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Finding Fundamental Fairness: Protecting the Rights of Homosexuals under European Union Accession Law

Travis J. Langenkamp

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Finding Fundamental Fairness: Protecting the Rights of Homosexuals Under European Union Accession Law*

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I. INTRODUCTION

The prospective enlargement of the European Union¹ has recently garnered significant and unprecedented attention. The significance stems, in part, from the fact that a total of thirteen countries are presently preparing for membership;² the unprecedented nature stems, in whole, from the enlargement process's potential impact on homosexual rights within the European Union and Applicant States. Recently, both the European Parliament and the European Commission have taken a united stance against the accession of Applicant Countries with anti-gay laws and practices.³ For some, this call for the end to such sexual orientation discrimination is indicative of a fundamental right founded upon equity and equality principles. Notwithstanding its traditional and nearly exclusive focus on economic matters, the European Union has increasingly taken human rights issues to heart.⁴ In seeking to improve upon its human

1. Currently, the European Union consists of fifteen Member States: Belgium, France, Germany, Italy, Luxembourg, Netherlands, Denmark, Ireland, United Kingdom, Greece, Portugal, Spain, Austria, Finland, and Sweden. New Member States were expected to gain admittance into the European Union near the end of 2002. *See* NICE EUR. COUNCIL, PRES. CONCLUSIONS, 400/1/00, at para. 8 (Dec. 8, 2000), available at <http://europa.eu.int/council/off/conclu/> (last visited Sept. 28, 2002) (the European Union plans to be "in a position to welcome those new Member States which are ready as from the end of 2002, in the hope that they will be able to take part in the next European Parliament elections [taking place in mid-2004.]" *Id.* at para. 8).

2. Only three countries have successfully negotiated accession into the European Union since 1986—Austria, Finland, and Sweden. *See* ANTHONY ARNULL ET AL., EUROPEAN UNION LAW 11 (4th ed. 2000). The prospective Applicant Countries of Bulgaria, the Czech Republic, Cyprus, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovakia, Slovenia, and Turkey, have all negotiated pre-accession agreements associating themselves with the European Union. *See id.* at 11–12.

3. *See EU Candidate Nations Pressured*, SAN DIEGO GAY & LESBIAN TIMES, Sept. 13, 2001, at 33. On September 5, 2001, Guenther Verhuegen, the European Union Enlargement Commissioner, addressed the European Parliament in regards to specific penal code provisions discriminating against homosexual men and lesbian women. Mr. Verhuegen emphasized "that the [European] Commission will continue to press in the enlargement negotiations for full observance of human rights and the rights of minorities. This includes a ban on any discrimination based on age, gender, sexual orientation or religious convictions." *Id.* (alteration in original).

4. This is in contrast to the forty-one member Council of Europe, founded in 1949, which is essentially a human rights organization that seeks to find an agreement "in economic, social, cultural, scientific, legal and administrative matters and in the maintenance and further [realization] of human rights and fundamental freedoms." A.H. ROBERTSON, EUROPEAN INSTITUTIONS 36–37 (3d ed. 1973) (quoting the Statute of the Council of Europe). *See also* D.W. BOWET, THE LAW OF INTERNATIONAL INSTITUTIONS 168 (4th ed. 1982). The European Convention on Human Rights is the Council of Europe's most important instrument. It establishes the basic fundamental human rights applicable throughout Europe and is primarily enforced through the European Court of Human Rights. Guy Scoffoni, *The Influence of the European Convention of Human Rights on the National Law of a Member State*, 2 J. CHINESE & COMP. L. 21, 22 (1996). In recent past, the European Court of Human Rights' decisions have been particularly responsive to lesbian and gay rights issues. For example, in *Dudgeon v. United*

rights legacy, the European Union has made strides particularly in the areas of employment discrimination, sex discrimination, and asylum and immigration.⁵

In tackling the issue of sexual orientation discrimination, the European Union must make significant efforts to conform or, perhaps, eradicate incongruous legislation within Applicant Countries. The difficulty of this endeavor is two-fold: first, in terms of the number and complexity of the laws of each Applicant Country; and, second, in the absence of any detailed and systematic documentation of sexual orientation discrimination within those same Applicant Countries. Compounding, if not confounding, such legitimate endeavors are the inconsistent anti-gay legislation prevalent within the present Member States. The stakes are high for Member States and Applicant Countries alike. Thus, the European Union's enlargement process may serve as proper method to end sexual orientation discrimination and provide "protections for homosexuals"⁶ within the European Union and in those countries that wish to become part of the European Union.

Part II. of this Comment explores the European Union's overall position regarding sexual orientation discrimination. Part II. discusses historical and procedural considerations taken into account by the European Parliament, and common law protections provided for within European Union countries, within the area of employment.

Part III. probes the European Union enlargement process as currently administered. Part III. examines the negotiation process, specifically how accession into the European Union law compels Applicant Countries to adopt the *acquis communautaire* legislation.

Kingdom, 45 Eur. Ct. H.R. (ser. A) (1981), a total ban on same-sex sexual acts was forbidden; in *Sutherland v. United Kingdom*, 24 Eur. H.R. Rep., (Comm'n Supp. 2) CD 22 (1997), discriminatory age of consent laws were stricken; and, in *A.D.T. v. United Kingdom*, 3 Eur. Ct. H.R. (2000), discriminatory privacy laws were prohibited.

5. See TREATY OF AMSTERDAM AMENDING THE TREATY ON EUROPEAN UNION, THE TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES AND CERTAIN RELATED ACTS, Oct. 2, 1997, O.J. (C 340) 1 (1997) [hereinafter TREATY OF AMSTERDAM]. See also KAREN DAVIES, UNDERSTANDING EU LAW 16-17 (2001) (discussing the basic aims of the Treaty of Amsterdam).

6. Note that the intent of this Comment is not to debate whether protections for homosexuals somehow confer "special rights" on those individuals. Excellent discussions on this topic can be found elsewhere. See, e.g., Samuel A. Marcossan, *The "Special Rights" Canard in the Debate Over Lesbian and Gay Civil Rights*, 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 137 (1995) (arguing that categorizing gay and lesbian rights as "special rights" inhibits protection of homosexuals from discrimination); Christopher S. Hargis, Note, Romer, Hurley, and Dale: *How the Supreme Court Languishes with "Special Rights"*, 89 KY. L.J. 1189 (2001).

Part IV. analyzes the connection between the European Union enlargement process and strengthening homosexuals' protections within European Union Applicant Countries, as well as within Member States. Part IV. explores how the *acquis communautaire* on sexual orientation and gender identity issues can guarantee fundamental protections for homosexuals by adhering to binding and non-binding authorities.

Part V. addresses human rights and enlargement within the context of the European Convention on Human Rights. Part V. examines how sexual orientation protections are provided for under Convention law and how the European Union should recognize such protections under the auspice of the enlargement process.

Part VI. provides recommendations to the European Commission and European Parliament on how to improve the enlargement process to adequately safeguard protections for homosexuals. The European Union should implement concrete standards on minimum protections for homosexuals, provide genuine leadership by Member States on homosexual protection issues, and translate the manifest political will of Applicant States to encourage such countries to acquiesce to the requisite reforms. This Comment concludes that the proposed recommendations are all key components to successful and efficient European Union enlargement. A more refined enlargement process holds great potential for developing protections for homosexuals throughout Europe.

II. EUROPEAN UNION'S OVERALL POSITION REGARDING SEXUAL ORIENTATION DISCRIMINATION

A. Roth Report Considerations

The debate over homosexual⁷ rights within the European Union can be traced back to the early 1980s.⁸ It was not until the European Parliament's 1994 Report for the Committee on Internal Affairs and Citizens' Rights on Equal Rights for Homosexuals and Lesbians in the European Community that the relevance of such issues to the European Union were earnestly addressed.⁹ The Roth Report brought

7. For this Comment, the term "homosexual" refers to individuals having a sexual orientation to persons of the same sex, including both lesbians and gay males. As for bisexuals, the author assumes that the rights of bisexuals would automatically flow from the fundamental protections already afforded homosexuals and those same protections for homosexuals for which the author advocates herein.

8. See Mark Bell, *Sexual orientation and anti-discrimination policy: The European Community*, in *THE POLITICS OF SEXUALITY: IDENTITY, GENDER, CITIZENSHIP* 58 (Terrell Carver & Véronique Mottier eds., 1998).

