAL ORIENTATION AND THE FREE MOVEMENT OF PERSONS

##### A. TREATY OF AMSTERDAM

As expressed in the Preamble of the Treaty of Rome,<sup>95</sup> one of the main purposes of the EU – from the perspective of the Member States – is "the constant improvement of the living and working conditions of their peoples."<sup>96</sup> Encompassed within this purpose is the goal of free

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92. *Grant*, 1998 A11 E.R. (E.C.) at ¶¶ 31-32. See *supra* notes 16-46 and accompanying text.

93. Goransson, *supra* note 20, at 170-75.

94. Shaw, *supra* note 65. See *Grant*, 1998 A11 E.R. (E.C.) at ¶¶ 36 and 48.

95. The EEC Treaty (Treaty of Rome) was signed March 25, 1957, and entered into force January 1, 1958. CARTER & TRIMBLE, *supra* note 8, at 209. In February 1986, the EC Member States signed the Single European Act, which entered into force July 1, 1987. *Id.* The EC Member States signed the EU Treaty February 2, 1992, and it entered into force November 1, 1993. *Id.* The EU Treaty became known as the Maastricht Treaty, after the place where it was signed. *Id.* Thereafter, the entire European Communities became the European Union (EU). *Id.*

96. Francis Snyder, et al., *Subsidiarity: An Aspect of European Community Law and*



movement of people between Member States. The recent *Grant v. SWT* decision had an impact on the free movement of people because it allows employers to continue to discriminate based on sexual orientation, if the laws of a Member State allow such conduct. This leads to the unequal treatment of gay men and lesbians between Member States because, as previously discussed, the EU Member States have differing social attitudes and laws regarding homosexuality. Out of a population of approximately 365 million people,<sup>97</sup> the lesbian, gay and bisexual population in the EU includes at least eighty million citizens.<sup>98</sup> Thus, the unequal treatment of gay men and lesbians could potentially have an important economic impact for the entire EU, and thus could limit the EU's ultimate goals of full economic integration,<sup>99</sup> harmonization of social systems,<sup>100</sup> and close cooperation in employment, labor law, and working conditions.<sup>101</sup>

As early as 1981, the Parliamentary Assembly of the Council of Europe attempted to prevent discrimination based on sexual orientation.<sup>102</sup> The Assembly's Committee on Social and Health Questions proposed that the Assembly adopt a provision guaranteeing "the right to sexual determination."<sup>103</sup> This could be done by adding "sexual preference" to the European Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>104</sup> The Assembly approved other proposals including "abolishing police record-keeping of homosexual activity; ensuring equal treatment for homosexuals in employment; ending all medical research designed to alter sexual orientation; guaranteeing homosexual parents the right to custody of their children; and reducing the risk of rape and violence against homosexuals in prisons."<sup>105</sup> However, the Assembly refused to take the ultimate step of modifying the text of the Convention because it wanted to allow the case law in the area to further develop before it took such a significant step.<sup>106</sup> This re-

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*its Relevance to Lesbians and Gay Men*, in *HOMOSEXUALITY*, *supra* note 1, at 230.

97. *What is the European Community?* (visited June 6, 1999) <<http://europa.eu.int/cj/en/pres/qce.htm>>.

98. PETER TATCHELL, *EUROPE IN THE PINK: LESBIAN & GAY EQUALITY IN THE NEW EUROPE* 15 (1992).

99. EEC TREATY, *supra* note 4, art. 2.

100. *Id.* art. 117. See Kees Waaldijk, *The Legal Situation in the Member States*, in *HOMOSEXUALITY*, *supra* note 1, at 75.

101. EEC TREATY, *supra* note 4, art. 118. See Tatchell, *supra* note 98, at 55 (discussing Article 118).

102. Helfer, *supra* note 8, at 183. The Assembly is composed of representatives appointed by the Parliaments of each nation that has ratified the European Convention. The Parliament makes recommendations related to human rights. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at 183-84.

