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DEMOCRACY AND HUMAN RIGHTS—NOT FOR GAY PEOPLE?: EU EASTERN ENLARGEMENT AND ITS IMPACT ON THE PROTECTION OF THE RIGHTS OF SEXUAL MINORITIES

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"We want to enter Europe, not Sodom and Gomorrah."
Position of one of the Romanian MPs voting against the decriminalisation of homosexual acts.[1]

"The Assembly . . . calls upon the World Health Organisation to delete homosexuality from its International Classification of Diseases."
Parliamentary Assembly of the Council of Europe, Resolution 756 (1981), § 6

I. INTRODUCTION AND STRUCTURE OF THE ARGUMENT[2]

Gays and lesbians in Central and Eastern European countries (CEECs) did not have any rights under communism, where homosexuality had either been a criminal offence or, at best, the official attitude towards it could be characterised as repressive tolerance.[3] The development of civil rights and freedoms, which started after the collapse of the communist regimes, did not immediately result in a break through in the sphere of gay rights:[4] "[i]n the midst of the multifaceted transformation of [the CEECs], the status of gay and lesbian

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[1] Lucian Turcescu & Lavinia Stan, *Religion, Politics and Sexuality in Romania*, 57 EUR.-ASIA STUD. 291, 294 (2005).

[2] There is at least one other article on the same subject. *See generally* Travis J. Langenkamp, Comment, *Finding Fundamental Fairness: Protecting the Rights of Homosexuals Under European Union Accession Law*, 4 SAN DIEGO INT'L L.J. 437 (2003).

[3] *See* Michael Jose Torra, Comment, *Gay Rights after the Iron Curtain*, 22 FLETCHER F. WORLD AFF., 73, 74–75 (1998). Communist regimes also used homosexuality as an accusation against dissenters, using homophobic criminal law to prosecute dissidents. Turcescu & Stan, *supra* note 1, at 291.

[4] The term "gay" used throughout the note encompasses a reference to lesbian women, homosexual men, and bi-sexual people.

residents has undergone varied and dramatic changes and is still in flux."[5] Many hopes for change in this situation were related to the process of enlargement of the European Union (EU) and were fuelled by the belief that the EU would ensure that no country turning a blind eye to the problems related to gay rights and allowing discrimination on the basis of sexual orientation would be permitted to join. As it turned out, these hopes were only partly justified. The actions of the EU were timid, ill-focused, and stopped short of realising the potential for change offered by the legal context of enlargement preparation. Such developments can be explained by the limited nature of Community competences in this field, especially true at the very beginning of the enlargement process and which were certainly influenced by the questionable gay rights record of the European Court of Justice (ECJ). The EU did not decouple the pre-accession human rights monitoring of the candidate countries from its own internal incompetence in the field of gay rights and the limited scope of the *acquis* in this area.[6] While the situation improved slightly over the last few years preceding the enlargement, it is clear that the current adopted practice is unsustainable and that the EU should seriously consider allowing gay rights to play a more prominent role in the course of the preparation of future enlargements.

A. *Internal Reform, Enlargement, and Gay Rights: Turbulent Legal Developments*

Advocate General Elmer argued in his opinion in *Grant v. South-West Trains Ltd.* that:

> Equality before the law is a fundamental principle in every community governed by the rule of law and accordingly in the [European] Community as well. The rights and duties which result from Community law apply to all without discrimination and therefore also to the approximately 35 million citizens of the Community . . . who are homosexual.[7]

As the decision in *Grant*,[8] which "does the European Court of Justice little credit as a constitutional court,"[9] has demonstrated, this statement did not amount to anything more than wishful thinking. Even the coming into force of

[5] Torra, *supra* note 3, at 73.

[6] *Acquis communautaire* includes the whole body of legal instruments in force in the European Union. See Christine Delcourt, *The* Acquis Communautaire*: Has the Concept Had Its Day?*, 38 COMMON MKT. L. REV. 829, 852–53 (2001).

[7] Opinion of the Advocate-General, Sept. 30, 1997, ¶ 42, Case C-249/96, Grant v. South-West Trains Ltd., 1998 E.C.R. I-621. All the ECJ case-law is available at http://curia.europa.eu/ and http://eur-lex.europa.eu in all the official languages of the EU.

[8] *Grant*, 1998 E.C.R. I-621.

[9] Nicholas Bamforth, *Sexual Orientation Discrimination After* Grant v. South-West Trains, 63 MOD. L. REV. 694, 720 (2000). For a somewhat more Court-friendly analysis, see Christa Tobler, *Kroniek: Discriminatie op grond van geslacht*, NEDERLANDS TIJDSCHRIFT VOOR EUROPEES RECHT, Apr.–May 1998, at 74, 78–79.

the Amsterdam Treaty,[10] with its Article 13 EC allowing for the adoption of the legislative measures prohibiting, *inter alia*, discrimination on the basis of sexual orientation and the Equal Treatment Directive that followed,[11] did not change the situation entirely. *De facto*, there is still discrimination on the basis of sexual orientation in the EU.

Viewing the case-law of the ECJ[12] in the context of the European Court of Human Rights (ECt.HR)[13] and some national jurisdictions of the Member States of the EU provides an uneasy picture—both negative and positive developments can be observed.

The piling up of diverse and often contradictory European jurisprudence in the field of nondiscrimination on the basis of sexual orientation and gay rights was accompanied in recent years by a veritable explosion of legislation, marking an upcoming tide of recognition of same-sex unions and same-sex marriages,[14] as well as aiming at outlawing discrimination. Viewed in the broader context of world developments, and given that the gay, lesbian and bisexual rights movement has achieved global scale,[15] Europe, and especially the "old" Member States of the EU (so-called "EU-15"), is hardly trailing the leading jurisdictions in articulating the problems in the area of gay rights and trying to effectively tackle them. This is especially true in the field of the legal recognition of same-sex couples, where a number of EU Member States can be placed alongside Canada, South Africa, and the U.S. states of Massachusetts,[16] California,[17] and Vermont.[18]

Unfortunately but predictably, a certain backlash can be observed in a number of jurisdictions. ECJ's *Grant v. South-West Trains Ltd.* naturally came as a surprise after *P. v. S.*,[19] and the ECt.HR's *Fretté v. France*[20] was hardly to be

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[10] Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, 1997 O.J. (C 340) 1, 24, 26, 86. The *Official Journal of the European Union* is available online at http://eur-lex.europa.eu/.

[11] Council Directive 2000/78, 2000 O.J. (L 303) 16 (EC).

[12] *See* discussion *infra* Part V.B.

[13] *See* discussion *infra* Part VI.

[14] *See generally* LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW (Robert Wintemute & Mads Andenæs eds., 2001); Allison R. O'Neill, *Recognition of Same-Sex Marriage in the European Community: The European Court of Justice's Ability To Dictate Social Policy*, 37 CORNELL INT'L L.J. 199 (2004); O. De Schutter & A. Weyembergh, *La cohabitation légale une étape dans la reconnaissance des unions entre personnes du même sexe?*, 49 JOURNAL DES TRIBUNAUX 93 (2000).

[15] Carl F. Stychin, *Same-Sex Sexualities and the Globalization of Human Rights Discourse*, 49 MCGILL L.J. 951, 951 (2004).

[16] *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003) (holding that the state cannot deny the protections, benefits, and obligations of civil marriage to two peole of the same sex under the Massachusetts Constitution).

[17] CAL. FAM. CODE § 297.5(a) (Deering 2006).

[18] VT. STAT. ANN. tit. 15, § 1204 (2006); Baker v. State, 744 A.2d 864, 899 (Vt. 1999); *see* Mary L. Bonauto, *The Freedom to Marry for Same-Sex Couples in the United States of America*, *in* LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW, *supra* note 14, at 177.

[19] *See* Case C-249/96, Grant v. South-West Trains Ltd., 1998 E.C.R. I-621; Case C-13/94, P. v. S., 1996 E.C.R. I-2143.

expected after *Salgueiro da Silva Mouta* v. *Portugal*.[21] All in all, the beginning of this century and the last decade of the previous has been a very turbulent time for the development of gay rights in Europe, putting the sexual minorities, previously almost unseen in the legal discourse, into the spotlight.

During the same period, the EU[22] was simultaneously advancing in two fields of crucial importance: deepening and widening. The process of deepening is illustrated by the successful conclusion of three Intergovernmental Conferences (IGC), resulting in three major amendments of the founding Treaties[23] in less than a decade (Maastricht,[24] Amsterdam,[25] and Nice[26]), and, indeed, the creation of the EU by the Maastricht EU Treaty. The adoption of the Treaty Establishing a Constitution for Europe (TCE)[27] was meant to be the crown to this achievement, but the French *non* and the Dutch *nee* have made this development unlikely, thus leaving the aims of the Laeken Declaration unattained,[28] including the simplification of the "Constitutional Charter" of the Communities[29] and making the EU more democratic and transparent.[30] This development notwithstanding, the EU as we know it today is clearly superior in comparison with the pre-Maastricht Communities, indicating that the reform was a success.

The same can be said about the process of widening. The recent expansions of 2004 and 2007 brought the number of the Member States to 27,[31]

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[20] Fretté v. France, App. No. 36515/97, 2002-I Eur. Ct. H.R.

[21] Salgueiro da Silva Mouta v. Portugal, App. No. 33290/96, 1999-IV Eur. Ct. H.R. All the case-law of the ECt.HR is available online at http://www.echr.coe.int.

[22] *See generally* F. AMTENBRINK & H.H.B. VEDDER, RECHT VAN DE EUROPESE UNIE, (Boom Juridische uitgevers 2006); DAMIAN CHALMERS ET AL., EUROPEAN UNION LAW: TEXT AND MATERIALS (2006); PAUL CRAIG & GRÁINNE DE BÚRCA, EU LAW: TEXT, CASES, AND MATERIALS (3d ed. 2003).

[23] Treaty Establishing the European Coal and Steel Community, Apr. 18, 1951, http://europa.eu/scadplus/treaties/ecsc_en.htm; Treaty Establishing the European Economic Community, Mar. 25, 1957, http://europa.eu/scadplus/treaties/ecsc_en.htm; Treaty Establishing the European Atomic Energy Community (Euratom), Mar. 25, 1957, http://europa.eu/scadplus/treaties/ecsc_en.htm. The ECSC Treaty, in existence for 50 years, expired on July 23, 2002. Benedetta Ubertazzi, *The End of the ECSC*, 8 EUR. INTEGRATION ONLINE PAPERS 20 (2004), http://eiop.or.at/eiop/texte/2004-020.htm.

[24] Treaty on European Union, July 29, 1992, 1992 O.J. (C 191) 1.

[25] Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, 1997 O.J. (C 340) 1.

[26] Treaty of Nice, Feb. 26, 2001, 2001 O.J. (C 80) 1.

[27] Treaty Establishing a Constitution for Europe, Oct. 29, 2004, 2004 O.J. (C 310) 1.

[28] *See* The Future of the European Union - Laeken Declaration (Dec. 15, 2001), http://europa.eu.int/constitution/futurum/documents/offtext/doc151201_en.htm.

[29] Case 294/83, Parti écologiste "Les Verts" v. Parliament, 1986 E.C.R. 1339, ¶ 23.

[30] It has been argued that the TCE was ill-suited to sufficiently address the Laeken goals. *See* F. Amtenbrink, *Europa; Democratischer, Transparanter en Efficiënter?*, *in* EUROPA; EENHEID IN VERSCHEIDENHEID? 121 (F. Amtenbrink & S.B. van Baalen eds., 2005; Juliane Kokott & Alexandra Rüth, *The European Convention and Its Draft Treaty Establishing a Constitution for Europe: Appropriate Answers to the Laeken Questions?*, 40 COMMON MKT. L. REV. 1315 (2003).

[31] Treaty Concerning the Accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia, and the

marking the most significant increase in the number of Member States in the 50-year history of the polity *sui generis*.[32] The 2004 enlargement was the fifth expansion in the history of European integration.[33] Bulgaria and Romania joined the EU in 2007.[34] The EU's success is attracting increasing numbers of countries. Three more states are to follow: Croatia, Macedonia, (FYROM) and Turkey enjoy a candidate country status, while accession negotiations have already been opened with two of them (Croatia and Turkey). Moreover, a number of countries in Europe, Africa, and the Caucasus have made it clear that accession to the EU is among their main foreign policy objectives.[35]

Slovak Republic to the European Union, Apr. 16, 2003, 2003 O.J. (L 236) 17; *see* Kirstyn Inglis & Andrea Ott, *EU-uitbreiding en Toetredingsverdrag: verzoening van droom en werkelijkheid*, 4 SOCIAAL-ECONOMISCHE WETGEVING 146 (2004); Kirstyn Inglis, *The Union's Fifth Accession Treaty: New Means To Make Enlargement Possible*, 41 COMMON MKT. L. REV. 937 (2004); Erwan Lannon, *Le traité d'adhésion d'Athènes: Les négociations, les conditions de l'admission et les principales adaptations des traités résultant de l'élargissement de l'UE à vingt-cinq Etats membres*, *in* 40 CAHIERS DE DROIT EUROPEEN 15 (2004).

[32] For discussion of the *sui generis* nature of the EU, see James A. Caporaso et al., *Does the European Union Represent an* n *of 1?*, 10 ECSA REV. 3 (1997), *available at* http://aei.pitt.edu/54/01/N1debate.htm.

