

***P v S*: kite flying or a new constitutional approach?**

Catherine Barnard, Trinity College, Cambridge<sup>1</sup>

In the annals of Community Law history, the judgment in *P v S*<sup>2</sup> might be hailed as the *Van Gend en Loos*<sup>3</sup>, or the *Costa v ENEL*<sup>4</sup> of its time. Or it may not. In this chapter I shall argue that the judgment in *P v S* potentially recognises not only that the principle of equality is a genuine, moral, fundamental principle of Community law but one which takes its place at the very heart of the Community's constitution. Whether the potential offered by *P v S* is realised depends on public (and, in particular, governmental) reaction and on the Court itself:

**1. *P v S*: the facts and the judgment**

In *P v S* and *Cornwall County Council* the Court of Justice had to consider whether the principle of equal treatment between men and women contained in Directive 76/207 also applied to transsexuals.<sup>5</sup> A year after being employed by Cornwall County Council P informed S, the Chief Executive of the Council, of her<sup>6</sup> intention to undergo gender reassignment. This began with a life test, a period during

<sup>1</sup> I should like to thank Grainne de Búrca, Jo Shaw, Paul Skidmore and Jenny Steele for their extremely helpful comments. This article is to appear as a chapter in Dashwood and O'Leary *Equal Treatment* (Sweet & Maxwell, 1997).

<sup>2</sup> Case C-13/94 [1996] 2 CMLR 247

<sup>3</sup> Case 26/62 *Van Gend en Loos v Netherlandse Administratie der Belastingen* [1963] ECR 1

<sup>4</sup> Case 6/64 [1964] ECR 1141

<sup>5</sup> Transsexuals have been defined by the European Court of Human Rights in *Rees v United Kingdom*, para.38, Series A, No.106, judgment of 17 October 1986 as "those who, whilst belonging physically to one sex, feel convinced that they belong to the other, they often seek to achieve a more integrated, unambiguous identity by undergoing medical treatment and surgical operations to adapt their physical characteristics to their psychological nature. Transsexuals who have been operated upon thus form a fairly well-defined and identifiable group." This definition was cited by the Court in *P v S* at para.16.

<sup>6</sup> P was a male to female transsexual. Following the approach adopted by the Advocate General, I shall refer to P as a woman throughout. The Advocate General clearly saw P as a woman without, unlike

which P dressed and behaved as a woman, followed by surgery to give P the physical attributes of a woman. Five months later, after P had undergone some minor surgery, she was given notice of her dismissal. P then brought an action against S, arguing that she had been the victim of sex discrimination.

The Court referred to Article 2(1) of Directive 76/207 which provides that there shall be “no discrimination whatsoever on grounds of sex”. It then said that “the Directive is simply the expression, in the relevant field, of the principle of equality, which is one of the fundamental principles of Community law”.<sup>7</sup> The Court then reasoned that since the right not to be discriminated against on grounds of sex is one of the fundamental human rights whose observance the Court has a duty to ensure,<sup>8</sup> the scope of the Directive could not be confined simply to discrimination based on the fact that a person is of one sex or another.<sup>9</sup> It then said that in view of the purpose and the nature of the rights which it seeks to safeguard, the scope of the Directive applies to discrimination arising from the gender

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English Law “inquiring into her chromosomes, gonads or genitalia” (Skidmore, “Can Transsexuals suffer sex discrimination?” (1997) JSWFL forthcoming, citing *Corbett v Corbett* [1971] P 83, *R v Tan* [1983] QB 1053 and *White v British Sugar Corporation* [1977] IRLR 121).

<sup>7</sup> See also the Advocate General’s Opinion at para. 22: “The Directive is nothing if not an expression of a general principle and a fundamental right ... Respect for fundamental rights is one of the general principles of Community law which, the observance of which the Court has a duty to ensure.” The Court adopted a similar approach in Case C-132/92 *Roberts v Birds Eye Walls* [1994] IRLR 29 when it said that the principle of equal pay for men and women was “like the general principle of non-discrimination which it embodies in a specific form”. In the light of Article 7 EEC/6 EC prohibiting discrimination on the grounds of nationality, Article 40(3) prohibits discrimination between producers and consumers in respect of agriculture, Article 119 prohibits discrimination between men and women (Case 149/77 *Defrenne v Sabena (No.3)* [1978] ECR 1365) the Court has ruled that there is a general principle of non-discrimination (Case 1/72 *Frilli v Belgium* [1972] ECR 457, para.19; Case 152/73 *Sotgiu v Deutsche Bundespost* [1974] ECR 153, para 11; Case 162/82 *ECSC v Ferrier Sant’Anna* [1983] ECR 1681) or “equality which is one of the fundamental principles of Community Law” (Joined Cases 117/76 *Albert Rucksdeschel and another v HZA Hamburg-St.Annen* and 16/77 *Diamalt AG v HZA Itzehoe* [1977] ECR 1753).

<sup>8</sup> Citing Case 149/77 *Defrenne v Sabena* [1978] ECR 1365, paras.26 and 27, and Joined Cases 75/82 and 117/82 *Razzouk and Beydoun v Commission* [1981] ECR 1509, para.16. See also Case T-45/90 *Speybrouck v Parliament* [1992] ECR II-33, para.47

<sup>9</sup> Paras.18-19. The Court reached this conclusion even though the Advocate General Tesauo pointed out that it was indisputable that the *wording* of the principle of equal treatment laid down by the Directive referred to the traditional man/woman dichotomy.

reassignment of the person concerned, since “such discrimination is based, essentially if not exclusively, on the sex of the person concerned”.<sup>10</sup> Adopting the conventional comparative approach the Court then said that P was treated unfavourably by comparison with a person of the sex P was deemed to belong to (ie male) prior to gender reassignment.<sup>11</sup> However, in the next paragraph the Court moved from an approach based on an Aristotelian notion equality that like should be treated alike to a broader, more substantive notion of equality. It said that “to tolerate such discrimination would be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled, and which the Court has a duty to safeguard”.<sup>12</sup> Consequently, the Court ruled that Article 5(1) precluded the dismissal of a transsexual for a reason related to a gender reassignment.<sup>13</sup>

This is a quite remarkable decision, bucking the trend of increasing conservatism on the part of the Court towards equality matters.<sup>14</sup> A strong opinion by Advocate General Tesouro seems to have been highly influential. He advocated the need for law to keep pace with the times “otherwise it risks imposing outdated views and taking on a static role. [It] must therefore be capable of regulating new situations brought to light by social change and advances in society”.<sup>15</sup> Consequently, a Directive of 1976 which took account of what was “normal” at that stage should now be construed in a broader

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<sup>10</sup> Paras.20-21.

