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Sexual Orientation

The Case Law of the European Court of Human Rights

Keynote-Lecture - Conference

Sexual Citizenship and Human Rights:
What Can the US Learn from the EU and
European Law?

Austin, November 22, 2013

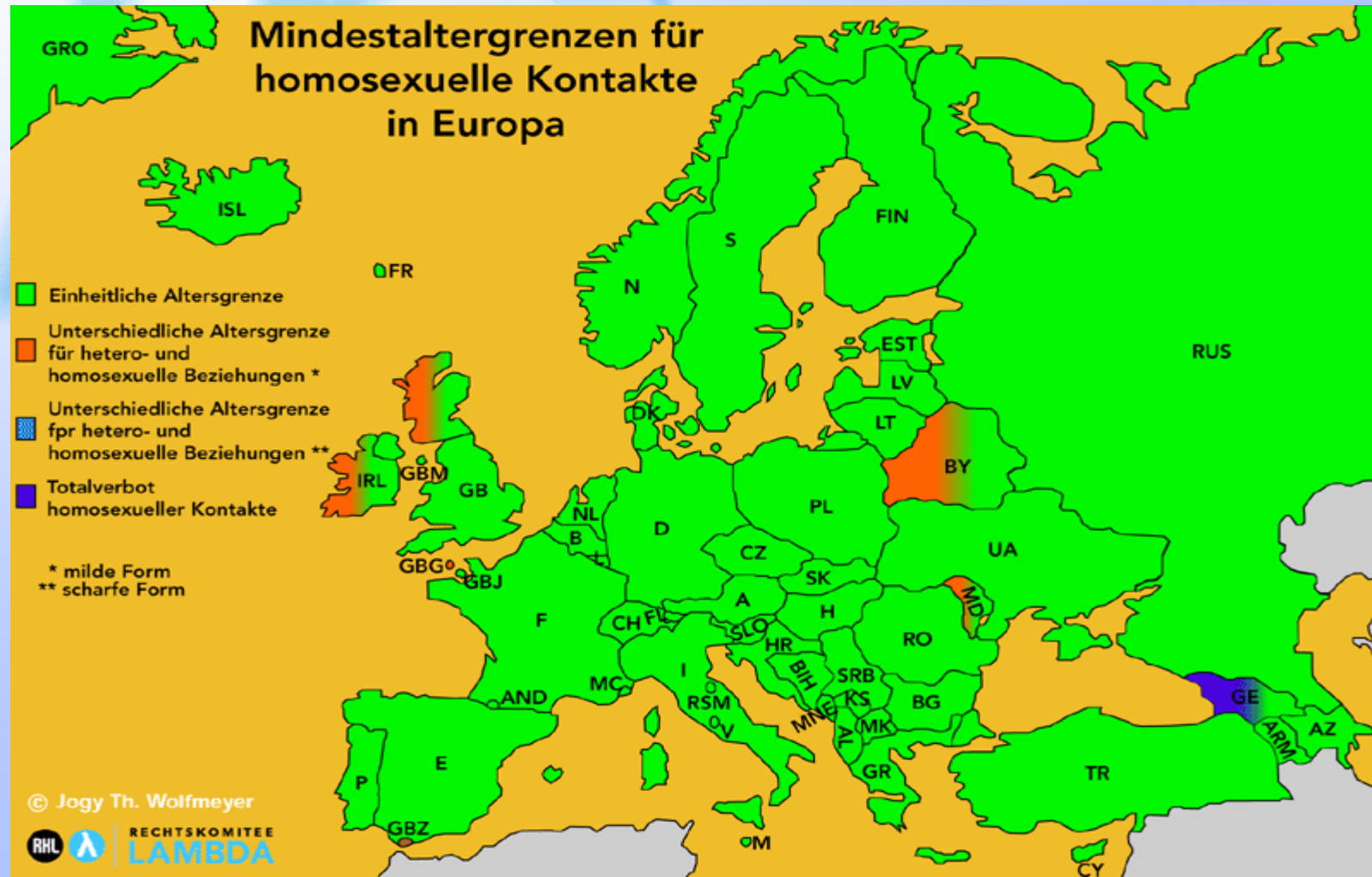
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1787 Repeal of Death Penalty for same-sex contacts
in the Austrian Empire as the first state in the
world