9. *Report of the Committee on Civil Liberties & Internal Affairs on Equal Rights for Homosexuals & Lesbians in the European Community*, EUR. PARL. DOC., A3-0028/94 (1994) [hereinafter Roth Report].

to light the harsh reality of widespread discrimination faced by lesbian and gay European Union citizens in a variety of areas.¹⁰

In particular, consideration in the Roth Report was given to sexual orientation discrimination in the areas of employment, marriage, adoption, and privacy.¹¹ Almost immediately, the European Parliament¹² called upon the European Commission¹³ to draft recommendations on the equal treatment of all Member State citizens regardless of their sexual orientation and on the annihilation of all forms of sexual orientation discrimination.¹⁴ Such recommendations, the European Parliament suggested, as a minimum, should seek to end:

- different and discriminatory ages of consent for homosexual and heterosexual acts, . . .
- all forms of discrimination in [labor] and public service law, . . .
- electronic storage of data concerning the sexual orientation of an individual without her or his . . . consent,
- the barring of lesbian and homosexual¹⁵ couples from marriage or from an equivalent legal framework, . . . [and],
- any restrictions on the rights of lesbians and homosexuals to be parents or to adopt or foster children.¹⁶

During this same period, coalitions among minority interests groups dedicated to the eradication of various forms of discrimination, including race, religious, disability, age, and sexual orientation, lobbied the fifteen

10. *Id.*

11. See Resolution on Equal Rights for Homosexuals and Lesbians in the EC, 1994 O.J. (C 61) 40 (1994).

12. As the largest multinational parliament in the world, the European Parliament's defined role is to represent the interests of the European Union citizenry, primarily acting in a legislative, budgetary, and supervisory capacity. DAVIES, *supra* note 5, at 23–27.

13. The European Commission is a multi-functional component of the European Union empowered to represent the interest of the European Union as a whole. It has three distinct roles: (1) the Commission acts legislatively, primarily initiating or drafting legislation or proposals; (2) administratively, the Commission acts as executor of policies and manager of international trade relations; and, (3) the Commission acts as the "Guardian of the Treaties", supervising and enforcing European Union rules. *Id.* at 32–36.

14. Resolution on Equal Rights for Homosexuals and Lesbians in the EC, *supra* note 11, at 42.

15. Here, the European Parliament's use of the term "homosexual" includes, at the very least, reference to gay males.

16. Resolution on Equal Rights for Homosexuals and Lesbians in the EC, *supra* note 11, at 42 (footnote added).

Member States.¹⁷ In partial acquiescence to such pressure, the Member States addressed the issue in the Treaty of Amsterdam.¹⁸ This treaty initiated European Union action to amend its founding treaties to allow the European Union to adopt legislation banning all forms of discrimination, including sexual orientation. Of significance, Article 13 states that:

Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic, religion or belief, disability, age or *sexual orientation*.¹⁹

B. European Union Common Law Considerations

Article 13 entered into force, on May 1, 1999, at a time when European Union law reform was most pressing for homosexuals. For example, the European Court of Justice had rendered two alarming decisions in *Grant v. South-West Trains Ltd.*²⁰ and *D. v. Council of the European Union*.²¹ Both decisions were wake up calls for the urgent need to protect rights of lesbian, gay men, and bisexuals within the European Union.

First, in *Grant v. South-West Trains Ltd.*, the European Court of Justice denied travel benefits to the lesbian partner of a South-West Trains employee.²² South-West Trains extended travel benefits to certain family members of its employees, primarily opposite-sex spouses, either married or unmarried. Same-sex partners of South-West Trains employees, however, were not extended the same or similar benefits. Instead of treating the issue of discrimination as one based on sexual orientation, the European Court of Justice regarded the matter as a gender equity issue.²³ The European Court of Justice decided that negative treatment of homosexuals did not constitute gender discrimination as long as both male and female homosexuals were treated equally.²⁴ Under “the present state of law within the Community [in 1998],” the European

17. Cf. Leo Flynn, *The Implications of Article 13 EC—After Amsterdam, Will Some Forms of Discrimination be More Equal than Others?*, 36 COMMON MKT. L. REV. 1127, 1138–49 (1999).

18. *Id.*

19. TREATY OF AMSTERDAM, *supra* note 5, art. 13 (emphasis added).

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

21. Case T-264/97, *D. v. Council of the European Union*, [1999] E.C.R. S.C. I-A-1, slip op.

22. See *Grant v. South-West Trains Ltd.*, *supra* note 20, at para. 50.

23. *Id.* at para. 35.

24. See *id.* at paras. 35, 41.

Court of Justice held, “stable relationships between two persons of the same sex are not regarded as equivalent to marriages or stable relationships outside marriage between two persons of the opposite sex.”²⁵

At the time, the *Grant v. South-West Trains Ltd.* decision was regarded as an utter reversal in sexual orientation European Union case law. A previous decision in 1996, *P. v. S. and Cornwall County Council*,²⁶ had indicated a solemn willingness by the European Court of Justice to kindle European Union law reform on discrimination. That case concerned an employee who was fired after revealing plans to undergo a gender reassignment to change the employee’s physical gender from male to female. The employee had brought the suit under the 1976 Equal Treatment Directive prohibiting sexual discrimination in employment.²⁷ Under Article 5(1) of the directive, “[a]pplication of the principle of equal treatment with regard to working conditions, including the conditions governing dismissal, means that men and women shall be guaranteed the same conditions without discrimination on grounds of sex.”²⁸ The European Court of Justice was persuaded by the employee’s argument that the 1976 Equal Treatment Directive was applicable to individuals discriminated against for reasons related to gender reassignment.²⁹ In effect, the decision rendered European Union law on gender equity applicable to both discrimination against women or men, *as well as* discrimination against transgender people. Until *Grant v. South-West Trains Ltd.*, homosexual rights advocates were comforted by the European Court of Justice’s encouraging decision in *P. v. S. and Cornwall County Council*.

The second troubling European Union decision was in *D. v. Council of the European Union*.³⁰ The European Union Council had denied benefits to the same-sex spouse of a Swedish employee. By that time, Sweden accorded most legal marital rights to same-sex couples and had an established registry for such partnerships. The European Union Court of First Instance rejected the plaintiff’s application on all

25. *Id.* at para. 35. *See also id.* at paras. 22, 24.

26. Case C-13/94, *P. v. S. and Cornwall County Council*, [1996] E.C.R. I-2143.

27. Council Directive 76/207, 1976 O.J. (L 39) 40.

28. *Id.* art. 5(1).

29. *See P. v. S. and Cornwall County Council*, *supra* note 26, at para. 23.

30. *D. v. Council of the European Union*, *supra* note 21, slip op. (denying same-sex couple a household allowance payable to married officials by concluding that a registered partnership was different in law from marriage according to the *acquis communautaire*).

grounds, relying in part on *Grant v. South-West Trains Ltd.* An appeal to the European Court of Justice was dismissed with costs awarded against D.,³¹ thereby maintaining the lower court's position that there was no breach of fundamental rights because homosexual partnerships were not to be afforded the same protections as married couples. Such disconcerting decisions only reinforce the need for action to protect homosexuals from discrimination within the European Union.

C. *Spur for Protection in Employment*

After the decisions in *Grant v. South-West Trains Ltd.* and *D. v. Council of the European Union*, the urgent need to enhance fundamental rights of homosexuals within the European Union was reinforced. Utilizing the necessary foundation in Article 13 of the Treaty of Amsterdam,³² new anti-discrimination legislative proposals can and have been built specifically in the area of employment.

In 2000, the European Commission proposed two directives against discrimination, both of which have been adopted by the Council of the European Union. The first directive, adopted in June 2000, forbids discrimination in the areas of employment, education, social protection, health, access to goods and service, and housing.³³ However, the tenor of this directive relates to racial and ethnic origin discrimination.

Near the end of 2000, a general framework directive regarding equal treatment in employment was adopted. This Framework Directive augments the earlier June directive.³⁴ The Framework Directive prohibits discrimination in employment on the grounds of religion, age, disability, or *sexual orientation*.³⁵ Most importantly, the Framework Directive forbids discrimination in all aspects of the employment relationship. Protections are granted for vocational training, within trade unions, and within professional associations.³⁶ Harassment is included in the broad definition of discrimination, and both direct and indirect forms of discrimination are prohibited.³⁷ Retaliatory action against complainants is forbidden.³⁸ Enforcement

31. *Id.*

32. *See* discussion *supra* Part I.A.

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

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

35. *Id.* art. 1, at 18.

36. *Id.* art. 3(1), at 19.

37. *Id.* art. 2, at 18-19.

38. *Id.* art. 11, at 20.

proceedings may also be initiated on behalf of and with the consent of a complainant against organizations ignoring the Framework Directive's obligations.³⁹ Furthermore, the Framework Directive calls for "effective, proportionate, and dissuasive" sanctions for discriminatory offenses.⁴⁰

Importantly, the Framework Directive is not only binding on Member States of the European Union, but all future Member States upon accession.⁴¹ Current Member States were given three years in which to amend employment discrimination provisions pertaining to sexual orientation.⁴² By December 2, 2003, the national employment laws of all Member States shall confer protection against sexual orientation discrimination for all European Union citizens, homosexual and heterosexual alike. After December 2, 2003, future Member States must have implemented the Framework Directive into their national legislative scheme *prior* to acceptance into the European Union.⁴³ With regard to employment within European Union Member States, the Framework Directive's force will enable lesbians, gay males, and bisexuals to rely on the clear, unconditional rights conferred by the Framework Directive.