<sup>11</sup> Para.21. Therefore, as Skidmore points out, if the appropriate comparator for a transsexual applicant is their previous persona, then dismissal of a transsexual will always constitute unlawful direct discrimination. The UK government argued that no discrimination had occurred because a female to male transsexual would have been treated in the same way (the so-called “false symmetry” approach - ie they both would have been treated equally badly). The Advocate General said that he was not convinced by this view. He argued that P would not have been dismissed if she had remained a man. The Court did not address the point.

<sup>12</sup> Para.22

<sup>13</sup> Unless the dismissal could be justified under Article 2(2)

<sup>14</sup> See, for example, Case C-399/92 *Helmig v Stadt Lengerich* [1994] ECR I-5727; Case C-408/92 *Smith v Avdel Systems* [1994] ECR I-4435, Case C-444/93 *Megner and Scheffel v Innungskrankenkasse Rheinhessen-Pfalz* [1995] ECR I-4741, Case C-317/93 *Nolte v Landesversicherungsanstalt Hannover* [1995] ECR I-4625, Case C-450/93 *Kalanke v Freie Hansestadt Bremen* [1995] IRLR 660

<sup>15</sup> Para.9

perspective. He said that it was necessary to go beyond the traditional classification and recognise that, in addition to the man/woman dichotomy there is a range of characteristics, behaviour and roles shared by men and women so that sex itself ought to be thought of as a continuum.<sup>16</sup>

He said that in the present case a rigorous application of the principle of equality was required so that any connotations relating to sex and/or sexual identity could not in any way be relevant. He argued that sex is important as a convention, a social parameter. Discrimination suffered by women is not due to their physical characteristics but rather to their role, the image society has of them. In the same way, he reasoned, unfavourable treatment suffered by transsexuals is most often linked to a negative image, a moral judgment which has nothing to do with their abilities in the sphere of employment.<sup>17</sup>

Consequently, he urged the Court to extend the interpretation of the Equal Treatment Directive to preclude the dismissal of a transsexual on the account of her change of sex. He concluded that:

“I am well aware that I am asking the Court to make a ‘courageous’ decision. I am asking it to do so, however, in the profound conviction that what is at stake is a universal fundamental value, indelibly etched in modern legal traditions and in the constitutions of the more advanced countries: *the irrelevance of a person’s sex with regard to the rules regulating relations in society*. ... Any other solution would sound like a moral condemnation - a condemnation, moreover, out of step with the times. I am quite clear, I repeat, that in Community law there is no precise provision *specifically* and literally intended to regulate the problem ... [but] I consider that it would be a great pity to miss this opportunity of leaving a mark of undeniable

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<sup>16</sup> While rejecting this as a basis on which the Court could proceed, he did say the idea was obsolete that the law should protect a woman who has been discriminated against but deny protection to those who are discriminated against, again by reason of sex, but because they fall outside the traditional man/woman classification. The Advocate General expressly denied that transsexuals were in law a third sex.

<sup>17</sup> At para. 19 the Advocate General pointed out that the abilities and role of P were not adversely affected by her change of sex. Indeed from the evidence it is clear that once P was given notice she was obliged to complete a number of tasks which she had started before the notice had been given.

civil substance, by taking a decision which is bold but fair and legally correct, inasmuch as it is undeniably based on and consonant with the great value of equality”.<sup>18</sup>

The unusual passion and force behind such arguments clearly suggest that *P v S* is an important case. I would suggest that the judgment may be significant for two main reasons. First, it seems to envisage a broad approach to the principle of equality, reinforcing the idea of equality as a fundamental right which forms part of the Constitutional Code of the Union. Not only is the recognition of the principle of equality significant in its own right but, some would argue, it also serves both legitimising and integrative functions in the Union. Secondly, the Court in *P v S* seems to recognise both the moral and economic content of the principle of equality. I propose to discuss both the potential significance of the judgment and the barriers which might prevent it from realising its full potential.

## 2. Equality and fundamental human rights

The decision in *P v S* may also have wider significance. By reaffirming in such strong terms that equality is a fundamental right the Court seems to emphasise its continued commitment to the recognition of rights and their importance to the Community legal order.

Equality stands alongside<sup>19</sup> economic, commercial and property rights,<sup>20</sup> rights of the defence,<sup>21</sup> traditional civil and political liberties,<sup>22</sup> rights created by Community Treaties and legislation,<sup>23</sup> social

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<sup>18</sup> Para.24. He drew support from a European Parliament Resolution (1989 OJ C 256/33) which called for clarification that transsexuals were indeed already covered by the Directive.

<sup>19</sup> This classification is derived from de Búrca “The Language of Rights and European Integration” in Shaw and More, *New Legal Dynamics of European Union* (Oxford: Clarendon), 1995, pp30-34.

<sup>20</sup> This includes the right to trade, right to use land and economic liberty

<sup>21</sup> This includes the privilege against self-incrimination, the right to a hearing, freedom from search and seizure

<sup>22</sup> Referring to human dignity, privacy, freedom of expression and the right to family life

rights<sup>24</sup> and administrative law principles<sup>25</sup> as fundamental rights recognised by the Court. In a jurisprudence which has been well documented,<sup>26</sup> the Court dealt with potential threats to its supremacy by affirming that Community law respects fundamental human rights,<sup>27</sup> a view which has now been endorsed by Article F(2) introduced by the Treaty on European Union.<sup>28</sup>

The continued emphasis by the Court on the importance of rights to the Community's legal order<sup>29</sup> cannot solely be attributable to its concerns about threats to the supremacy of Community law. This

<sup>23</sup> The fundamental freedoms and the principle of non-discrimination

<sup>24</sup> These include workers' rights to health and safety, pregnancy and maternity, equal pay and equal treatment. See generally Diez-Picazo and Ponthoreaux, *The Constitutional Protection of Social Rights: Some Comparative Remarks*, EUI Working paper 91/20

<sup>25</sup> Including principles of legal certainty, legitimate expectations, proportionality and equality

<sup>26</sup> See generally, Hartley, *The Foundations of European Community Law*, (Oxford: Clarendon), 3rd ed., 1994, pp139-149, Mancini, "A Constitution for Europe" (1989) 26 CMLRev 595, Coppel and O'Neill, *op cit*, nX, pp228-231

<sup>27</sup> Mancini and Keeling, ("Democracy and the European Court of Justice" (1994) 57 MLR 175) say at p.187: "It would be an exaggeration to say that the European Court was bulldozed into protecting fundamental rights by rebellious national courts. It is, however, clear that the Court did not embark upon that course in a spontaneous binge of judicial activism. The fact that the Court was forced to recognise fundamental rights in order to prevent the Community's laws from being tested for compatibility with national constitutions should suffice to exonerate the Court from a charge of wilfully exceeding its powers by rewriting the Treaty. ... The justification for interpreting the Treaty as protecting fundamental rights in spite of the silence of its terms is strong. It is inconceivable that the national parliaments would have ratified a Treaty which was capable of violating the fundamental tenets of their own constitutions".

