



**Sexual Orientation,
Gender Identity and
Justice: A Comparative
Law Casebook**



INTERNATIONAL
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OF JURISTS



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Acronyms

CAH: *Congenital Adrenal Hyperplasia*

CEDAW: *Convention on the Elimination of All Forms of Discrimination Against Women*

CoE: *Council of Europe*

CRC: *Convention on the Rights of the Child*

ECHR: *European Convention on Human Rights*

ECJ: *European Court of Justice*

ECtHR: *European Court of Human Rights*

FtM: *Female to Male*

HRC: *Human Rights Committee*

ICCPR (or CCPR): *International Covenant on Civil and Political Rights*

ICESCR: *International Covenant on Economic, Social and Cultural Rights*

ICJ: *International Court of Justice*

IVF: *In Vitro Fertilisation*

LGBTI: *Lesbian Gay Bisexual Transgender Intersex*

MSM: *Men who have sex with men*

MtF: *Male to Female*

UDHR: *Universal Declaration of Human Rights*

UNHCR: *UN High Commissioner for Refugees*

FOREWORD

Foreword

THE HON. MICHAEL KIRBY AC CMG*

This is a remarkable book. It tells an extraordinary tale. It collects more than 100 court decisions of comparatively recent years in which judges of many lands have had to grapple with decisions about the legal rights of members of sexual minorities (homosexuals, bisexuals, transsexuals, intersex and other 'queer' people).

The collection is remarkable, in that it shows the extraordinary progress that has been made in a couple of decades, when measured against the hostility and inequality that marked this topic of the law over hundreds of years previously. The hostility and inequality are by no means over. The cases recorded in this book come from diverse countries. But most of them are from the courts of developed nations. In many countries of Africa, the Caribbean and Asia, inequality and injustice continue to prevail with legal backing and societal support. Still, the very publication of this book, with its clear message of parliamentary and judicial progress in the cause of equality and basic rights, will itself contribute to the global process that is underway. Judges and lawyers will read the book. They will take heart and courage to press forward in their own lands until the last remnants of ignorance and prejudice are finally removed from the face of the law.

I well remember debates that arose in the Executive Committee of the International Commission of Jurists (ICJ) in the late 1980s and early 1990s about whether laws targetting sexual minorities were properly the subject of concern for a body committed to the rule of law, the independence of the judiciary and the protection of universal human rights. When I became Chairman of the Executive Committee, I determined to update the focus of the ICJ so as to include new and challenging issues previously neglected. These included the human rights of people living with HIV and AIDS; the human rights issues arising from the great scientific and technological developments of nuclear fission, informatics and genomics; and the human rights of sexual minorities.

* President of the International Commission of Jurists (1995-8); Justice of the High Court of Australia (1996-2009); Gruber Justice Prize 2010.

One very distinguished jurist from a developing country said at that time: 'I will concede everything else. But please do not add the topic of sexuality. We do not have homosexuals in our country. It is completely alien to our culture. It is contrary to our spiritual beliefs. The topic is regarded with disgust. Please do not damage the ICJ by adding such an issue to its agenda'.

Because I was myself a target of the many laws that oppressed sexual minorities in my own country, Australia, I found this response by a most admirable and committed human rights lawyer wounding, puzzling, and almost unbelievable. But he was only expressing opinions that were widespread in his country as in mine. His views were not idiosyncratic. They reflected the terrible burdens which, to this day, have been heaped upon sexual minorities, often because of the perceived instructions of religious scriptures, sometimes shared by the most numerous religions in the world. How could progress possibly be made in the face of such scriptures and the attitudes they engendered? How could the law be reformed and social attitudes changed? How could legislatures, with members reflecting similar views, be encouraged to repeal oppressive old laws? How could judges and other jurists be brought to an insight of the wrong-headedness of their approaches so that true equality for all could be achieved under the law?

How, in a single generation, the centuries old stigma came to be challenged on the streets, in the academies, in civil society organisations and amongst law-makers is a story that is still unfolding. Tragically, the AIDS epidemic, with its urgent need to secure the co-operation and participation of sexual minorities, was to play a part in lifting the scales of ignorance and promoting a new realism about the old oppressive laws. The advance for universal education, the growth of broadcasting and the internet, developments in scientific knowledge and the transnational justice conversation about fundamental human rights have all played a part in promoting the movement for change.

Within the ICJ, it was a rational debate, a search for empirical information, the support of a few champions, the examples of other like-minded bodies and an expanding global dialogue that eventually led to the adoption of the programme that included affording a response to the oppression of sexual minorities as a human rights concern. Eventually, at first reluctantly, my colleague who had resisted any discussion of the topic came around to see its legitimacy. I do not say that he has done so with enthusiasm. Even today, it challenges his old beliefs and deep-seated prejudices. Yet on the topics explored in the cases recorded in this book, may be seen a journey that the law has been taking over the past quarter century since I first raised the issue in the ICJ. The journey continues, not without setbacks and interruptions. Except for the smaller numbers of people involved, it bears many similarities to the earlier stages of the same journey when the ICJ became a leader in the efforts against the oppression of people on the grounds of their gender and race. In those instances too, the foundation for part of the oppression had sometimes been misunderstandings of scriptural texts and

religious traditions. In the face of such forces, the progress that has been made is astonishing. But the need for persistence endures.

When one looks at the records of the cases collected here, the variety of the jurisdictions and issues can be quickly seen:

- Some of the cases are very recent; few can be described as old; but a number from 30 years ago or more have been included to illustrate the mind-set of those earlier days as well as the early heralds who saw the need for fresh thinking;
- The majority of the cases come from English-speaking countries of the common law tradition. Yet an increasing number of the recent decisions come from civil law jurisdictions and from nations with quite different approaches to law and judicial decision-making;
- Most of the decisions come from countries of Europe or of European-derived cultures. Yet increasing numbers derive from Asian States, from Africa and Latin America, demonstrating the universality of many of the topics addressed in this book;
- A majority of the countries whose decisions are included have a Christian religious tradition. Yet an increasing number are beginning to appear from countries of different religious and philosophical traditions, including Lebanon, Turkey, India, Korea, Singapore and Hong Kong;
- Most of the decisions have arisen in civil law disputes submitted to judicial determination, including cases invoking constitutional and like norms. Yet quite a few of the decisions concern the operation of criminal and other public laws which, in many lands, continue to oppress and stigmatise members of the sexual minorities;
- Most of the recorded decisions in the past 20 years appear generally to favour the enlargement of the rights to equality for gays and other sexual minorities. But not all are favourable. As a recent divided decision in my own country concerning the rights of transsexuals illustrates, judicial enlightenment can sometimes take the law only so far. Legislative reform is often slower in coming;
- In most of the decisions, decisions have turned upon domestic law. Yet a feature of many of the more recent cases has been a sensible outreach by judges, grappling with common problems, to the wisdom evident in the decisions and reasoning of jurists in other lands. Thus, *Lawrence* in the Supreme Court of the United States of America referred to *Dudgeon and Norris* in the European Court of Human Rights. The *Naz Foundation* decision in India referred to all of these and many others. This intellectual dialogue across borders is bound to continue whenever new frontiers of knowledge challenge old traditions and legal understandings; and

- Necessarily, all of the decisions recorded here are explained by reference to legal reasoning. Yet behind the law lie the choices that judges (especially in the higher appellate courts) must make between competing principles and policies of the law. Attitudes and values can affect the choices that are made. This feature of the judicial branch of government is evident at many points in the decision-making revealed by the cases.

In some of the decisions collected in this book, the judges who participated in the decision-making are identified by their names. Thus, in one of the Australian decisions concerning sexuality and refugee law, I myself make an appearance in a case that came before the High Court of Australia. For the most part, however, the judges are anonymous, so that we do not know the names of those who furthered the enlightenment. The lawyers, too, are anonymous, yet their role as advocates making powerful and persuasive arguments cannot be ignored. Finally, there are the litigants themselves. Their names may be reflected in the case titles, but we know so little of who they are as individuals. Each case represents a story, a person whose life was touched and changed by the law. This book is testament to their collective courage.

The voices of judges interpreting their national constitutions resonate across borders. The great themes of equality, individual dignity, and privacy are woven through these cases. Often they speak with reason, occasionally they speak with passion. An instance is the exceptional power of the opinion of Justice Anthony Kennedy writing for the Supreme Court of the United States in *Lawrence v Texas* 539 US 558 at 578-9 (2003) when he said:

“Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.”

Law and judicial reasoning is ordinarily about logic, consistency, analysis and interpretation. But it is also about persuasion, communication, human empathy and new-found enlightenment. Law appeals to our rational sense. But it also appeals to our emotions and our intuitive appreciation that human beings should be treated equally in like cases and should not be deprived of basic human rights because of some feature of their nature that they did not choose and cannot change.

It is difficult to think of any other area of the law where so much progress has been made in such a short space of time. A good part of that progress has been made because judges with the power to do so, reached decisions advancing rationality over prejudice; secularism over inherited beliefs; equality over discrimination; and universal rights over stigma.

I congratulate the ICJ on this publication. I would not have expected so much a quarter of a century ago when I first raised the topic. The progress in this Casebook is gratifying. But the progress in the hearts and minds of good people is even more important, because it bears the seeds of much future progress.



MICHAEL KIRBY
Sydney, Australia

22 June 2011

INTRODUCTION

Introduction

BACKGROUND

In 2009 the International Commission of Jurists began to gather together national court decisions that addressed questions concerning sexual orientation and gender identity. It did so because it had become evident that battles over some of the most controversial issues of the day were being waged in domestic courts. A very small number of cases can be brought before international human rights bodies - such as the regional human rights commissions and courts and UN treaty bodies - but increasingly international human rights arguments were being heard at the domestic level. What you have before you is the result of this research.

The fourteen chapters are organised by topic. Each chapter begins with a general introduction to that particular field of law, followed by case summaries. The latter set forth the legal issue and the relevant domestic, comparative and international law, and then summarise the arguments, reasoning, and result. Cases that are summarised in the Casebook are bold-faced throughout the text.

Altogether, the Casebook consists of 108 cases, from 41 countries across a variety of regions, covering a span of more than forty years. The vast majority of decisions, nevertheless, date from the past decade. The pace of change is clearly accelerating.

PURPOSE

The Casebook has two purposes. First, it should help lawyers, judges, and human rights activists better understand how to use the law to protect individual rights. The ICJ hopes that readers of the Casebook will be encouraged to raise arguments that are grounded in international and comparative law in their domestic courts and that courts will find the experiences of other courts relevant. The ICJ further hopes that the Casebook will promote public interest litigation in defence of rights, assist individuals whose rights have been violated to seek redress in court, and enable lawyers to develop effective and persuasive reasoning.

Second, the ICJ hopes that the Casebook will stand as evidence for the claim that law on sexual orientation and gender identity is global in nature. A court in New Delhi is referring not only to the decisions of courts in Strasbourg or Washington.

It is also, and perhaps especially, paying attention to precedents established in South Africa, Hong Kong and elsewhere. Activists in Thailand and Guyana assert the right to cross-dress. Individuals in Kampala and Kathmandu demand judicial enforcement of their rights under international law. People everywhere want their relationships – with their partners, with their children – to receive legal recognition and protection.

LIMITATIONS

The Casebook has certain limitations. During the process of compiling these cases, some difficult choices had to be made. The Casebook is not comprehensive. It does not contain every decision that involves sexual orientation or gender identity. There were simply too many cases to do so. Essentially, the Casebook attempts to take account of the types of factual scenarios that are most relevant and the lines of reasoning that parties and judges have relied upon. To this end we have included negative and positive decisions.

Some areas of law, such as hate crimes, have been omitted, because we felt that hate crime prosecutions were more likely to depend on specific evidence of motive rather than on interpretation of human and constitutional rights. Some very pressing human rights issues, such as conditions of detention for LGBT people in custody, are not represented in the Casebook either, because they are not areas that have been extensively litigated.

Because this area of law is changing so rapidly, the Casebook may not fully reflect the current state of the law. To the extent possible, subsequent legal developments, whether judicial or legislative, have been noted in postscripts.

The Casebook focuses on the judicial protection of human rights. It would be a mistake, however, to draw the conclusion that litigation is the only means available to enforce human rights. Much legal change occurs in parliaments. In Europe, for example, the rights of LGBT individuals and communities have advanced significantly following legislative reform, sometimes in reaction to or in anticipation of judicial decisions. Legal change can also be achieved via processes that occur in society rather than in the courtroom - in workplaces, on the radio waves, and in neighbourhood bars.

Many of the cases are relevant to more than one chapter. A custody case that involved a transgender parent, for example, is found in the parenting chapter but could also have been included in the transgender chapter. Cases about immigration benefits extended to same-sex couples could have been categorised under Partnerships instead of Asylum and Immigration. In the same manner, many of the legal arguments are relevant to several chapter themes. Where possible, cases in different chapters have been cross-referenced.

Finally, a word should be said about language. We have tried wherever possible to preserve the original wording of the court. For example, we use “homosexual” or “transsexual” or “sexual diversity” where the court has done so, and adopt a court’s use of personal pronouns in some of the transgender cases even if this did not reflect the individual’s preferred gender. This may read as discordant. However, we felt that it was important to highlight some of the judicial tension and discomfort around gender choice. We have also adopted the original language when naming the parties, such as “appellant”, “defendant”, and “plaintiff”.

OBSERVATIONS

The ICJ expected that many of the cases would show that domestic courts have interpreted and applied principles of international human rights law. It is true that frequent references are made to *Toonen v. Australia* (decided by the UN Human Rights Committee in 1994) and *Dudgeon v. United Kingdom* (decided by the European Court of Human Rights in 1981). What is equally evident, however, is that domestic courts are increasingly drawing on comparative constitutional law. They are engaged in a conversation across borders about the meaning of constitutional and human rights. Even when they reach different conclusions, courts are bound to respond to comparative law arguments.

Moreover, their use of international and comparative (domestic) law is somewhat similar. International law is often treated as on par with comparative law. Each is a source of guidance and judicial experience that is relevant to the task of interpretation rather than a binding obligation. This makes some sense when one considers that core norms are usually found in both international and constitutional texts. In some instances, indeed, the development of national law influences the decisions of supranational bodies, as in the European Court case of *Goodwin v. United Kingdom*, which drew heavily on cases involving gender recognition from New Zealand and Australia.

In addition, there is considerable cross-cultural convergence around the meaning of norms. The idea that privacy implies autonomy for personal and intimate decision-making, for example, has been recognised by a range of courts in many different countries. A large number of these cases refer to a dissenting opinion in a US Supreme Court case (Justice Blackmun in *Bowers v. Hardwick*) as well as to *Toonen* and *Dudgeon*. The robust conception of privacy articulated in these opinions marks the waning influence of “public morality”, which many courts had previously relied upon to justify the criminalisation of consensual and private sex between adults. This view of privacy affirms that it is not the function of the criminal law to implement social or political disapproval of certain forms of sexual conduct, regardless of whether that disapproval is widespread.

The cases also demonstrate significant agreement around the meaning of equality and non-discrimination. Once the law is officially neutral with regard to same-sex relationships, the discriminatory nature of differential treatment based on sexual orientation becomes apparent. Sexual orientation and gender identity are treated as an aspect of diversity, akin to race or religion, one of numerous characteristics that define individual identity. Even in jurisdictions where same-sex sexuality is subject to criminal sanction, however, courts have recognised and reasserted the universality of all human rights. In doing so, they reaffirm the *Universal Declaration of Human Rights*.

This Casebook reveals a dramatic evolution of jurisprudence in the area of sexual orientation and gender identity. Arguments based on emotion, social disapproval and cultural attitudes are giving ground to arguments based on the rights to privacy, equality, and non-discrimination.

Finally, the law is not just about legal standards. It is also about people. Nowhere is this more vividly demonstrated than in litigation, where a court's decisions can change individual lives for better or worse. In each of these cases, a court has considered a law, evaluated it, assessed its constitutionality, and applied it. Simultaneously, the cases allow us to glimpse the lives of those involved and see how the law has affected their daily experiences. The Casebook is a testament to the courage of ordinary people who have sought to use the law to vindicate their rights.

DECRIMINALISATION

Chapter one

Decriminalisation

INTRODUCTION

Laws criminalise same-sex sexual conduct in 76 countries around the world.¹ They are often referred to as sodomy laws. Sometimes these laws criminalise specific sexual acts, such as anal and oral sex, regardless of the sex of the partners. Sometimes they criminalise any kind of sexual contact between partners of the same sex. The majority focus on sex between men, although recently both Botswana and Malawi have enacted laws criminalising lesbian sex. Occasionally the laws are drafted with great precision, but more commonly they use language such as “carnal knowledge against the order of nature” or “gross indecency”. These are usually known as morals offences and are justified by reference to tradition, popular opinion, and public morality. What they share is that they all make private sexual activity between consenting adults illegal.

Initially most legal reform around decriminalisation occurred legislatively. In 1957, the Wolfenden Committee issued a report recommending that the United Kingdom should decriminalise private homosexual conduct. The Wolfenden Report reflected a theory of the relationship between criminal law and morality that was first popularised by philosopher J.S. Mill and later by H.L.A. Hart. In the words of the Wolfenden Report: “[U]nless a deliberate attempt be made by society through the agency of the law to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law’s business”.² In other words, the function of the criminal law should be to prevent harm, not to legislate moral values.

The Wolfenden Report marked a turning point. The United Kingdom followed its recommendations by amending the *Sexual Offences Act* in 1967. The Report influenced the American Law Institute’s development of the *Model Penal Code* (MPC), which removed homosexuality from its list of offences. The MPC in turn led many US States to repeal laws that prohibited consensual sodomy. Excerpts from the Wolfenden Report appeared in *Dudgeon v. United Kingdom* (1981), in which the European Court of Human Rights struck down laws in Northern Ireland that prohibited all sexual activity between men, on the grounds that they violated the right to privacy guaranteed by the *European Convention for the Protection of Human Rights and Fundamental Freedoms*. *Dudgeon* effectively required legislative repeal in all Council of Europe countries.

Internationally, in 1994 the UN Human Rights Committee decided (in the case of *Toonen v. Australia*) that Tasmania's sodomy laws violated Articles 17 (privacy) and 26 (non-discrimination) of the *International Covenant on Civil and Political Rights* (ICCPR).³ In so doing, it rejected Tasmania's public morality justification. Since *Toonen*, the Human Rights Committee and other UN treaty bodies have repeatedly urged States to decriminalise consensual same-sex sexual conduct.

Change occurs judicially as well as legislatively. Recent years have witnessed a rise in constitutional challenges to sodomy laws. The cases presented here show how arguments have been developed in national courts. What is striking is that almost all of these cases draw heavily on both international human rights and comparative constitutional law. National courts are engaged in an ongoing conversation, specifically about same-sex sexual conduct and more generally about the criminal law's role in regulating private, consensual and non-harmful conduct. The following themes are evident in a review of the cases.

Locus Standi (Standing). In many of the cases, the unconstitutionality of the law is raised as a defence by the defendant in a criminal case. However, in Hong Kong, India and South Africa, applicants brought challenges based on the prospective application of the law. Both South Africa and India have liberal standing doctrines. In the Hong Kong case of *Leung v. Secretary for Justice*, the government argued that, since the applicant had never been prosecuted under the law in question, he did not have sufficient interest to challenge it. The court disagreed. If the government's view were followed, the applicant would have access to justice only if he broke the law. In fact, the applicant's life had already been "seriously affected by the existence of the legislation in question". The Hong Kong court's reasoning followed the analysis of the European Court of Human Rights in cases such as *Norris v. Ireland* and *Sutherland v. United Kingdom*, both of which concluded that even unenforced criminal laws interfered with the applicant's private life.⁴ The *Leung* Court quoted *Sutherland*. "Even though the applicant has not in the event been prosecuted or threatened with prosecution, the very existence of the legislation directly affected his private life: either he respected the law and refrained from engaging in any prohibited sexual acts prior to the age of 18 or he committed such acts and thereby became liable to criminal prosecution." Similar reasoning was used in *Toonen v. Australia* by the UN Human Rights Committee, which likewise found a direct and continuous interference with the applicant's right to privacy.

In addition to the threat of future prosecution, the European Court in *Norris* emphasised present harms experienced by the applicant. The applicant was a victim within the meaning of Article 25 of the Convention, because the law could be enforced against him in the future and because, even unenforced, it caused prejudice and social exclusion. Both the High Court of Delhi in the *Naz Foundation* and the Constitutional Court of South Africa in *National Coalition for Gay and Lesbian Equality* emphasised the stigmatising effects of the criminal law on gay

men. The law's "symbolic effect is to state that in the eyes of our legal system all gay men are criminals", wrote Justice Ackermann in the majority opinion. In **Leung**, the Court of Appeal excerpted Justice Sachs' description of the case, that it was "about the status, moral citizenship, and sense of self-worth of a significant section of the community". The Hong Kong Court then concluded that, because the case affected "the dignity of a section of society in a significant way", the applicant had sufficient interest to bring his claim.

Note, however, that this perspective on standing is not universal. In **Tan Eng Hong v. Attorney General**, the High Court of the Republic of Singapore held that, although the applicant satisfied the "substantial interest" test, meaning he had an actual interest in the outcome, he failed to meet the "real controversy" requirement. There could be no "real contest of the legal rights," as required by case law in Singapore, because the original charges against the applicant had been dismissed and he had in fact pleaded guilty to another offence.

Position of Governmental Institutions. In the South Africa and Fiji cases, national human rights institutions intervened on the side of the claimants. In the **Naz Foundation** case, the government of India adopted two different positions: the Ministry of Home Affairs supported the constitutionality of the law and the Ministry of Health & Family Welfare argued that Section 377 hindered HIV/AIDS prevention efforts. These apparently contradictory responses on the part of government (or government-affiliated institutions) recall the government positions in both *Dudgeon* and *Toonen*. In *Dudgeon*, the sodomy laws had already been repealed in England, Wales, and Scotland. Northern Ireland's laws were thus in contrast to those applying elsewhere on the United Kingdom. In *Toonen*, the federal government of Australia did not oppose the challenge to the criminal laws of Tasmania. In the US case of **Lawrence v. Texas**, although there was no federal government position, the number of States with sodomy laws had dropped by half since *Bowers*, signalling some degree of State acceptance.

Privacy. The right to privacy is protected by Article 17 of the ICCPR as well as by many domestic constitutions. In some countries that lack an express privacy provision, such as India and the United States, the right has been inferred from other constitutional guarantees concerning life and liberty. Both legislative reform, inspired by the Wolfenden Report, and decisions of the UN Human Rights Committee and the European Court of Human Rights, were premised on the right to privacy and the related concept of autonomous decision-making. Thus in *Toonen* the Human Rights Committee observed that it was "undisputed that adult consensual sexual activity in private" is covered by the concept of privacy, while in *Dudgeon* and its progeny, *Norris v. Ireland* and *Modinos v. Cyprus*, the European Court reached the same conclusion in respect of Article 8 of the *European Convention*. The US Supreme Court case of *Bowers v. Hardwick* (1986) (overruled by **Lawrence** in 2003), also dealt exclusively with the case as a question of privacy. Later cases, however, have examined equality and non-discrimination aspects in

addition to privacy. In **National Coalition, Naz Foundation, Nadan & McCoskar v. State**, and **Lawrence** (Justice O'Connor's concurrence), both are considered. Because the Hong Kong cases included here challenge differential age of consent (**Leung**) and difference in treatment for public sexual activity (**Yau**), the judicial analyses focused on equality and discrimination arguments.

In cases striking down sodomy laws, privacy is about more than protection for physical spaces, such as the home. In the words of Justice Kennedy's opinion for the court in **Lawrence**:

Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves the liberty of the person both in its spatial and in its more transcendent dimensions.

In **National Coalition**, both the majority and concurring opinions emphasised that privacy involved space for private decisions about personal relationships. Justice Ackermann wrote: "Privacy recognises that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community. The way in which we give expression to our sexuality is at the core of this area of private intimacy." Justice Sachs wrote that the right to privacy is based on "the notion of what is necessary to have one's autonomous identity ... What is crucial is the nature of the activity, not its site".

In **Banana**, the Supreme Court of Zimbabwe rejected any such right to privacy under the Constitution. According to the court, the Constitution guaranteed only protection from arbitrary search or entry and had "nothing whatever to do with whether or not consensual sodomy is a crime". Privacy was not addressed in the Botswana case of **Kanane v. State**.

Equality. Equality arguments arise under both non-discrimination and equal protection of the law guarantees. These rights are closely related. The principle of equality requires that persons who are equally situated are treated equally. Failure in this regard will amount to discrimination unless an objective and reasonable justification exists.

The right to non-discrimination was not considered by the European Court in **Dudgeon**, but in the 1999 case of **Salgueiro da Silva Mouta v. Portugal** the Court held that sexual orientation is a concept "undoubtedly" covered by the open-ended grounds of prohibited discrimination listed in Article 14 of the *European Convention*.⁵ Human Rights Committee jurisprudence includes sexual orientation under Article 26 of the ICCPR. In South Africa, both the interim Constitution and the 1996 Constitution include sexual orientation as a prohibited ground of discrimination, making South Africa the first country in the world to include such a textual provision.

In *Kanane* and *Banana*, the courts rejected challenges to the law based on non-discrimination. Section 23 of the *Constitution of Zimbabwe* and Section 15 of the *Constitution of Botswana* both enshrine the right to be free from discrimination on the basis of certain enumerated grounds. Sexual orientation is not among them. Both courts held that their constitutions did not include “sexual orientation” as a prohibited ground, although in Botswana the court had earlier found the list of discriminatory grounds to be illustrative and not exhaustive. In *Kanane*, the Botswana Court of Appeal noted that the “public interest must ... always be a factor in the court’s consideration of legislation particularly where such legislation reflects a public concern”. It concluded that “[t]he time has not yet arrived to decriminalise homosexual practices even between consenting adult males in private. Gay men and women do not represent a group or class which at this stage has been shown to require protection under the Constitution.” Conversely, the Delhi High Court held that “sexual orientation” was an analogous ground to sex under Article 15 of the Constitution, which protects against discrimination on several enumerated grounds. In reaching this conclusion it relied on the reasoning of the Human Rights Committee in *Toonen* as well as the Canadian Supreme Court in *Egan v. Canada*.

The American and Indian constitutions do not list specified grounds under their equal protection clauses. As the Delhi High Court explained: “Article 15 is an instance and particular application of the right of equality which is generally stated in Article 14”. Equal protection jurisprudence in both countries requires that a classification drawn by law be rationally related to a legitimate State interest. In her concurrence on equal protection grounds in *Lawrence*, Justice O’Connor rejected public morality as a justification for the law. In *Naz Foundation*, the court also found that public morality is not a legitimate State interest and held that, although protection of public health was a legitimate State interest, the law at issue was not rationally connected to this legislative end. Similar reasoning regarding the protection of public health was used by the Human Rights Committee in *Toonen*.

In *Yau*, in order to meet the justifications test, the government argued that there was a genuine need for differential treatment and that this was established by the fact that the legislature had enacted the law. The court disagreed, saying that a genuine need for differential treatment could not be established from the mere act of legislative enactment. Therefore the law failed at the first stage of the test.

Laws can be discriminatory even if they are written in neutral terms. In *Leung*, the law in question imposed a higher age of consent for all acts of anal sex, regardless of whether the partners were of the same or opposite sex. The Court of Appeal, adopting the reasoning of the lower court, found that anal and vaginal sex were equivalent and therefore it was discriminatory to impose a higher age of consent on the former than the latter. “Denying persons of a minority class the right to sexual expression in the only way available to them, even if that way is denied

to all, remains discriminatory when persons of a majority class are permitted the right to sexual expression in a way natural to them.”

Public Morality. When a constitutional right is infringed, courts engage in a similar proportionality analysis. (See, for examples, Section 36(1) of the *Constitution of South Africa* and Section 37 of the *Constitution of Fiji*.) As the Hong Kong Court of Appeal stated in **Leung**: “Any restriction on a constitutional right can only be justified if (a) it is rationally connected to a legitimate purpose and (b) the means used to restrict that right must be no more than is necessary to accomplish the legitimate purpose in question”. In American equal protection jurisprudence, this is known as rational basis review. A law will be sustained if the classification drawn by the statute is rationally related to a legitimate State interest. Laws that infringe fundamental rights such as privacy are subjected to a higher standard of review in both India and the USA.

The chief justification advanced for laws criminalising same-sex sexual conduct is that they protect and preserve public morality. The legitimacy of public morality, sometimes characterised by courts as popular opinion on matters of sexual morality, was dispositive in the **Kanane** and **Banana** cases. In **Kanane**, the Court found “no evidence that the approach and attitude of society in Botswana to the question of homosexuality and to homosexual practices by gay men and women requires a decriminalisation of those practices, even to the extent of consensual acts by adult males in private”. In **Banana**, the majority opinion of the Supreme Court of Zimbabwe stated: “I do not believe that this court, lacking the democratic credentials of a properly elected parliament, should strain to place a sexually liberal interpretation on the Constitution of a country whose social norms and values in such matters tend to be conservative”. Chief Justice Gubbay disagreed. In his dissent he wrote: “In my view, the criminalisation of anal sexual intercourse between consenting adult males in private, if indeed it has any discernable objective other than the enforcement of private moral opinions of a section of the community (which I do not regard as valid), is far outweighed by the harmful and prejudicial impact it has on gay men”.

In **Nadan & McCoskar**, the Court appeared to accept that public morality was a legitimate State interest but found that it failed the proportionality test, given the importance of the rights involved. In the **Dudgeon** line of cases, the European Court likewise accepted that public morality was a permissible reason for limiting the right to privacy. However, since the laws were rarely enforced and interfered with a “most intimate aspect of private life”, they were neither necessary for achieving this goal nor proportional.⁶

In **Naz Foundation, National Coalition for Gay and Lesbian Equality** and **Lawrence**, the courts rejected the public morality rationale. According to Justice O’Connor: “Moral disapproval of a group cannot be a legitimate State interest under the Equal Protection Clause because legal classifications must not be drawn for the

purpose of disadvantaging the group burdened by the law. Texas' invocation of moral disapproval as a legitimate State interest proves nothing more than Texas' desire to criminalise homosexual sodomy. But the Equal Protection Clause prevents a State from creating a classification of persons undertaken for its own sake." In ***Naz Foundation***, after discussing ***Lawrence***, ***Dudgeon***, ***Norris***, and the ***National Coalition*** cases, the Delhi Court held: "Moral indignation, howsoever strong, is not a valid basis for overriding individual's fundamental rights of dignity and privacy".

All three courts viewed public morality as a pretext for animus. Thus, in ***National Coalition***, Justice Ackermann said that "private moral views" were based "to a large extent on nothing more than prejudice". In ***Lawrence***, Justice O'Connor wrote: "[B]ecause Texas so rarely enforces its sodomy law as applied to private, consensual acts, the law serves more as a statement of dislike and disapproval against homosexuals than as a tool to stop criminal behavior. The Texas sodomy law raise[s] the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." The Delhi High Court, rejecting the public morality rationale, stated: "Section 377 IPC targets the homosexual community as a class and is motivated by an animus towards this vulnerable class of people". Chief Justice Gubbay raised a similar concern in his dissent in ***Banana***, suggesting that the belief that homosexuality was immoral might in fact be the result of prejudice.

In South Africa and in India, the courts clarified that the rejection of "public morality" was not a rejection of normative values. The South African court recalled the "political morality" of the constitution, and the Indian court made reference to "constitutional morality". In both countries, the constitutions explicitly value diversity. As the ***Naz*** Court explained: "If there is one constitutional tenet that can be said to be [the] underlying theme of the Indian Constitution, it is that of inclusiveness".

This collection of decriminalisation decisions from almost all regions of the world demonstrates the increasing use of both international and comparative law to interpret constitutional principles of privacy and non-discrimination. Where courts sustain sodomy laws, as in the ***Kanane*** and ***Banana*** cases as well as the overruled US case of ***Bowers v. Hardwick***, it appears to be because the courts rely on a certain theory of criminal law and, as well, have a narrow view of their institutional role. Thus a court that accepts that public morality alone is sufficient justification for a criminal law is more likely to uphold a sodomy law against constitutional attack. Similarly, a court that views its role as deferential to parliament is less likely to act to safeguard individual rights from majority opinion.

CASE SUMMARIES

Case No. 111-97-TC, Constitutional Tribunal of Ecuador (27 November 1997)

Procedural Posture

More than a thousand private citizens, many of them members of LGBT or human rights organisations, brought a public action challenging the constitutionality of the law criminalising same-sex sexual conduct.

Facts

Shortly before the public action was brought, more than one hundred homosexuals were arrested in the city of Cuenca. This episode triggered denunciations and protests that created a favourable environment for challenging the criminal law.

Issue

Whether the criminalisation of same-sex sexual conduct violated the constitutional rights to equality before the law and to freedom of conscience and religion.

Domestic Law

Constitution of Ecuador, Article 22 (individual rights), Paragraphs 6 (equality before the law) and 7 (freedom of conscience and religion), Article 32 (State's duty to protect the family), and Article 36 (protection of minors).

Criminal Code, Article 516 (1) (providing that consensual same-sex sexual conduct was punishable by a term of 4 to 8 years imprisonment).

Reasoning of the Court

The plaintiffs argued that the criminal law violated rights to equality before the law and to freedom of conscience protected under the *Constitution of Ecuador*. They requested that the challenged provision be declared discriminatory and thus unconstitutional.

The plaintiffs maintained that homosexuality was neither a crime nor an illness. In support they cited the position of the American Psychological Association and the World Health Organization, as well as legislation decriminalising same-sex sexual conduct or prohibiting discrimination based on sexual orientation adopted in several countries around the world. They argued, furthermore, that the criminalisation of same-sex conduct was degrading to lesbian and gay individuals.

The Government responded that the body competent to deal with decriminalisation was the legislature, not the Constitutional Tribunal. The Government agreed that same-sex sexual conduct should be decriminalised but only because the challenged provision was hardly ever enforced.

The Court adopted a medical theory that described homosexuality as a dysfunction of the endocrine system and on these grounds considered it appropriate to treat homosexuality medically rather than by penal sanction. Criminalisation and imprisonment would be ineffective.

The Court did not approve of homosexuality. It stated that, although homosexuality should not be legally sanctionable, neither should it be considered socially commendable. Homosexuals were entitled to enjoy all human rights in full equality provided that the “exteriorization of their conduct did not infringe on the rights of others”.

The Court declared unconstitutional the first paragraph of Article 516.

Postscript

The year after this decision was adopted the *Constitution of Ecuador* was amended and several new fundamental rights were included in the text including the right to make free, informed, voluntary and responsible decisions concerning one’s sexuality, life and sexual orientation; and the right to free personal development. Discrimination on grounds of sexual orientation was prohibited.

National Coalition for Gay and Lesbian Equality v. Minister of Justice, Constitutional Court of South Africa (9 October 1998)

Procedural Posture

The National Coalition for Gay and Lesbian Equality and the Human Rights Commission brought a lawsuit challenging the constitutionality of statutory and common law offences criminalising anal sex between consenting adult men (referred to as the “sodomy laws”). The High Court ruled the laws unconstitutional and invalid. The Constitutional Court reviewed the order of the High Court.

Issue

Whether laws criminalising sexual activity between consenting adult men violated the *Constitution of South Africa*.

Domestic Law

Constitution of South Africa, Section 9 (guaranteeing equality, and equal protection before the law, and prohibiting unfair discrimination including on the grounds of sexual orientation), Section 10 (dignity), Section 14 (right to privacy), Section 36(1) (providing in part that the rights in the *Bill of Rights* “may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom”).

Comparative Law

Bowers v. Hardwick, United States Supreme Court, 1986 (upholding constitutionality of State law criminalising sodomy).

Romer v. Evans, United States Supreme Court, 1996 (finding unconstitutional a State constitutional amendment that withdrew a specific class of people - gays and lesbians - from the protection of the law without a legitimate State purpose, in violation of the equal protection clause of the federal Constitution).

R v. M(C), Ontario Court of Appeal, Canada, 1995 (finding that a higher age of consent for anal intercourse than for vaginal intercourse was discriminatory and violated Section 15(1) of the *Canadian Charter of Rights and Freedoms*).

Vriend v. Alberta, Supreme Court of Canada, 1998 (holding that sexual orientation was a ground analogous to those listed in section 15(1) of the *Canadian Charter of Rights and Freedoms*).

International Law

Dudgeon v. United Kingdom, ECtHR, 1981 (finding that the sodomy laws of Northern Ireland violated the right to privacy under the *European Convention*).

Norris v. Ireland, ECtHR, 1988 (finding that the sodomy laws of Ireland violated the right to privacy under the *European Convention*).

Toonen v. Australia, United Nations Human Rights Committee, 1994 (finding that the sodomy laws of Tasmania violated the rights to privacy and non-discrimination under the ICCPR).

Reasoning of the Court

Majority Opinion (per Justice Ackermann)

First the Court summarised the stages of a Section 9 discrimination inquiry. Because differentiation was on a specified ground (sexual orientation), discrimination was established. Unfair discrimination was therefore presumed, but the Court was still required to consider whether fairness had not been established. It did this by analysing the impact of the sodomy laws.

The Court held that the sodomy laws reinforced existing social prejudices and had a severe impact, “affecting the dignity, personhood and identity of gay men at a deep level”. Furthermore, the laws had “no other purpose than to criminalise conduct which fails to conform with the moral or religious views of a section of society”. Therefore the discrimination was unfair.

The main argument was that sodomy laws were inconsistent with the right to equality. However, the Court also considered the right to dignity, protected by Section 10. The constitutional protection of dignity required the Court “to acknowledge the value and worth of all individuals as members of our society”.

The sodomy laws punished “a form of sexual conduct which is identified by our broader society with homosexuals. Its symbolic effect is to state that in the eyes of our legal system all gay men are criminals.” But the harm was not just symbolic. Gay men were at risk of arrest, prosecution and conviction for engaging in “sexual conduct which is part of their experience of being human”. The Court found that punishing sexual expression “degrades and devalues gay men in our broader society. As such it is a palpable invasion of their dignity and a breach of section 10 of the Constitution.”