III. ANTI-DISCRIMINATION AND EUROPEAN UNION ENLARGEMENT

The basis for enlargement lies in the European Union's three foundational treaties: the European Coal and Steel Community Treaty of 1952;⁴⁴ the 1958 Treaty Establishing the European Economic Community;⁴⁵ and, the 1958 Treaty Establishing the European Atomic Energy Community.⁴⁶ As the European Union has grown in both economic and geographic terms, the Member States have extensively amended and reformed these treaties. This evolution was primarily instituted through

39. *Id.* art. 9(2), at 20.

40. *Id.* art. 17, at 21.

41. *Id.* art. 18, at 21.

42. *Id.*

43. *Id.*

44. TREATY INSTITUTING THE EUROPEAN COAL AND STEEL COMMUNITY, Apr. 18, 1951, 261 U.N.T.S. 140.

45. TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY, Mar. 25, 1957, 298 U.N.T.S. 11.

46. TREATY ESTABLISHING THE EUROPEAN ATOMIC ENERGY COMMUNITY, Mar. 25, 1957, 298 U.N.T.S. 167.

three additional far-reaching treaties: the Single European Act of 1986,⁴⁷ the 1992 Treaty on European Union,⁴⁸ and the Treaty of Amsterdam.⁴⁹

Most recently, the Treaty of Nice⁵⁰ seeks to amend the existing treaties.⁵¹ Once the Treaty of Nice has been ratified by the fifteen Member States in accordance with their respective constitutional procedures,⁵² it will enter into force primarily with the effect of facilitating the enlargement of the European Union. As noted at the Nice Summit, “[t]he new Millennium has given [the European Union] an unprecedented opportunity to bind together the countries of [Europe] into a wide area of peace, stability and greater economic potential.”⁵³

Although some protections for homosexuals against discrimination in employment within the European Union are apparent, sexual orientation discrimination remains endemic in Europe. Protections against sexual orientation discrimination are lacking in many areas, including sexual offense laws, homophobic violence, legal recognition of same-sex partnerships, and service within the armed forces. Undoubtedly, the European Union is dedicated to creating harmony among the varied

47. SINGLE EUROPEAN ACT, JUNE 29, 1987, O.J. (L 169) 1 (1987), 2 C.M.L.R. 741 (1987) (amending TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY). This act was designed to speed up integration within the European Union and lay down political co-operation provisions. See DAVIES, *supra* note 5, at 11–13.

48. TREATY ON EUROPEAN UNION, Feb. 7, 1992, O.J. (C 224) 1 (1992) (amending TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY, as amended by SINGLE EUROPEAN ACT). Also known as the Maastricht Treaty, the Treaty on European Union was implemented to sustain the momentum spawned by the Single European Act by creating what is today known as the European Union. See DAVIES, *supra* note 5, at 11–15.

49. TREATY OF AMSTERDAM, *supra* note 5. The primary aim of the Treaty of Amsterdam was to amend the existing treaties, by placing the interests of workers at the heart of the Union, by removing existing barriers to free movement while improving security; by giving the European Union a stronger world voice, and by ensuring greater effectiveness and efficiency in preparation for enlargement. See DAVIES, *supra* note 5, at 16–18.

50. TREATY OF NICE AMENDING THE TREATY ON EUROPEAN UNION, THE TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES AND CERTAIN RELATED ACTS, Feb. 26, 2001, O.J. (C 80) 1 (2001). The Treaty of Nice was agreed upon at the European Council on December 7–9, 2000 and signed on February 26, 2001.

51. The key Treaty of Nice provisions purport to: (1) extend qualified majority voting within the European Council, which is the European Union’s primary impetus for political direction and development; (2) re-weight the voting structure of European Council in favor of the more populated European Union countries; and, (3) reform the organization and size of the European Commission. See DAVIES, *supra* note 5, at 18–19.

52. See *The Irish Agree; Now Will Everyone Else Kindly do the Same?*, *The Economist*, Oct. 26, 2002–Nov. 1, 2002, at 46 (Ireland gives “the green light to EU enlargement” after a second referendum attempt on October 19, 2002. *Id.*). See also EUROPA: The European Union On-line: Treaty of Nice (ratification situation summary table noting that the “Treaty of Nice will enter into force on the first day of the second month after the lodging of the ratification instrument by the Member State which is the last to complete this formality”), at http://europa.eu.int/comm/nice_treaty/ratifiable_en.pdf (last visited Dec. 2, 2002).

53. President Romano Prodi, Speech at the European Parliament on the European Council of Nice (Dec. 12, 2000), at <http://jpn.cec.eu.int/english/press-info/4-2-57.htm> (last visited Sep. 17, 2002).

economies of its Member States.⁵⁴ However, existing European Union law can also be used to encourage, if not require, legislative reforms enhancing homosexual protection from sexual orientation discrimination within current and future Member States. The enlargement process provides such an avenue for reform.

A. *The Process of Enlargement*

The most recent process of enlargement of the European Union was commenced on approximately March 30, 1998.⁵⁵ Negotiations are currently being held with the following twelve applicant countries: Bulgaria, Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovakia, and Slovenia. The basic principle of these ongoing negotiations is that all the applicant countries must accept existing European Union law, commonly referred to as the *acquis communautaire*.

An understanding of the process of enlargement is essential to achieving the goal of enhancing anti-discrimination laws within the European Union. Although European Union enlargement is a significant process, the mechanisms for accession into the European Union have traditionally been ill-defined.

Until 1993, European Union enlargement was characterized by a series of rigorous negotiations between Member States and Applicant Countries.⁵⁶ New Member States were admitted into the European Union

54. Commission Press Release, *EU Enlargement: A Good Compromise Between the Financial Interests of the Current EU-15 and the New Member States* (Feb. 12, 2002) (enlargement recognized as "a good compromise between the financial interests of the current EU-15 and the new Member States"), available at <http://europa.eu.int/comm/enlargement/docs/news.htm> (last visited Sept. 12, 2002).

55. See, e.g., European Commission Composite Paper: Reports on Progress Towards Accession by Each of the Candidate Countries COM (98)712, at 21. ("The accession process was launched on 30 March 1998 in Brussels by a meeting of Foreign Ministers of the Member States, the countries of central and eastern Europe and of Cyprus." *Id.*).

56. After the fall of the Berlin Wall in 1989, the European Union established diplomatic relations with numerous central European countries. For example, the European Union eliminated long-standing import quotas on various products, extended the Generalized System of Preferences (GSP), and consummated Trade and Cooperation Agreements with Bulgaria, the former Czechoslovakia, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, and Slovenia. In addition, the European Union created the Phare Programme, designed to provide financial support for the countries struggling to reform and rebuild their economies. Phare was to become the world's largest assistance program in central Europe, providing technical expertise and investment support.

only upon satisfactory completion of these negotiations, formalized by a treaty of accession or similar convention.⁵⁷ This informal accession process was legitimized in the early 1990s, offering potential future Member States a modicum of guidance.⁵⁸ Article O of the Treaty on European Union merely stated that “[t]he conditions of admission . . . shall be the subject of an agreement between the Member States and the applicant State.”⁵⁹

Still left with little formal guidance, applicant Countries from central and eastern Europe needed clarification. In 1993, The Copenhagen European Council promised that “[t]he countries in Central and Eastern Europe that so desire shall become members of the Union. Accession will take place as soon as an applicant is able to assume the obligations of membership by satisfying the economic and political conditions required.”⁶⁰

At the same time, the Member States of the European Union designed its membership criteria, which are often referred to as the Copenhagen Criteria. In 1993, the Copenhagen European Council set forth in detail its criteria for accession. The Copenhagen Criteria requires Applicant Countries to achieve:

- Stability of institutions guaranteeing democracy, the rule of law, *human rights and respect for minorities*;
- The existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the [European] Union; [and],
- The ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union.⁶¹

An Applicant Country is also required to create:

The conditions for its integration through the adjustment of its administrative structures, so that European [Union] legislation transposed into national legislation is implemented effectively through appropriate administrative and judicial structures.⁶²

Following the commencement of negotiations in 1997, the European Commission began to publish opinions on the progress of the Applicant

57. During the 1990s, European Union Member States actively pursued and entered Association Agreements, also known as Europe Agreements, with ten countries of central Europe. Europe Agreements provide the legal basis for bilateral relations between these countries and the European Union. Previously, European Union had negotiated similar Association Agreements with Turkey in 1963, Malta in 1970, and Cyprus in 1972. An additional Customs Union was entered with Turkey in December 1995.

58. TREATY ON EUROPEAN UNION, *supra* note 48, art. O (as in effect 1992) (now Article 49).

59. *Id.*

60. COPENHAGEN EUR. COUNCIL, PRES. CONCLUSIONS, SN 180/93 (June 1993).

61. *Id.* (emphasis added).