<sup>28</sup> This provides that "The Union shall respect fundamental rights, as guaranteed by the European Convention for the protection of Human Rights and fundamental freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law." This, in effect, gives effect to earlier rulings of the Court of Justice in cases such as Case 4/73 *Nold* [1974] ECR 491, para.13, Case 36/75 *Rutili* [1975] ECR 1219, para.32, Case 44/79 *Hauer v Land Rheinland-Pfalz* [1979] ECR 3727, para.15, Case 136/79 *National Panasonic v Commission* [1980] ECR 1979, Case 222/84 *Johnston v RUC* [1986] ECR 1651, para.18, Case 260/89 *ERT* [1991] ECR 2925, para.41, Case C-159/90 *SPUC v Grogan* [1991] ECR I-4685. See generally Mendelson, "The Court of Justice and Human Rights" (1981) YBEL 125, Toth, "Human Rights" in *Encyclopaedia of European Community Law*, 1990, Clarendon; Coppel and O'Neill, "The European Court of Justice: taking rights seriously?" (1992) 12 Legal Studies 227 and the responses by Weiler and Lockhart (1995) 32 CMLRev 51 and 579

<sup>29</sup> See, for example, Case C-260/89 *ERT* [1991] ECR I-2925, para.41; Case C-353/89 *Commission v Netherlands* [1991] ECR I-4069, para.30; Case C-23/93 *TV10 v Commissariat voor de media* [1994] ECR I-4795, para.24

has led some commentators to suggest that the recognition of a core of fundamental rights is important for purposes of legitimisation and integration in the Union.<sup>30</sup>

The question of legitimacy and the European Union has long been a vexed one.<sup>31</sup> Even the definition of legitimacy is uncertain. De Búrca suggests that it concerns the justification, and the acceptance, of authority and the exercise of power. She suggests that in most Western political systems, the power of the state is legitimised through the democratic process, in that government is based on the fiction of the consent of the governed who are supposed broadly to support the values on which the state is founded.<sup>32</sup> The problem facing the European Union is that the widening and deepening of its competence as a result of spill-over,<sup>33</sup> if this is what has occurred,<sup>34</sup> has not been accompanied by a commensurate increase in popular support.<sup>35</sup> There is a lack of consensus about *l'idée de l'Europe* - its role, purpose and ultimate objectives.<sup>36</sup> This is exacerbated by the existence of a "novel" form of government, lacking a traditional democratic structure, with sovereignty shared between the traditional nation states

<sup>30</sup> See, for example, De Búrca, "The Language of Rights and European Integration" in Shaw and More (eds.) *New Legal Dynamics of European Union* (Oxford: Clarendon Press), 1995, 40-1

<sup>31</sup> See generally Obradovic, "Policy Legitimacy and the European Union" (1996) 34 *JCMS* 191

<sup>32</sup> De Búrca, "The Quest for Legitimacy in the European Union" (1996) 59 *MLR* 349. See also Weiler, "The Transformation of Europe" (1991) 100 *Yale Law Journal* 2403, 2467-2473

<sup>33</sup> On spill-over and neo-functionalism - see Wincott, "Political Theory, Law and European Union" in Shaw and More (eds.) *New Legal Dynamics of European Union* (Oxford: Clarendon Press), 1995, George, *Politics and Policy in the European Union* (Oxford: OUP), 1996, 3rd ed., chap 3

<sup>34</sup> For differing approaches to integration theory see Armstrong, *New Institutionalism and EU Legal Studies: Towards an Interdisciplinary Research Agenda*, paper delivered at the WG Hart workshop 1996

<sup>35</sup> The Maastricht Treaty was rejected by the first referendum in Denmark and only narrowly approved in France. See Franklin, Marsh, and McLaren "Uncorking the Bottle: Popular Opposition to European Unification in the Wake of Maastricht" (1994) 32 *JCMS* 455. See also Weiler, "Fin-de-Siècle Europe", in Dehousse (ed) *Europe after Maastricht: An Ever Closer Union* (München: Law Books in Europe), 1994, 203 who says "The Maastricht Treaty on European Union, justly hailed as a remarkable diplomatic achievement, has been met in the European street with a sentiment ranging from hostility to indifference".

<sup>36</sup> See generally Lafan, "Politics of Identity and Political Order in Europe" (1996) 34 *JCMS* 81

and an increasingly independent supra-national authority,<sup>37</sup> which possess many of the powers of a state.<sup>38</sup> Consequently, it is argued that given the important legislative and regulatory role played by the Union, safeguarding individual rights, as fundamental constitutional values should be an important part of the democratic process.<sup>39</sup> Even if it is not appropriate to apply principles of state theory to the European Union, since the EU has powers which impact upon the lives of its citizens it seems to follow that their rights should be protected. In *P v S* the Court appears to be taking a further step in this direction. However, what is striking is that the Court has chosen to do this, not in the context of a dispute concerning one of the Community institutions, but relating to a national, private law matter - the termination of a contract of employment - albeit that the contract was concluded with an emanation of the state. This raises the question whether the Court is trying to assert the legitimacy argument beyond its natural frontiers.<sup>40</sup>

As far as integration is concerned,<sup>41</sup> Cappelletti sees rights as an integrating force. He said "there is hardly anything that has greater potential to foster integration than a common bill of rights, as the

<sup>37</sup> Everson, "The Legacy of the Market Citizen" in Shaw and More (eds.) *New Legal Dynamics of European Union* (Oxford: Clarendon Press), 1995, p.78

<sup>38</sup> De Búrca, *op cit*, n.X, p 352

<sup>39</sup> Mancini and Keeling, *op cit* at nX, p.181. As Jachtenfuchs explains ("Theoretical Perspectives on European Governance" (1995) 1 ELJ 115, 126), modern society and its political order are based on a solid consensus of generally shared values. Such a consensus is reflected in the catalogue of fundamental rights and values found in many Western constitutions.

