

Homophobia and Discrimination on Grounds of Sexual Orientation in the European Union

Persecution - death penalty or imprisonment for same-sex acts:



death penalty



imprisonment, no precise indication of the length



imprisonment from 1 month to 10 years



imprisonment from 11 years to a life-long sentence

Recognition - countries which recognise same-sex unions and introduced registration systems:



marriage



equal (almost equal) substitute for marriage



clearly inferior substitute for marriage



Protection - countries which introduced laws prohibiting discrimination on the grounds of sexual orientation (in some countries such bans included in national constitutions and in some countries in other laws; areas of protections from discrimination varies).



No specific legislation

The FRA



- Independent Agency of the European Union - 168/2007
- **Objective:** To provide Community institutions and Member States with assistance and expertise on fundamental rights issues, when implementing Community law
- **Tasks:** Data collection & research – awareness raising
- **Geographical scope:** European Union
- **Areas of activity:** Multi-annual Framework + requests from the European Parliament, Council or Commission

Background and future work



- June 2007 European Parliament request for a comprehensive report covering all EU MSs to “... assist in its deliberations concerning the need for a ‘horizontal Directive’”
- June 2008: Part I, Comparative Legal Report
- March 2009: Part II, Comparative Social Report
- 2009 – 2010: Participation in Expert Group developing draft Council of Europe Ministers’ recommendation on homophobia
- 2009 – 2010: Co-operation with Council of Europe CHR for a study covering the remaining 20 CoE member states
- June 2010: Update of Legal Report
- 2010 onwards: FRA Roundtables on sexual orientation/gender identity discrimination

The social situation



- 27 national studies based on available data
- Fieldwork research in the 27 EU Member States (interviews)
 - Public authorities
 - Equality Bodies
 - LGBT NGOs
 - Questionnaire survey of 343 stakeholders
- Two meetings with LGBT organisations from 27 EU MS
- Eurobarometer survey results on majority population

Public opinion - attitudes



- Eurobarometer Discrimination Survey (July 2008) → over half of EU respondents think that discrimination on grounds of sexual orientation is widespread in their country
- Using a ten-point 'comfort scale' with the idea of having a homosexual as a neighbour:
 - Sweden (9.5), Netherlands and Denmark (9.3)
 - **EU average (7,9)**
 - Italy: 6.7
 - Bulgaria (5.3), Latvia (5.5) and Lithuania (6.1)

The legal situation

- Comparative analysis based on 27 **FRALEX** national studies
- EU law and sexual orientation:
 - Article 2 TEU (Union values: equality, respect for human rights, non-discrimination)
 - Article 10 TFEU + 3 TEU: proactive role in combating discrimination
 - Article 19 TFEU (ex art. 13 TEC, general competence, unanimity)
 - Article 6 TEU: EU Fundamental Rights Charter binding (art. 21: non-discrimination)
 - Employment Directive 2000/78/EC

Main findings



- Equal treatment applied “unequally” in EU law (EC/2000/43)
- 18 EU Member States provide comprehensive protection
- Unequal treatment of same sex couples ‘moving’ in the EU
- Legal confusion regarding gender identity discrimination

