

**SEXUAL ORIENTATION AND GENDER IDENTITY DISCRIMINATION:
THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS
AND THE EUROPEAN COURT OF JUSTICE**

**Summary prepared for ILGA-Europe to submit to
Mr. Thomas Hammarberg, Commissioner for Human Rights, Council of Europe**

Robert Wintemute, Professor of Human Rights Law
School of Law, King's College, University of London, United Kingdom
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I. Steps in eliminating sexual orientation discrimination

- 1787 - Austria was first European country to repeal its death penalty for some forms of consensual same-sex sexual activity; the following countries followed by no later than the indicated dates: France (1791), Belgium and Luxembourg (1792), the Netherlands (1811), Spain (1822), England, Wales, Ireland (1861)

Council of Europe (data for first 15 EU states + Russia) ¹ (year law passed)	no blanket ban on same-sex sexual activity (equal age of consent)	legislation against discrimination in employment or services ²	same-sex couples: second-parent adoption (child of partner)	same-sex couples: joint adoption (child not related to partners)	same-sex couples: register + some rights	same-sex couples: register + equal rights ³	same-sex couples: register + equal rights + same name (legal marriage)
Spain	1822 (1988)	1995	2005	2005	1998-03 ⁴	2005	2005
Belgium	1792 (1985)	2003	2006	2006	1998	2003	2003
Netherlands	1811 (1971)	1991	2000	2000 ⁵	1997	1997	2000
Sweden	1944 (1978)	1987	2002	2002	1994	1994	bill expected
United Kingdom	1967, 1980, 1982 (2000)	2003	2002 ⁶	2002	2004	2004	-----
Denmark	1930 (1976)	1987	1999	-----	1989	1989	-----
Finland	1971 (1998)	1995	-----	-----	2001	2001	-----
Germany	1969 (1994)	2003	2004	-----	2001	-----	-----
France	1791 (1982)	1985	-----	-----	1999	-----	-----
Luxembourg	1792 (1992)	1997	-----	-----	2004	-----	-----
Portugal	1945 (___?)	2003	-----	-----	2001 ⁷	-----	-----
Ireland	1993 (___?)	1993	-----	-----	-----	-----	-----
Italy	1889 (1889)	2003	-----	-----	-----	-----	-----
Austria	1971 (2002)	2003	-----	-----	-----	-----	-----
Greece	1950 (___?)	2003	-----	-----	-----	-----	-----
Russia	1993 (1997)	-----	-----	-----	-----	-----	-----

¹ For data on more countries analysed by Dr. Kees Waaldijk, Universiteit Leiden, Netherlands, see <http://athena.leidenuniv.nl/rechten/meijers/index.php3?m=10&c=128>.

² National legislation or, for the public sector, Directive 2000/78/EC (in force 2 Dec. 2003).

³ Perhaps excluding certain parental rights (adoption, medically assisted procreation).

⁴ Laws in the *comunidades autónomas* (regions).

⁵ The Dutch Government plans to remove the exception for intercountry adoption in 2007.

⁶ Adoption and Children Act 2002 (second-parent and joint adoption); England and Wales only; in force on 30 Dec. 2005; similar reforms proposed for Scotland and Northern Ireland.

⁷ Recognition of de facto cohabitation; there is no register yet.

II. "Basic Rights" (rights to be free from violence and to campaign for legal reforms) under the European Convention on Human Rights

- by "Basic Rights", I mean "general human rights" of concern to every person (including heterosexual and non-transgender persons) that are well-established and not legally controversial
- in particular, "Basic Rights" include the right to be free from violence by state actors (and to state protection against violence by private actors), and the right to campaign for legal reforms; under each Article below, there is a list of clear or potential violations
- all cases cited in Part II. are judgments of the European Court of Human Rights,⁸ unless otherwise indicated

Article 2 – Right to life; Article 3 – Prohibition of torture, inhuman or degrading treatment or punishment; Protocols No. 6 and No. 13 on abolition of death penalty

- deportation of asylum-seeker to a country (anywhere in the world) where they might be killed or physically abused, by state officials or private individuals (*Soering v. U.K.*, 1989, *Chahal v. U.K.*, 1996); the Court could extend this principle to deportation to face the death penalty using Protocols No. 6 and No. 13; but see *F. (Fashkami) v. U.K.* (22 June 2004), Application No. 17341/03 (Court admissibility decision) (U.K. permitted to deport gay man to Iran)

