

K.B. v. National Health Service Pensions Agency and the Secretary of State for Health: The Influence of Human Rights Law in Protecting Transsexuals from Employment Discrimination

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I. INTRODUCTION

K.B., a female former employee of the National Health Service (NHS), the British agency authorized to administer public health services, and R., a female-to-male transsexual, are involved in a loving, committed domestic relationship, and have been partners for many years.¹ Through her employment with NHS, K.B. was eligible to participate in the NHS pension plan.² As a result of contributions she made to the plan over the period of twenty years in which she worked for NHS, K.B. was eligible for an annual income of £5375.86.³ However, in the event of K.B.’s death, R. was not entitled to receive K.B.’s pension as a spousal benefit because under United Kingdom legislation, R. cannot legally be considered K.B.’s spouse because transsexuals are prohibited from marrying members of their opposite acquired sex.⁴ K.B. maintained that the refusal of NHS to award the widower’s pension to her partner R. in the event of K.B.’s death was discrimination based on sex and in violation of Article 141 EC,⁵ European Court of Justice case law, and Directive 75/117.⁶

1. See Case C-117/01, *K.B. v. The Nat’l Health Serv. Pensions Agency & the Sec’y of State for Health*, [2004] 1 C.M.L.R. 28, 935, ¶¶ AG 1-5 (Opinion of Advocate General Colomer).

2. See *id.* at 935, ¶¶ AG 1-4.

3. See *id.*

4. See *id.* at 935-36, ¶¶ AG 1-6.

5. Article 141 of the Treaty Establishing the European Community (EC) refers to the principle of equal pay for equal work. It reads:

1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.

2. For the purpose of this Article, “pay” means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer.

TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Nov. 10, 1997, O.J. (C 340) 141 (1997) [hereinafter EC TREATY].

6. Article 1 of Directive 75/117 of 10 Feb. 1975 reads:

K.B. unsuccessfully brought her claim before the Employment Tribunal and the Employment Appeal Tribunal.⁷ The case was then sent to the United Kingdom's Court of Appeal, which requested that the European Court of Justice make a preliminary ruling on the matter.⁸ In his advisory opinion to the Court of Appeal, Advocate General Ruiz-Jarabo Colomer concluded that the ineligibility of transsexuals involved in committed relationships to receive a widower's pension due to the UK's failure to enact laws legally recognizing the right of transsexuals to marry constituted sex discrimination.⁹ After considering the opinion of the Advocate General, the European Court of Justice *held* that European Community law on sex discrimination prohibits legislation that prevents a transsexual from achieving the marital status necessary for him to be eligible for his partner's employee benefits. Case C-117/01, *K.B. v. The National Health Service Pensions Agency and the Secretary of State for Health*, [2004] 1 C.M.L.R. 28, 958 ¶ 37.

II. BACKGROUND

The struggle to achieve legal recognition and protection of a transsexual's decision to change his or her sex has followed a path of progressive realization within the European Community's legal system. Along the way, arguments based on a fundamental human rights framework have been integral in securing legal respect for gender reassignment and in ensuring legal protection from discrimination arising from the decision to change one's sex.¹⁰

Within the European Court of Human Rights,¹¹ the acceptance that a state's refusal to recognize a transsexual's gender reassignment amounted

The principle of equal pay for men and women outlined in Article 119 of the Treaty, hereinafter called "principle of equal pay", means, for the same work or for work to which equal value is attributed, the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration.

In particular, where a job classification system is used for determining pay, it must be based on the same criteria for both men and women and so drawn up as to exclude any discrimination on the grounds of sex.

Council Directive 75/117, art. 1, 1975 O.J. (L 45) 19.

7. See *K.B.*, 1 C.M.L.R. 28, 936, ¶¶ AG 7,9.

8. *Id.* at 936, ¶ AG 9.

9. *Id.* at 952, ¶ AG 81.

10. See *Goodwin v. United Kingdom*, App. No. 28957/95, 35 Eur. H.R. Rep. 18, 447 (2002); Case C-13/94, *P v. S & Cornwall County Council*, 1996 E.C.R. I-2143, I-2167.