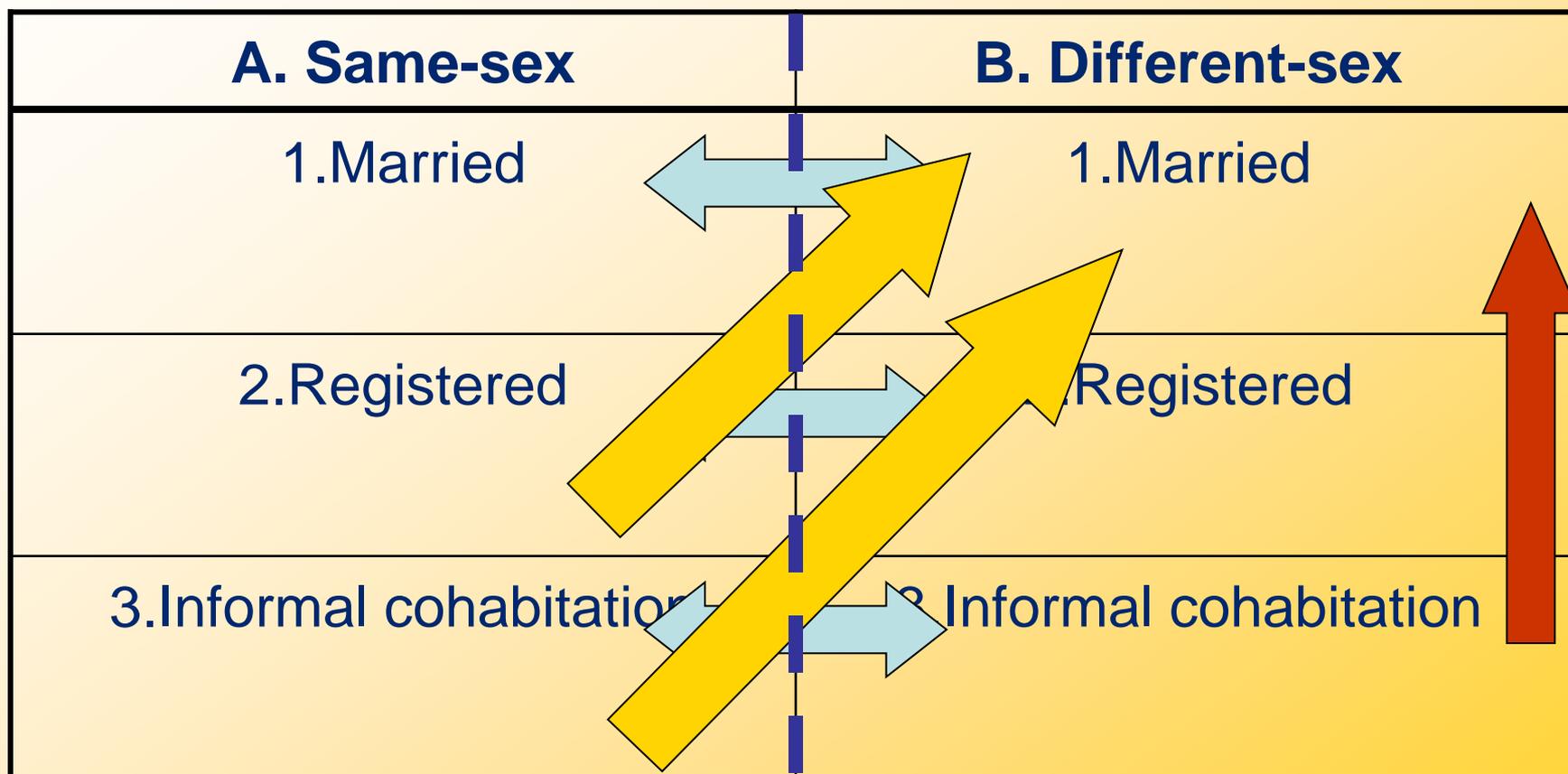
Main problematic issues

- **Freedom of assembly** (obstruction of pride and other events by public authorities or ‘counter-demonstrators’; negative responses by some politicians and religious institutions to calls for improving LGBT rights)
- **Hate-motivated incidents** (verbal aggression most common type, usually in public; young people are subjected to assaults more than older; several accounts of deadly assaults on transgender persons; attacks against LGBT NGOs premises also recorded; **serious underreporting**)
- **Education**
- **Health**
- **Asylum**

Employment

- LGBT invisibility → low level of recorded complaints
- True extent of homophobia, transphobia and sexual orientation discrimination difficult to determine
 - Lack of rights awareness & reluctance to “come out”
- In the workplace evidence of discrimination, harassment, bullying, ridicule
- **Workplace (employment) benefits** → risk of discrimination against same-sex partners (several combinations possible)

Fact-situations and types of potential discrimination



Precedents (ECJ)

- **A.3/B.3 case (horizontal):** *Grant vs. South West Trains* 1998 (C-249/96): no discrimination on grounds of sex (Art. 141 EC) but discrimination on grounds of sexual orientation (not prohibited)
 - Compare ECtHR *Karner vs Austria* (2003)
- **A.2/B.1 case (diagonal):** *D. & Sweden v. Council* 2001 (C-122,125/99): neither discrimination on the basis of sex nor on the basis of sexual orientation, but on grounds of civil status
- Maruko: **A.2/B.1 case (diagonal)** - *D. & Sweden* now overruled