Articles 10 and 11 – Freedom of expression, assembly and association

- state interference (or failure by the state to protect against private interference) with lesbian, gay, bisexual and transgender (LGBT) books, magazines, newspapers, films, videos, meetings, marches, parades and demonstrations, or the establishment and operation of LGBT associations, should normally violate Articles 10 and 11

Scherer v. Switzerland (No. 17116/90) (14 Jan. 1993) (report of the former European Commission of Human Rights) (applicant's conviction of publishing obscene material for showing a video in a gay sex shop violated Article 10); (30 March 1994) (Court judgment) (struck out of the Court's list because the applicant had died)

Plattform "Ärzte für das Leben" v. Austria (21 June 1988) (police have a "positive obligation" to protect a demonstration against counter-demonstrators who try to disrupt it)

⁸ All judgments and admissibility decisions of the European Court of Human Rights are available at <http://www.echr.coe.int> (HUDOC), as are many reports and admissibility decisions of the former European Commission of Human Rights (which ceased to take new cases on 1 Nov. 1998). Type the applicant's name after "Case Title", or type in the application number, and tick "Reports" or "Decisions" on the left if you are looking for one of these rather than one of the Court's "Judgments" (it is safer to tick both English and French; some documents are published only in one language).

Stankov and the United Macedonian Organisation Ilinden v. Bulgaria (2 Oct. 2001)

84. ... The definitions of those exceptions [in Art. 11(2)] are necessarily restrictive and must be interpreted narrowly ...

86. ... Freedom of assembly as enshrined in Article 11 ... protects a demonstration that may annoy or give offence to persons opposed to the ideas or claims that it is seeking to promote ...

97. ... Freedom of assembly and the right to express one's views through it are among the paramount values of a democratic society. The essence of democracy is its capacity to resolve problems through open debate. Sweeping measures of a preventive nature to suppress freedom of assembly and expression other than in cases of incitement to violence or rejection of democratic principles – however shocking and unacceptable certain views or words used may appear to the authorities, and however illegitimate the demands made may be – do a disservice to democracy and often even endanger it. ... [the Bulgarian government feared separatism]

107. ... [I]f every probability of tension and heated exchange between opposing groups during a demonstration were to warrant its prohibition, society would be faced with being deprived of the opportunity of hearing differing views on any question which offends the sensitivity of the majority opinion. ... The national authorities must display particular vigilance to ensure that national public opinion is not protected at the expense of the assertion of minority views, no matter how unpopular they may be.

United Macedonian Organisation Ilinden and Ivanov v. Bulgaria (20 Oct. 2005)
(facts similar to those of Central and Eastern European pride marches)

115. ... [T]he authorities appeared somewhat reluctant to protect the members and followers of Ilinden from a group of counter-demonstrators. As a result, some of the participants in Ilinden's rally were subjected to physical violence from their opponents (see [para. 62]). ... [T]he Court recalls that genuine, effective freedom of peaceful assembly cannot be reduced to a mere duty on the part of the State not to interfere; it is the duty of [the] State[] to take reasonable and appropriate measures to enable lawful demonstrations to proceed peacefully (see *Plattform "Ärzte für das Leben"* ...). The authorities were therefore bound to take adequate measures to prevent violent acts directed against the participants in Ilinden's rally, or at least limit their extent. ...

Bączkowski v. Poland (3 May 2007) (violation of Article 11 and Article 14 combined with Article 11) (refusal to grant permit for LGBT Pride March in Warsaw in June 2005)

III. "Individual Rights" (ie, equal rights for LGBT individuals) under the European Convention on Human Rights

- by "Individual Rights", I mean "LGBT human rights" (rights of concern mainly to LGBT individuals) that are mostly well-established in the case law of the European Court of Human Rights, because they are about "equal rights for LGBT individuals", as opposed to "equal rights for same-sex couples"

A. Criminal law

1. Total bans on same-sex sexual activity violate Article 8 (private life)

- *Dudgeon v. United Kingdom* (22 Oct. 1981) (Court judgment)
- *Norris v. Ireland* (26 Oct. 1988) (Court judgment)
- *Modinos v. Cyprus* (22 April 1993) (Court judgment)