11. The European Court of Human Rights interprets the European Convention for the Protection of Human Rights and Fundamental Freedoms. Protocol 11 of the Convention requires member states to enforce the decision of the Court through political or legal means. Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11, Nov. 4, 1950, Europ. T.S. No. 5 [hereinafter *European Convention*]. The Court of Justice of the

to a violation of basic human rights came quite recently through the consolidated cases of *I v. United Kingdom*¹² and *Goodwin v. United Kingdom*.¹³ Breaking with over twenty years of precedent, the European Court of Human Rights unanimously held that the United Kingdom's failure to take steps to legally recognize a post-operative male-to-female transsexual's gender reassignment constituted a violation of the right to privacy and the right to marry under Articles 8 and 12 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.¹⁴ While the Court recognized that the British government provided support for transsexuals by paying for their sex change operation through the nationalized health care system and by allowing transsexuals to change their names and gender identity, the Court ruled that the respect for privacy also included a positive obligation on the part of the state to legally recognize a transsexual's sex change through the modification of an individual's birth certificate.¹⁵ Nothing less than full and complete legal recognition of a transsexual's changed gender identity was required.¹⁶ The growing protection that transsexuals received in the member states, in addition to the inadequacy of the British government to reform their policies to respond to the plight of transsexuals in British society,¹⁷ convinced the Court that the policy choice of recognizing a

European Communities (known as the Court of Justice) was established to ensure that European Community law is interpreted and applied consistently throughout the member states. Europa, *The Court of Justice*, at http://www.europa.eu.int/institutions/court/index_en.htm (last visited Apr. 1, 2004). The two Courts are independent and separate institutions; however, the Court of Justice, as will be demonstrated, frequently integrates human rights principles in its own decisions. Europa, *European Convention on Human Rights*, at <http://www.europa.eu.int/scadplus/leg/en/cig/g4000e.htm#e17> (last visited Apr. 1, 2004).

12. *I v. United Kingdom*, App. No. 25680/94, 36 Eur. H.R. Rep. 53, 967 (2003).

13. *Goodwin*, 35 Eur. H.R. Rep. 18, 447.

14. *Id.* at 480-81. Article 8 of the Convention states:

(1) Everyone has the right to respect for his private and family life, his home, and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 12 of the Convention states:

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

European Convention, *supra* note 10, arts. 8, 12.

15. *See Goodwin*, 35 Eur. H.R. Rep. 18, 473.

16. *See id.* at 477-78.

17. Prior to *Goodwin*, the status of transsexuals in the UK was governed by the decision in *Corbett v. Corbett*, 1971 P. 83 (Eng. C.A.). The *Corbett* court held that the sex of an individual was fixed and could not be changed. *Id.* at 104. A person's chromosomal and gonadal factors at

transsexual's gender change no longer fell within the country's margin of appreciation.¹⁸

The Court demonstrated its understanding of the difficult situation that transsexuals faced by existing in a society that refused to respect their gender change, stating that “[a] conflict between social reality and law arises which places the transsexual in an anomalous position, in which he or she may experience feelings of vulnerability, humiliation and anxiety.”¹⁹ Drawing on the need to respect human dignity, human freedom, individual autonomy and the right to develop one's identity, principles which according to the Court form the “very essence of the Convention” itself, the Court stated that the UK could not infringe on a transsexual's human right to shape her identity by refusing to recognize her decision to do so.²⁰

Concerning the issue of the right to marry, the Court held it was not within the margin of appreciation for a state to deny transsexuals the right to marry individuals of their opposite-acquired sex.²¹ The Court rejected the narrow construction offered by the government, which argued that the requirement to recognize the gender reassignment on a birth certificate did not extend to recognition of a sex change for marriage purposes.²² The Court established that “sex” as interpreted under Article 12 of the Convention is not necessarily determined by biological factors, but rather includes the psychological determinants of sex, and should take into account an individual's taking steps to change his sex.²³

While decisions prior to *Goodwin* and *I* failed to protect the privacy and marriage rights of transsexuals, the developing human rights jurisprudence of these prior cases did lay the groundwork for securing protections for transsexuals. In *Rees v. United Kingdom*, a 1987 case involving a female to male transsexual seeking the same legal

birth determine sex. *Id.* The *Corbett* court did not give legal recognition of the psychological component in determining sex and rejected the claim that sex could be changed by medical intervention. *Id.* at 108. The UK's Court of Appeal upheld the *Corbett* decision in *Bellinger v. Bellinger*, 2002 Fam. 150, 166 (Eng.).