106. *Id.* at 184.

fusal undermined the Assembly's recommendations.<sup>107</sup>

In 1984 the European Parliament made a statement deploring "all forms of discrimination based on an individual's sexual tendencies," and asked Member States to take action to stop legal and social anti-homosexual discrimination.<sup>108</sup> The Parliament proposed a resolution requesting that EC<sup>109</sup> Member States take action similar to the proposals of the Parliamentary Assembly of the Council of Europe.<sup>110</sup> However, the European Commission took no further action because it claimed that the EC Treaty provided no guidance regarding gay and lesbian rights, and thus it had no competence to take action prohibiting discrimination based on sexual orientation.<sup>111</sup>

In 1989 the European Parliament reiterated its support for equal treatment of homosexuals by proposing that the European Social Charter ensure the right of all workers to equal protection regardless of sexual preference.<sup>112</sup> However, the Parliament did not take any further action.<sup>113</sup> In 1994, the European Parliament again attempted to encourage Member States to protect sexual minorities.<sup>114</sup> As mentioned above, the Parliament passed a resolution asking Member States to pass legislation that provides homosexuals and lesbians access to "marriage or an equivalent legal framework and to adoption and fostering of children."<sup>115</sup> Thus far, most Member States have not passed such legislation.

The most recent attempt to eliminate discrimination based on sexual orientation is contained in the 1997 Amsterdam Treaty. Before addressing specific articles of the Amsterdam Treaty, a background that led to the drafting of the Amsterdam Treaty is necessary. In 1992 the EC Member States decided to expand European law beyond the provisions of the Treaty of Rome.<sup>116</sup> In order to do this, the EC Member States signed the Treaty of the European Union (TEU).<sup>117</sup> The TEU expanded EU law through: 1) increasing monetary union provisions; 2) granting citizenship in the EU to all citizens of the Member States; 3) heightened social provisions; and 4) including different areas of empha-

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107. *Id.*

108. Waaldijk, *supra* note 100, at 75. See Helfer, *supra* note 8, at 184 (referring to proposed resolution that advocated Member State action).

109. At the time the EU was called the European Community (EC).

110. Helfer, *supra* note 8, at 184-85.

111. *Id.* at 185.

112. *Id.*

113. *Id.*

114. Goransson, *supra* note 20, at 176.

115. *Id.*

116. Daniel T. Murphy, *The European Union's Common Foreign and Security Policy: It Is Not Far From Maastricht to Amsterdam*, 31 VAND. J. TRANSNAT'L L. 871, 872 (1998).

117. *Id.*

sis between Member States and the EC Treaty institutions.<sup>118</sup> The TEU established a set of relationships between the Treaty, EU institutions, and the Member States.<sup>119</sup> These relationships rest on “three pillars.”<sup>120</sup> The first pillar consists of the EC Treaty and its related acts.<sup>121</sup> The other two pillars are the Common Security and Foreign Policy, and Cooperation in the Fields of Justice and Home Affairs.<sup>122</sup>

At the direction of the TEU, the Member States held an Intergovernmental Conference.<sup>123</sup> This Conference was held over sixteen months, and culminated in June 1997 with agreement on the text of a draft treaty – the Amsterdam Treaty.<sup>124</sup> In October 1997, the EU Member States signed the final version of the Amsterdam Treaty.<sup>125</sup> The Amsterdam Treaty “shall enter into force on the first day of the second month following that in which the last Member State deposits the instrument of ratification with the Italian government.”<sup>126</sup> France was the last EU Member State to ratify the Amsterdam Treaty. It did so in March 1999.<sup>127</sup>

With respect to the issues addressed in this paper, the most significant provision of the Amsterdam Treaty provides:

[w]ithout 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*.<sup>128</sup>

This provision has significance because it constitutes the first official action taken by the EU that may definitively prohibit discrimination based on sexual orientation on a Community-wide basis. Unlike the Amsterdam Treaty, all previous efforts have been contingent upon the legislatures of the various Member States passing laws prohibiting discrimination based on sexual orientation. However, as addressed below, there is one caveat -- this provision is based on the unanimous action of the EU Council.

Some critics lobbied heavily against passing the Amsterdam

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118. *Id.*

119. *Id.* at 874.

120. *Id.*

121. *Id.*

122. Murphy, *supra* note 116, at 874.

123. *Id.* at 875.

124. *Id.* at 872.

125. *Id.*

126. Youri Devuyt, Introductory Note, in Amsterdam Treaty, *supra* note 14.

127. *France Ratifies EU Amsterdam Treaty Amid Criticism*, AGENCE-FR. PRESSE, Mar. 3, 1999, available in 1999 WL 2556911.