<sup>40</sup> A precedent has already been set for this incursion into the national domain. It has also been prepared to review the validity of acts of Member States on the basis of fundamental human rights when they are implementing Community rules (see, for example, *Case 5/88 Wachauf v Federal Republic of Germany* [1989] ECR 2609) or when they are derogating from one of the economic freedoms of the Community (See, for example, *Case 36/75 Rutili* [1975] ECR 1219, para.32 and, more clearly, *Case 260/89 Ellenki Radiophonia Tileorasi (ERT) v Dimotiki Etairi Pliroforissis* [1991] ECR 2925, para.43).

<sup>41</sup> See Dehousse and Weiler's definition of integration: "integration must be regarded as a *process*, leading gradually, with the passage of time, to an increase in the exchanges between the various societies concerned and to a more centralised form of government" at p.246 of "The Legal Dimension" in Wallace (ed), *The Dynamics of European Integration* (London: RIIA), 1990. See also Ward's caveat that "the concept of European integration is itself a paradox, suggesting as it does integration towards a vanishing point of disintegration or assimilation" in "In Search of an Identity" (1994) 57 MLR 315



constitutional history of the United States has proved".<sup>42</sup> Rights are intended to make individuals feel part of, and committed both to the political process and to their particular Communities. As Dahrendorf explains, civil or civic rights form the core of the classic rights of citizenship, with political rights and then social rights arranged in a series of concentric circles beyond these.<sup>43</sup> This rhetoric seems to have influenced the creation of the "Citizenship of the Union", albeit as presently conceived by Articles 8-8e of the EC Treaty, a rather emaciated concept.<sup>44</sup>

If the political theory is correct and rights do serve legitimising and integrationist objectives then I suggest that it is no coincidence that the Court has used *P v S* to reaffirm the importance of the principle of equality. The right to equality - that each person matters equally - is one of the oldest and most well-recognised of fundamental human rights, the Enlightenment ideal informing the political theories of Locke, Paine and Rousseau.<sup>45</sup> They considered that citizenship was about equal or common rights for all and it was these principles that provided the ethical bases for the French Declaration of the Rights of Man<sup>46</sup> and the Constitution of the United States of America.<sup>47</sup> Principles of equality have

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<sup>42</sup> Cappelletti, *The Judicial Process in Comparative Perspective*, (Oxford: Clarendon) 1989, 395, cited in de Búrca (1995), p.41

<sup>43</sup> *Der Moderne Soziale Konflikt* (Stuttgart: DVA), 1992, discussed in Everson, *op cit*, nX p.82. See also the leading work by Marshall, *Class, Citizenship and Social Development*, 1964

<sup>44</sup> The rights are limited to moving and residing freely within the territory of the Member States, voting and standing as a candidate in municipal elections and elections to the European Parliament in the Member State in which the Union citizen resides; receiving diplomatic protection in the territory of a third country in which the Member States of nationality of the Union citizen is not represented; and petitioning the European Parliament and complaining to the ombudsman. See generally O'Leary, *European Union Citizenship: Options for Reform*, IPPR, 1996

<sup>45</sup> Meehan, *Citizenship and the European Community* (London: Sage), 1993, 17. See generally Hampscher-Monk, *A History of Modern Political Thought: Major Political Thinkers from Hobbes to Marx* (Oxford: Blackwell) 1992

<sup>46</sup> "Article premier - Les hommes naissent et demeurent libres et égaux en droits". The preamble to the Constitution of the Fifth Republic declares the people's continued respect for the principles laid down in the 1789 Declaration.

<sup>47</sup> The Fourteenth Amendment to the American Constitution enshrines the right to "equal protection of the laws" - ie equal treatment of persons similarly situated; all persons must be treated equally if they should be. See Currie, *The Constitution of the United States: A Primer for the People* (Chicago: University of Chicago Press), 1988, chap 6.

also inspired the great legal theorists such as Fuller, Rawls and Dworkin. They agree that a juridical order must be based on the principles of equality and freedom and that any such order would then be an order of right.<sup>48</sup>

The Court is not working in isolation. Many of its judges come from systems where the principle of equality is enshrined in their constitutions.<sup>49</sup> At Community level, the Commission has been pushing for the use of a general equality clause in legislation<sup>50</sup> and its *Comité des sages*, set up to examine the future of the Community Social Charter 1989,<sup>51</sup> suggested that rights including equality before the law, the ban on any form of discrimination, and equality between men and women should have full and immediate effect.<sup>52</sup>

### 3. The moral content of rights

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<sup>48</sup> Ward, *op cit*, nxx, p.323

<sup>49</sup> For example, in Germany Article 3 of the Grundgesetz provides: (1) Alle Menschen sind vor dem Gesetz gleich; (2) Männer und Frauen sind gleichberechtigt. Der Staat fördert die tatsächliche Durchsetzung der Gleichberechtigung von Frauen und Männern und wirkt auf die Beseitigung bestehender Nachteile hin. (3) Niemand darf wegen seines Geschlechtes, seiner Abstammung, seiner Rasse, seiner Sprache, seiner Heimat und Herkunft, seines Glaubens, seiner religiösen oder politischen Anschauungen benachteiligt oder bevorzugt werden. Niemand darf wegen seiner Behinderung benachteiligt werden. Article 1 of the Italian Constitution of 1948 provides that "Tutti i cittadini hanno pari dignità sociale e sono eguali davanti alla legge, senza distinzione di sesso, di razza, di lingua, di religione, di opinioni politiche, di condizioni personali e sociali."

<sup>50</sup> The Commission's proposed Directive implementing the parental leave collective agreement included a general equality clause. The Commission's proposal goes further than the collective agreement. It provides that "When Member States adopt the provisions to implement this Directive, these shall prohibit any discrimination based on race, sex, sexual orientation, colour, religion or nationality. Article 12 of Directive 89/552 (OJ No.L298, 17.1089, p.23) provides that television advertising must not include an discrimination on the grounds of race, sex or nationality nor offend any religious or political beliefs and Article 22 provides that Member States shall ensure that broadcasts do not contain any incitement to racial hatred on the grounds of race, sex, religion or nationality. The Commission has also proposed to amend the Community Staff Regulations and Conditions of Employment to provide that officials shall be entitled to equal treatment without reference to race, political, philosophical or religious beliefs, sex or sexual orientation COM(96) 77, 1996 OJ C 144.