The Court emphasised that the privacy argument was as important as the equality argument. It defined privacy as physical space but also as a “sphere of private intimacy and autonomy” in which human relationships were nurtured without interference. “The way in which we give expression to our sexuality is at the core of this area of private intimacy. If, in expressing our sexuality, we act consensually and without harming one another, invasion of that precinct will be a breach of our privacy.”

Under Section 36(1), the Court considered whether the limitation was reasonable and justifiable “in an open and democratic society based on human dignity, equality and freedom”. Considering the factors listed in Section 36(1), the Court found the rights involved were very important and that the limitation represented a severe infringement. No valid purpose for the limitation had even been suggested. “The enforcement of the private moral views of a section of the community, which are based to a large extent on nothing more than prejudice, cannot qualify as such a legitimate purpose.”

Moreover, nothing “in the jurisprudence of other open and democratic societies based on human dignity, equality and freedom” pointed in a different direction. Instead, there was “a definite trend towards decriminalisation”. The Court cited cases from the European Court and the United Nations Human Rights Committee. The United States, the Court observed, was an exception to this general trend. Nevertheless, the US case of *Bowers v. Hardwick* had been the subject of “sustained criticism” and more recently the US Supreme Court, in *Romer v. Evans*, had struck down an amendment to a State constitution that prohibited public measures designed to protect persons on the basis of their sexual orientation. The South African Constitution, unlike the US Constitution, contained express privacy and dignity guarantees as well as an express prohibition of unfair discrimination on the ground of sexual orientation.

“A number of open and democratic societies have turned their backs on the criminalisation of sodomy in private between adult consenting males, despite the fact that sexual orientation is not expressly protected in the equality provisions of their constitutions. Their reasons for doing so ... fortify the conclusion which I have reached that the limitation in question in our law regarding such criminalisation cannot be justified” under the Constitution.

Concurrence (per Justice Sachs)

Justice Sachs framed the question as one about “the nature of the open, democratic and pluralistic society contemplated by the Constitution”. He began by asking whether it was the act or the person that was the target of sodomy laws and concluded that it was the person. The laws at issue failed the harm principle, under which conduct was only criminalised if it caused harm. “In the case of male homosexuality, however, the perceived deviance is punished simply because it is deviant.”

Because sodomy laws had the effect of making everything associated with homosexuality “queer, repugnant or comical”, the equality interest was directly engaged. “People are subject to extensive prejudice because of what they or what they are perceived to be, not because of what they do.”

Justice Sachs rejected the notion, proffered by the applicants, that the privacy argument was a “poor second prize”. He emphasised that equality and privacy could not and should not be treated separately. In this case, a single situation could “give rise to multiple, overlapping and mutually reinforcing violations of constitutional rights”. The violation of equality by the sodomy laws “is all the more egregious because it touches the deep, invisible and intimate side of people’s lives”.

Privacy was not just about the bedroom. As Justice Blackmun described in his dissent in *Bowers v. Hardwick*, privacy was not just a negative right to occupy a private space free from government intrusion. It was the right to make fundamental decisions about intimate relationships without penalisation.

Autonomy, Justice Sachs explained, meant more than “the right to occupy an envelope of space in which a socially detached individual can act freely from interference by the state”. Individuals were not “isolated, lonely, and abstract” figures. The Constitution: “acknowledges that people live in their bodies, their communities, their cultures, their places and their times. The expression of sexuality requires a partner, real or imagined. It is not for the state to choose or to arrange the choice of partner, but for the partners to choose themselves.”

Justice Sachs viewed equality and dignity as complementary principles. “The manner in which discrimination is experienced on grounds of race or sex or religion or disability varies considerably ... The commonality that unites them all is the injury to dignity imposed upon people as a consequence of their belonging to certain groups. Dignity in the context of equality has to be understood in this light.” The sodomy laws, by denying “full moral citizenship in society because you are what you are, impinge on the dignity and self-worth of the group”. He referred to South Africa’s apartheid past. “At the heart of equality jurisprudence is the rescuing of people from a caste-like status and putting an end to their being treated as lesser human beings because they belong to a particular group.”

According to Justice Sachs, “the success of the whole constitutional endeavour in South Africa will depend in large measure on how successfully sameness and difference are reconciled”. Equality is not sameness or uniformity but rather acknowledgement and acceptance of difference. “What the Constitution requires is that the law and public institutions acknowledge the variability of human beings and affirm the equal respect and concern that should be shown to all as they are.”

Justice Sachs also addressed morality and argued for a morality based on the “deep political morality” of the Constitution’s *Bill of Rights*. “What is central to the character and functioning of the state ... is that the dictates of the morality which it enforces, and the limits to which it may go, are to be found in the text and spirit of the Constitution itself.”

Banana v. State, Supreme Court of Zimbabwe (29 May 2000)

Procedural Posture

Canaan Banana, a former president of Zimbabwe, was convicted by the High Court on two counts of sodomy, seven counts of indecent assault, one count of common assault, and one count of committing an unnatural offence, and he appealed his conviction to the Supreme Court.

Issue

Whether the common law crime of sodomy was in conformity with Section 23 of the Constitution, which guaranteed protection against discrimination on the ground of gender.

Facts

The conduct at issue arose out of Canaan Banana’s relationships with several male aides while he was in office. In 1997, his former aide-de-camp alleged that he had been subjected to repeated sexual abuse.

Domestic Law

Constitution of Zimbabwe, Section 23 (protection from discrimination, including on the grounds of gender), including Section 23(5) (any law discriminating between persons on the grounds of gender would not be in contravention of Section 25 to the extent that it took due account of physiological differences between persons of different gender, so long as such a law was reasonably justifiable in a democratic society), Section 11 (preamble), and Section 17 (protection from arbitrary search or entry).

Comparative Law

Bowers v. Hardwick, United States Supreme Court, 1986 (upholding constitutionality of State law criminalising sodomy).

National Coalition for Gay and Lesbian Equality v. Minister of Justice, Constitutional Court of South Africa, 1998 (finding unconstitutional statutory and common law offences of sodomy).

Romer v. Evans, United States Supreme Court, 1996 (finding unconstitutional a State constitutional amendment that withdrew a specific class of people - gays and lesbians - from the protection of the law without a legitimate state purpose, in violation of the equal protection clause of the federal constitution).

R v. M(C), Ontario Court of Appeal, Canada, 1995 (finding that a higher age of consent for anal intercourse than for vaginal intercourse was discriminatory and violated Section 15(1) of the *Canadian Charter of Rights and Freedoms*).

Vriend v. Alberta, Supreme Court of Canada, 1998 (holding that sexual orientation was a ground analogous to those listed in section 15(1) of the *Canadian Charter of Rights and Freedoms*).

International Law

International Covenant on Civil and Political Rights, Article 26.

Dudgeon v. United Kingdom, ECtHR, 1981 (finding that the sodomy laws of Northern Ireland violated the right to privacy under the *European Convention*).

Modinos v. Cyprus, ECtHR, 1993 (finding that the sodomy laws of Cyprus violated right to privacy under the *European Convention*).

Norris v. Ireland, ECtHR, 1988 (finding that the sodomy laws of Ireland violated the right to privacy under the *European Convention*).

Toonen v. Australia, United Nations Human Rights Committee, 1994 (finding that the sodomy laws of Tasmania violated rights to privacy and non-discrimination under the ICCPR).

Reasoning of the Court

By 3 to 2, the Supreme Court rejected the constitutional appeal. The main difference between the majority and dissent was over whether the criminalisation of same-sex sexual conduct (“sodomy”) discriminated on the basis of gender or sexual orientation. The other issues on appeal concerned the cautionary rule in sexual assault cases, the single witness situation, and various rulings on admissibility of evidence. On these points the Court was unanimous.

Majority Opinion (per Justices McNally, Muchechete and Saundura)

The majority opinion first rejected the dissent’s use of comparative law. It stated that consensual sodomy had been decriminalised in three main ways: by legislation, after the gradual development of a more tolerant public attitude; by a constitution that specifically mentions sexual orientation, as in South Africa; or by a supra-national judicial authority, such as the European Court of Human

Rights. The majority placed great weight on *Bowers v. Hardwick*, emphasising that in 1986 25 States in the United States criminalised consensual sodomy. “The fact remains that the present stand of perhaps the most senior court in the western world is that it is not unconstitutional to criminalise consensual sodomy.”

The majority discussed the role of public opinion, describing Zimbabwe as conservative in matters of sexual behaviour. “I do not believe that this court, lacking the democratic credentials of a properly elected parliament, should strain to place a sexually liberal interpretation on the Constitution of a country whose social norms and values in such matters tend to be conservative.” The majority also quoted *Bowers* in support of this point: “The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognisable roots in the language or design of the Constitution”.

The majority then addressed the non-discrimination argument. The opinion emphasised that what was forbidden by Section 23 was discrimination between men and women and not “between heterosexual men and homosexual men”. In the court’s view, this was important because “the *real* complaint by homosexual men is that they are not allowed to give expression to their sexual desires, whereas heterosexual men are”. That form of discrimination, reasoned the majority, was not the kind forbidden by Section 23.

Regarding the dissent’s “technically correct” argument, that anal sex involving women rather than men as passive partners was permitted under the law, the majority found it lacked “common sense”. The majority stated that anal sex between heterosexual partners was the result either of a “drunken mistake” or “an excess of sexual experimentation in an otherwise acceptable relationship”. The majority also doubted that the occurrence of anal sex between opposite-sex partners could be proven, (and declared this to be a practical issue rather than a matter of principle).

The majority concluded that, since the discrimination in this case was between homosexual men and heterosexual men, and discrimination on grounds of gender was therefore not at issue, it was not forbidden by the Constitution.

Dissent (per Chief Justice Gubbay and Justice Ebrahim)

As framed by Chief Justice Gubbay, the question was whether the common law crime of sodomy imposed on males a restriction to which females were not subject and, if it did, whether such a law was “reasonably justifiable in a democratic society”. Because Zimbabwe case does not criminalise either sexual acts between women or anal sex between a female and male, Chief Justice Gubbay found that “the only distinction that makes such acts criminal is the participants’ gender or sex”.

The dissent relied heavily on international and comparative law, and especially the decision of the Constitutional Court of South Africa in *National Coalition for Gay and Lesbian Equality v. Minister of Justice* and the decision of the Ontario

Court of Appeal in *R v. M (C)*, which found that a different age of consent for anal intercourse violated the right to equality. The dissent stated: “it therefore affords some support for the view that a law which subjects acts of anal intercourse occurring between consenting male adults to criminal sanction should be held to be unconstitutional on the ground that it discriminates against gender”.

The dissent distinguished the United States Supreme Court case *Bowers v. Hardwick*. “The unconstitutionality of Georgia’s sodomy laws was based upon the right to privacy which is not specifically mentioned in the Constitution of the United States. A gender discrimination argument could not be advanced because the Georgia statute was gender neutral; anal sex was prohibited for homosexuals as well as heterosexuals.” The dissent also noted that *Bowers v. Hardwick* had been heavily criticised and that the same court had handed down *Romer v. Evans*, which struck down a discriminatory amendment to a State constitution.

Since the sodomy law took “due account of physiological differences between the male and female genders”, under the constitutional framework the court was then required to consider whether the law was reasonably justifiable in a democratic society. If not, it was in violation of Section 23 of the Constitution. The criteria were whether: (1) the legislative objective which the limitation was designed to promote was sufficiently important to justify overriding the fundamental right concerned; (2) the measures designed or framed to meet the legislative objective were rationally connected to it and were not arbitrary, unfair or based on irrational considerations; and (3) the means used to impair the right or freedom were no more than was necessary to accomplish the objective.

First, the objective of the criminal law was to discourage conduct “considered immoral, shameful and reprehensible and against the order of nature”. The Court had to determine whether this objective was so important as to outweigh the protection against gender discrimination. To answer this question, the dissent reviewed the legal position in other countries, beginning with South Africa, noting the position in the majority of member States of the Council of Europe, and discussing the European Court of Human Rights’ decision in *Dudgeon v. United Kingdom* and the line of cases which followed it.

The dissent recognised that the majority of people might “find acts of sodomy morally unacceptable”. But public disapproval was not sufficient. “This does not mean, however, that today in our pluralistic society that moral values alone can justify making an activity criminal. If it could one immediately has to ask, ‘[b]y whose moral values is the state guided?’”

After quoting Professor Ronald Dworkin’s work *Taking Rights Seriously* (1978), the dissent stated: “I am thus not persuaded that in a democratic society such as ours it is reasonably justifiable to make an activity criminal because a segment, maybe a majority, of the citizenry consider it to be unacceptable”. The dissent offered a particular view of the role of the judiciary in terms of the protection of

individual rights: “The courts cannot be dictated to by public opinion.... Otherwise there would be no need for constitutional adjudication. Those who are entitled to claim the protection of rights include ... the marginalised members of society.”

The second issue the dissent had to resolve was whether the limitation of rights was rationally connected to its objective and was not arbitrary, unfair or based on irrational considerations. Here the dissent asked whether it could be rational to criminalise the (anal intercourse) only when it was performed by males. “If both forms of sexual deviation are to be regarded as immoral and against the order of nature, by what logic is the discrimination against the male gender justified?” The dissent questioned why sexual acts between women were not criminalised if it was the homosexual nature of the act that was the focus of the provision.

Third, the dissent considered whether the limitation on the right or freedom was more than necessary to accomplish the objective. To answer this question, the dissent quoted a number of sources, including Professor Edwin Cameron’s article, “Sexual Orientation and the Constitution: A Test Case for Human Rights” (1993), the Canadian Supreme Court in *Vriend v. Alberta*, and the South African case *National Coalition for Gay and Lesbian Equality v. Minister of Justice*. These sources considered the harmful impact of such laws on gay men. The dissent stated that “depriving such persons of the right to choose for themselves how to conduct their intimate relationships poses a greater threat to the fabric of society as a whole than tolerance and understanding of non-conformity could ever do”.

Lawrence v. Texas, United States Supreme Court (26 June 2003)

Procedural Posture

The defendants were convicted of “anal sex with a member of the same sex” in violation of Section 21.06 of the *Texas Penal Code*. At trial, they challenged the law on the grounds that it violated the Equal Protection Clause of the 14th Amendment of the *United States Constitution*. The trial court rejected that challenge and convicted both defendants, fining them \$200. The defendants appealed to the Court of Appeals. After hearing the case *en banc*, the Court, in a divided opinion, rejected the constitutional arguments and affirmed the convictions. The Court of Appeals considered the Supreme Court’s 1986 decision in *Bowers v. Hardwick* to be controlling law. The Supreme Court granted the petition for writ of certiorari (review).

Facts

Police officers went to a private residence in response to a reported weapons disturbance. They entered John Geddes Lawrence’s apartment and observed him and Tyrone Garner engaged in a sexual act. Both men were arrested, held in custody overnight, and charged.

Issue

Whether the Texas law criminalising sexual conduct between same-sex couples but not opposite-sex partners violated the Constitution's guarantee of equal protection of the laws; whether the criminalisation of adult consensual sexual conduct violates the Constitution's guarantee of privacy.

Domestic Law

Constitution of the United States, 14th Amendment ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

Bowers v. Hardwick, United States Supreme Court, 1986 (upholding State law criminalising sodomy against constitutional challenge).

Carey v. Population Services International, United States Supreme Court, 1977 (invalidating State law forbidding sale or distribution of contraceptives to persons under 16 years of age).

Eisenstadt v. Baird, United States Supreme Court, 1972 (invalidating State law that prohibited the distribution of contraceptives to unmarried persons).

Griswold v. Connecticut, United States Supreme Court, 1965 (invalidating a State law that prohibited the use of contraceptives by married couples).

Planned Parenthood of Southeastern Pa. v. Casey, United States Supreme Court, 1992 (holding that United States laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education).

Roe v. Wade, United States Supreme Court, 1973 (recognising the right of a woman to make certain fundamental decisions concerning her destiny, including the right to terminate a pregnancy).

International Law

Dudgeon v. United Kingdom, ECtHR, 1981 (finding that the sodomy laws of Northern Ireland violated the right to privacy under the *European Convention*).

Modinos v. Cyprus, ECtHR, 1993 (finding that the sodomy laws of Cyprus violated the right to privacy under the *European Convention*).

Norris v. Ireland, ECtHR, 1988 (finding that the sodomy laws of Ireland violated the right to privacy under the *European Convention*).

Reasoning of the Court

Majority Opinion (per Justice Kennedy).

With respect to *Bowers v. Hardwick*, the issue was framed as “whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy”. According to the majority, that initial statement disclosed “the Court’s own failure to appreciate the extent of the liberty at stake”.

To say that the issue in Bowers was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse. The laws involved in Bowers and here ... seek to control a personal relationship that whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.

Next the majority opinion considered *Bowers*’ use of history. Contrary to *Bowers*’ claims, the majority found that ancient criminal laws were not directed at “homosexuals” as a particular category, but at certain kinds of non-procreative sex. “The longstanding criminal prohibition of homosexual sodomy upon which the *Bowers* decision placed such reliance is as consistent with a general condemnation of nonprocreative sex as it is with an established tradition of prosecuting acts because of their homosexual character.”

Although the majority questioned *Bowers*’ description of historical precedent, it recognised that moral disapproval of homosexual conduct was strong and longstanding, but affirmed that moral disapproval was not the key question. “The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. Our obligation is to define the liberty of all, not to mandate our own moral code.”

In deliberate but vague language, the Court then addressed the two legal arguments in contention: *Bowers*’ judgment that the essential issue was whether individuals had the right to engage in homosexual sodomy, and the alternative view that the overriding principle is one of privacy (which should protect the right of individuals to engage in consensual sexual behaviour in private). The majority opinion concluded that history and tradition were not dispositive. It faulted *Bowers* for deciding that claims made on behalf of homosexual sodomy were unfounded while failing to take into account authorities “pointing in an opposite direction”. The Court cited both the 1957 Wolfenden Committee Report and the European Court of Human Rights’ decision in *Dudgeon v. United Kingdom*. “Authoritative in all countries that are members of the Council of Europe (21 nations then, 45 nations now), the [*Dudgeon*] decision is at odds with the premise in *Bowers* that the claim put forward was insubstantial in our Western civilization.” The Court returned to this point later in its argument. “To the extent that *Bowers* relied on values we share with a wider civilization, it should be noted that the reasoning and holding in *Bowers* have been rejected elsewhere.” It noted that other nations outside the Council of Europe had also found the right at issue here to be “an integral part of human freedom”.

Reviewing United States cases that developed the notion of liberty protected by the Due Process Clause (sometimes referred to as substantive due process, to distinguish it from procedural due process), the Court relied on *Planned Parenthood of Southeastern Pa. v. Casey* for the proposition that: “These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment”.

Noting again the practice of other countries, the majority stated: “There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent.” United States laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.

Bowers v. Hardwick was overruled and the judgment of the Court of Appeals reversed.

Concurrence (per Justice O’Connor)

Justice O’Connor relied on the 14th Amendment’s Equal Protection Clause. Legislation would be presumed valid, and would be sustained, if the classification drawn by the statute was rationally related to a legitimate State interest. In American jurisprudence this is referred to as rational basis review. “We have consistently held that some objectives, such as a bare desire to harm a politically unpopular group, are not legitimate state interests.” Moral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause because legal classifications must not be drawn for the sole purpose of disadvantaging a group.

Justice O’Connor observed that the Texas statute treated the same act (anal sex) differently, based only on the identity of the participants. It thus made “homosexuals unequal in the eyes of the law by making particular conduct – and only that conduct – subject to criminal sanction”. In addition to the consequences that flowed from a conviction, the effect of the sodomy law was to brand “all homosexuals as criminals, thereby making it more difficult for homosexuals to be treated in the same manner as everyone else”.

According to Justice O’Connor, “Texas’ invocation of moral disapproval as a legitimate state interest proves nothing more than Texas’ desire to criminalise homosexual sodomy. But the Equal Protection Clause prevents a State from creating a classification of persons undertaken for its own sake. And because Texas so rarely enforces its sodomy law as applied to private, consensual acts, the law serves more as a statement of dislike and disapproval against homosexuals than as a tool to stop criminal behavior.”

Texas argued that the law did not discriminate against homosexual *persons*, only against homosexual *conduct*. Justice O’Connor rejected this argument. She found

that the conduct in question was closely “correlated” with being homosexual. The law therefore was targeted at more than conduct. It was instead: “directed toward gay persons as a class. After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal.” Because of the sodomy law, as the State of Texas admitted, simply being homosexual carried the presumption of being a criminal.

“The State cannot single out one identifiable class of citizens for punishment that does not apply to everyone else, with moral disapproval as the only asserted state interest for the law. The Texas sodomy statute subjects homosexuals to a lifelong penalty and stigma. A legislative classification that threatens the creation of an underclass ... cannot be reconciled with the Equal Protection Clause.”

Kanane v. State, Court of Appeal, Botswana (30 July 2003)

Procedural Posture

Utjiwa Kanane was charged with committing an unnatural offence, contrary to section 164(c) of the *Penal Code*, and committing indecent practices between males, contrary to section 167. The conduct at issue involved Graham Norrie, a British tourist, and occurred in December 1994. (Norrie pleaded guilty, paid a fine, and left the country.) Kanane pleaded not guilty, alleging that sections 164(c) and 167 both violated the Constitution. The High Court ruled that these sections of the *Penal Code* did not violate the Constitution. Kanane then appealed to the Court of Appeal.

Issue

Whether sexual acts between consenting adult men in private violated the Constitution.

Domestic Law

Penal Code of Botswana, Sections 164 and 167. Because the defendant was charged with these crimes before 1998, the Court looked at both versions of the law to decide whether the post-1998 version was unconstitutional.

Pre-1998 Section 164 (Offence of having carnal knowledge of another “against the order of nature”, and individuals *permitting a male* to have “carnal knowledge” of him or her “against the order of nature”).

Post-1998 Section 164 (Offence of having carnal knowledge of another “against the order of nature”, and individuals *permitting any other person* to have “carnal knowledge” of him or her “against the order of nature”).

Pre-1998 Section 167 (Offence of *male persons* committing public or private acts of “gross indecency with another male person” or procuring “another male person to commit any act of gross indecency” or attempting to do so).

Post-1998 Section 167 (Offence of *any person* committing public or private acts of “gross indecency with another person” or procuring “another person to commit any act of gross indecency with him or her” or attempting to do so).

Constitution of Botswana, Sections 3 (constitutional protection of the fundamental rights and freedoms of every individual in Botswana), and 15 (“no law shall make any provision that is discriminatory either of itself or in its effect”).

Attorney-General v. Dow, Court of Appeal, Botswana, 1992 (holding that the list of protected grounds in Section 15 of the Constitution was illustrative and not exclusive and that discrimination on the basis of gender, although not expressly mentioned in Section 15, would violate Section 3 of the Constitution).

Comparative Law

Banana v. State, Supreme Court of Zimbabwe, 2000 (finding constitutional State sodomy law).

Bowers v. Hardwick, United States Supreme Court, 1986 (upholding State law criminalising sodomy against constitutional challenge).

Lawrence v. Texas, United States Supreme Court, 2003 (affirming that same-sex sexual conduct between consenting adults was part of the liberty protected by the substantive due process clause of the 14th Amendment to the federal Constitution and striking down Texas’ sodomy law).

National Coalition for Gay and Lesbian Equality v. Minister of Justice, Constitutional Court of South Africa, 1998 (finding unconstitutional statutory and common law offences of sodomy).

Reasoning of the Court

First, the Court held that Section 167, prior to amendment, was: “clearly discriminatory on the basis of gender” because it “was aimed entirely at male persons ... No such bar to similar activities existed for females.” However, any need to strike down Section 167 ended when it was amended to be gender neutral in 1998.

Counsel for Kanane argued that Section 164 discriminated against gay men both pre-amendment and post-amendment. The Court considered this argument at length, quoting from South African cases, the dissent in *Bowers v. Hardwick*, *Lawrence v. Texas*, and the Wolfenden Committee Report. The Court observed that sodomy had been decriminalised in member States of the Council of Europe, as well as in Australia, New Zealand, Canada, and the United States.

The issue, as framed by the Court, was whether discrimination on the basis of sexual orientation should be prohibited by the Constitution. According to the Court, the answer lay in part in whether the circumstances in Botswana “demand the decriminalization of homosexual practices”.

The Court noted: “No evidence was put before the court a quo nor before this court that public opinion in Botswana has so changed and developed that society in this country demands such decriminalization”. The Court cited the Zimbabwean case *Banana v. State*. “As to Gubbay CJ’s views on public opinion I am of the view that while courts can perhaps not be dictated to by public opinion, the courts would be loath to fly in the face of public opinion, especially if expressed through legislation passed by those elected by the public to represent them in the legislature... The public interest must therefore always be a factor in the court’s consideration of legislation particularly where such legislation reflects a public concern.”

The fact that the laws in question had been amended as recently as 1998 indicated that societal attitudes had not changed. “The legislature, in passing the 1998 Amendment Act, clearly considered its provisions and, as with the effect of the rest of the act, broadened them... I conclude therefore that so far from moving towards the liberalisation of sexual conduct by regarding homosexual practices as acceptable conduct, such indications as there are show a hardening of contrary attitude.”

The Court held: “Gay men and women do not represent a group or class which at this stage has been shown to require protection under the Constitution.” Therefore Section 164 survived the constitutional challenge.

McCoskar and Nadan v. State, High Court of Fiji at Suva (26 August 2005)

Procedural Posture

The authorities charged Thomas McCoskar and Dharendra Nadan with having or permitting carnal knowledge of the other against the order of nature, in violation of Section 175 (a) and (c) of the *Fijian Penal Code*. They were also charged with gross indecency between males, in violation of Section 177. The magistrates’ court sentenced each to two years’ imprisonment (twelve months for each offence). Both parties appealed their convictions and sentences.

Facts

Thomas McCoskar, an Australian tourist, visited Fiji for two weeks in March and April of 2005, during which time he and Dharendra Nadan had a consensual sexual relationship. Suspecting that Nadan had stolen AUD \$1500 from him, McCoskar filed a complaint with the police and then checked in for his return flight to Australia. Before McCoskar’s departure, airport police interviewed Nadan, who explained that McCoskar agreed to pay him modelling fees, as he intended to post photographs of their consensual sex on the internet. Nadan claimed that he had not been paid. The police detained McCoskar before his flight departed.

Under questioning, McCoskar admitted to his sexual relationship with Nadan and to the existence of the photographs, which were seized from his digital camera.

Issue

Whether Sections 175(a) and (c) and 177 of the *Fijian Penal Code* violated the constitutional guarantees of privacy and equality.

Domestic Law

Fiji Penal Code, Section 175 (“unnatural offences”: any person who (a) has carnal knowledge of any person against the order of nature; ... or (c) permits a male person to have carnal knowledge of him or her against the order of nature is guilty of a felony, and is liable to imprisonment for fourteen years with or without corporal punishment); and

Section 177 (“indecent practices between males”: any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him ... is guilty of a felony, and is liable to imprisonment for five years, with or without corporal punishment).

Constitution of Fiji, Section 37 (every person has the right to personal privacy including the right to privacy of personal communication, subject to such limitations prescribed by law as are reasonable and justifiable in a free and democratic society).

International Law

International Covenant on Civil and Political Rights, Article 17.

The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights.

Dudgeon v. United Kingdom, ECtHR, 1981 (finding that the sodomy laws of Northern Ireland violated the right to privacy under the *European Convention*).

Toonen v. Australia, United Nations Human Rights Committee, 1994 (finding that the sodomy laws of Tasmania violated thrights to privacy and non-discrimination under the ICCPR).

Comparative Law

Bernstein v. Bester, Constitutional Court of South Africa, 1996 (right to privacy should be construed in a way that recognises that all individuals are members of a broader community and are defined in relationship to that community).

Bowers v. Hardwick, United States Supreme Court, 1986 (upholding State law criminalising sodomy against constitutional challenge; dissent of Justice Blackmun).

Egan v. Canada, Supreme Court of Canada, 1995 (establishing that sexual orientation constituted a prohibited ground of discrimination under Section 15 of the *Canadian Charter of Rights and Freedoms*).

Lawrence v. Texas, United States Supreme Court, 2003 (affirming that same-sex sexual conduct between consenting adults was part of the liberty protected by the substantive due process clause of the 14th Amendment to the federal Constitution and striking down Texas' sodomy law).

National Coalition for Gay and Lesbian Equality v. Minister of Justice, Constitutional Court of South Africa, 1998 (finding unconstitutional statutory and common law offences of sodomy).

Reasoning of the Court

For the State, the Director of Public Prosecutions argued that constitutional rights could be limited in the public interest and on moral grounds; and that, because homosexuality was “abhorrent” to a “religious and conservative State”, limits could be imposed on the rights to privacy and equality. In an amicus brief, the Attorney General argued that rights to equality and privacy were validly limited in the interest of morals. In its amicus brief, the Human Rights Commission argued that these provisions of the *Penal Code* were unconstitutional and needed to be struck down.

The Court first observed that the “sodomy” laws traced their origin back to England and had been copied throughout the British Empire.

Concerning equality, the appellants argued that clauses (a) and (c) of Section 175 were discriminatory as they “applied only to gay men and criminalised their primary expression of sexuality”. The Court found that, although technically Section 175 was gender neutral and applied to men and women of any sexual orientation, in application it was not neutral. Counsel for the State could not offer any evidence showing that heterosexual couples had been prosecuted for consensual private acts “against the order of nature”. The Court therefore accepted the argument that Section 175 offences were “selectively enforced primarily against homosexuals”.

Turning to Section 177, which explicitly applied only to males, the Court held: “What the section does is to make certain conduct between males criminal, while leaving unaffected by the criminal law comparable conduct when not committed exclusively by males”. The section was thus discriminatory.

The Court acknowledged that the preamble to the Constitution emphasised the Christian heritage of Fiji but rejected the contention that Fiji was based solely upon Christian values. The Court also recognised that many Fijians genuinely and sincerely believed that any change in the law “to decriminalize homosexual conduct would seriously damage the moral fabric of society”. The Court found

such views relevant for the purpose of constitutional interpretation. However, the shock or offence to members of the public could not, on its own, validate unconstitutional law.

The Court stated that, “at the core of the appellants’ case is the principle that the State has no business in the field of private morality and no right to legislate in relation to the private sexual conduct of consenting adults”. The Court quoted from the Wolfenden Committee Report: “[T]here must remain a realm of private morality and immorality, which is, in brief and crude terms, not the law’s business”. It then reviewed the privacy-based jurisprudence of the European Court of Human Rights and the United Nations Human Rights Committee. Privacy, reasoned the Court, was not just the right to be left alone but also the right to “express your personality and make fundamental decisions about your intimate relationships without penalization”.

Guided by the Constitutional Court of South Africa’s jurisprudence on privacy, the Court stated: “The way in which we give expression to our sexuality is the most basic way we establish and nurture relationships. Relationships fundamentally affect our lives, our community, our culture, our place and our time. If, in expressing our sexuality, we act consensually and without harming one another, invasion of that precinct risks relationships, risks the durability of our compact with the State and will be a breach of our privacy.”

The Court then noted “a definite trend towards decriminalization of consensual adult homosexual intimacy”. Privacy, the Court reasoned, should include “the positive right to establish and nurture human relationships free of criminal or indeed community sanction”. The criminalisation of private consensual adult sex acts was neither a proportionate nor a necessary limitation.

Leung v. Secretary for Justice, High Court of the Hong Kong Special Administrative Region, Court of Appeal (20 September 2006)

Procedural Posture

In the trial court the applicant challenged the constitutionality of Section 118C of the *Crimes Ordinance of the Hong Kong Special Administrative Region*. The Section criminalised anal intercourse between males where one partner was below the age of 21. Where one partner was under the age of 21, both partners would be criminally liable. Section 118D set out a similar provision in relation to “buggery with a girl under 21”. Section 118D only criminalised the conduct of a male partner older than 21 years of age who had anal intercourse with a younger female partner. Unlike Section 118C, Section 118D did not criminalise the conduct of the female partner. By contrast to these sections, the age of consent for all other sexual conduct by heterosexual and, by implication, lesbian couples, was

a uniform 16 years of age. At first instance the trial court found for the Applicant. The Secretary of Justice appealed to the High Court, contending that Section 118C was constitutionally valid.

Facts

The applicant was 20 years of age when the proceedings for judicial review were commenced and therefore he, and any of his male sexual partners over the age of 21, were subject to Section 118C. The applicant submitted that he had “experienced great difficulties in developing lasting homosexual partnerships” because the law prohibited consensual anal sex between men until a man reached the age of 21 (rather than 16). The existence of the provision created a “fear of prosecution” in the applicant and the applicant claimed to have suffered from loneliness and distress as a result. The applicant contended that the differential age of consent violated his constitutional rights to privacy, equality and non-discrimination.

Issue

Whether (to the extent that it created a different legal standard for sexual intercourse between males over the age of 16 and under the age of 21 and their older sexual partners) Section 118C was unjustifiably discriminatory relative to laws applicable to heterosexual or lesbian couples, and as such was in breach of the equality, non discrimination and privacy provisions contained in the *Basic Law* and the *Bill of Rights*.

Domestic Law

Basic Law of Hong Kong, Article 25 (equality before the law) and Article 39 (incorporating the ICCPR into the law of Hong Kong).

Hong Kong Crimes Ordinance, Sections 118C and 118D.

Hong Kong Bill of Rights, Article 1 (entitlement to rights without distinction, following ICCPR Article 2), Article 14 (Protection of privacy, family, home, correspondence, honour and reputation, following ICCPR Article 17), and Article 22 (equality before and equal protection of the law, ICCPR Article 26).

Comparative Law

A v. Secretary of State for the Home Department, House of Lords, United Kingdom, 2005 (on the importance of the independence of the judiciary and judicial ability to rule on the validity of legislation as a “cornerstone” of the rule of law).

Ghaidan v. Godin-Mendoza, House of Lords, United Kingdom, 2004 (holding that “where the alleged violation comprises differential treatment based on grounds such as race or sex or sexual orientation the court will scrutinise with intensity any reasons said to constitute justification”).

National Coalition for Gay and Lesbian Equality v. Minister of Justice, Constitutional Court of South Africa, 1998 (equating sexual acts between male partners to those between male and female partners).

International Law

International Covenant on Civil and Political Rights.

Dudgeon v. the United Kingdom, ECtHR, 1981 (absolute criminalisation of “buggery” violated right to privacy under the *European Convention*, but permissible for countries to fix age limits for sexual conduct).

Norris v. Ireland, ECtHR, 1988 (finding that sodomy laws of Ireland violated the right to privacy under the *European Convention*).

Sutherland v. the United Kingdom, ECtHR, 2001; *L v. Austria*, ECtHR, 2003 (finding that unequal ages of consent for sexual conduct violated *European Convention*).

Reasoning of the Court

The applicant argued that the age restriction and criminalisation of consensual anal intercourse created by Section 118C infringed the rights to privacy, equality and non-discrimination set out in Articles 25 and 39 of the *Basic Law of Hong Kong*. Article 25 provided that “all Hong Kong residents shall be equal before the law”.

In addition, it was argued that Articles 1, 14 and 22 of the *Hong Kong Bill of Rights* had been breached. Article 1 enshrined an entitlement to rights without distinction; Article 14 created a right to the protection of privacy, family, home, correspondence, honour and reputation; and Article 22 provided that all Hong Kong residents should have equality before and equal protection of the law. These provisions of the *Bill of Rights* mirrored Articles 2, 17 and 26 of the ICCPR respectively.

The Secretary of Justice argued that “buggery was not to be equated with sexual intercourse between a man and a woman” and therefore it was not discriminatory to differentiate between anal intercourse and other sexual acts. The Secretary of Justice submitted that the legislative scheme was non-gender specific and that “there was no inequality: the minimum age restrictions applied equally to both women and men” by virtue of Sections 118C and 118D.

For the purposes of the appeal the High Court focused on non-discrimination and equality. While the Court acknowledged that consensual homosexual acts committed in private were an aspect of the right to privacy, it considered that contravention of that right was a subsidiary issue, since homosexual acts (in the form of buggery) had been decriminalised in Hong Kong since 1991. There was no total prohibition of “buggery” but rather a differentiated age of consent. Consequently, the Court’s primary concern was discrimination and inequality of treatment, on the basis of the age restrictions contained in Section 118C.

The Court adopted a two-stage approach when it analysed the constitutionality of Section 118C. It considered first whether Section 118C infringed the rights to equality, non discrimination or privacy protected by the *Basic Law* or the *Bill of Rights* (ICCPR); and, if so, second, whether the infringement could be justified.

For an infringement of a constitutional right to be justified, the Court required that the impugned provision should be “rationally connected to a legitimate purpose” and that “the means used to restrict that right must be no more than is necessary to accomplish the legitimate purpose in question”.

In assessing whether an infringement existed and in dealing with the submissions of the Secretary of Justice, the Court followed the trial court in ruling that “homosexual buggery” was a form of sexual intercourse comparable to vaginal intercourse. The Court stated,

Sexual intercourse between men and women is not just for the purpose of procreation. It also constitutes an expression of love intimacy and constituting perhaps the main form of sexual gratification. For homosexual men, buggery fits within these definitions.

On this point the Court cited European Court case law including *Sutherland v. the United Kingdom* and *L v. Austria*.

In dealing with the Secretary’s second contention, that no inequality existed if Section 118C was read in conjunction with Section 118D, the Court held that the legislative scheme had a substantively greater impact on homosexual men engaging in anal intercourse than it did on heterosexual men and women. The Court agreed with Justice Hartman that the fact that anal intercourse was the “only means” of sexual intercourse available between males was decisive. The Court quoted with approval the following passage of the trial court’s decision:

Denying persons of a minority class the right to sexual expression in the only way available to them, even if that way is denied to all, remains discriminatory when persons of a majority class are permitted the right to sexual expression in a way that is natural to them ... It is disguised discrimination founded on a single base: sexual orientation.