[33] When the Treaties of Paris and Rome were signed, the Communities consisted of six founding Member States: France, Germany, Italy, and the Benelux countries. The previous enlargements included: (1) accession of the U.K., Ireland, and Denmark, *see* Treaty Concerning the Accession of the Kingdom of Denmark, Ireland, and the United Kingdom of Great Britain and North Ireland to the European Economic Community and the European Atomic Energy Community, Jan. 22, 1972, 1972 O.J. (L 73); (2) accession of Greece, *see* Documents Concerning the Accession of the Hellenic Republic to the European Communities, 1979 O.J. (L 291); (3) accession of Spain and Portugal, *see* Documents Concerning the Accession of the Kingdom of Spain and the Portuguese Republic to the European Communities, 1985 O.J. (L 302); (4) accession of Austria, Sweden, and Finland, see Documents Concerning the Accession of the Republic of Austria, the Kingdom of Sweden, the Republic of Finland and the Kingdom of Norway to the European Union, 1994 O.J. (C 241). The last, 5th round marked the accession of Estonia, Latvia, Lithuania, Poland, The Czech Republic, Slovakia, Hungary, Slovenia, Cyprus, and Malta. *See* Documents Concerning the Accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union, 2003 O.J. (L 236). The unification of Germany that *de facto* amounted to the enlargement of the Communities to include the territory of the former German Democratic Republic (GDR) is not counted as a separate round since it was regulated by German law, not by the EU enlargement instruments. Michael Bothe, *The German Experience To Meet the Challenges of Reunification*, *in* EU ENLARGEMENT: THE CONSTITUTIONAL IMPACT AT EU AND NATIONAL LEVEL 435, 437 (Alfred E. Kellermann et al. eds., 2001).

[34] Documents Concerning the Accession of the Republic of Bulgaria and Romania to the European Union, 2005 O.J. (L 157). Subject to the Commission's approval, the date of accession could be moved to 2008. *Id.* at 10. *See generally* J.S. van der Oosterkamp & A.S.N. Galama, *De toetreding tot de Europese Unie van Bulgarije en Roemenië*, 3 SOCIAAL-ECONOMISCHE WETGEVING 8 (2007).

[35] These countries include, but are not limited to, Albania, Bosnia i Herzegovina, Cape Verde, Georgia, Montenegro, Moldova, Serbia, and Ukraine. *See* Christopher Melville, *Government to Request EU Membership for Cape Verde*, WORLD MKTS ANALYSIS, May 9, 2005, *available at* Lexis-Nexis; Ministry for Foreign Affairs of Ukraine, Integration Strategy (June 8, 1998), http://www.mfa.gov.ua/mfa/en/publication/content/2823.htm.

Although the latest enlargement was generally regulated by the same principles as all the previous expansions of the EU,[36] it was different from the previous expansions in legal terms. This difference mostly concerned the formulation and subsequent application by the EU of the conditionality principle,[37] allowing it to "steer" the national developments in the candidate countries in order to assure that the new-comers comply with the pre-accession requirements of article 6(1) EU, including, *inter alia*, democracy, the rule of law, and the protection of human rights (gay rights included).[38] The fifth enlargement of the EU brought about a powerful mechanism to affect the state of the law of those countries willing to join, and certainly had potential to serve as a watermark for the protection of gay rights in Eastern Europe.

This article analyzes the impact of enlargement of the EU on the protection of gay rights in the new-coming states. In other words, it aims at outlining the application of the enlargement conditionality principle by the Community institutions in the course of the preparation of the fifth and the sixth enlargements to the promotion of gay rights in the candidate countries and the acceding states. Viewing the groundbreaking legal developments in the field of gay rights protection in Europe in the light of the enlargement preparation and the dynamics of the EU's own development, including both Treaty reforms and enlargement, provides an excellent framework for the analysis of the effectiveness of the EU as an exporter of the principle of nondiscrimination on the basis of sexual orientation as well as of the protection of gay rights.

B. *Structure of the Argument*

Did gay rights matter in the course of the pre-accession "democracy, the rule of law, and human rights"[39] assessment? How effectively did the EU act in order to promote gay rights? What kinds of standards were available to it, and which standards were used in practice? Why, in the end, were the successes obtained so modest and demands so timid? In order to answer these questions, both the enlargement law of the EU and the legal measures related to the protection of gay rights in the EU legal system should be analysed. Furthermore, it is necessary to put the applicable European law on the issue into the context of legal developments in other jurisdictions, both national (the Member States of the EU) and international, most notably the ECt.HR. This

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[36] On the legal regulation of enlargements, see generally HANDBOOK ON EUROPEAN ENLARGEMENT (Andrea Ott & Kirstyn Inglis eds., 2002). *See also* EU ENLARGEMENT: A LEGAL APPROACH (Christopher Hillion ed., 2004); ROZSZERZENIE UNII EUROPEJSKIEJ: KORZYŚCI I KOSZTY DLA NOWYCH KRAJÓW CZŁONKOWSKICH (Jarosław Kundera ed., 2005); Dimitry Kochenov, *EU Enlargement Law: History and Recent Developments: Treaty – Custom Concubinage?*, 9 EUR. INTEGRATION ONLINE PAPERS 6 (2005), http://eiop.or.at/eiop/texte/2005-006.htm (providing an exhaustive list of books on this issue in footnote 2).

[37] EDWIGE TUCNY, L'ELARGISSEMENT DE L'UNION EUROPEENNE AUX PAYS D'EUROPE CENTRALE ET ORIENTALE (L'Harmattan 2000); *see* Kochenov, *supra* note 36, at 14.

[38] *See* discussion *supra* Part I.A.

[39] As outlined in the Copenhagen political criteria, see Presidency Conclusions, Copenhagen European Council (June 21–22, 1993), No. SN180/1/93. *See* discussion *infra* Part II.B.

will enable sober assessment of the successes as well as the failures of the EU in the pre-accession gay rights protection and promotion.

The article starts by providing an outline of the EU enlargement law in order to assess the arsenal of tools for the promotion of potential change in the sphere of gay rights legally at the disposal of the EU with particular regard to the potential of the principle of conditionality in this respect (**II**). Then it turns to analysing the scope of the EU competences for promoting gay rights in the course of the pre-accession exercise. It argues that checking the compliance of the candidate countries with the basic principles set out in article 6(1) EU forms an exception from the general rule of article 5 EC that the Community is only competent in the areas where national sovereign powers have been transferred to it by the Member States. Only the removal of the pre-accession human rights assessment from the scope of the article 5 EC limitations could allow effective testing of the candidate countries' readiness to join (**III**). The article then scrutinises the actual assessment of the level of gay rights protection provided by the Community institutions in the course of enlargement preparation. Such analysis reveals that gay rights only played a marginal role in the preparation of the fifth enlargement, and no full use of the enlargement law instruments and pre-accession "steering" competences was made by the EU in this particular field (**IV**). The section that follows is confined to the analysis of the dynamics of the gay rights *acquis* in a bid to explain the alarmingly low profile enjoyed by gay rights in the course of the pre-accession exercise. Simple comparison between the pre-accession demands in the field of gay rights and the evolution of the scope of the gay rights *acquis* demonstrates a clear correlation between the two, *de facto* amplifying the deficiencies of the gay rights *acquis*, clearly not suited to the role of a cornerstone of the pre-accession gay rights assessment (**V**). Lastly, the pre-accession developments in the field of gay rights protection are put into the context of progress in this field achieved in other jurisdictions and, most notably, the ECt.HR and the U.N. Human Rights Committee. It is argued that these, alongside the rules adopted by the EU-15, could provide the EU with more elaborated standards of gay rights protection than the Community gay rights *acquis* (**VI**).

Notwithstanding the deficiencies of the pre-accession process, Europe is facing an unprecedented improvement in the gay rights climate—the glorious march of the legal recognition of same-sex partnerships and marriages,[40] the adoption of national non-discrimination legislation, and the successful transposition of the Equal Treatment Directive by all the Member States marked a crucial change in the attitude of the legislator towards the problems of gay people and the discrimination they suffered.[41] Nevertheless, the article's

[40] For a summary of such developments on the world scale, see Robert Wintemute, *Conclusion* to LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW, *supra* note 14, at 759, 761.

[41] For a summary of national legal developments related to gay rights in Europe, see Kees Waaldijk, *Towards the Recognition of Same-Sex Partners in European Union Law: Expectations Based on Trends in National Law*, *in* LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW, *supra* note 14, at 635, 649–50.

conclusions are alarming—the powerful principle of conditionality in the possession of the EU was largely disregarded in the course of pre-accession gay rights promotion. This approach should be changed in the preparation of the future expansions of the EU.

II. EU ENLARGEMENT LAW: CONDITIONALITY OF STICKS AND CARROTS

A. *Principles and Application Criteria*

In short, the essence of the EU enlargement law is that any democratic European state can join the EU by protecting human rights, adhering to the principle of the rule of law, and sharing the objectives of the EU. This is clearly spelled out in article 49 EU:

> Any European State which respects the principles set out in Article 6(1) may apply to become a member of the Union. It shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the assent of the European Parliament, which shall act by an absolute majority of its component members.
>
> The conditions of admission and the adjustments to the Treaties on which the Union is founded, which such admission entails, shall be the subject of an agreement between the Member States and the applicant State. This agreement shall be submitted for ratification by all the contracting States in accordance with their respective constitutional requirements.[42]

Article 6(1) EU demands respect of the following principles: "liberty, democracy, respect for human rights[,] and fundamental freedoms, and the Rule of Law [,] . . . which are common to the Member States."[43]

Through providing some general guidance as to who may apply to join the EU and which institutions are involved in dealing with the applications, article 49 EU does not contain any detailed procedure for how enlargements of the EU are to be regulated. In practice, enlargement law comes down to a set of enlargement principles and application criteria.[44] The application criteria should be met at the time of the submission of the application for membership to the Council of the European Union ("Council"). If this is not the case, the question of adhering to the principles cannot even be raised—the application made by a state that does not meet the criteria would be immediately rejected (as happened with Morocco[45]) or left unanswered (as in the case of Franco's Spain[46]).

[42] Article 49 EU
[43] Article 6(1) EU
[44] For a brief analysis, with further references, of the EU enlargement law, see Kochenov, *supra* note 36.
[45] *Id.* at 29 n.15.
[46] *Id.* at 10.

Similarly, once a country ceases to meet the application criteria for some reason, the process immediately comes to a halt (similar to what happened to Greek association in 1967[47]). A situation might arise when an applicant country meets the formal criteria but is not ready to adhere to the principles or might be ready to adhere to the principles but does not meet the application criteria. In both such cases, enlargement is impossible. Thus, taking this distinction into account, Hillion's view that a country "can be eligible but not admissible"[48] (and vice versa) becomes clear.

Having met all the application criteria, the countries joining in the fifth enlargement were all clearly eligible to enter the EU. The criteria,[49] as outlined in article 49(1) EU included statehood, Europeanness, and sharing the principles of article 6(1) EU. Scholarly literature also regards membership of the Council of Europe (CoE)[50] as a necessary criterion,[51] which is justifiable given the wording of article 6(2) EU, the views of the candidate countries,[52] and the common goals the CoE shares with the EU.[53]

Accepting the principles of enlargement appeared more challenging for the CEECs.[54] Traditionally, EU enlargement law knows two main principles—

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[47] *Id.* The application of the Association Agreement with Greece was frozen after the *coup d'État* of the colonels. *Id.*; *see* 1963 J.O. (L 26) 93.

[48] Christophe Hillion, *Enlargement of the European Union: A Legal Analysis, in* ACCOUNTABILITY AND LEGITIMACY IN THE EUROPEAN UNION 411 (Anthony Arnull & Daniel Wincott eds., 2002); Christophe Hillion, *The Copenhagen Criteria and Their Progeny*, *in* EU ENLARGEMENT: A LEGAL APPROACH 19 (Christophe Hillion ed., 2004).

[49] For the evolution of the criteria and their analysis, see Kochenov, *supra* note 36, at 9–11.

[50] Statute of the Council of Europe, May 5, 1949, Europ. T.S. No. 1. Accessions to the CoE are regulated by art. 4 of the Statute and presuppose ratification of the European Convention on Human Rights (ECHR). Convention for the Protection of Human Rights and Fundamental Freedoms, as Amended by Protocol No. 11, Nov. 4, 1950, Europ. T.S. No. 5.

[51] *See* Koen Lenaerts, *Fundamental Rights in the European Union*, 25 EUR. L. REV. 575, 599 (2000); Dinah Shelton, *The Boundaries of Human Rights Jurisdiction in Europe*, 13 DUKE J. COMP. & INT'L L. 95, 97 (Winter 2003); TUCNY, *supra* note 37, at 28.

[52] TUCNY, *supra* note 37, at 28.