128. Amsterdam Treaty, *supra* note 14, at pt. 1, art. 13 (emphasis added).

Treaty.<sup>129</sup> A main concern for one critic, Justice Rory O'Hanlon, was the loss of sovereignty for small nations such as Ireland. This concerned Justice O'Hanlon because nations are not compensated for sovereignty they agree to sacrifice.<sup>130</sup> Justice O'Hanlon wrote that the Amsterdam Treaty is a step toward giving up all sovereignty, and is on a path toward a "vast, unwieldy conglomerate of states with different languages, traditions and cultures."<sup>131</sup> Part 1, Article 13 of the Amsterdam Treaty, which provides the mechanism to stop discrimination based on sexual orientation, bothered Justice O'Hanlon the most.<sup>132</sup> In Justice O'Hanlon's opinion, this provision defeats "the will of the Irish people."<sup>133</sup>

This argument fails to acknowledge the fact that measures cannot be passed without the support of the entire Membership of the EU Council, including Ireland. Thus, if prohibiting discrimination based on sexual orientation truly undermines the will of the Irish people, theoretically, such a provision will not pass through the EU Council because Ireland will have the ability to veto any provision it disagrees with.

In order to implement prohibitions on discrimination based on sexual orientation, the EU Council must act unanimously, and the European Parliament must be consulted.<sup>134</sup> This means that one Member State can act unilaterally to prevent the Council from passing provisions prohibiting discrimination. This raises problems because most Member States, particularly the United Kingdom, do not allow homosexuals to have the same rights and privileges as heterosexuals.<sup>135</sup>

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129. See Patricia McKenna, *Vote No So We Can Renegotiate a More Democratic Europe: Voters Should Ask Why They Are Deliberately Being Kept in the Dark*, by a Campaign of Insults and Abuse, *About the Implications for Ireland of the Amsterdam Treaty*, IRISH TIMES, May 12, 1998, at 16; Justice Rory O'Hanlon, *We Must Reject Further International Interference in our Domestic Affairs: The Amsterdam Treaty is a Bridge Too Far; We Should Not be Bludgeoned Into Accepting Political Union*, IRISH TIMES, May 20, 1998, at 16.

130. O'Hanlon, *supra* note 129

131. *Id.*

132. *Id.*

133. *Id.* Ms. McKenna argued that the EU Member States should not have passed the Amsterdam Treaty because the Treaty takes away too much decision-making power in major political areas from national governments, and gives it to Brussels. McKenna, *supra* note 129.

134. Amsterdam Treaty, *supra* note 14, at pt. 1, art. 13.

135. Historically, England has been one of the most outwardly hostile nations toward homosexual relationships. Jorge Martin, Note, *English Polygamy Law and the Danish Registered Partnership Act: A Case for the Consistent Treatment of Foreign Polygamous Marriages and Danish Same-sex Marriages in England*, 27 CORNELL INT'L L.J. 419, 428-30 (1994). Some examples of English hostility are: 1) The Sexual Offences Act of 1967 defines privacy so narrowly that when applied to same-sex relationships, if a same-sex couple has sex in a bedroom when someone is in another room of the house, they are in violation of the act. Therefore, same-sex couples having sex in a hotel are in violation of the act. *Id.* at 428. 2) Section 28 of the Local Government Act of 1988 "prohibits local authori-

Thus, although the Amsterdam Treaty allows for action prohibiting discrimination based on sexual orientation, the unanimity requirement allows those nations wary of giving up too much of their sovereignty to the EU Community to veto legislation prohibiting discrimination based on sexual orientation.<sup>136</sup> The unanimity requirement thus makes it more difficult to get measures passed. Consequently, the Amsterdam Treaty is only a framework for passing laws in the future; it does not constitute a current prohibition on discrimination based on sexual orientation.<sup>137</sup>

Further complicating matters was the resignation of the entire membership of the EU Commission following accusations of wrongdoing.<sup>138</sup> This has an especially detrimental affect on the Amsterdam Treaty because before EU Member States are obligated to pass laws prohibiting discrimination based on sexual orientation, the EU Commission must propose such legislation.<sup>139</sup> Although a new commission has been selected, the political turmoil and economic crises in the EU make the proposal of legislation prohibiting discrimination based on sexual orientation a hope for the distant future.<sup>140</sup>

Although the Amsterdam Treaty is a step in the right direction, "any progress under [the provisions prohibiting discrimination based on

ties from intentionally promoting homosexuality as a pretended family relationship." *Id.* at 428-29 (internal citation omitted). 3) Section 11(c) of the Matrimonial Causes Act of 1973 makes a marriage void if it is not "respectively male and female." *Id.* at 429 (citation omitted). Ironically, despite English hostility toward rights for homosexuals, Cherie Blair, wife of Prime Minister Tony Blair, served as counsel for Lisa Grant in her case before the ECJ. Ben Fenton, *Cherie Booth, QC, Puts Case Against the Government: Blair's Wife Takes Lesbian Cause to Europe*, DAILY TELEGRAPH (LONDON), July 10, 1997, at 8.