For that reason it held that Section 118C substantively infringed the rights to equality and to privacy enshrined in the *Basic Law* and the *Bill of Rights*.

The Court then determined whether the infringement could be rationally justified. This involved an inquiry into the purpose of the legislation. The purpose was suggested to be “the protection of the young from sexual activities which are, for want of a better term, for more mature persons”. However, no evidence was submitted to the Court to justify the setting of 21 as the age limit for consensual

anal sex. The Court noted that the absence of any medical reason to vary the age of consent for different sexual acts. In addition, the Court referred to parliamentary debates on the decriminalisation of “buggery” in 1991 and fixing the age of consent. As for the argument that 21 was an appropriate age of consent to sexual acts of that nature because individuals were “more mature”, the Court concluded that this was an insufficient justification for differentiating between “buggery” and other sexual activity. As a result, the Court found that “the burden of justifying the infringement on the Applicant’s fundamental rights” had not been met.

As a final consideration, the Court turned to the concept of the “margin of appreciation” accorded to the legislature in cases involving constitutional challenges, in recognition of the unique place of the legislature to make determinations as to the needs of society. Citing the case of *Dudgeon v. United Kingdom*, the Court acknowledged that it was not its place to infringe on the policy-making mandate of the legislature. However, the Court held that this concept was of limited application and it followed Lord Nicholls in the English case of *Ghaidan v. Godin-Mendoza* in holding that the courts must “scrutinize with intensity” any purported justification of a breach of rights on the basis of race, sex or sexual orientation. The Court stated:

Where the Court does not see any justification for the alleged infringement of fundamental rights, it would be its duty to strike down unconstitutional laws, for while there must be deference to the legislature as it represents the views of the majority in a society, the Court must also be acutely aware of its role which is to protect minorities from the excesses of the majority. In short, the Court’s duty is to apply the law; in constitutional matters, it must apply the letter and spirit of the Basic Law and the Bill of Rights.

In essence the Court asserted that, while a margin of appreciation exists, the true role of the courts is to independently apply and interpret the law free from the legislature’s influence, even in areas where the issue in question was socially or morally contentious.

The High Court upheld the first instance decision of Justice Hartman, ruling that Section 118C was unconstitutional on the grounds that it breached the relevant sections relating to non-discrimination, equality and privacy contained in the *Basic Law* and the *Bill of Rights*. The Court read down Section 118C, converting the age of consent to 16 years of age.

Secretary for Justice v. Yau Yuk Lung Zigo and Lee Kam Chuen,
Court of Final Appeal of the Hong Kong
Special Administrative Region (17 July 2007)

Procedural Posture

The respondents were charged with having committed buggery “other than in private”, in violation of Section 118F(1) of the *Crimes Ordinance*. They pleaded not guilty on the ground that the law was unconstitutional. Finding the law unconstitutional, the magistrate dismissed the charges and the government appealed to the Court of Appeal. The Court of Appeal agreed that Section 118F was unconstitutional and dismissed the government’s appeal. The government then appealed to the Court of Final Appeal.

Issue

Whether the law criminalising buggery “other than in private” was discriminatory and in violation of the *Basic Law* and the *Hong Kong Bill of Rights*.

Domestic Law:

Basic Law of Hong Kong, Article 25 (equality before the law).

Hong Kong Bill of Rights, Article 22 (implementing Article 26 of the ICCPR).

Crimes Ordinance, Section 118F(1) (“A man who commits buggery with another man otherwise than in private shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for 5 years”).

International Law

International Covenant on Civil and Political Rights, Article 26.

Reasoning of the Court

The Court held that Section 118F(1) was discriminatory and infringed the constitutional right to equality. The Court noted that a common law offence of committing “any act of a lewd, obscene or disgusting nature which outrages public decency” existed under which sexual activity in public could be prosecuted. However, unlike their heterosexual counterparts, same-sex couples had been additionally subjected to Section 118F(1).

The Court commenced with a review of the law of equality. Not all differences in treatment would be discriminatory. However, in order for differential treatment to be justified, a law had to satisfy three tests. First, the law must pursue a legitimate aim, meaning that it has to be established that a genuine need for the different treatment existed. Second, the difference in treatment must be rationally connected to that legitimate aim. Third, the difference in treatment must be proportionate, no more than was necessary to accomplish the legitimate aim. The

Court stated: “Where the difference in treatment satisfies the justification test, the correct approach is to regard the difference in treatment as not constituting discrimination and not infringing the constitutional right to equality”. The Court also noted that, where the differential treatment was based on grounds such as race, sex or sexual orientation, the Court would scrutinise with intensity whether the difference in treatment was justified.

The Court found that Section 118(1) created a difference in treatment affecting gay men. Although all people, regardless of sexual orientation, were exposed to criminal liability for committing “a sexual act of a lewd, obscene or disgusting nature which outrages public decency”, only gay men were subject to the statutory offence in Section 118F(1). Heterosexuals were not subject to any comparable criminal liability. Section 118F(1) drew a “dividing line ... on the basis of sexual orientation ... in relation to the same or comparable conduct”.

The Court rejected the government’s argument that genuine need was established by the fact that the law was enacted and that “in enacting it, the Legislature must be taken to have considered that there was a genuine need for such a specific offence”. The Court held that a genuine need for a discriminatory law could not be “established from the mere fact of legislative enactment”. A genuine need had to be “identified and made out”. No such need was made out.

The Court concluded that Section 118F(1) was discriminatory because it “only criminalises homosexual buggery otherwise than in private but does not criminalise heterosexuals for the same or comparable conduct when there is no genuine need for the differential treatment”.

Naz Foundation v. Government of NCT of Delhi and Others, High Court of Delhi at New Delhi, India (2 July 2009)

Procedural Posture

In 2001 a writ petition was filed by Naz Foundation, an NGO working in the public health field, to challenge the constitutionality of Section 377 of the *Indian Penal Code*, which criminalised as “unnatural offences” consensual oral and anal sex between adults in private. In 2004, the Delhi High Court dismissed the writ petition on the ground that it could not hear an academic challenge to the constitutionality of the legislation. Naz Foundation appealed to the Supreme Court, which held that the matter should be heard and remanded it for consideration. Voices Against 377, a coalition of associations representing the human rights of children, women and LGBT people, intervened in support of the petitioner. The respondent, Union of India, was represented by the Ministry of Home Affairs and the Ministry of Health & Family Welfare. However, the government position split and the Ministry of Health & Family Welfare argued in favour of the petitioner.

Issue

Whether Section 377 infringed fundamental rights guaranteed under the *Constitution of India*.

Domestic Law

Constitution of India, Articles 14 (equality and equal protection), 15 (non-discrimination), and 21 (right to life and liberty).

Comparative Law

Bowers v. Hardwick, United States Supreme Court, 1986 (upholding constitutionality of State law criminalising sodomy; Justice Blackmun dissenting).

Corbiere v. Canada, Supreme Court of Canada, 1999 (noting that recognition of analogous ground involves considering whether differential treatment of persons defined by a characteristic or combination of traits has the potential to violate human dignity in the sense underlying s. 15(1) of the *Canadian Charter of Rights and Freedoms*).

Egan v. Canada, Supreme Court of Canada, 1995 (establishing that sexual orientation constituted a prohibited ground of discrimination under Section 15 of the *Canadian Charter of Rights and Freedoms*).

Eisenstadt v. Baird, United States Supreme Court, 1972.

Griswold v. Connecticut, United States Supreme Court, 1965.

In re Blue Diamond Society, Supreme Court of Nepal, 2008 (finding that laws and practices which discriminated against sexual minorities and third gender people were unconstitutional).

Lawrence v. Texas, United States Supreme Court, 2003 (affirming that same-sex sexual conduct between consenting adults was part of the liberty protected by the substantive due process clause of the 14th Amendment to the federal Constitution and striking down Texas' sodomy law).

Leung v. Secretary for Justice, High Court of the Hong Kong Special Administrative Region, Court of Appeal, 2006 (finding differential age of consent for same-sex sexual conduct to be unconstitutional).

Nadan and Another v. State, High Court of Fiji, 2005 (finding sodomy laws to be unconstitutional in violation of rights to privacy and equality).

National Coalition for Gay and Lesbian Equality v. Minister of Justice, Constitutional Court of South Africa, 1998 (finding unconstitutional statutory and common law offences of sodomy).

Olmstead v. United States, United States Supreme Court, 1928 (dissent of Justice Brandeis).

Planned Parenthood of Southeastern Pa v. Casey, United States Supreme Court, 1992.

Roe v. Wade, United States Supreme Court, 1973.

Romer v. Evans, United States Supreme Court, 1996 (finding unconstitutional a State constitutional amendment that withdrew a specific class of people - gays and lesbians - from the protection of the law without a legitimate States purpose, in violation of the equal protection clause of the federal Constitution).

Vriend v. Alberta, Supreme Court of Canada, 1998 (holding that sexual orientation was a ground analogous to those listed in section 15(1) of the *Canadian Charter of Rights and Freedoms*).

International Law

Dudgeon v. United Kingdom, ECtHR, 1981 (finding that the sodomy laws of Northern Ireland violated the right to privacy under the *European Convention*).

Modinos v. Cyprus, ECtHR, 1993 (finding that the sodomy laws of Cyprus violated the right to privacy under the *European Convention*).

Norris v. Ireland, ECtHR, 1988 (finding that the sodomy laws of Ireland violated the right to privacy under the *European Convention*).

Toonen v. Australia, United Nations Human Rights Committee, 1994 (finding that the sodomy laws of Tasmania violated the rights to privacy and non-discrimination under the ICCPR).

Reasoning of the Court

Naz Foundation presented evidence that Section 377, which had been interpreted by Indian courts to cover both oral and anal sex regardless of the sex of the partners, caused discrimination and stigma against gay, transgendered, and “men who have sex with men” (MSM) communities. As a result of Section 377, individuals were subjected to police abuse and violence. Section 377 impeded Naz Foundation’s public health efforts, particularly in the field of HIV/AIDS prevention. Naz Foundation argued that the right to privacy was implicit in Article 21’s guarantee of the right to life and liberty and that private consensual sexual conduct was included within this right to privacy. The petitioner further maintained that Section 377 violated Article 14 (equal protection) because it failed the rational nexus test and created an arbitrary distinction between procreative and non-procreative sexual acts. Finally, the petitioner argued that Section 377 discriminated on the basis of sexual orientation and thus violated Article 15.

Voices Against 377 submitted evidence of the extreme ostracism of the gay community and used affidavits, media reports, and court cases to document exploitation, mistreatment, and violence at the hands of both State and non-State actors. Voices Against 377 also introduced into evidence a variety of law review

articles and public statements by Indian officials. Many of these exhibits were quoted or referred to throughout the judgment.

The Ministry of Home Affairs justified retention of Section 377 on the grounds of protection of health and morals. It also asserted that Section 377 was mostly invoked in cases of child sexual abuse, not adult consensual sex, and submitted that removing the provision would “open flood gates of delinquent behavior” and could be “misconstrued as providing unfettered license for homosexuality”. With respect to morality, the Ministry of Home Affairs argued that “the legal conception of crime depends upon political as well as moral considerations” and that law could not run separately from society. It claimed that India was a more conservative society than other countries that had decriminalised homosexual conduct and that Indian society had yet to demonstrate “readiness or willingness to show greater tolerance”.

The Court first discussed the protection of dignity, autonomy, and privacy. It found that although there was no specific privacy provision in the Constitution, the right had been read into Article 21. It reviewed American jurisprudence on privacy, beginning with *Griswold v. State of Connecticut* and continuing through *Lawrence v. Texas*. Quoting Justice Ackermann in *National Coalition for Gay and Lesbian Equality v. Minister of Justice*, the Court observed that expressing one’s sexuality and forming sexual relationships was “at the core of this area of private intimacy”.

The Court accepted that sexual conduct was about identity as well as privacy. Relying on a variety of sources, including the *Yogyakarta Principles*, the Court noted that “the sense of gender and sexual orientation of the person are so embedded in the individual that the individual carries this aspect of his or her identity wherever he or she goes”. The Court concluded that Section 377 “denies a person’s dignity and criminalises his or her core identity solely on account of his or her sexuality”. This criminalisation of identity denied “a gay person a right to full personhood which is implicit” in the notion of life under Article 21.

The Court was concerned with the stigmatising effects of Section 377 even when it was not enforced. Referring to evidence that showed Section 377 was used to brutalise and harass, the Court compared the criminalisation of identity to the *Criminal Tribes Act 1871*. “These communities and tribes were deemed criminal by their identity, and mere belonging to one of those communities rendered the individual criminal.”

To respond to Ministry of Home Affairs’ protection of public health argument, the Court relied on statements by UNAIDS and the United Nations General Assembly Special Session on HIV/AIDS, and the affidavit submitted by the Ministry of Health & Family Welfare through its agency the National AIDS Control Organisation (NACO). It found that the submissions made by the Ministry of Home Affairs were not supported by the record. In contrast, the affidavit of NACO stated that “Section 377 IPC pushes gays and MSM underground, leaves them vulnerable

to police harassment and renders them unable to access HIV/AIDS prevention material and treatment ... NGOs working in the field of HIV/AIDS prevention and health care [are] being targeted and their staff arrested". Since the Ministry of Home Affairs argued that Section 377 was not often enforced against consensual adult sexual conduct, the Court, citing *Toonen v. Australia*, concluded that it could not be deemed essential for the protection of morals or public health and thus failed the reasonableness test.

When a provision infringes a fundamental right, it must satisfy the compelling State interest test. The Court held that the enforcement of public morality did not amount to a compelling State interest that justified invading the privacy of adults engaged in consensual sex in private who had no intention to cause harm. In so holding, it relied on O'Connor's concurrence in *Lawrence*, the European Court cases, the Wolfenden Committee Report, and India's Constitutional Assembly Debates. "Popular morality, as distinct from a constitutional morality derived from constitutional values, is based on shifting and subjecting notions of right and wrong. If there is any type of morality that can pass the test of compelling state interest, it must be constitutional morality and not public morality." The Constitution, the Court recalled, recognised, protected, and celebrated diversity. "To stigmatise or to criminalize homosexuals only on account of their sexual orientation would be against the constitutional morality."

The Court next found that Section 377 violated the guarantee of equality under Article 14 and the guarantee of non-discrimination under Article 15. For a legislative classification to be constitutional, it must be "founded on an intelligible differentia" and have a rational relation to the objective sought. The Court held that the law failed this test because its objective (enforcement of public morality) was irrational, unjust, and unfair. Under Article 15, the Court concluded that "sexual orientation" was analogous to the protected ground of "sex". Because Article 15 prohibited private acts of discrimination, the Court held that discrimination on the ground of sexual orientation was impermissible "even on the horizontal application of the right".

In re Article 534, Criminal Court of Al-Bitroun, Lebanon (2 December 2009)

Procedural Posture

The defendants, both male, were charged with having "unnatural sexual intercourse" under Article 534 of the *Lebanese Penal Code*.

Facts

On 29 February 2007, members of a police patrol found the defendants in a car that was parked by the side of the road and took them to the Al-Bitroun Police

Station on the grounds that they had been engaged in homosexual intercourse. It was alleged that the men had been kissing. However, it was unclear whether either of the men was in a State of undress and whether any sexual intercourse had occurred. A box of condoms was reported to have been in the car when the police arrived.

Issue

Whether the alleged actions of the defendants constituted “sexual intercourse against nature” and were in violation of Article 534 of the *Lebanese Penal Code*.

Domestic Law

Lebanese Penal Code, Article 534 (providing that any sexual intercourse against nature will be punished with up to one year imprisonment).

Reasoning of the Court

Two streams of reasoning ran through the judgment of the Honourable Mounir Suleiman. The first related to prosecution’s failure to establish strong evidence in support of the charges. There was conjecture as to the circumstances in which the men had been found, including inconsistent witness testimony. The Court held that it was not clear whether any sexual intercourse had occurred. Furthermore, the presence of a box of condoms could not be considered conclusive evidence: condoms were neither prohibited material nor evidence of a prohibited act; indeed, having condoms was encouraged by public awareness campaigns on sexual health. On this basis, insufficient evidence existed to sustain the charges.

The second stream of reasoning related to the concept of “unnatural” sexual acts. In deliberating this point, the Judge noted the nebulous character of the notion of a “violation of nature”. What was considered “unnatural” was closely linked to “the mood of a society and its traditions”, in addition to the willingness of society to accept new or emerging “norms of nature”. The Court noted that:

Man is part of nature and one its elements and one its cells and no one can say that any act of his acts or behaviour is contradicting nature even if the act is criminal or offending simply because these are the rules of nature and if the sky is raining during summer time or if we have a hot weather during winter or if a tree is giving unusual fruits all these can be according to and with harmony to nature and are part of its rules themselves.

The Court ordered that the criminal investigation into the behaviour of the defendants cease.

Tan Eng Hong v. Attorney General, High Court of the Republic of Singapore (15 March 2011)

Procedural Posture

The plaintiff was originally charged with an offence under Section 377A of the *Penal Code* (gross indecency between males) and he challenged the constitutionality of that provision. The Section 377A charges were later dropped, however, and the plaintiff pled guilty to Section 294(a) (Obscene Acts), to which he pled guilty. However he pursued his constitutional challenge. The Attorney General requested that the constitutional challenge be struck out and the Assistant Registrar granted the application. The plaintiff then appealed to the High Court.

Issue

Whether the plaintiff had standing to challenge the law.

Domestic Law

Constitution of Singapore, Articles 9 (liberty of the person), 12 (equal protection), and 14 (freedom of religion).

Singapore Penal Code, Sections 377A (“Any male person who, in public or private, commits, or abets the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person, shall be punished with imprisonment for a term which may extend to 2 years”).

Chan Hiang Leng Colin & Others v. Minister for Information and the Arts, High Court of Singapore, 1995.

Comparative Law

Leung v. Secretary for Justice, High Court of the Hong Kong Special Administrative Region, Court of Appeal, 2006 (finding applicant had standing to challenge the law even though never charged).

Reasoning of the Court

In order to determine whether the plaintiff could challenge the constitutionality of Section 377A, it had to determine three issues: 1) whether the plaintiff had a “substantial interest” in the matter at hand and thus had *locus standi* to raise a constitutional issue; 2) whether a real controversy was at stake, involving an injury or violation of the plaintiff’s constitutional rights; 3) whether the plaintiff’s claim was certain to fail.

With respect to the first issue, the Court held that the plaintiff did have a substantial interest in the constitutional validity of Section 377A. Although the Court held that the case did not raise issues under Articles 9 (liberty of the person) or 14 (freedom

of religion), it found that the plaintiff had raised a genuine constitutional issue with regard to equal protection under the law, under Article 12. To comply with Article 12, Section 377 had to fulfil two conditions. First, it had to be founded on an intelligible difference; secondly, it had to bear a rational relation to the objective sought. The Court found that, even if the challenged provision was founded on an intelligible difference (because it applied to “sexually-active male homosexuals”), it was arguable that a social objective could be furthered by criminalising male, but not female, sexual activity.

Having decided that an Article 12 issue was raised, the Court next considered whether the plaintiff’s constitutional right to equal protection had been injured or violated. The Court held that, even if the plaintiff was no longer being charged under Section 377A, the spectre of future prosecution was sufficient. This argument had already been accepted by the Hong Kong High Court in *Leung v. Secretary for Justice*. The plaintiff therefore satisfied the substantial interest test for *locus standi*.

However, the Court decided there was no longer a real controversy because the facts had become hypothetical. There was nothing at stake for the plaintiff, who had already pleaded guilty and been convicted under another charge.

The Court also addressed the third issue of certainty of failure, and found the case not to be completely without merit. On the contrary, it raised several issues that deserved more detailed treatment, among them the question whether Article 12 encompassed sexual orientation. Therefore, it could not be assumed that, had all other criteria been met, the plaintiff’s claim was likely to fail.

Nonetheless, the Court held that the plaintiff had failed to prove that there was a real controversy in issue after the withdrawal of the charges against him. The appeal was therefore dismissed.

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- 1 Eddie Bruce-Jones & Lucas Paoli Itaborahy, “State-sponsored Homophobia: A world survey of laws criminalising same-sex sexual acts between consenting adults” (ILGA May 2011).
 - 2 Wolfenden Committee, Report of the Committee on Homosexual Offences and Prostitution (Home Office & Scottish Home Department, London 1957) at para. 61.
 - 3 Human Rights Committee, Views of 4 April 1994, *Toonen v. Australia*, Communication No. 488/1992.
 - 4 European Court of Human Rights, Judgment of 26 October 1988, *Norris v. Ireland*, Application No. 10581/83; European Court of Human Rights, Judgment of 27 March 2001, *Sutherland v. United Kingdom*, Application No. 25186/94.
 - 5 European Court of Human Rights, Judgment of 21 December 1999, *Salgueiro da Silva Mouta v. Portugal*, Application No. 33290/96, para. 28.
 - 6 European Court of Human Rights, Judgment of 22 October 1981, *Dudgeon v. United Kingdom*, Application No. 7525/76, paras. 52, 60.

UNIVERSALITY, EQUALITY AND NON- DISCRIMINATION

Chapter two

Universality, Equality and Non-Discrimination

INTRODUCTION

The cases presented here deal with universality, equality and non-discrimination. These are foundational principles of human rights law. Article 1 of the *Universal Declaration of Human Rights* provides: “All human beings are born free and equal in dignity and rights.” The Preamble of the ICCPR recognises that “the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”. Every regional human rights instruments also refers to the universality of rights. The *Vienna Declaration and Programme of Action*, adopted unanimously by all States at the World Conference on Human Rights in 1993, states: “Human rights and fundamental freedoms are the birthright of all human beings; their protection and promotion is the first responsibility of Governments”. What this should mean is that every human being, regardless of sexual orientation or gender identity, is entitled to the full enjoyment of all human rights.

The intertwined principles of equality and non-discrimination are likewise essential for the effective protection of human rights, as both national constitutions and universal and regional human rights instruments recognise. The African Commission on Human and Peoples’ Rights has observed: “Together with equality before the law and equal protection of the law, the principle of non-discrimination provided under Article 2 of the Charter provides the foundation for the enjoyment of all human rights”.¹ The Inter-American Court has held that it “considers that the principle of equality before the law, equal protection before the law and non-discrimination belongs to *jus cogens*, because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws.”²

In many ways, each chapter in the Casebook deals with universality, equality, and non-discrimination. The cases selected here were chosen for their explicit treatment of these subjects. The two Ugandan cases are especially significant given their context. When *Mukasa and Oyo* was decided, in December 2008, Section 145 of the *Penal Code* already criminalised “carnal knowledge against the order of nature” with a maximum term of life imprisonment. Police violence and arrests were common. *Mukasa and Oyo*, a case of police ill-treatment, represents

the explicit application of international human rights law. The court did not directly mention the sexual orientation or gender identity of the applicants. Rather, the court upheld the principle of the universality of all human rights in finding that Mukasa's and Oyo's constitutional and human rights had been violated by illegal search and seizure and subsequent physical abuse.

The second case, ***Kasha Jacqueline, David Kato, and Onziema Patience v. Rolling Stone***, arose two years later, when circumstances had changed for the worse. In October 2009, MP David Bahati introduced the *Anti-Homosexuality Bill*. The bill included provisions imposing the death penalty for what it termed "aggravated homosexuality" and also prohibited all forms of advocacy and organising around LGBT issues. If enacted, it would have required people to report individuals for engaging in homosexual conduct. By the time *Rolling Stone* published its "Uganda's Top Homos" story in October 2010, most public discourse was intensely homophobic. Threats and harassment had increased. Three LGBT activists from Sexual Minorities Uganda filed a lawsuit for violation of their constitutional rights and sought an injunction. In issuing it, the court emphasised that the case was about constitutional rights, not "homosexuality *per se*". "The scope of section 145 is narrower than gayism generally. One has to commit an act prohibited under section 145 in order to be regarded a criminal." Three weeks later, one of the applicants, David Kato, was dead, killed in his home by an assailant with a hammer. The editor of *Rolling Stone*, Giles Muhame, disavowed any responsibility. He stated: "We want the government to hang people who promote homosexuality, not for the public to attack them. We said they should be hanged, not stoned or attacked."³

The implicit defence in the first case, explicit in the second, was that LGBT individuals had fewer rights than others. Giles Muhame argued in court that, since the applicants had admitted to being homosexuals, they had not come to court with clean hands and should be denied relief. In both instances the courts responded by asserting the principle of universality: LGBT individuals in Uganda, despite extreme social ostracism and official discrimination, were still entitled to universal human rights guarantees.

The case of ***Sunil Babu Pant v. Government of Nepal***, decided by the Supreme Court of Nepal in December 2007, is historic for its recognition of the rights of "people of the third gender". Although the case also concerned redress for human rights violations based on sexual orientation, the Supreme Court devoted the majority of its opinion to the exclusion of *metis* (men who dress and identify as feminine) from almost all civic rights. The evidence presented showed that *metis* were targeted by police and others for their non-conforming gender expression and identity. Because *metis* were routinely denied citizenship cards, they did not have access to a range of entitlements and benefits that such cards conferred. This case was about citizenship in its most basic sense: *metis* were

not recognised as citizens of Nepal. In ordering that *metis* be given citizenship cards that reflected their third gender and that protections against discrimination on the basis of gender identity and non-discrimination be enshrined in the new Constitution, the Supreme Court emphasised the universality of all human rights. As citizens of Nepal, people of the third gender were entitled to all rights protected by the Constitution and international law. It was the “responsibility of the State to create the appropriate environment and make legal provisions accordingly for the enjoyment of such rights”.

In the United States case of ***Romer v. Evans***, the issue was not the universality of rights but the degree to which government had power to classify or differentiate between groups of people. The State law at issue (Amendment 2) described the class as one defined by “homosexual, lesbian or bisexual orientation, conduct, practices or relationships”. It then provided that this group of people was excluded from legal protection from acts of discrimination. Finding a violation of the Equal Protection Clause, the US Supreme Court held: “Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. A State cannot so deem a class of persons a stranger to its laws.” In his dissent, Justice Scalia, relying on the Court’s decision in *Bowers v. Hardwick* that sodomy laws were constitutional, objected to the idea that a State could not classify based on a predisposition to engage in behavior that a State was legitimately and constitutionally entitled to criminalise. The majority focused on status and not potentially criminal sexual conduct. Nevertheless, the Supreme Court’s decision in ***Romer v. Evans*** was instrumental seven years later in ***Lawrence v. Texas***, when it overruled *Bowers v. Hardwick*.

The cases from Canada and Trinidad go one step farther than ***Romer***. In both cases the courts concluded that it was unconstitutional to exclude sexual orientation from non-discrimination laws. When ***Vriend*** was decided in 1998, the Supreme Court of Canada had already held “sexual orientation” to be a comparable ground of discrimination for the purposes of section 15 (equality rights) of the *Charter of Rights and Freedoms*.⁴ In ***Vriend***, the Supreme Court held that the legislature’s omission of sexual orientation from Alberta’s *Individual Rights Protection Act* was itself an infringement of Section 15. Although “sexual orientation” might be read as neutral, in that it is shared by both heterosexuals and homosexuals, the Court addressed the requirements of substantive equality, observing that heterosexuals were not discriminated against on the basis of their sexual orientation.

In ***Suratt and Others v. Attorney General***, the plaintiffs had charged that the government had failed to implement provisions of the *Equal Opportunity Act* (EOA). In defence, the government argued that the Act itself was unconstitutional, in part because it omitted “sexual orientation”. Section 3 provided explicitly that “sex does not include sexual preference or orientation”. The trial court upheld this exclusion but the Court of Appeal reversed, finding the Act unconstitutional

because the exclusion was unjustified. The Court of Appeal emphasised that “sexual orientation” could not provide a reasonable basis for distinction and, relying on reasoning akin to the Supreme Court of Canada in *Egan v. Canada*, found that this ground was analogous to sex. The court pointed out that discriminating against an individual purely on the basis that he or she had been convicted of a criminal act would itself be unconstitutional. The court stated that it would be a “[d]ouble punishment to deny a person access to the things enjoyed by other members of the community in addition to the severe criminal sanctions that his behaviour would attract. The EOA is invidious because in respect of criminal behaviour, it is generally accepted that once one pays one’s debt to society, it is over.”

In 2007 the Privy Council overturned the Court of Appeal, ruling that the *Equal Opportunity Act* was not inconsistent with the *Constitution of Trinidad & Tobago*. However, the Privy Council’s decision dealt not with the exclusion of sexual orientation but the other alleged grounds of invalidity.⁵

A theme that runs through all of these cases is the conflation or distinction between status and conduct. The European Court and the UN Human Rights Committee concluded that the criminalization of same-sex sexual conduct violated the right to privacy long before they dealt directly with the question of the right to be protected against discrimination based on sexual orientation; in other words, they addressed sexual activity before sexual identity. Thus, in *Dudgeon*, the Court found in 1981 that Northern Ireland’s sodomy laws violated rights under Article 8 of the *European Convention*, but did not decide until 1999 that a difference in treatment based on sexual orientation violated the applicant’s rights under Article 14.⁶ The UN Rights Committee decided *Toonen* in 1994 and observed in passing that “sexual orientation” was included in Article 26 of the ICCPR, but only in 2003 did the Committee explain that individuals had a more general right to be guaranteed equal protection under the laws with respect to sexual orientation.⁷

This progression from decriminalization to non-discrimination, with respect to sexual orientation, is not preordained. With the exception of Canada, all the States included here criminalised consensual same-sex sexual conduct at the time these decisions were handed down. (In Nepal, “unnatural sex” was criminalised but was not defined.) Despite the existence of these criminal laws, the courts nonetheless held that classifications based on sexual orientation were not rational. The characteristic at issue – a same-sex sexual orientation – had undergone a transformation. In Justice Scalia’s words, it changed from being a description of a “self-avowed tendency” to engage in prohibited conduct, to being a marker of a class. In essence, these courts affirmed that this group characteristic could not be the basis for difference of treatment.

CASE SUMMARIES

Romer v. Evans, United States Supreme Court (20 May 1996)

Procedural Posture

Respondents (who included LGBT persons and municipalities) brought litigation against State authorities in a State trial court challenging the adoption of Amendment 2 to the *Constitution of the State of Colorado*. The trial court granted a permanent injunction against enforcement of Amendment 2. The Colorado Supreme Court affirmed. The State of Colorado appealed to the United States Supreme Court.

Facts

In a State-wide referendum, Colorado voters had adopted Amendment 2, which precluded all legislative, executive or judicial action at any level of State or local government designed to protect the status of persons based on their “homosexual, lesbian or bisexual orientation, conduct, practices or relationships”.

Issue

Whether Amendment 2 violated the Equal Protection guarantee of the *United States Constitution*.

Domestic Law

Colorado Constitution.

Constitution of the United States, 14th Amendment (Equal Protection).

Bowers v. Hardwick, United States Supreme Court, 1986 (upholding constitutionality of State law criminalising sodomy).

Reasoning of the Court

The State argued that Amendment 2 did nothing more than deny “special rights” to homosexuals. The Colorado Supreme Court, however, found that the immediate objective of Amendment 2 was to repeal existing laws that prohibited discrimination on the basis of sexual orientation. The Supreme Court adopted this interpretation of the amendment. “The amendment withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies.”

The 14th Amendment guaranteed “equal protection of the laws” for all persons. In order to survive an Equal Protection challenge at the lowest level of scrutiny (rational basis), a legislative classification had to bear a rational relation to some legitimate end. This amendment failed the test. First, the Supreme Court held, it imposed “a broad and undifferentiated disability on a single named group”, which

was an invalid form of legislation. Second, “its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus towards the class it affects; it lacks a rational relationship to legitimate State interests”.

With regard to the first point, Amendment 2 identified persons by a single trait and then denied them protection across the board. The disqualification of a “class of persons from the right to seek specific protection of the law” was unprecedented, observed the Court. “A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.”

With respect to the second point, the amendment invited the inevitable inference that it was born of animosity. “If the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare ... desire to harm a politically unpopular group cannot constitute a legitimate State interest.”

The judgment of the Colorado Supreme Court was affirmed.

Dissent

Justice Scalia focused on whether there was a legitimate rational basis for the law. He argued that the amendment was an attempt by Coloradans to preserve “traditional American moral values”. In his view, the majority was wrong to equate opposition to homosexuality with racial or religious bias. He relied heavily on the 1986 case *Bowers v. Hardwick*, in which the Supreme Court held that a State law criminalising sodomy was constitutional. He asked: “If it [is] constitutionally permissible for a State to make homosexual conduct criminal, surely it is constitutionally permissible for a State to enact other laws merely *disfavouring* homosexual conduct?” Since the amendment targeted sexual orientation and not just conduct, Justice Scalia added: “If it is rational to criminalise conduct, surely it is rational to deny special favour and protection to those with a self-avowed tendency or desire to engage in the conduct?” Where the majority saw “animosity”, Justice Scalia saw “morality”. Thus, he reasoned, the only animus at work was “moral disapproval of homosexual conduct”, the same sort of moral disapproval that justified criminalising murder or polygamy. Justice Scalia argued that the Court’s reasoning would invalidate State laws prohibiting polygamists, “unless, of course, polygamists for some reason have fewer constitutional rights than homosexuals”.

Vriend v. Alberta, Supreme Court of Canada (2 April 1998)

Procedural Posture

The appellant, a college laboratory instructor, was dismissed because of his homosexuality. He appealed against the decision and applied for reinstatement, but was refused. He then attempted to file a complaint with the Alberta Human

Rights Commission, arguing that his employer had discriminated against him on the basis of his sexual orientation. However, the Commission advised him that he could not make a complaint because the Alberta *Individual Rights Protection Act* (IRPA) did not include sexual orientation as a protected ground.

The appellant then challenged the constitutionality of the IRPA on the ground that it contravened Section 15 of the *Canadian Charter of Rights and Freedoms* because it did not include sexual orientation as a prohibited ground for discrimination. Finding that the omission of protection against discrimination on the basis of sexual orientation was an unjustified violation of Section 15 of the Charter, the judge ordered that the words “sexual orientation” be read into the IRPA as a prohibited ground of discrimination. The government of Alberta appealed to the Supreme Court.

Facts

The appellant was employed as a laboratory coordinator by a college in Edmonton, Alberta. He received positive evaluations, salary increases and promotions. However, in 1990, the appellant disclosed to his employer that he was gay. Despite the college’s request, he refused to resign. The college then dismissed him for non-compliance with its policy on homosexuality.

Issue

Whether the IRPA’s omission of sexual orientation among the prohibited grounds of discrimination infringed the appellant’s right to equality and, if so, whether the infringement was justified.

Domestic Law

Canadian Charter of Rights and Freedoms, Sections 1, 15, and 32.

Individual Rights Protection Act, Alberta, Preamble and Sections 2(1), 3, 4, 7(1), 8(1), 10, and 16(1).

Egan v. Canada, Supreme Court of Canada, 1995 (establishing that sexual orientation constituted a prohibited ground of discrimination under Section 15 of the *Canadian Charter of Rights and Freedoms*).

Haig v. Canada, Ontario Court of Appeal, Canada, 1992 (affirming that the omission of sexual orientation in the *Canadian Human Rights Act* constituted discrimination contrary to Section 15 of the Charter).

Comparative Law

Romer v. Evans, United States Supreme Court, 1996 (finding unconstitutional a State constitutional amendment that withdrew a specific class of people - gays and lesbians - from the protection of the law without a legitimate State purpose, in violation of the equal protection clause of the federal Constitution).

Reasoning of the Court

The *Individual Rights Protection Act* (IRPA) prohibited discrimination on several grounds. Over the years, IRPA had been expanded to include additional prohibited grounds, but the Alberta Government always refused to include sexual orientation. For this reason, the appellant had not been able to file a complaint for employment discrimination with the Alberta Human Rights Commission.

Issues arising from legislative omission could be considered in terms of conformity with the Charter. The Court adopted the two-step approach summarised in *Egan v. Canada*. First, the Court considered whether the claimant's right to equality before the law, equality under the law, equal protection of the law, or equal benefit of the law had been denied. Since not every distinction would give rise to discrimination, the second step was to determine whether the distinction created by the law amounted to discrimination. This involved two questions. Whether the equality right had been denied on the basis of a personal characteristic that was either enumerated in the Charter or analogous to those enumerated; and second, whether that distinction had the effect of imposing a burden, obligation or disadvantage not imposed upon others, or withholding or limiting access to benefits or advantages that were available to others.

The Court rejected the respondent's argument that the IRPA's "neutral silence" could not be considered to create a distinction by merely omitting to refer to sexual orientation. According to the Court, the under-inclusiveness of the IRPA did create a distinction and denied substantive equality to gay and lesbian individuals. Although neutral in appearance, the omission clearly had a differential impact on homosexuals and heterosexuals, since heterosexuals were never discriminated against on the basis of their sexual orientation.

The respondent's contention that the distinction was not created by law, but existed in society independently of the IRPA, was also rejected. The fact that discrimination against gays and lesbians existed in society was precisely the reason why these persons needed protection.

The Court then considered the impact of the exclusion. The first and most apparent impact was to exclude lesbians and gay men from the remedial procedures established by the IRPA, a clear denial of equal protection of the law. The Court also argued that, apart from this immediate effect, it could be reasonably inferred that the exclusion of sexual orientation from the Act would contribute to, perpetuate, or even encourage discrimination on such grounds. According to the Court, the exclusion of sexual orientation from the IRPA signalled that discrimination on grounds of sexual orientation was not as serious or as deserving of condemnation as other forms of discrimination. In excluding sexual orientation from the IRPA's protection, the Government had in effect stated that all persons were equal in dignity and rights except gay men and lesbians. Such a message, though implicit, violated Section 15 of the Charter.