18. See *Goodwin*, 35 Eur. H.R. Rep. 18, 477-78. Within the European Court system, margin of appreciation refers to the level of discretion a country has in implementing any given policy. A wide margin of appreciation signifies that the state has almost complete discretion on developing and implementing a particular policy. INTERNATIONAL HUMAN RIGHTS IN CONTEXT 854-58 (Henry J. Steiner & Philip Alston eds., 2000).

19. *Goodwin*, 35 Eur. H.R. Rep. 18, at 473.

20. See *id.* at 479.

21. See *id.* at 477.

22. *Id.* at 478.

23. See *id.* at 480.

recognition and right to marry in *Goodwin and I*, the 12-3 majority held that the wide margin of appreciation afforded to member states concerning the legal status of transsexuals gave the UK full discretion in deciding the legal status they assigned to transsexuals.²⁴ However, the Court was sympathetic to the situation of transsexuals, noting that it was “conscious of the seriousness of the problems affecting these persons and the distress they suffer. The Convention has always to be interpreted and applied in light of current circumstances. The need for appropriate legal measures should therefore be kept under review having regard particularly to scientific and societal developments.”²⁵ The Court also held that the right to marry only applied to individuals of the opposite biological sex, thus precluding the ability of transsexuals to marry.²⁶ The Court’s decision sanctioned the UK’s case law governing the treatment of transsexuals.²⁷

Four years later, the Court again considered the legal status of transsexuals in the UK in *Cossey v. United Kingdom*.²⁸ By a vote of 10-8, the Court upheld the *Rees* decision.²⁹ While acknowledging a growing consensus among member states in protecting the privacy rights of transsexuals, the Court did not feel that societal circumstances were sufficiently compelling to hold the UK in violation of the Convention.³⁰ Most notable in *Cossey* was the eloquent and influential dissenting opinion offered by Judge Martens, which detailed the ways in which the UK’s legal system violated the human rights of transsexuals and called for the Court, as the “last resort protector of oppressed individuals” to protect transsexuals.³¹ As Martens wrote,

The principle which is basic in human rights and which underlies the various specific rights spelled out in the Convention is respect for human dignity and human freedom. Human dignity and human freedom imply that a man should be free to shape himself and his fate in the way he deems best fits his personality. A transsexual does use those very fundamental rights. He is prepared to shape himself and his fate. In doing so, he goes through a long, dangerous and painful medical treatment to have his sexual organs, as far as is humanly feasible, adapted to the sex he is convinced he belongs to. After these ordeals. . . he turns to the law and. . . [he] demands

24. *Rees v. United Kingdom*, App. No. 9532/81, 9 Eur. H.R. Rep. 56, 67 (1987).

25. *Id.* at 67-68.

26. *Id.* at 68.

27. *See id.* at 66-67.

28. *Cossey v. United Kingdom*, App. No. 10843/84, 13 Eur. H.R. Rep. 622 (1991).

29. *See id.* at 622-23.

30. *Id.* at 641.

31. *Id.* at 653 (Martens, J., dissenting).

to be recognised and to be treated by the law as a member of the sex he has won; he demands to be treated without discrimination³²

A refusal to recognize such a request “can only be qualified as cruel” according to Judge Martens.³³

Drawing on, among other things, the decisions of the European Court of Human Rights, the decisions of the European Court of Justice have reflected a need to protect transsexuals from employment discrimination based on the obligation to protect and respect human dignity and freedom.³⁴

In *P v. S and Cornwall County Council*, the Court of Justice held that a provision prohibiting employment discrimination on the grounds of sex barred an employer from discriminating against a transsexual based on her decision to undergo gender reassignment surgery.³⁵ P. was a manager at an educational institution administered by the Cornwall County Council.³⁶ After a year of employment, P. informed her employer that she intended to undergo gender reassignment surgery to become a woman, and was subsequently assured by her employer that her job was not in jeopardy.³⁷ During the process, and after informing her employers that she planned on returning to work dressed as a woman, P.’s employer informed her that she had been terminated.³⁸ P. brought proceedings against her employer claiming discrimination based on sex.³⁹ The Court held that the principle against sex discrimination encompassed the fundamental human right of equality, and that such a right should not be

32. *Id.* at 648 (Martens, J., dissenting).