[53] The EU and CoE accession criteria are also quite similar. On the CoE enlargement law, see EUR. PARL. ASS. DEB., *Resolution 1115 (1997) Setting Up of an Assembly Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe*, 5th Sess., Doc. No. 1115 (1997); EUR. PARL. ASS. DEB., *Order No. 485 on the General Policy of the Council of Europe*, 25th Sess., Doc. No. 6744 (1993); EUR. PARL. ASS. DEB., *Order No. 488 on the Honouring of Commitments Entered Into by New Member States*, 39th Sess., Doc. No. 6882 (1993); EUR. PARL. ASS. DEB., *Resolution 917 on a Special Guest Status with the Parliamentary Assembly*, 5th Sess., Doc. No. 6036 (1989); EUR. PARL. ASS. DEB., *Resolution 1031 on the Honouring of Commitments Entered Into by Member States When Joining the Council of Europe*, 14th Sess., Doc. No. 7037 (1994); *see also* Commission Pour le Respect des Obligations et Engagements des Etats Membres du Conseil de l'Europe (Commission de Suivi) (Nov. 8, 2005), http:/ /assembly.coe.int/committee/MON/Role_F.htm. *See also* Dimitry Kochenov, *An Argument for Closer Cooperation between the European Union and the Council of Europe in the Field of EU Enlargement Regulation*, 2 CROATIAN Y.B. EUR. L. & POL'Y 311 (2006), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=953960.

[54] For the analysis of enlargement principles, see Kochenov, *supra* note 36, at 11–16.

full and unconditional acceptance of the *acquis communautaire*,[55] including the goals of the Community/Union and the options open for development,[56] and the limited duration and reach of the transitional periods. *Tout court*, the newcomers cannot deviate from the *acquis* and are unable to change the Treaties.[57] Not following directly from the text of article 49 EU, these principles stem from the very nature of the Community and form the core component of the Community method.[58]

B. *Conditionality Principle*

The fifth enlargement saw an important change in the structure of principles, namely, a new conditionality principle was added. The EU reserved itself a right to assess the level of preparedness for accession of those countries willing to join, analyzing their economic status as well as their record in the field of human rights, democracy, and the rule of law. To a considerable extent, the origins of the principle lie in the specific character of the fifth enlargement round, which was not exactly like the previous rounds, due to both the sheer number of applicants[59] and the nature of the majority of the newcomers, most of whom were ex-Communist states. The essence of the new principle was first formulated in the Copenhagen criteria released by the European Council. According to the criteria:

> Membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and, protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union. Membership presupposes the candidate's ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union.[60]

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[55] *See* L.J. Brinkhorst & M.J. Kuiper, *The Integration of the New Member States in the Community Legal Order*, 9 COMMON MKT. L. REV. 364, 365, 372 (1972); Marc Maresceau, *The EU Pre-Accession Strategies: A Political and Legal Analysis*, *in* THE EU'S ENLARGEMENT AND MEDITERRANEAN STRATEGIES: A COMPARATIVE ANALYSIS 3 (Marc Maresceau & Erwan Lanon eds., 2001).

[56] This position has first been articulated by Pierre Pescatore. PIERRE PESCATORE, LE DROIT DE L'INTEGRATION 29 (A.W. Sijthoff – Leiden 1972).

[57] For some exceptions, see Kochenov, *supra* note 36, at 32 n.54.

[58] *See* CHRISTOPHER PRESTON, ENLARGEMENT AND INTEGRATION IN THE EUROPEAN UNION 18 (1997); Christopher Preston, *Obstacles to EU Enlargement: The Classical Community Method and the Prospects for a Wider Europe*, 33 J. COMMON MKT. STUD. 451, 456–57 (1995).

[59] *See* Maresceau, *supra* note 55, at 3.

[60] Presidency Conclusions, Copenhagen European Council (June 21–22, 1993), No. SN180/1/93. *See* Dimitry Kochenov, *Behind the Copenhagen Façade: The Meaning and Structure of the Copenhagen Political Criterion of Democracy and the Rule of Law*, 8 EUR. INTEGRATION ONLINE PAPERS 10 (2004), http://eiop.or.at/eiop/texte/2004-010.htm; *see also*EU ENLARGEMENT: A LEGAL APPROACH, *supra* note 48.

Such an approach is a logical one—the best way to ensure the success of political and economic reforms in the transition countries wanting to join is to control their progress, which was done through the newly introduced pre-accession strategy concept.[61] In light of this progress-control idea, the EU established a formal link between the achievement of certain standards in the development of the economy, public administration, human rights protection, and other spheres; and the benefits the applicants could acquire from the EU. Among those benefits were various types of aid and assistance[62] and the ultimate culmination of CEECs, that is, an eventual accession to the EU. Therefore, the EU was acting in a twofold role, both as an "[a]id [d]onor and [c]lub [o]wner."[63]

The conditionality principle allowed the EU to carry out an "impartial assessment" of the applicants' progress towards accession. In other words, theoretically, the assessment of progress conducted by the European Commission ("Commission") on behalf of the EU was supposed to be based uniquely on the performance of the candidate countries and to be free of any political considerations, resulting in depoliticisation of the process of enlargement.[64] Consequently, only the most prepared candidates get a chance to join the EU. In practice, however, conditionality hardly makes accession more predictable and clear.[65] The overall effectiveness of the conditionality principle, at least in the field of gay rights, is very doubtful.

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[61] HANDBOOK ON EUROPEAN ENLARGEMENT 103–04 (Andrea Ott & Kirstyn Inlgis eds., 2002); LAURENT BEURDELEY, L'ÉLARGISSEMENT DE L'UNION EUROPÉENNE AUX PAYS D'EUROPE CENTRALE ET ORIENTALE ET AUX ÎLES DU BASSIN MÉDITERRANÉEN 43 (L'Harmattan 2003); Hillion (2002), *supra* note 48, 414.

[62] These benefits were (1) mainly the PHARE programme applying to Poland and Hungary, Council Regulation 3906/89, 1989 O.J. (L 375) 11 (EC); GDR, Czechoslovakia, Bulgaria, Romania, and Yugoslavia, Council Regulation 2698/90, 1990 O.J. (L 257) 1 (EC); Albania, Estonia, Lithuania, and Latvia, Council Regulation 3800/91, 1991 O.J. (L 357) 10 (EC); Slovenia, Council Regulation 2334/92, 1992 O.J. (L 227) 1 (EC); Croatia, Council Regulation 1366/95, 1995 O.J. (L 133) 1 (EC); and FYROM, Council Regulation 463/96, 1996 O.J. (L 65) 3 (EC); (2) the SAPARD programme, providing assistance in the agricultural sector, Council Regulation 1268/1999, 1999 O.J. (L 161) 87 (EC); and (3) the ISPA programme, providing assistance in the fields of transport and environment, Council Regulation 1267/1999, 1999 O.J. (L 161) 73 (EC). PHARE, SAPARD, and ISPA are united in a single legal framework, Council Regulation 1267/1999, 1999 O.J. (L 161) 68 (EC). *See also* Council Regulation 622/98, 1998 O.J. (L 85) 1 (EC) (introducing Accession Partnerships and making the receipt of the pre-accession aid conditional on the pre-accession progress). On pre-accession assistance, see Marc Maresceau, *Pre-Accession*, *in* THE ENLARGEMENT OF THE EUROPEAN UNION 12 (Marise Cremona ed., 2003); Alain Guggenbühl & Margareta Theelen, *The Financial Assistance of the European Union to Its Eastern and Southern Neighbours: A Comparative Analysis*, *in* THE EU'S ENLARGEMENT AND MEDITERRANEAN STRATEGIES: A COMPARATIVE ANALYSIS 217 (Marc Maresceau & Erwan Lannon eds., 2001).

[63] Heather Grabbe, *European Union Conditionality and the* Acquis Communautaire, 23 INT'L POL. SCI. REV. 249, 253 (2002).

[64] For the main criteria of a "depoliticised enlargement process," see K. Engelbrekt, *Multiple Asymmetries: The European Union's Neo-Byzantine Approach to Eastern Enlargement*, 39 INTERNATIONAL POLITICS 42 (2002).

[65] Hillion (2002), *supra* note 48, 402; Kochenov, *supra* note 60.

C. *Legal Instruments of Conditionality*

Standing alone, the Copenhagen Criteria were only able to set the most general pre-accession conditionality framework, unable to ensure the day-to-day application of the principle. As far as gay rights were concerned, the Criteria did not make any special mention of them at all. Some further legal and political instruments were clearly needed to make the Copenhagen Criteria operational. Responding to this need, a sophisticated framework of Copenhagen-related documents was devised. These instruments, put at the disposal of the Community institutions, provided an ensemble of tools for checking the level of the candidate countries' preparedness for accession and aimed at providing the necessary information on the basis of which the most important decisions leading to enlargement were to be made. Due to lack of space, the Copenhagen-related documents cannot be described here in detail, though such analysis can be found elsewhere.[66] In short, the Copenhagen-related documents represent a system of eight different types of legal-political instruments designed with a view to effectively implement the Copenhagen Criteria, making the conditionality principle workable. These documents include:

(1) Commission Opinions on the countries' applications for accession (every country's application is assessed in a separate Opinion);
(2) Agenda 2000 (a general document accompanying the individual Opinions and outlining the overall enlargement strategy);
(3) Commission Regular Reports on the candidate countries' progress towards accession. The progress made by each candidate country is analysed in a separate Report (released annually following the Opinions);
(4) Commission Composite (Strategy) Papers, summarising the findings of the country Reports (released annually together with the Reports);
(5) Comprehensive Country Monitoring Reports, dealing individually with the reform progress in every acceding country (released between the signing of the Treaty of Accession and the actual accession of a given country to the EU);
(6) Comprehensive Monitoring Report (summarising the findings of all the Comprehensive Country Monitoring Reports);
(7) Accession Partnerships (APs), released by the Council in the form of Decisions based on the Commission's proposals and outlining a clear set of priority areas each candidate country is to work on in order to progress towards accession;
(8) White Papers dealing with the problems of certain candidate countries (especially Bulgaria and Romania).[67]

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[66] Kochenov, *supra* note 60.

[67] All the aforementioned documents are available online at the Commission's enlargement webpage, http://ec.europa.eu/enlargement/key_documents/index_archive_en.htm.

Since the formulation of the conditionality principle by the European Council in 1993 (Copenhagen), the evolution of the Copenhagen-related documents has made considerable progress to establishing a fairly rigid legal framework for its application. This progress particularly came to life through the adoption of the APs, introduced by the European Council in 1997 (Luxembourg). Regulation 622/98, allowing for the adoption of the APs, stipulated that the candidate countries' pre-accession progress and eligibility for EU funding was directly related to their ability to meet the priorities set in the APs and the Copenhagen Criteria (as interpreted in other Copenhagen-related documents).[68] Article 4 of the Regulation established that "when the commitments contained in the Europe Agreement are not respected and/or progress towards fulfilment of the Copenhagen criteria is insufficient, the Council. . . may take appropriate steps with regard to any pre-accession assistance granted to an applicant State."[69]

Thus, Regulation 622/98 moved the whole pre-accession exercise from the field of enlargement politics[70] into the spotlight of the law, making the Copenhagen Criteria legally enforceable.[71] The Copenhagen-related documents and the Copenhagen Criteria themselves thus instantly became legal instruments, providing the Commission with sufficient legal (as opposed to purely political) grounds to freeze accession progress of a country failing to respect the requirements contained in these documents (at least as far as the financing of the pre-accession projects was concerned). As a result, the implementation of the conditionality principle came to include both sticks and carrots—the well-behaved candidate countries were entitled to financial assistance while those disregarding their obligations under the principle could be subjected to the effects of article 4 of Regulation 622/98. The potential effectiveness of such a complex approach is difficult to dispute.[72]

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[68] Council Regulation 622/98, 1998 O.J. (L 85) 1 (EC).

[69] Article 4 of the Council Regulation 622/98, 1998 O.J. (L 85) 1 (EC).

[70] In the context of the 2nd enlargement, the ECJ deemed enlargement regulation too political to intervene. *See* Case 93/78, Mattheus v. Doego Fruchtimport und Tiefkühlkost eG, 1978 E.C.R. 2203. There is still no comparable case-law in the context of the 5th enlargement after Regulation 622/98 was adopted.

[71] Kirstyn Inglis, *The Europe Agreements Compared in the Light of Their Pre-Accession Reorientation*, 37 COMMON MKT. L. REV. 1173, 1186 (2000).

[72] The number of different types of Copenhagen-related documents of potentially varying effectiveness available to the Commission made it possible to combine them in different ways in order to implement the conditionality principle better, making the pre-accession exercise more flexible. On the critique of such combinations of different tools, see Dimitry Kochenov, *EU Enlargement: Flexible Compliance with the Commission's Pre-Accession Demands and Schnittke's Ideas on Music* (The Ctr. for the Study of Eur. Pol. & Soc'y 2005, Working Paper), *available at* http://hsf.bgu.ac.il/europe/index.aspx?pgid=pg_127842651974615376; Dimitry Kochenov, *Why the Promotion of the* Acquis *Is not the Same as the Promotion of Democracy and What can be Done in Order also to Promote Democracy instead of Just Promoting the* Acquis, 2 *Hanse L. Rev.* 171 (2006), http://www.hanselawreview.org/pdf4/Vol2No2Art02.pdf.