Using the two-part test established in *Egan v. Canada*, the court then considered whether this violation of Section 15 could be justified under Section 1 of the Charter. Under Section 1, infringements or “violations” were permissible if the State of Alberta could establish that they were “reasonably justified in a free and democratic society.” This Section 1 test required that the objective of the legislation must arise from a pressing and substantial need, and the means chosen to attain this legislative end were themselves reasonable and demonstrably justifiable in a free and democratic society. To meet the second requirement, three criteria had to be satisfied: (1) the right’s violation should be rationally connected to the aim of the legislation; (2) the impugned provision should minimally impair the Charter guarantee; and (3) the effect of the measure should be in proportion to its objective, so that the abridgement of the right would not outweigh attainment of the legislative goal.

According to the Court, the omission of sexual orientation in the IRPA did not satisfy any of the aforementioned requirements. Therefore, the violation it caused could not be justified under Section 1 of the Charter.

As a remedy, the words “sexual orientation” were read into the prohibited grounds of discrimination of the IRPA.

Kenneth Suratt and Others v. Attorney General, Court of Appeal of Trinidad and Tobago (26 January 2006)

Procedural Posture

The plaintiffs filed a motion requesting an order compelling the government to establish an Equal Opportunity Commission and Tribunal as mandated under the recently passed *Equal Opportunity Act*. The trial judge dismissed the motion on the basis that the *Equal Opportunity Act* was itself unconstitutional in several respects and that, given this, a claim for constitutional relief could not be sustained. The plaintiffs appealed.

Facts

The *Equal Opportunity Act* had been adopted with the aim of prohibiting discrimination on a range of grounds. However, a change in government occurred shortly after the Act entered into force and the new Attorney General took the view that the law was unconstitutional. The government therefore took no steps to establish the Equal Opportunity Commission and Tribunal. In response to the plaintiffs’ motion, the Attorney General contended that the government could not be compelled to establish a Commission or Tribunal because the *Equal Opportunity Act* was unconstitutional on several grounds, one of which was that it explicitly excluded sexual orientation from the grounds of discrimination that it prohibited.

Issue

Whether the *Equal Opportunity Act* was unconstitutional because, among other reasons, it explicitly excluded sexual orientation from grounds of discrimination that it prohibited.

Domestic Law

Constitution of Trinidad and Tobago, Chapter I, Sections 4 and 5.

Equal Opportunity Act 2000, Sections 3 and 7.

Comparative Law

Vriend v. Alberta, Supreme Court of Canada, 1998 (holding that omission of sexual orientation as protected ground of discrimination in IRPA violated S. 15 of the *Canadian Charter*).

Reasoning of the Court

The plaintiffs alleged that they had suffered discrimination on grounds prohibited under the *Equal Opportunity Act*. They argued that the failure of the government to take steps to constitute and appoint members to the Commission and Tribunal established under the *Equal Opportunity Act* deprived them of protection afforded by the law.

According to the Attorney General, the Act's deliberate exclusion of sexual orientation from its definition of "sex" (a prohibited ground for discrimination) supported the claim that the Act was unconstitutional. Persons alleging discrimination on grounds of sexual orientation were denied the right to equality before the law and equal protection as provided for in the Constitution.

With respect to this argument, the Court first agreed that the definition of "sex" under the *Equal Opportunity Act* did explicitly exclude persons claiming discrimination on the basis of sexual orientation. At the same time, however, the Act prohibited discrimination based on gender. The Court then considered the distinction between sex and gender and observed that, while "sex" was generally understood to refer to the biological differences between male and female, "gender" was a broader concept, socially and culturally construed. The term "gender" could thus be understood to include sexual orientation.

Next, the Court considered the criminalisation of homosexual acts under the domestic law of Trinidad and Tobago and distinguished between sexual orientation and sexual conduct. Whereas homosexual sexual activity was subject to criminal sanction, being a homosexual person was not a crime.

Affirming that all legislation had to be construed in conformity with the constitutional provision on protecting equality of treatment and equality before the law, it concluded that every law that created a discriminatory effect must show that the distinctions it made were reasonable and did not violate

the Constitution. Sexual orientation was not a reasonable basis for distinction, because the distinction in question was subjective and often based on prejudice and stereotyping.

The Court held that the specific exclusion of sexual orientation from the prohibited grounds of discrimination effectively excluded people who claimed discrimination on the basis of sexual orientation or sexual preference from the protection granted by the *Equal Opportunity Act*. The exclusion thus denied a particular category of persons protection of the law and equality of treatment under the law.

The Court held that, although laws criminalising same-sex sexual conduct were in place, and taking into account the difference between sexual orientation and sexual conduct, discrimination on grounds of sexual orientation based on homosexual conduct was not justifiable. Fundamental rights arose from the inherent dignity and value of every human being and were universal, regardless of an individual's sexual orientation. It would amount to double punishment to deny a person his or her fundamental rights and to impose the severe criminal sanctions established under the law for committing homosexual acts.

While a criminal conviction or even homosexuality could be considered relevant in certain situations (when selecting a candidate for certain jobs, for example), the general discrimination permitted by the *Equal Opportunity Act* was unjustified and unconstitutional.

The Court held the *Equal Opportunity Act* to be unconstitutional in several respects and thus void. For this reason, the appellants could not be considered as having been deprived of protection under the law and their appeal was therefore dismissed.

Postscript

In 2007 the Court of Appeal decision was overturned by the Privy Council, which ruled that the *Equal Opportunity Act* was not inconsistent with the *Constitution of Trinidad & Tobago*. However, the Privy Council did not mention the exclusion of sexual orientation from the Act but only the other alleged grounds of invalidity. It held that the other grounds of invalidity argued by the Attorney General did not render the law unconstitutional.

Sunil Babu Pant and Others v. Nepal Government and Others, Supreme Court of Nepal (21 December 2007)

(Note: Summary based on translation published in National Judicial Academy Law Journal, 2 NJA Law Journal 2008, pp. 261-286.)

Procedural Posture

In April 2007, the Blue Diamond Society, MITINI Nepal, Cruse AIDS Nepal, and Parichaya Nepal, all organizations representing lesbians, gays, and “people of the

third gender”, filed a writ petition under Article 107(2) of the *Interim Constitution of Nepal* seeking recognition of transgender individuals as a third gender, a law prohibiting discrimination on the basis of sexual orientation and gender identity, and reparations by the State to victims of State violence and discrimination.

Facts

Under Nepal’s citizenship card system, all adult citizens with citizenship cards were given access to certain benefits, such as ration cards, passports, and residency cards. Officials frequently denied citizenship cards to individuals who wished to register as a third gender rather than as male or female. In addition, although not used to prohibit same-sex sexual relationships, Nepal’s *Criminal Code* criminalised “unnatural sexual intercourse”. People of the third gender (*metis*) frequently faced police violence and harassment because of their gender expression.

Issue

Whether LGBTI people were entitled to the full range of constitutional and international human rights.

Domestic Law

Interim Constitution of Nepal, 2063 [2007 AD]

Article 12 (guaranteeing the right to freedom, including the right to live with dignity and the right not to be deprived of personal liberty except in accordance with the law).

Article 13 (guaranteeing equal protection under the law and prohibiting discrimination on grounds of religion, sex, race, caste, tribe, origin, language or ideological conviction).

Article 32 (providing the right to file a petition before the Supreme Court under its extraordinary jurisdiction for the enforcement of fundamental rights).

Article 107 (conferring jurisdiction on the Supreme Court to review legislation as well as enforce constitutional rights; conferring *locus standi* on groups or associations in matters involving enforcement of fundamental rights).

Comparative Law

Constitution of Fiji.

Constitution of South Africa.

Corbett v. Corbett (Otherwise Ashley), Probate, Divorce and Admiralty Division, United Kingdom, 1970 (holding that sex was biologically fixed at birth and could not be changed by medical or surgical means).

Lawrence v. Texas, United States Supreme Court, 2003 (affirming that same-sex sexual conduct between consenting adults was part of the liberty protected by the

substantive due process clause of the 14th Amendment to the federal Constitution and striking down Texas' sodomy law).

National Coalition for Gay and Lesbian Equality v. Minister of Justice, Constitutional Court of South Africa, 1998 (finding unconstitutional statutory and common law offences of sodomy).

SP Gupta and others v. President of India, Supreme Court of India, 1981 (clarifying the concept of public interest litigation and explaining the need for liberal standing doctrine in case of disadvantaged classes).

International Law

Convention on Elimination of all Forms of Discrimination against Women.

Convention on the Rights of the Child.

International Covenant on Civil and Political Rights.

International Covenant on Economic, Social and Cultural Rights.

International Convention on Elimination of All Forms of Racial Discrimination.

Universal Declaration of Human Rights.

Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity.

Goodwin v. United Kingdom, ECtHR, 2002; *I v. United Kingdom*, ECtHR, 2002 (holding that classifying post-operative transgender persons according to their pre-operative sex violated Articles 8 and 12 of the *European Convention*).

Van Kück v. Germany, ECtHR, 2003 (finding that law requiring individual to prove medical necessity of sex reassignment surgery in order to be entitled to reimbursement violated Article 8 of the *European Convention*).

Toonen v. Australia, United Nations Human Rights Committee, 1994 (finding that the sodomy laws of Tasmania violated the rights to privacy and non-discrimination under the ICCPR).

Reasoning of the Court

The Government of Nepal argued that the writ petition should be dismissed. According to the Government, it was based on hypotheses and assumptions and gave no specific examples. Anyone treated in a discriminatory manner or who had been the victim of violence had recourse to courts to enforce their rights. The Court should not make a separate law for people based on their sexual orientation and gender identity: the rights of the petitioners could be protected under the existing legal framework. The Interim Constitution already guaranteed the petitioners the right to be free from discrimination.

The petitioners argued that international instruments as well as the decisions of other national courts protected people, including those of the third gender, against discrimination on grounds of sexual orientation. People of the third gender (homosexual, transgender, and intersex people) had not been treated equally. It was the responsibility of the State to provide identity documents, including birth certificates, citizenship certificates, passports and voter identity cards, specifying sex in accordance with the identity of “gender minorities”. Without identity cards, people of the third gender were deprived of education and other public benefits and were dishonored and disrespected.

The Court considered the following questions:

- (1) Whether the writ petition regarding the rights of homosexuals and people of the third gender, considered as minorities on the basis of gender identity or sexual orientation, fell under the category of public interest litigation.
- (2) Whether homosexuals and people of the third gender were so naturally or because of some mental perversion.
- (3) Whether the State had acted in a discriminatory manner with respect to the petitioners.
- (4) Whether the order sought by the petitioners should be issued.

First, the Court found that the writ petition fell within the category of public interest litigation because it concerned a matter of social justice. It was a “constitutional duty and responsibility of the state to make the deprived and socially backward classes and communities” able to enjoy their rights as others did. Protection of the rights of disadvantaged groups fell within the realm of public interest litigation; the Court had previously widened *locus standi* under its extraordinary jurisdiction in cases of public interest litigation.

The Court next considered the origin of non-conforming sexual orientations and gender identities. It used the *Yogyakarta Principles* to define sexual orientation and gender identity and defined the terms lesbian, gay, bisexual, transsexual, homosexual, transgender, and intersexuality. The Court concluded that sexual orientation was a natural process rather than the result of “mental perversion” or “emotional and psychological disorder”. It rejected the notion that people of the third sex were “sexual perverts”. As for the question of whether the State had discriminated against citizens whose sexual orientation was homosexual and whose gender identity was transgender, the Court found that the petitioners and the people they represented did indeed face violence, stigmatization, and discrimination. It based this finding on the *Yogyakarta Principles* and reports of the Special Procedures of the UN Human Rights Council.

The Court addressed same-sex marriage, mentioning that Nepalese law criminalised same-sex marriage as “unnatural coitus”. The Court observed that

it was appropriate to think about “decriminalizing and de-stigmatizing same-sex marriage by amending the definition” of unnatural coitus.

The Court reviewed the equality principles of Article 26 of the ICCPR and Article 13 of the Constitution. It noted that non-discrimination on the basis of sex was a fundamental right of every citizen. The Court then held that the fundamental rights of the Interim Constitution were enforceable rights guaranteed to all citizens of Nepal. These were rights “vested in the third gender people as human beings. The homosexuals and third gender people are also human beings as other men and women are, and they are the citizens of this country as well.” The Court forbade discrimination on the ground of sexual orientation.

Regarding sexual activity, the Court relied on the right to privacy. It stated:

The right to privacy is a fundamental right of an individual. The issue of sexual activity falls under the definition of privacy. No one has the right to question how two adults perform sexual intercourse and whether this intercourse is natural or unnatural.

An individual’s choice of sexual partner thus fell within the right to self-determination. The Court concluded that the rights of homosexuals and people of the third gender had not been protected under Nepali law. Although same sex sexual conduct was not specifically criminalised, the State had contributed to discrimination and social prejudice. Medical science had already proven that “this is a natural behaviour rather than a psychiatric problem”. In the face of scientific evidence, old beliefs should be abandoned. Furthermore, the Court stated, the “fundamental rights of an individual should not be restricted on any grounds such as religion, culture, customs, values and the like”.

Since LGBTI people were “natural persons”, they could not be excluded from the full enjoyment of rights. The Court emphasised that it was “the responsibility of the state to create an appropriate environment and make legal provisions accordingly for the enjoyment of such rights”.

The Court ordered the Government to make the necessary arrangements, including making new laws or amending existing laws, to ensure that people of different gender identities and sexual orientations could enjoy their rights without discrimination. The Court further ordered that the new Constitution should guarantee non-discrimination on the grounds of gender identity and sexual orientation. Finally, the Court directed the Government to form a committee to study issues related to same-sex marriage.

Postscript

As a result of this decision, new citizenship cards have a separate column for the third sex. In November 2008, the Supreme Court directed the Government to draft laws recognizing same-sex marriage.

Mukasa and Oyo v. Attorney General, High Court of Uganda at Kampala (22 December 2008)

Procedural Posture

The applicants filed a complaint to the High Court for the alleged violation of their fundamental rights and freedoms by the respondent and its agents.

Facts

The first applicant was a prominent LGBT rights activist. One night, two government officials raided her house. Although they did not have a search warrant, they seized several documents relating to her activities. The officials also illegally arrested the second applicant, who was a guest at the first applicant's house. The first applicant was not at home at the time.

At the police station, the second applicant was treated in a humiliating manner, forcibly undressed and "fondled", allegedly to determine her sex. She was then released without charges but ordered to return the following day with the first applicant.

The following day, the two applicants went back to the police station. The police said that there were no pending charges against them and that the first applicant could have her documents back. However, when she got home she realised that the police had withheld some of her documents.

Issue

Whether the applicants' rights to personal liberty, human dignity, protection from inhuman treatment, and privacy of person, home and other property, had been violated.

Domestic Law

Constitution of Uganda, Article 23 (protection of personal liberty), Article 24 (respect for human dignity and protection from inhuman treatment), and Article 27 (right to privacy).

International Law

Convention on Elimination of all Forms of Discrimination against Women, Article 3.
Universal Declaration of Human Rights, Article 1.

Reasoning of the Court

The applicants argued that the acts of the police and government officials breached their constitutional rights. In particular, they submitted that the warrantless search of the first applicant's house violated her right to privacy and

that the second applicant's arrest breached her right to personal liberty. They also argued that the second applicant had been subjected to sexual harassment and indecent assault amounting to degrading treatment.

The respondents denied all the allegations presented by the applicants. The officer who was in charge of the police post at the time the second applicant was arrested denied the arrest, sexual harassment, and seizure of property.

One of the government officials denied that the second applicant was arrested at the first applicant's house. He said that she had been arrested in a bar, where she was publicly kissing the first applicant. The official testified that the residents, shocked by the applicants' behaviour, were about to lynch them and that he arrested them in order to save them. According to the official, the first applicant had managed to escape and therefore he only took the second applicant to the police station. He denied having entered the first applicant's house or humiliating the second applicant.

On the basis of the evidence at hand, the Court concluded that there had been no "bar incident" and that the applicants were telling the truth. The Court found that the actions of the police and of the government officials "clearly amounted to a breach of [the plaintiffs'] constitutional guarantees... and a violation of International Human Rights Instruments to which Uganda is a party."

First, the first applicant's house had been forcibly opened and searched without a search warrant. The government officials had no authority to take such actions, which were unlawful. However, the respondent in the proceedings (the Attorney General) was not liable for these actions. The Attorney General was nevertheless accountable for the actions of the police. By forcibly undressing the second applicant in public and touching her breast, the police had humiliated her and contravened the constitutional provision prohibiting degrading treatment.

Furthermore, the Court found the actions of the police violated the provisions of several human rights treaties, including Article 1 of the UDHR, guaranteeing equal dignity and rights to all human beings. Article 3 of CEDAW had also been violated. This provision guaranteed the equal enjoyment of, among others, the rights to liberty and security of the person, equal protection under the law and freedom from torture and other cruel, inhuman or degrading treatment.

Moreover, the Court found that the police had not handled the first applicant's documents properly. Her right to privacy of person, home and other property had therefore been violated.

The Court held that the applicants' rights to human dignity and protection from inhuman treatment, personal liberty and privacy of the person, home and property had been violated and awarded them compensation.

**Kasha Jacqueline, David Kato Kisule and Onziema Patience
v. Rolling Stone Ltd and Giles Muhame,
High Court of Uganda at Kampala (30 December 2010)**

Procedural Posture

The applicants filed a complaint to the High Court alleging that the publication of an article by the respondents violated their constitutional rights. As relief, they requested compensation for the pain and anguish caused as well as an injunction restraining the respondents from publishing further injurious information about them.

Facts

The respondents were the publishers of a newspaper called “Rolling Stone”. On 2 October 2010, an article with the title “100 Pictures of Uganda’s top homos leak” was published in the newspaper. The article accused the gay community of trying to recruit “very young kids” and “brainwash them towards bisexual orientation”. It called on the government to take a bold step against this threat by hanging dozens of homosexuals.

The article published the names and pictures of several members of the Ugandan LGBT community and provided information about them and, in some cases, their home addresses. With regard to the first applicant, the article accused her of hosting at her house gatherings of the gay community, sometimes ending in orgies. The article also accused the third applicant of planning to recruit children at schools. The second applicant’s name and address were published in the article and his picture appeared on the cover.

Issue

Whether the applicants’ rights to human dignity and protection from inhuman treatment and to privacy of person and home had been violated.

Domestic Law

Constitution of Uganda, Article 22 (right to life), Article 23 (protection of personal liberty), Article 24 (respect for human dignity and protection from inhuman treatment), Article 27 (right to privacy), and Article 29 (freedom of conscience, expression, movement, religion, assembly and association).

Penal Code Act, Section 145 (criminalising sodomy).

Comparative Law

Hugh Owen v. Saskatchewan Human Rights Commission, Saskatchewan Queen’s Bench, Canada, 2002 (upholding the hate speech provision of the provincial human rights code).

Reasoning of the Court

The applicants first argued that the article had exposed them to possible violence, ridicule, hatred and “mob justice”, amounting to a threat of violation of their right to human dignity and protection from inhuman treatment.

Moreover, the call for homosexuals to be hanged, coupled with the threat of violence and mob justice, amounted to a threat of death without due process. It was therefore a threat of violation of the applicants’ right to life.

Third, the applicants argued that the article threatened their rights to liberty and to freedom of movement. They also submitted that the article violated their right to privacy of the person and home.

The respondents argued that the applicants were not entitled to the relief sought for several reasons. They had already exposed themselves as homosexuals on the internet and had also voluntarily appeared in public as homosexual activists. According to the respondents, they could not invoke a violation or a threat of violation of their right to privacy. Furthermore, the applicants had presented no evidence to show that the article had exposed them to any danger with regard to their lives or incited any public violence; their claim that their rights to life and freedom of movement had been violated was therefore ill-founded. Finally, the respondents noted that homosexuality was a criminal offence under the *Penal Code Act*. Since the applicants admitted being homosexuals, they “had not come to court with clean hands” and should therefore be denied relief.

The Court decided to limit its analysis to two rights only: the right to human dignity and protection from inhuman treatment, and the right to privacy of the person and home.

The Court first stressed that the motion under consideration did not concern homosexuality as such, but rather the alleged infringement or threat of infringement of fundamental rights and freedoms. Next, the Court affirmed that its jurisdiction covered infringed rights but also threats to fundamental rights and freedoms. The fact that the applicants had provided no evidence of actual violence against their persons or their homes was not relevant.

With regard to the applicants’ right to human dignity and protection from inhuman treatment, the issue was whether the article threatened or tended to threaten the human dignity of gay persons in general and, in particular, the applicants.

The Court found that the publication of the applicants’ identities and addresses, coupled with the explicit call to hang gays by the dozen, tended to “tremendously threaten” their right to human dignity.

As for the applicants’ right to privacy of the person and home, the Court affirmed they had “no doubt” that this right had been threatened by the exposure of the applicants’ identities and addresses in the article.

Lastly, the Court addressed the criminalisation of homosexual acts and noted that, under section 145 of the *Penal Code Act*, a person was not considered a criminal for the sole fact of being gay. In order to be regarded as a criminal, one had to commit an act prohibited under that provision. The Court thus distinguished between the being gay and sexual conduct.

The Court held that Rolling Stone threatened the applicants' rights to human dignity and protection from inhuman treatment, as well as their right to privacy of the person and home. The Court issued the injunction sought by the applicants, restraining the respondents from publishing more information about the identities and addresses of Ugandan gays and lesbians.

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- 1 African Commission on Human and Peoples' Rights, Decision of 15 May 2006, *Zimbabwe NGO Human Rights Forum v. Zimbabwe*, Communication No. 245/2002, para. 169.
 - 2 Inter-American Court of Human Rights, Advisory Opinion OC-18/03 of 17 September 2003, *Juridical Condition and Rights of Undocumented Migrants*, para. 101.
 - 3 Barry Malone, 'Ugandan gay activist beaten to death after threats', *Globe and Mail* (Toronto, 27 January 2011).
 - 4 *Egan v. Canada* (discussed in Chapter 13).
 - 5 *Suratt & Ors v. The Attorney General of Trinidad and Tobago* (Trinidad and Tobago) [2007], UKPC 55, 15 October 2007.
 - 6 European Court of Human Rights, Judgment of 21 December 1999, *Salegueiro da Silva Mouta v. Portugal*, Application No. 33290/96, para. 36.
 - 7 Human Rights Committee, Views of 18 September 2003, *Young v. Australia*, Communication No. 941/2000, para. 10.4.

EMPLOYMENT DISCRIMINATION

Chapter three

Employment Discrimination

INTRODUCTION

Article 6 of the *Covenant on Economic, Social and Cultural Rights* obliges States Parties to “recognise the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts”. When LGBT individuals challenge job-related decisions based on their sexual orientation and gender identity, they are asserting the right to be treated as equal citizens in matters of employment. For many years this was a controversial proposition. Where same-sex sexual conduct was criminalised, States often enacted statutory prohibitions on employment. Even criminal laws had not been passed, terms such as “moral turpitude” or “immoral behaviour” were often used to bar gay men and lesbian women from jobs. Certain fields of employment, especially teaching and police professions, were essentially closed to people who were suspected of or who admitted to being gay or lesbian. Transgender individuals still frequently stand to lose jobs (or job offers) when they are in the process of gender transitioning.

A number of questions recur in employment discrimination cases. Is an individual's personal sexual conduct (whether deemed illegal or merely immoral) relevant to work performance? May an individual be fired for being gay or lesbian? Is conduct to be separated from status or is status defined by conduct? Are transgender individuals protected by sex discrimination prohibitions? Are transgender individuals protected with regard to their sex or because they have changed their sex? More broadly, privacy and equality are themes that also appear clearly.

In the United States, challenges to workplace discrimination were sometimes more successful than direct challenges to sodomy laws. In 1960 consensual sodomy was a crime in every State of the United States, and “almost all the states excluded these purported ‘sex criminals’ from securing teaching certificates or professional licenses, [and] no state allowed open lesbians or gay men to serve as police officers or other public servants”.¹ In 1960, a government scientist named Franklin Kameny lost his job for allegedly soliciting sex from an undercover police officer. He sued to get his job back, without success, and then filed a *pro se* petition with the US Supreme Court in which he argued that the “immoral conduct” bar was an unconstitutional “attempt to tell the citizen what to think and how to believe”.² He lost, as did many gay and lesbian plaintiffs who followed in his footsteps.

Norton v. Macy, decided in 1969, was a landmark case. The appellate court rejected the arguments of the civil service commission that an employee's after-work sexual encounters influenced his ability to perform his job. Although the court conceded that the civil service commission could label the employee's homosexual conduct "immoral" or "disgraceful", this alone did not end the inquiry. "The range of conduct which might be said to affront prevailing mores is so broad and varied" that only conduct that had an actual impact on the job function was sufficient to justify termination.³ This is known as the nexus requirement. In ***Morrison v. State Board of Education***, the petitioner's teaching diplomas were revoked by the State Board of Education after he admitted to having a brief sexual relationship with another man. The Supreme Court of California, following *Norton v. Macy*, decided that the terms "immoral conduct" and "moral turpitude" in the code of conduct for teachers were only constitutional if they related to acts that indicated unfitness to teach. Because the Board of Education had failed to show that petitioner's conduct affected his performance as a teacher, he could not be subject to disciplinary action.

Other cases were influenced by the US Supreme Court's 1986 decision to uphold the State of Georgia's sodomy law. If it was constitutional to criminalise conduct that defined the class of homosexuals, then discriminatory employment action against homosexuals could not be prohibited on constitutional grounds. These cases conflate status and conduct. In ***Padula v. Webster***, for example, the plaintiff challenged a decision by the Federal Bureau of Investigation not to hire her after she disclosed that she was a lesbian. She argued that her sexual orientation should be regarded as a suspect or quasi-suspect classification, such that any difference in treatment was inherently to be regarded as suspect and subject to strict judicial scrutiny. The D.C. Circuit disagreed. In light of *Bowers v. Hardwick*, the Court reasoned that "a status defined by conduct that states may constitutionally criminalise" could not be a suspect class under the equal protection clause. Discriminating against an individual on the basis of her same-sex sexual orientation could not be considered "invidious discrimination" because there could "hardly be more palpable discrimination against a class than making the conduct that defines the class criminal". In other words, the US Supreme Court's decision to uphold Georgia's sodomy law meant that homosexuals as a class could be discriminated against, regardless of whether or not they engaged in criminalised sex.

In India, Section 377 of the *Penal Code* prohibits consensual same-sex sexual conduct. The High Court of Delhi found unconstitutional Section 377 in July 2009, but that decision was pending appeal to the Supreme Court at the time ***Siras v. Aligarh Muslim University*** was decided. (See ***Naz Foundation*** in Chapter 1.) In ***Siras***, the petitioner was a professor who had been evicted from his campus housing and suspended from his teaching position after he was surreptitiously filmed having sex in his home with a male partner. The charge against him was that he had engaged in "immoral sexual activity in contravention of basic moral

ethics". The High Court at Allahabad explicitly refused to consider this charge (or its relevance in the *Naz Foundation case*), except to note that the petitioner had not been charged or convicted of any criminal offence: the issue was moral turpitude with regard to his employment, and here the Court held that the petitioner's sexual preference did not amount to misconduct and that his right to privacy had been violated. As an interim measure, it ordered a stay of the order that suspended him and removed his university housing.

The other cases in this chapter are from jurisdictions that did not criminalise sexual activity. *Sentencia C-481/98*, decided by the Constitutional Court of Colombia in 1998, is an employment discrimination case that illustrates both the equality and liberty/autonomy arguments. It concerned the constitutionality of *Decree 2277 of 1979*, which provided that homosexuality was a ground for discharge in the teaching profession. The Court considered whether an individual's sexual orientation was innate or a matter of personal choice. If the former, it was akin to sex, a ground protected from discrimination by Article 13 of the Constitution. If the latter, it was an issue of autonomy, protected by the right to free development of personality under Article 16. Differences in treatment based on sexual orientation, as an innate or biological trait, were subject to the most stringent judicial review, and could only be justified by showing that the difference in treatment was the sole means available to satisfy a compelling public interest. Where sexual orientation was considered a question of personal choice, it was also protected, because the rights to privacy and free development of personality guaranteed individual self-determination, provided that this did not interfere with the rights of others or the legal order. The Court also noted that it was required to follow the decision of the Human Rights Committee in *Toonen v. Australia*, which had included sexual orientation within "sex", under Articles 2 and 26 of the ICCPR.⁴

For the District Court of St. Petersburg (Russian Federation), the case of *P v. State Health Institution*, turned on the medical status of homosexuality. Because it was no longer classified as a mental disorder by the Ministry of Health or the World Health Organization at the time of the applicant's medical examination for employment with the railway in 2003, the Court declared that an earlier diagnosis of "perverse psychopathy" was not relevant and that a decision by the Railway Clinic to disqualify the applicant was therefore unlawful.

Schroer v. Billington examined an offer of employment made to a counter-terrorism research specialist which was withdrawn after he informed his prospective employer that he would be transitioning from male to female. The employer claimed that the plaintiff might not be able to obtain a security clearance, and that a transgender woman would lack credibility with military contacts or when testifying before Congress. The federal district court in Washington, D.C., rejected both arguments on the grounds that "deference to the real or presumed biases of others is discrimination". It held that Schroer had been subjected to discrimination both because of sex stereotyping (she no longer had a masculine

appearance) and because of sex itself, since discrimination based on gender identity is a form of sex discrimination. Here the Court drew an analogy between changing one's sex and changing one's religion. If discrimination against religious converts was discrimination on grounds of religion, the refusal "to hire Schroer after being advised that she planned to change her anatomical sex by undergoing sex reassignment surgery was *literally* discrimination 'because of ... sex'".

Schroer v. Billington is significant for two reasons. Previous US cases had rejected claims of discrimination based on gender identity.⁵ In *Price Waterhouse v. Hopkins*, however, the US Supreme Court had ruled that equal employment law covered discrimination based on gender role stereotyping. Although *Price Waterhouse* concerned a woman whose appearance and manner of dress were not viewed as stereotypically feminine, its reasoning has since been applied to cases of transgender employment discrimination.⁶ Since *Price Waterhouse*, courts have found that differences in treatment, that are based on non-conforming appearance and behaviour with regard to gender, fall within prohibited grounds of discrimination, based on sex. As one court explained:

[D]iscrimination against a plaintiff who is a transsexual - and therefore fails to act and/or identify with his or her gender - is no different from the discrimination directed against Ann Hopkins in Price Waterhouse, who, in sex-stereotypical terms, did not act like a woman. Sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as "transsexual," is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity.⁷

Nevertheless, courts did not protect transgender individuals as a class. Rather, their claims were framed in terms of gender nonconformity (corresponding to the sex stereotyping claim of *Price Waterhouse*). In **Schroer**, for the first time a court recognised, not only a sex stereotyping claim but a claim based on transition from one sex to another.⁸

A contrasting approach was taken in the 1996 case of *P v. S and Cornwall County*, where the European Court of Justice (ECJ) also concluded that discrimination against a transgender employee constituted sex discrimination, prohibited under the *EU Equal Treatment Directive*.⁹ The *Equal Treatment Directive* prohibited differential treatment on the grounds of sex, and the question before the ECJ was whether a difference in treatment based on gender reassignment constituted a difference in treatment based on sex. According to the Court, the scope of the directive could not be "confined simply to discrimination based on the fact that a person is of one or other sex". It also applied to people who chose to change gender.

Such discrimination is based, essentially if not exclusively, on the sex of the person concerned. Where a person is dismissed on the

*ground that he or she intends to undergo, or has undergone, gender reassignment, he or she is treated unfavourably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment.*¹⁰

For the ECJ, the issue is not gender non-conformity but involves a comparison between an individual's treatment before and after sex reassignment. Because of the ECJ's jurisprudence in this area, transgender individuals are protected against employment discrimination under the prohibitions against sex discrimination. In addition, the *Gender Equality Directive of 2006* includes a specific reference to discrimination based on gender reassignment.¹¹

In Europe, explicit prohibitions now apply to employment discrimination based on sexual orientation and on gender identity. *EU Council Directive 2000/78/EC* established a general framework for equal treatment in employment and occupation, which requires that member States adopt legislation to prohibit direct and indirect discrimination on grounds of sexual orientation in both public and private employment.¹² Although some States had already enacted legislation prohibiting employment discrimination on grounds of sexual orientation prior to the Directive, few significant court cases have challenged employment decisions.¹³

For members of the Council of Europe, Article 14 of the *European Convention on Human Rights* prohibits discrimination on the basis of sexual orientation and gender identity with respect to the rights and freedoms guaranteed by the Convention. In the cases of *Lustig-Prean and Beckett v. United Kingdom* and *Smith and Grady v. United Kingdom* (both 1999), the European Court overturned a ban on homosexuals in the armed forces on the grounds that the ban violated the right to respect for private life. (See Chapter 5.) However, because the Convention binds State parties, it applies only to legislation and to public employers. In 2010 the CoE Committee of Ministers adopted *Recommendation (2010)5*, which provides, in part, that Member States should "ensure the establishment and implementation of appropriate measures which provide effective protection against discrimination on grounds of sexual orientation or gender identity in employment and occupation in the public as well as in the private sector".¹⁴

CASE SUMMARIES

Morrison v. State Board of Education,
Supreme Court of California, United States (20 December 1969)

Procedural Posture

The petitioner filed a petition for writ of mandamus to review a determination of the State Board of Education revoking his teaching diplomas. The Superior Court of Los Angeles County denied the writ and the petitioner appealed.

Facts

The petitioner held two teaching diplomas, issued by the State Board of Education, which qualified him for employment as a teacher in the public secondary schools of California. He worked for many years as a teacher and had no complaints or criticisms about his performance. In 1963 the petitioner became friends with another male teacher and the two had a brief physical relationship. One year later, the other teacher reported the same-sex relationship to the school superintendent and the petitioner resigned.

In 1965, a procedure was initiated through the State Board of Education to revoke the petitioner's teaching diplomas. The Board held a hearing and in 1966, pursuant to the recommendations of the hearing examiner, revoked the diplomas because of immoral and unprofessional conduct and moral turpitude as authorised by Section 13202 of the *California Education Code*. This revocation rendered the petitioner ineligible for employment as a teacher in any public school of the State.

Issue

Whether the petitioner's homosexual relationship constituted "immoral conduct", "unprofessional conduct" or "moral turpitude", justifying revocation of his teaching diplomas.

Domestic Law

California Education Code, Section 13202 ("The State Board of Education shall revoke or suspend for immoral or unprofessional conduct, ... or for any cause which would have warranted the denial of an application for a certification document or the renewal thereof, or for evident unfitness for service, life diplomas, documents, or credentials issued pursuant to this code." Among the causes warranting denial of such documents is the commission of "any act involving moral turpitude").

Jarvella v. Willoughby-Eastlake City School District, Court of Common Pleas of Lake County, Ohio, United States 1967 (reversing the dismissal of a teacher for immorality because of the content of a private letter, since his conduct was not hostile to the welfare of the school community and therefore not covered by the statute).

Norton v. Macy, United States Court of Appeals for the District of Columbia, 1969 (affirming that a federal employee could not be dismissed on the basis of his (alleged) homosexuality unless his conduct had a negative impact on the efficiency of the service).

Sarac v. State Board of Education, California Court of Appeal, United States, 1967 (upholding the Board's decision to revoke petitioner's teaching credentials on the basis that the homosexual acts he committed amounted to immoral and unprofessional conduct).

Reasoning of the Court

First the Court reviewed jurisprudence concerning cases of dismissal based on “immoral conduct”, “unprofessional conduct” or “moral turpitude”, in order to more precisely define the terms and link them to the fundamental question of unfitness for the job. The Court noted that these terms substantially overlapped, and drew a parallel with disciplinary cases concerning the dismissal or disbarment of attorneys because of “moral turpitude”. The Court’s own jurisprudence indicated that acts did not involve “moral turpitude” warranting disbarment unless from those acts it could be fairly inferred that an attorney’s moral character would probably lead him or her to abuse his or her privileges or to disregard his or her duties. The Court did not consider itself as having “the function or right to regulate the morals, habits or private lives of lawyers” unless those morals, habits and private lives “demonstrate unfitness to practice law or adversely affect the proper administration of justice”. Only then could the Court suspend or revoke the privilege to practice law “in order to protect the public”.

Next, the Court analysed *Jarvella v. Willoughby-Eastlake City School District* and *Norton v. Macy*. In *Jarvella*, the court dealt with the issue of whether a teacher could be dismissed for “immorality” merely on the basis of the vulgar language used in a private letter to a friend. The court held that the relevant provision authorising dismissal for “immorality” did not cover the teacher’s conduct, and he could not therefore be dismissed. According to the court, “immoral conduct” was not to be considered in the abstract but rather as “conduct which is hostile to the welfare of the general public; more specifically in this case, conduct which is hostile to the welfare of the school community”. Moreover, the court affirmed that “the private conduct of a man, who is also a teacher, is a proper concern to those who employ him only to the extent it mars him as a teacher”. Similarly, the United States Court of Appeals for the District of Columbia held in *Norton* that the immoral conduct of an employee could support a dismissal without further inquiry only if said conduct had “some ascertainable deleterious effect on the efficiency of the service”.

The Court built on these prior cases to demonstrate that the terms “immoral conduct”, “unprofessional conduct” and “moral turpitude” contained in the *Education Code* had to be subject to reasonable interpretation. Accordingly, they were only to cover conduct indicating unfitness to teach. Otherwise, the language of the statute could embrace virtually every conduct potentially subject to disapproval and would therefore leave room for arbitrary and discriminatory application.

The Court then analysed the meaning of the term “immorality”. It argued that, while one could expect a reasonable stable consensus as to what conduct adversely affects students and fellow teachers, no such consensus could be presumed about what is moral and what is not. According to the Court, it was not likely that the Legislature intended, through Section 13202 of the *Education Code*,

“to establish a standard for the conduct of teachers that might vary widely with time, location, and the popular mood”.

Moreover, the Court argued, the meaning of “immoral conduct”, “unprofessional conduct” and “moral turpitude” must relate to the occupation involved. Different professions had different duties and responsibilities, and different standards of probity needed to be applied.

