

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

# LGBTI rights in the World

ILGA, the worldwide federation campaigning for lesbian, gay, bisexual, trans and intersex rights since 1978

January 2008

**PERSECUTION:**

- death penalty: 7 countries
- imprisonment: 76 countries and 4 entities\*

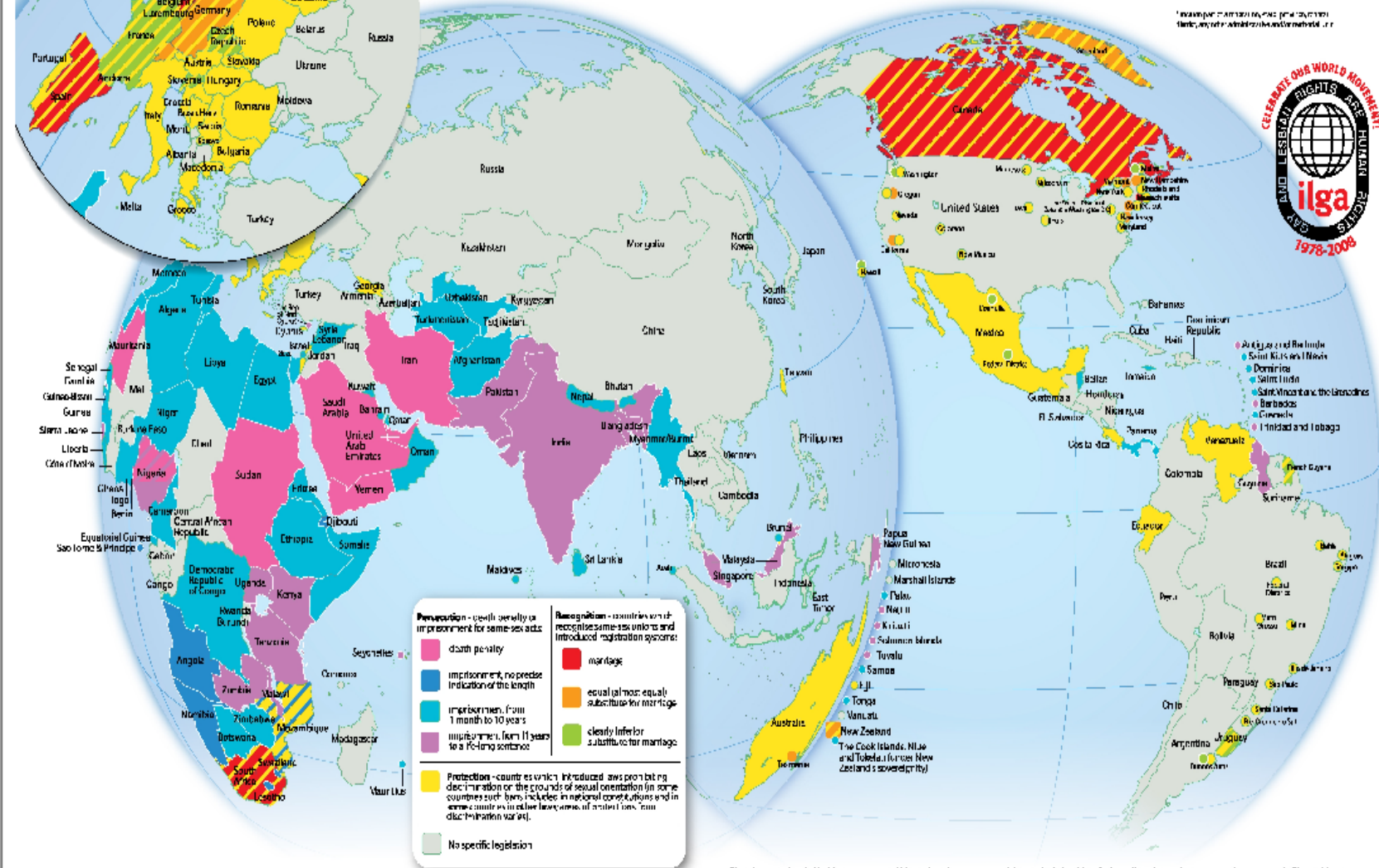
**PROTECTION:**

- anti-discrimination laws: 49 countries and 31 entities\*

**RECOGNITION:**

- recognition and registration for same sex unions: 19 countries and 14 entities\*

\* example: Palestinian, the Palestinian Authority, the West Bank, the Gaza Strip, the State of Palestine, etc.