III. THE ISSUE OF PRE-ACCESSION COMPETENCES—TRANSCENDING THE SCOPE OF THE *ACQUIS*

In order to make effective use of the Copenhagen-related documents and thus fully implement the principle of conditionality while assessing the state of the candidate countries' development, especially in the fields of democracy, the rule of law, and human rights protection, the EU, while conducting the accession process, had to rid itself of its inherent competence limitations. Being a supranational organisation[73] enjoying limited sovereignty based on the powers transferred to it from the Member States,[74] the scope of Community competences is limited, as stated in article 5 EC, to the areas in which the competences have been transferred to it.[75] This limitation was emphasized by the ECJ at a very early stage of integration[76] and has most definitely brought itself to the fore in the *Tobacco Advertising* case[77]—a European analogue of *U.S. v. Lopez*.[78] Moreover, according to the last sentence of article 5 EC, "[a]ny action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty."[79]

Created to strive to achieve the objectives set out in the Treaties, the Community does not therefore have general legislative competence. As a consequence, the majority of elements included into the Copenhagen political criteria of democracy, the rule of law, and the protection of human rights, lie in fields where the Community is powerless. In other words, the *acquis communautaire* is of little use for the conduct of any substantial analysis of the

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[73] In the scholarly literature, the principle was formulated in the middle of the last century. *See* PETER HAY, FEDERALISM AND SUPRANATIONAL ORGANIZATIONS (1966); KLAUS VON LINDEINER-WILDAU, LA SUPRANATIONALITÉ EN TANT QUE PRINCIPE DE DROIT (A.W. Sijthoff – Leyde 1970). On the summary of the relation between supranationality and sovereignty in Community law, see Dimitry Kochenov, *The Case of the EC: Peaceful Coexistence of an Ever Powerful Community and Sovereign Member States?*, *in* THE EUROPEAN UNION AND GOVERNANCE 243 (Francis Synder ed., 2003).

[74] The idea of delegation of powers *and* limitation of national sovereignty is very well articulated in the case-law of the ECJ. *See* Case 6/64, Flaminio Costa v. E.N.E.L, 1964 E.C.R. 585; Case 26/62, NV Algemene Transport- en Expeditie Onderneming Van Gend & Loos v. Neth. Inland Revenue Admin., 1963 E.C.R. 1, § II B. It also found a reflection in the Constitutions of the Member States. *See* Bruno de Witte, *Constitutional Aspects of European Union Membership in the Original Six Member States: Model Solutions for the Applicant Countries?*, *in* EU ENLARGEMENT: THE CONSTITUTIONAL IMPACT AT EU AND NATIONAL LEVEL 65, 68 (Alfred E. Kellermann et al. eds., 2001). The new Member States that joined the Union in 2004 amended their Constitutions to make such delegations possible. ANNELI ALBI, EU ENLARGEMENT AND THE CONSTITUTIONS OF CENTRAL AND EASTERN EUROPE (Cambridge Univ. Press 2005).

[75] *See* Alan Dashwood, *The Limits of European Community Powers*, 21 EUR. L. REV. 113 (1996).

[76] *See* Case 111/63, Lemmerz-Werke GmbH v. High Auth. of the ECSC, 1965 E.C.R. 677.

[77] Case C-74/99, R. v. Sec'y of State for Health *ex parte* Imperial Tobacco Ltd., 2000 E.C.R. I-8599; Case C-376/98, Federal Republic of Germany v. Parliament, 2000 E.C.R. I-8419.

[78] *See* United States v. Lopez, 514 U.S. 549, 551, 567–68 (1995) (holding that when Congress passed the Gun-Free School Zones Act, Congress exceeded the authority conferred to it by the United States Constitution).

[79] Consolidated Version of the Treaty Establishing the European Community, Dec. 29, 2006, art. 5, 2006 O.J. (C 321) 37, 46.

candidate countries' compliance with the Copenhagen political criteria. Thus, where limited by the scope of the *acquis*, the EU can hardly be effective in applying the conditionality principle since the majority of the candidate countries' problem areas, including the core of gay rights and non-discrimination on the basis of sexual orientation, simply lie *outside* the scope of the *acquis*.

The substance of the Copenhagen Criteria coupled with the interpretation of article 5 EC in the light of article 6(1) EU allows the conclusion that article 5 EC competence limitations did not actually apply to the pre-accession application of the principle of conditionality. An analogy with the internal-external competence split existing in the field of human rights protection reinforces such conclusion.[80]

The wording of the Copenhagen Criteria (especially taken together with the Copenhagen-related documents) is much broader in scope than the *acquis communautaire*. For instance, there is no *acquis* on minority protection,[81] the naturalization policies of the Member States,[82] or the rule of law.[83] When asked to check the state of minority protection in the candidate countries, the Commission obviously could not rely on the non-existent *acquis*. The fact that the Copenhagen-related documents contain assessments of developments in areas falling outside the *acquis* proves that the EU did not feel restrained by article 5 EC limitations in the course of the pre-accession. This is justified by the interpretation of articles 49 and 6(1) EU in conjunction with article 5 EC. Given the broad wording of Article 6(1) EU, it would be logical to presuppose that the standard of democracy, the rule of law, and human rights are *not per se* confined to the sphere of Community/Union competences. Moreover, since Article 6(1) EU is employed (as required by a reference made to it from Article 49 EU) as a "gate-keeper" of the Community to ensure that only democratic states respecting human rights join, limiting its reach to the issues covered by

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[80] In the sphere of human rights protection, the external competences are much broader than the internal ones. *See* Philip Alston & J.H.H. Weiler, *An 'Ever Closer Union' in Need of a Human Rights Policy: The European Union and Human Rights*, *in* THE EU AND HUMAN RIGHTS 3, 8 (Philip Alston ed., 1999); Andrew Clapham, *A Human Rights Policy of the European Community*, 10 Y.B. EUR. L. 309 (1990); Dominic McGoldrick, *The EU After Amsterdam: An Organisation with General Human Rights Competence?*, *in* LEGAL ISSUES OF THE AMSTERDAM TREATY 249 (David O'Keeffe & Patrick Twomey eds., 1999).

[81] *See* Gabriel von Toggenburg, *A Rough Orientation Through a Delicate Relationship: The European Union's Endeavours for (Its) Minorities*, 4 EUR. INTEGRATION ONLINE PAPERS 16 (2000), http://eiop.or.at/eiop/texte/2000-016.htm; Christophe Hillion, *Enlargement of the European Union – the Discrepancy between Membership Obligations and Accession Conditions as Regards the Protection of Minorities*, 27 FORDHAM INT'L L.J. 715 (2004).

[82] Case C-369/90, Micheletti v. Delegación del Gobierno en Cantabria, 1992 E.C.R. I-4239, ¶ 10. Nevertheless, naturalisation played a role in the pre-accession as part of the minority protection Copenhagen criterion. Dimitry Kochenov, Pre-accession, Naturalization, and "Due regard to Community Law": The European Union's "Steering" of National Citizenship Policies in Candidate Countries during the Fifth Enlargement', 4 ROMANIAN J. POLITICAL SCI. 71 (2004), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=926851.

[83] *See generally* MARIA LUISA FERNANDEZ ESTEBAN, THE RULE OF LAW IN THE EUROPEAN CONSTITUTION (1999).

the *acquis* would be contrary to its very purpose and would fail to ensure the effective functioning of the EU's enlargement law as envisaged by the framers. In other words, whatever the scope of gay rights *acquis*, in the context of pre-accession, the EU was competent to promote gay rights protection and non-discrimination on the basis of sexual orientation as it saw fit.

IV. GAY RIGHTS IN THE COPENHAGEN-RELATED DOCUMENTS

A. *Overall Picture*

Clearly, to agree with Koppelman, "[s]o many things are wrong with laws that discriminate against gay people that it is hard to know where to begin."[84] The Commission was facing the same problem and resolved it in a somewhat disappointing way. The analysis of the Copenhagen-related documents demonstrates with clarity that gay rights did not play a crucial role in the course of the pre-accession exercise. Moreover, the beginning of the fifth enlargement preparation was marked by an almost total disregard of gay rights. Although the situation changed slightly with the Regular Reports released after 2000, the standard of gay rights protection promoted in the Copenhagen-related documents was very low and the criticism of the non-performing countries inconsistent.

Commission Opinions (1997) on the CEECs' applications for accession announced that all the countries besides Slovakia[85] protected human rights sufficiently and found that they met the Copenhagen political criteria of democracy, the rule of law, the protection of human rights, and the respect for and protection of minorities.[86] This recognition came about notwithstanding the fact that one of these countries *de facto* criminalised consensual, same-sex relations between adults,[87] had criminal legislation establishing different ages of consent applying to homosexual and heterosexual relationships,[88] and did not outlaw discrimination on the basis of sexual orientation. Needless to say, same-

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[84] Andrew Koppelman, *Defending the Sex Discrimination Argument for Lesbian and Gay Rights: A Reply to Edward Stein*, 49 UCLA L. REV. 519, 519 (2001).

[85] Mečiar's Slovakia had a much worse democracy and human rights record compared to other CEECs. *See* M. Steven Fish, *A Vladimír Mečiar Retrospective: The End of Mečiarism*, 8 E. EUR. CONST. REV. (1999), *available at* http://www.law.nyu.edu/eecr/vol8num1-2/special/endofmec.html.

[86] *See* all the 1997 Commission Opinions. The Commission only used the term "minorities" to refer to ethnic, religious, and linguistic minorities, assessing gay rights exclusively in the sections of the Copenhagen-related documents dealing with human rights protection.

[87] Such legislation was in force in Romania until 2001. *See* COMM'N EUR. CMTYS., *2001 REGULAR REPORT ON ROMANIA'S PROGRESS TOWARDS ACCESSION* 23 (2001). *See also* discussion *infra* Part IV.B.

[88] 2001 Reports recognised that age-of-consent discrimination existed in Bulgaria and Hungary and welcomed the abolition of difference in the age of consent in Lithuania. *See* COMM'N EUR. CMTYS., *2001 REGULAR REPORT ON BULGARIA'S PROGRESS TOWARDS ACCESSION* 22 (2001); COMM'N EUR. CMTYS., *2001 REGULAR REPORT ON HUNGARY'S PROGRESS TOWARDS ACCESSION* 21 (2001); COMM'N EUR. CMTYS., *2001 REGULAR REPORT ON LITHUANIA'S PROGRESS TOWARDS ACCESSION* 22 (2001).

sex unions and the recognition of other substantial gay rights were unknown to the legal systems of candidate countries. The hostility of a great majority of the population of the CEECs towards homosexuals made the position of gays in Eastern Europe even more difficult.[89] Moreover, churches gaining influence after the fall of communism, often embraced an openly homophobic position.[90]

In this context, the recognition by the Commission that the applicant countries met the Copenhagen human rights protection criteria came as a body blow to gay rights activists. If criminalisation of homosexual acts could not prevent a country from being regarded as providing sufficient protection of human rights to qualify as meeting the Copenhagen Criteria, then what could? Upon the release of the Opinions, the functionality of the Copenhagen Criteria as such (at least as applied) could legitimately be questioned. The EU that positioned itself (also before the European East "coming back to Europe") as a fierce protector of human rights could legitimately be expected to do much more in this domain.

The recognition that the applicant countries met the requirements of the Copenhagen political criteria as early as in 1997 contradicted the commitment towards gay rights protection confirmed on numerous occasions by the members of the Commission. So Mr. Flynn, writing on behalf of the Commission, confirmed as early as 1996 that "[t]he issue of the eradication of discrimination on grounds of sexual orientation is directly linked to the broader issue of fundamental rights and freedoms,"[91] thus, placing this type of discrimination within the scope of the Copenhagen political criteria. Later on, this position was confirmed by Enlargement Commissioner Verheugen. Talking about nondiscrimination against homosexuals, the Commissioner stated that this principle "not only reflect[s] the basic principles of the Union, but also the basic principles that new Member States will be expected to accept upon accession," continuing that "[t]he Commission is fully committed to ensuring that this condition for accession is respected."[92] In line with the Commission, the European Parliament (EP) also declared that it would never support the accession of any country "that, through its legislation or policies, violates the human rights of lesbians and gay men."[93]

In the course of the pre-accession process, the Commission mostly focused on two issues related to gay rights—the decriminalisation of homosexual acts and the equalisation of the age of consent for homosexual and heterosexual relationships. These two issues were accompanied by a number of relatively minor ones, such as removing the prohibition of "homosexual actions in public" and the differential treatment of homosexual and heterosexual

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[89] *See* Torra, *supra* note 3, at 73.

[90] To provide an example, the Holy Synod of the Romanian Orthodox Church met before the discussion of the law decriminalising homosexual acts in the Romanian Senate, and instructed its spokesman, Archbishop Nifon, to ask the Romanian President not to sign such a bill into law. Turcescu & Stan, *supra* note 1, 294.

[91] Written Question 2224/96, 1996 O.J. (C 365) 95.

[92] Written Question E-4142/00, 2001 O.J. (C 235 E) 78, 79.

[93] Resolution on Equal Rights for Gays and Lesbians in the EC, 1998 O.J. (C 313) 186, ¶ J.

prostitution. During the last years of pre-accession, the issue of the prohibition of discrimination on the basis of sexual orientation was also included in the Reports, coming down to a requirement of "revolutionary" changes in the national legislation of the candidate countries.[94] However, it was not assessed among the human rights issues since it belonged to the area of the transposition of the *acquis*, initially arising from the adoption of the Equal Treatment Directive. In other words, the announcement that the applicant countries met the Copenhagen political criteria in 1997 did not mark the end of the pre-accession gay rights monitoring. On the contrary, the Reports that followed tended to pay increasing attention to gay rights protection.