As a consequence, the Court held that, within the meaning of Section 13202, the Board of Education could characterise as “immoral conduct”, “unprofessional conduct” or “moral turpitude” only those acts indicating unfitness to teach. Only in this way could the provision be constitutionally applied to the petitioner in the present case.

The Court considered that all the issues raised by the petitioner (violation of his right to due process, right to privacy and right to work) were resolved by its proper construction of Section 13202. The issue at stake was, therefore, whether or not the Board of Education had applied the same construction when adopting disciplinary action against the petitioner. The Court concluded that the record contained no evidence that the petitioner’s conduct indicated his unfitness to teach. The Board of Education provided no experts’ testimony or evidence linking the petitioner’s conduct to unfitness to teach. According to the Court, “the board failed to show that petitioner’s conduct in any manner affected his performance as a teacher”.

In a 4 to 3 decision, the Court held that the petitioner could not be subject to disciplinary action under a statute authorising the revocation of his teaching diplomas for immoral conduct, unprofessional conduct or acts involving moral turpitude in the absence of any evidence that his conduct indicated his unfitness to teach.

The judgment of the Superior Court denying the writ was then reversed, and the case was remanded to the Superior Court for proceedings consistent with the decision.

Padula v. Webster (Director, FBI), United States Court of Appeals for the District of Columbia (26 June 1987)

Procedural Posture

The plaintiff challenged a decision of the FBI not to hire her, alleging that it was based solely on her sexual orientation and therefore violated the defendant’s own policy as well as the plaintiff’s constitutional rights. The District Court allowed the defendant’s motion for summary judgment and dismissed both the plaintiff’s claims. The plaintiff appealed.

Facts

The plaintiff had applied for a position as a special agent with the FBI. Following the first screening tests, the FBI had conducted a routine investigation on her background that disclosed her homosexuality. During a follow-up interview the plaintiff confirmed that she was a lesbian. After some time, the FBI notified the plaintiff that it was unable to offer her a position, asserting that she had been rejected due to intense competition for the position. The plaintiff, contesting this, alleged that the decision had been taken solely on the basis of her sexual orientation.

Issue

Whether the FBI's decision not to hire the plaintiff on the basis of her sexual orientation violated the right to Equal Protection guaranteed by the 14th Amendment of the United States Constitution.

Domestic Law

Administrative Procedure Act.

Constitution of the United States, 14th Amendment (Equal Protection).

Bowers v. Hardwick, United States Supreme Court, 1986 (upholding the constitutionality of State law criminalising sodomy).

Dronenburg v. Zech, United States Court of Appeals for the District of Columbia, 1984 (holding that the discharge of a petty officer from the Navy for engaging in homosexual conduct was justified).

Reasoning of the Court

The Court considered two issues. The first was whether the hiring decisions of the FBI could be subjected to judicial review. The Court held that hiring decisions could be judicially reviewed.

The second was whether the agency had relied on constitutionally prohibited factors. The plaintiff argued that the decision not to hire her on the basis of her sexual orientation had denied her the equal protection of the law guaranteed by the 14th Amendment. She also requested that sexual orientation be recognised as a "suspect" or "quasi-suspect" classification and that, therefore, any differential treatment on that basis ought to be subjected to strict judicial scrutiny.

The Court noted that the parties disagreed about the description of the class in question. The FBI argued that its policy focused only on homosexual conduct and not on sexual orientation *per se*. The plaintiff, on the contrary, maintained that "homosexual status is accorded to people who engage in homosexual conduct". Given that the plaintiff did not identify herself as a homosexual who did not engage in homosexual conduct, the Court found the definitional disagreement irrelevant.

The issue was thus whether “homosexuals, defined as persons who engage in homosexual conduct”, constituted a “suspect” or “quasi-suspect” classification, and whether the FBI’s hiring decision was subject to strict or heightened scrutiny. The respondents argued that two recent cases, *Bowers v. Hardwick* and *Dronenburg v. Zech*, were insurmountable barriers to the plaintiff’s claim. The Court agreed.

In *Dronenburg*, a navy officer who had been dismissed from the Navy for engaging in homosexual conduct argued that his constitutional rights to privacy and equal protection had been violated. The court had held that the right to privacy included no right to engage in homosexual conduct. As for the right to equal protection, it was only infringed if the Navy’s policy was not rationally related to a permissible end. Given the specialised function and “unique needs” of the military, the court had held that the discharge for homosexual conduct was justified.

In *Hardwick*, the Supreme Court had upheld a Georgia law criminalising sodomy. It held that the right to privacy only concerned family relationships, marriage and procreation and did not extend to all kinds of private sexual conduct between consenting adults. A “right to engage in consensual sodomy” was not constitutionally protected since it was neither implicit in the concept of liberty nor “deeply rooted in this Nation’s history and tradition”. The judicial review therefore only had to consider whether the law had a rational basis. The court had held that “the presumed beliefs of the Georgia electorate that sodomy is immoral provide an adequate rationale for criminalizing such conduct”.

The Court found that the reasoning in *Dronenburg* and *Hardwick* precluded “suspect” classification status for sexual orientation. The Court emphasised that it would have been “quite anomalous, on its face, to declare a status defined by conduct that states may constitutionally criminalise as deserving of strict scrutiny under the equal protection clause”. Moreover, the Court noted, if the Supreme Court was: “unwilling to object to state laws that criminalise the behaviour that defines the class, it is hardly open to a lower court to conclude that state sponsored discrimination against the class is invidious. After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal.”

Nevertheless, this did not mean that every act of discrimination based on sexual orientation was constitutionally authorised: laws and government practices needed to pass the rational basis test of the equal protection clause, if challenged. A governmental agency that discriminated against homosexuals thus had to justify the discrimination in terms of “some government purpose”.

The Court noted that the FBI was a national law enforcement agency whose agents had to be able to work in all the States of the United States. To have agents engaging in conduct that was criminalised in several states would “undermine the law enforcement credibility” of the agency. Moreover, it was not irrational for the FBI to fear that homosexual conduct could expose its agents to the risk of blackmail.

Therefore, drawing a comparison with *Dronenburg*, the Court concluded that the FBI's specialised functions rationally justified the consideration that homosexual conduct could adversely affect the agency's ability to carry out its responsibilities.

The Court affirmed the decision of the District Court.

Sentencia C-481/98, Constitutional Court of Colombia (9 September 1998)

Procedural Posture

Germán Humberto Rincón Perfetti filed a petition for judicial review of Article 46 of *Decree 2277 of 1979 (Standards for the Exercise of the Teaching Profession)*. The Constitutional Court granted the petition and decided the issue after holding a public hearing and requesting opinions from experts and persons directly involved in the matter.

Issue

Whether Article 46 of *Decree 2277* categorising homosexuality as a ground of misconduct in the teaching profession violated the right to privacy, the right to free personal development, the right to work, and the right to equality under the *Constitution of Colombia*.

Domestic Law

Constitution of Colombia, Article 13 (equal protection), Article 15 (right to privacy), Article 16 (right to free development of personality), Article 26 (right to work), and Article 26 (right to choose one's profession).

Decree 2277 of 1979 (Standards for the Exercise of the Teaching Profession), Article 46 ("homosexuality or the practice of sexual aberrations" amounts to grounds of misconduct in the teaching profession).

Sentencia T-477/95, Constitutional Court of Colombia, 1995 (holding that one of the fundamental aspects of a person's individual identity is sexual identity).

The Court also referred to its earlier decisions about homosexuality for the propositions that homosexuality in itself could not be condemned and homosexual conduct could only be sanctioned if it violated the rights of others or produced social harms.

International Law

Dudgeon v. United Kingdom, ECtHR, 1981 (finding that the sodomy laws of Northern Ireland violated the right to privacy under the *European Convention*).

Modinos v. Cyprus, ECtHR, 1993 (finding that the sodomy laws of Cyprus violated the right to privacy under the *European Convention*).

Norris v. Ireland, ECtHR, 1988 (finding that the sodomy laws of Ireland violated the right to privacy under the *European Convention*).

Toonen v. Australia, United Nations Human Rights Committee, 1994 (finding that the sodomy laws of Tasmania violated the rights to privacy and non-discrimination under the ICCPR).

Reasoning of the Court

According to the petitioner and some of the interveners, Article 46 provided for the adoption of sanctions against a teacher for the mere fact of being gay. This, they argued, constituted discrimination on the basis of sexual orientation and violated rights protected by the Constitution.

Opposing interveners considered that Article 46 was consistent with the Constitution. Some restriction of the rights of homosexual persons was justified to protect the rights of minors, including denying them access to the teaching profession.

Lastly, some interveners argued that limiting the law's application to public homosexual conduct would resolve the issue, removing any need to declare the regulation unconstitutional.

The Court started by examining the legal and scientific debate about homosexuality and its causes. It recalled that homosexuals had long been discriminated against on the basis of misconceptions that they were abnormal, sick or immoral. However, the American Psychiatric Association removed homosexuality from its list of mental disorders in 1973 and the World Health Organization did the same in 1993. Clearly, homosexuality could no longer be considered a sickness.

The Court assessed the constitutionality of the contested regulation in terms of two different theories of homosexuality: as biologically determined, or a product of free will.

According to the Court, if homosexuality were considered to be biologically determined, every difference in treatment based on sexual orientation would amount to unacceptable discrimination, since it would be a distinction based on a feature that the individual did not choose. Discrimination based on sexual orientation would therefore violate the equality principle, protected by Article 13 of the Constitution. This situation appeared even more intolerable to the Court because differential treatment based on sexual orientation rarely served a constitutionally relevant aim, since sexual orientation was not linked to the capacities required for carrying out a task.

The Court also dealt with the "suspect classification" theory, originally elaborated by the United States Supreme Court. It provided criteria for assessing whether a ground for different treatment was "suspect" and should be considered potentially discriminatory. The Court identified the following criteria for potentially

discriminatory forms of classification: classification on the basis of permanent personal characteristics that an individual cannot choose to change; classification on the basis of characteristics that historically were subject to social or cultural prejudice; and classification on the basis of characteristics that had no relevance to the rational distribution of rights or assignments.

If homosexuality was biologically determined, a difference in treatment based on sexual orientation should be prohibited.

If homosexuality was freely chosen, the Court considered the right to privacy and the right to free development of personality under Articles 15 and 16 of the Constitution.

The Court emphasised that Article 16 of the Constitution did not provide for acceptable and unacceptable models of the development of personality. The only limiting conditions were not to affect the rights of others and not to infringe the constitutional order. The Court stated that sexual identity was a fundamental element of life. Moreover, an individual's sexual orientation pertained to the sphere of his or her individual autonomy, allowing for the adoption, without external coercion, of any sexual orientation that did not violate the constitutional order. In the words of the Court:

Sexuality, besides involving the most intimate and personal sphere of an individual (Colombian Constitution, Art. 15), pertains to the field of his or her fundamental freedom, and in those [domains] the State and the community cannot intervene, since no relevant public interest is at stake, nor is any social harm caused.

Therefore, any restriction in obtaining a teaching position based on an individual's sexual orientation would violate his or her right to free development of personality and would undermine the value of pluralism, which was protected by Article 1 of the Constitution.

According to the Court, regardless of which theory was used, the same conclusion would be reached. Every differential treatment based on an individual's sexual orientation was to be presumed unconstitutional and thus subject to strict scrutiny. The measure adopted must not only be grounded in a legitimate aim but must meet a pressing social need in order to satisfy the standards of strict scrutiny. Differential treatment not only had to be adequate in order to achieve that aim but also strictly necessary, that is, there must be no alternative measure available; and different treatment must meet a pressing and significant social need without affecting the group concerned by the measure disproportionately.

With regard to the aim pursued by the contested provision, the interveners argued that it protected children against possible abuses and the risk of "improper influence" on children. The Court did not accept the first part of this argument, on the ground that homosexuals have no predisposition to child abuse. It also

disagreed with its second part, arguing that the development of an individual's sexual orientation was a complex phenomenon, and the presence of a homosexual teacher could not be considered sufficient to "cause" changes to occur in the sexual orientation of his or her students. Otherwise, it would not be possible to explain the existence of homosexual children with heterosexual parents.

The Court also dismissed the Attorney General's suggestion that Article 46 might not be declared unconstitutional if its application were limited to cases of public homosexual conduct. In the Court's opinion, this would protect the privacy of gay individuals (at least to some extent) but would fail to address prejudice and discrimination. Moreover, the provision would remain discriminatory because it did not impose similar constraints on heterosexual individuals.

For these reasons, the Court deemed it necessary to exclude from the law a provision which was openly incompatible with the principles and values set forth in the Constitution, derived from old prejudices, and hindered the development of a pluralist and tolerant democracy. The Court declared the regulation unenforceable.

P v. State Health Institution "Dorozhnaya Policlinika of Oktyabrskaya Railways" (Case 1066/05), Frunzensky District Court of St. Petersburg, Russian Federation (10 August 2005)

Procedural Posture

The Medical Expert Commission of the State Health Institution "Dorozhnaya Policlinika" [Railway Clinic] had declared the applicant professionally unfit. The applicant brought a civil action against the Railway Clinic to have the decision declared unlawful and oblige the defendant to issue a new decision. The applicant was represented by the Mental Disability Advocacy Center, an international NGO based in Budapest.

Facts

In 1992, the applicant was diagnosed with "perverse psychopathy". This diagnosis was based on his sexual orientation, since homosexuality was, at that time, considered a "mental disorder" in the Soviet Union.

In 1999, the Ministry of Health of the Russian Federation obliged all medical professionals to use the World Health Organization's International Classification of Diseases (ICD-10) as the basis of diagnosis. The ICD-10 had ceased to classify homosexuality as a mental disorder in 1992. In 2003 the applicant had his entry in the psychiatric registry of the local psychiatric clinic deleted. However, the military registration office refused to cancel his diagnosis and confirmed that the office still considered him unable to serve in the army because of his homosexuality, which they had re-classified as "other disorders of sexual identity".

On 6 February 2003, the applicant underwent an examination by the medical expert commission in order to enrol in a course for passenger train guards. He presented both his military card and a certificate from a psycho-neurological clinic certifying the absence of mental disorders.

The commission declared him professionally unfit on the basis of his military card which stated that he had a limited ability to serve in the military under Article 7b of the *1987 Nomenclature of Disorders* (“psychopathy”).

Issue

Whether the applicant’s sexual orientation made him professionally unfit.

Domestic Law

Civil Procedure Code, Article 3.

Labour Code, Article 213 (Medical Examinations of Some Categories of Employees).

Law on Psychiatric Care (appendix to the regulations of military medical examination), Article 6 (limitations on performance of certain types of professional activities and activities related to potentially dangerous activities), and Article 48 (judicial grievance procedure).

1987 Nomenclature of Disorders, Article 7 (Psychopathy).

Reasoning of the Court

The Court first reviewed the facts of the applicant’s case. When undergoing a medical examination ordered by the military registration office in 1992, the applicant had been diagnosed with a mental disorder (“perverse psychopathy”). The Court accepted the testimony of a specialist, Dr. Dmitry D. Isaev, that this diagnosis was based exclusively on the applicant’s declaration of homosexual orientation. This was grounded in the former understanding of homosexuality as a pathological condition and a mental disorder. However, homosexuality was no longer considered a mental disorder since Russia had adopted the International Statistical Classification of Diseases and Related Health Problems in 1997. Therefore, the Court concluded, at the time of his medical examination in 2003 the applicant had no recognised mental disorder.

The Court next considered the requirement of a medical examination prior to employment under Article 213 of the *Russian Labour Code* and Article 6 of the *Law on Psychiatric Care*, under which a person could be declared professionally unfit on grounds of mental disorder. However, the Court emphasised that the applicant had no contra-indications on the date of his medical examination by the Railway Clinic. It rejected the defendant’s argument that the entry in the military card referring to the 1992 diagnosis was a ground for declaring the applicant professionally unfit.

Having restated that homosexuality was not a mental disorder, and therefore the applicant had no mental condition making him professionally unfit, the Court allowed his claim and declared unlawful the decision of the Railway Clinic.

Schroer v. Billington, United States District Court for the District of Columbia (19 September 2008)

Procedural Posture

The plaintiff brought a civil action against Billington, the head of the Library of Congress, a government agency. The plaintiff alleged that the defendant's decision not to hire her after she announced that she would undergo a male to female gender transition amounted to sex discrimination contrary to Title VII of the *Civil Rights Act*. The defendant moved to dismiss for failure to State a claim and the District Court denied the motion. The case then went to trial on the merits.

Facts

The plaintiff was a transgender woman. In 2004, before changing her gender identity, she applied for a post of Specialist in Terrorism and International Crime with the Congressional Research Service (CRS), an arm of the Library of Congress. She applied as "David J. Schroer" and used the male pronoun.

The plaintiff was well qualified for the job. Before her retirement from the military in 2004, she was a colonel assigned to the United States Special Operation Command, serving as the director of a classified organisation that tracked and targeted high-threat international terrorist organisations. In this position, she analysed sensitive intelligence reports, planned operations and regularly briefed senior military and government officials, including the Vice President and the Secretary of Defence.

Before applying for the position with CRS, the plaintiff had been diagnosed with gender identity disorder and was working with a clinical social worker in order to develop a plan for transitioning from male to female. However, since she had not yet begun to present herself as a woman on a full-time basis, she applied for the position and attended the interview as a male.

The plaintiff received the highest interview score of all candidates. She was then asked to submit several writing samples and an updated list of references. After receiving these materials, the members of the selection committee unanimously recommended that the plaintiff be offered the job. A CRS staff member, Charlotte Preece, called the plaintiff in order to offer her the job and she accepted. Preece began then to fill out the paperwork necessary to finalise the hiring.

Before Preece had completed and submitted these documents, the plaintiff asked her to lunch in order to tell her about her gender transition. Since she was about to start dressing in traditionally feminine clothing and presenting as a woman

on a full-time basis, the plaintiff believed that it would be less disruptive if she started work at CRS as a woman, rather than as a man and later began presenting as a woman. The plaintiff explained that she was transgender, that she would be transitioning from male to female, and that she would be starting work as a woman. Preece asked a number of questions about this process and raised the issue of the plaintiff's security clearance, necessary for the terrorism specialist position. Afterwards, Preece asked the personnel security officer for the Library of Congress what impact the gender transition might have on the plaintiff's ability to get a security clearance. The officer answered that she did not know and that she would have to look into the applicable regulations.

The next day, Preece met with other members of staff to discuss the terrorism specialist position. She said that the plaintiff had been, but no longer was, her first choice for the position. During the meeting, no in-depth discussion took place of the issues linked to the plaintiff's security clearance. On the following day, Preece called the plaintiff to rescind the job offer, saying: "[B]ased on our conversation yesterday, I've determined that you are not a good fit, not what we want". She then called the second candidate and offered him the position.

Issue

Whether the defendant's refusal to hire the plaintiff was based on her transgender identity and, if that was the case, whether this amounted to discrimination on the basis of sex.

Domestic Law

Civil Rights Act of 1964, Title VII (Equal Employment Opportunities) Section 703 (prohibiting discrimination on the basis of race, colour, religion, sex or national origin).

Price Waterhouse v. Hopkins, United States Supreme Court, 1989 (affirming that Title VII's protection includes claims of discrimination based on gender role stereotyping).

Smith v. City of Salem, United States Court of Appeals for the 6th Circuit, 2004 (affirming that discrimination against transgender individuals is a form of sex stereotyping).

Ulane v. Eastern Airlines, United States Court of Appeals for the 7th Circuit, 1984 (holding that discrimination based on gender identity is not protected by Title VII) (implicitly overruled by *Price Waterhouse*).

Reasoning of the Court

The plaintiff claimed that the defendant denied her employment solely because of her gender identity and that this violated the prohibition of discrimination on the basis of sex set forth in Title VII of the Civil Rights Act.

The defendant argued that it had a number of non-discriminatory reasons for refusing to hire the plaintiff, including concerns about her ability to receive and continue to hold a security clearance; her ability to maintain her contacts within the military after the transition; and her credibility when testifying before the United States Congress, since the position required congressional testimony. Since the plaintiff had not been forthcoming about her transition from the beginning, doubts were raised about her trustworthiness. Finally, the defendant contended that it feared that the plaintiff's transition might distract her from her job. The defendant also argued that "a hiring decision based on transsexuality is not unlawful discrimination under Title VII".

The Court divided its reasoning in two parts. First, the Court analysed the security clearance and other concerns raised by the defendant and found them to be plainly manufactured to justify the hiring decision. The Court noted that the plaintiff already held a security clearance from her employment with a prior government agency and that the Library of Congress would typically recognise this security clearance.

As to the objections raised about the plaintiff's credibility and military contacts, the Court noted that they were "explicitly based on her gender non-conformity and [her] transition from male to female and [were] facially discriminatory as a matter of law". According to the Court, "deference to the real or presumed biases of others is discrimination, no less than if an employer acts on behalf of his own prejudices".

In the second part of its opinion, the Court analysed the two legal theories advanced by the plaintiff in order to demonstrate that the defendant's conduct amounted to prohibited sex discrimination.

The plaintiff's sex stereotyping theory was grounded in *Price Waterhouse v. Hopkins*, a case in which a female senior manager was denied partnership in a firm because she was perceived to be too "macho" for a woman. In ruling for the plaintiff, the Court held that Title VII's reach included claims of discrimination based on "sex stereotyping". Since *Price Waterhouse*, other federal courts had also concluded that punishing employees for failure to conform to sex stereotypes was sex discrimination.

Following this line of cases, the 6th Circuit had held that discrimination against transgender individuals was a form of sex stereotyping prohibited by *Price Waterhouse*. In *Smith v. City of Salem*, for instance, the 6th Circuit affirmed that "discrimination against a plaintiff who is transsexual – and therefore fails to act and/or identify with his or her gender – is no different from the discrimination directed against Ann Hopkins in *Price Waterhouse*, who, in sex-stereotypical terms, did not act like a woman".

According to the Court, the present case rested on direct and compelling evidence that the defendant's decision not to hire her was "infected by sex stereotypes". The selecting official admitted that "when she viewed the photographs of [the plaintiff] in traditionally feminine attire ... she saw a man in women's clothing". Moreover, she believed that others at the Library of Congress, as well as in Congress, would not take the plaintiff seriously because they, too, would view her the same way.

The Court therefore concluded that the plaintiff was entitled to a judgment based on a *Price Waterhouse* type claim for sex stereotyping.

The plaintiff's second legal theory was that, since gender identity is a component of sex, discrimination on the basis of gender identity was sex discrimination. The Court noted that the defendant was enthusiastic about hiring the plaintiff until she disclosed her plans for a gender transition. The defendant revoked the offer when it learned that the man to whom it had offered the job was about to become a woman. According to the Court, this amounted to discrimination on the basis of sex.

In order to explain its reasoning, the Court drew a parallel between sex discrimination and religious discrimination. It argued that, just as religious discrimination easily encompassed discrimination based on a change of religion, sex discrimination should include discrimination based on a change of sex. According to the Court, courts have traditionally allowed their focus on the label "transsexual" to prevent them from including the issue within sex discrimination.

In *Ulane v. Eastern Airlines*, for instance, the 7th Circuit held that discrimination based on sex meant only that "it is unlawful to discriminate against women because they are women and against men because they are men". However, the Court affirmed that this was no longer a tenable approach. Moreover, it argued, even if the anatomical approach to Title VII was accepted, the defendant's decision not to hire the plaintiff because she planned to change her anatomical sex was literally discrimination because of sex.

The Court held that, in refusing to hire the plaintiff on the basis of her gender transition and of her failure to conform to the decision maker's sex stereotypes, the defendant violated the Title VII prohibition on sex discrimination.

SR Siras v. Aligarh Muslim University,
High Court at Allahabad, India (1 April 2010)

Procedural Posture

The petitioner filed a writ petition in the Allahabad High Court, challenging the orders issued against him by Aligarh Muslim University on the grounds that they violated his constitutional rights.

Facts

The petitioner was a reader and chair of the Department of Modern Indian Languages of Aligarh Muslim University. He was living in campus accommodation and awaiting promotion to professor prior to his retirement. In February 2010, some members of the press broke into his residential quarters and filmed him having sex with a male partner. University personnel arrived on the scene and examined the video footage. The following day, the Vice Chancellor of the University placed the petitioner under suspension and ordered him to vacate his house.

The petitioner was served with notice for a hearing on a charge of misconduct. He was accused of indulging in “immoral sexual activity ... in contravention of basic moral ethics” while living in University housing and of thereby undermining the “pious image” of the academic community. After the incident, the media also started publishing videotapes and clippings about the petitioner. The petitioner replied to the charge sheet but at the same time decided to file a writ petition against the measures adopted by the University.

Issue

Whether the petitioner’s suspension from his teaching position and his removal from his campus accommodation violated his rights to privacy and equality.

Domestic Law

Aligarh Muslim University Act 1920, Sections 13 and 36 B.

Constitution of India, Articles 14 (right to equality), 15 (non-discrimination), 16 (equality of opportunity in public employment), and 21 (protection of life and personal liberty).

Statutes of the Aligarh Muslim University, Section 40 (removal of members and employees).

Naz Foundation v. Government of NCT of Delhi and Others, High Court of Delhi at New Delhi, India, 2009 (finding Section 377 of the Indian Penal Code to violate constitutional guarantees of privacy, equality, non-discrimination, dignity and health).

Reasoning of the Court

The petitioner stated that no complaint of indecent behaviour or misconduct had been made against him at any time. In reply to the charges, he admitted being gay and said that he had never hidden his sexual orientation. According to him, his sexual orientation was not any person’s concern and the right to privacy and the right to equality under Articles 14, 15 and 21 of the *Constitution of India* protected what he did in the privacy of his home.

Furthermore, the petitioner maintained that both the media and university personnel had entered his flat without his consent and had therefore intruded into his privacy in violation of Article 21 of the Constitution. He also submitted that Article 14 and 16 of the Constitution guaranteed equality to all persons, regardless of their sexual orientation, and prohibited discrimination on such ground. Moreover, according to the petitioner, any act done in the privacy of a person's home, which did not affect his employment, did not amount to misconduct subject to departmental inquiry and persecution.

The petitioner relied on *Naz Foundation* for the argument that he was entitled to the rights to privacy, dignity, equality and non-discrimination with respect to sexual orientation.

The defendant raised preliminary objections to the writ petition on the grounds that the suspension order was still subject to approval by the Executive Council. The petitioner still had administrative remedies available to him, since he could appeal to the Executive Council.

First, the Court held that the question of the applicability of *Naz Foundation* did not arise in the case because the allegations were not the basis of any criminal offence, charge or conviction involving "moral turpitude". Second, it held that the possibility of appeal to the Executive Council was not a bar to entertaining the writ petition.

The Court further stated that the petitioner was justified in stating that an adult's sexual preference may not amount to misconduct, especially given the circumstances in which the fact was discovered (in violation of the right to privacy). It affirmed that privacy was a fundamental right that needed protection and that, in any case, the allegations made against the petitioner would require a strict standard of proof if they were to fall within the definition of immorality and amount to misconduct.

As an interim measure (while the petitioner's appeal to the Executive Council against the suspension order was pending), the Court ordered a stay of both the order and the petitioner's removal from his campus accommodation. It also restrained the media from publishing any material on the incident.

- 1 William N. Eskridge, Jr., 'Sexual and Gender Variation in American Public Law: From Malignant to Benign to Productive' (2010), 57 *UCLA Law Review* 1333 at n. 43.
- 2 This account is taken from William N. Eskridge, 'January 1961: The Birth of Gaylegal Equality Arguments' (2001), 58 *New York University Annual Survey of American Law* 39, 40.
- 3 *Norton v. Macy*, 417 F.2d 1161, 1165-66, US Court of Appeals for the D.C. Circuit (1 July 1969).
- 4 The Constitutional Court of Colombia had earlier held that article 93 of the Constitution made the doctrine of UN treaty bodies obligatory at the domestic level. See Decision C-408/96, 4 September 1996, at para. 24. For a thorough explanation of Colombian jurisprudence in regard to matters of sexual orientation, see Esteban Restrepo-Saldarriaga, *Advancing Sexual Health through Human Rights in Latin America and the Caribbean*, (International Council on Human Rights Policy, Working Paper, 2011) available at http://www.ichrp.org/files/papers/183/140_Restrepo_LAC_2011.pdf.
- 5 See *Ulane v. Eastern Airlines*, United States Court of Appeals for the 7th Circuit, 1984 (holding that discrimination based on gender identity is not protected by the equal employment statute).
- 6 *Smith v. City of Salem*, United States Court of Appeals for the 6th Circuit, 2004 (finding termination of a firefighter during gender transition was sex discrimination based on the firefighter's gender non-conforming behaviour and appearance); *Kastl v. Maricopa County Community College*, United States Court of Appeals for the 9th Circuit, 2009 (finding it unlawful to discriminate against a transgender person because he or she does not behave in accordance with an employer's gender expectations for men and women); *Glenn v. Brumby*, US District Court for the Northern District of Georgia, 2 July 2010 (in which a transgender employee established a *prima facie* case of discrimination on basis of gender).
- 7 *Smith v. City of Salem* at 573, 575.
- 8 See generally Elizabeth M. Glazer & Zachary A. Kramer, 'Transitional Discrimination' (Spring 2009), 18 *Temple Political & Civil Rights Law Review* 651, 653.
- 9 *Council Directive 76/207/EEC* of 9 February 1976, on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.
- 10 European Court of Justice, *P v. S and Cornwall County*, Case C-13/94, of 30 April 1996, at paras. 20-21.
- 11 *European Parliament and Council Directive 2006/54/EC* of 5 July 2006, on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), 5 July 2006, at Recital 3. See also EU Fundamental Rights Agency, *Homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity: comparative legal analysis* (2010 Update), at 21.
- 12 *Council Directive 2000/78/EC* of 27 November 2000, on establishing a general framework for equal treatment in employment and occupation, at Article 1.
- 13 Kees Waaldijk, "Comparative Analysis" in *Combating sexual orientation in employment legislation in fifteen EU member states* (Report of the European Group of Experts on Combating Sexual Orientation Discrimination 2004).
- 14 *Recommendation CM/Rec (2010)5 of the Committee of Ministers to member states, on measures to combat discrimination on grounds of sexual orientation or gender identity*, 31 March 2010, para. 29.

**FREEDOM OF
ASSEMBLY,
ASSOCIATION
AND EXPRESSION**

Chapter four

Freedom of Assembly, Association and Expression

INTRODUCTION

The rights to freedom of expression, association, and peaceful assembly are grouped together because they are often intertwined. Freedom of expression is frequently a necessary component of the rights to freedom of assembly and association when people join together for an expressive purpose. All three are protected in international and regional human rights instruments and are considered essential to the functioning of a pluralistic and democratic society.¹ Human rights activists also need to be able to exercise these rights to do their work.

The cases in this chapter span more than thirty-five years, yet the issues they address are still contested. The ability of LGBT individuals and organisations to organise, mobilise, and speak out on matters of sexuality is often restricted. Historically, discussion of homosexuality was frequently prohibited in the name of public morality. In 1988, for example, the United Kingdom adopted Section 28 of the *Local Government Act*, which prohibited local authorities from “promot[ing] homosexuality or publish[ing] material with the intention of promoting homosexuality”. Local authorities were also prohibited from teaching in schools about “the acceptability of homosexuality as a pretended family relationship”.² Although Section 28 has since been repealed, similar laws exist elsewhere. In July 2009, the Lithuanian Parliament adopted a law entitled *Law on the Protection of Minors against the Detrimental Effect of Public Information*. Adopted over a presidential veto, the law prohibited information that “agitate[s] for homosexual, bisexual and polygamous relations”. Following an international outcry, that provision was deleted but a new version of the law banned information that “denigrates family values” from places accessible to minors.³ An *Anti-Homosexuality Bill*, introduced in the Ugandan Parliament in September 2009 but never brought to a vote, would have prohibited all “promotion of homosexuality”.⁴ Its existence was used by the Minister of Ethics in December 2010 to prevent the screening of a human rights documentary that briefly mentioned homosexuality.⁵ A recent case in Malawi examined the police seizure of clothing (t-shirts and wrappers) imprinted with a non-discrimination message by local organisations working on LGBT health and rights.⁶

The UN Human Rights Committee has addressed only once the legality of restricting discussion of homosexuality, in the 1982 case of *Hertzberg v. Finland*. The *Finnish Penal Code* imposed a six-month prison sentence or a fine on anyone who publicly encouraged “indecent behaviour between persons of the same sex”.⁷ The authors of the communication were journalists whose television and radio programmes had been censored under the law. The government invoked protection of public morals to justify the limitation, as provided for in Article 19(3) of the ICCPR. The HRC, without examining the content of the censored programmes, held that the State was due a “certain margin of discretion” in matters of public morals and concluded there was no violation.⁸ It noted that the audience for television and radio programmes could not be limited and that “harmful effects on minors” might occur.⁹ An individual concurring opinion pointed out that

*the conception and contents of ‘public morals’ referred to in article 19(3) are relative and changing. State-imposed restrictions on freedom of expression must allow for this fact and should not be applied so as to perpetuate prejudice or promote intolerance. It is of special importance to protect freedom of expression as regards minority views, including those that offend, shock or disturb the majority.*¹⁰

These views appear to have influenced the Committee’s approach to the question of public morals. In *General Comment No. 22*, the Committee stated that “the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations ... for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition”.¹¹ The Human Rights Committee quoted this language in its *Draft General Comment on Article 19* (freedom of expression).¹²

The Human Rights Committee will have the opportunity to revisit *Hertzberg* when it considers *Fedotova v. Russia*. In the domestic case, discussed below, the Russian Constitutional Court found that a law criminalising “homosexual propaganda” near schools did not violate the constitutional guarantee of freedom of expression.

Restrictions are not limited to expression. The freedoms of assembly and association are frequently violated too. In recent years authorities in the Russian Federation, Moldova, Romania, Poland and Latvia have banned pride marches and tolerance and equality assemblies.¹³ Authorities have also refused to register LGBT organisations in a number of countries, including Mongolia, Botswana, Lesotho, and Turkey.¹⁴ The European Court has consistently held that even shocking or disturbing ideas are protected by the rights to freedom of association and peaceful assembly. In *Bączkowski v. Poland* and *Alekseyev v. Russia*, the European Court found that denying LGBT groups permission to assemble peacefully violated the right to assembly protected by the Convention, and also violated the right to non-discrimination on the basis of sexual orientation.¹⁵

In *Alekseyev*, the Government claimed that a Pride March had been banned to prevent public disorder, and to protect morals and respect for religious beliefs. It argued that children might be exposed involuntarily to homosexuality and that the “ideas of the event organisers ... encroached on the rights, lawful interests and human dignity of believers.” Accordingly, the Government submitted, “any form of celebration of homosexual behaviour should take place in private or in designated meeting places with restricted access.”¹⁶ The European Court firmly rejected these arguments. Freedom of assembly, it recalled, included assemblies that might “annoy or cause offence” to others.¹⁷ It was the duty of the State to protect demonstrators and enable lawful demonstrations to proceed peacefully. It would in fact be “incompatible with the underlying values of the Convention if the exercise of Convention rights by a majority group were made conditional on its being accepted by the majority.”¹⁸ The Court disagreed with the Government’s contention that no European consensus existed on homosexuality, and in any event found the claim irrelevant because “conferring substantive rights on homosexual persons is fundamentally different from recognising their right to campaign for such rights.” There was no ambiguity about the right of individuals “to openly identify as gay, lesbian or any other sexual minority, and to promote their rights and freedoms, in particular by exercising their freedom of peaceful assembly”.¹⁹

The themes identified in the work of the Human Rights Committee and the European Court – the importance of advocacy in a democracy, the role of public morality in limiting rights, and the protection of children – are all reflected in the cases presented here. Furthermore, to a significant degree, many of the cases reference and make use of international and comparative law.

In the United States, prior to the Supreme Court’s decision in *Lawrence v. Texas*, at a time when several States criminalised consensual same-sex conduct, students formed LGBT support groups at universities. Universities, perhaps not surprisingly, tried to shut them down, and many of these disputes ended up in court. Appellate courts uniformly concluded that the justifications advanced by university authorities for refusing to recognise such student groups were insufficient to justify the infringement of freedoms of expression and association guaranteed by the First Amendment of the *Federal Constitution*.²⁰ In *Gay Alliance of Students v. Matthews*, the University’s governing body denied the Alliance’s application to register as a student organisation. The Alliance’s purposes were to build “a supportive community among individuals who believe in the right of self-determination with regard to sexual orientation” and “to advocate for gay rights”. Before the court, the University argued that granting recognition to the group would encourage students to become members and would “increase the opportunity for homosexual contacts”. The Court’s response was twofold:

If the University is attempting to prevent homosexuals from meeting one another to discuss their common problems and possible solutions to those problems, then its purpose is clearly inimical

to basic first amendment values. Individuals of whatever sexual persuasion have the fundamental right to meet, discuss current problems, and to advocate changes in the status quo, so long as there is no incitement to imminent lawless action.

If, on the other hand, [the University's] concern is with a possible rise in the incidence of actual homosexual conduct between students, then a different problem is presented. We have little doubt that the University could Constitutionally regulate such conduct [...] But denial of registration is overkill.

Other US courts reached similar conclusions. For example, in *Gay Student Services v. Texas A&M University (TAMU)*, the Court stated: “As to TAMU’s asserted interest in preventing expression likely to ‘incite, promote, and result’ in then-illegal homosexual activity, we emphasise that while Texas law may prohibit certain homosexual practices, no Texas law makes it a crime to be a homosexual.”²¹

In *Gay Students Organization v. Bonner*, the Court emphasised that the organisation’s “efforts to organise the homosexual minority, ‘educate’ the public as to its plight, and obtain for it better treatment from individuals and from the government thus represent but another example of the associational activity unequivocally singled out for protection in the very ‘core’ of association cases decided by the Supreme Court”.²² These cases show that, even where the conduct that defines the class is criminalised, individuals still have the right to freedom of expression.