33. *Id.* In *Sheffield & Horsham v. United Kingdom*, a 1998 case with facts and reasoning identical to those of *Cossey*, the Court held by a vote of 11 to 9 that there had been no violation of Article 8 of the Convention. *Sheffield & Horsham v. United Kingdom*, App. No. 22885/93 & 23390/94, 27 Eur. H.R. Rep. 163, 197 (1998).

34. While the Court has utilized human rights law to protect transsexuals and heterosexual nonmarried partners from discrimination, it has refused to utilize a human rights framework as a basis to prohibit discrimination against other sexual minorities, including homosexuals. *See* Case C-249/96, *Grant v. South-West Trains, Ltd.*, 1998 E.C.R. I-621, I-652 (holding that the denial of benefits given to opposite sex partners of employees to a female employee’s same sex partner did not constitute sex discrimination). However, the Court in *Grant* did suggest their decision could change based on evolving human rights jurisprudence and societal norms that recognized the right to family, and the right to marry among homosexual partners. *See id.* at I-649-51; *see also* Case C-122/99, *D & Kingdom of Sweden v. Council of the European Union*, 2001 E.C.R. I-4319 (holding that a registered partnership in a member state which gave homosexuals couples all the legal benefits of marriage did not constitute marriage under European Council staff benefits awarding married couples a household allowance).

35. Case C-13/94, *P v. S & Cornwall County Council*, 1996 E.C.R. I-2143, I-2165.

36. *See id.* at I-2161.

37. *See id.* at I-2146.

38. *See id.* at I-2147.

39. *See id.*

narrowly construed.⁴⁰ Discrimination arising from a person's decision to undergo gender reassignment surgery was within the scope of the prohibition against sex discrimination according to the Court.⁴¹ In the words of the Court, "[t]o 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."⁴²

Much like the Court analyzed the scope of the prohibition of sex discrimination, the decision in *Safet Eyüp* dealt with the proper scope of what constituted a family for the purpose of determining the award of benefits the state confers upon spouses.⁴³ Family members of foreign workers are entitled to legal residence and a worker's permit after five years of residence under European Union Law.⁴⁴ At issue in *Safet Eyüp* was the legal residence of the wife of a Turkish national working in Austria.⁴⁵ In 1983, Mrs. Eyüp married Mr. Eyüp in Austria.⁴⁶ Two years later, they divorced.⁴⁷ While divorced, the couple continued to live and share their life together.⁴⁸ Four of the couple's seven children were also born during this time.⁴⁹ In 1993, Mrs. Eyüp married Mr. Eyüp in Austria again.⁵⁰ Subsequently, Mrs. Eyüp applied for a worker's permit.⁵¹

The Austrian government denied Mrs. Eyüp a work permit, stating that she did not meet the requirements.⁵² Specifically, the Austrian government maintained that during the period of time they spent divorced, Mrs. Eyüp had lost her status as a spouse, and therefore as a family member, and thus she could not establish the five years of residency as a family member to qualify for the permit.⁵³ The European Court of Justice interpreted the "family member" requirement broadly, holding that the intention of the law was to preserve the unity of family life, which clearly was present here as the Eyüps had a "de facto family" evidenced by the fact that their family life remained uninterrupted

40. *See id.* at I-2164.

41. *See id.* at I-2165.

42. *Id.*

43. *See* Case C-65/98, *Safet Eyüp v. Landesgeschäftsstelle des Arbeitsmarktservice Vorarlberg*, 2000 E.C.R. I-4747, I-4773.

44. *See id.* at I-4769.

45. *Id.* at I-4750.

46. *See id.* at I-4770.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *See id.* at I-4771.

52. *See id.* at I-4771-72.