136. See generally Padraig Flynn, *Amsterdam Will Create a Union Responsive to People's Needs: Opponents of the Amsterdam Treaty Have Made Wild and Misleading Claims While the Reality is That the Treaty Gives the Irish Public all the Guarantees its (sic) Requires on the Issue of Defence*, IRISH TIMES, May, 18, 1998, at 14 (arguing for the passage of the Amsterdam Treaty despite the fact that it requires further surrender of sovereignty to the EU Community because the Amsterdam Treaty will "create a union responsive to the people's needs").

137. Angela Broughton, et al., *International Employment*, 32 INT'L LAW. 303, 305 (1998). Many recognize the reality that it is unlikely that the EU Commission will have the ability to pass laws prohibiting discrimination based on sexual orientation, at least not for a while, because of the unanimity requirement. See Charles Bremner, *Gay Workers Have No Right To Equal Benefits*, TIMES (LONDON), Feb. 18, 1998, at 14.

138. Phillip J. Longman, *The High Price of Staying Together: A Scandal Highlights Problems in Euro-land*, U.S. NEWS & WORLD REP., Mar. 29, 1999, at 46. Finally, after six months, the EU Parliament approved the appointment of a new president of the EU Commission - Romano Prodi, former Italian prime minister. Prodi has selected his commission, but this setback has delayed a number of crucial decisions, many which are more pressing than banning discrimination based on sexual orientation. *And So to Business*, GULF NEWS, Sept. 17, 1999, available in 1999 WL 21060955.

139. See Amsterdam Treaty, *supra* note 14, at pt. 1, art. 13.

140. See generally Longman, *supra* note 138 (discussing the political and economic turmoil of the EU since the implementation of the euro - the European single currency).

sexual orientation] will depend on the work of committed and determined activists."<sup>141</sup> Furthermore, because the Amsterdam Treaty only requires the Council of Ministers to take appropriate action to combat discrimination based on sexual orientation, this may only consist of directives, thus requiring each EU Member government to pass its own legislation complying with the directives.<sup>142</sup> This puts prohibitions on discrimination based on sexual orientation back to the position they were in before the Amsterdam Treaty. "This could add years to the time it would take a non-discrimination ban to go into effect."<sup>143</sup>

#### B. THE FREE MOVEMENT OF PERSONS

One fundamental right affected by discrimination based on sexual orientation is the free movement of persons. This infringement makes prohibitions on such discrimination even more important. The Amsterdam Treaty, with its emphasis on equal treatment and non-discrimination, is a small step toward furthering the European integration process, particularly the free movement of persons, though there is still much work to be done.

The free movement of persons is a fundamental right under the EU Treaty, but only to the extent that such a right helps further the Community objective of a fully integrated free market economy.<sup>144</sup> In the EU context, a fundamental right is not defined the same as a fundamental right under the United States Constitution. Fundamental rights in the EU are "capitalist principles that promote free trade and movement across national borders."<sup>145</sup> The EU Treaty guarantees the free movement of persons to workers under Article 48 of the EU Treaty, and to the self-employed who have the right of establishment under Article 52.<sup>146</sup> However, as mentioned above, Member States may impose limitations on the right of EU citizens to enter and take up work in their states.<sup>147</sup> Member States may base these limitations on public policy, public security and/or public health. In addition, states are free "to determine the requirements of public policy in light of their national needs."<sup>148</sup> However, these limitations must be justified, and the ECJ may review such to ensure that the justification complies with the terms and purposes of the EU.<sup>149</sup>

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141. Flynn, *supra* note 136.

142. Amsterdam Treaty, *supra* note 14, at pt. 1, art. 13; Edwin Unsworth, *E.U. Rejects Same-Sex Benefits*, BUS. INS., Mar. 2, 1998, at 31.

143. Unsworth, *supra* note 142, at 31.

144. Carlos A. Ball, *The Making of a Transnational Capitalist Society: The Court of Justice, Social Policy, and Individual Rights Under the European Community's Legal Order*, 37 HARV. INT'L L.J. 307, 341 (1996).

145. *Id.* at 308.

146. *Id.* at 346-47.

