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Sexual Orientation

The Case Law of the European Court of Human Rights

The Global Arch of Justice:

Sexual Orientation Law Around the World

Conference convened by Williams Institute &

Int. Lesbian and Gay Law Association (ILGLaw)

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1787 Repeal of Death Penalty for same-sex contacts
in the Austrian Empire 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. State intervention interferes with this right; and such interferences are justified only if demonstrably necessary to avert damage from others (*pressing social need, proportionality*)
- Attitudes and moral convictions of a majority cannot justify interferences into the right to private life (or into other human rights)

(*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)

- 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 reasons

(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)

- 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 personal development and the right to establish and maintain relations with other human beings
(Zehnalová & Zehnal vs. CZ 2002)

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*: 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 army)

- *Lustig-Prean & Beckett vs. UK* 1999, *Smith & Grady vs. UK* 1999

Right to Assembly:

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

- *Byczkowski vs. PL* 2007

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
- 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 of single-adoption violates Art. 14 ECHR

- *E.B. vs. France* 2008

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*)

Pending Cases

- *E.B. vs. Austria I, F.J. vs. Austria II*, refusal of parole based on prior discriminatory age of consent convictions; keeping of police data on prior investigations under discriminatory age of consent (Art. 8, 14 EMRK)
- *E.B. vs. Austria II, A.S. vs. Austria, A.V. vs. Austria, H.G. vs. Austria III, H.G. vs. Austria IV*, registration of discriminatory age of consent convictions in nation-(and EU-)wide registry of criminal convictions
- *Dietz & Suttasom vs. Austria (34062/06)*, social security health benefits, (direct discrimination vis a vis unmarried hts couples) (Art. 8, 14 EMRK & Art. 1 Prot. No. 1)
- *X & et. al. vs. Austria (19010/07)*, step-parent adoption (direct discrimination vis a vis unmarried hts couples) (Art. 8, 14 EMRK) (communicated)
- *M.W. vs. UK (11313/02)*, survivor's pension, (indirect discrimination vis a vis married hts couples) (Art. 8, 14 EMRK) (communicated)
- *Schalk & Kopf vs. Austria (30141/04)*, access to civil marriage (Art. 12 EMRK) or another comparable legal institution (Art. 8, 14 EMRK) (communicated)



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