53. *See id.*

throughout the period of the divorce.⁵⁴ In *Safet Eyüp*, the Court rejected the legal technicalities that the State and employers relied upon in order to circumvent the spirit and purpose behind the law.⁵⁵

In employment discrimination matters dealing with sexual minorities, the case history of the European Court of Justice reveals that the Court has been willing to protect transsexuals from discrimination in the workplace, often times using human rights principles to support their claims.⁵⁶ The substantial role that human rights considerations have played in discrimination cases indicates that evolving human rights jurisprudence is likely to shape future decisions of the Court of Justice as it deals with employment and other forms of discrimination against transsexuals.⁵⁷

III. COURT'S DECISION

In the noted case, the Court of Justice integrated Court of Human Rights case law with Court of Justice case law regarding the status of transsexuals in order to analyze whether the denial of benefits to an employee's transsexual partner constituted sex discrimination.⁵⁸ The Court rejected the Tribunal's narrow interpretation of the employment rights of transsexuals, which maintained that the protection given to transsexual employees under the Court's decision in *P v. S* did not confer the additional obligation on the employer to extend a widower's pension to an employee's transsexual partner.⁵⁹

After summarizing the relevant European Union and domestic case law and establishing the fact that pension benefits to spouses were considered pay according the European Union Law,⁶⁰ the Court gave special attention to the recent European Court of Human Rights cases requiring member countries to allow transsexuals to marry.⁶¹ Judge Ruiz-Jarabo Colomer considered opinions of the Court of Human Rights to be of "utmost importance" to the Court of Justice since principles of European Community law are frequently taken from human rights law.⁶² The Judge further stated that the European Human Rights Convention

54. *Id.* at I-4778.

55. *Id.* at I-4777.

56. *See generally* Case C-13/94, *P v. S & Cornwall County Council*, 1996 E.C.R. I-2143.

57. *See generally* Case C-117/01, *K.B. v. The Nat'l Health Serv. Pensions Agency & the Sec'y of State for Health*, [2004] 1 C.M.L.R. 28, 935.

58. *See id.* at 949-50, ¶¶ AG 64-71.

59. *See id.* at 950-51, ¶¶ AG 73-76.

60. *See id.* at 936-40, ¶¶ AG 10-24, 956, ¶¶ 25-27.

61. *See id.* at 949-50, ¶¶ AG 64-66.

62. *Id.* at 940, ¶ AG 27.

protects both the right to family, which encompassed the right to make provisions for one's surviving dependants, and the right to privacy, and that these fundamental rights could be violated by employment practices that exclude transsexual partners from pension benefits.⁶³

Of equal importance to the interpretation of Community Law are the practices of member states.⁶⁴ In this regard, the opinion pointed out that the vast majority of member states allowed transsexuals to marry, which demonstrated the acceptance among member states of the fundamental right of transsexuals to marry.⁶⁵

This recognition among European states of the transsexual's right to marry supported K.B.'s sex discrimination claim according to Judge Colomer.⁶⁶ The Court held that by prohibiting transsexuals from exercising the fundamental right to marry, the state directly discriminated against transsexuals by denying them the opportunity to attain a civil status that would lead to the enjoyment of employment benefits offered to employee spouses.⁶⁷ The Judge analogized this situation to a law that allows women to enter a certain profession, but discriminates against them by denying them the opportunity to have access to the education necessary to enter such a profession.⁶⁸ Such a law would clearly constitute sex discrimination under European Union Law.⁶⁹ Furthermore, because the discrimination was directly related to the sexual identity of the partner, and not the sexual orientation of the partner, the discrimination was within the scope of sex discrimination.⁷⁰ Thus, Judge Colomer distinguished discrimination based on sexual orientation as a different issue than discrimination against transsexuals.⁷¹

Judge Colomer reiterated the importance of recognizing fundamental human rights in the interpretation of European Community Law.⁷² According to Judge Colomer, human rights law demanded the respect for human dignity and freedom, and the role of the Court was to interpret Community Law to be consistent with these human rights principles and the evolving human rights jurisprudence of the member states.⁷³ In the noted case, social justice and European public policy

63. *See id.* at 942, ¶ AG 37.

64. *See id.* at 940, ¶ AG 27.

65. *See id.* at 940, ¶ AG 28.

66. *See id.* at 949-50, ¶¶ AG 66-67.

67. *See id.* at 950-51, ¶¶ AG 67-76, 956-57, ¶¶ 30-33.

