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Sexual Orientation & Gender Identity

The Case Law of the European Court of Human Rights

‘LET’S GO TO COURT!’ STRATEGIC LITIGATION
OF LGBT RIGHTS IN HUNGARY

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1787 Repeal of Death Penalty for same-sex contacts in the Habsburg Empire (incl. Hungary) as the first state in the world
(substituted by up to 3 months forced labour)

1789 Decriminalization of same-sex contacts in France as the first state in the world

I. European Court of Human Rights:

- Very essence of the convention is respect for human dignity and freedom
- Notion of personal autonomy is an important principle underlying the interpretation of the right to respect for private life
- Sexuality and sexual life are at the core of the fundamental right to protection of private life (Art. 8). State intervention interferes with this right; and such interferences are justified only if demonstrably necessary to avert damage from others (*pressing social need, proportionality*)
- Art. 8 protects self-determination as such

- Attitudes and moral convictions of a majority cannot justify interferences into the right to private life (or into other human rights)
- Incompatible with the underlying values of the Convention if the exercise of Convention rights by a minority group were made conditional on its being accepted by the majority

(Dudgeon vs. UK 1981, Norris vs. Ireland 1988, Modinos vs. Cyprus 1993, Laskey, Brown & Jaggard vs. UK 1997, Lustig-Prean & Beckett vs. UK 1999; Smith & Grady vs. UK 1999; A.D.T. vs. UK 2000, Christine Goodwin vs. UK 2002, I. vs. UK 2002, Fretté vs. France 2002, L. & V. v. Austria 2003, S.L. v. Austria 2003, Schüth v. Germany 2010; Obst v. Germany 2010; Alekseyev vs. RUS 2010)

Discrimination on the basis of sexual orientation

- is unacceptable
- is as serious as discrimination on the ground of race, ethnic origin, religion and sex
- differentiation requires *particularly serious (convincing and weighty)* reasons
- margin of appreciation is narrow
- distinctions must be *necessary* (not only suitable) to realise a legitimate aim
- distinctions *solely* on the basis of sexual orientation
-> discrimination

(*Lustig-Prean & Beckett vs. UK* 1999; *Smith & Grady vs. UK* 1999; *Salgueiro da Silva Mouta vs. Portugal* 1999; *L. & V. v. Austria* 2003, *S.L. v. Austria* 2003, *E.B. vs. France* 2008, *Kozak vs. POL* 2010, *Schalk & Kopf vs. A* 2010, *P.B. & J.S. vs. A* 2010, *J.M. vs. UK* 2010, *Alekseyev vs. RUS* 2010; *Kiyutin vs. RUS* 2011)

- not just negative rights to freedom from state intervention

but also

- positive rights to (active) protection of these rights in relation to the state as well as in relation to other individuals
- obligation of the state to act in case of interference with the right to self-determination and to personal development, including the right to establish and maintain relations with other human beings (*Zehnalová & Zehnal vs. CZ 2002*; *Schüth v. Germany 2010*; *Obst v. Germany 2010*)

II. Sexual Orientation

Criminal Law:

(a) Total Bans violate Art. 8 ECHR

- *Dudgeon vs. UK* 1981, *Norris vs. Ireland* 1988,
Modinos vs. Cyprus 1993

same: UN-Human-Rights-Committee, *Toonen vs. Australia* 1994

(b) Bans of (homo)sexual contacts between more than two persons violate Art. 8 ECHR

- *A.D.T. vs. UK* 2000

(c) Higher age of consent violates Art. 8 and 14 ECHR

- *L. & V. vs. Austria* 2003, *S.L. vs. Austria* 2003, *BB vs. UK* 2004;
Woditschka & Wilfling vs. Austria 2004, *F. L. vs. Austria* 2005; *Thomas Wolfmeyer vs. Austria* 2005; *H.G. & G.B. vs. Austria* 2005;
R.H. vs. Austria 2006

(d) Repeal of higher age of consent is not enough: Victims must be rehabilitated and compensated, also if acquitted

- *L. & V. vs. Austria* 2003, *S.L. vs. Austria* 2003, *Woditschka & Wilfling vs. Austria* 2004, *F. L. vs. Austria* 2005; *Thomas Wolfmeyer vs. Austria* 2005; *H.G. & G.B. vs. Austria* 2005; *R.H. vs. Austria* 2006
- *S. L. vs. A 2003*: EUR 5.000,-- compensation (plus costs and expenses) to an adolescent, who (between 14 and 18) was barred from entering into self-determined sexual relations with adult men

(e) Ban of (homosexual) pornography among adults and without unwanted confrontation of others

S. vs. CH 1992 (EComHR)

Employment:

Inquiries into sexual orientation and dismissal on the basis of homosexuality violate Art. 8 ECHR

(also in the armed forces)

- *Lustig-Prean & Beckett vs. UK* 1999, *Smith & Grady vs. UK* 1999, *Perkins and R v UK* 2002; *Beck, Copp and Bazeley v UK* 2002