<sup>51</sup> A non-binding declaration signed by 11 of the 12 Member States in 1989.

<sup>52</sup> *For a Europe of Civic and Social Rights*, Report by the Comité des Sages chaired by Maria de Lourdes Pintasilgo, Brussels, October 1995-February 1996, Commission, DGV.

If *P v S* is premised on the idea that rights have an integrating and legitimising effect why is it that the other rights recognised by the Court have not managed to deliver these expected benefits? One explanation may lie in the Court's own ambivalence to the very rights it has created. Ward recognises this. He argues that although there is a rights discourse in Community law the language itself is wholly deceptive.<sup>53</sup> He says that the language of rights remains consciously unconceptualised and that there is conspicuously no jurisprudential literature which reveals the fundamental differences which lie between the raw economic-political rights advanced in European law and the various conceptualisations of moral rights. Referring to Derrida,<sup>54</sup> he says that there is no substance to these rights because they are generated purely as political or, more accurately, economic rights which have never been intended to furnish substantive moral or principled rights. He continues "as Kant famously commented, a legal order without morally generated rights is like the wooden head of a horse, beautiful but empty". Phelan puts the matter rather differently - what might be conceived as a human right inspired by a different political philosophy becomes, in the Community context, an instrument for attaining the economic aims of the Treaty.<sup>55</sup> As he explains, unlike Constitutions such as the Irish Bunreacht na hEireann, the EC Treaty "contained no centrepiece Bill of Rights focused on a humanist vision and drawing inspiration from a natural law, political or ethical philosophy".<sup>56</sup> The objectives of the EC concern the completion of the internal market, economic and monetary union and the European Union.<sup>57</sup>

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<sup>53</sup> *op cit*, nxx, p.328

<sup>54</sup> *The Other Heading: Reflections on Today's Europe*, translated by Brault and Naas (Bloomington: Indiana University Press), 1992

<sup>55</sup> See Phelan, "Right to Life of the Unborn v Promotion of Trade in Services: the European Court of Justice and the Normative Shaping of the European Union" (1992) 55 MLR 670

<sup>56</sup> *Ibid*, p.677. The Preamble to the Irish Constitution states "In the name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions of both men and states must be referred ... And seeking to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured, true social order attained".

<sup>57</sup> *Opinion 1/92 Re the Draft Treaty on a European Economic Area* [1992] 1 CMLR 245, 268, 272, citing Articles 2, 8a, 102a, Article 1 SEA and s.2.5 of the Solemn Declaration of Stuttgart of 19 June 1983. It is, however, possible to find references in the Treaty to the attainment of broader social policy objectives. For example, Article 2 EC talks of a "high level of employment and of social protection,

In *P v S* the Court may be taking a tentative step to rebut these critics by recognising that the Union is not only about securing the market freedoms but also about achieving social justice. It will be recalled that the Advocate General said that by failing to recognise equality in respect of transsexuals would “sound like a moral condemnation”. He also referred to the words of Advocate General Trabucchi<sup>58</sup>, talking of “a legal system corresponding to the concept of social justice and European integration”. Further, both the Court and the Advocate General recognised that the Equal Treatment Directive formed part of the Community’s objectives of harmonising living and working conditions while maintaining their improvement. However, this point is made with some caution. For many years the Court of Justice described the principle of equal treatment between men and women as fundamental,<sup>59</sup> yet the quest for harmonisation was economically driven by the concern to avoid distortions of competition.<sup>60</sup> As the Court famously observed in its landmark judgment in *Defrenne (No.2)*:

“Article 119 pursues a double aim. *First*, ... the aim of Article 119 is to avoid a situation in which undertakings established in states which have actually implemented the principle of equal pay suffer a competitive disadvantage in intra-Community competition as compared with undertakings established in states which have not yet eliminated discrimination against women workers as regards

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the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States”, Article 117 talks of improved working conditions and Title XIV of the Treaty provides for economic and social cohesion. For example Article 130a provides that the Community shall aim at reducing the disparities between the levels of development of the various regions, and the backwardness of the least favoured regions, including rural areas. These broader social purposes of the Community have been recognised extra-judicially by Mancini. He has said that the rights of European citizens are close to the heart of the European Court (*op cit*, note x, p.186). Its perception of Europe is that found in the Preamble: the creation of “an ever closer union among the peoples of Europe”. As Mancini vividly describes it this is the “genetic code” transmitted to the Court by the founding fathers.

<sup>58</sup> Case 7/75 *Mr and Mrs F v Belgium* [1975] ECR 679, 697

<sup>59</sup> See, for example, Case 149/77 *Defrenne (No.3)* [1978] ECR 1365, 1378, Case 152/84 *Marshall (No.1)* [1986] ECR 723, para36 and Docksey, “The Principle of Equality between Men and Women as a Fundamental Right Under Community Law” (1991) 20 ILJ 258

<sup>60</sup> See also Barnard, “The economic objectives of Article 119” in Hervey and O’Keeffe, *Sex Equality Law in the European Union*, (Chichester: Wiley), 1996

pay. *Second*, this provision forms part of the social objectives of the Community, which is not merely an economic union, but is at the same time intended, by common action to ensure social progress and seek the constant improvement of living and working conditions of their peoples ... This double aim, which is at once economic and social, shows that the principle of equal pay forms part of the foundations of the Community.” (emphasis added).