68. *See id.* at 951, ¶ AG 76.

69. *See id.*

70. *See id.* at 950, ¶ AG 73.

71. *See id.*

72. *See id.* at 949, ¶ AG 66.

73. *See id.* at 949-51, ¶¶ AG 66-69, 76.

entitled a transsexual the full and complete recognition of his gender reassignment, and such recognition necessarily extended to the employment arena.⁷⁴ Echoing the sentiments of Judge Martens in his dissent in *Cossey*, Judge Colomer concluded,

[T]ranssexuals suffer the anguish of being convinced that they are victims of an error on the part of nature. Many have chosen suicide. At the end of a long and painful process, in which hormone treatment is followed by delicate surgery, medical science can offer them partial relief by making their external physical features correspond as far as possible to those of the sex to which they feel they belong. To my mind it is wrong that the law should take refuge in purely technical expedients in order to deny full recognition of an assimilation which has been so painfully won.⁷⁵

IV. ANALYSIS

The judgment in the noted case demonstrates the impact that human rights doctrine can have on advancing the rights of transsexuals outside the sphere of human rights jurisdiction. The field of human rights provides a universal language through which sexual minorities, such as transsexuals, can gain protection against discrimination found at all levels of society, including the employment sector.⁷⁶ Human rights doctrine is especially useful in advocating for a broad range of rights because it provides a framework that considers both a positive and negative obligation on the part of the state in protecting fundamental rights.⁷⁷ The recognition of positive and negative state obligations ensure that legal victories obtained by transsexuals are not narrowly construed but rather adhere to the goals of providing complete legal respect and recognition for their gender reassignment. Furthermore, human rights principles do not prescribe static norms. Rather, they provide courts with an interpretive tool by which they can incorporate the evolving societal acceptance toward sexual minorities into their case law.⁷⁸

74. See *id.* at 951-52, ¶¶ AG 77-81.

75. *Id.* at 952, ¶ AG 79.

76. See generally INTERNATIONAL HUMAN RIGHTS IN CONTEXT, *supra* note 17, at 366-68 (summarizing the universality claim proposed by many international human rights scholars).

77. See *id.* at 363-64; see also Alice M. Miller, *Human Rights and Sexuality: First Steps Toward Articulating a Rights Framework for Claims to Sexual Rights and Freedoms*, 93 AM. SOC'Y INT'L L. PROC. 288, 294 (1999).

78. See Helen G. Berrigan, *Transsexual Marriage: A Trans-Atlantic Judicial Dialogue*, 12 TUL. J. L. & SEXUALITY 87, 111 (2003). Judge Berrigan discusses the influence that changing societal norms concerning the definitions of "marriage" and "sex" had on the *Goodwin* and *I* decisions, and assesses the potential effect those decisions could have on American courts. See *id.*; see also Rhona K.M. Smith, *International Decisions*, 97 AM. J. INT'L L. 659, 663 (2003) (considering the *Goodwin* and *I* decisions as a reflection of "the dynamism of human rights").

The concept of fundamental human rights suggests that such rights should never be violated because they arise from the idea that a person is human and therefore inherently entitled to certain protections. An international human rights framework assumes universality, both in relation to geography and culture, and in relation to the different aspects of societal life. As the noted case recognizes, societal acceptance of a fundamental human right infers that a human right extends to all spheres of life, including an individual's status within the employment context.⁷⁹ It is artificial to hold that a transsexual's human right to marry does not have to be recognized by an employer for the purposes of determining employee benefits because human rights apply in all situations in which the dignity, respect, and freedom of the individual is threatened.⁸⁰

Judge Colomer's view of the role of the Court as protector of rights is consistent with human rights law developed in the European Court of Human Rights.⁸¹ The language of human rights includes both a positive and negative obligation on the part of the state to protect human rights.⁸² Respect for human rights not only requires the state to refrain from violating or interfering with a person's human dignity and freedom, but also obligates a state to *respect* an individual's human rights.⁸³ Respect often requires that a state must promote policies and laws that are consistent with the exercise of human freedom, dignity, and equality while at the same time prohibit policies that interfere with these fundamental rights.⁸⁴ Laws must be read in light of the current societal notions of social justice, as Judge Colomer acknowledged when he discussed the need for European Union Law to be consistent with the evolving standards of society and social policy concerning transsexuals.⁸⁵

Moreover, because human rights jurisprudence is in a constant state of development as it responds to changing societal norms and increased tolerance, human rights decisions are often the harbinger of the changing status of oppressed individuals both internationally and within the different sectors of society. The hard won right to privacy and right to marry pursued by transsexuals for so long, for example, was a precursor to the right to equality in employment.⁸⁶ Human rights jurisprudence thus sets the framework upon which other courts can draw upon when

79. *See K.B.*, 1 C.M.L.R. 28 at 951-52, ¶¶ AG 77-79.