147. Clapham & Weiler, *supra* note 4, at 39.

148. *Id.*

149. *Id.*

The ECJ analyzed the definition of “worker” and the scope of the right to free movement in *Levin v. Staatssecretaris van Justitie*.<sup>150</sup> In that case, the Court discussed the objectives of the EU Treaty and stated that “according to Articles 2 and 3, [one of the objectives of the EU Treaty is] the abolition, as between Member States, of obstacles to freedom of movement for persons, with the purpose inter alia of promoting throughout the Community a harmonious development of economic activities and a raising of the standard of living.”<sup>151</sup> Based on this objective, the Court held that Mrs. Levin, as a part-time worker, had the right to freely move and work in any EU Member State “because the denial of such a right to her and to other part-time workers would have undermined the successful attainment of the Community’s economic objectives.”<sup>152</sup> Thus, for the right of free movement to apply to EU citizens, it must assist in the creation of an integrated common market.<sup>153</sup> Therefore, the determination as to whether an individual is entitled to the right of free movement stems from “whether he or she is an active participant in the economy.”<sup>154</sup>

The main goal of the EU is economic integration, thus social policy issues are secondary and only addressed to the extent that they impact economic integration.<sup>155</sup> Unfortunately, because of this secondary status, the social policies related to same-sex couples and free movement have not moved toward protecting homosexuals’ “fundamental right” to free movement, although discrimination in employment in any form does impact economic integration.

Most Member States probably prefer to ignore the long-term economic impact discrimination has, rather than address the social policies impacted by discrimination based on sexual orientation. Most significantly, the criteria set forth in *Levin* (i.e. whether a citizen is an active participant in the economy determines their entitlement to a right of free movement), have not applied to homosexual employees within the EU. At present, most states do not prohibit employment discrimination based on sexual orientation.<sup>156</sup> This causes a problem because discrimination based on sexual orientation is a disincentive for homosexual citizens of non-discriminatory states Member States to move to and find employment in discriminatory Member States.<sup>157</sup>

Other factors such as higher taxes and higher crime rates may also

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150. Ball, *supra* note 144, at 349.

151. *Id.* (internal quotation omitted).

152. *Id.* at 350.

153. *Id.*

154. *Id.*

155. *Id.* at 308-09.

156. Only France, Denmark, the Netherlands and Ireland prohibit such discrimination. See *supra* note 7 and accompanying text.

157. Ball, *supra* note 144, at 382.

affect free movement, however, discrimination in employment directly affects a fundamental objective of the Community – freedom of movement to allow citizens of Member States to compete in the EU's labor market.<sup>158</sup> Thus, Member States should work harder to actively prohibit such discrimination.

As the laws of the Member States currently stand, homosexual employees receive different treatment depending upon the Member State they live in. This inequality of treatment impedes free movement because “employees in countries where they are guaranteed legal protection against discrimination may be loathe to relocate in other [EU] [M]ember [S]tates where no such protection exists because they would thereby be vulnerable to discrimination.”<sup>159</sup> For example, homosexual citizens in Denmark, France, Ireland and the Netherlands have their rights of free movement infringed because no other countries offer protection against employment discrimination based on sexual orientation.<sup>160</sup> In addition, homosexual employees of other Member States may move to France, Ireland or the Netherlands because they currently are the only Member States offering such protection, thereby distorting free competition in labor markets, and putting employers in EU countries without protection against discrimination based on sexual orientation at a disadvantage.<sup>161</sup> These employers may be disadvantaged in a number of ways, but most significantly they may be unable to attract some “high calibre” employees merely because the employees are homosexual.<sup>162</sup>

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158. *Id.* at 382-83.

159. TATCHELL, *supra* note 98, at 56.

160. *Id.*

161. *Id.*

162. *Id.* Following are a few examples of the ways in which homosexuals may be discriminated against in nations that are hostile toward homosexual relationships: 1) A French lesbian may accept seasonal work in Germany, thereby availing herself of the privilege of free movement. While in Germany, she could be confronted with harassment from her employer if he or she discovers her sexuality. However, unlike in France, she will have no legal recourse in Germany to stop the harassment or ensure that she will receive compensation for her services; 2) An American company may locate its headquarters in the United Kingdom. Citizens from all the various EU countries staff the headquarters. While in the UK, homosexual staff members will face the following discrimination and persecution: a) they will have no legal protection against sexual discrimination in the workplace, including unfair dismissal or harassment; b) they will have no legal protection against sexual discrimination in the provision of public and private services, such as housing; c) the male staff members could be prosecuted if they have sex with other men, unless both are at least 21, and the sexual acts occur in a private dwelling with doors locked, windows shut, and no other person is in any part of the house; and d) the gay male staff members, and in some instances lesbian staff members, may be prosecuted for consensual non-genital contact (i.e. kissing, caressing, exchanging telephone numbers in a public place, etc.). *Id.* at 56-57. These types of issues will have the greatest impact on free movement until the European Council passes some type of community-wide legislation prohibiting this type of treatment. However, as mentioned above, passing such laws