2. Ages of consent to male-female, male-male and female-female sexual activity must be equal under articles 8 (private life) and 14 (non-discrimination)

- *Sutherland v. U.K.* (1 July 1997) (Commission report)
- *L. and V. v. Austria, S.L. v. Austria* (9 January 2003) (Court judgments); see *S.L.* para. 37:

“the Court reiterates that sexual orientation is a concept covered by Article 14 ... Just like differences [in treatment] based on sex, ... differences [in treatment] based on sexual orientation require particularly serious reasons by way of justification ...”

3. Non-sado-masochistic group sexual activity in private cannot be prohibited under Article 8 (private life)

- *A.D.T. v. U.K.* (31 July 2000) (Court judgment) (non-sado-masochistic)
- *Laskey v. U.K.* (19 Feb. 1997) (Court judgment) (sado-masochistic can be prohibited if more than minor physical injury results); or is the test now consent? see *K.A. v. Belgium* (17 Feb. 2005) (woman withdrew her consent)

4. Other discrimination against (private, non-commercial) same-sex sexual activity by the criminal law

- probably violates Article 8 (private life), on its own or with Article 14 (non-discrimination)

B. Legal recognition of gender reassignment

- *B. v. France* (25 March 1992) (Court judgment) (violation of Article 8, private life) (France required to change legal sex on birth certificate)
- *Christine Goodwin v. U.K., I. v. U.K.* (11 July 2002) (Court judgments) (violation of Article 8, private life; see IV.A below for Article 12) (U.K. required to change legal sex on birth certificate)
- *Grant v. U.K.* (23 May 2006) (Court judgment) (violation of Article 8, private life) (U.K. required to grant pension to post-operative transsexual woman at same age as other women)
- *L. v. Lithuania* (11 Sept. 2007) (Court judgment) (violation of Article 8, private life) (absence of legislation, no compensation required if legislation passed within 3 months of judgment)

C. Insurance coverage for medical expenses related to gender reassignment

- *van Küick v. Germany* (12 June 2003) (Court judgment) (violation of Article 8, private life) (where insurance plan covers "medically necessary" treatment, gender reassignment must be included)

D. Employment

- *Smith & Grady v. U.K., Lustig-Prean & Beckett v. U.K.* (27 Sept. 1999, violation, 25 July 2000, compensation) (Court judgments) (violation of Article 8, private life) (dismissal from armed forces); see *Grady*, para. 97:

“To the extent that they represent a predisposed bias on the part of a heterosexual majority against a homosexual minority, these negative attitudes [of heterosexual members of the armed forces] cannot, of themselves, be considered by the Court to amount to sufficient justification for the interferences with the [lesbian and gay members’] rights ... any more than similar negative attitudes towards those of a different race, origin or colour.”

E. Other discrimination by a public authority against LGBT individuals

- probably violates Article 8 (private life), on its own or with Article 14 (non-discrimination) (but see V. below)

- applies to custody of an LGBT individual's genetically-related children after a divorce: *Mouta v. Portugal* (21 Dec. 1999) (Court judgment) (violation of Articles 8, family life, with Article 14) (sexual orientation, and probably gender identity, cannot be cited as negative factors in deciding which parent should have custody of a child after a different-sex marriage ends in divorce); see para. 36:

“the [Lisbon] Court of Appeal made a distinction based on considerations regarding the applicant’s sexual orientation, a distinction which is not acceptable under the Convention [like distinctions based on religion] (see, *mutatis mutandis*, ... *Hoffmann* ... [Jehovah’s Witness mother] ...).”

- applies to adoption of children by unmarried individuals: *E.B. v. France* (22 January 2008) (Court judgment) (violation of Article 14 combined with Article 8, private or family life, by 10 votes to 7 on the facts, 14 to 3 on the principle); see para. 96:

"the domestic authorities made a distinction based on considerations regarding [the applicant's] sexual orientation, a distinction which is not acceptable under the Convention (see ... *Mouta*, ... para. 36)."