62. *Id.*

Countries with respect to Copenhagen Criteria (Regular Reports).⁶³ Regular Reports are submitted to the European Council, and contain a detailed analysis of the progress made by each applicant Country. These Regular Reports allow the European Council to monitor the course of negotiations and make decisions on whether an Applicant Country has satisfied certain accession criteria.

*B. Compelling Applicant Countries to Adopt the Requisite
Acquis Communautaire*

The integration in administrative and judicial structures of European Union legislation, including the *acquis communautaire*, can be used as a tool requiring Applicant Countries to adopt anti-discriminatory legislation, specifically with regards to sexual orientation discrimination.

The Treaty of Amsterdam built upon the platform set by the Copenhagen European Council's criteria.⁶⁴ By amendment, the relevant provisions of the Treaty on European Union now provide:

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 contracting States in accordance with their respective constitutional requirements.⁶⁵

63. The European Commission submitted the first set of these Regular Reports, covering the ten associated countries in central Europe, Cyprus, and Turkey, to the Council in November 1998. Progress Reports from the Commission on Progress Towards Accession by Each of the Candidate Countries, Nov. 4, 1998, available at http://europa.eu.int/comm/enlargement/report_11_98/index.htm (last visited Sept. 26, 2002).

64. In December 1997, the Luxembourg European Council emphasized that “[a]s a prerequisite for enlargement of the Union, the operation of the institutions must be strengthened and improved in keeping with the institutional provisions of the Amsterdam Treaty.” *European Union Enlargement*, in LUXEMBOURG EUR. COUNCIL: PRES. CONCLUSIONS (Dec. 12 & 13, 1997), at para. 3, at <http://europa.eu.int/council/off/conclu/dec97.htm> (last visited Sept. 21, 2002).

65. CONSOLIDATED VERSION OF THE TREATY ON EUROPEAN UNION art. 49 (ex. art. O), Feb. 7, 1997, O.J. (C 340) 145, 171 (1997) (emphasis added) [hereinafter TREATY ON EUROPEAN UNION].

Article 49's link to Article 6(1) of the Treaty on European Union is significant. In effect, Applicant Countries are required by Article 49 to adhere to the principles articulated in Article 6(1). Article 6(1) provides that "[t]he Union is founded on principles of liberty, democracy, *respect for human rights* and fundamental freedoms, and the rule of law, *principles which are common* to the Member States."⁶⁶

Arguably, an implicit interpretation of "respect for human rights" of Article 49 would include fundamental rights. Thus, Article 49 would also incorporate Article 6(2) of the Treaty on European Union, which provides that "[t]he Union shall *respect fundamental rights*, as guaranteed by the European Convention [on Human Rights] and as they result from the constitutional traditions common to the Member States, as *general principles* of Community law."⁶⁷

The nexus among such concepts as "human rights," "fundamental rights," and "general principles of law" all seem entirely appropriate.⁶⁸ Therefore, as demonstrated, applicant Countries must manifest a level of respect for human rights as deemed appropriate under European Union law. This *respect for human rights* provides the requisite step for compelling applicant Countries to uniformly and adequately protect homosexuals from sexual orientation discrimination.

C. *Procedures for Accession Require Adherence to Article 49*

A variety of institutions must approve an Applicant Country's accession into the European Union. Approval of a single Applicant Country can require numerous steps and separate decisions. Article 49 alone requires a unanimous decision in the Council of Ministers, a vote in favor by an absolute majority of the members of the European Parliament, and domestic approval by each of the existing Member States.⁶⁹

Of these three, the European Parliament stands out as asserting the most influence over enforcing human rights obligations. The European Parliament has an established record as an advocate for human rights, including lesbian and gay rights. For example, in September 1998, the European Parliament stated that it would refuse to consent to the accession of any Applicant "[C]ountry that, through its legislation or

66. *Id.* art. 6(1) (emphasis added).

67. *Id.* art. 6(2) (emphasis added).

68. A.G. Toth, *Human Rights as General Principles of Law, in the Past and in the Future*, in *GENERAL PRINCIPLES OF EUROPEAN COMMUNITY LAW* 73, 73-74 (Ulf Bernitz & Joakim Nergelius eds., 2000).

69. TREATY ON EUROPEAN UNION, *supra* note 65, art. 49.

policies violates the human rights of lesbians and gay men.”⁷⁰ This position has been reinforced by both the European Parliament and the European Commission, who have taken a united stance against the accession of Applicant Countries with anti-gay laws and practices.⁷¹

IV. THE CONNECTION BETWEEN ANTI-DISCRIMINATION LAW AND EUROPEAN UNION ENLARGEMENT

The connection between anti-discrimination law and the conditions and procedures for accession into the European Union is two-fold. First, any Applicant Country seeking entry into the European Union must incorporate the existing body of European Union law, including the *acquis communautaire*, into its existing national legislation.⁷² This means that wherever anti-discrimination law exists under European Union law, then, prior to accession, the Applicant Country’s national laws must be brought into accord with such European Union obligations.⁷³ Second, any Applicant Country seeking entry into the European Union must also guarantee respect for fundamental freedoms and human rights, including protections based on sexual orientation and gender identity.⁷⁴ Neither the Treaty on European Union⁷⁵ nor the criteria for accession established by the Copenhagen European Council define “human rights” or the “minorities” that they aspire to protect. However, sexual orientation and gender identity issues are reasonable considerations within this requirement of accession.

A. *The Acquis Communautaire on Sexual Orientation and Gender Identity*

The negotiation procession for European Union accession initially starts with “screening.” Essentially, the existing *acquis communautaire* of the European Union is divided into thirty-one chapters. The national legislation of each Applicant Country is examined in great detail in relation to each of the thirty-one chapters of the existing body of

70. Resolution on Equal Rights for Gays and Lesbians in the EC, 1998 O.J. (C 313) 186, 188 para. J.

71. See, e.g., SAN DIEGO GAY & LESBIAN TIMES, *supra* note 3, at 33.

72. See discussion *supra* Part II.B.

73. See discussion *supra* Part II.B.

74. See discussion *infra* Part IV.

75. See TREATY ON EUROPEAN UNION, *supra* note 65, arts. 6(1)–(2).

European Union Law.⁷⁶ Early identification of disparate legislation allows the European Union sufficient opportunity to address such issues in negotiations. After the initial screening, negotiations commence with the Applicant Country, wherein each chapter presents different issues. At present, twelve countries have completed the initial screening process and have begun negotiations.⁷⁷ Each negotiation runs its own course, varying in speed and difficulty, with no set order for accession into the European Union.⁷⁸

Addressing the *acquis communautaire* with regard to lesbian, gay male, and bisexual issues is a difficult, but necessary aspect of the screening process. Given that until the late 1990s sexual orientation discrimination issues in the European Union wallowed in a murky legal foundation, policy developments are difficult to ascertain.⁷⁹ Nevertheless, there are some relevant binding and non-binding authorities addressing such discrimination.

1. Binding Authority

The Framework Directive adopted in December 2000 provides the principal binding authority for integration of anti-discriminatory legislation in Applicant Countries prior to accession.⁸⁰ Applicant Countries are obligated to adopt sufficient measures to protect homosexuals from discrimination.⁸¹

Several Applicant Countries, including Romania and the Czech Republic, have already taken steps to comply with the Framework Directive. The Romanian Government adopted an anti-discrimination law that defines “discrimination” as:

[E]ncompass[ing] any difference, exclusion, restriction or preference based on race, nationality, ethnic appurtenance, language, religion, social status, beliefs, *sex or sexual orientation*, appurtenance to a disfavored category or any other criterion, aiming at or resulting in a restriction or prevention of the equal recognition, use or exercise of human rights and fundamental freedoms in the political, economic, social and cultural field or in any other fields of public life.⁸²

76. See ARNULL ET AL., *supra* note 2, at 11–12.

77. HELSINKI EUR. COUNCIL, PRES. CONCLUSIONS, paras. 8–10 (Dec. 11, 1999), at <http://ue.eu.int/newsroom/index.htm> (last visited Sept. 21, 2002). These countries are Bulgaria, Czech Republic, Cyprus, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovakia, and Slovenia. *Id.*

78. *Id.* at para. 11.

79. See discussion *supra* Part I.B.

80. See Framework Directive, *supra* note 34. See also discussion *supra* Part I.C.

81. See Framework Directive, *supra* note 34, art. 3(1).

82. ORDINANCE ON PREVENTING AND PUNISHING ALL FORMS OF DISCRIMINATION art. 2 (Aug. 31, 2000) (Rom.), translated at http://www.pili.org/library/discrimination/romanian_ordinance.htm (last visited Sept. 21, 2002).