Another issue raised by *Grant v. SWT* involves the inability of homosexual citizens to move from one Member State to another as guaranteed by Article 8 of the EU Treaty. Current laws in most Member States infringe upon this right because some Member States allow homosexual citizens to receive employment benefits for their same-sex partners, whereas other Member States deny such benefits. Furthermore, some Member States allow Registered Partnerships that provide invaluable benefits equivalent to those offered to married couples. Despite potential better employment opportunities in other Member States, homosexual citizens may not want to leave non-discriminating Member States because they would then have to forfeit these benefits.

Some may argue that if emigration occurs within the EU, the losses will be internalized, thereby minimizing the overall impact to the EU.<sup>163</sup> Although the overall costs to the EU as a whole will not be excessive, certain regions will likely suffer unnecessary "brain drain" and economic disparity.<sup>164</sup> This would lead to an unequal allocation of the EU work force.<sup>165</sup> Thus, although the right of free movement is not overtly denied to same-sex couples or homosexual citizens, discrimination in-rings on such a right.

The most recent attempt made by the EU institutions through the Amsterdam Treaty can potentially protect the lesbian and gay community against discrimination in areas already within the competence of the Community (i.e. employment conditions and the free movement of labor).<sup>166</sup> Such an approach couches the protection in terms of economic fairness and equality, rather than morality, thereby making it easier for EU Member States less open to equal treatment for homosexuals, to implement measures prohibiting discrimination based on sexual orientation.<sup>167</sup> These Member States can justify their actions based on economic rather than social considerations because denying the right of free movement, whether direct or indirect, to one portion of the citizenry, impairs economic expansion and stability.<sup>168</sup>

## V. CONCLUSION

Although the EU has proceeded in the right direction toward pro-

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may not occur for a long time. See *supra* notes 138-40 and accompanying text.

163. Russell Child, *The Economic Situation in the Member States*, in *HOMOSEXUALITY*, *supra* note 1, at 171.

164. *Id.*

165. *Id.*

166. Ball, *supra* note 144, at 385.

167. *See id.*

168. *See generally* Waaldijk, *supra* note 100, at 75 (referring to the ongoing existence of homosexual discrimination).

hibiting discrimination based on sexual orientation, the *Grant v. SWT* decision still prevails as the current law in the EU. This decision unfortunately represents a setback in the homosexual rights movement that has made various strides in the last thirty years. Aware of the impending passage of the Amsterdam Treaty, the ECJ took a conservative approach to its decision in *Grant v. SWT*. This allowed the ECJ to maintain the "status quo," and left the definitive decision-making to the legislative branch of the EU.

*Grant v. SWT* presented the ECJ with the opportunity to definitively decide this issue, but it chose not to capitalize on that opportunity, and has now left the decision-making power to the members of the European Council and the European Parliament. This causes problems because the ability of the European Council to pass community-wide legislation prohibiting discrimination based on sexual orientation is predicated on the unanimous vote of the European Council after consultation with the European Parliament, and a proposal from the European Commission.<sup>169</sup> Due to the recent political and economic instability in the EU, passage of the necessary legislation will be difficult.<sup>170</sup>

Thus, rather than ensuring that the Member States apply the law of the EU uniformly, the ECJ ensured that it will take a long time before uniformity exists with respect to discrimination against sexual minorities. Despite failed attempts to do so in the past, the legislative and executive institutions within the EU must continue to promote the prohibition of discrimination based on sexual orientation in order for the Community to achieve the full economic and social integration for which it strives. Until then, it is clear that "[a]ll animals are equal, but some animals are more equal than others."<sup>171</sup>

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169. Grant, 1998 A11 E.R. (E.C.) at ¶ 48. See Amsterdam Treaty, *supra* note 14, at pt. 1, art. 13.

170. See *supra* notes 138-40 and accompanying text.

171. Orwell, *supra* note 2, at 112.