B. *Decriminalising Homosexual Acts—The Example of Romania*

The most far-reaching gay rights violations were recorded by the Commission in Romania. Providing an especially worrisome example, this country merits a separate assessment.

Romania stood apart among the candidate countries due to its particularly dubious human rights record in the field of gay rights.[95] This country only decriminalised homosexual acts in 2001.[96] Its persistent unwillingness to do so attracted the special attention of whistle-blowers within both the CoE[97] and the EU framework.[98] In fact, Romania promised to decriminalise homosexual acts on joining the CoE in 1993. Instead of repealing article 200 of its Criminal Code, which criminalised homosexual acts among consenting adults, Romania amended the article adding a "public scandal" clause.[99] Homosexual acts were to be prosecuted only on causing a "public scandal," which was defined by the authorities as follows: "two or more people know that an act occurred and disapprove of it."[100] To make the overall picture even grimmer, homosexual associations were also prohibited. Such an amendment did not satisfy the CoE and was criticised in Resolution 1123 of the

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[94] For the example of Bulgaria, see D. Mihajlova, *Zakonăt za zaščita srešču diskriminatsijata kato instrument za zaščita na žertvite na neravno tretirane, osnovano na priznaka seksualna orientatsija*, *in* ANTIDISKRIMINATSIONNOTO ZAKONODATELSTVO V BĂLGARIJA: ISTORIJA I RAZVITIJE (Evropejski Institut ed., 2005), *available at* http://diversity.europe.bg/page.php?category=309&id=1739.

[95] *See* Turcescu & Stan, *supra* note 1, at 292–298; Torra, *supra* note 3, at 79–80.

[96] COMM'N EUR. CMTYS., *2001 REGULAR REPORT ON ROMANIA'S PROGRESS TOWARDS ACCESSION* 23 (2001). Once put into the context of international developments, the Romanian gay rights record does not look that grim. The U.S. Supreme Court only invalidated a statute prohibiting homosexual acts in 2003. Lawrence v. Texas, 539 U.S. 558 (2003).

[97] *See Reply to Written Question No. 367 to the Committee of Ministers by Mr. Van der Maelen: "Homosexual Rights in Romania"*, COM (2003) 367 final (Mar. 31, 2003); *Reply from the Committee of Minister to Written Question No. 364 by Mr. Van der Maelen: "Homosexual Rights in Romania"*, COM (1996) 364 (Apr. 12, 1996).

[98] *See* Written Question E-4142/00, *supra* note 87; Written Question E-2754/96, 1997 O.J. (C 105) 24; *see also* Resolution on Stiffer Penalties for Homosexuals in Romania, 1996 O.J. (C 320) 197.

[99] This amendment came as a consequence of the Constitutional Court ruling No. 81 of July 15, 1995.

[100] Torra, *supra* note 3, at 80 n.18.

Parliamentary Assembly of the Council of Europe.[101] CoE criticism did not produce any results and was supported in 1997 by the Commission's Opinion.[102] Later, the Commission continued pointing out the need to bring the Criminal Code "in line with European standards."[103] Nevertheless, Romania's unwillingness to cooperate did not prevent it from meeting the Copenhagen Criteria.[104]

A strange situation has transpired—a state criminalising homosexual acts was announced to have satisfied the Copenhagen Criteria of gay rights protection. The situation was only changed in 2001, four years after the first demands of the European Commission and eight years after Romania's accession to the CoE. The case of Romania is an excellent illustration of the paradoxical nature of the Copenhagen Criteria in relation to gay rights. The threshold of meeting the Criteria was so low that it did not require a candidate country to decriminalise homosexual acts.

C. *Combating Age-of-Consent Discrimination*

As noted above, the criminal codes of a number of candidate countries created a situation where homosexuals suffered discrimination even without a blanket ban on homosexual acts. The Commission, supported by the European Parliament,[105] stressed the need to remove the discriminatory provisions from the criminal codes in a number of Copenhagen-related documents.[106] In the context of pre-accession, such demands looked slightly odd set against a climate where no consensus existed among the EU-15 Member States regarding the level of gay rights protection. Notably, age-of-consent discrimination still existed in Greece,[107] and the UK abolished it only under pressure from the ECt.HR.[108]

The candidate countries' response to the Commission's criticism in this sphere varied—it took Bulgaria one year to change its Penal Code and thus eliminate discrimination.[109] Estonia amended its Criminal Code even without a

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[101] EUR. PARL. ASS. DEB., *Resolution1123 (1997) on Honouring of Obligations and Commitments byRomania*, 14th Sess., Doc. No. 1123 (1997). All the CoE documents are available online at http://www.coe.int/.

[102] *Commission Opinion on Romania's Application for Membership of the European Union*, COM (1997) 18 final, at 16.

[103] COMM'N EUR. CMTYS., *2000 REGULAR REPORT FROM THE COMMISSION ON ROMANIA'S PROGRESS TOWARDS ACCESSION* 21 (2001).

[104] *See* a paradox discussed *supra* Part III.A.

[105] European Parliament Resolution on Respect for Human Rights in the European Union (1998–1999), 2000 O.J. (C 377) 344, ¶ 76.

[106] *See e.g.* COMM'N EUR. CMTYS., *2001 REGULAR REPORT ON BULGARIA'S PROGRESS TOWARDS ACCESSION* 22 (2001).

[107] Langenkamp, *supra* note 2, at 465 n. 150.

[108] *See, e.g.*, Dudgeon v. United Kingdom, App. No. 7525/76, 59 Eur. Ct. H.R. (ser. A) (1983); Norris v. Ireland, App. No. 10581/83, 142 Eur. Ct. H.R. (ser. A) (1988); Modinos v. Cyprus, App. No. 15070/89, 259 Eur. Ct. H.R. (ser. A) (1993).

[109] COMM'N EUR. CMTYS., *2002 REGULAR REPORT ON BULGARIA'S PROGRESS TOWARDS ACCESSION* 30 (2002).

demand from the Commission.[110] Notwithstanding the criticism of the Commission, Hungary did not amend its Code during the reporting period.[111] Consequently, the Hungarian Constitutional Court intervened to declare the provisions of the Penal Code concerning the difference in the age of consent unconstitutional.[112] In its 2002 Report, the Commission noted the fact that discrimination on the basis of sexual orientation was institutionalised in the Hungarian armed forces.[113] Surprisingly, the Commission only mentioned this fact without criticising Hungary for this policy, which amounts to a breach of the ECt.HR[114] and Directive 2000/78/EC.[115]

D. *Illegal Differential Treatment of the Candidate Countries*

Overall, the Commission failed to treat all the candidate countries equally during the pre-accession reporting exercise. In the fourth reporting round (2000) for example, the Commission, focusing solely on gay rights in Romania and Cyprus, did not even mention the issue of age-of-consent discrimination against homosexuals existing in other candidate countries, thus creating an illusion that the situation elsewhere was acceptable, which was not the case. According to the European Parliament, such discrimination also existed in Bulgaria, Estonia, Hungary, and Lithuania.[116] Therefore, the Commission clearly failed to raise the same set of issues in its assessments of different countries without providing any justification for such a position.

Such treatment of the candidate countries was in blunt contradiction to the principle of equal treatment of the candidate countries and the milestone idea behind the conditionality principle, namely that of accession based on merits. This largely unbalanced approach to the assessment of pre-accession progress was coupled with the Commission's limited use of all the legal instruments of pressure available to it, resulting in its *de facto* inability to push the candidate countries to reform legislation in this domain. This made the European Parliament, anxious about a dubious situation in this area of

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[110] *See* COMM'N EUR. CMTYS., *2001 REGULAR REPORT ON ESTONIA'S PROGRESS TOWARDS ACCESSION* 21 (2001). Responding most probably, to the call of the Eurpoean Parliament "to remove from . . . penal codes all laws[,] which entail discrimination against lesbians and homosexuals." *See* European Parliament Resolution on Respect for Human Rights in the European Union, *supra* note 105, at ¶ 76.

[111] COMM'N EUR. CMTYS., *2001 REGULAR REPORT ON HUNGARY'S PROGRESS TOWARDS ACCESSION* 21 (2001).

[112] COMM'N EUR. CMTYS., *2002 REGULAR REPORT ON HUNGARY'S PROGRESS TOWARDS ACCESSION* 29 (2002); *see* Renata Uitz, *Hungary: Mixed Prospects for the Constitutionalization of Gay Rights*, 2 INT'L J. CONST. L. 705, 707 (2004).

[113] COMM'N EUR. CMTYS., *2002 REGULAR REPORT ON HUNGARY'S PROGRESS TOWARDS ACCESSION* 29 (2002).

[114] *See* Lustig-Prean v. United Kingdom, App. Nos. 31417 & 32377/96, Eur. Ct. H.R. (1999); Smith v. United Kingdom, App. Nos. 33985 & 33986/96, 1999-VI Eur. Ct. H.R. ¶¶ 111–12.

[115] Council Directive 2000/78/EC, art. 3, 2000 O.J. (L 303) 16, 19 ¶ 4 does not include sexual orientation or gender among the grounds of possible derogation regarding service in the armed forces.

[116] European Parliament Resolution on Respect for Human Rights in the European Union, *supra* note 105, at ¶ 76.

enlargement preparation, urge the Council to raise the question of discrimination against homosexuals during the membership negotiations.[117] The EP also addressed the candidate countries directly, urging them to abolish discrimination on the basis of sexual orientation.[118]

Most importantly, the proactive role of the European Parliament, as a tireless advocate of putting gay rights on the pre-accession agenda, resulted in the reversing of the Commission's unwillingness to acknowledge and criticise the candidate countries' numerous problems in this domain. In other words, the European Parliament played an important role in assuring that the accession process both withstood the challenge of confronting the candidate countries with their own problems in the field of gay rights and ensured that the principle of conditionality was properly applied. The EP stepped into the spot-light of enlargement regulation at a time when the Commission had failed to ensure that the accession process would be evaluative and inclusive, and that all the candidate countries would "join the European Union on the basis of the same criteria and . . . on an equal footing."[119] The Estonian example is very telling in this respect—this country abolished discriminatory provisions after the "general" call of the EP even without any specific criticism from the Commission.[120]

To summarise—being free to promote any standard, the EU opted for advancing two basic requirements, decriminalisation of homosexual acts and equality of ages of consent for heterosexual and homosexual acts in criminal law of the candidate countries. Overall, the role played by gay rights in the course of the pre-accession was minimal, corresponding to the timid and often inconsistent demands of the Commission.

V. THE GAY RIGHTS *ACQUIS* AND THE PROMOTION OF GAY RIGHTS IN THE PRE-ACCESSION PROCESS

The history of gay rights *acquis* is marked by recent changes and can be divided into two main phases. The adoption of Directive 2000/78/EC serves as a separator between the two.

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[117] European Parliament Resolution on the Annual Report on International Human Rights and European Union Human Rights Policy, 1999, 2000 O.J. (C 377) 336, ¶ 28.

[118] *See* European Parliament Resolution on the Enlargement of the European Union B5-0538/2001, 2002 O.J. (C 72 E) 165, ¶ 55; European Parliament Resolution on Lithuania's Application for Membership of the European Union and the State of Negotiations A5-0253/2001, 2002 O.J. (C 72 E) 173, ¶ 5; European Parliament Resolution on Hungary's Application for Membership of the European Union and the State of Negotiations A5-0257/2001, 2002 O.J. (C 72 E) 191, ¶ 14; European Parliament Resolution on Bulgaria's Application for Membership of the European Union and the State of Negotiations A5-0258/2001, 2002 O.J. (C 72 E) 194, ¶ 9; European Parliament Resolution on Romania's Application for Membership of the European Union and the State of Negotiations A5-0259/2001, 2002 O.J. (C 72 E) 200, ¶ 6.

[119] Presidency Conclusions, Brussels European Council ¶ 10 (Dec. 12-13, 1997).

[120] *See* sources cited *supra* note 105.

A. *Nonexistent Gay Rights* Acquis *before the Adoption of the Equality Directive*

Before the entry into force of the Treaty of Amsterdam, which introduced article 13 into the EC Treaty, the Union had little to boast of in the field of gay rights and nondiscrimination on the basis of sexual orientation. On the one hand, as was also confirmed in the course of enlargement preparation, the Union was committed to respecting gay rights, regarding them as part of human rights;[121] on the other hand, the Union did not have any competences in this domain and thus could not legislate to prohibit sexual-orientation discrimination. Even the EP's commitment to gay rights could not change the situation. The pre-Amsterdam *status quo* in this field is excellently summarised by Commissioner Flynn: "At present the Treaty on European Union does not confer specific powers on the institutions to eradicate discrimination on grounds of sexual orientation."[122] Article 13 EC provided the Community with a tool to change this situation, enabling the institutions to legislate, *inter alia* in the field of combating discrimination, on the basis of sexual orientation.[123]

In fact, it can be argued that potentially the Community was not absolutely powerless in this domain even before article 13 EC was introduced into the Treaty. In defence of this claim, it is necessary to turn to the ECt.HR, which possesses "special significance"[124] in Community law, providing, according to article 6(2) EU and ECJ case-law,[125] a source of principles of Community law. The Convention, although not directly prohibiting discrimination on the basis of sexual orientation, was interpreted by the ECt.HR in such a way that certain gay rights fell within the scope of its article 8.[126] Moreover, the ECt.HR nondiscrimination article (art. 14) was later unequivocally interpreted by the ECt.HR to include sexual orientation among the prohibited grounds of discrimination.[127]

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[121] Written Question 2224/96, *supra* note 86.