The other cases in this chapter do not deal with direct criminal prohibitions but with public morals limitations on speech and other forms of expressive activity on the subject of homosexuality. In most of these cases, courts rejected the argument that protection of public morals justified the infringement. Thus in *In re Road Traffic Act*, the Constitutional Tribunal of Poland emphasised the importance of freedom of assembly, calling it a cornerstone of democracy. It warned of the dangers of curtailing this freedom to accord with majority views. Finally, in language reminiscent of the Constitutional Court of South Africa in *National Coalition for Gay and Lesbian Equality* and the High Court of Delhi in *Naz Foundation*, the Constitutional Tribunal distinguished “public morals” from the moral views of legislators or other public figures. The latter could not use their personal views as a reference or criterion for restricting the right to peaceful assembly.

In *Siyah Pembe Üçgen Izmir*, the Izmir Court was not persuaded by the prosecutor’s argument that an LGBT organisation could be restricted on grounds of “immorality”. Sexual orientation and gender identity were facts, it reasoned, not matters of morality or immorality. Notions of public morality were subjective and could change with time and place. In order to characterise an association’s aims as immoral, one would have to show that its aims were against morals that were universally accepted. Since the prosecutor had not brought evidence of this sort, the Court concluded that the application to dissolve the organization should be denied.

The Izmir Court's reasoning concerning public morality is similar to the UN Human Rights Committee when it explained the use of public morality as a restriction under Article 18 of the ICCPR.²³

Similarly, in **Ang Ladlad**, the Supreme Court of the Philippines relied on the ICCPR, the UDHR, cases from the European Court and the UN Human Rights Committee and cases from the United States when it reversed a decision by the Commission on Elections to deny Ang Ladlad registration as a political party. Quoting extensively from Justice O'Connor's concurrence in **Lawrence v. Texas**, the Supreme Court held that "moral disapproval of an unpopular minority" was not a legitimate State interest under the equal protection clause. Although many Filipinos disapproved of homosexuality, the values of democracy precluded using religious or moral views to restrict Ang Ladlad's rights. Its decision was based on both constitutional and international law. Reading the right of political participation under Article 21 of the UDHR in light of the decision of the Human Rights Committee in *Toonen v. Australia*, the Court found that international law protected the right of LGBT organisations to participate in the political process.

The Supreme Court of Argentina likewise relied strongly on international and comparative law, including the US case of **Romer v. Evans**, when it found that denying registration to a transgender organisation violated the Constitution. The Superintendent of Corporations had argued that Asociación Lucha por la Identidad Travesti-Transexual did not benefit the common good but only a discrete group of transgender individuals. The Court of Appeals had found no violation of constitutional rights. On appeal to the Supreme Court, the Attorney General, in support of the Association, argued that the "common good" referred to social conditions that permitted all members of society to achieve the highest enjoyment of democratic values, including pluralism. The Supreme Court agreed and concluded that the "common good" could not be limited to what the majority considered good.

Concern to protect children from exposure to information about homosexuality arises in various ways in these cases. In **In re Futyu Hostel**, where an LGBT youth group was denied permission to stay in a hostel, the Tokyo High Court reasoned that the hostel had a legitimate purpose in seeking to prevent sexual activity among youth but that this applied to all, not just same-sex sexual activity. It reasoned that neither heterosexual nor homosexual youth were likely to engage in sex in dormitory-style rooms. In **Hatter v. Pepsi Sziget**, which examined the contractual and constitutional rights of an LGBT organisation to participate in a cultural festival by displaying of educational materials on homosexuality, the Hungarian court accepted that protecting children from information about homosexuality was a legitimate interest. The State had a constitutional obligation to ensure children's "satisfactory physical, mental and moral development" and contact with an LGBT organisation might have a negative effect. Nevertheless, when balancing this right against the right to freedom from discrimination based on sexual orientation,

this ground was insufficient. Hatter's participation in the festival did not create a specific risk that a child might join a homosexual association.

A contrary conclusion was reached in *In re Fedotova*. In this case, the Russian Constitutional Court underscored the importance of protecting children from information that could harm their health and moral and spiritual development. The law at issue prohibited "homosexual propaganda" near schools. In upholding the law, the Court concluded that prohibiting such propaganda near children could not violate constitutional rights. The Court's conclusion appears to be in direct contrast with the views of the Committee on the Rights of the Child, when it assessed conformity of State practice with the *Convention on the Rights of the Child*, as well as with the opinion of UN human rights experts.²⁴ Article 13 of the CRC protects the right of children to receive information and the Committee has interpreted this to include information about sexuality and sexual behaviour.²⁵ For example, when the Committee considered Section 28 of the *United Kingdom Local Government Act*, it urged the State to repeal it.²⁶ The Committee has also held that the non-discrimination provision guarantees the rights set forth in the CRC without discrimination on the ground of sexual orientation.²⁷

Although public morality is expressly a legitimate purpose justifying restriction of the rights to freedom of expression, peaceful assembly, and association in the ICCPR, courts have been alert to ensure that "public morality" does not mask prejudice. They have distinguished between a genuine public morality and one that merely reflects majority opinion. Most of the cases discussed in this chapter emphasise the important role these rights play in protecting minorities and that the expression of minority viewpoints benefits democratic societies. As the Human Rights Committee has noted, limits on rights must not violate the guarantees of equality and non-discrimination found in both international and domestic constitutional law.²⁸

CASE SUMMARIES

Gay Alliance of Students v. Matthews, United States Court of Appeals for the 4th Circuit (28 October 1976)

Procedural Posture

A Virginia district court heard the case between the Gay Alliance of Students and various members of the administration of Virginia Commonwealth University. The district court ruled for and against both parties on different points of law and both parties appealed to the Court of Appeals for the 4th Circuit.

Facts

The Gay Alliance of Students was founded in 1974 to support the University's homosexual and bisexual community and promote gay civil rights. The Alliance

applied to the Office of the Dean of Student Affairs for registration as a student organisation. Registered student organisations received certain benefits: they were listed in a student activity directory; had access to university consultation services on financial management, budget preparation, and financial records; had access to University buildings for meetings and activities; enjoyed use of the campus newspaper, radio station, and bulletin boards for advertising; and were eligible to apply for funding from the University. The Alliance's application was timely and met all procedural requirements. Nonetheless, it was not handled in the usual manner. The Vice President for Student Affairs forwarded the application to the Board of Visitors, the University's governing body. The Board denied the Alliance's application and provided no reasons.

Issue

Whether the University's denial of registration to an LGBT student group was a violation of the right to freedom of expression under the Constitution.

Domestic Law

Constitution of the United States, 1st Amendment (freedom of speech, of the press, and the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.); 14th Amendment, Section 1 (Equal Protection).

Bates v. City of Little Rock, United States Supreme Court, 1960 (holding that "subtle governmental interference", for example in student organisation policies at State universities, were capable of violating the 1st Amendment).

Brandenburg v. Ohio, United States Supreme Court, 1969 (holding that restricting the fundamental right of association was constitutional if there was an "incitement to imminent lawless action").

Healy v. James, United States Supreme Court, 1972 (holding that "the Constitution's protection is not limited to direct interference with fundamental rights" and that advocacy is always afforded full protection under the 1st Amendment).

National Socialist White People's Party v. Ringers, United States Court of Appeals for the 4th Circuit, 1973 (holding that, when a State provided services or facilities to a group, such accommodation did not indicate the government's ideological approval of the group or its activities).

Police Dept. Of the City of Chicago v. Mosley, United States Supreme Court, 1972 (holding that the government could deny equal protection so long as the difference in treatment was "tailored to serve a substantial governmental interest").

Tinker v. Des Moines Independent Community School District, United States Supreme Court, 1969 (holding that public schools could regulate any activity that "materially and substantially disrupts the work and discipline of the school").

Reasoning of the Court

The Alliance argued that the University violated the freedom of association rights guaranteed by the 1st Amendment to the United States Constitution.

The Court agreed. The Court cited the decision in *Healy v. James*, which held that “the Constitution’s protection is not limited to direct interference with fundamental rights”. The Court in *Bates v. City of Little Rock* also held that this broader protection of rights could be violated by “subtle governmental interference” (not just by a “heavy-handed frontal attack”). This constitutional interpretation of the 1st Amendment led the Court to rule that the University’s actions infringed on the Alliance’s associational rights. The University’s refusal to register the Alliance hindered its efforts to recruit new members and denied to the Alliance the enjoyment of the University’s services that other registered student organisations were afforded.

The Court acknowledged that the University’s constitutional violation could have been legal if the University had legitimate justifications. Though the University presented justifications, the Court found that they did not overcome the 1st Amendment violation. First, the University argued that registering the Alliance would increase the number of students in the organisation. According to the Court, this argument was premised on the belief that registering the Alliance would indicate the University’s approval of the Alliance’s aims and objectives; and that such approval would encourage students to join the group who otherwise would have no interest in doing so.

The Court rejected this justification on two grounds. First, it noted that many registered student groups at the University expressed political and social aims and objectives. These groups existed even though the University had made no indication of ideological approval and it could not therefore use this argument as a justification. The Court’s finding was supported by the testimony of a University administrator, that “the registration and recognition of an organization [did] not, in any sense, carry with it approval or endorsement of the organization’s aims”. Second, the court in *National Socialist White People’s Party v. Ringers* had held that, even when the government was forced to provide recognition or facilities to groups with discriminatory membership policies, “state approval or support of those policies is not thereby forthcoming”. The Court concluded that the *Ringers* decision precluded the University from rejecting the Alliance’s application on grounds of ideological approval. Third, the Court held that if the University’s recognition of the Alliance encouraged membership, such encouragement was consistent with the 1st Amendment’s guarantee of association rights and, therefore, was not grounds for denying registration of a student group.

Next, the Court dealt with the University’s argument that recognising the Alliance would have adverse consequences on some students. The Court held that this justification failed under the 1st Amendment as well. It stated: “the very essence of

the First Amendment is that each individual makes his own decision as to whether joining an organization would be harmful to him". Furthermore, the court in *Healy* had held that a public university or college "may not restrict speech or association simply because it finds the views expressed by any group to be abhorrent".

Finally, the University argued that as "a matter of logic, the existence of the Alliance as a recognised campus organization would increase the opportunity for homosexual contacts". The Court recognised two possible interpretations of the phrase "homosexual contacts" and rejected the legitimacy of both. First, if the phrase "homosexual contacts" simply referred to "contacts" in which homosexuals discussed their common problems, the University's rejection amounted to an unconstitutional restriction of the Alliance's fundamental rights. The court in *Bradenburg v. Ohio* stated that a restriction on the fundamental right of freedom of association was constitutional only if there was an "incitement to imminent lawless action". The University provided no evidence of incitement to imminent lawless action, and, therefore, failed to justify its rejection of the Alliance.

"Homosexual contacts" might also refer to sexual activity between students of the same sex. This interpretation had implications for the Alliance because Virginia law criminalised anal and oral sex. The Court cited *Tinker v. Des Moines Independent Community School District*, which held that public schools like the University may permissibly regulate any conduct that "materially and substantially disrupt(s) the work and discipline of the school." Finding that illegal same-sex activity fell within the ruling in *Tinker*, the Court held that the University could regulate homosexual activity. However, the Court found no evidence that Alliance members engaged in illegal sexual practices.

The Court again cited *Healy*: "the critical line for First Amendment purposes must be drawn between advocacy, which is entitled to full protection, and action, which is not". Despite the illegality of same-sex sexual activity, the Court reasoned that the Alliance's purpose involved only advocacy, which was protected by the 1st Amendment. The Court concluded that "the suppression of associational rights because the opportunity for homosexual contacts is increased constitutes prohibited overbreadth". For the same reasons, the Court rejected the justification that recognising the Alliance would have attracted new homosexual students to the Alliance. Highlighting the distinction between advocacy and action, the Court noted that "Virginia law does not make it a crime to be a homosexual".

The Court also held that the Alliance's members were denied equal protection of the laws under the 14th Amendment. The Court cited the case of *Police Dept. of the City of Chicago v. Mosely* where it was held that the government could deny equal protection so long as discrimination was "tailored to serve a substantial governmental interest". The University's denial was neither tailored properly nor did it serve a substantial governmental interest.

The Court held that, while the University recognised student groups and conferred privileges upon them, the University was required to recognise the Alliance.

Postscript

When this case was heard, the State of Virginia criminalised consensual anal and oral sex, regardless of the sex of the partners. (*VA Code Ann.* Section 18.2-361.) To the extent that the relevant statute covers solicitation of public sex acts, it has been held to survive the United States Supreme Court's decision in *Lawrence v. Texas*. See *Singson v. Commonwealth*, Virginia Court of Appeals, 2005.

In re Futyu Hostel, Tokyo High Court, Civil 4th Division, Japan (16 September 1997)

Procedural Posture

An LGBT group called OCCUR was denied permission to stay in a government-run youth hostel by the Tokyo Educational Committee. OCCUR appealed the decision. The Tokyo District Court reversed the decision of the Committee, which then appealed to the High Court.

Facts

OCCUR, an LGBT group composed of young adults, stayed at Seinen no Ie in Futyu (a "Youth Hostel" sometimes referred to as "Fuchu Youth Hostel") in February 1999. The local government of Tokyo owned the hostel, pursuant to the *Tokyo Seinen No Ie (Youth House) Act*, Article 8 (1)(2). The hostel did not charge individuals and groups who used its facilities. OCCUR accused the hostel's management of mishandling the homophobic behaviour of other groups who were staying at the hostel at the same time as OCCUR.

After several meetings between OCCUR and the management, the hostel declined OCCUR's application to stay overnight at the hostel again, pending a judgment by the Tokyo Educational Committee. The Committee denied OCCUR overnight stays at the hostel because sexual activity might occur in rooms shared by homosexuals. The Committee stated that it would also prevent opposite-sex heterosexuals from sharing rooms for the same reason. The Committee reasoned that the possibility of sexual activity violated the goal of the hostel, which was to facilitate the healthy development of Japanese youth. The Committee allowed OCCUR to use its facilities during the day.

Issue

Whether the government could deny an LGBT youth group permission to stay at a student hostel.

Domestic Law

Constitution of Japan, Article 14 (equality and non-discrimination), Article 21 (freedom of association and assembly), and Article 26 (right to education).

Local Autonomy Act, Articles 244(2) and 244(3).

Tokyo Seinen No Ie (Youth House) Act, Article 8 (1) (2).

Reasoning of the Court

The plaintiffs raised a number of issues. They argued that statements by the manager of the Futyu Hostel had insulted OCCUR's members and amounted to unlawful defamation. These statements suggested that Japanese society did not support the activities and beliefs of OCCUR. The statements implied that homosexuality had a negative impact on young people and that gay men who shared a room would have sexual contact. Their main argument, however, was that the Educational Committee had contravened the constitutional rights of OCCUR's members. By prohibiting OCCUR's members from staying at the hostel, the Committee had violated the rights of association and education. The plaintiffs also argued that the Committee violated OCCUR's rights under the *Local Autonomy Act*.

The Committee responded that the statements by the hostel's manager did not amount to unlawful defamation because they were made during a private conversation. There was no degradation of OCCUR's social reputation and therefore, defamation had not occurred.

The Committee maintained that the hostel could legally prevent OCCUR from staying overnight. The hostel was founded with the goal of facilitating the healthy development of youth. Many of the hostel's visitors were minors who, according to the Committee, were immature and impressionable. Exposure to sexual activity, regardless of the sex and sexual orientation of the parties involved, would compromise the students' healthy development. Discrimination did not occur because male and female heterosexuals were also not permitted to share rooms.

The Tokyo High Court agreed with the Tokyo District Court and ruled in favour of OCCUR but rejected the claim of defamation. The High Court found that it was unlawful for the hostel not to accept OCCUR's application, despite the Committee's authority to decide the issue. The Court ruled that the hostel should have accepted the application and waited for the Committee to issue its decision. Despite rejecting the defamation claim, the Court held that the Committee's decision was unlawful for a number of reasons.

First, the Court rejected the claim that sexual activity had an inherently negative effect on youth who witnessed or took part in such activity. In practice,

furthermore, sexual activity would occur rarely if at all because of the hostel's dormitory-style rooms; neither heterosexuals nor homosexuals would be likely to engage in sexual conduct in view of other people. But the Court did recognise that the hostel had the right take measures to restrict sexual activity on its premises.

The Court also ruled in favour of OCCUR on constitutional and statutory grounds. Articles 21 and 26 of the Constitution guaranteed freedom of assembly and association and the right to an equal education. Based on these provisions, OCCUR had the right to use the hostel. Additionally, the *Local Autonomy Act* limited the government's ability to deny access to public facilities, such as those governed by the *Tokyo Seinen No Ie (Youth House) Act*. Based on these constitutional and statutory provisions, the hostel could not prevent OCCUR members from using its facilities. While heterosexuals could be accommodated in sex-segregated housing, homosexuals could not. The hostel's sexual orientation separation policy was therefore a violation of both the *Local Autonomy Act* and the Constitution. The Court did not clarify whether housing OCCUR's members in single rooms would have survived constitutional scrutiny (assuming the hostel had enough single rooms to accommodate OCCUR's members).

Furthermore, the Court dismissed the notion that the possibility of same-sex sexual activity provided a justification for prohibiting homosexuals from staying in the same room. Assuming that the hostel had a legitimate interest in limiting sexual activity, the Court held that the mere possibility of sexual activity would not justify the exclusion of OCCUR members. The Court stated: "[t]here needs to be a concrete and substantial possibility of sexual conduct. This applies the same to heterosexuals when the facility does not have enough room to separate them." The Committee had provided no evidence that extensive sexual activity was likely to occur. The Court observed that, even had it found a high risk of sexual activity, the hostel would still have been required to grant OCCUR access while taking measures to limit its occurrence.

The Court noted that the sex-segregated housing policy was intended to curb sexual activity. This policy merely reduced the likelihood that guests would have sex with each other. However it had limited effect. The Court stated that to apply the policy "systematically to homosexuals to minimise the already low possibility of sexual conduct and completely preclude homosexuals from using the Youth Hostel is an undue restriction on the homosexual's right to use public facilities". Although the hostel had permitted OCCUR to use its facilities during the day, the Court held that it was: "a core feature of the Youth House to be able to use it overnight, and this cannot be regarded as a minor benefit. Homosexuals have a right to use the Youth House and benefit from its features."

The Court ruled in favour of OCCUR on all claims except that of defamation. It awarded OCCUR compensatory and punitive damages and attorney's fees.

Hatter v. Pepsi Sziget, Budapest 2nd and 3rd District Court of Justice, Hungary (March 2002)

Procedural Posture

The District Court of Justice heard the case after an injunction, granted in favour of the appellant organisation, was dismissed by another court on procedural grounds.

Facts

Hatter Barati Tarsasag a Melegeker Egyesulet, the appellant, was an LGBT group. The government recognised Hatter as a group having *kiemelkedően közhasznú*, or “pre-eminent standing”. The term referred to non-profit organisations that the government believed to be of outstanding public benefit. In order to achieve pre-eminent standing, an organisation’s goals and activities had to overlap with those of the central or municipal governments, in other words support the State’s functions. Hatter’s objectives were “the establishment of new institutions and services aimed at the better social integration of the gay and lesbian community in the public and civil spheres”.

On 11 July 2001 Hatter finalised a contract with the defendants, the organisers of Budapest’s Pepsi Sziget Festival, which was one of the largest music and cultural festivals in Europe. Hatter planned to provide information and educational materials on homosexuality and HIV/AIDS. Hatter had participated in the 1999 Sziget Festival in a similar capacity.

However, prior to Hatter’s 2001 participation agreement, the local mayor informed the festival’s organisers by letter that he would not consent to any homosexual-related activities at the festival. The letter was dated 3 July 2001. On 10 July 2001, the organisers amended the contract forms to State that there would be: “no educational or any other type of programme related to homosexuality, under whatever designation. This serves the purpose of protecting juveniles and also the interest of safeguarding those who think differently.”

Issue

Whether the contract’s terms were unconstitutional, thereby rendering the contract void.

Domestic Law

Civil Code of Hungary, Sections 76 (prohibiting discrimination against private persons on the grounds of gender, race, ancestry, national origin, or religion; protecting freedom of conscience; prohibiting any unlawful restriction of personal freedom; prohibiting injury to body or health; providing that contempt for or insult to the honour, integrity, or human dignity of private persons shall be violations of inherent rights); and Section 200(2) (providing that any contract violating or evading legal regulations “shall be null and void”).

Constitution of Hungary, Article 60 (protecting freedom of thought, conscience, and religion), Article 67 (guaranteeing the right of children to receive the protection and care of their family, and of the State and society, which is necessary for their satisfactory physical, mental and moral development); and Article 70/A (ensuring the human rights and civil rights of all persons without discrimination).

Reasoning of the Court

The Court decided that the contract between Hatter and the festival organisers was procedurally valid and that, therefore, the provisions prohibiting activities relating to homosexuality were valid. Having failed to prove that the contract was procedurally void on this ground, Hatter argued alternatively that the discriminatory nature of the contract violated Hatter's constitutional rights.

Section 200(2) of the *Civil Code of Hungary* provided that any contract that violated legal regulations or evaded legal regulations "shall be null and void". Hatter argued that the terms of the contract violated Articles 60 and 70A of the Constitution and Section 76 of the *Civil Code*. Article 60 protected freedom of thought, conscience, and religion. Section 76 broadly prohibited "[d]iscrimination against private persons on the grounds of gender, race, ancestry, national origin, or religion; violation of the freedom of conscience; any unlawful restriction of personal freedom; injury to body or health; contempt for or insult to the honor, integrity, or human dignity of private persons."

The Court declined to consider a Section 200(2) violation based on Article 60 and Section 76. It focused instead on Article 70A of the Constitution, which stated that "[T]he Republic of Hungary shall ensure the human rights and civil rights for all persons on its territory without any kind of discrimination such as on the basis of race, colour, gender, language, religion, political or other opinion, national or social origins, financial situation, birth or on any other grounds whatsoever".

The Court held that this protection against discrimination extended to "differential treatment based on sexual orientation" and applied to organisations as legal personalities. However, the Court also recognised that, although sexual orientation was a protected classification, this constitutional right could be legally – indeed, necessarily – restricted. It stated that when "fundamental constitutional rights need to be weighed against one another, then it needs to be reasonably assessed how and to what degree one may be restricted vis-à-vis the other". The defendants and Court agreed that prohibiting Hatter's presence at the Sziget festival implicated two constitutional rights. On one hand, prohibiting Hatter's participation would violate the group's right to be free from discrimination based on sexual orientation. On the other, it was claimed that Hatter's participation might violate the rights of children, as set out in Article 67 of the Constitution, namely: "all children have the right to receive the protection and care of their family, and of the State and society, which is necessary for their satisfactory physical, mental and moral development".

The Court weighed the importance of these constitutional rights and concluded that Hatter's right to be free from discrimination based on sexual orientation outweighed the rights of children in Article 67. It found any risk to children to be speculative. In the Court's opinion "the specific risk that is manifest when a child joins a homosexual association, and which may justify restrictions, is not given in the current situation".

The Court ruled in favour of Hatter and held that the contract was void under Section 200(2) of the *Civil Code*. The contract's anti-LGBT provision clearly violated the "spirit of the Constitution". Moreover, Hatter's status bestowed on the group standing to appear and operate in public. The Court stated that, while it was "evident that the public display of ... [Hatter's] 'otherness' and the furthering of the societal acceptance thereof is only possible within such boundaries as do not violate the rights or rightful interests of others", and though children had a legitimate claim to protection, their protection at the expense of Hatter's rights would perpetuate and promote existing social prejudices against sexual minorities.

Thus the Court ruled that the contract's discriminatory provision violated Hatter's constitutional rights, and that the constitutional right of children to be protected from negative effects of contact with an LGBT organisation did not, in this case, justify limiting the LGBT organisation's constitutional rights. Because the event had passed, the Court awarded Hatter monetary damages.

K 21/05, In re Road Traffic Act, Constitutional Tribunal of Poland (18 January 2006)

Procedural Posture

The Commissioner for Citizens' Rights (an ombudsman) petitioned the Constitutional Court to consider the constitutionality of the *Road Traffic Act 1997*.

Facts

A group of individuals and the Foundation for Equality applied to hold a march in Warsaw in order to raise public awareness about discrimination against minorities, including sexual minorities. On 12 May 2005, they applied for permission to organise a march that would lead from the Parliament to Assembly Square. On 3 June 2005, the City Council Road Traffic Office, acting at the direction of the Mayor of Warsaw, denied permission for the march, stating that the organisers had failed to submit a traffic organisation plan as required under Article 65 of the *Road Traffic Act*.

Issue

Whether Article 65 of the *Road Traffic Act* infringed the constitutional right to freedom of assembly.

Domestic Law

Assemblies Act 1990, Article 1(2).

Constitution of Poland, Article 31(3) (providing that any statutory limitation of the exercise of constitutional freedoms, including for the protection of public morals, was not to violate the essence of freedoms and rights), Article 53 (freedom of religion), and Article 57 (freedom of peaceful assembly).

Road Traffic Act 1997, Article 65.

K 34/99, Constitutional Tribunal of Poland, 2000 (holding that the *Road Traffic Act* was not incompatible with the Constitution).

Reasoning of the Court

The Court first addressed its previous opinion in the case *K 34/99* where it held that a previous – though very similar – version of the *Road Traffic Act* did not violate any constitutional rights. The State argued that *K 34/99* barred the Court from considering the present issue because of the principle of *ne bis in idem* (that no legal action could be instituted twice for the same cause). The Court, however, held that the amended version of the *Road Traffic Act* “imposed many [new] obligations upon the organiser of such an assembly, and the failure to meet these requirements results in the refusal to issue permission”. Furthermore, and more importantly, the current *Road Traffic Act* transformed “the essence of freedom of assembly into the right to assemble, regulated by decisions of an organ of public administration [the police], acting on the basis of provisions whose formulation allows for excessive discretion in such decisions”.

The Court highlighted the importance of the freedom of assembly, finding that it served several important purposes. It ensured people’s autonomy and developed their collective and self-identity. It was a cornerstone of democracy. It facilitated public opinion “by creating the possibility to influence the political process through criticism and protest”. Freedom of assembly could be used to protect minority groups, such as sexual orientation minorities. It also increased the “legitimacy and acceptance [of] ... decisions taken by representative organs and the administrative-executive structure subordinate to them”. Finally, it acted as “an early warning mechanism” that exposed social and political tensions.

The Court found that freedom of assembly played a vital role in promoting democracy and an effective legislature but that, conversely, the legislature should not have an effect on freedom of assembly: “Freedom of assembly is a constitutional value and not a value defined by the democratically legitimised political majority in power at a certain moment in time”. The Court also noted that the “public morals” protected by Article 31(3) of the Constitution were distinct from the moral views of the legislature and other political figures. As such, the moral views of legislators and other politicians could not justify restriction of freedom of assembly. The Court held that these public figures must protect

groups who exercise their freedom of assembly, regardless of any controversy – including the threat of violence – that might arise from such an assembly.

According to the Court, the government could permissibly limit the right to assembly only to the extent that it requested prior notification of all planned assemblies. Any further infringement would give the State too much power. The legislator could not “regulate the essence of a particular constitutional value” based on circumstances that were not constitutionally significant, such as rules for the use of public roads.

Having found that the right to freedom of assembly was of paramount constitutional importance, the Court criticised the wording of Article 65 of the *Road Traffic Act*, which collectively characterised different types of public events as “athletic competitions, rallies, races, assemblies and other events hindering traffic”. Rejecting this characterisation, the Court held that they were: “not of the same constitutional nature. The legislature made an error by failing to account for the constitutional nature of freedom of assembly as a fundamental political freedom.” The Court noted that the legislature had already recognised the need to differentiate between different classes of public activities. The *Road Traffic Act*, for example, had less stringent requirements for public events that involved religious activities. This reflected the freedom of religion protection in Article 53 of the Constitution. Because freedom of assembly was also constitutionally protected, it was “unjustified to treat assemblies, whose significant common feature with events of religious nature is their constitutional rank, differently”.

The Court concluded that Article 65 of the *Road Traffic Act* was unconstitutional.

Postscript

The facts of this case were also the subject of an application to the European Court of Human Rights. In *Bączowski and Others v. Poland*, the European Court found violations of Articles 11 (peaceful assembly), 13 (effective remedy), and 14 (non-discrimination) of the *European Convention*. *Application No. 1543/06*, Judgment of 3 May 2007.

Asociación Lucha por la Identidad Travesti-Transexual v. Inspección General de Justicia, Supreme Court of Justice of Argentina (21 November 2006)

Procedural Posture

The plaintiff, an association of transgender individuals, was denied recognition as a legal entity by the relevant government office. The Association appealed against the administrative decision but the appeal was dismissed. The Association then filed a motion for review of the denial of appeal to the Supreme Court of Justice.

Facts

The Association was denied recognition as a legal entity, which was provided for under Article 33 of the *Civil Code*. The Superintendent of Corporations, the authority responsible for this administrative decision, maintained that the Association did not fulfil the requirements set forth in Article 33. Specifically, the Superintendent of Corporations found that the Association failed the requirement of having an objective that promoted the “common good”. The Superintendent held that the Association’s objectives (fighting discrimination based on gender identity and promoting better integration of transgender persons) favoured only the Association’s members and “those sharing their ideas”. Since the whole of society did not benefit from these activities, it could not be said that the Association pursued the “common good”.

Issue

Whether the decision to deny recognition as a legal entity to the Association was based on reasonable grounds.

Domestic Law

Civil Code of Argentina, Articles 33 and 45.

Constitution of Argentina, Articles 14 (equal protection), 16 (equality).

Anti-discrimination Law No. 23.592.

Comunidad Homosexual Argentina c. Resolución Inspección General de Justicia, Argentina Supreme Court of Justice, 1991.

International Law

American Convention on Human Rights, Article 1 (obligation to respect rights without discrimination), Article 16 (freedom of association), and Article 24 (equal protection).

International Covenant on Civil and Political Rights, Articles 1, 2, 22 and 26.

International Covenant on Economic, Social and Cultural Rights, Article 2.

Universal Declaration of Human Rights, Articles 2, 7 and 20.

Advisory Opinion OC-4/84, Inter-American Court of Human Rights, 1984 (analysing equal protection amendment of the *Constitution of Costa Rica*)

Advisory Opinion OC-6/86, Inter-American Court of Human Rights, 1986 (analysing meaning of the word “Laws” in Article 30 of the *American Convention on Human Rights*).

Comparative Law

Romer v. Evans, United States Supreme Court, 1996 (finding unconstitutional a State constitutional amendment that withdrew a specific class of people - gays

and lesbians - from the protection of the law without a legitimate State purpose, in violation of the equal protection clause of the federal Constitution).

Reasoning of the Court

The National Civil Court of Appeal had dismissed the plaintiff's appeal against the administrative decision on the grounds that it did not constitute discrimination but was a legitimate exercise of the authority's discretion. The Court of Appeal held that classification was not suspect under the ICCPR or ICESCR. Furthermore, the Court held, Argentina could not be forced by any international provision to recognise an association that was not considered useful for the social development of the community.

The Association argued that the Court of Appeal had interpreted Article 33 of the *Civil Code* in a way that violated the rights to equality before the law, equal treatment, and equal opportunity, which were protected by the Constitution as well as international treaties.

According to the Association, the real reason behind the denial of recognition was the gender identity of its members. On these grounds it argued that the judgment was discriminatory.

The Attorney General argued in support of the Association. In his view, the main issue concerned the Court of Appeal's assertion that the Association did not fulfil the requirement of pursuing the "common good". The claim that only a discrete group of people benefited from the Association's existence and activity was arbitrary. The same could be said about other associations (gay organisations, for instance), which nevertheless obtained recognition as legal entities.

Furthermore, the Attorney General argued, the concept of "common good" referred to social conditions that allow members of a community to achieve the highest level of personal development and the highest enjoyment of democratic values. The jurisprudence of domestic courts as well as the Inter-American Court of Human Rights confirmed this assertion. The fight against discrimination could be considered to serve this aim.

According to the Attorney General, the Court of Appeal had adopted a partial and unreasonable interpretation of the Association's statute, in that it failed to consider that the statute concerned fundamental rights protected by the Constitution as well as by international instruments. Lastly, the Attorney General noted the importance attached by international bodies to discrimination based on sexual identity.

The Supreme Court held, first, that the administrative decision infringed the right to freedom of association.

According to the Court, the protection of the right to freedom of association provided by the Constitution had been strengthened and deepened by several

international human rights instruments. The Court noted that the right to freedom of association was fundamental for the protection of the right to freedom of expression and human dignity. Limitations on this right entailed the risk of isolating certain social groups, especially those that had difficulties in being effectively integrated in society.

Only the promotion of ideas that disregard or threaten the protection of people's dignity could justify a limitation of the right to freedom of association. The principles of pluralism and tolerance implied that freedom of association had always to be considered useful, because it increased respect for other people's ideas, citizens' participation in the democratic system, and social cohesion. It was wrong, the Court argued, to understand "common good" to mean what the majority considered good.

The Court next noted the widespread prejudice against sexual minorities. Transgender individuals, in particular, suffered from social discrimination but were also victims of ill treatment, violence and aggression. They were often marginalised, with serious consequences for their living conditions and health. It was therefore nearly impossible to assert that an association which aimed to end their marginalisation and improve their living conditions was not pursuing the common good.

According to the Supreme Court, the judgment of the Court of Appeal had not been grounded in law but rather on the judges' personal opinions with regard to transgender individuals. This was discriminatory and contrary to the Constitution. Furthermore, there was no rational connection between the differential treatment imposed on plaintiff and a legitimate State objective.

The Court allowed the motion, reversed the judgment of the National Civil Court of Appeal, and remanded the case for trial in accordance with its judgment.

In re Fedotova,

Constitutional Court of the Russian Federation (19 January 2010)

Procedural Posture

The plaintiffs brought a complaint to the Constitutional Court, alleging that Article 4 of the *Ryazan Region Law "On Protection of Morals of Children in Ryazan Region"*, and Article 3.10 of the *Ryazan Region Law "On Administrative Offences"*, violated their constitutional rights. Under the law, public actions aimed at the "propaganda of homosexuality (sodomy and lesbianism)" were prohibited.

Facts

The plaintiffs were convicted of an administrative offence for having displayed posters that declared "Homosexuality is normal" and "I am proud of my

homosexuality” near a secondary school building. The purpose of this action was to promote tolerance towards LGBT persons in Russia.

Issue

Whether the challenged provisions violated the plaintiffs’ freedom of expression, protected by Article 29 of the *Constitution of the Russian Federation*.

Domestic Law

Constitution of Russia, Article 2 (supreme value of rights and freedoms), Article 29 (freedom of expression), and Article 38(1) (protection of motherhood, childhood and the family).

Federal Law “On the Basic Guarantees of the Rights of the Child in the Russian Federation”, Articles 4 and 14.

Ryazan Region Law “On Administrative Offences”, Article 3.10.

Ryazan Region Law “On the Protection of the Morals of Children in Ryazan Region”, Article 4.

International Law

European Convention on Human Rights, Article 10 (freedom of expression).

Reasoning of the Court

The Court first affirmed that, according to Article 2 of the Constitution of the Russian Federation, a human being and his or her rights and freedoms were of the highest value. Therefore, the recognition, respect and protection of these rights and freedoms was a State obligation.

Next the Court noted that the Constitution, under Article 38, specifically protected motherhood, childhood and the family. In the Court’s view, the traditional understanding of family, motherhood and childhood were values that required special protection from the State. According to the Court, legislators had acted on the premise that the interests of minors were an important social value. One of the aims of State policy on the protection of children was the protection of minors from factors that could negatively impact their physical, intellectual, psychological, spiritual and moral development. More precisely, the Russian *Federal Law “On the Basic Guarantees of the Rights of the Child in the Russian Federation”* protected children from information, propaganda and agitation that could harm their “health [and] moral and spiritual development”.

In the Court’s view, the Ryazan legislature adopted the challenged provisions with the aim of ensuring the intellectual, moral and psychiatric security of children. The Court argued that, in fact, the “propaganda of homosexuality” constituted an “uncontrolled dissemination of information capable of harming health [and] moral and spiritual development”. The prohibition of such propaganda among

persons who, due to their age, lacked the capacity to critically assess it could not be considered to violate citizens' constitutional rights.

Next, the Court analysed the protection of the right to freedom of expression provided by the Constitution. Article 29 of the Constitution guaranteed the right to freedom of speech, as well as the right to freely disseminate information by any lawful means. However, the Court noted that under Article 10 of the *European Convention*, freedom of expression was subject to limitations provided such limitations were established by law, had a legitimate purpose, and were necessary in a democratic society.

Finally, the Court concluded that the challenged Ryazan law did not prohibit or disparage homosexuality. It did not discriminate against homosexuals nor did it grant excessive powers to public authorities. The Court therefore concluded that the law could not be considered to limit freedom of expression excessively.

The Court declared the plaintiffs' complaint inadmissible.

Postscript

In February 2010, the plaintiff Irina Fedotova submitted a communication concerning her prosecution under the Ryazan law to the United Nations Human Rights Committee for consideration under the Optional Protocol to the ICCPR. The communication, registered as No. 1932/2010, is pending.

Ang Ladlad v. Commission on Elections, Supreme Court of the Philippines (8 April 2010)

Procedural Posture

The Commission on Elections denied the petitioner, Ang Ladlad, registration as a political organisation in 2009. Ang Ladlad petitioned the Supreme Court for *certiorari* review, which was granted. The Commission on Human Rights (CHR) intervened on behalf of Ang Ladlad in this case before the Supreme Court.

Facts

Ang Ladlad was a political organisation composed of members of the Filipino LGBT community. In 2006, in accordance with Filipino law, Ang Ladlad applied for registration with the Commission on Elections. The application was denied because the Commission on Elections found that the organisation lacked a substantial membership base. The group applied again in 2009, but the Commission on Elections again dismissed the application, this time on moral and religious grounds.