The Romanian provision is applicable with regards to the following fields:

- a. employment conditions, conditions and criteria of recruitment and selection, criteria for promotion, access to all forms and levels of professional orientation, professional training, and refresher courses;
- b. social protection and social security;
- c. public services or other service, access to goods and facilities;
- d. the education system; [and],
- e. enforcement of public peace and order.⁸³

Unfortunately, the weight of the Romanian legislation is without effect considering that no regulations have yet been implemented. The European Commission agrees, having noted that the “initiative is a very positive step—but, both further secondary legislation and revised institutional arrangements will be necessary before the provisions contained in the ordinance can be applied. It therefore remains too early to assess the effectiveness of this measure.”⁸⁴

The Czech Republic has also recognized its obligations under the Framework Directive. In October 2000 legislation was introduced to provide general anti-discrimination measures.⁸⁵ In 2001, the Czech Parliament further built upon this initiative, amending its labor code and including a provision penalizing discrimination on several bases, including sexual orientation.⁸⁶ However, like Romania, such legislation is meaningless without the appropriate implementation of regulations and enforcement of those regulations.

Although the steps taken by both countries are encouraging, the Framework Directive specifically requires more than just a general ban on discrimination. Article 14 of the Framework Directive provides that:

83. *Id.* art. 3.

84. 2000 Regular Report from the Commission on Romania's Progress Towards Accession 21 (Nov. 8, 2000), at http://europa.eu.int/comm/enlargement/report_11_00/ro_en.pdf (last visited Sept. 21, 2002).

85. 2000 Regular Report from the Commission on the Czech Republic's Progress Towards Accession 24, 66 (Nov. 8, 2000) (October 2000 amendments to Employment Act), at http://europa.eu.int/comm/enlargement/report_11_00/cz_en.pdf (last visited Sept. 21, 2002).

86. 2001 Regular Report from the Commission on Czech Republic's Progress Towards Accession 67–68 (Nov. 13, 2001), at http://europa.eu.int/comm/enlargement/report2001/cz_en.pdf (last visited Sept. 21, 2002). (“Amendment to the Labour Code contains a fundamental anti-discrimination provision . . . against *any* discrimination in employment.” *Id.* (emphasis added).)

Member States shall *encourage dialogue with appropriate non-governmental organisations* which have, in accordance with their national law and practice, a legitimate interest in contributing to the fight against discrimination on any of the grounds referred to in Article 1 with a view to *promoting the principle of equal treatment*.⁸⁷

The Framework Directive requires Applicant Countries, as well as Member States, to develop a dialogue with relevant non-governmental actors, including lesbian, gay male, and bisexual rights groups that are prominent on a national level within an Applicant Country.⁸⁸ Thus, accession into the European Union will require Applicant States to demonstrate that they have adequately dealt with employment discrimination against homosexuals.

2. *Non-Binding Authority*

Recommendations, resolutions, and opinions are examples of non-binding authority suitable for protecting fundamental rights, including those of homosexuals. The European Court of Justice has recognized that although such measures cannot be judicially enforced, they may have some legal effect.⁸⁹ In addition, there is some indication that such non-binding measures should be considered part of the *acquis communautaire*.⁹⁰

To date, the European Union has yet to codify a list of fundamental human rights. Instead, the Court of Justice has relied on general principles it has derived from the national constitutions of Member States.⁹¹ In June 1999, the European Council compiled a list of fundamental rights to be recognized by the European Union. Recently, the European Parliament, the European Council, and the European Commission considered such a list of fundamental rights, called the European Union Charter of Fundamental Rights (Charter).⁹² The Charter enumerates a range of civil, economic, political, and social rights of European Union citizens. Such rights explicitly included protections for lesbians, gays, and bisexuals.

87. Framework Directive, *supra* note 34, art. 14 (emphasis added).

88. *See id.*

89. *See* Case C-322/88, *Grimaldi v. Fonds des Maladies Professionnelles*, [1989] E.C.R. 4407 (indicating that non-binding measures should be taken into consideration when interpreting European Union law).

90. *See* Gregor Noll & Jens Vedsted-Hansen, *Non-Communitarians: Refugee and Asylum Policies*, in *THE EU AND HUMAN RIGHTS* 359, 375-76 (Philip Alston et al. eds., 1999).

91. *See* Case C-4/73, *J. Nold, Kohlen- und Baustoffgroßhandlung v. Commission*, [1974] E.C.R. 491, 507-08 (establishing human rights dimension in European Union legal order).

92. Charter of Fundamental Rights of the European Union, 2000 O.J. (C 364) 1 [hereinafter Charter].

Article 21 of the Charter provides that “Any discrimination based on any ground such as sex, race, [color], ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.”⁹³

Further, the Charter recognizes “rights which correspond to the rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms.”⁹⁴ According to the Charter, the meaning and scope of such rights “shall be the same as those laid down by the . . . Convention.”⁹⁵ Such an explicit reference certainly indicates the European Union’s willingness to incorporate the European Court of Justice’s common law position on discrimination, including sexual orientation discrimination.⁹⁶

Any attempt to test the boundaries and persuasiveness of the Charter’s non-binding authority may be premature. The Charter was presented and signed at the meeting of the European Council in Nice in December 2000, but its adoption has been deferred until 2004. The Preamble states that the European Union recognizes “the rights, freedoms and principles set out” in the Charter;⁹⁷ yet, to be legally binding, the Charter must be incorporated into the Treaty on European Union.⁹⁸ Until then, the Charter remains a non-binding instrument.⁹⁹ However, its persuasive force as a non-binding instrument should not be ignored.

V. HUMAN RIGHTS AND ENLARGEMENT

The other precondition for accession into the European Union is the establishment of respect for human rights, including the protection of

93. *Id.* art. 21(1), at 13.

94. *Id.* art. 52(3), at 21.

95. *Id.*

96. In addition, Article 20 of the Charter states that: “Everyone is equal before the law,” and calls upon the European Union to protect cultural, religious, and linguistic diversity. *Id.* arts. 20, 22, at 13.

97. *Id.* pmbl., at 8.

98. See TREATY OF NICE AMENDING THE TREATY ON EUROPEAN UNION, THE TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES AND CERTAIN RELATED ACTS, *supra* note 50, at 85–86 (discussing the need to address the status of the Charter).

99. The President of the European Council welcomed the Charter and noted that it combines “in a single text the civil, political, economic, social and societal rights hitherto laid down in a variety of international, European or national sources.” NICE EUR. COUNCIL, PRES. CONCLUSIONS, *supra* note 1, at para. 2.

homosexuals. However, defining “human rights” presents a significant difficulty. This difficulty is exacerbated by the lack of any statement of rights in the founding treaties of the European Union.¹⁰⁰

The most relevant point of reference is Article 6(2) of the Treaty on European Union, which provides that “[t]he Union shall respect fundamental rights as guaranteed by the European Convention for the protection of Human Rights.”¹⁰¹ This emphasis on human rights is reflected in the case law of the European Court of Justice.¹⁰² For example, in *Grant v. South-West Trains Ltd.*,¹⁰³ the European Court of Justice pointed to the existing European Convention case law on the definition of a family when determining whether a fundamental right to equal treatment in employment for same-sexed couples existed.¹⁰⁴

The European Convention on Human Rights is a suitable source of human rights in the context of European Union enlargement. All current Applicant Countries are signatories to the European Convention on Human Rights.¹⁰⁵ Under its principles, requiring Applicant Countries to respect, at a minimum, the rights as set forth in the European Convention on Human Rights and as interpreted by the Council of Europe seems to be highly appropriate. Therefore, an examination of the European Convention on Human Rights contribution to combating sexual orientation discrimination is necessary.

A. *Sexual Orientation and the European Convention on Human Rights*

The European Convention on Human Rights does not mention sexual orientation. Nonetheless, it has developed as a source of protection for

100. Elizabeth F. Defeis, *Human Rights and the European Union: Who Decides? Possible Conflicts Between the European Court of Justice and the European Court of Human Rights*, 19 DICK. J. INT’L L. 301, 308 (2001). (“[T]he [European Union founding] treaties themselves are general and lack specificity with regard to human rights.” *Id.*).

101. TREATY ON EUROPEAN UNION, *supra* note 65, art. (6)(2).

102. See DAVIES, *supra* note 5, at 23–27 (noting that the European Court of Justice has two principle functions: to check for consistencies with European Union treaties and interpret European Union provisions).

103. See *Grant v. South-West Trains Ltd.*, *supra* note 20.

104. *Id.* at paras. 33, 34 (noting that the European Commission of Human Rights found that “stable homosexual relationships do not fall within the scope of the right to respect for family life under Article 8 of the [European] Convention,” and that the European Court of Human Rights interprets “[a]rticle 12 of the [European] Convention [as only applying] to the traditional marriage between two persons of opposite biological sex”).