[122] Written Question 2224/96, 1996 O.J. (C 356) 95; *see* Written Question 2133/83, 1984 O.J. (C 173) 9; Written Question 2134/83, 1984 O.J. (C 152) 25.

[123] *See* Council Directive 2000/78, 2000 O.J. (L 303) 16 (EC).

[124] *See* Case C-299/95, Kremzow v. Austria, 1997 E.C.R. I-2629, ¶ 14; Case C-260/89, Elliniki Radiophonia Tiléorassi AE v. Dimotiki Etairia Pliroforissis, 1991 E.C.R. I-2925, ¶ 41.

[125] *See* Case C-185/97, Coote v. Granada Hospitality Ltd., 1998 E.C.R. I-5199, ¶¶ 21–23; Case 222/84, Johnston v. Chief Constable of the Royal Ulster Constabulary, 1986 E.C.R. 1651, ¶ 18.

[126] *See, e.g.*, Dudgeon v. United Kingdom, App. No. 7525/76, 59 Eur. Ct. H.R. (ser. A) (1983); Norris v. Ireland, App. No. 10581/83, 142 Eur. Ct. H.R. (ser. A) (1988); Modinos v. Cyprus, App. No. 15070/89, 259 Eur. Ct. H.R. (ser. A) (1993). It has been argued that privacy is neither the best nor the only right included in the Convention which may be employed for gay rights protection—Articles 10 and 11 can potentially be used. Clarice B. Rabinowitz, Note, *Proposals for Progress: Sodomy Laws and the European Convention on Human Rights*, 21 BROOK. J. INT'L L. 425, 427, 455–69 (1995).

[127] Salgueiro da Silva Mouta v. Portugal, App. No. 33290/96, 1999-IV Eur. Ct. H.R. ¶¶ 34 –36; Fretté v. France, App. No. 36515/97, 2002-I Eur. Ct. H.R. ¶¶ 32–33. The scope of application of the article was somewhat limited before the entry into force of Protocol 12 to the ECHR (1 April 2005), since it could only be applied in conjunction with some other article of the Convention. *See* Protocol No. 12, Europ.T. S. No. 177.

Despite the fact that the Convention does not apply within the Community legal system directly,[128] the ECJ is competent to make use of the legal principles derived from the Convention's provisions as interpreted by the ECt.HR. It was up to the ECJ to recognise the pro-gay rights development in the law of the Convention and to try to transplant them into Community law. Notwithstanding the expectations of a number of scholars,[129] the Court appeared unprepared to move in this direction. Its hard-line formalistic stand in *Grant* rendered the Community totally powerless in the domain of gay rights protection.

B. *The ECJ's Dubious Record in the Domain of Gay Rights Protection*

The ECJ played an especially controversial role in the development of the principle of nondiscrimination on the ground of sexual orientation in the EU, developing a body of "decisions [that] are irreconcilable and incoherent."[130]

Taking an active pro-egalitarian stand in the *P. v. S.* case,[131] where the Court recognised, as discriminatory on the basis of sex, the dismissal of a transsexual employee intending to undergo gender reassignment,[132] the Court disappointed gay rights activists by changing its position in the later case-law.

In the *Grant* case,[133] which was "logically indistinguishable"[134] from *P. v. S.* and concerned granting travel concessions to a same-sex partner of a South-West Trains Ltd. employee, the ECJ did not follow the *P. v. S.* rule, *de facto*

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[128] *See* D.J. HARRIS ET AL, LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 27–28 (1995).

[129] *See generally* Paul L. Spackman, Comment, Grant v. South-West Trains: *Equality for Same-Sex Partners in the European Community*, 12 AM. U.J. INT'L L. & POL'Y 1063 (1997) (discussing gay rights protection before *Grant* was decided).

[130] Bruce Carolan, *Judicial Impediments to Legislating Equality for Same-Sex Couples in the European Union*, 40 TULSA L. REV. 527, 530 (2005); *see* Bamforth, *supra* note 9; Iris Canor, *Equality for Lesbians and Gay Men in the European Community Legal Order - "They Shall Be Male and Female"?*, 7 MAASTRICHT J. OF EUR. & COMP. L. 273 (2000); Adrian Williams, *An Evaluation of the Historical Development of the Judicial Approach to Affording Employees Protection Against Discrimination on the Basis of Their Sexual Orientation*, BUS. L. REV., Feb. 2004, at 32.

[131] *See* Case C-13/94, P. v. S., 1996 E.C.R. I-2143; *see* Leo Flynn, Case Law, *Case C-13/94,* P v. S. and Cornwall County Council*, Judgment of the Full Court of 30 April 1996, [1996] ECR I-2143*, 34 COMMON MKT. L. REV. 367 (1997); Paul Skidmore, Commentary, *Sex, Gender and Comparators in Employment Discrimination*, 26 INDUS. L.J. 51 (1997).

[132] *P. v. S.*, 1996 E.C.R. I-2143, ¶ 21. The Court found the dismissal discriminatory under the Equal Treatment Directive, Council Directive 76/207, 1976 O.J. (L 39) 40 (EEC).

[133] Case C-249/96, Grant v. South-West Trains Ltd., 1998 E.C.R. I-621; *see* Katell Berthou & Annick Masselot, *La CJCE et les couples homosexueles*, 12 DROIT SOCIAL 1034 (1998); Laurence R. Helfer, International Decisions, Grant v. South-West Trains, Ltd. *Case C-249/96*, 93 AM. J. INT'L L. 200 (1999); John McInnes, Case Law, *Case C-249/96,* Lisa Jacqueline Grant v. South West Trains Ltd.*, Judgment of the Full Court of 17 February 1998, [1998] ECR I-636*, 36 COMMON MKT. L. REV. 1043 (1999); Carol Daugherty Rasnic, *The Latest Pronouncement from the European Court of Justice on Discrimination Against Homosexuals:* Grant v. South-West Trains, Ltd., 12 N.Y. INT'L L. REV. 79 (1999).

[134] Andrew Koppelman, *The Miscegenation Analogy in Europe, or, Lisa Grant Meets Adolf Hitler*, *in* LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW, *supra* note 14, at 623, 632.

reducing it only to cases involving transsexuals.[135] The grant of travel concessions in *Grant* was predicated on the fact that sex of the spouse or partner should have been opposite to that of the employee.[136] The Court found that Community law prohibiting sex discrimination could not be used here and that Community law did not include prohibitions of discrimination based on sexual orientation.[137] In this case, the Court did not take into consideration the opinion of AG Elmer who argued, referring to *P. v. S.* that "the [EC] Treaty [is] precluding forms of discrimination against employees based exclusively, or essentially, on gender."[138]

The Court, refusing to compare homosexual couples with heterosexual ones, tends to interpret same-sex relationships as being by their very nature different from opposite-sex ones, which allows the Court not to apply the equality principle. Confirming a "stereotyped notion of the European family"[139] in *D & Sweden v. Council*,[140] the Court found that "the situation of an official who has registered a partnership [with a person of the same sex] in Sweden cannot be held to be comparable . . . to that of a married official,"[141] ruling that only married (*i.e.*, heterosexual) couples were entitled to family allowance under the Staff Regulations.

The decisions in *D. & Kingdom of Sweden* and *Grant* were called "wake up calls for the urgent need to protect rights of lesbian, gay men, and bisexuals within the European Union,"[142] putting "the Member States . . . under . . . a moral obligation to take action."[143] There is no new case-law on nondiscrimination based on sexual orientation. Some applications for preliminary ruling have been withdrawn following *Grant*.[144] However, in its case-law on transsexuals, most recently *K.B. v. National Health Service Pensions*

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[135] Case C-249/96, Grant v. South-West Trains Ltd., 1998 E.C.R. I-621, ¶¶ 2, 37–42.
[136] *Grant*, 1998 E.C.R. at ¶¶ 25–28.
[137] *Id.* at ¶¶ 43–47.
[138] Opinion of the Advocate-General, *supra* note 7, at ¶ 16.
[139] Eugenia Caracciolo di Torella & Emily Reid, *The Changing Shape of the "European Family" and Fundamental Rights*, 27 EUR. L. REV. 80, 84 (2002).
[140] Joined Cases C-122 & 125/99P, D & Sweden v. Council, 2001 E.C.R. I-4319; *see* Evelyn Ellis, Case Law, *Joined Cases C-122 & 125/99P,* D and Sweden v. Council*, Judgment of the European Court of Justice of 31 May 2001, Full Court*, 39 COMMON MKT. L. REV. 151 (2002); Katell Berthou & Annick Masselot, *Le mariage, les patenariats et la CJCE: Ménage à trois*, 1 CAHIERS DE DROIT EUROPÉEN 679 (2002). On the analysis of the outcome of the case in the first instance (T-264/97), see Christine Denys, *Homosexuality: A Non-Issue in Community Law?*, 24 EUR. L. REV. 419 (1999).
[141] *D & Sweden*, 2001 E.C.R. I-4319, ¶ 51.
[142] Langenkamp, *supra* note 2, at 442.
[143] McInnes, *supra* note 128, at 1058.
[144] For example, following *Grant*, the application for preliminary ruling in *Perkins* v. *United Kingdom* was withdrawn on July 13, 1998. Later, *ex parte Perkins* reached ECt.HR. *See* Perkins v. United Kingdom, App. Nos. 43208 & 44875/98, Eur. Ct. H.R. ¶¶ 22, 31 (2002).

Agency[145] and *Richards v. Secretary of State for Work & Pensions*,[146] the Court continues to apply the *P. v. S.* sex discrimination test.

The case-law of the ECJ in the gay rights field is remarkable in at least three respects, all closely related to each other.

First, the Court makes a clear distinction between transsexuals and gays, applying the sex discrimination test to the former and refusing to do so for the latter. Consequently, its case-law on the rights of transsexuals is much more in line with human rights principles than that on the rights of homosexuals.[147] At the same time, a strong argument can be made in favour of regarding discrimination based on sexual orientation as sex discrimination.[148]

Second, the Court's test in gay rights discrimination cases bizarrely involves comparing the situation of homosexual men to that of lesbian women, not heterosexuals. Thus, a male homosexual couple is compared to a lesbian couple, and no discrimination is found. Such a choice of comparator involves a double change and thus does not withstand the simplest logical test—comparing two men to two women involves both a change in the sex of the person and of his or her partner.[149] "[R]eveal[ing] a true perversion of the common-sense notion of equality,"[150] such an approach invites strong analogies with the underlying reasoning of miscegenation laws,[151] dismissed by the U.S. Supreme Court in *McLaughlin v. Florida*[152] and *Loving v. Virginia*,[153] and possibly

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[145] *See* Case C-117/01, K.B. v. Nat'l Health Serv. Pensions Agency, 2004 E.C.R. I-541; *see also* Iris Canor, Note, *Case C-117/01,* K.B. v. National Health Service Pensions Agency, Secretary of State for Health, 41 COMMON MKT. L. REV. 1113 (2004).

[146] *See* Case C-423/04, Richards v. Sec'y of State for Work and Pensions, 2006 E.C.R. I-3585.

[147] According to some reports, this distinction owes its existence to the comparison in costs of guaranteeing equality to these two groups—transsexuals and homosexuals. *See* Eugenia Caracciolo di Torella & Annick Masselot, *Under Construction: EU Family Law*, 29 EUR. L. REV. 32, 42 (2004). There are also other policy considerations related to sizes of these groups and potential political consequences of extending the application of nondiscrimination to them. Mark Bell, *Shifting Conceptions of Sexual Discrimination at the Court of Justice: From* P. v. S. *to* Grant v. SWT, 5 EUR. L.J. 63, 74–77 (1999).

[148] *See, e.g.*, Bamforth, *supra* note 9, at 701–14; Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994); Robert Wintemute, *Recognising New Kinds of Direct Sex Discrimination: Transsexualism, Sexual Orientation and Dress Codes*, 60 MOD. L. REV. 334, 344–353 (1997); *see also* Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265 (1999) (explaining why defining sex is not easy).

[149] McInnes, *supra* note 133, at 1050.

[150] Bruce Carolan, *Rights of Sexual Minorities in Ireland and Europe: Rhetoric Versus Reality*, 19 DICK. J. INT'L L. 387, 405 (2001).

[151] In *Pace v. Alabama*, 106 U.S. 583 (1883), *overruled in part by McLaughlin v. Florida*, 379 U.S. 184 (1964), the appeal to equal protection to strike down a statute prohibiting interracial sex was dismissed using reasoning identical to that used by the ECJ in *Grant*. *Cf.* Koppelman, *supra* note 134, at 626 (arguing that the "miscegenation" law in *Pace v. Alabama* is analogous to the reasoning used by the ECJ in *Grant*).

[152] McLaughlin v. Florida, 379 U.S. 184 (1964). The Supreme Court invalidated a criminal statute prohibiting an unmarried interracial couple from habitually living in and occupying the same room at night on the grounds that it "treats the interracial couple . . . differently than it does any other couple." *Id.* at 188.