This historical legacy and the precedence given to the economic rationale over the social justification, has had a suffocating effect on the development of the principle of equality.<sup>61</sup>

Everson also recognises that the troublesome legacy of a European market citizen continues to live on.<sup>62</sup> Certainly hints of the continued ambivalence found in *Defrenne (No.2)* towards social rights can still be detected in the views of the Advocate General in *P v S*. He said that the Equal Treatment Directive is essentially intended “with a view to satisfying the economic goals prescribed by the Treaty while satisfying the criteria of *social justice*, to ensure equal treatment as between workers”. Indeed, the source of P’s complaint was that she was being denied employment, an economic activity, on the grounds of her sex change. In other words P was, in Meehan’s language, both a citizen-as-worker and a citizen-as-human being.<sup>63</sup>

However, I do not wish to over-emphasise this point. It does not appear to be the principal motivating factor behind the judgment - it merely provides continuity with what was decided previously. It seems that the Advocate General and the Court decided in favour of allowing transsexuals to fall within the

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<sup>61</sup> See Fenwick and Hervey, “Sex Equality in the Single Market: New Directions for the European Court of Justice” (1995) 32 CMLRev 443, More, “‘Equal Treatment’ of the Sexes in European Community Law: What does ‘Equal’ mean?” (1993) 1 *Feminist Legal Studies* 45, Whiteford, “Lost in the Mists of Time. The ECJ and Occupational Pensions” (1995) 32 CMLRev 801

<sup>62</sup> Everson “The Legacy of the Market Citizen” in Shaw and More, (eds.) *New Legal Dynamics of European Union* (Oxford: Clarendon Press), 1995

<sup>63</sup> Meehan, *Citizenship and the European Community*, (London: Sage), 1993, p.147

scope of Directive 76/207 because they considered it morally just to do so.<sup>64</sup> P had been dismissed without good cause and they were going to provide her with a remedy. If the Court is genuinely taking a step towards recognising the moral dimension of rights, then in terms of citizen's rights it could be argued that *P v S* marks a move away from the perception of an individual's right to participate in the Community venture as a market citizen, a *homo economicus*,<sup>65</sup> but as a Union citizen, a shift by the Court away from the culture of the market<sup>66</sup> to the culture of the Union.

Indeed, it might be possible to go further. It could be argued that not only does *P v S* introduce a new moral dimension to the principle of equality but that it sees equality as a higher, moral principle of Community law, taking precedence over Treaties and secondary legislation.<sup>67</sup> Some support for this view can be found in the words of Advocate General Tesouro in *P v S*. He talked of the "fundamental and inalienable value which is equality".<sup>68</sup> Later he referred to the "universal fundamental value ... the great value of equality".<sup>69</sup> Mancini, writing extra-judicially, also seems to have recognised this possibility. He said that "like respect for human rights, the 'fundamental democratic principle' forms

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<sup>64</sup> See, for example, para.24 of the Advocate General's Opinion quoted at p.xx above.

<sup>65</sup> Agh, "Citizenship and Civil Society in Central Europe" in van Steenberg *The Condition of Citizenship*, 1994, 108, (London: Sage) cited in Everson "The Legacy of the Market Citizen" in Shaw and More, (eds.) *New Legal Dynamics of European Union* (Oxford: Clarendon Press), 1995, 73

<sup>66</sup> See Weiler, "The Transformation of Europe" (1991) 100 *Yale Law Journal* 2403, 2477

<sup>67</sup> In *Legal Theory*, Friedman (p.97) refers to a decision in 1953 of the West German Constitutional Court which held that the principles of separation of powers and the principles governing the relations between husband and wife on the basis of general equality were "supra-positive" (*übergesetzliche*) governing the Constitution and could be declared by the Constitutional Court to invalidate a "simple" constitutional norm.

<sup>68</sup> Para.20

<sup>69</sup> Para.24. When concluding his plea for courage by the Court, the Advocate General repeated the words of Advocate General Trabucchi in *Case 7/75 Mr and Mrs F v Belgium* [1975] ECR 679, 697: "If we want Community law to be more than a mere mechanical system of economics and to constitute instead a system commensurate with the society which it has to govern, if we wish it to be a *legal system corresponding to the concept of social justice and European integration*, not only of the economy but of the people, we cannot disappoint the [national] court's expectations, which are more than those of legal form" (emphasis added).

an inherent part of the Community legal order which finds its roots in the constitutional traditions of the Member States, *in natural law* and in the common legal heritage of western civilisation”.<sup>70</sup> However, the Irish Supreme Court recently rejected such an approach. In *Re Article 26 and the Information (Termination of Pregnancy Bill 1995)*<sup>71</sup> a challenge was made to the amendment to the Irish Constitution permitting information to be given on the availability of abortion on the grounds that the amendment contravened “the natural law” which, it was argued, was higher than the positive rights written into the Constitution. However, the Supreme Court refused to recognise natural law as being able to transcend the Constitution. It would therefore seem that while *P v S* may be important for the protection it might offer to other minority groups, the mechanics of its application may undermine the effectiveness of the principle.

## 5. Conclusions

*Pv S* may well not be authority for all I have suggested. The language of equality may only be rhetoric, deceiving those looking to the Court to take a renewed lead in the push towards ever closer Union. The rhetoric of liberalism may in reality mask a limited concession to transsexuals, who are relatively few in number.<sup>72</sup> It may also be seen as a pragmatic judgment dovetailing with the approach adopted by the European Convention on Human Rights.

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<sup>70</sup> Mancini and Keeling, *op cit*, nX, p.179. See also Hartley (“The European Union, Judicial Objectivity and the Constitution of the European Union” (1996) 112 LQR 95 and Arnall’s response in (1996) 112 LQR 95). He refers to Article 164 which provides that “The Court of Justice shall ensure that in the interpretation of this Treaty *the law is observed*” (emphasis added). He reasons that since the Court must ensure the observance of the law in the interpretation and application of this Treaty, the law must be something other than the Treaty. Therefore there exists a law higher than that contained in the Treaties, the observance of which the Court must ensure. However, according to Hartley, this higher law is the development of an “ever closer union”, the creation of a federation.

<sup>71</sup> (1995) 2 ILRM 81

<sup>72</sup> In Europe 1 in 30,000 males and 1 in 100,000 females seek to have a sex change operation - Advocate General Tesouro’s Opinion in *P v S*. It seems that no precise figures exist for the number of homosexuals in the European Union. Estimates vary between 1 in 5 of the population and 1 in 20.