105. Bulgaria on Sept. 7, 1992; Czech Republic on Mar. 18, 1992; Cyprus on Oct. 6, 1962; Estonia on Apr. 16, 1996; Hungary on Nov. 5, 1992; Latvia on June 27, 1997; Lithuania on June 20, 1995; Malta on Jan. 23, 1967; Poland on Jan. 19, 1993; Romania on June 20, 1994; Slovakia on Mar. 18, 1992; Slovenia on June 28, 1994; and, Turkey on May 18, 1954. Dates of Ratification of the European Convention on Human Rights, at <http://www.echr.coe.int/Eng/EDocs/DatesofRatification.html> (last modified July 18, 2002).

lesbians, gay males, and bisexuals. The European Court of Human Rights first established such rights in a series of cases involving adult gay males' right to privacy.¹⁰⁶ The prohibition of consenting sexual relations between gay males in private was found to be inapposite to the right to respect for life under Article 8 of the European Convention on Human Rights. The Court relied on Article 8, which states, in pertinent part, that "everyone has the right to respect for his private and family life."¹⁰⁷ In 1997, the enjoyment of the right to privacy was applied in an employment context. In *Sutherland v. United Kingdom*,¹⁰⁸ the European Commission on Human Rights held that requiring a higher age for consent to a male homosexual act than for heterosexual acts was discriminatory and contrary to Article 14 of the European Convention on Rights.¹⁰⁹

Recent European Convention case law demonstrates its potential influence on lesbian, gay male, and bisexual rights within the European Union. In *Lustig-Prean and Beckett v. United Kingdom*,¹¹⁰ the Court of Human Rights considered the legality of the United Kingdom's ban on homosexuals serving in the armed forces. The Court of Human Rights held that the ban on homosexuals in the military was in violation of Article 8 of the European Convention on Human Rights.¹¹¹ The United Kingdom had justified the ban on the supposed negative reaction there would be from other individuals in the military to the presence of lesbian, gay males, and bisexuals.¹¹² In rejecting the United Kingdom's argument, the Court of Human Rights stated:

106. See *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) (1981); *Norris v. Ireland*, 142 Eur. Ct. H.R. (ser. A) (1989); *Modinos v. Cyprus*, 259 Eur. Ct. H.R. (ser. A) (1993).

107. E.g., *Dudgeon v. United Kingdom*, *supra* note 106.

108. *Sutherland v. United Kingdom*, 24 Eur. H.R. Rep., (Comm'n Supp. 2) CD 22 (1997).

109. *Id.* at paras. 66–67 (deciding by a majority of 14 to 4 that "no objective and reasonable justification exists for the maintenance of a higher minimum age of consent to male homosexual, than to heterosexual, acts and that the application discloses discriminatory treatment in the exercise of the applicant's right to respect for private life under Article 8 of the Convention."). Article 14 states that the rights and freedoms laid down in the Convention should "be secured without discrimination on any ground such as sex, race, [color], language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status." All European Union Member States have ratified the Article. See Dates of Ratification of the European Convention on Human Rights, *supra* note 105.

110. *Lustig-Prean and Beckett v. United Kingdom*, App. Nos. 31417/96 & 32377/96, 29 Eur. Ct. H. R. 548 (2000).

111. See *id.* at 585.

112. See *id.* at paras. 90–91.

To the extent they represent a predisposed bias on the part of a heterosexual majority against a homosexual minority, these negative attitudes cannot, of themselves, be considered by the Court to amount to sufficient justification for the interferences with the applicants' rights outlined above, any more similar negative attitudes towards those of a difference race, origin or [color].¹¹³

Such a comparison between sexual orientation and other types of discrimination certainly indicates that the Court of Human Rights views homophobic discrimination as equally impermissible. Its conviction is clearly stated in its holding that "the Court cannot overlook the widespread and consistently developing views and associated legal changes to the domestic laws of the [Member] States on this issue."¹¹⁴

The Court of Human Rights followed up its decision in *Lustig-Prean and Beckett v. United Kingdom* with another landmark decision. *Salgueiro da Silva Mouta v. Portugal*¹¹⁵ concerned the denial of child custody to a father because he was a homosexual. The lower court of appeals expressly linked its decision to the fact that the father was living with another man.¹¹⁶ Upon review, the Court of Human Rights held that the denial of the father's rights regarding his family was impermissible under Article 8 of the European Convention of Human Rights and a violation of Article 14 with respect to sexual orientation.¹¹⁷ Most importantly, the Court of Human Rights confirmed that Article 14 must be implicitly interpreted to include protections against sexual orientation discrimination.¹¹⁸

B. Incorporating Human Rights Principles in the Enlargement Process

The upshot of the developing European Convention on Human Rights case law is to settle any doubts that international human rights include lesbian and gay rights. Given that Article 6(2) of the Treaty on European Union links the European Union to the standards set forth in the European Convention on Human Rights, a foundation exists for requiring Applicant Countries to comply with the case law of the Court of Human Rights with respect to homosexuals.¹¹⁹ Clearly, any discrimination based on sexual orientation, at least in a criminal context, will be in violation of Article 8's right to respect for private life.¹²⁰

113. *Id.* at para. 90.

114. *Id.* at para. 97.

115. *Salgueiro da Silva Mouta v. Portugal*, [1999] 1999-IX Eur. Ct. H.R. 309.

116. *Id.* at 322.

117. *Id.* at 328-30.

118. *See id.* at 327.

119. *See discussion supra* Part II.B.

120. *See A.D.T. v. United Kingdom*, [2000] 2000-IX Eur. Ct. H.R. (holding that criminalization of homosexual acts in private between men is an impermissible interference with the right to respect for private life in light of the absence of public health considerations and the private nature of the acts).

The European Commission has recognized the relation between European Convention case law and the accession process. Since 1997, the Regular Reports, as published annually by the European Commission, analyze the human rights situations in each Applicant Country with regard to the Copenhagen Criteria.¹²¹ The European Parliament and the European Council then examine the Regular Reports. Sexual orientation issues have gradually been included into these Regular Reports. For example, the 1997 Regular Report on Romania noted that “homosexuals are exposed to abuses by the vagueness of the term ‘public scandal’ as applied to homosexual acts by . . . the Penal Code.”¹²² Furthermore, in its 1999 re-evaluation of Romania, the European Commission looked to the package of draft laws offered by the Ministry of Justice and added that the Romanian Penal Code has still to be brought “in line with European standards (on issues such as *decriminalization of homosexuality*, domestic violence, libel, offence to authorities, and verbal outrage).”¹²³ Such statements evidence the European Union’s recognition that protections for homosexuals should form part of the criteria used for enlargement. However, the European Union’s observations are rather general.¹²⁴ The 2000 Romanian Regular Report notes proposed reforms to the Romanian criminal law on homosexuality; however, in the same report, the European Commission still concludes that “Romania continues to respect human rights and freedoms.”¹²⁵

The yearly assessments of the Applicant Countries by the European Commission on compliance with the enlargement requirements do not devote much attention to the European Convention on Human Rights’ position on sexual orientation. For example, the 1999 Regular Report on Cyprus makes no reference to sexual orientation issues,¹²⁶ despite

121. See discussion *supra* Part II.A.

122. Commission opinion on Romania’s application for membership of the European Union, COM(97)2003, at 16.

123. 2000 Regular Report from the Commission on Romania’s Progress Towards Accession, *supra* note 84, at 21 (emphasis added).

124. See discussion *infra* Part V.A. for further inadequacies of the European Commission’s Regular Reports. See also 2002 Regular Report from the Commission Romania’s Progress Towards Accession 33 (Oct. 9, 2002), at <http://europa.eu.int/comm/enlargement/report2002/> (last visited Dec. 2, 2002) (noting generally the decriminalization of homosexuality in a mere one-sentence paragraph).

125. 2000 Regular Report from the Commission on Romania’s Progress Towards Accession, *supra* note 84, at 22.

126. See 1999 Regular Report from the Commission on Cyprus’ Progress Towards Accession COM(99)502 (Oct. 13, 1999).

Cyprus's obvious violation of human rights. A year earlier, Cyprus adopted several anti-homosexual provisions, including an unequal age of consent law and measures to curtail lesbian and gay organizations.¹²⁷ As with Romania, the European Commission concluded that "Cyprus continues to respect human rights and freedoms."¹²⁸ The 2000 Cyprus Regular Report notes that amendments to such laws were made, "removing elements which had been objected to by the Council of Europe."¹²⁹ Given that the Council of Europe operates outside the auspices of the European Union, the pressure for anti-discrimination protections for homosexuals is not coming from the European Union itself.¹³⁰

The European Parliament appears to be the only European Union institution to seriously raise sexual orientation issues within the context of enlargement. In 1998, the European Parliament issued a warning that it would not consent to the accession of any Applicant Country that "through its legislation or policies violates the human rights of lesbians and gay men."¹³¹ More recently, the European Parliament has drawn attention to the treatment of lesbians, gay males, and bisexuals in Bulgaria, Cyprus, Estonia, Hungary, Lithuania, and Romania.¹³² Such countries have been called on "to remove from their penal codes all laws which entail discrimination against lesbians and homosexuals."¹³³ In addition, the request has been made by the European Parliament that the "Council [of the European Union] and [European] Commission . . . raise the question of discrimination against homosexuals during membership negotiations, where necessary."¹³⁴

VI. SEXUAL ORIENTATION AND ACCESSION: GOING FORWARD

The accession process holds great potential for acting as a catalyst for advancing homosexual protections throughout the European Union. Unfortunately, there appears to be little resolve on the part of the European Union to make sexual orientation issues an integral part of the

127. Cypriot Criminal Code, arts. 171, 173–74, available at <http://www.sodomylaws.org/world/cyprus/cyprus.htm> (last visited Oct. 2, 2002).