[153] Loving v. Virginia, 388 U.S. 1 (1967).

even justifies the Nuremberg anti-Jewish laws of the Third Reich.[154] It seems to come down to reasoning akin to "[t]he law, in its majesty, prohibits the rich as well as the poor from sleeping under [the] bridges."[155]

Third, the ECJ refused to apply the ECHR standards of nondiscrimination on the basis of sexual orientation, viewing itself legally incapable of enlarging the scope of powers of the Community.[156] This argument, which could be expected after Opinion 2/94, is a boringly superficial one, given that in the early days of integration, human rights protection was not included in the founding Treaties at all, and the Court moved to protect human rights more or less on its own initiative, relying on the "constitutional traditions common to the Member States" and the ECHR.[157]

C. *The Gay-Rights* Acquis a*fter the Adoption of the Equality Directive*

The legislator's response to the ECJ case-law came in the form of the Council Directive 2000/78/EC,[158] adopted on the basis of article 13 EC. The Directive outlawed discrimination on the basis of sexual orientation and recognised that "[d]iscrimination based on . . . sexual orientation may undermine the achievement of the objectives of the EC Treaty."[159] Sexual orientation is also one of the grounds on which discrimination is prohibited by article 21(1) of the Charter of Fundamental Rights of the European Union[160] and also is part of the unfortunate Treaty Establishing a Constitution for

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[154] *See* Koppelman, *supra* note 134, at 628.

[155] Carolan, *supra* note 150, at 405.

[156] *See* Case C-249/96, Grant v. South-West Trains Ltd., 1998 E.C.R. I-621, ¶ 45.

[157] *See, e.g.*, Case 29/69, Stauder v. City of Ulm-Sozialamt, 1969 E.C.R. 419, ¶ 7; Case 11/70, Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel, 1970 E.C.R. 1125, ¶ 4; Case 4/73, J. Nold, Kohlen- und Baustoffgroßhandlung v. Comm'n, 1974 E.C.R. 491, ¶ 13. For an analysis of this process, see HENRY G. SCHERMERS & DENIS F. WAELBROECK, JUDICIAL PROTECTION IN THE EUROPEAN COMMUNITIES 38–46 (6th ed. 2001); Joseph R. Wetzel, Note, *Improving Fundamental Rights Protection in the European Union: Resolving the Conflict and Confusion Between the Luxembourg and Strasbourg Courts*, 71 FORDHAM L. REV., 2823, 2834–37 (2003).

[158] Council Directive 2000/78, 2000 O.J. (L 303) 16 (EC); *see* Dagmar Schiek, *A New Framework on Equal Treatment of Persons in EC Law?*, 8 EUR. L.J. 290 (2002); B. Koopman, *De bijzondere inkadering van de Algemene Kaderrichtlijn*, 5 NEDERLANDS TIJDSCHRIFT VOOR EUROPEES RECHT 126 (2001). In the context of other equality instruments, see Lisa Waddington & Mark Bell, *More Equal Than Others: Distinguishing European Union Equality Directives*, 38 COMMON MKT. L. REV. 587 (2001).

[159] Council Directive 2000/78, pmbl. ¶ 11, 2000 O.J. (L 303) 16 (EC).

[160] Charter of Fundamental Rights of the European Union, 2000 O.J. (C 364) 1. The Charter is a "proclaimed document" having no binding force in EC law; nevertheless, the Court of the First Instance has made several references to the Charter. *See, e.g.*, Case T-177/01, Jégo-Quéré v. Comm'n, 2002 E.C.R. II-2365, ¶ 42, *overruled by* Case C-263/02 P, 2004 E.C.R. I-3425. In Advocate General Mischo's ill-famous opinion, *D & Sweden*, he used the Charter to justify reluctance to advance in the human rights field. *See* Joined Cases C-122 & 125/99P, D & Sweden v. Council, 2001 E.C.R. I-4319, ¶ 51 (Mischo, A.G., opinion). It has been argued that the rationale behind the drafting of the Charter was actually to limit the human rights reach of the ECJ. *See* Allard Knook, *The Court, the Charter, and the Vertical Division of Powers in the European Union*, 42 COMMON MKT. L. REV. 367 (2005).

Europe (art. II-81(1)). It can only be hoped that these legal developments allow the Court to change its position and start providing better protection of gays against discrimination.

At the same time, other recent legislative documents at the Union level demonstrate the reluctance of the EU to move towards better protection of gay rights. Directive 2004/38/EC on Citizens' Free Movement,[161] for instance, does not view same-sex couples and spouses as equal to heterosexual couples, only recognising same-sex couples in the countries where same-sex unions are recognised.[162] Clearly, creating two types of families/unions for the purposes of EC law that depend on the Member State of residence chosen by the couple is not at all in line with the idea of uniform and effective application of EC law throughout the entire territory of the EU.[163] Using ECJ case-law, it is easy to demonstrate, for instance, that the citizens of the Member States where same-sex couples enjoy recognition will be deterred from moving to the Member States where there is no such recognition, to the detriment of the free-movement principles.[164] This failure of the Directive will have to be addressed by the Community legislator in the nearest future.[165] Moreover, treating same-sex couples differently from heterosexual couples amounts to discrimination as prohibited by article 14 of the ECHR.[166]

The position on the issue of recognizing same-sex couples taken by the Citizens' Free Movement Directive is generally in line with other EU legal provisions. Notwithstanding the fact that the ECJ regards respect for family life as a fundamental right,[167] the state of development of the EU family law is truly embryonic.[168] Any protection for same-sex unions throughout the EU is totally lacking[169] *de facto* making it more difficult for the members of such unions to

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[161] Council Directive 2004/38, 2004 O.J. (L 158) 77 (EC).

[162] Council Directive 2004/38, art. 2, 2004 O.J. (L 158) 77, 88 (EC). Not providing for universal recognition of same-sex partnerships all over the EU, *effet utile* of the Directive in this field is minimal, since the countries that established such partnerships already could recognize foreign partnerships of similar nature using international private law. For an argument for such recognition of French PACS in the Netherlands, see Hans U. Jessurun d'Oliveira, *Het Pacte Civil de Solidarité, het geregistreerde partnerschap, het opengestelde huwelijk, en het Nederlandse internationaal privaatrecht*, 884 NEDERLANDS JURISTENBLAD (2000).

[163] For a critique of the Directive, see Mark Bell, *Holding Back the Tide? Cross-Border Recognition of Same-Sex Partnerships within the European Union*, 12 EUR. REV. OF PRIVATE L. 613 (2004).

[164] *E.g.*, Case C-370/90, R. v. Immigration Appeal Tribunal *ex parte* Sec'y of State for Home Dep't, 1992 E.C.R. I-4265, ¶¶ 19–20.

[165] Similar problems of same-sex unions' recognition are also acute in the United States. *See* Andrew Koppelman, *Interstate Recognition of Same-Sex Civil Unions After* Lawrence v. Texas, 65 OHIO ST. L.J. 1265 (2004). Koppelman argues that non-recognition of such unions by other States is unconstitutional. *Id.*

[166] Karner v. Austria, App. No. 40016/98, 2003-IX Eur. Ct. H.R. ¶ 37.

[167] *See* Case 12/86, Demirel v. Stadt Schwäbisch Gmünd, 1987 E.C.R. 3719, ¶ 28.

[168] Caracciolo di Torella & Masselot, *supra* note 139, at 32.

[169] In *D & Sweden*, the ECJ clearly linked the notion of a family with different sexes of the spouses; also, the CFI has been unwilling to reinterpret the meaning of "family." *See* Joined Cases C-122 & 125/99P, D & Sweden v. Council, 2001 E.C.R. I-4319, ¶ 51; Case T-65/92, Arauxo-Dumay v. Comm'n, 1998 E.C.R. II-597, ¶ 30; *see also* Bell, *supra* note 163, at 620–622 (explaining how same sex marriages would not be valid across the European Union under

enjoy their EU law rights.[170] Moreover, as underlined by Reid and Caracciolo di Torella, such a position amounts to a total disregard of a legitimate policy adopted by some Member States willing to create a legal institution for same-sex couples that would be comparable to marriage.[171]

The EU thus ignores the fact that "[m]arriage is not necessarily viewed as the foundation of a family any more."[172] Instead, a certain European conjugal hierarchy[173] is put in place, with registered heterosexual marriage at the top of the pyramid. Due to the limited application of the Staff Regulations compared to all the same-sex couples within the scope of Community law who do not happen to be Community civil servants, the change in the Staff Regulations to avoid future *D. & Sweden* situations cannot be regarded as a turning point in this regard.

D. *Gay Rights* Acquis *and Gay Rights in the Pre-Accession*

The dynamic account of the gay rights *acquis* can be used to explain a sudden rise in attention to gay rights in the Copenhagen-related documents in the year 2001. After the adoption of the Equality Directive, the Commission apparently saw itself better positioned to intervene in the developments in gay rights taking place in the candidate countries. Although the correlation between the development of the gay rights *acquis* and the scope of the Commission's pre-accession demands in this field is pretty obvious (virtually total silence on this issue preceding the 2001 Reports, succeeded by mentioning gay rights in a number of Copenhagen-related documents that followed), it raises two important questions. First, where the Commission took its pre-accession "European standard" from, and, second, whether the Commission felt constrained by the EU's lack of internal competence in this domain before the Directive was adopted.[174]

Regarding the second question, it is possible to speculate that the Commission was very much aware of the competence split, allowing it to address demands related to gay rights protection to the candidate countries even before the Community became competent in this domain. This awareness explains sporadic inclusion by the Commission of rare gay rights demands included in the Regular Reports preceding the adoption of the Equality

current free movement legislation). It has been argued that the ECJ can reverse the policy in this field. *See* O'Neill, *supra* note 14. To do this, the Court will need to change its orthodox position.

[170] *See* Lina Papadopoulou, *In(di)visible Citizens(hip): Same-sex Partners in European Union Immigration Law*, 21 Y.B. EUR. L. 229 (2002); Benoît Guiguet, *Le droit communautaire et la reconnaissance des partenaires de même sexe*, 35 CAHIERS DE DROIT EUROPEEN 537 (1999).

[171] Caracciolo di Torella & Reid, *supra* note 139, at 84.

[172] Caracciolo di Torella & Masselot, *supra* note 147, at 33.

[173] Daniel Borillo, *Pluralisme conjugal ou hiérarchie des sexualités: La reconnaissance juridique des couples homosexuels dans l'Union européenne*, 46 MCGILL L.J. 875, 910 (2001).

[174] Article 13 EC did not provide competences to combat discrimination on the basis of sexual orientation, serving uniquely as a legal basis for the Community to legislate in this domain. *See* European Union: Consolidated Versions of the Treaty on European Union and of the Treaty Establishing the European Community, Dec. 29, 2006, art. 13, 2006 O.J. (C 321) 1.

Directive. Accordingly, the Equality Directive did not provide the Commission with additional pre-accession competence but simply attracted (alongside the pro-gay stand taken by the EP) the Commission's attention to the issue of gay rights.

Answering the first question is more difficult. What kind of "European standard" could the Commission promote if the EU was simply incompetent in this domain, unable to legislate in this field, and if the ECJ refused to acknowledge the ECt.HR's gay rights jurisprudence as part of the principles of EC law?

Generally, two possible standards were available—the EP Resolution "on equal rights for homosexuals and lesbians in the EC"[175] and the 1981 PACE Recommendation 924 "On Discrimination against Homosexuals,"[176] accompanied by a Written Declaration addressing the protection of homosexuals' rights situation in the CEECs.[177]

The substance of these two standards differs substantially—Recommendation 924 is narrower in scope compared to the EP Resolution. The Recommendation focuses on the decriminalisation of homosexual acts, nondiscrimination in the ages of consent for homosexual and heterosexual acts, and "equality of treatment of homosexuals with regards, in particular, to employment, pay[,] and job security."[178] It is notable that the EU only reached the level of protection of gay rights advocated by the Recommendation with the adoption of the Equality Directive, *i.e.*, exactly twenty years after the adoption of the Recommendation. The higher standard of the EP Resolution is yet to be reached.[179] Along with the elements of Recommendation 924, the Resolution also called on the Member States and the Commission to "end barring of lesbians and homosexual couples from marriage or from an equivalent legal framework"[180] and to end "restrictions on the rights of lesbians and homosexuals to be parents or to adopt or foster children."[181]

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[175] Resolution on Equal Rights for Homosexuals and Lesbians in the EC, A3-0028/94, 1994 O.J. (C 61) 40.

[176] EUR. PARL. ASS. DEB., *Recommendation 924 (1981) on Discrimination Against Homosexuals*, 10th Sess., Doc. No. 924 (1981).

[177] EUR. PARL. ASS. DEB., *Written Declaration No. 227 on Homosexual Rights in the New Democracies*, Doc. No. 6679 (1993).

[178] EUR. PARL. ASS. DEB., Doc. No. 924, ¶ 7.

[179] As outlined by Carolan, there is a huge gap between the actual level of protection of gay rights in the EU and the public image of nondiscrimination presented by the Union. *See* Carolan, *supra* note 150, at 405.

[180] Resolution on Equal Rights for Homosexuals and Lesbians in the EC, 1994 O.J. (C 61) 40, ¶ 14. Such a view of marriage is considerably broader than that adopted by the ECt.HR in the course of interpretation of article 8 of the Convention. X v. United Kingdom, App. No. 9369/81, Eur. Ct. H.R. (1983); S v. United Kingdom, App. No. 11716/85, Eur. Ct. H.R. (1986); Kerkhoven v. Netherlands, Appl. No. 15666/89, Eur. Ct. H.R. (1992).