Tadao Maruko v. VddB (C-267/06): the facts



- 2001+2004: legislation on "registered life partnership", not identical to marriage
- Maruko's partner: a costume designer, member of VddB, 45 years paid fees to VddB as his heterosexual colleagues, 13 years of partnership with Mr. Maruko (registered in 2001). Died in 2005
- VddB: according to applicable regulations, survivors benefits are paid out only to married partners; Mr. Maruko not entitled to pension
- Tadao Maruko: legal action before the Bav. Adm. Court

The questions before the Court

- Main questions before the Court were:
 - Are the contributions paid to the pension scheme covered by the Directive?
 - Is the fact-situation covered by the directive in light of Recital 22?
 - Does the Directive preclude the exclusion of the (same-sex) life partner from the survivor's pension?

Pension scheme is 'pay'

- If:
 - Its source is an employment contract
 - Is financed exclusively by employer and worker contributions
 - The amount payable reflects the level of contributions by those parties
- Not relevant: the public nature of the pension fund; the mandatory contribution to the scheme
- It is not a state social security scheme (art. 3(3) exclusion not applicable)

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 fall outside of the scope of the Directive (because of recital 22)

The Court on marital status

- Directive's preamble cannot reduce the scope of the Directive (para. 60)
- Civil status not an EU competence per se...
- ...but MS when exercising their competence must comply with EU law...
- ...and in particular with the principle of non-discrimination

Direct vs. indirect discrimination

1. Direct discrimination: “marriage” is not a ‘neutral’ criterion, but makes use of sexual orientation per se as a basis for the distinction (just as “pregnancy” amounts to direct sex discrimination)
2. Indirect discrimination: differential treatment not based on sexual orientation per se, but via a legal status (closely connected to it), which amounts to an apparently neutral condition which excludes people of a particular sexual orientation

European Commission & Advocate General Colomer:



- no direct discrimination (no reference to sexual orientation)
- indirect discrimination & no justification visible
- but only: if RP is marriage-equivalent (“substantially the same effects”)
- Problem: comparability and indirect discrimination logically don’t mix together (see Bell; Schiek)

➤ Indirect discrimination

- ❖ criterion of marriage is always “apparently neutral” and puts LGB people “at a particular disadvantage” (Art. 2 par. 2 lit. b)
 - ❖ pay is made contingent upon a condition which same-sex couples can never fulfil (legal ban)
 - ❖ compare 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)
- Otherwise: little discrimination (in MS with marriage-equivalent RP) outlawed, but big discrimination (in MS without such RP) not (despite same unequal treatment)

The judgment (01.04.2008)



- *Recital 22:*

Recital 22 cannot affect the application of the Directive (par. 59)

- *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(1): “genuine and determining occupational requirement“

Problem of comparative parameters

- Abstract/formal: comparison of marriage and RP as a legal construct?
- Concrete/factual: situation of opposite-sex spouses vs. same-sex life partners?
- And in this second case: the naturalistic situation vs. the situation as it results from the legal encapsulation of its core characters?

The “comparable situation”

(1) formally:

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

(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

The Reaction of German High Courts

(decisions on family allowance for civil servants)

**Federal Administrative Court (BwG 2 C 33.06,
15.11.2007):**

- 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 done nor intended by the legislator

Federal Constitutional Court (BvG 2 BvR 1830/06, 06.05.2008).



- No comparability, as:
 - no general statutory equalization
 - (a) equalization was not the intention of the legislator
 - (b) no blanket clause
 - (c) special regulations with deviations from the law of marriage
 - no complete equalization in the law of public sector employees (still differences in remuneration and pension-rights)
 - spouses typically in need of alimony by partner; RP typically not
 - irrelevant that civil law maintenance-obligations are identical (in marriage and RP)

Problems:

- General equalization
 - circular reasoning (if general equalization would have taken place, no inequality would exist, and question of discrimination would not arise)
- Equalization in social benefits for public sector employees
 - circular reasoning (discrimination is justified with another discrimination)
- Typical/non-typical need of alimony:
 - general-abstract approach which contradicts the individual-concrete view of the ECJ
 - family-allowance is not dependent upon a need of alimony (also childless civil servants receive it..even if their married partner earns more)

Römer vs. City of Hamburg (C-147/08, pending):

- 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?

Thank you for your attention

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