(substituted by up to 3 months forced labour)

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

Europe



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)
- 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, 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, *X. et. al v A* [GC] 2013; *Vallianatos v. GR* [GC] 2013)

- 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)

2000 Inadmissible to base disadvantageous treatment on human rights violations having occurred in the past

- regardless of complaint back those days
- regardless of recognition of the violation back those days

(*Thlimmenos v. Greece* 2000; *E.B. et. al. vs A* 2013)

2002 Member states have actively remove negative effects materializing today as the result of historical attitudes which today are recognized as to be in violation of human rights

(*Wessels-Bergervoet vs. NL* 2002, *E.B. et. al. vs A* 2013).

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) Entries in criminal records have to be deleted
– *E. B. et. Al. vs. Austria* 2013,

(f) Ban on (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 **diservice 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, *GenderDoc v Moldova* 2012)

Incitement to Hatred:

Criminal conviction for incitement to hatred on the basis of sexual orientation does not violate free speech

- *Vejdeland vs. S* 2012

Homophobic Violence:

Right to effective protection from homophobic violence
incl. **special attention in investigations** to the homophobic motive of the crime

- *X vs. TR* 2012

Religiously motivated discrimination:

Freedom of religion does not justify discrimination on the basis of sexual orientation

- *Eweida et al vs. UK* 2013 (solemnization of rp by civil servant; counselling of ss couples by a therapist employed in an institution with anti-discrimination policy)

Partnerships:

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

- *Karner vs. A* 2003; *Kozak vs. PL* 2010; *P.B. & J.S. vs. A* 2010, *J.M. vs. UK* 2010, *X et. al. [GC] vs A* 2013
- 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

Secondparent-adoption for (unmarried) opposite-sex couples but not for (unregistered) same-sex couples violates Art. 14 ECHR

- *X et. al. [GC] vs A* 2013

X et. al. v Austria [GC]

19 Feb 2013 (10 : 7)

- All three (mother, step-mother **and the child**) were directly affected by the difference in treatment and could claim to be victims of the alleged violation (par. 127)
- all three (mother, step-mother **and the child**) were affected **as a family** by the violation and **therefore** the Court found it appropriate to make a **joint award** in respect of non-pecuniary damage (par. 157)
- importance of granting legal recognition to ***de facto family life*** (citing *Wagner 2007* and *Emonet 2007*) (par. 145)
- the **burden of proof** for the necessity of a distinction based on sexual orientation is **on the government** (par. 141)
- there is **not just one way or one choice** when it comes to leading one's family or private life (par. 139)
- the protection of the family in the traditional sense has to be balanced against the Convention rights of sexual minorities, with the **margin of appreciation being narrow** (par. 151)

- **no evidence** before the Court that it would be *detrimental* to the child to be brought up by a same-sex couple or to have **two legal mothers and two legal fathers** (par. 142, 144, 146, 151)
- Also the *dissenting minority* stated
- that the three applicants (two women with child) enjoy the protection of family life (par. 2)
- that the child received a proper upbringing from his mother and her partner (par. 2 & 10)

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, *X et. al. [GC] vs A* 2013)
- 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 part two of Art. 12).

Right to Marry

Art. 12 ECHR:

“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.”

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.

Vallianatos et. al. v GR [GC]

7 Nov 2013

Restriction of *registered partnership (civil union)* to opposite-sex couples only (excluding same-sex couples)

- > violates Art. 14 ECHR (16:1)
- > ss couples cannot marry
- > **particular interest** in a civil union as sole basis to have relationship recognized
- > only 2 of 19 member-states exclude ss couples from rp
- > no convincing and weighty reasons capable of justifying the exclusion of ss couples



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