On the other hand, if *P v S* is authority for the proposition that the principle of equality is a fundamental, moral, constitutional right then this judgment must surely take its place beside *Van Gend en Loos*, *Costa v ENEL*, *Internationale Handelsgesellschaft*<sup>73</sup> and *Opinion 1/91*<sup>74</sup> as a milestone in the Court's voyage to establish the new Community legal order. If equality is becoming a standard against which to judge the legality of both Community and Member State action, then the Court is creating a genuinely fundamental right which assumes a superior position in the hierarchy of norms. Taking this argument one stage further, it could be said that the Court may be embarking, however tentatively, on the first stage of developing a judicially constructed bill of rights, or it is at least trying to nudge the legislature in this direction.<sup>75</sup> This would accord with the view of the Comité des Sages<sup>76</sup> which argued that if the Union wishes to become "an original political entity, it must have a clear statement of the citizenship it is offering its members. Inclusion of civic and social rights in the Treaties would help to nurture that citizenship and prevent Europe from being perceived as a bureaucracy assembled by technocratic elites far removed from daily concerns".<sup>77</sup> The inclusion of social rights in this category

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<sup>73</sup> Case 11/70 *Internationale Handelsgesellschaft v Einfuhr- und Vorratstelle Getreide* [1970] ECR 1125

<sup>74</sup> [1992] 1 CMLR 245

<sup>75</sup> This would not be the first time that the Court has intervened in areas where it perceives that the politicians have not been able to reach a satisfactory solution. For example, it was prepared to expand the powers of the European Parliament when serious concern was expressed about the inferior position of the only directly elected Community institution (Case 138/79 *Roquette Frères* [1980] ECR 3333, Case 139/79 *Maizena* [1980] ECR 3396 (Parliament's right of intervention); Case 208/80 *Lord Bruce of Donnington* [1981] ECR 2205 (ECJ has jurisdiction under Article 177 to give preliminary rulings on the validity and interpretation of acts of the Parliament); Case 13/83 *Parliament v Council* [1985] ECR 1513 (Parliament's right to initiate proceedings under Article 175); Case 294/83 *Les Verts* [1986] ECR 1339 (Parliament can be sued under Article 173); Case 70/88 *Parliament v Council (Chernobyl)* [1991] ECR I-4529 (Parliament can sue under Article 173). As Bengoetxea has observed, (*The Legal Reasoning of the European Court of Justice* (Oxford: Clarendon), 1993, 104-105) the Court is a socio-political agent operating within and reacting to a certain political environment. See also Wincott, "Political Theory, Law and European Union" in Shaw and More (eds.) *New Legal Dynamics of European Union* (Oxford: Clarendon Press), 1995, 298-9). In very different circumstances, but against a similarly difficult political background, the Court intervened in *Cassis de Dijon* (Case 120/78 *Rewe-Zentrale AG v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649) to develop the important principles of mutual recognition and mandatory requirements to break the log-jam on harmonisation legislation.

<sup>76</sup> *For a Europe of Civic and Social Rights*, Report by the Comité des Sages chaired by Maria de Lourdes Pintasilgo, Brussels, October 1995-February 1996, Commission, DGV.

<sup>77</sup> The responses of the European Parliament, ECOSOC and the ETUC to the Commission's Green Paper on Social Policy also called for "the establishment of the fundamental social rights of citizens as a constitutional



would also be in harmony with the UN Covenant on Economic and Social Rights, the Conventions and Recommendations of the ILO, the European Social Charter of the Council of Europe and the Community's Social Charter of 1989.

Such an approach might assist the process of integration and legitimisation, of giving the Union a meaningful identity. The fundamental rights of individuals would be widely protected, without these rights being over prescriptive. It might help address the criticism that "The Europe of Maastricht is devoid of ideals",<sup>78</sup> that there has been a loss of the deeper *raison d'être* of the enterprise, that Europe has become an end in itself and no longer a means for a higher human end. A rights based approach might also help reconcile the growing tension between the desire for decentralisation - subsidiarity - and the need for the Community to have an identifiable and meaningful face. It would also be entirely consistent with some form of confederal or consociational model of government.

The rights-based approach might also provide a way of addressing what Shaw describes as the legal challenge of the post-Maastricht Union: to accommodate disintegration, namely decentralisation or non-centralisation, involving the preservation and enhancement of diverse legal, political and cultural structures which presently mark out the limits of integration. The importance of this has been brought into sharp focus by the UK's opt-out from the Social Chapter, and the likely accession of the former Eastern bloc countries to the Union, with the prospect of varying forms of integration<sup>79</sup> involving a

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element of the European Union" - COM(94)333, p.69. The *Molitor Report* (COM (95)288 final/2, 39) on legislative and administrative simplification called for the adoption of a Bill of Rights. See also Kenner, "Citizenship and Fundamental Rights: Reshaping the Social Model" in Kenner (ed), *Trends in European Social Policy: Essays in Memory of Malcolm Mead*, (Dartmouth, 1995), especially pp78-84

<sup>78</sup> Weiler, "Fin-de-Siècle Europe", in Dehousse (ed) *Europe after Maastricht: An Ever Closer Union* (München: Law Books in Europe), 1994, 204

<sup>79</sup> Blanpain, Hepple, Sciarra, Weiss, *Fundamental Social Rights: Proposals for the European Union*, (Peeters, 1996), 1. See also Lodge, "Preface: The Challenge of the Future" in Lodge (ed) *The European Community and the Challenge of the Future*, 2nd ed (Pinter, 1993)

*multi-speed Europe*<sup>80</sup> and a *Europe with variable geometry*.<sup>81</sup> Blanpain *et al.* have argued that these models could work only if there is a clear definition of specific social objectives and a statement of fundamental social rights.<sup>82</sup>

Weiler does, however, sound a note of warning.<sup>83</sup> He argues that judicial protection of fundamental human rights by the Court of Justice may operate as a source of unity and disunity in the dialectical process of European integration. Beyond a certain core, reflected in the European Convention on Human Rights, the definition of fundamental human rights often differs from polity to polity.<sup>84</sup> He continues “What menu and flavour of human rights are chosen in the Community context matters, and it can become a source of tension even in the absence of a direct conflict of norms”. Hepple also sounds a note of caution in advocating constitutionally entrenched and justiciable rights.<sup>85</sup> He argues that much rights talk is rhetorical and acquires meaning only in specific social and political contexts.

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<sup>80</sup> This means that Member States pursue the same social objectives but some move faster than others. It is a technique which has also been used in some employment Directives such as the Working Time Directive and the Young Workers Directive.

<sup>81</sup> Member States would be allowed not to participate in certain social policies as a limited exception, subject to certain rules.

<sup>82</sup> Blanpain, Hepple, Sciarra, Weiss, *Fundamental Social Rights: Proposals for the European Union*, (Peeters, 1996).