128. 1999 Regular Report from the Commission on Cyprus' Progress Towards Accession 10 (Oct. 6, 1999), at http://europa.eu.int/comm/enlargement/report_11_00/pdf/en/Cyprus_en.pdf (last visited Oct. 2, 2002).

129. 2000 Regular Report from the Commission on Cyprus's Progress Towards Accession 15 (Nov. 8, 2000) at http://europa.eu.int/comm/enlargement/report_11_00/pdf/en/cy_en.pdf (last visited Oct. 2, 2002).

130. See BOWET, *supra* note 4, at 168–69.

131. Resolution on Equal Rights for Gays and Lesbians in the EC, *supra* note 70, at 188 para. J.

132. European Parliament Resolution on Respect for Human Rights in the European Union, 2000 O.J. (C 377) 344, 352.

133. *Id.*

134. European Parliament Resolution on the Annual Report on International Human Rights and European Union Human Rights Policy, 2000 O.J. (C 377) 336, 339.

accession process. Should the European Union choose to adhere to the Copenhagen Criteria and Article 49's requirement to respect human rights and fundamental freedoms, several comprehensive efforts can be taken to capitalize on the European Union accession process. These possible suggestions rest upon the assumption that European Union enlargement represents a significant evolution with the potential to ignite much needed reform.

First, the European Union should articulate clear universal standards for measuring the performance of Applicant Countries in the area of homosexual protections. Second, the European Union Member States should ensure consistency in their own homosexual protection laws. Third, the European Union should seize upon each Applicant Country's political will for accession and firmly apply effective measures to ensure the implementation of meaningful protections for homosexuals.

VII. CREATE CLEAR STANDARDS

The Copenhagen Criteria illustrate the importance of establishing a European Union built on common values. The enlargement negotiation process could certainly facilitate such an objective if clear and consistent standards are developed so as to effectively measure compliance with the Copenhagen Criteria. Specifically, a requirement for Applicant Countries to achieve "stability of institutions guaranteeing democracy, the rule of law, *human rights and respect for minorities*"¹³⁵ would benefit from precise standards underlying what an Applicant Country is expected to satisfy.

Currently, the European Union's method of monitoring Applicant Countries compliance with the Copenhagen Criteria is wholly inadequate. Applicant Countries' records regarding minorities, in general, are assessed on a yearly basis in Regular Reports presented by the European Commission to the European Parliament and to the European Council.¹³⁶ Aimed at measuring progress made by candidates towards accession, these Regular Reports also provide precise recommendations to the Applicant Countries with the intent of improving their records.

135. COPENHAGEN EUR. COUNCIL, PRES. CONCLUSIONS, *supra* note 60 (emphasis added).

136. See discussion *supra* Part II.A. For an example of such a Regular Report, see, e.g., 2001 Regular Report on Cyprus' Progress Towards Accession (Nov. 13, 2001) at http://europa.eu.int/comm/enlargement/report2001/cy_en.pdf (last visited Dec. 2, 2002).

The inadequacies of the Regular Reports become clear when assessing the discriminatory provisions in the penal codes of Applicant Countries that affect homosexuals. Facially discriminating on the basis of sexual orientation, some “age of consent” provisions stipulate different age limits for heterosexual acts and for homosexual acts.¹³⁷

In past Regular Reports, the European Commission has mentioned these “age of consent” disparities only briefly and cursorily. The 2000 Regular Reports referred only to Romanian and Cypriot provisions,¹³⁸ although similar provisions were also in force at that date in Bulgaria, Estonia, Hungary, and Lithuania.¹³⁹ Thereafter, pressure mounted, resulting in more thorough reporting by the European Commission in the following year’s Regular Reports.¹⁴⁰

137. Such provisions are discriminatory because they encourage blackmail, force gays to lead double lives, deter honest sexual education, and inhibit youths from learning about themselves in freedom.

138. 2000 Regular Report from the Commission on Cyprus’s Progress Towards Accession, *supra* note 129, at 15; 2000 Regular Report from the Commission on Romania’s Progress Towards Accession, *supra* note 84, at 21. The Cypriot Criminal Code sets the age of consent for male homosexual acts at 18 years the age of consent for heterosexual acts is 16 years of age. The Romanian Penal Code sets the age of consent for homosexual acts at 18 years the age of consent for heterosexual acts is 15 years of age.

139. See 2000 Regular Report from the Commission on Bulgaria’s Progress Towards Accession 15 (Nov. 8, 2000), at http://europa.eu.int/comm/enlargement/report_11_00/bg_en.pdf (last visited Sept. 21, 2002) (making no reference to homosexuality or sexual orientation); 2000 Regular Report from the Commission on Estonia’s Progress Towards Accession 15 (Nov. 8, 2000), at http://europa.eu.int/comm/enlargement/report_11_00/ee_en.pdf (last visited Sept. 21, 2002) (making no reference to homosexuality or sexual orientation); 2000 Regular Report from the Commission on Hungary’s Progress Towards Accession 15 (Nov. 8, 2000), at http://europa.eu.int/comm/enlargement/report_11_00/hu_en.pdf (last visited Sept. 21, 2002) (making no reference to homosexuality or sexual orientation); 2000 Regular Report from the Commission on Lithuania’s Progress Towards Accession 15 (Nov. 8, 2000), at http://europa.eu.int/comm/enlargement/report_11_00/lt_en.pdf (last visited Sept. 21, 2002) (making no reference to homosexuality or sexual orientation). The Bulgarian Penal Code set the age of consent at 14 years of age for heterosexual acts and at 16 for homosexual acts; The Estonian Penal Code provided for a higher age of consent for homosexual relations (16 years) than for heterosexual vaginal intercourse (14 years); The Hungarian Penal Code, in 2000, set the age of consent differently for homosexual and heterosexual relations: 18 and 14 years respectively; and, The Lithuanian Penal Code, at the time, included a discriminatory age of consent law fixed at 18 year of age for homosexual conduct only.

140. In responding to criticism and lobbying, primarily from lesbian and gay interests groups, the European Parliament adopted several resolutions relating to the situation of homosexuals in the aforementioned countries, thereby placing homosexual rights more firmly on the enlargement agenda. See EUR. PARL. RES. B5–0538/2001, para. 55 (2001) (calling on candidate countries to abolish discrimination based on sexual orientation); EUR. PARL. RES. A5–0251/01, On Estonia’s application for Membership of the European Union and the State of Negotiations, para. 6 (2001) (noting Estonia’s replacement of the penal code, eliminating discrimination against homosexual men and lesbian women); EUR. PARL. RES. A5–0253/2001, On Lithuania’s Application for Membership of the European Union and the State of Negotiations, para. 5 (2001) (calling

In the 2001 Regular Reports, the European Commission purports that Lithuania and Romania have abolished the offending penal code provisions.¹⁴¹ However, in November 2001, at the time of the final draft of Regular Reports, the Romanian Senate had yet to approve the country's new "Emergency Ordinance" and repeal its disparate age of consent laws.¹⁴² The Regular Reports also noted that similar provisions still exist in Bulgaria,¹⁴³ Cyprus,¹⁴⁴ and Hungary,¹⁴⁵ but only the

on Lithuania to eliminate penal code provisions discriminating against homosexual men and lesbian women); EUR. PARL. RES. A5-0257/2001, On Hungary's Application for Membership of the European Union and the State of Negotiations, para. 14 (2001) (calling on Hungary to eliminate penal code provisions discriminating against homosexual men and lesbian women); EUR. PARL. RES. A5-0258/2001, On Bulgaria's Application for Membership of the European Union and the State of Negotiations, para. 9 (2001) (calling on Bulgaria to eliminate penal code provisions discriminating against homosexual men and lesbian women); EUR. PARL. RES. A5-0259/2001, On Romania's Application for Membership of the European Union and the State of Negotiations, para. 6 (2001) (calling on Romania to comply with E.U. principles on discrimination); EUR. PARL. RES. A5-0261/2001, On Cyprus's Membership Application to the European Union and the State of Negotiations, para. 25 (2001) (calling on Cyprus to eliminate penal code provisions discriminating against homosexual men and lesbian women). These resolutions are all *available at* http://www.europarl.eu.int/enlargement/positionep/default_en.htm (last visited Sept. 25, 2002).

141. See 2001 Regular Report from the Commission on Lithuania's Progress Towards Accession 22 (Nov. 13, 2001), *at* http://europa.eu.int/comm/enlargement/report2001/lt_en.pdf (last visited Sept. 21, 2002). ("The new Criminal Code, which has not yet entered into force, eliminates the difference in age as regards consent depending on sexual orientation, and includes provisions banning discrimination on that basis." *Id.* at 22.); 2001 Regular Report from the Commission on Romania's Progress Towards Accession 27 (Nov. 13, 2001), *at* http://europa.eu.int/comm/enlargement/report2001/ro_en/pdf (last visited Sept. 21, 2002) ("[T]he government adopted an emergency ordinance that amended the Penal Code in order to *decriminalize homosexuality*. Homosexual relations are no longer a criminal offence, and sexual offenses are now governed by the same legislation irrespective of sex." *Id.* at 27.).