- implicitly overrules *Fretté v. France* (26 Feb. 2002) (Court judgment) (no violation of Article 14 combined with Article 8, by 4 votes to 3)

- the same principle should apply to access to donor insemination and other forms of medically assisted procreation, when they are made available to unmarried heterosexual individuals

F. Discrimination by private parties against LGBT individuals

- can argue that every member state has a positive obligation under Articles 8 (private life or family life) and 14 (non-discrimination) to pass legislation prohibiting sexual orientation discrimination in the private sector; argument accepted by the Supreme Court of Canada in *Vriend v. Alberta*, [1998] 1 Supreme Court Reports 493, <http://scc.lexum.umontreal.ca/en/index.html> (but see V. below)

IV. "Couple Rights" (ie, equal rights for same-sex couples) under the European Convention on Human Rights

- by "Couple Rights", I mean "LGBT human rights" (rights of concern mainly to LGBT persons) that have so far been recognised only to a limited extent by the case law of the European Court of Human Rights, because they are about "equal rights for same-sex couples", rather than "equal rights for LGBT individuals"

A. Right of a transsexual person to contract a different-sex legal marriage

- *Sheffield & Horsham v. UK* (30 July 1998) (Court judgment), para. 66 (no violation of Article 12, right to marry, by 18 votes to 2: "the right to marry guaranteed by Article 12 refers to the traditional marriage between persons of opposite biological sex")

- *Sheffield* overruled by *Christine Goodwin v. U.K., I. v. U.K.* (11 July 2002) (Court judgments) (violation of Article 12 by 17 votes to 0) (U.K. required to permit transsexual persons to marry a person of the sex opposite to their reassigned sex)

B. Rights of transsexual parents

- *X, Y & Z v. UK* (22 April 1997) (Court judgment), para. 52 ("Article 8 cannot ... be taken to imply an obligation for the respondent State formally to recognise as the father of a child a person who is not the biological father")

- for practical purposes, overruled in the U.K. by *Christine Goodwin* and *I.*, because recognition of transsexual men as legal fathers, where their non-transsexual female partners have undergone donor insemination, will follow from recognition of transsexual men as legal men

C. Discrimination against unmarried same-sex partners (compared with unmarried different-sex partners)

- *Karner v. Austria* (24 July 2003) (Court judgment) (violation of Article 8, respect for home, together with Article 14) (only unmarried different-sex and not same-sex partners could succeed to a tenancy after the death of the official tenant)

- *Karner* clearly overrules the following six admissibility decisions of the former European Commission of Human Rights (on which the European Court of Justice relied in *Grant v. South-West Trains*, Case C-249/96, [1998] E.C.R. I-621):

X & Y v. UK (No. 9369/81) (3 May 1983), 32 Decisions and Reports (D.R.) 220, 5 European Human Rights Reports (E.H.R.R.) 601 (immigration claim by same-sex partner)

W.J. & D.P. v. UK (No. 12513/86) (11 Sept. 1986) (immigration)

C. & L.M. v. UK (No. 14753/89) (9 Oct. 1989) (immigration)

B. v. UK (No. 16106/90) (10 Feb. 1990) (immigration)

S. v. UK (No. 11716/85) (14 May 1986) (same issue as *Karner*)

Röösli v. Germany (No. 28318/95) (15 May 1996) (same issue as *Karner*)

D. Discrimination against unmarried same-sex partners compared with married different-sex partners (issues other than adoption)

- the Court and Commission have not been sympathetic to claims by unmarried different-sex partners who chose not to marry:

Shackell v. U.K. (Application No. 45851/99) (27 April 2000) (Court admissibility decision – inadmissible)

Saucedo Gómez v. Spain (No. 37784/97) (26 Jan. 1999) (Court admissibility decision – inadmissible)

Quintana Zapata v. Spain (No. 34615/97) (4 March 1998) (Commission admissibility decision – inadmissible)

- however, same-sex partners do not have this choice in most countries; a pending case makes the argument that they should be exempted from having to marry to qualify for a particular right or benefit:

M.W. v. U.K. (No. 11313/02) (not yet declared admissible or inadmissible by the Court) (denial to same-sex partner of bereavement benefits provided only to legal spouse of deceased)

