

**Helmut Graupner**

# **The ECJ Römer Judgment a first assessment**

**Equality and Justice**  
**LGBTI Rights in the XXI Century**  
International Conference  
Florence, 12-13 May 2011

[www.graupner.at](http://www.graupner.at)[www.graupner.at](http://www.graupner.at)



**I.**

**The Case *Tadao Maruko***

**II.**

**The Reaction of German High Courts**

**III.**

**The Case *Jürgen Römer***

**III. III.**  
**Tadao Maruko gegen**  
**Versorgungsanstalt der deutschen Bühnen (Vddb)**  
**(C-267/06)267/06)**

*Hans Hettinger:* -> costume designer  
-> 45 years member of Vddb  
-> 45 years paid fees to Vddb as his heterosexual colleagues  
-> 13 years of partnership with Mr. Tadao Maruko  
-> 2001 registered their partnership  
-> died 2005

*Vddb:* -> survivors benefits only to married partners  
-> no pension to Tadao Maruko

*Tadao Maruko:* -> legal action  
(BayrVG München M 3 K 05.1595)

*BayrVG*: referral for a preliminary ruling

1. direct discrimination?
2. discrimination justified by recital 22?

**Recital 22:**

“This Directive is without prejudice to national laws on marital status and the benefits dependent thereon.”

*VddB & UK* -> unequal treatment of married couples and registered couples are outside of the scope of the Directive (due to recital 22)



## *Tadao Maruko:*

1. Direct discrimination (as referral to pregnancy is direct discrimination on the ground of sex):
  - > needs not be decided, as in any case
  - > pay is made contingent upon a condition which same-sex couples never ever can fulfil
  - > as in K.B. (2004) (opposite-sex couples with post-operative transgender partner were not allowed to marry):
    - the condition of marriage must be dropped for same-sex couples (as long as marriage is not available)
2. Indirect discrimination:
  - > not only in case of RP equivalent to marriage
  - > as long as marriage is forbidden for same-sex couples:
    - criterion of marriage always is just „apparently neutral“ and puts homosexuals „at a particular disadvantage“ (Art. 2 par. 2 lit. b)

*European Commission &  
Advocate General Dámaso Ruiz-Jarabo Colomer:*

- > no direct discrimination (no referral to sexual orientation)
- > indirect discrimination & no justification visible
- > but only: if RP is marriage-equivalent („substantially the same effects“)
- > Effect: little discrimination (in MS with marriage-equivalent RP) outlawed, but big discrimination (in MS without such RP) not (despite same unequal treatment)

Problem of comparative parameters:  
*Marriage-RP or opposite-sex couples vs. same-sex couples?*

# The Judgment

(Grand Chamber, 01.04.2008)

- *Recital 22:*  
Recital 22 cannot affect the application of the Directive (par. 59f)
- *Direct Discrimination*  
-> if registered partners „in comparable situation“ as married partners (par. 70-73)

Art. 2 par. 1 lit. a Dir 2000/78/EC:

“direct discrimination ...where one person is treated less favourably than another ... in a comparable situation,”

-> Justification only possible under Art. 4 Abs. 1 („genuine and determining occupational requirement“)

## *The „comparable situation“*

(1) formally:

determination is task of the national court (par. 72f)

(2) in substance:

-> „Comparability“, not „Identity“ (par. 69)

-> „so far as concerns that survivor’s benefit“ (par. 73)

-> individual-concrete comparison with the „situation comparable to that of a spouse who is entitled to the survivor’s benefit provided for under the occupational pension scheme managed by the Vddb.“ (par. 73)

-> criteria of the national court (par. 62, 69):

(a) formally constituted for life

(b) union of mutual support and assistance



-> ECJ does not object to these criteria and explicitly says :

**„The combined provisions of Articles 1 and 2 of Directive 2000/78 preclude legislation such as that at issue in the main proceedings ...“**

(emphasis added)

-> Compare to the judgment in *Palacios* (2007):

“The prohibition on any discrimination on grounds of age ... must be interpreted as not precluding national legislation **such as that at issue in the main proceedings**, ..., **wherever** [how criteria which the national court has to apply in determining compatibility with community law]” (emphasis added)

## **II.II.**

# **The Reaction of German High Courts**

(decisions on family allowance for civil servants, §§40 Abs. 1 Nr. 1 BBesG)

**Federal Administrative Court („Bundesverwaltungsgericht“)**  
**(2 C 33.06, 15.11.2007)**

**Federal Constitutional Court („Bundesverfassungsgericht“)**  
**(2 BvR 1830/06 , 06.05.2008)**

No comparability, as

-> RP and marriage are not identical

(differences for instance regarding social benefits for civil servants, in tax legislation and joint adoption)

-> complete or general equalization was neither created nor intended by the legislator

-> irrelevant that civil law maintenance-obligations are identical (in marriage and RP)

# Federal Constitutional Court („Bundesverfassungsgericht“)

(1 BvR 1164/07 , 07.07.09)

- rejects its own (and Federal Administrative Court's) prior case-law (par. 112)
- strict scrutiny for distinctions based on sexual orientation (par. 85, 88)
- “protection of marriage” alone no justification (Art. 100)
- “promotion of the family” not restricted to married partners (par. 103)
- number of children (2.200) in RPs (13.000) not “negligible” (par. 113)
- “serious differences” (between marriage & RP) required (par. 93)
- differences must be related to the social benefit in question and to its aim and purpose (par. 86, 100)