The Commission on Elections found that Ang Ladlad, as an LGBT organisation, "tolerate[d] immorality which offends religious beliefs". It cited the Bible and the

Koran as proof that homosexual activity violated standards of morality, and held that it could only recognise law-abiding parties.

The Commission believed that Ang Ladlad's support of LGBT issues violated several statutes (including Articles 201, 695 and 1306 of the *Civil Code of the Republic of the Philippines*) that referred to concepts such as "morality," "mores, good customs," "public morals," and "morals". Additionally, the Commission believed that approving Ang Ladlad would violate the constitutional duty to "promote and protect [the youth's] physical, moral, spiritual, intellectual, and social well-being".

Issue

Whether the Commission on Elections' refusal to register Ang Ladlad violated the right of the organisation and its members to freedom of association, freedom of expression, and political participation.

Domestic Law

Civil Code of the Philippines, Articles 201 (immoral doctrines, obscene publications and exhibitions, and indecent shows), 695 and 1306.

1987 *Constitution of the Philippines*, Article II, 13 (State protection of youth), Article III, Section 1 (equal protection), and Section 5 (freedom of religion).

Comparative Law

Constitution of the United States, 14th Amendment (Equal Protection).

Fricke v. Lynch, United States District Court of Rhode Island, 1980 (holding that LGBT groups could not be denied the right of freedom of association; limiting government's involvement in that right).

Lawrence v. Texas, United States Supreme Court, 2003 (affirming that same-sex sexual conduct between consenting adults was part of the liberty protected by the substantive due process clause of the 14th Amendment to the federal Constitution, and striking down Texas' sodomy law).

International Law

International Covenant on Civil and Political Rights, Article 25 (rights to take part in the conduct of public affairs, to vote and to be elected, to have access on general terms of equality to public service); and Article 26 (rights of equality before the law, equal protection of the law, and non-discrimination).

Universal Declaration of Human Rights, Article 21 (1) (right to take part in the government either directly or through freely chosen representatives).

United Macedonian Organisation Ilinden and Others v. Bulgaria, ECtHR, 2006 (holding that seemingly radical or shocking political and social ideas are protected through the exercise of the right of association).

Toonen v. Australia, United Nations Human Rights Committee, 1994 (holding that Article 26 of the ICCPR prohibits discrimination based on sex, which includes sexual orientation).

Reasoning of the Court

The Supreme Court rejected all the reasons given by the Commission on Elections (COMELEC). Philippine case law clearly interpreted Article III, Section 5 of the Constitution as a call for “government neutrality in religious matters”. The Commission on Elections’ use of the Bible and the Koran was thus a significant constitutional violation.

The Court also rejected any public morals argument. While it recognised prejudice and discrimination against homosexuals were widespread, it refused to acknowledge that public sentiment was a source of law, stating: “We recall that the Philippines has not seen fit to criminalise homosexual conduct. Evidently, therefore, these ‘generally accepted public morals’ have not been convincingly transplanted into the realm of law.” The Commission on Elections had provided no evidence to show that the government had a secular, as opposed to religious or moral, interest in prohibiting the formation of an LGBT political party.

Further, the Court found that the accusation of unlawful activity by Ang Ladlad was “flimsy, at best; disingenuous, at worst”. The Commission on Elections’ selective targeting of Ang Ladlad provided grounds for a claim under the Constitution’s Equal Protection Clause.

While the Court refused to identify homosexuals as a separate class in need of special or differentiated treatment, it nonetheless held that the Commission on Elections’ decision violated the Equal Protection Clause. Philippine jurisprudence affirmed that any government intervention, even one that did not burden a suspect class or breach a fundamental right, must reflect a rational interest of government. The Court stated that the asserted interest in this case, the “moral disapproval of an unpopular minority”, was “not a legitimate state interest that is sufficient to satisfy rational basis review under the equal protection clause”. The only interest favoured by the Commission on Elections’ differentiation was “disapproval of or dislike for a disfavoured group”.

The Court also found that the Commission on Elections ruling violated the Philippine doctrine of freedom of expression. While the Constitution placed power in the hands of the majority, it also limited the power of that majority to “ride roughshod over the dissenting minorities”. According to the Court, freedom of expression could be limited only by restrictions that were “proportionate to the legitimate aim pursued”:

Absent any compelling state interest, it is not for the COMELEC or this Court to impose its views on the populace. Otherwise stated, the COMELEC is certainly not free to interfere with speech for no better

reason than promoting an approved message or discouraging a disfavoured one. This position gains even more force if one considers that homosexual conduct is not illegal in this country. It follows that both expressions concerning one's homosexuality and the activity of forming a political association that supports LGBT individuals are protected as well.

The Court supported its reasoning with references to international and comparative constitutional decisions. Constitutionally, when it infringed on the freedom of association of an individual or group, the government's actions must involve "more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint". Even radical or shocking political and social ideas were protected through the exercise of the right of association.

The Court recognised that many Philippine citizens disapproved of homosexuality and Ang Ladlad's agenda. Nonetheless, the Court held, Philippine democracy "precludes using the religious or moral views of part of the community to exclude from consideration the values of other members of the community".

Finally, the Court ruled that international law required the Commission on Elections to recognise Ang Ladlad. According to the Human Rights Committee's decision in *Toonen v. Australia*, Article 26 of the ICCPR prohibited discrimination based on sex, including sexual orientation. Reading the right to participate in government under Article 21 of the UDHR in light of *Toonen*, the Court held that international law protected the right of LGBT organisations to participate in the political process and that the Commission on Elections' decision contravened that right.

Based on constitutional and international law, the Court held that Ang Ladlad must be recognised by the Commission on Elections as a political party in the Philippines.

The People v. Siyah Pembe Üçgen Izmir Association ("Black Pink Triangle"), Izmir Court of First Instance No. 6, Turkey (30 April 2010)

Procedural Posture

The Prosecutor's Office of Izmir brought a complaint to the Court requesting that the defendant association, Siyah Pembe Üçgen Izmir ("Black Pink Triangle"), be dissolved because it failed to comply with the requirements set forth in the *Civil Code* as well as in the Constitution.

Facts

When Black Pink Triangle was founded by LGBT activists in 2009, it sent a copy of its statute and the necessary documentation to the Izmir Department of Associations. Article 2 of Black Pink Triangle's statute stated that its aims were

to support solidarity between lesbian, gay, bisexual, *travesti* and transsexual individuals; establish awareness that these persons exist as part of society; create a freer social atmosphere; support self-expression of LGBT; correct societal misinformation and misunderstanding; reduce alienation of LGBT individuals; and end discrimination. The Department of Associations responded that the aims of the association were immoral, contrary to law, and in breach of both the *Civil Code* and Articles 33(3) and 41 of the Constitution. Article 33(3) of the Constitution provided that “[f]reedom of association may only be restricted by law in order to protect national security and public order, or prevent the commission of crime, or protect public morals [and] public health”, while Article 41 dealt with protection of the family. The Department contended that, because these Articles had been breached, Black Pink Triangle’s freedom of association could be legally restricted under Article 11(2) of the *European Convention*. Black Pink Triangle refused to change Article 2 of its statute and the Department of Associations then applied to the Prosecutor’s Office of Izmir to have the association dissolved.

Issue

Whether the association’s aims, as set forth in its statute, were contrary to the Constitution and the *Civil Code* and whether, as a result, its freedom of association could be legally restricted.

Domestic Law

Constitution of Turkey, Article 10 (equality before the law), Article 33 (freedom of association), Article 41 (protection of the family), and Article 90 (ratification of international treaties).

Turkish Civil Code No. 4721, Articles 56 to 60.

International Law

European Convention on Human Rights, Articles 11 (freedom of assembly and association) and Article 14 (prohibition of discrimination).

International Covenant on Civil and Political Rights, Article 22 (freedom of association).

Universal Declaration of Human Rights, Article 20 (freedom of assembly and association).

Reasoning of the Court

The Prosecutor’s Office argued that Black Pink Triangle should be dissolved under Article 60 of the *Civil Code*, which regulated the process for examining associations’ applications for recognition. According to this provision, the competent authority had 60 days to evaluate the documentation presented and, if needed, to ask the association to make amendments in accordance with national law. However, Black Pink Triangle had refused to amend Article 2 of its statute.

The Court considered the right to freedom of association. It noted that freedom of association was protected under the UDHR, the ICCPR and the *European Convention*. It also noted that Article 14 of the *European Convention* affirmed that the enjoyment of all Convention rights and freedoms must be secured without discrimination.

Article 10 of the Constitution provided that all individual were equal before the law and that State organs and administrative authorities must act in compliance with this principle in all their proceedings. Moreover, under Article 33, the Constitution protected the right to form associations and this freedom could only be restricted by law on the grounds of protecting national security and public order, to prevent crime, or protect public morals or public health.

The Court found that, despite the fact that the aims in the defendant's statute were alleged to be immoral and contrary to law, sexual identity and orientation were not voluntarily chosen by individuals. Furthermore, according to the Court, it was "a well-known fact" that LGBT individuals existed in Turkey as in every other country in the world.

In the Court's view, it was not possible to characterise as "immoral" the fact that someone had a particular "involuntary" sexual orientation, or the use of words such as lesbian, gay, bisexual, *travesti* or transsexual; nor was being lesbian, gay, bisexual, *travesti* or transsexual prohibited under national law. Therefore the use of such terms in Black Pink Triangle's statute could not be considered immoral or contrary to law.

Finally, the Court addressed the issue of public morality and noted that this was a subjective concept that could change in time and place. The Court reasoned that, in order to characterise an association's aims as immoral, it had to be shown that those aims were "against strictly determined morals that are accepted by the whole of the society". In the present case, the general aim of the association was to strengthen solidarity among LGBT persons, cultivate a freer environment in society, end discrimination against LGBT individuals, and ensure their social integration. According to the Court, Turkish law did not prevent LGBT persons from forming an association with these aims.

The Court refused the request to dissolve the association and affirmed that lesbian, gay, bisexual, *travesti* and transsexual individuals have the same right as everyone else to form an association.

- 1 See *Universal Declaration of Human Rights*, Articles 19, 20; *International Covenant on Civil and Political Rights*, Articles 19, 21, 22; *Arab Charter on Human Rights*, Article 28; *African Charter on Human and Peoples' Rights*, Articles 9, 10, 11; *American Convention on Human Rights*, Articles 13, 15, 16; *European Convention for the Protection of Human Rights and Fundamental Freedoms*, Articles 10, 11.
- 2 *Local Government Act 1988*, Section 28 (repealed by *Local Government Act 2003*).
- 3 Amnesty International, 'Lithuania: New Move Toward Penalising Homosexuality', 30 November 2010.
- 4 *The Anti-Homosexuality Bill 2009*, Section 13.
- 5 US Department of State, *2010 Country Reports on Human Rights Practices: Uganda* (Washington, DC 8 April 2011); Remarks of UN Special Rapporteur on the Situation of Human Rights Defenders, Margaret Sekaggya (Geneva 15 February 2011).
- 6 'Police impound NGOs' homosexual wrappers', *Nyasa Times Online* (Malawi 17 May 2011).
- 7 Human Rights Committee, Views of 2 April 1982, *Hertzberg v. Finland*, Communication No. 61/1979, para. 2.1.
- 8 *Hertzberg v. Finland*, paras. 10.3, 11.
- 9 *Hertzberg v. Finland*, para. 10.4.
- 10 *Hertzberg v. Finland*, Individual Opinion of Torkel Opsahl, J. Joined by Rajsoomer Lallah and Walter Sumra Tarnopolsky.
- 11 Human Rights Committee, *General Comment No. 22* (The right to freedom of thought, conscience, and religion), UN Doc. CCPR/C/21/REV.1/Add.4, 30 July 1993, at para. 8.
- 12 Human Rights Committee, *Draft General Comment No. 34* (Article 19), UN Doc. CCPR/C/GC/34/CRP.6, 3 May 2011, para. 33.
- 13 ILGA-Europe, 'Freedom of Assembly' (Working Paper) (August 2008); Council of Europe Commissioner for Human Rights, Thomas Hammarberg, 'Pride events are still hindered – this violates freedom of assembly' (blog post) (2 June 2010).
- 14 The Mongolian LGBT Center was registered by the Legal Entities Registration Agency in late 2009, more than two years after its application was first rejected. IGLHRC, 'Mongolia: First LGBT Advocacy NGO Registered and Recognized by Government', 16 December 2009. In Botswana, LeGaBiBo has filed a lawsuit challenging the denial of registration and Section 164 of the Penal Code in April 2011. Affidavit of Caine Youngman, High Court of Botswana, February 2011 (on file with the ICJ). In Lesotho, Matrix was finally registered as an LGBT organization in November 2010, after it agreed to not to encourage or promote the crime of sodomy. Personal email from Nkoya Thabane, 25 November 2010 (on file with the ICJ).
- 15 European Court of Human Rights, Judgment of 3 May 2007, *Bączkowski and Others v. Poland*, Application No. 1543/06; European Court of Human Rights, Judgment of 21 October 2010, *Alekseyev v. Russia*, Application No. 4916/07, 25924/08 and 14599/09.
- 16 *Alekseyev v. Russia*, at paras. 59-60.
- 17 *Alekseyev v. Russia* at para. 73.
- 18 *Alekseyev v. Russia* at para. 81.
- 19 *Alekseyev v. Russia* at para. 84.
- 20 In addition to the case included in this chapter, see also *Gay Lib v. University of Missouri*, 558 F.2d 848, US Court of Appeals for the 8th Circuit (1977) (finding university's reasons for rejecting recognition of student group insufficient where the avowed purpose of the group was to advocate liberalization of legal restrictions against practice of homosexuality); *Gay Students Organization of University of New Hampshire v. Bonner*, 509 F.2d 652, US Court

- of Appeals for the 1st Circuit (1974) (holding that prohibiting an organization from holding social activities on campus denied members their right of association); *Gay and Lesbian Students Association v. Gohn*, 850 F.2d 361, US Court of Appeals for the 8th Circuit (1988) (finding that university denial of a funding request for content-motivated reasons violated the First Amendment); *Gay Student Services v. Texas A&M University*, 737 F.2d 1317, US Court of Appeals for the 5th Circuit (1984) (finding argument that university's refusal to recognize officially homosexual student group on grounds of was to protect public health was an insufficiently as compelling justification for infringement on First Amendment rights).
- 21 *Gay Student Services v. Texas A&M University*, 737 F.2d at 1328 (emphasis in original).
 - 22 *Gay Students Organization of University of New Hampshire v. Bonner*, 509 F.2d 652, 660.
 - 23 Human Rights Committee, *General Comment No. 22* (The right to freedom of thought, conscience and religion), UN Doc. CCPR/C/21/Rev.1/Add.4, 30 July 1993, para. 8.
 - 24 Report of the Special Rapporteur on the Right to Education, Vernor Muñoz Villalobos, UN Doc. A/HRC/8/10/Add.1, 13 May 2008, at paras. 79-84; Report of the Special Rapporteur on the Right to Education, Vernor Muñoz Villalobos, UN Doc. A/HRC/4/29/Add.1, 15 March 2007, at paras. 34-37.
 - 25 Committee on the Rights of the Child, *General Comment No. 3* (HIV/AIDS and the Rights of the Child), UN Doc. CRC/GC/2003/3, 17 March 2003, at para. 16; Committee on the Rights of the Child, *General Comment No. 4* (Adolescent health and development in the context of the *Convention on the Rights of the Child*), UN Doc. CRC/GC/2003/4, 1 July 2003 at paras. 26-31.
 - 26 Committee on the Rights of the Child, *Concluding Observations (United Kingdom of Great Britain and Northern Ireland)*, UN Doc. CRC/C/15/Add.188, 9 October 2002, at para. 44(d).
 - 27 Committee on the Rights of the Child CRC, *General Comment No. 4* (Adolescent health and development in the context of the *Convention on the Rights of the Child*), UN Doc. CRC/GC/2003/4, 1 July 2003 at para. 6.
 - 28 Human Rights Committee, *General Comment No. 22* (the right to freedom of thought, conscience, and religion), UN Doc. CCPR/C/21/REV.1/Add.4, 30 July 1993, at para. 8; Human Rights Committee, *Draft General Comment No. 34* (Article 19), UN Doc. CCPR/C/GC/34/CRP.6, 3 May 2011, at para. 27.

MILITARY SERVICE

Chapter five

Military Service

INTRODUCTION

Whether gays and lesbians may serve openly in the armed forces is an issue that continues to confront courts and legislatures around the world. At least twenty-five countries currently permit gay and lesbian service members.¹ Some countries never introduced an express ban on military service, while in others bans were repealed either through legislative or judicial action. The issue is often hotly debated. In South Korea, in October 2010, the Human Rights Commission found that a military law criminalizing same-sex sexual conduct was in violation of gay soldiers' rights to equality and privacy. Less than six months later, in **2008 Hun-Ga21**, the Constitutional Court of South Korea reached the opposite conclusion and upheld the law.

The impetus for legislative reform has often originated in judicial or quasi-judicial processes. In Australia, a sailor named Anita Van der Meer complained to the Australian Human Rights and Equal Opportunities Commission after she was threatened with discharge for her involvement in a same-sex relationship. The Australian Cabinet lifted the ban in 1992. In Canada, Michelle Douglas was dishonourably discharged for being a lesbian. Although she reached a settlement in her court case, the litigation prompted the military to review and change its policy. In the United States, legislation was enacted to repeal the law *Don't Ask Don't Tell* even as an appellate court was reviewing a trial court's decision striking down the law.² More than 13,000 service men and women had been discharged since the law was enacted in 1993.³

The European Court overturned the British ban on service by gay individuals in the armed forces in two decisions handed down in 1999.⁴ The applicants had alleged that the investigations into their homosexuality and their subsequent discharges violated their right to respect for their private lives under Article 8 of the Convention. The Court found interference in the applicants' private lives had occurred but concluded it was in pursuit of legitimate aims, namely "the interests of national security" and "the prevention of disorder."⁵ Nevertheless, the Court found that such interference was not necessary in a democratic society. Under European Court jurisprudence, the test of "necessary in a democratic society" meant that the interference must respond to a "pressing social need"

and be “proportionate to the legitimate aim pursued”.⁶ Because the restriction concerned “a most intimate part of an individual’s private life”, only “particularly serious reasons” could serve as justifications.⁷ The Court noted that the primary justification for retaining the policy was the “negative attitudes of heterosexual personnel towards those of homosexual orientation”.⁸ The Court observed that

*these attitudes, even if sincerely felt by those who expressed them, ranged from stereotypical expressions of hostility to those of homosexual orientation, to vague expressions of unease about the presence of homosexual colleagues. To the extent that they represent a predisposed bias on the part of a heterosexual majority against a homosexual minority, these negative attitudes cannot, of themselves, be considered by the Court to amount to sufficient justification for the interferences with the applicants’ rights, any more than similar negative attitudes towards those of a different race, origin or colour.*⁹

Finding no “concrete evidence to substantiate the alleged damage to morale and fighting power”, the European Court held that the government had not offered “convincing and weighty reasons to justify the policy”.¹⁰

In this chapter, the judicial approaches are quite varied. The test in the United States for a law that infringes upon a fundamental right is similar to the one adopted by the European Court. Such a law must advance an important governmental interest, the intrusion must significantly further that interest, and the intrusion must be necessary. In **Log Cabin Republicans**, the government argued that the purpose of *Don’t Ask Don’t Tell* was to advance the important governmental interests in military readiness and troop cohesion. In an earlier and unrelated challenge to the same law, the Court of Appeals for the 9th Circuit had accepted that these were important governmental interests.¹¹ The Court in **Log Cabin Republicans** limited its analysis to the second and third prongs of the test. It found that the government had failed to meet its responsibility to establish either that the law furthered these interests or was necessary. On the contrary, the plaintiffs introduced significant evidence establishing that *Don’t Ask Don’t Tell* adversely affected the government’s interests in military readiness and troop cohesion. Through witness testimony and documents, the plaintiffs showed that the law caused the discharge of qualified and needed service members; and that the military had delayed the discharge of gay service members if they were on overseas deployments during wartime, thereby indicating that the military itself did not consider discharge of lesbian and gay personnel to be necessary. **Log Cabin Republicans** was argued and won on the strength of the evidentiary record.

The plaintiffs in **Log Cabin Republicans** did not raise equal protection arguments. The earlier case of *Witt v. Rumsfeld* had dismissed Witt’s equal protection challenge to *Don’t Ask Don’t Tell* because a majority of the Supreme Court in **Lawrence v. Texas** had struck down Texas’s sodomy law on privacy and liberty grounds only.

In South Korea, the Constitutional Court by a slim majority upheld the constitutionality of Article 92 of the *Military Penal Code* in the case of **2008 Hun-Ga21**. The government had successfully argued that the law was necessary to preserve troop morale and unit cohesion. The Court considered this was a legitimate objective and that the law was a proportional means of reaching this objective. Although only same-sex sexual conduct was prohibited, the Court reasoned that sexual orientation was not protected under the Constitution and therefore this did not amount to discrimination. Four justices dissented on the ground that the law was unconstitutionally vague because it did not distinguish between consensual and non-consensual sex.

In the Colombian and Peruvian cases, government defence of the laws at issue was somewhat minimal. In the Colombian case the Prosecutor General intervened on the side of the plaintiff challenging the law. The Colombian Court read down the statute to prohibit all sexual acts, whether homosexual or heterosexual, carried out in public or on duty or within military premises. In the Peruvian case, **Sentencia 0023-2003-AI-TC**, the Ombudsman's Office filed suit against the law. The reasoning in both cases emphasised the requirements of formal equality. The laws at issue were struck down in part because they prohibited only sexual conduct between same-sex partners.

Although the Constitutional Tribunal did not specifically state where or how sexual orientation was located in Article 2(2) of the *Constitution of Peru*, it did find a difference in treatment based on sexual orientation to be unconstitutional. The Tribunal stated: "If what is illegal is the practice of a dishonest conduct, there is no an objective nor a reasonable ground for only punishing the acts between persons of the same sex". This reasoning was further developed in **Sentencia 00926-2007-AA**, where the Constitutional Tribunal stated that discriminatory treatment based on sexual orientation was contrary to the Constitution.

CASE SUMMARIES

Sentencia C-507/99, Constitutional Court of Colombia (14 July 1999)

Procedural Posture

Constitutional challenge to the disciplinary regulations of the Colombian Army.

Issue

Whether it was lawful to discipline soldiers on active duty on the grounds that they lived in concubinage or adultery, associated with "anti-social" elements such as homosexuals or prostitutes, or practiced homosexuality or prostitution.

Domestic Law

Constitution of Colombia, Article 1 (respect for human dignity), Article 7 (recognition of cultural diversity), Article 13 (equality before the law and non-discrimination), Article 15 (right to privacy), and Article 16 (right to free development of personality).

Decree 85 of 1989, Article 184, Paragraphs (b), (c) and (d).

Sentencia C-481/98, Constitutional Court of Colombia, 1998.

Sentencia T-539/94, Constitutional Court of Colombia, 1994 (affirming that homosexuals cannot be discriminated against just because their sexual conduct is not that which the majority of the population has adopted).

International Law

International Covenant on Civil and Political Rights, Article 2 (non-discrimination), Article 17 (protection of privacy), and Article 26 (equality and equal protection).

Reasoning of the Court

The plaintiff argued that the challenged provision (*Decree 85 of 1989*, Article 184) amounted to discrimination on the basis of sexual orientation and therefore violated the *Constitution of Colombia* as well as human rights treaties to which Colombia was a party.

The Ministry of Defence and the Ministry of the Interior intervened in the proceedings to defend the provision. They argued that the conduct of the Army had to be impeccable and therefore its disciplinary regime could deal with the realm of ethics.

The Prosecutor General also intervened, arguing that the expression “homosexuals and prostitutes” in paragraph (c) had to be struck out because neither constituted anti-social conduct. According to the Prosecutor, such activities did not cause any damage to society nor did they violate the rights of others. Moreover, paragraph (d) had to be struck out as well because the sanction imposed on “carrying out homosexual acts” violated the right to privacy and the right to free development of one’s personality.

The Court first dealt with the prohibition of living together outside of marriage and it found that this provision violated Article 42 of the Constitution, explicitly recognising *de facto* unions.

Considering the other challenged provisions, the Court noted that the conduct prohibited under the military disciplinary code had often been linked to behaviour that was subject to prejudice and social censorship. However, a characteristic of the Constitution was that it allowed a broad margin for the defence and protection of personal autonomy. According to the Court, the Constitutional Assembly had decided to protect personal freedom as a fundamental right, and therefore

emphasised the liberal principle of institutional non-interference in private issues that do not threaten social coexistence. Within the recognition of the right to free development of one's personality, the Constitution protected the individual's right to self-determination. The sole limit on this right was that its exercise should respect the constitutional order and the rights of others.

Furthermore, the Court noted that sexuality is inherent to being human and associated with a person's most intimate experience of himself or herself. The constitutional protection of the individual, represented by the right to personal development and the right to privacy, must necessarily include sexual orientation. According to the Court, since no public interest or social danger was engaged, neither the State nor society were entitled to interfere with the development of an individual's sexual identity. In a democratic society the right to sexual self-determination could not be the result of a legal restriction mandating that everyone should have the sexual orientation that was most deeply or commonly expressed in traditional mores.

In support of its position, the Court cited the ICCPR and the jurisprudence of the Human Rights Committee on sexual orientation based discrimination, which established that the word "sex", among the prohibited grounds of discrimination, also covered sexual orientation. It also cited its own jurisprudence, which recognised that homosexuality is a legitimate sexual orientation and affirmed that discrimination on the basis of sexual orientation was prohibited (*Sentencia T-539/94*).

The Court next considered the consequences of including homosexual acts in the list of offences against military honour. It noted that this stigmatised homosexuals and condemned private acts that, if carried out in a responsible way and in private, did not interfere with being a member of the military. According to the Court, the stigma was caused by the fact that only homosexual conduct was considered to be an offence against honour. As for the intrusion into privacy, the Court noted that the wording of paragraph (d) included every homosexual act, even if carried out in private, and therefore condemned homosexuality itself. Citing its *Sentencia C-481/98*, the Court then reaffirmed that every provision of law tending to stigmatise a person on the basis of his or her sexual orientation was contrary to the Constitution and therefore explicitly rejected by the Court.

The Court affirmed that an individual participating in community life, including in the military, did not renounce to his or her right to a private life. Nevertheless, this protection of private life did not cover sexual acts (whether homosexual or heterosexual) carried out in public or while on duty or within military premises.

The Court declared unconstitutional the paragraph of the challenged provision concerning concubinage and adultery as well as the paragraph categorising homosexuals and prostitutes as "anti-social". It read down the remaining challenged paragraph ("carry out homosexual acts"), limiting its application to

sexual acts (whether committed by homosexuals or heterosexuals) carried out in public or on duty or within military premises.

Sentencia 0023-2003-AI/TC,
Constitutional Tribunal of Peru (9 June 2004)

Procedural Posture

The Ombudsman's Office filed a motion with the Constitutional Tribunal, challenging the constitutionality of Article 269 of the *Military Justice Code*, which prohibited same-sex sexual activity within the military.

Issue

Whether the provision prohibiting homosexual conduct within the military violated the rights to human dignity and to equality before the law.

Domestic Law

Constitution of Peru, Article 1 (protection of the individual and respect for dignity) and Article 2 (equality before the law and non-discrimination).

Military Justice Code (Decree No. 23214), Article 269.

Reasoning of the Court

The first paragraph of Article 269 provided that a soldier who carried out "indecent acts or acts against nature with a person of the same sex, within or outside the military premises, will be punished with expulsion from the Army if he is an officer, or with prison if he is a troop soldier". The second paragraph of the provision dealt with the use of violence, threats or abuse of authority, as aggravating factors.

The Ombudsman's Office argued that Article 269 violated the constitutional rights to human dignity and to equality before the law.

Defending the law, the Attorney General argued that homosexuality was "the expression of a set of values that is not suitable for the requirements of military life".

The Court found that the provision was unconstitutional for several reasons. First, it held that it was inappropriate for military justice to deal with issues such as indecent acts or acts against nature, since its jurisdiction should be limited to crimes related to work functions.

Second, the Court found that the provision violated the right to equality before the law by punishing indecent acts only if committed between persons of the same sex. If the purpose was to prohibit certain "indecent" sexual acts as wrongful

conduct, there was no objective or reasonable ground for prohibiting such acts only when they were committed by persons of the same sex.

Lastly, Article 269 violated the equality principle by prohibiting sexual acts carried out within military premises only when they were considered “against nature”, whereas other kinds of sexual acts on military premises were not prohibited.

The Court declared Article 269 of the *Military Justice Code* unconstitutional.

Sentencia 00926-2007-AA, Constitutional Tribunal of Peru (3 November 2009)

Procedural Posture

The plaintiff filed an *amparo* action against the police school’s decision to expel him. The 47th Civil Court of Lima dismissed the *amparo* and the Lima Superior Court affirmed. The plaintiff appealed to the Constitutional Tribunal.

Facts

The plaintiff was a student at the police academy. On 13 October 2003, the school director adopted a report stating that the plaintiff and another student had had a sexual relationship. According to the report, this constituted a serious offence against police morals.

To prepare this report, the school director had taken statements from the two students and other witnesses. The school director had also ordered a psychological examination of the two students to discover their sexual orientation and required them to undergo anal examinations.

The school director decided to expel the plaintiff and the second student because they had had a relationship and on several occasions had had sex within the school premises.

Issue

Whether the police school’s decision to expel the plaintiff violated his right to due process.

Domestic Law

Constitution of Peru, Articles 1 (protection of the individual and respect for dignity) and 2 (equality before the law and non-discrimination).

Reasoning of the Court

Three judges differed on the relevant legal grounds but agreed on the decision to allow the *amparo*. Two other judges dissented from the decision. What follows is the opinion of Justice Mesía Ramírez.

Having ruled the claim admissible, the Court analysed the disciplinary regime governing police premises. It noted that the police school's disciplinary council based its decision to expel the plaintiff and his fellow student on the fact that they had committed serious offences against police morals which "affected the prestige of the school and the institution, undermined morals and discipline and affected honour".

According to the Court, the issue at stake was whether the administrative process carried out by the school's authorities sought to punish the plaintiff for sexual activity conducted on school premises or for his sexual orientation.

The Court affirmed that any kind of sexual conduct (whether heterosexual or homosexual) on school premises was a disciplinary offence, especially in light of the role and structure of the institution involved. However, clear proof was required before applying a disciplinary measure; mere supposition was insufficient.

The Court next examined whether guarantees of due process had been respected. It noted that, after rumours of an alleged homosexual relationship, the disciplinary council had interrogated the plaintiff and his fellow student. The two students at first admitted having had homosexual relations at the school. However, they later retracted their confessions and said they had made them because of fear and pressure.

The Court then dealt with the other evidence taken: the psychological and anal examinations carried out with the aim of determining whether the two students were homosexuals. According to the Court, these procedures violated the plaintiff's rights. In fact, neither examination was decisive in determining whether the two students had had sexual relations within the school premises. Their aim was rather to demonstrate that the students were homosexual. It was therefore their sexual orientation that constituted the serious offence causing their expulsion.

In particular, the Court criticised the decision to subject the two students to a psychological examination. This procedure left room to suppose that homosexuality was a mental disorder that had to be cured. The Court affirmed that these ideas were anachronistic and retrograde and violated the right to privacy, the right to free development of the personality, and the right to integrity, and amounted to discriminatory treatment. According to the Court, homosexuality was a legitimate sexual choice that was part of the individual's sphere of intimacy. The exercise of this freedom was grounded in the right to privacy and the right to free development of the personality. It followed that every discriminatory treatment based on sexual orientation was contrary to the Constitution.

Furthermore, the Court held that the decision to subject the two students to anal examinations constituted ill treatment violating personal integrity, and therefore amounted to degrading treatment.

The Court allowed the plaintiff's *amparo* action against the police school's decision to expel him, on the grounds that the administrative procedure against him had violated his rights to human dignity, integrity, privacy, free development of the personality and due process, and his rights not to be subjected to degrading treatment. The Court declared void the resolution that expelled the plaintiff from the police school and issued an order to accept him back as a student.

Log Cabin Republicans v. United States, United States District Court for the Central District of California (12 October 2010)

Procedural Posture

Constitutional challenge to the federal “*Don’t Ask, Don’t Tell*” Act (DADT) brought by Log Cabin Republicans, a civil society organisation advocating equal rights for gays and lesbians.

Issue

Whether DADT, which required the discharge of service members for same-sex sexual activity or for disclosing their sexual orientation, violated the right to privacy under the substantive due process clause of the Constitution, as well as the rights to freedom of speech and association.

Domestic Law

“*Don’t Ask, Don’t Tell*” Act.

Constitution of the United States, 1st Amendment (Freedom of Religion, Press, Expression) and 5th Amendment (Due Process).

Bowers v. Hardwick, United States Supreme Court, 1986 (upholding State law criminalising sodomy against constitutional challenge).

Holmes v. California National Guard, United States Court of Appeals for the 9th Circuit, 1998 (holding that a State National Guard member could not be discharged for saying publicly that he was gay but could be excluded from any of the many positions in the Guard that required federal recognition).

Lawrence v. Texas, United States Supreme Court, 2003 (affirming that same-sex sexual conduct between consenting adults was part of the liberty protected by the substantive due process clause of the 14th Amendment to the federal Constitution, and striking down Texas’ sodomy law).

Witt v. Department of Air Force, United States Court of Appeals for the 9th Circuit, 2008 (applying a heightened level of scrutiny to a case involving the discharge of a military nurse and remanding to the district court for a factual determination of whether DADT significantly furthered the governmental interest in unit cohesion and whether a less intrusive means could have been used to further that interest).

Reasoning of the Court

In its first argument, the plaintiff organisation claimed that DADT violated its members' right to privacy, protected under the substantive due process clause of the Constitution.

The Court briefly analysed the text of the challenged regulation, and identified three grounds for dismissal from the military. According to DADT, a service member would be discharged if he or she (a) had engaged in homosexual acts; (b) had stated that he or she was homosexual; or (c) had married or attempted to marry a person of the same biological sex.

The Court next stated that in order to be considered constitutional, DADT had to fulfil three conditions: (1) advance an important governmental interest; (2) significantly further that interest; and (3) be necessary to further that interest. Noting that the court in *Witt* had held that DADT advanced an important governmental interest and therefore fulfilled the first condition, the Court only assessed the fulfilment of the second and third conditions.

According to the defendants, the restriction furthered the important government interest in military readiness and unit cohesion. However, the defendants relied solely on the legislative history of DADT and the text itself to support their position. The plaintiff argued that DADT did not further these interests, and brought evidence to show that DADT caused the discharge of qualified service members despite troop shortages and the discharge of service members with critically needed skills and training. It also had a negative impact on military recruiting.

Furthermore, the evidence demonstrated that in times of war the military retained service members known to be homosexuals, despite DADT, or delayed their discharge until after they had completed their overseas deployments. According to the Court, if gay and lesbian members of the military had represented a threat to military readiness or unit cohesion, the defendants would not have continued to deploy them in combat. On the basis of this evidence, the Court concluded that DADT had not significantly furthered the Government's interests. Rather, as the defendants themselves admitted on several occasions, DADT had harmed those interests. For the same reasons, DADT could not be considered to fulfil the third condition. It was not necessary for advancement of the Government's interests.

The plaintiff further claimed that DADT violated its members' rights to freedom of expression under the 1st Amendment, because it was overly broad and amounted to a content-based restriction. Again, the Court started by assessing the standard of review applicable to 1st Amendment challenges. Laws regulating speech based on content generally had to withstand intense scrutiny because of the fundamental importance of the rights involved.

The Court first dealt with the threshold question of whether or not DADT constituted a content-based restriction on speech. The principal inquiry for

determining content-neutrality was “whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys”. The defendants did not answer this question directly, but rather relied on previous decisions concerning DADT and freedom of expression, mainly on *Holmes v. California National Guard*. In *Holmes*, the court had found that DADT did not raise a freedom of expression issue. However, the Court noted that *Holmes* had been decided before *Lawrence v. Texas* and was “necessarily rooted” in *Bowers v. Hardwick*, which *Lawrence* overruled. The Court then analysed the text of DADT and noted that it did not prohibit service members from discussing their sexuality in general, nor did it prohibit all service members from disclosing their sexual orientation. Heterosexual members were free to state their sexual orientation, while gay and lesbian members were not. Therefore, the Court found that the Act, on its face, discriminated on the basis of the content of the speech. It then noted that, in keeping with an established rule of deference, regulation of speech in a military context would survive constitutional scrutiny if it restricted speech no more than was “reasonably necessary to protect the substantial government interest”. However, the Court held that DADT failed this test, since the sweeping reach of its restrictions on speech were far broader than was reasonably necessary to protect the substantial government interest at stake (military readiness and unit cohesion). As in the privacy challenge, the Court found that DADT served to impede military readiness and unit cohesion rather than to further these goals. Therefore, the plaintiff was also entitled to judgment on its claim for violation of constitutional guarantees of freedom of speech and to petition the government.

The Court held that the plaintiff had demonstrated that DADT violated the constitutional rights of its members and was therefore entitled to the relief sought: a judicial declaration that DADT violated rights to privacy and freedom of expression, and a permanent injunction barring its enforcement.

Postscript

The government applied for a stay of the decision until an appeal could be heard. The United States Court of Appeals for the 9th Circuit Court granted an indefinite stay. In December 2010 the President signed into law a bill to repeal DADT. The repeal will take effect 60 days after completion of a certification process.

2008 Hun-Ga21 (Military Penal Code Article 92), Constitutional Court of South Korea (31 March 2011)

Procedural Posture

A platoon sergeant was indicted under Article 92 of the *Military Penal Code* on the grounds that he had had a sexual relationship with another service member. The military court recommended that the constitutionality of Article 92 be reviewed by the Constitutional Court. Proceedings were suspended until resolution of the

constitutional question. The National Human Rights Commission submitted a brief to the Constitutional Court which concluded that Article 92 was unconstitutional because it violated the rights to sexual self-determination, privacy, and equality of service members. The Ministry of Defence defended Article 92 on the grounds that it was necessary to maintain military cohesion and morale.