E. Discrimination between registered same-sex partners and married different-sex partners (issues other than adoption)

- no Court decisions yet; but see Case C-267/06, *Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen* (1 April 2008) (European Court of Justice) (survivor's pension for deceased employees' different-sex spouses must also be provided to their same-sex registered partners "if registration places persons of the same sex in a situation comparable to that of spouses so far as concerns that survivor's benefit")

- *Maruko* implicitly overrules the reasoning in Joined Cases C-122/99 P, C-125/99 P, *D. & Sweden v. Council* (31 May 2001) (European Court of Justice) (Swedish registered partnership did not have to be treated as equivalent to a marriage for the purpose of an employment benefit provided by an EU institution)

F. Discrimination between married same-sex partners and married different-sex partners (issues other than adoption)

- no Court decisions yet, but principle of *Karner* should apply, where a member state has voluntarily decided to open up marriage to same-sex partners

G. Equal access to legal marriage for same-sex partners

- language in *Christine Goodwin* and *I.* (see IV.A. above) suggests that the Court could eventually (when more than 3 of 47 Council of Europe Member States have granted equal access to legal marriage to same-sex partners) change its interpretation of Article 12 and find that Article 12 guarantees access to marriage regardless of the sexes of the partners; see para. 98 of *Goodwin*:

“Reviewing the situation in 2002, the Court observes that Article 12 secures the fundamental right of a man and woman [1] to marry and [2] to found a family. The second aspect is not however a condition of the first and the inability of any couple to conceive or parent a child cannot be regarded as *per se* removing their right to marry]”

- however, the Court was not ready to do so in November 2006, in the context of two legally male-female but factually female-female couples (the female partner who was born male had undergone gender reassignment) who wished to have the gender reassignment legally recognised remain married, rather than divorce and register a same-sex civil partnership:

Wena & Anita Parry v. United Kingdom (No. 42971/05) (28 Nov. 2006) (Court admissibility decision - inadmissible) (couple from England).

R. and F. v. United Kingdom (No. 35748/05) (28 Nov. 2006) (Court admissibility decision - inadmissible) (couple from Scotland)

H. Access to an alternative registration system

Schalk & Kopf v. Austria (No. 30141/04) (not yet declared admissible or inadmissible by the Court) (male-male couple denied access to legal marriage; must Austria create some alternative registration system for same-sex couples?)

I. Adoption by same-sex partners of each other's genetic children (second-parent adoption) or joint parental authority or custody where one partner is a genetic parent

- the principle of *Karner* should apply if unmarried different-sex partners already enjoy this right (as in Portugal)

- if so, this would overrule *Kerkhoven v. Netherlands* (No. 15666/89) (19 May 1992) (Commission admissibility decision - inadmissible) (no parental authority for lesbian mother's female partner over their child by donor insemination where unmarried male partner would have qualified in the same situation)

- if only married different-sex couples enjoy this right, depends on IV.D

J. Joint adoption by same-sex partners of an unrelated child

- the principle of *Karner* should apply if unmarried different-sex couples already enjoy this right (as in Portugal)

- if only married different-sex couples enjoy this right, depends on IV.D

K. Access to donor insemination for female-female couples

- the principle of *Karner* should apply if unmarried different-sex couples already enjoy this right (as in France)
- if only married different-sex couples enjoy this right, depends on IV.D

V. Cases that might fall outside the Convention (Protocol No. 12 is needed)

- if the facts of the case do not fall "within the ambit" of another Convention right, Article 14 (prohibition of discrimination) cannot be invoked
- I would argue that "private life" in Article 8 is affected in every case of sexual orientation or gender identity discrimination, and that Article 14 can always be invoked (as Article 9 can be invoked in every case of discrimination based on religion, see *Thlimmenos v. Greece*, 6 April 2000, Court judgment) but the Court has not clearly accepted this argument to date:

Robert Wintemute, "'Within the Ambit': How Big Is the 'Gap' in Article 14 European Conv. on Human Rights?", [2004] *European Human Rights Law Review* 366

Robert Wintemute, "Filling the Article 14 'Gap': Government Ratification and Judicial Control of Protocol No. 12 ECHR", [2004] *European Human Rights Law Review* 484