Right to Assembly:

Ban of Gay-Pride-Parades violates Art. 11 ECHR

- any measures interfering with the freedom of assembly and expression other than in cases of incitement to violence or rejection of democratic principles do a disservice to democracy and often even endanger it
- **however shocking and unacceptable** certain views or words used may appear to the authorities
- conferring *substantive rights* on homosexual persons is **fundamentally different** from recognising their *right to campaign* for such rights
(*Baczowski vs. PL* 2007, *Alekseyev vs. RUS* 2010)

Partnerships:

Disadvantageous treatment of same-sex couples vs. opposite-sex couples requires *particularly serious reasons* and must be *necessary* to achieve a legitimate aim (Art. 14 ECHR)

-*Karner vs. Austria* 2003; *Kozak vs. PL* 2010;

P.B. & J.S. vs. A 2010, *J.M. vs. UK* 2010

-same: UN-Human-Rights-Committee, *Young vs. Australia* 2003; *X. vs. Colombia* 2007

Parenting:

Disadvantageous relating to sexual orientation in decision-making violates Art. 14 ECHR

-*Salgueiro da Silva Mouta vs. Portugal* 1999

Ban on single-adoption violates Art. 14 ECHR

-*E.B. vs. France* 2008

Ban on medically assisted procreation for lesbian couples violates Art. 14

- *Austrian Supreme Court* 2011 (3 Ob 147/10d)

Marriage:

Art. 12 EMRK grants the right to marry a partner of the *same biological sex* (post-operative transsexual with a member of his/her former sex)

- major *social changes* in the institution of marriage since the adoption of the Convention
- dramatic changes brought about by developments in *medicine and science*
- rejected as artificial the argument that post-operative transsexuals had not been deprived of the right to marry because they remained able to marry a person of their former opposite sex

- the applicant *lived as a woman and would only wish to marry a man* but had no possibility of doing so and could therefore claim that the very essence of her right to marry had been infringed
- the inability of any couple to conceive or be a parent to a child cannot be regarded *per se* as removing their right to marry.
- Article 9 of the Charter of Fundamental Rights of the European Union departs, no doubt deliberately, from the wording of Article 12 of the Convention in removing the reference to men and women.

(*Goodwin vs. UK* 2001, *I. vs. UK* 2001)

Schalk & Kopf vs. A (2010)

ECtHR still hesitant to fully apply this line of argument also in marriage cases of (fully) same-sex partners

- cohabiting same-sex couple -> **'family life'** ("just as the relationship of a different-sex couple") (confirmed in *P.B. & J.S. vs A* 2010)
- the **right to marry** enshrined in Art. 12 of the Convention is **applicable to same-sex couples**

But:

- then only 6 out of 47 Convention States had allowed same-sex-marriage
 - > "as matters stand", same-marriage **not (yet)** part of the **very essence** of the right to marry (Art. 12)
 - > member-states may prohibit marriage by same-sex couples (under par. 2 of Art. 12).

4:3 majority

- no violation in introduction of registered partnership for same-sex couples as late as 1 January 2010

Dissenting minority of three judges:

- the failure (prior to 2010) to provide at least a marriage-comparable institute providing formal legal recognition of same-sex partnerships violated Art. 8, 14 ECHR.

III. Gender Identity

- **Right to documents according to gender identity**
(*B. v. France* 1992)
- **Right to comprehensive legal recognition of sex change after gender reassignment surgery**
(*Goodwín v. UK* 2002, *I v. UK* 2002)
- **Right to gender reassignment surgery** (*L. v Lithuania* 2007)
- **Right to (heterosexual) marriage with a person belonging to former sex**
(*Goodwín v. UK* 2002, *I v. UK* 2002)
- **Pension rights according to the new sex** (*Grant v. UK* 2006)

- **Burden of proof for necessity of gender reassignment treatment (i.e. surgery) as a precondition for insurance cover is inproportionate**
(*Van Kück v. Germany* 2003)
- **Waiting period of 2 years as a precondition for insurance cover of gender reassignment treatment (i.e. surgery) is inproportionate**
(*Schlumpf v. CH* 2009)
- **Divorce requirement inadmissible**
(Austrian Constitutional Court (VfGH) 8 June 2006, V 4/06)
- **Surgery requirement inadmissible**
(Austrian Administrative Supreme Court (VwGH) 27.02.2009, 2008/17/0054; VwGH 15.09.2009, 2008/06/0032; VfGH 03.12.2009, B 1973/08; VwGH 17.02.2010, 2009/17/0263)
- **Forced outing by marriage certificates inadmissible**
(Austrian Administrative Supreme Court 29 Nov 2010, 2010/17/0042)

The right to gender identity and personal development is a fundamental aspect of the right to private life

(EGMR: *Van Kück v. Deutschland* 2003
[par. 75], a.o.)

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