142. See Carlotta Gall, *It's Still No Breeze for Gays, Even Diplomatic Ones*, N.Y. TIMES, Oct. 17, 2001, at A1. "Changing the law and public attitudes in Romania has been a long, hard struggle. Even now, Parliament is delaying ratification of the government's decision. The repeal of the law still stands, but Parliament's attitude reflects a general intolerance in the society." *Id.*

143. 2001 Regular Report from the Commission on Bulgaria's Progress Towards Accession (Nov. 13, 2001) *at* http://europa.eu.int/comm/enlargement/report2001/bg_en.pdf (last visited Sept. 25, 2002). "Bulgarian law currently discriminates against *homosexuals*. Discriminatory provisions in the Penal Code need to be removed to avoid discrimination." *Id.* at 22.

144. See 2001 Regular Report from the Commission on Cyprus's Progress Towards Accession, *supra* note 136. "A difference in age as regards consent, depending on sexual orientation, remains in Cypriot penal law." *Id.* at 16.

145. See 2001 Regular Report from the Commission on Hungary's Progress Towards Accession (Nov. 13, 2001), *at* http://europa.eu.int/comm/enlargement/report2001/hu_en.pdf (last visited Sept. 25, 2002). "Homosexual (male or female) relations with minors of 14 years

Bulgarian Regular Report explicitly refers to this as a discriminatory provision and calls for its removal. The Cypriot and Hungarian Regular Reports merely mention the provisions without comment. Perhaps more perplexing is the European Commission's ultimate conclusion that all Applicant Countries, with the exception of Turkey, continue to fulfill the Copenhagen Criteria.¹⁴⁶ On the issue of non-discrimination in general, the Commission only remarks that further efforts are needed.¹⁴⁷

Certainly, these Regular Reports demonstrate an inconsistency that needs to be addressed. Clear and consistent standards are necessary to comparatively measure each Applicant Country's compliance with the Copenhagen Criteria, specifically as it relates to sexual orientation issues. The adoption of such standards would obviate disparate findings of compliance by the European Commission. At a time when Commissioner Gunter Verhuegen has made it clear that the European Commission will continue to press in the enlargement negotiations for human rights and non-discrimination, including those grounded in sexual orientation,¹⁴⁸ such standards are absolutely imperative. Otherwise, if the European Commission continues to claim that Applicant Countries already fulfill the Copenhagen Criteria despite the persistence of discriminatory provisions in their penal codes, the Copenhagen Criteria's call for respect for "*human rights and . . . for minorities*" is without full meaning.

VIII. DEMONSTRATE CONSISTENCY IN MEMBER STATE LAWS

In addition to creating a clear set of meaningful standards, Member States can do more to ensure homosexuals protection through leading by example. To date, the record of Member States in this area has been mixed. This is reflected in the swell of differences in the national laws of the Member States. On one side, Member States such as the Netherlands, Denmark, and Sweden provide meaningful homosexual protections, treating sexual orientation discrimination as unlawful as well as providing legal recognition to same-sex partnerships.¹⁴⁹ On the other hand, Member States such as Greece

or over are punishable under the criminal law, whereas heterosexual relations with the same age group are not if there is consent. Therefore a difference in the age of consent, depending on *sexual orientation*, remains in place." *Id.* at 21.

146. Making a Success of Enlargement: Strategy Paper and Report of the European Commission on the Progress Towards Accession by Each of the Candidate Countries 12 (2001), at http://europa.eu.int/comm/enlargement/report2001/strategy_en.pdf (last visited Sept. 25, 2002). "The Copenhagen political criteria continue to be met by all presently negotiating candidate countries. Turkey still does not meet these criteria." *Id.*

147. *Id.* "Further efforts are needed in ensuring gender equality and non-discrimination." *Id.*

148. See, e.g., SAN DIEGO GAY & LESBIAN TIMES, *supra* note 3, at 33.

149. See Kim Saskia & Drew Liebert, *A Primer on Civil Unions* 10 (Oct./Nov. 2001), at http://www.nclrights.org/publications/pubs_primercivilunions.html (last visited

and United Kingdom have significantly weaker protections regarding sexual orientation and have discriminatory laws.¹⁵⁰ Greece and the United Kingdom are not the only offending Member States failing to adequately protect the interest of homosexuals with regard to the Copenhagen Criteria. Reference, here, is only representative of such disparities that exist among Member State legislation as a whole with regard to sexual orientation.¹⁵¹

European Union enlargement should be used as an opportunity to encourage both Member States, as well as Applicant Countries, to re-examine sexual orientation issues in their national legal systems. However, it is difficult for Member States to put real pressure on the Applicant Countries to improve the treatment of homosexuals when the very same Member States have existing, questionable legislation.

IX. TRANSLATE POLITICAL WILL INTO ACTION

Not only must Member States place internal pressures on themselves to spark reform, external pressures are essential as well. Applicant Countries exhibit a substantial will to join the European Union. The

Oct. 1, 2002). ("Denmark was the first country to offer such a benefit, enacting registered partner status in 1989. Other Northern European countries soon followed . . . Sweden, . . . [and] the Netherlands." *Id.*). See also Lambda Legal Defense and Education Fund, *International Recognition of Same-Sex Partnerships* (March 30, 2001), at <http://www.lambda.legal.org/cgi-bin/iowa/documents/> (last visited Oct. 1, 2002). ("Within the last decade, several countries have moved to create a new marital status ≈ registered partnership: Denmark (1989), . . . Sweden (1995), . . . [and] the Netherlands (1998). . . . The Netherlands is the only country in the world that allows same-sex couples the freedom to marry, providing gay and lesbian people the full range of protections, responsibilities, and benefits that come with civil marriage." *Id.*).

150. See *Greece: Continuing Discrimination Against Homosexual Men*, AMNESTY INT'L, (Oct. 12, 2001), at <http://web.amnesty.org/ai.nsf/Index/EUR250072001> (last visited Oct. 1, 2002). ("Men are discriminated against because the age of consent for heterosexual acts is 15 years while that for homosexual acts is 17 years." *Id.*); Lambda Legal Defense and Education Fund, Marriage Project Fact Sheet, *International Recognition of Same-Sex Partnerships*. ("Several countries recognize same-sex couples' family relationships for purposes of immigration, including . . . the United Kingdom." *Id.*).

151. 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, 1091-92 (1997). ("The wide variations in the national laws of the . . . [European Union] member countries concerning the rights of homosexuals could, for example, be viewed as violating the [European Union's] commitments to the 'harmonious development' . . . 'closer relations between the States' . . . 'approximation of the laws' . . . 'establishment of function of the common market' . . . 'improved working conditions and . . . their harmonization' . . . 'harmonization of social systems' . . . and 'close co-operation' in 'employment, [labor] law and working conditions'." *Id.*).

European Union must capitalize on that eagerness and compel Applicant Countries to demonstrate compliance with the Copenhagen Criteria.¹⁵²

European Union politicians are in a position to put more pressure on the negotiating process. Politicians on all levels in the Applicant Countries should be called upon to work towards law reform. In this context, gay activists can play a major role. For example, the discriminatory age of consent provision in the Dutch Penal Code abolished in 1971 resulted from political pressure and demonstration organized by activists.¹⁵³ Such activism, particularly by gay youth and gay student groups, will certainly aid in igniting crucial reforms necessary to protect the interests of current and future gay, lesbian, and bisexual European Union Citizens.

X. CONCLUSION

The protection of minorities, specifically homosexuals, is an inherent part of the European Union's policy on human rights, especially in light of Article 6 of the Treaty on European Union's reference to the European Convention for the Protection of Human Rights and Fundamental Freedoms. The Copenhagen Criteria, as designed in 1993 for countries wishing to join the European Union, specifically highlights the protection of minorities, including homosexuals. Particular attention should be paid to homosexual protections within the context of the current European Union enlargement process so as to create a more stable institution guaranteeing democracy. The proposed recommendations should go a long way in attaining that goal.

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152. See discussion *supra* Part II.A.

153. See Göranan Therborn, 'Pillarization' and 'Popular Movements' Two Variants of Welfare State Capitalism: The Netherlands and Sweden, in THE COMPARATIVE HISTORY OF PUBLIC POLICY 192, 192-241 (Frances G. Castles ed., 1989) ("The most important change was brought about in 1971, when clause 248bis was abolished. Until that time homosexual contacts between people over 21 and under 21 years of age had been prohibited. For heterosexual contacts the age-limit was traditionally at 16. In 1991 the sex laws were amended considerably again, and in this change [activists] played an active part as well." *Id.*).