- as a result, there could be some cases where the Court will hold that Article 14 does not apply and that Protocol No. 12 is needed
- *F. v. Switzerland* (No. 11680/85) (10 March 1988) (Commission admissibility decision – inadmissible) (ban on same-sex but not different-sex prostitution could not be challenged under Article 14 because prostitution does not fall within "private life" in Article 8)
- *Fretté v. France* (see III.E above) - 3 of 7 judges thought Article 14 did not apply
- this is why every Council of Europe Member State should sign and ratify Protocol No. 12 (general right to non-discrimination that does not require that the facts of the case fall "within the ambit" of another Convention right)

(Optional) **Protocol No. 12** to the Convention (opened for signature 4 Nov. 2000, in force 1 April 2005, only in the 17 Member States that have ratified as of 11 June 2008; 20 Member States have signed but not ratified; 10 Member States have yet to sign; text and Explanatory Report at <http://conventions.coe.int>, Search, Treaties, CETS No. 177):

Article 1 – General Prohibition of Discrimination

(1) The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

(2) No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1." (emphasis added)

**European Convention on Human Rights, Protocol No. 12,
Signatures and Ratifications as of 11 June 2008**

Ratified (17 Member States)	Signed (20 Member States)	No Action (10 Member States)
Albania Andorra Armenia Bosnia & Herzegovina Croatia Cyprus Finland Georgia Luxembourg Macedonia Montenegro Netherlands Romania San Marino Serbia Spain Ukraine <u>(EU: only 5 of 27 member states)</u>	Austria Azerbaijan Belgium Czech Republic Estonia Germany Greece Hungary Iceland Ireland Italy Latvia Liechtenstein Moldova Norway Portugal Russia Slovakia Slovenia Turkey	Bulgaria Denmark France Lithuania Malta Monaco Poland Sweden Switzerland United Kingdom

VI. Texts of the Parliamentary Assembly of the Council of Europe (PACE) and the Committee of Ministers (CM)

- PACE, Opinion No. 216 (2000), <http://assembly.coe.int/Documents/AdoptedText/ta00/EOPI216.htm> (English), <http://assembly.coe.int/Documents/AdoptedText/ta00/FOPI216.htm> (français) (26 Jan. 2000) (“the ground ‘sexual orientation’ should be added”), based on the Report of the Committee on Legal Affairs and Human Rights, Document 8614, <http://assembly.coe.int/Documents/WorkingDocs/doc00/EDOC8614.HTM> (English) <http://assembly.coe.int/Documents/WorkingDocs/doc00/FDOC8614.HTM> (français) (14 Jan. 2000)

- PACE, Recommendation 1470 (2000) on the “Situation of gays and lesbians and their partners in respect of asylum and immigration in the member states of the Council of Europe”, <http://assembly.coe.int/Documents/AdoptedText/ta00/EREC1470.htm> (English) <http://assembly.coe.int/Documents/AdoptedText/ta00/FREC1470.htm> (français) (30 June 2000)

- PACE, Recommendation 1474 (2000) on the “Situation of lesbians and gays in Council of Europe member states”,
<http://assembly.coe.int/Documents/AdoptedText/ta00/EREC1474.htm> (English)
<http://assembly.coe.int/Documents/AdoptedText/ta00/FREC1474.htm> (français)
 (26 Sept. 2000)
- CM, Reply to PACE Recommendation 1474 (Decision, Item 4.3, 765th meeting, 19 Sept. 2001, <http://cm.coe.int/dec/2001/765/43.htm>, English)

VII. Case law of the European Court of Justice (Luxembourg)

<http://europa.eu.int/cj/index.htm> (interpreting European Community law), all judgments (except *P.*) at <http://europa.eu.int/jurisp/cgi-bin/form.pl?lang=en> (type in case no.)