[181] 1994 O.J. (C 61) 40, ¶ 14. Nondiscrimination on the basis of sexual orientation in the issues of parental child custody is protected. *See* Salgueiro da Silva Mouta v. Portugal, App. No. 33290/96, 1999-IV Eur. Ct. H.R. ¶¶ 35–36. This does not apply to nondiscrimination on the same basis in adoptions. *See* Fretté v. France, App. No. 36515/97, 2002-I Eur. Ct. H.R. ¶ 43.

While both of these standards are not binding, the CoE standard is somewhat more authoritative, since a number of its elements have been incorporated into the case-law of the ECt.HR. This mostly concerns the decriminalisation of homosexual acts[182] and the application of the same age of consent for homosexual and heterosexual acts.[183] While this standard is not binding on the Community due to the ECJ's position in *Grant*, it is nevertheless binding on the EU Member States, all of them being members of the CoE.

In other words, the Commission could choose between a "minimum" standard, provided by the CoE and reflected in PACE Recommendation 924, and a "maximum" standard, proposed by the European Parliament (and incorporating the first one).

Instead of choosing between the two, the Commission opted for promoting uniquely those elements of the standards that found firm reflection in the case-law of the ECt.HR, since no mention was made in the pre-2001 Reports of the nondiscrimination based on sexual orientation in employment and other spheres. None of the Reports adopted the standard formulated by the European Parliament in its 1994 Resolution. The Commission did not even mention the possibility of recognising the rights of homosexuals to adopt children or to register partnerships (to say nothing about getting married), showing no concern with any broader understanding of gay rights. In other words, in practice, the ECt.HR served as a gay rights standard provider in the course of the pre-accession exercise. The Commission adopted the most minimal standard possible, which does not come as a surprise especially considering the threshold used to determine if an applicant country meets the Copenhagen Criteria.

VI. GAY RIGHTS IN THE BROADER CONTEXT

The last decade saw a veritable explosion of recognition of gay rights around the world. Numerous jurisdictions, from U.N. bodies to local and provincial authorities, demonstrated willingness to do their best to award gay rights suitable protection. Viewed in this light, the growing recognition of nondiscrimination on the basis of sexual orientation in the European Union and its Member States, as well as the rise in the number of European jurisdictions allowing the registration of same-sex partnerships and marriages, comes as a natural development. All the more natural was it for the EU to try to export the momentum of change in the gay rights sphere to the new Member States (then candidate countries) of Central and Eastern Europe.

At the same time, the developments at the Union level, and especially the case-law of the ECJ, were lagging far behind the front lines of gay rights recognition. Moreover, when passing the decisions in *Grant* and *D & Sweden*

[182] *See, e.g.*, Dudgeon v. United Kingdom, App. No. 7525/76, 59 Eur. Ct. H.R. (ser. A) (1983); Norris v. Ireland, App. No. 10581/83, 142 Eur. Ct. H.R. (ser. A) (1988); Modinos v. Cyprus, App. No. 15070/89, 259 Eur. Ct. H.R. (ser. A) (1993); A.D.T. v. United Kingdom, App. No. 35765/97, 2000-IX Eur. Ct. H.R.

[183] *See* Sutherland v. United Kingdom, App. No. 25186/94, Eur. Ct. H.R. (2001).

the ECJ was very well aware of the international developments in gay rights protection. In *Grant*, for instance, the Court dismissed the reasoning of the U.N. Human Rights Committee.[184] In *Toonen v. Australia*, the Committee ruled that discrimination on the basis of sexual orientation was included among the grounds of discrimination prohibited by article 26 of the ICCPR.[185] The ECJ was reluctant to follow this example. It reaffirmed that it usually takes account of ICCPR in the matters of human rights[186] but pointed out that following the Committee's interpretation would entail an extension of the human rights jurisdiction of the Community, which it was not entitled to do, since "rights cannot in themselves have the effect of extending the scope of the Treaty provisions beyond the competences of the Community."[187] The ECJ also submitted that the decisions of the Committee were not binding and distanced itself from the interpretation of discrimination in *Toonen*.[188] In view of the fact that the Community is bound by international law,[189] and given the Court's role in reading fundamental rights principles into the Treaties,[190] it is difficult to fully agree with such an assessment.[191]

Later case-law of the U.N. Human Rights Committee demonstrates with all clarity that *Toonen* was not some deviation from commonly accepted international practice as the ECJ tried to present it in *Grant*,[192] but is still good law, and has been built upon. Following *Toonen*, the Committee ruled in *Young v. Australia*[193] that there was no legitimate reason to deny same-sex partners government benefits offered to heterosexual couples. Accordingly, Young, as a partner of an Australian veteran, was entitled to a government pension.[194] The parallels between this case and *D. & Kingdom of Sweden*, decided one year later are obvious.

In Europe, the ECt.HR played a particularly constructive role in the protection of gay rights. This Court ruled, *inter alia*, that criminalisation of homosexual acts between consenting adults was illegal,[195] prohibited age-of-consent discrimination in criminal law targeting same-sex couples,[196] and

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184 U.N. Human Rights Committee, *Selected Decisions of the Human Rights Committee Under the Optional Protocal*, 133, U.N. Doc. CCPR/C/50/D/488/1992 (Mar. 31, 1994), *available at* http://www.ohchr.org/english/about/publications/docs/sdecisions-vol5.pdf.

185 *Id.* at 139 ¶ 8.7.

186 *See* Case C-249/96, Grant v. South-West Trains Ltd., 1998 E.C.R. I-621, ¶¶ 43–44.

187 *Id.* ¶ 45.

188 *Id.* ¶¶ 46, 47.

189 Case C-286/90, Anklagemyndigheden v. Poulsen, 1992 E.C.R. 6019, ¶ 9.

190 *See* sources cited *supra* note 157.

191 *See* Canor, *supra* note 130, at 287–90.

192 *See Grant*, 1998 E.C.R. I-621, ¶ 47.

193 U.N. Human Rights Committee, U.N. Doc. CCPR/C/78/D/941/2000 (Aug. 6, 2003), *available at* http://www.bayefsky.com/html/australia_t5_iccpr_941_2000.php.

194 *Id.* at ¶ 12.

195 *See, e.g.*, Dudgeon v. United Kingdom, App. No. 7525/76, 59 Eur. Ct. H.R. (ser. A) (1983); Norris v. Ireland, App. No. 10581/83, 142 Eur. Ct. H.R. (ser. A) (1988). This does not apply to consensual sadomasochistic practices between adult men. Laskey v. United Kingdom, App. Nos. 21627, 21826, & 21974/93, 1997-I Eur. Ct. H.R. ¶¶ 45–51.

196 *See* Sutherland v. United Kingdom, App. No. 25186/94, Eur. Ct. H.R. (2001).

employed the nondiscrimination principle to overturn a national decision refusing a father the custody of his child on the sole ground of his homosexuality.[197] The ECt.HR disallowed, in *Karner*, discrimination between unmarried heterosexual and same-sex couples.[198] In *Karner*, the ECt.HR underlined that the Austrian argument related to the protection of a "traditional family unit" was "abstract" and dismissed it.[199] The dismissal of gays from the armed forces on the grounds of their sexual orientation was also announced to be in violation of the Convention (there was, *inter alia* a violation of art. 8 (private life)).[200] Equally informative is ECt.HR case-law on transsexuals, which also demonstrates that the Court takes an approach that can be called somewhat more progressive than that adopted by other jurisdictions. Therefore, under the right to private life, a male to female transsexual was entitled a pension starting at the age of 60, which is the pension age for female workers in the U.K.[201]

Nevertheless, even the ECt.HR made some steps in the direction of a more cautious approach to gay rights protection. In a recent judgement, it refused a gay man the right[202] to adopt a child, ruling in *Fretté* that the nondiscrimination principle of article 14 of the Convention, although covering nondiscrimination on the basis of sexual orientation, did not apply to that particular situation. The Court reasoned that the prohibition pursued a legitimate aim of "protect[ing] the health and rights of children."[203] No scientific evidence was presented by the French government to substantiate such a position. The decision in the *Fretté* case came totally unexpectedly after *Salgueiro da Silva Mouta*, which was logically identical to it and yet produced a different outcome.

What were the reasons behind such a change of position? It could be suggested that the ECt.HR decision in *Fretté* is an indirect consequence of the enlargement of the CoE and, in a way, reflects the situation of gay rights in Eastern Europe. It is telling to examine the majority in the case. Besides the French judge, those voting to *de facto* overrule *Salgueiro da Silva Mouta* included

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[197] *See* Salgueiro da Silva Mouta v. Portugal, App. No. 33290/96, 1999-IV Eur. Ct. H.R.

[198] Karner v. Austria, App. No. 40016/98, 2003-IX Eur. Ct. H.R. ¶ 42.

[199] *Id.* ¶ 41.

[200] Lustig-Prean v. United Kingdom, App. Nos. 31417 & 32377/96, Eur. Ct. H.R. (1999); Smith v. United Kingdom, App. Nos. 33985 & 33986/96, 1999-VI Eur. Ct. H.R.

[201] Grant v. United Kingdom, App. No. 32570/03, Eur. Ct. H.R. ¶¶ 2, 7, 51 (2006). This case is similar to the ECJ's Case C-423/04, Richards v. Sec'y of State for Work and Pensions, 2006 E.C.R. I-3585.

[202] Such a right exists in French family law under art. 343-1 of the Civil Code. C. CIV. art. 343-1 (Fr.).

[203] Fretté v. France, App. No. 36515/97, 2002-I Eur. Ct. H.R. ¶ 38. For (harsh) critique, see Daniel Borrillo & Thierry Pitois-Etienne, *Différence des sexes et adoption: la ‹psychanalyse administrative› contre les droits subjectifs de L'individu*, 49 MCGILL L.J., 1035, 1048–51 (2004); Thomas Willoughby Stone, Comment, *Margin of Appreciation Gone Awry: The European Court of Human Rights' Implicit Use of the Precautionary Principle in* Fretté v. France *to Backtrack on Protection from Discrimination on the Basis of Sexual Orientation*, 3 CONN. PUB. INT. L.J. 271 (2003).

judges from Lithuania, the Czech Republic, and Albania. The judges who voted against were from Austria, Belgium, and the U.K.[204]

In the light of the majority in *Fretté*, the future of gay rights in the European Union can also be deemed to be rather grim. The Commission's unwillingness to treat this issue seriously in the course of the pre-accession process resulted in a situation where countries reluctant to protect gay rights managed to join the European Union. Consequently, the situation with regards to the recognition of same-sex partnerships and gay rights protection in the EU changed instantly on May 1, 2004, the day of enlargement. Among the new Member States, only Hungary permitted gays to enter civil unions. The gay rights record of other new Member States is rather alarming. The danger of *Fretté* majorities in the ECJ and CFI[205] is more than real.

Generally speaking, however, there is a growing concern with gay rights protection at the global level. In this, the European Union moves apace with world development following other jurisdictions in prohibiting discrimination on the basis of sexual orientation. In the course of the 1990s, such legislation was passed in a great number of the EU-15 Member States.[206] Also, the Constitutional Courts of Canada[207] and South Africa[208] moved in the direction of broadening the scope of gay rights in their respective jurisdictions.[209] The situation with gay rights in the world is improving rapidly.

VII. CONCLUDING REMARKS

The Union's noncompliance with any of the standards of gay rights protection it had at its disposal in 1997, when the pre-accession Regular Reporting of the East European applicants for membership commenced, did not prevent it from promoting gay rights protection as a necessary pre-accession requirement included in the Copenhagen Criteria. The range of the Copenhagen-related legal instruments, coupled with the pre-accession principle of conditionality that offered the EU a virtual *carte blanche* in "steering" the democratic and human rights reforms in the candidate countries, all led observers to believe that the EU would advance gay rights protection in the candidate countries during the pre-accession exercise. This has not happened. In focusing timorously and inconsistently on a minimal range of rights, the Commission's performance in the course of the pre-accession exercise left

[204] The unanimous opinion in *Salgueiro da Silva Mouta v. Portland* was delivered with two East European judges (Croatian and Polish) on the panel. *See* Salgueiro da Silva Mouta v. Portugal, App. No. 33290/96, 1999-IV Eur. Ct. H.R.

[205] Since ECJ and CFI issue unanimous judgements it will be very difficult to find out for sure which judges were responsible for a given decision.

[206] Waaldijk, *supra* note 41, at 649–50.

[207] *See* Vriend v. The Queen, [1998] 1 S.C.R. 493 (Can.); Egan v. The Queen, [1995] 2 S.C.R. 513 (Can.).

[208] *Nat'l Coal. for Gay and Lesbian Equal. v. Minister of Justice* 1999 (1) SA 6 (CC) (S. Afr.).

[209] Kenneth McK. Norrie, *Constitutional Challenges to Sexual Orientation Discrimination*, 49 INT'L & COMP. L.Q. 755, 755–58 (2000).

much to be desired. Such performance was partly due to the confusion within the gay rights *acquis* and the orthodox case-law of the ECJ in this field. The development of the ECt.HR jurisprudence in the field of gay rights and the adoption of the Equality Directive has the potential to change this situation. As far as the application of the EU enlargement law is concerned, the present practice of virtually ignoring gay rights is unsustainable. The European Commission should reconsider the pre-accession role played by gay rights in the enlargements to come.