<sup>83</sup> “Fundamental Rights and Fundamental Boundaries: On Standards and Values in the Protection of Human Rights” in Neuwahl and Rosas (eds), *The European Union and Human Rights* (The Hague: Martinus Nijhoff), 1995

<sup>84</sup> The Advocate General went to some lengths to establish that transsexuals enjoy a degree of protection in most of the Member States. He says that some states have given a legal response to transsexuality by adopting special legislation eg Sweden (Act of 21 April 1972 [1972] SFS 119), Germany (Act of 10 September 1980 [1980] BGB 1654), Italy (Act 164 of 14 April 1982 ([1982] 106 GURI 1654) and the Netherlands (Act of 21 April 1985 (1985] *Staatsblad* 243). The laws concerned authorise transsexuals to correct their birth certificates so as to include reference to their new sexual identity, with the result that they can marry, adopt children and enjoy pension rights according with their new sexual identity. In states such as Denmark the legality of surgery performed on transsexuals is based on laws which have nothing to do with the question of transsexuality (Law of 11 May 1935 on voluntary castration), in other states the problem is resolved case by case by the courts (France, Belgium, Spain, Portugal, Luxembourg and Greece) or in Austria the matter is dealt with at an administrative level.(para.10).

<sup>85</sup> “The Future of Labour Law” (1995) 24 ILJ 303/

He argues that it is necessary to distinguish those principles from which rights flow which are fundamental to democratic societies from particular economic and social policies which are conditioned by the level of socio-economic development of a particular country. He cites the example of the Spanish Constitution which distinguishes between enforceable fundamental rights and freedoms, including the right to equality, freedom of expression, right to associate and the right to free choice of work or profession, and “Guiding Principles of Economic and Social Policy” which places obligations on the public authorities to pursue certain policies which are not enforceable before any court.

On a micro-level a rights based approach might also have a disintegrating effect among those whose actions have been challenged. If these Community rights could be enforced only against the Community institutions and the Member States then their effectiveness would be limited.<sup>86</sup> On the other hand, if as in the employment context, the rights could be enforced horizontally between citizens, the benefits of a European Constitution might be less obvious to the defendants in any action. In *P v S* the defendant was the County Council, an “emanation of the state”. Following *Webb v EMO*<sup>87</sup> it might be possible for the British courts to construe the British Sex Discrimination Act 1975 as giving effect to the ruling in *P v S* in horizontal situations.

The fate of *P v S* may well depend on how it is received. As Hartley has observed “A common tactic [by the Court] is to introduce a new doctrine gradually: in the first case that comes before it, the Court will establish the doctrine as a general principle ... if there are not too many protests, it will be reaffirmed in later cases: the qualifications can then be whittled away and the full extent of the doctrine

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<sup>86</sup> In the United States the Constitution regulates the relations between the individual and government and not among citizens themselves. The only exceptions are the thirteenth amendment which forbids slavery whether public or private, and the eighteenth which forbade the private production or transportation of alcoholic beverages until it was repealed by the twenty-first amendment. In France the Constitution cannot be invoked by individuals. It can only be used to check the validity of proposed national legislation.

<sup>87</sup> Decision of the House of Lords, 19 October 1995

revealed.”<sup>88</sup> The immediate challenge facing the Court is whether to extend the protection of the principle of equality to other groups.<sup>89</sup> Advocate General Teasuro in *P v S* suggested that it should. He said that “the prohibition of discrimination on grounds of sex is an aspect of the principle of equality, a principle which requires no account to be taken of discriminatory factors, principally sex, race, language and religion. What matters is that, in like situations, individuals should be treated alike”.<sup>90</sup> The Court must also consider whether the principle of equality is a free-standing right enforceable both before the European Court of Justice and the domestic courts or whether it is merely used as a method

<sup>88</sup> Hartley *The Foundations of European Community Law*, (Oxford: Clarendon), 1988, 1st ed., 78-9. This can be seen in the *Van Gend en Loos* as the Court developed the principle of supremacy and in Case C-83/91 *Meilicke v ADV/ORG Meyer* [1992] ECR I-4871 and Case C-320/90 *Telemarsicabruzzo v Circostel* [1993] ECR I-393 when the Court started restricting the scope of Article 177 references.

<sup>89</sup> This is of most immediate concern in the case of homosexuals due to the reference made in July 1996 to the European Court of Justice by the Southampton Industrial Tribunal on this point in *Grant v SWT*. The importance of this matter has been highlighted by the decisions in *R v Ministry of Defence, ex parte Smith and Grady* [1996] IRLR 100 and *Smith v Gardner Merchant* [1996] IRLR 342. It is possible to construe *P v S* in such a way. The Court said that discrimination arising from gender reassignment was based essentially “on the sex of the person concerned”, apparently giving the term “sex” a broader construction than simply gender. On the facts of the case the discrimination at issue was in reality not on the grounds of sex but on the grounds of having a sex change.<sup>89</sup> If that is so, it could be argued the judgment should be extended to the situation of discrimination against homosexuals who suffer sex-based discrimination, loosely so-called, but in reality suffer discrimination on the grounds of their sexuality. Some support for the view that the Directive can apply to homosexuals can be found in the Advocate General’s Opinion. He said: “as the expression of a more general principle, on the basis of which sex should be irrelevant to the treatment everyone receives, the directive should be construed in a broader perspective, including therefore all situations in which sex appears as a discriminatory factor” (para. 18). If the rationale behind the Equal Treatment Directive is that people should not be discriminated against due to characteristics which are immutable and irrelevant to a person’s ability to do a job, for example sex (and, by implication, transsexuality), then it should also apply by extension to homosexuals. However, this approach would require a bigger leap of faith (and a larger departure from the wording of the Directive) by the Court than *P v S*, since discrimination against transsexuals is on the grounds of their sex or gender whereas discrimination against homosexuals is on the grounds of their sexuality.

<sup>90</sup> Para. 19. See also para. 48 of the Court’s judgment in Case T-45/90 *Speybrouck v Parliament* [1992] ECR II-33 where the Court said that in relations between Community institutions and employees and the latter’s dependants “the requirements imposed by the principle of equal treatment are in no way limited to those resulting from Article 119 of the EEC Treaty or from the Community Directives adopted in the field”. How far should the principle of equality go? Should equality be ensured in every case or should, as in the United States, a higher degree of protection be accorded to some groups over others (Tribe, *American Constitutional Law*, Foundation Press, 2nd ed, 1988, chapter 16). Should homosexuals be entitled to equal treatment with heterosexuals? Should the disabled be entitled to demand equal treatment with the able-bodied? Should optometrists be able to demand equality with opticians?

of interpretation, deriving its legal force from the Equal Treatment Directive or Article 119. If the general principle of equality does have direct effect this would represent an important step towards the judicial creation of a bill of rights.