80. *See id.*

81. *See Goodwin v. United Kingdom*, 35 Eur. H.R. Rep. 18, 447 (2002).

82. *See id.*

83. *See id.*

84. *See id.*

85. *K.B.*, 1 C.M.L.R. 28 at 952, ¶ AG 80.

86. *See id.* at 951-52, ¶¶ AG 76-80.

attempting to interpret legislation in a way that is consistent with public policy.

The use of human rights jurisprudence in the recent United States Supreme Court case of *Lawrence v. Texas*, for example, demonstrates the universality and dynamic nature of human rights.⁸⁷ While the Court in the noted case used the concepts of human dignity and freedom to advance the rights of transsexuals, the United States Supreme Court relied upon the concept of liberty to secure the rights of individuals to make choices about their sex life without interference from the state.⁸⁸ In establishing the right to liberty in choosing one's sexual lifestyle, the Court drew upon European Human Rights Court cases in support of the proposition that the right "has been accepted as an integral part of human freedom in many other countries."⁸⁹ Human rights jurisprudence also gave the Court the flexibility to adapt to changing societal norms.⁹⁰ The Court utilized the decisions of the European Court of Human Rights and current policies of European member states as well as the changing laws and jurisprudence in the United States to "show an emerging awareness that liberty gives substantial protection" to the private sexual lives of adults.⁹¹ The incorporation of human rights doctrine in the decision in *Lawrence* is compelling evidence that a human rights approach is a promising strategy in efforts to protect and expand the rights of sexual minorities.⁹²

Though promising, it is important to note that a human rights strategy does pose some concerns. Paradoxically, while the potential exists for human rights to liberate sexual minorities, there is also a danger that a focus on human rights could exclude certain groups of people.⁹³ For example, most human rights cases are argued on behalf of an identifiable class of people, and while the members of the particular class may benefit from legal victories, other sexual minorities may not.⁹⁴

87. 123 S. Ct. 2472 (2003) (holding unconstitutional a Texas state law that prohibited two persons of the same sex from engaging in sexual conduct).

88. *See id.* at 2475, 2478.

89. *Id.* at 2483.

90. *See id.* at 2480-81.

91. *Id.*

92. While the decision in *Lawrence* dealt with a negative right to be free from interference by the state, it is possible that *Lawrence* will open the door to establishing a positive right of the state to legally recognize the decisions and choices of sexual minorities. The recent decision in Massachusetts holding a statute prohibiting same sex couples from marrying unconstitutional according to the state's constitution suggests that this might be the case. *See Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 969-70 (Mass. 2003).

93. *See Miller, supra* note 77, at 290-93.

94. *See id.* at 290-91. This danger is demonstrated in the noted case by Judge Colomer's insistence that the right of transsexuals to marry is a different issue than the right of homosexuals

Human rights advocates have the difficult task of using human rights principles to promote the right of diverse groups and individuals to exercise their sexuality and to protect individuals exercising this right from discrimination.⁹⁵ However, the legal victories of transsexuals in Europe and the recent United States Supreme Court case in *Lawrence* indicate that this daunting task is possible and suggest that human rights principles are potentially a powerful tool that sexual minorities can use to gain legal protection and recognition.

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to do so. See Case C-117/01, *K.B. v. The Nat'l Health Serv. Pensions Agency & the Sec'y of State for Health* [2004] 1 C.M.L.R. 28, 950, ¶AG 73.

95. See *id.* For a complete evaluation of human rights as it applies to sexual minorities, see ERIC HEINZE, *SEXUAL ORIENTATION: A HUMAN RIGHT* (1995).