1. Gender identity

- Case C-13/94, *P. v. S. and Cornwall County Council* (30 April 1996), [1996] European Court Reports (ECR) I-2143, http://europa.eu.int/eur-lex/en/search/search_case.html (Year = 1994) (dismissal of transsexual employee was sex discrimination contrary to Council Directive 76/207/EEC)
- Case C-117/01, *K.B. v. National Health Service Pensions Agency* (7 Jan. 2004), [2004] ECR I-0000 (ineligibility of transsexual male partner of non-transsexual female employee for survivor's pension, because they are currently unable to marry, was in principle sex discrimination contrary to Article 141 of the EC Treaty)
- Case C-423/04, *Richards v. Secretary of State for Work and Pensions* (27 April 2006) (Council Directive 79/7/EEC requires that a post-operative transsexual woman be granted a retirement pension at 60, like other women, not 65, as in the case of men)

2. Sexual orientation

- Case C-249/96, *Grant v. South-West Trains* (17 Feb. 1998), [1998] ECR I-621 (no sex discrimination contrary to Article 141 EC where employment benefit denied to female employee's unmarried female partner but male employee's unmarried female partner qualified)
- Joined Cases C-122/99 P, C-125/99 P [“P” means *pourvoi* or appeal to ECJ from CFI but is not part of case no.], *D. & Sweden v. Council* (31 May 2001), [2001] ECR I-4319 (failure to treat a Swedish registered partnership as equivalent to a civil marriage for the purpose of an employment benefit was neither sex nor sexual orientation discrimination)

- Case C-267/06, *Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen* (1 April 2008) (Council Directive 2000/78/EC banning sexual orientation discrimination in relation to pay "preclude[s] legislation ... under which, after the death of his life partner, the surviving partner does not receive a survivor's benefit equivalent to that granted to a surviving spouse, even though [if], under national law, life partnership places persons of the same sex in a situation comparable to that of spouses so far as concerns that survivor's benefit", despite Recital 22: "This Directive is without prejudice to national laws on marital status and the benefits dependent thereon.") (issue similar to that in *M.W. v. UK* and *Schalk & Kopf*, IV.D. and IV.H. above)

3. Disparity between the two European Courts' case law

- it can be argued that, to date, the European Court of Justice (ECJ) has done nothing for LGBT individuals, with regard to a particular issue, unless the European Court of Human Rights (ECtHR) had already provided some protection

- *P.* (ECJ, 1996) was arguably made possible by *B. v France* (ECtHR, 1992), which was cited by the Advocate General in *P.*
- *K.B.* (ECJ, 2004) and *Richards* (ECJ, 2006) were made possible by *Christine Goodwin* (ECtHR, 2002)
- *Grant v. South-West Trains* (ECJ, 1998) and *D.* (ECJ, 2001) failed because there was not yet any positive case law from the ECtHR on couples that are factually and legally same-sex (ie, where neither partner has undergone gender reassignment)
- *Karner v. Austria* (ECtHR, 2003) makes it almost certain that the ECJ will interpret Council Directive 2000/78/EC as requiring (unlike *Grant*) that employment benefits for unmarried partners be the same whether the partners are different-sex or same-sex (this form of equal treatment should also apply to different-sex and same-sex registered partners and different-sex and same-sex married partners)
- the reasoning in *Maruko* (ECJ, 2008) is extremely narrow because the ECtHR has yet to rule on differences in treatment between registered or unregistered same-sex partners and married different-sex partners (see the pending cases of *M.W. v. UK* and *Schalk & Kopf*, IV.D. and IV.H. above), and the ECJ seems to be afraid of trespassing on national competence over family law

VIII. Further reading

Robert Wintemute, *Sexual Orientation and Human Rights: The United States Constitution, the European Convention, and the Canadian Charter* (Oxford University Press, 1997)

R.W., "Recognising New Kinds of Direct Sex Discrimination: Transsexualism, Sexual Orientation and Dress Codes" (1997) 60 *Modern Law Review* 334, <http://www.blackwell-synergy.com/doi/abs/10.1111/1468-2230.00084> (Full Text PDF)

R.W., "Strasbourg to the Rescue? Same-Sex Partners and Parents Under the European Convention" in Robert Wintemute (ed.) & Mads Andenæs (hon. co-ed.), *Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law* (Oxford, Hart Publishing, 2001)

R.W., "Religion vs. Sexual Orientation: A Clash of Human Rights?", (2002) 1 *Journal of Law and Equality* (University of Toronto) 125, <http://www.jle.ca/files/v1n2/JLEvln2art1.pdf>

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R.W., "Sexual Orientation and the Charter: The Achievement of Formal Legal Equality (1985-2005) and Its Limits", (2004) 49 *McGill Law Journal* 1143, <http://www.journal.law.mcgill.ca/abs/vol49/4winte.html>

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