- assessment of differences not upon abstract considerations but upon concrete reality of life (par. 112, 114, 115)
- no differences (par. 102, 111-113):
  - (a) unlimited legally binding union of mutual support and assistance
  - (b) maintenance obligations
  - (c) need for alimony
- survivors benefits are substitutes for alimony (par. 116, 119)

**-> RP entitled to same survivor's pension as married partners**

## **Maruko**

- > VddB withdraw their appeal
- > judgment of VG München final & Tadao Maruko gets survivors pension

## III.III.

# The Case *Jürgen Römer*

## New case *Römer vs. City of Hamburg* (C-147/08):

- > higher retirement pension for employee with married partner than for employee with RP
- > even if married partner has higher income than employee and they have no children
- > even if RP is in need of alimony by the employee and they have to care for children
- > will the ECJ specify or extend the Maruko-judgment?
- > Will it rule on indirect discrimination?

*Advocate General Niilo Jääskinen*  
(Opinion 15. Juli 2010)

- > confirms interpretation of *Maruko* (as outlined above)
- > marriage and family-law: competence of member-states
- > if marriage excludes same-sex couples:  
employment benefits must not be restricted to opposite-sex couples, otherwise

**Direct Discrimination** -> if legal position married couples-reg couples is comparable

**Indirect Discrimination** -> (a) if legal position married couples-reg couples is not comparable, or  
(b) if no registration at all



- > protection of marriage and the family as such no valid justification for discrimination (par. 106-111)
- > neither if such protection is enshrined in a national constitution
- > **Union-law supersedes also national constitutional law**
- > prohibition of discrimination on the basis of sexual orientation is a **general principle of Union law** (par. 129-133)
- > prohibition of discrimination not restricted to periods after entry into force of Dir 2000/78/EC, but it takes full effect before this date
- > equal treatment and compensation can be claimed **back to the beginning of a certain discrimination**

# The Judgment

(Grand Chamber, 10.05.2011)

- > confirms interpretation of *Maruko* (as outlined above)
- > marriage and family-law: competence of member-states
- > if marriage excludes same-sex couples:  
employment benefits must not be restricted to opposite-sex couples, otherwise

**Direct Discrimination** -> if legal position marriage-rp is comparable

## Comparability:

(1) task of the national judge, but:

(2) criteria **must** be:

- > *comparable* (not identical) situations (par. 42)
- > *specific and concrete* (not global and abstract) comparison (par. 42)
- > in the light of the *benefit concerned* (par. 42)
- > focus on **relevant** rights and obligations (according to the *purpose* and the *condition* for the benefit at issue) (par. 43)



-> **NOT (“must not”)**: overall comparison between marriage and registered partnership (par. 42, 43)

*People (couples) are to be compared, not abstract legal institutions!*

- > relevant rights/obligations for partner-supplement to retirement pension:  
*mutual care and support* (par. 46-51)
- > those obligations incumbent both on life partners and on married spouses (par. 48)
- > since creation of registered partnership (par. 48)

- > protection of marriage and the family in a national constitution as such is no valid justification for discrimination, as
- > **Union-law supersedes also national constitutional law (par. 37, 51)**
- > *principle of equal treatment* derives from international instruments and from the constitutional traditions common to the Member States (see Dir 2000/78/EC, recital 3 & 4 “right of all persons to equality before the law and protection against discrimination”) (par. 59, *Mangold* 2005, par. 74, *Kücükdeveci* 2010, par. 20; *Sayn-Wittgenstein* 2011, par. 89)
- > Dir 2000/78/EC: sole purpose of laying down, in that field, a general framework (legal remedies, burden of proof, affirmative action etc., see *Mangold* 2005, par. 76) for combating such discrimination (see Art. 1) (par. 38, 59)
- > prohibition of discrimination on the basis of sexual orientation is a **general principle of Union law** (implicit in par. 59; explicit for age in *Mangold* 2005, par. 75 (“thus”!) & *Kücükdeveci* 2010, par. 21)

- > no need to wait for consistency of national law with European law (par. 64)
- > right to equal treatment can be claimed by an individual and courts have to set aside any conflicting provision of national law (par. 64; Mangold 2005, par. 77)

**But only:**

if the discrimination at issue falls within the scope of Union law

A discrimination falls within the scope of Union law by

(a) **expiry of transposition-period for Dir 2000/78/EC**

(Art. 13 EC, now Art. 19 TFEU, and the general principle alone do not suffice) (par. 61, 62; *Bartsch* 2008, par. 16, 18; *Kücükdeveci* 2010, par. 25)

(b) **voluntary** (partial or general) **implementation** of Directive 2000/78 (before the end of transposition-period) (par. 63; *Bartsch* 2008, par. 17)

(c) **new discriminatory regulations** after entry into force of the Directive:

even before expiry of transposition-period:

States must refrain from any measures seriously compromising the result prescribed by a directive (*Mangold*, par. 67; *Inter-Environnement Wallonie*, par. 45)

(d) taking place in an **area within the scope** of application of Union law (*Mangold* 2005, par. 51, 64, 75, „fixed-term work“); also outside employment (but then no framework like Dir 2000/78/EC)

In *Römer*

-> only (a)

-> Union law entitles Mr. Römer to claim equality (and compensation) (only) back to

**3 Dec 2003**



ECJ in *Römer*

-> silent on **indirect discrimination**

-> issue for future judgments



[www.gruppener.at](http://www.gruppener.at)