These laws are aimed at lesbian, gay men and bisexual and at same sex activities and relationships. At times, they also apply to trans and intersex people. The world map project was coordinated by Juris for Kids (USA) and Shepherd Barris U.G.A. This map was originally designed by Philipe Moench for 'You might be a... USA' adjustments for 'USA - Europe Newsletter' by 'Juris for Kids' and 'USA' magazine led in 'USA' magazine. It is sponsored by 'USA' magazine. It is published in world's every official language and some activity between consenting adults. In USA report by Daniel Johnson read on [www.gay.com](http://www.gay.com) in English, Spanish, Portuguese and French.

**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

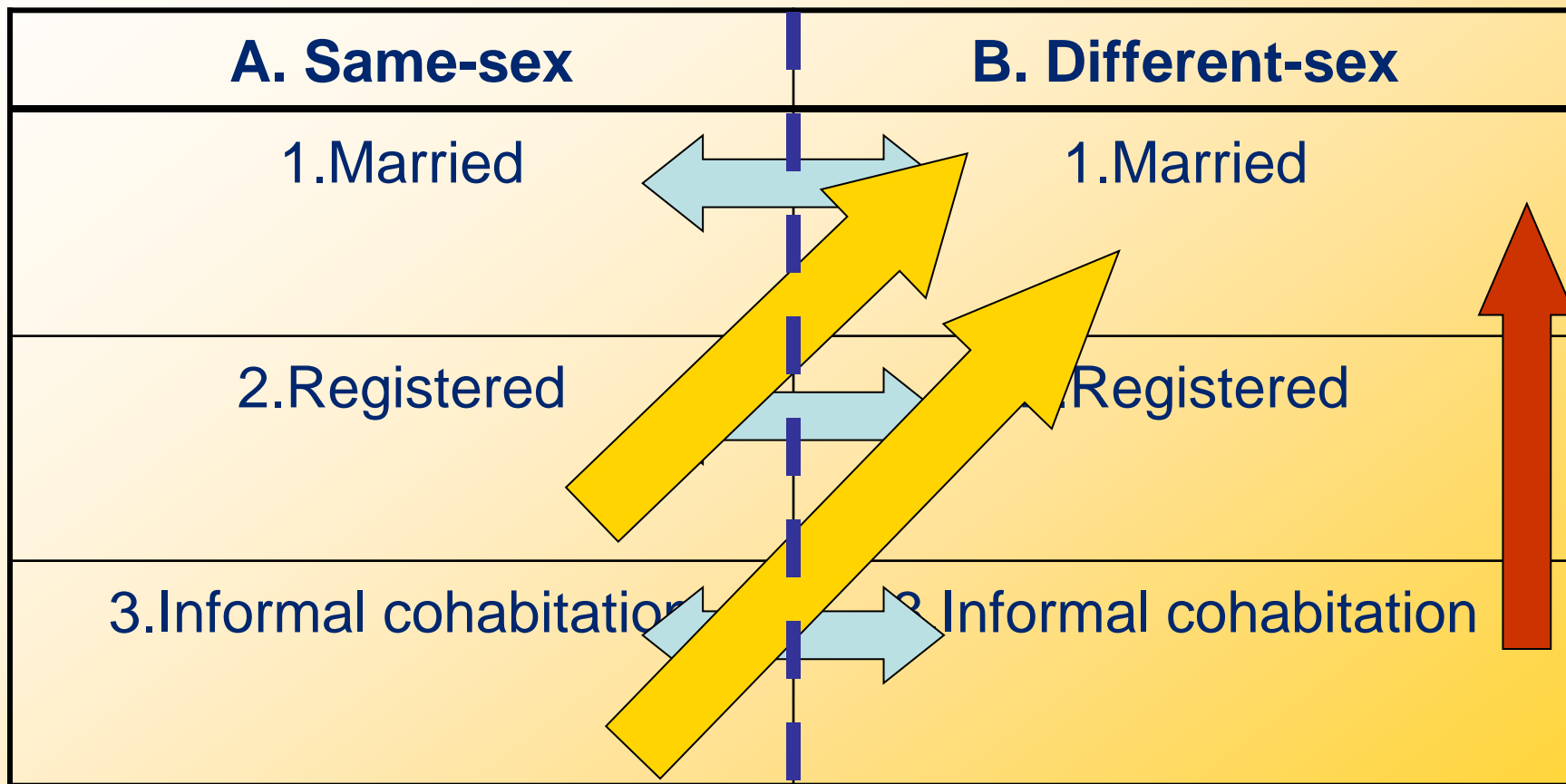
# Main problematic issues

- **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)



# Marital status and benefits

## 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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