Issue

Whether Article 92 was unconstitutionally vague or violated the defendant's rights to privacy and equal protection of the laws.

Domestic Law

Constitution of South Korea, Article 11(1) ("All citizens shall be equal before the law, and there shall be no discrimination in political, economic, social, or cultural life on account of sex, religion, or social status"), Article 17 ("The privacy of no citizen shall be infringed"), and Article 37(2) ("The freedoms and rights of citizens may be restricted by Act only when necessary for national security, the maintenance of law and order, or for public welfare. Even when such restriction is imposed, no essential aspect of the freedom or right shall be violated").

Military Penal Code, Article 92 (providing that service members who engage in anal sex between men ("*gye-gan*") or other forms of indecent sexual acts are subjected to up to one year of imprisonment).

Reasoning of the Court

The Constitutional Court first addressed the issue of whether the law was unconstitutionally vague. It found that the law did not violate the principle of *nulla poena sine lege* because an individual "with common sense and ordinary sensibilities" could easily predict what conduct would be prohibited under the law. In reaching this conclusion, the Court stated that an ordinary citizen would objectively regard homosexual sexual acts with antipathy.

Next the Court considered whether Article 37(2) had been infringed. It considered that the asserted objective of the law – preservation of sound living conditions and morale within the community of the armed forces – was legitimate. It found that prohibiting sex between same-sex soldiers was a proportional means of attaining this end. In its proportionality analysis, the Court found that the importance of preserving sound living conditions and morale within the armed forces community and the public interest of national security outweighed the right to sexual self-determination or right to privacy of individual service members.

Regarding equality, the Court held that treating sex between same-sex partners differently from sex between opposite-sex partners did not amount to discrimination on the basis of sex and was therefore not prohibited by the Constitution.

The Constitutional Court upheld Article 92 by a vote of 5 to 4. The four dissenting justices argued that the law was unconstitutionally vague because it did not distinguish between coerced and consensual sexual activity.

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- 1 Nathaniel Frank, *Gays in Foreign Militaries 2010: A Global Primer* (Palm Center, University of California at Santa Barbara February 2010), Appendix.
 - 2 The *Don't Ask Don't Tell Repeal Act* was approved by both houses of the US Congress in December 2010. Full repeal is supposed to occur within 60 days of certification by the Secretary of Defense and the Chairman of the Joint Chiefs of Staff.
 - 3 'US Senate lifts don't ask don't tell gay soldier ban' BBC News (18 December 2010).
 - 4 European Court of Human Rights, Judgment of 27 September 1999, *Lustig-Prean and Beckett v. United Kingdom*, Applications No. 31417/96 and 32377/9; European Court of Human Rights, Judgment of 27 September 1999, *Smith and Grady v. United Kingdom*, Applications No. 33985/96 and 33986/96.
 - 5 *Lustig-Prean*, para. 67.
 - 6 *Lustig-Prean*, para. 80.
 - 7 *Lustig-Prean*, para. 82.
 - 8 *Lustig-Prean*, para. 89.
 - 9 *Lustig-Prean*, para. 90.
 - 10 *Lustig-Prean*, paras. 92 and 98.
 - 11 *Witt v. Rumsfeld*, 527 F.3d 806, US Court of Appeals for the 9th Circuit, 2008.

INTERSEX

Chapter six

Intersex

INTRODUCTION

The term “intersex” refers to a range of anatomical conditions that do not fall within standard male and female categories. They may be the result of variations in an individual’s chromosomes, hormones, gonads, or genitalia. For example, having one ovary and one testis, or gonads that contain both ovarian and testicular tissue, are both intersex conditions. Chromosomal patterns that are XXY or XO instead of XX or XY are also intersex conditions. The genitalia of some but not all intersex individuals are not clearly identifiable as male or female. Intersex conditions may not become apparent until puberty or later, when sterility is an issue. Intersex is not itself a medical condition. It is better understood as a label used to describe biological variety.¹

Republic of Philippines v. Jennifer Cagandahan concerned an individual with congenital adrenal hyperplasia (CAH), one of the most common causes of intersex conditions. The body of an XX individual with CAH continues to produce virilizing hormones, resulting in masculine secondary sex characteristics. Jennifer Cagandahan had been registered female at birth but at adulthood identified as male. He filed a petition asking that his name be changed to Jeff and that his birth certificate be altered to reflect the male sex. Although a year earlier the Supreme Court had held that an individual who had received sex reassignment surgery could not change her birth certificate (see ***Silverio v. Philippines***, Chapter 8), in this case a different division of the Supreme Court granted Cagandahan’s petition. The Court relied on the fact that the plaintiff’s desire to change the sex on his birth certificate was the result of a “natural” biological medical condition. The Court acknowledged a role for individual self-identification, stating that it was reasonable to allow an intersex individual to determine his or her own gender as his or her body matured.

One of the most prominent issues facing intersex individuals is genital normalizing surgery, especially when performed on infants and young children. A surgical approach to intersex conditions was first adopted in the late 1950s and 1960s and became standard in the 1970s.² It reflected the belief that “sexual identity is a function of social learning” and that children whose “genetic sexes are not clearly reflected in external genitalia” could be successfully raised as members of

either sex.³ American pediatric guidelines advised surgery if an infant was born with a penis less than a certain size or a clitoris larger than a certain size.⁴ Surgery is typically feminising; for example, it reduces the size of a clitoris, transforms a penis into a clitoris, or creates a vagina (vaginoplasty). Organisations like the Intersex Society of North America, and some legal scholars and members of the medical profession, object to genital normalising surgery on infants and young children on the grounds that it is usually medically unnecessary, is often performed without the fully informed consent of the child or parents, and poses severe risks for sexual and reproductive health.⁵ Furthermore, an intervention that surgically causes an individual's genitals to resemble standard male or female genitals does not influence that person's hormones and chromosomes, and these may or may not be consistent with his or her surgically-altered genitalia. As the ISNA states: "Genital "normalizing" surgery does not create or cement a gender identity; it just takes tissue away that the patient may want later".⁶

Medical and legal scholars have documented instances of individuals who were subjected to genital surgery as infants or children and who later rejected the gender identity to which they had been surgically assigned. The most famous case involves a child born male whose penis was severely burned during circumcision. He was then raised as "Joan", after surgery had removed his penis and fashioned a vulva. As a teenager, "Joan" rejected her female assignment; as an adult, he lived as a man, married a woman, and was the stepfather to his wife's three children. He later underwent female-to-male sex reassignment surgery.⁷ The individual, whose real name was David Reimer, committed suicide in 2004.⁸

In re Völling is an example of an individual who was subjected to sex reassignment surgery without full knowledge or consent. Christiane Völling was raised as a male and at puberty had developed male secondary sex characteristics. During a routine appendectomy, doctors detected a uterus, fallopian tubes, and ovaries, but no testes. A chromosomal analysis revealed the female XX pattern, but this was not disclosed to the plaintiff. Instead, the plaintiff was informed that she was "60 percent" female and that she had the presence of both male and female internal sex organs. When she was eighteen, all her intra-abdominal female sexual organs were removed and no male sex organs were discovered during the operation. The plaintiff was in fact female in terms of her gonadal tissue and chromosomes. Physicians concluded that she was probably assigned to the male sex at birth and developed secondary male sex characteristics because she had an androgenital syndrome or an adrenal gland tumor, both of which can produce excessive male hormones in individuals who are chromosomally female.

The Regional Court of Cologne found for the plaintiff. It concluded on the evidence that the plaintiff had not been informed that surgery would remove "normal female anatomy". Rather than "corrective" surgery, to "adapt and maintain one of two present sexes", the surgery caused a "complete removal of organs from the only present and organic sex". Furthermore, the treatment records made no

suggestion that the plaintiff faced an acute health risk that required immediate and irreversible surgery. She was awarded 100,000€ in damages.⁹ In the United States, by contrast, actions to seek legal redress have generally been unsuccessful because the medical profession has not reached agreement on what approach to intersex conditions is appropriate.¹⁰

In a series of decisions, the Constitutional Court of Colombia elaborated standards for informed consent to genital normalizing surgery. In *Sentencia T-477/95*, the Court considered the case of a teenager who had been accidentally castrated as an infant and then subjected to sex reassignment surgery and raised as a girl. When the teenager learned about the operation, he sued the doctors and the hospital. The Court ruled that the sex of a child could not be altered without the child's informed consent. *Sentencia 377/99* involved an eight-year old child who had male (XY) chromosomes but was raised as a girl. Due to an inability to synthesise testosterone, the child had ambiguous genitalia. Doctors recommended surgery to create a clitoris and vagina and remove the child's gonads, but would not proceed with the surgery because of the judicial requirement of informed consent. The mother then brought suit to compel the hospital to accept her consent in place of the child's.

The Constitutional Court held that the mother's consent could not be substituted for the child's in this case. Under Article 16 of the Constitution, an individual had the right to free development of personality, which included the feeling of belonging to or identifying with a particular sex. The child's informed consent was required; but in certain situations parental consent could be substituted, if consent was informed, qualified and persistent. In cases of genital normalizing surgery, the need for parental consent diminished with age. The need to protect the right of free development of personality was greater in the case of an eight-year old child, who had already become aware of his or her genitalia and was better able to define his or her own gender identity; as a child grew older, his or her autonomy increased and deserved increased protection. The Court concluded that surgery on children above the age of five should be postponed until the child could consent for itself.

In *Sentencia T-912/08*, the Constitutional Court applied its earlier reasoning to hold that parental consent could not be substituted for that of a five-year old child. Here it held that the child and parents had to be fully informed about the surgery, its implications and risks. Once all the facts were known, the child and the parents together could give joint consent. But if the child's decision did not accord with that of the parents, then no surgery could be performed until the child had reached the age of majority and could make an independent decision.

Whether individuals with intersex conditions should be included under non-discrimination laws is a matter of controversy. For example, the Intersex Initiative website states:

The vast majority of people born with intersex conditions do not view “intersex” as part of their identity. In fact, many people would not even describe their condition as “intersex,” as they feel that they simply have a medical condition, like congenital adrenal hyperplasia or androgen insensitivity syndrome, and not “intersex status.” Its inclusion along with “lesbian, gay, bisexual and transgender” further spreads the inaccurate perception that “intersex,” like “lesbian, gay, bisexual and transgender,” is an identity group.¹¹

By contrast, the Support Initiative for People with atypical Sex Development (SIPD) describes the significant discrimination and stigma that people with intersex conditions face in Uganda. SIPD works towards “the realisation and protection of human rights for this minority population”.¹²

An example of discrimination affecting intersex individuals is the refusal to issue birth certificates to infants with ambiguous genitalia. In ***Muasya v. Attorney General***, the High Court of Kenya heard a case concerning Richard Muasya, an intersex individual in prison. Muasya had never been issued a birth certificate or identity card, had left school at an early age, and had been convicted of robbery with violence. Because he was intersex, he was held in a cell at a police station pending trial. When sentenced, he was sent to a male-only prison, where he was subjected to invasive body searches, mockery and abuse.

The High Court found that the fact that Muasya had not been issued a birth certificate did not constitute discrimination or lack of legal recognition. It also held that the Constitution should not be interpreted to include a third gender. Rather, intersex individuals fell into the category of male or female, according to the appearance of their genitals at birth. Intersex individuals did not belong in the category of “other status” under Article 26 of the ICCPR. However, the Court found that Muasya’s treatment while in prison amounted in inhuman and degrading treatment, contrary to the Constitution and the UDHR, and he was awarded damages. At the time of publication, Muasya was appealing the decision.¹³

CASE SUMMARIES

Sentencia SU 337/99,
Constitutional Court of Colombia (12 May 1999)

Procedural Posture

Action brought against the Colombian Institute of Family Welfare and the Office of the Public Advocate (Defensor del Pueblo de la Seccional del Departamento XX) by the plaintiff mother on behalf of her 8 year-old intersex child, NN. Neither defendant had been involved in the medical treatment of NN, but a medical team would only perform surgery with the defendants’ permission.

As the sole guardian of NN (whose father was recently deceased), the plaintiff alleged that a refusal to allow her to consent to medical treatment of her minor child's condition was a violation of equal treatment, freedom of personal development, and protection of childhood. The lower court held that, under *Sentencia T-477/95*, the plaintiff's consent could not be substituted for that of her minor child. The case was sent to the Constitutional Court, where the 7th Chamber of Revision nullified the action against the Colombian Institute of Family Welfare and Office of the Public Advocate and added the Office of Social Welfare and the presiding doctor as defendants.

Facts

The midwife who delivered NN declared the child to be female and NN was raised as a girl. At the age of three a paediatric doctor found that NN was a pseudohermaphroditic male, meaning that NN had difficulty synthesising testosterone and possessed ambiguous genitalia, including a three-centimetre phallus, a scrotum, labia folds and interior gonads. Subsequently, a medical team recommended genital-conforming surgery including a clitoroplasty, vaginal remodelling, and the removal of NN's gonads. The team found that NN's phallus would never be large or function like an average penis and urged surgery before the child reached puberty. The medical team then refused to perform the surgery because the Constitutional Court had previously held that parental permission could not be substituted for the permission of the child and that the child could not make such a decision until the age of majority. The plaintiff sought permission from the court to substitute the plaintiff's consent since the child was still a minor and "could not make decisions for herself", contending that, if the medical team were to wait for the child to have "the capacity to decide, it would be too late and would prevent normal psychological, physical, and social development".

Issue

Whether requiring the mature consent of the plaintiff's child to perform genital-conforming surgery violated the right to equal treatment, freedom of personal development, and the protection of childhood.

Domestic Law

Constitution of Colombia, Article 1 (human dignity) and Article 16 (right to free development of personality).

Sentencia T-477/95, Constitutional Court of Colombia, 1995 (holding that, where an infant's male genitalia were damaged in an accident and surgeons had assigned the female sex, parents could not choose the sex of their child without the child's informed consent).

International Law

Convention on the Rights of the Child, Article 3 (requiring States to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents).

International Covenant on Civil and Political Rights, Article 5 (respecting the responsibilities, rights and duties of parents), Article 7 (requiring free consent to medical or scientific experimentation), Article 8 (right of the child to preserve his or her identity), Article 12 (States to assure to the child who is capable of forming his or her own view the right to express those views in all matters affecting the child), and Article 18 (primary responsibility of parents or legal guardians for the upbringing and development of the child).

Reasoning of the Court

The Court noted that there was little jurisprudence on intersex issues and that almost all cases referring to sexual identity dealt with homosexuality and transgender issues. Nevertheless, the Court emphasised that determining consent in intersex surgical cases was important because about one in every 7,000-10,000 persons were born with indeterminate gender. The Court estimated that about 15,000-37,000 intersex persons lived in Colombia.

Because of the lack of information, the Court conducted a scientific and medical inquiry into the nature and frequency of hermaphroditism and solicited medical opinions on possible treatments before issuing an opinion. A questionnaire was submitted to various domestic and international hospitals and universities and third-party interventions were also requested.

The three main legal elements of parental consent were: (1) the urgency and importance of the treatment to the interests of the child; (2) the risks and the impact/intensity of the treatment on the current and future autonomy of the child; and (3) the age of the child. The Court therefore also requested details as to the urgency of medical procedures in intersex cases, the benefits and harm that could result from medical interventions or lack thereof, and the optimal age for such procedures.

The responses revealed the complexity of the topic. There were two competing schools of thought regarding the medical, psychological, legal, and moral complications, including the possibility of seriously impacting personal autonomy and the right to personal development. Those advocating 'surgery' were primarily doctors and academics, and they urged surgery as early as possible. Specifically, they said that genital ambiguity could be traumatic and frustrating for both the parents and the child and that the child might have serious problems adjusting to ambiguous gender identity, and could suffer rejection by peers and parents. Further, they felt that early surgery and sex assignment was especially important because they believed that gender identity was formed within the first two years

of life and solidified within the first five. Even if surgery were not possible in the first few months of life, these doctors felt that surgery must be performed before puberty. However, the majority of doctors had seen few intersex cases and many referred to transgender operations, ignoring differences in age and the purpose of the surgery. The Court criticised recourse to the North American medical case “John-Joan”, because the doctors who had stated that John (a baby boy who lost his penis during a botched surgery) was successfully “made” into a girl failed to mention that at puberty John refused female hormone treatments, rejected further vaginal reconstruction, and had transitioned to living as a man before being told that he was born “male”.

Those who were in favour of seeking the consent of the intersex individual were a minority of doctors and medical academics and civil society organisations like the Intersex Society of North America (ISNA). They argued that genital-conforming surgery, which was invasive, irreversible, and painful, impacted individual autonomy. ISNA testimonials also stated that surgery affected sex lives and in some cases had amounted to sexual mutilation. Further, reproductive organs could not be “repaired” and sexual feeling was often lost due to the removal of sensitive tissue. They criticised three aspects of pre-consent surgery: (1) the lack of medical criteria for determining sex and the use of the size of the genitalia as a determining factor; (2) the imperfection of parental informed consent, because parents were often given insufficient or deceptive information; and (3) the lack of studies confirming that the invasive plastic surgery had to be done before children could decide for themselves. These advocates proposed that parents should: (1) make an early gender choice, not based solely on the size of the phallus or clitoris, but on the likely balance of hormones at puberty; (2) be provided with a clear, complete and honest account of all options, and immediately receive psychological support from professionals specialising in this field; and (3) know that the child might develop gender traits inconsistent with the chosen gender.

The Court added some qualifying observations. It noted that the number of surgery advocates was far larger than the number of consent advocates, and that the proposed alternatives were not necessarily feasible. Further, surgical procedures had advanced, making it less likely that sexual sensitivity would be destroyed; and the medical community was improving communication with parents.

The Court submitted the criticisms of ISNA and other doctors who opposed pre-consent surgery to the pro-surgery faction, and requested comments. In some cases, doctors refused to respond, and were reproached for this by the Court. In other instances, the ISNA stance led doctors to question their willingness to perform surgery on infants who could not provide informed consent.

In the Court’s view, and in accordance with Article 7 of the ICCPR, consent was central to medical autonomy because individuals must decide how they want to approach personal health as free moral agents. Furthermore, consent was part of

the constitutional right to personal development. In a pluralistic modern society, personal beliefs and experiences informed personal medical decisions, and the patient's decision must be respected because it is "our personal convictions that allow us to live with dignity and meaning". However, the Court stated that consent was not an absolute requirement when constitutional values collide, and thus involved case-by-case determination. If a patient was unable to provide consent, or if refusal would have grave health risks for a third party, consent could be given by someone other than the patient.

Informed consent was established by judging: (1) the invasiveness of the procedure and the patient's level of understanding; (2) the degree of medical qualification in relation to the risk; and (3) the ability of the patient to accept the risk with an objective and critical self-awareness. The final point was especially important, and required the patient to have adequate knowledge and understanding of relevant data. It was the duty of the doctor to provide the patient with all necessary information, including alternatives and counselling. Information was to be provided neutrally, so that the patient could make an informed decision without being influenced by the doctor's view of the alternatives.

The Court noted that intersex cases presented a special issue of consent, because conflicting constitutional and international law imperatives supported each side of the argument. While a parent or guardian did not have to right to endanger a child's life, children were not always aware of their best interests. As a result, parents and guardians were often partially responsible for medical decisions concerning children. Young adults were "under the care of parents, but not under their absolute control". Article 16 of the Constitution upheld the right to free development of personality, establishing the constitutional right to personal identity and autonomy. An essential element of any life plan, and of individual identity, was the feeling that one belonged to a particular sex. Article 44 maintained that State and society have an obligation to assist and protect children to ensure their full and harmonious development and full exercise of their rights. CRC Articles 18, 3.2, 5, 7, 8, 14.2, 42, and 44 all established the rights of children in relation to their best interest. This included the right to know their parents, the rights of the parent, and State obligations to the child. Furthermore, the family was at the heart of society and was an essential space of pluralism. Yet Articles 19 and 20 also provided for the suspension of the rights of the parent. These Articles were especially relevant with regard to medical consent, because on the one hand the promotion of parental rights helped guarantee parental involvement in the child's life, while on the other hand the State must sometimes determine that the child's best interests override the rights of the parent. The Court concluded that there was no evidence for saying that surgical intervention was right or wrong: it compared the situation to one in which a new, highly experimental, and extremely risky cancer treatment is proposed for a child who has no other medical options.

The Court attempted to balance these competing concerns. While the autonomy and free development of the child was of the utmost importance, and might be negatively affected by surgery, the child's right to personal development was also extremely important, and might be negatively affected by failure to perform surgery at a young age. The Court resolved this issue by finding that both domestic and international law established parents and family as the ultimate care provider for the child; a child's autonomy and free development required acceptance and support by parents and social environment. Where parents had considered all aspects of the medical debate, had understood and weighed the options according to the interests of the child, and had been provided with psychological support that enabled them to make a rational decision based on the child's well-being, parental consent might substitute for the child's consent. However, parental consent had to be "informed, qualified and persistent".

The Court noted that the urgency of surgery diminished substantially with age. Psychologists tended to agree that by the age of 5 "a child has not only developed a defined gender identity but is also aware of what happens to his or her body and can [understand] different gender roles and express their wishes". Therefore the Court found that consent could only be substituted before the age of five.

In the present case, NN was eight years old. Not only had the urgency of surgical intervention diminished but the child already had a developed gender identity and showed no problems either psychologically or socially. The Court found that a child of eight already had a sense of autonomy, and prior cases established that the need to protect the right of free development grew as a child became more self-aware. The Court therefore concluded that, constitutionally, consent could not be substituted if a child had a full cognitive, social, and emotional understanding of his or her body and a gender identity firmly in place. The Court reasoned as follows. (1) the original urgency to operate was lessened because the child had already developed a gender identity and become aware of his or her genitalia. Also, the child was probably better able to define his or her own gender identity during puberty with the help of counselling. (2) A child exposed to surgery without a reason would be likely to be confused and to feel it had been punished: he or she would need to be informed in order to avoid the dangers associated with unexplained and invasive change. (3) An older child had greater autonomy and therefore benefited from greater constitutional protection. For children of five or older, therefore, surgery should be postponed until the child could consent.

The Court stated: "Intersexuality appeals to our capacity for tolerance and challenges our ability to accept difference. Public authorities, the medical community and citizens in general have a duty therefore to open a space for these people [who have been] silenced up till now." The Court concluded that in intersex surgery cases a medical team of urologists, endocrinologists, geneticists, gynaecologists, and psychiatrists should be asked to address all the physical and

mental aspects of the child's gender identity, identify the medical and non-medical interventions, and set out the possible benefits and harms of each approach. The family should be clearly apprised of all risks, side effects and dangers, and the decision should be made based on which sex the child would best be able to adapt to throughout life. The Court held that a generic application would not work in intersex cases and the medical team would have to assess each case on an individual basis.

NN was an older child and the Court found that denying immediate access to surgery was not a grave compromise of her right to life. Therefore the mother could not authorise surgery or hormone treatment. Because NN was eight years old, invasive medical procedures could only occur with the child's informed consent. The Court therefore required that a medical team be established to help support both the plaintiff and the child and ensure that they were both completely informed of all treatment options. If the medical team then found NN to be sufficiently autonomous to provide informed consent, she could have surgery before the age of majority. In the alternative, the ability for informed consent could be approached on a sliding scale, with less invasive procedures taking place first and the rest following as NN matured.

In re Völling, Regional Court Cologne, Germany (6 February 2008)

Procedural Posture

The plaintiff, an intersex individual, claimed that the defendant, a surgeon, had failed to provide him with adequate information as to the nature and extent of a surgical procedure. The procedure, which was performed by the defendant on 12 August 1977, resulted in the removal of female sexual organs including the plaintiff's ovaries, uterus and fallopian tubes. The plaintiff sought compensation for the pain and suffering that had resulted from the operation.

Facts

The plaintiff was born with ambiguous genitalia and the plaintiff's urethra had formed abnormally. However, he was assigned a male gender at birth and was raised as male. During puberty the plaintiff exhibited masculine hair growth including a beard.

In February 1976 at the age of 14, the plaintiff's appendix was removed. During the surgery internal abnormalities were detected. Upon further medical examination the existence of female reproductive organs, including ovaries and fallopian tubes, was diagnosed. In addition, ostensible medical evidence suggested the presence of male reproductive characteristics; however, no testicular tissue was detected. The medical conclusion was that the plaintiff possessed both male and female organs.

The plaintiff was informed of the existence of the female reproductive organs and, although still identified as male, was informed that he was 60% female. In correspondence with medical practitioners, the plaintiff's sister reported that the plaintiff was unstable and seriously considering suicide as a result of the diagnosis.

An analysis of the plaintiff's chromosomes, conducted in December 1976, led to the discovery of a normal female chromosomal pattern. This discovery was not shared with the plaintiff. Further examinations, including some psychological analysis of the plaintiff's sexual awareness and orientation, were conducted by medical professionals, culminating in the disputed operation on 12 August 1977.

The operation proceeded on the understanding that the plaintiff possessed both male and female sexual organs. It was recorded in a medical report as a "testovarectomy", which the Court described as the removal of a hermaphroditic gonad comprising both male and female tissue. However, during the operation no male anatomy was detected, repudiating the pre-treatment diagnosis. Instead, the surgeon discovered and removed "a normal female anatomy with pre-pubertal uterus, normal sized ovaries, blindly ending vagina". A post-operative medical report suggested that the plaintiff might have had a medical condition called Androgenital Syndrome, which would have explained the "virilisation" (masculinisation) of his otherwise female body. Following the surgery, the plaintiff continued to live as a male but later came to identify as female.

In 2006, the plaintiff investigated his medical records, and discovered the true nature and extent of the surgery that took place on 12 August 1977, as well as the concealment of his chromosome pattern.

Issue

Whether the defendant failed to properly inform the plaintiff of the true nature and extent of the surgical procedure in which his female sexual organs were removed and, if so, whether the procedure was performed without the plaintiff's informed consent.

Reasoning of the Court

The plaintiff argued that he had never consented to, and had not fully understood, the procedure that took place. In particular, he argued that he was not informed that it could result in the removal of fully formed and exclusively female intra-abdominal anatomy. The plaintiff claimed that removal of his female anatomy had obliged him to live his life with the "wrong gender". He argued that the surgery had deprived him of the opportunity to obtain alternative treatment and explore a life with his true gender identity.

The plaintiff argued that he had been led to believe that a tumour or degenerative tissue had been removed. In addition, the treatment he received had led to medical problems and chronic urinary tract infection.

The defendant repudiated the charges. He argued that he believed the plaintiff had been adequately informed about the procedure and had consented to it. He also argued that, as a surgeon, he had operated on the basis of the pre-surgery medical diagnosis of other medical practitioners and that the operation itself was performed in the presence of a senior physician who had instructed the defendant to remove the organs.

Further, the defendant argued that the plaintiff had presented as and identified as male and that it was not evident that he possessed a “naturally female body”. The defendant argued that the removed organs were “profoundly atrophied” and that there were therapeutic reasons, such as the plaintiff’s mental instability, which justified the failure to fully inform the plaintiff of his condition.

The Court held that the plaintiff had not been appropriately informed about the “nature, content and extent” of the operation carried out on 12 August 1977. In the Court’s opinion, the defendant had failed to demonstrate that he had a sound reason for not fully disclosing to the plaintiff the details of his condition and the defendant’s assertion that information was withheld in order not to “confuse” the plaintiff was unsustainable. This was held to be true both with regard to the failure to ensure that the plaintiff was informed about his chromosomal pattern prior to surgery, and the failure to abstain from surgical intervention until the plaintiff had been properly informed of his situation.

The Court also found that, prior to surgery, the plaintiff was not informed about his 46,XX chromosomal constitution. In addition, the character of the operation had been transformed by the intra-surgery discovery that the plaintiff was wholly female, both chromosomally and organically. Instead of being an operation to address the existence of both male and female reproductive organs, the surgery was transformed into the removal of the organs of the only sex present in his body.

At this point the defendant had an obligation to inform the plaintiff that his medical diagnosis had fundamentally changed. The Court held that the plaintiff was entitled to have the significance of the discovery fully explained to him. The defendant should have obtained his fully informed consent before carrying out an operation that would remove his exclusively female organs.

As to the defendant’s argument that he was merely acting under instruction and on the basis of the original medical reports, the Court held that the defendant would have understood, and should have assessed, the ramifications of the intra-operative findings. The Court concluded that the defendant could not have “guiltlessly” assumed that the surgical procedure that he then carried out could have been governed by any preoperative agreement.

The Court did note that, although the defendant was not directly responsible for the general medical treatment plan or the initial failure to inform the plaintiff of his chromosomal constitution, as a surgeon he ought to have understood and

fundamentally reviewed the information available to him and his responsibility to disclose it. In light of his expertise and his role in the operation, the defendant could not absolve himself of responsibility.

The Court held that the plaintiff's lawsuit was well founded. The decision regarding costs and compensation was reserved for final judgment until further evidence on the consequences of the surgery had been gathered.

Republic of the Philippines v. Jennifer Cagandahan, Supreme Court of the Philippines, Second Division (12 September 2008)

Procedural Posture

In conformity with law, the plaintiff published the petition for name and gender change in a newspaper and had the petition posted. The solicitor general entered his appearance, and authorised a provincial prosecutor to appear on his behalf. At the hearing the plaintiff testified and presented the expert witness testimony of Dr Michael Sionyon of the Department of Psychiatry who maintained that the plaintiff's gender choice was permanent and that recognition would be advantageous to the plaintiff. The trial court granted the petition, and the solicitor general entered a petition to the Second Division court seeking a reversal.

Facts

The plaintiff was registered at birth as female, but developed secondary male characteristics over time. He was diagnosed with congenital adrenal hyperplasia and displayed both male and female characteristics. At age six the plaintiff was diagnosed with clitoral hypertrophy and small ovaries; at age thirteen the ovaries had minimised, he had no breasts and no menstrual cycle. He stated that in his mind, appearance, emotions and interests he was a male person, and therefore asked that his birth certificate sex be changed to male, and that his name be changed from Jennifer to Jeff. A medical expert testified that the plaintiff was genetically female but that, because the plaintiff's body secreted male hormones, his female organs had not developed normally. He further testified that the plaintiff's condition was permanent and recommended the change of gender because the plaintiff had adjusted to his chosen role as male and the gender change would be advantageous to him.

Issue

Whether the court should recognise a new name and gender identity to reflect the chosen gender of an intersex person who was raised as the opposite gender.

Domestic Law

Rules of the Court, 103 (regulating name change) and 108 (regulating the cancellation or correction of civil registry entries).

Comparative Law

MT v. JT, New Jersey Superior Court, United States, 1976 (“It has been suggested that there is some middle ground between sexes, a ‘no-man’s land’ for those individuals who are neither truly ‘male’ nor truly ‘female’”).

Reasoning of the Court

The Court first discussed the Wikipedia definition of intersex and remarked on the diverse treatment of intersex individuals internationally. In quoting the reference in *MT v. JT* to a gender ‘no-mans land’, the Court noted that “[T]he current state of Philippine statutes apparently compels that a person be classified as either a male or as a female, but this Court is not controlled by mere appearances when nature itself fundamentally negates such rigid classification”.

The Court stated that it was of the view that “where the person is biologically or naturally intersex the determining factor in his gender classification would be what the individual, like respondent, having reached the age of majority, with good reason thinks of his/her sex.” Because Cagandahan thought of himself as a male and his body produced high levels of androgen, there was “preponderant biological support for considering him as being male.” According to the Court, for intersex persons gender classification at birth was inconclusive. “It is at maturity that the gender of such persons ... is fixed.”

In this case, the Court considered that the plaintiff had allowed “nature to take its course” and had not interfered with what “he was born with”. By not forcing his body to become female, he permitted the male characteristics of the body to develop. Thus the Court rejected the objections of the solicitor general and held that, where no law governed the matter, the Court should not force the plaintiff to undergo treatment to reverse his male tendencies.

The Court held that where the individual was biologically or naturally intersex, it was reasonable to allow that person to determine his or her own gender.

Sentencia T-912/08, Pedro v. Social Security et al., Constitutional Court of Colombia, Chamber of Revision (18 December 2008)

Procedural Posture

Action brought before the civil court by the plaintiff father on behalf of his 5 year-old child against the office of Social Services and the General Northern Clinic. The civil court ruled against the plaintiff, asserting that the child was over the benchmark age for parental consent, that the mother had not given express consent for the surgery, and that the plaintiff had not demonstrated an informed, qualified, and consistent decision-making capacity regarding surgery. The plaintiff appealed. The superior tribunal upheld the lower court’s ruling and further stated that it was not the place of the court to override the decision of a medical board

where there existed a real possibility of severe mental and physical problems for the child. The plaintiff then sought remedy from the Constitutional Court.

Facts

The plaintiff's child was identified as having both male and female genitalia, including both ovaries and testicles. The child was raised as and identified as a boy, but it was unclear if the child could naturally produce male hormones or had the potential to procreate as a man. The defendants had the child examined to confirm the possibility of genital-conforming surgery, but found that the child had more congenital and physical female attributes, including a fallopian tube that might be functional and possible excretion of female hormones. The defendants then referred the case to a medical board which concluded that surgery, in accord with the laws and jurisprudence of the Colombian Constitution, needed the fully informed consent of the child, which would not be possible before the age of 18.

Issue

Whether the defendants' refusal to authorise and carry out genital-conforming surgery on the plaintiff's five year-old child, because parental consent was insufficient under the law, undermined the child's right to life and freedom of personal development.

Domestic Law

Constitution of Colombia, Articles 11 (right to life) and 16 (right to free development of personality).

Sentencia SU-337/1999, Constitutional Court of Colombia, 1999 (holding that parents could not substitute their consent for that of their 8 year-old child, who was old enough to make informed and mature decisions regarding invasive gender conforming surgery).

Sentencia T-551/1999, Constitutional Court of Colombia, 1999 (finding parental consent invalid because parents had not been fully informed and because their consent was not repeated over a sustained period of time).

Reasoning of the Court

The Court discussed the clash between the constitutional right to autonomy and the rights of the beneficiary, specifically in cases involving children. It found that, in intersex cases involving surgery, the decision of the child was paramount, while the right of the parent to make decisions in a protective capacity was secondary.

The Court stressed the need to evaluate and consider each case individually, taking into account the distinct elements of each case when determining if the informed consent of a parent could be substituted for that of a minor. The information to be assessed included: "(i) the urgency of the treatment, (ii) the impact and/or risk of the treatment on the autonomy and future of the child, and

(iii) the age and maturity of the child”. The 1999 case of *Sentencia SU-337/1999* and *Sentencia T-551/1999*, which defined the circumstances in which parental consent could be substituted for that of the child, established the factors that need to be considered regarding consent for intersex children. If the child was under the age of 5, if the parents were informed, qualified, and consistent in their decision, and if the decision was in accord with respected and accredited medical board recommendations, surgery could be performed. The Court found that an array of medical personnel should be available to inform the parents of alternatives and risks, as well as the possible negative future impacts that surgery could have on the child. The Court also emphasised that therapists and social workers should be permanently available to assist both the parents and the child to reach their decisions.

If the child was five years or older, it became the right of that child to make the decision about his or her sexual identity if (i) the parent also consented, (ii) the child demonstrated an express desire to be a particular gender, and (iii) a respected and accredited medical board agreed with the decision. Further, both child and parents must be aware of the known risks, future consequences, and possible side effects. The Court indicated that the board’s role was to examine the child’s physical attributes but also to evaluate the mental state of child and parents. Specifically, the Court considered it important to ascertain whether the child truly identified with the gender desired by the parents. Older children also needed help and support from therapists and social workers. No time constraint should be imposed on the process of decision-making, to discuss alternatives, verify the parties’ mental state, and ascertain that parents and child were able to show consistent commitment to a chosen gender.

The Court required the defendants to form a medical team within forty-eight hours, consisting of surgeons, urologists, endocrinologists, paediatricians, psychiatrists, therapists, and social workers. This team would assist the child and the parents to understand the surgery and its implications, and would also perform exams, diagnostics, and evaluations, which they would explain and discuss with child and parents. If, after the parents and child had been fully informed of the medical findings, the complications and risks of surgery, and potential future issues as well as alternative medical and non-medical options, and providing the medical team agreed with their decision, the defendants were mandated to perform surgery within fifteen days. However, if the child’s decision did not match that of the parents, or the medical team did not agree with the decision of the child and parents, no surgery could be performed until the child was eighteen and able to make his or her own informed decision.

**Richard Muasya v. the Hon. Attorney General,
High Court of Kenya (2 December 2010)**

Procedural Posture

The petitioner, an intersex individual, brought suit alleging violations of constitutional rights.

Facts

The petitioner was born with both female and male genitalia. The petitioner's parents gave him a male name but, as a result of his ambiguous gender, he did not obtain a birth certificate and thus could not acquire an identity card or passport. The petitioner's parents did not pursue the option of "corrective" surgery because it was too expensive. The Petitioner did not complete his schooling and an attempt at marriage did not succeed.

Eventually the petitioner was charged with the capital offence of robbery with violence, arrested, and held in prison. During a routine physical search the prison officers discovered his ambiguous genitalia and consequently could not decide whether to house him in a male or female cell. The Kiuti Magistrates Court ordered that the petitioner be medically examined and the medical report confirmed that he was intersexual. The Magistrates Court then ordered that the petitioner was to be remanded in isolation in the Kiuti Police Station pending trial.

The petitioner was convicted, sentenced to death and sent to a male-only prison for convicts on death row. There the petitioner was made to share cells and facilities with male inmates but was later placed in isolation. It was alleged that while he was in the prison he was subjected to invasive body searches, mockery and abuse because of his condition.

Issue

Whether, as a result of being intersex, the petitioner had suffered from lack of legal recognition and from discrimination; had his fundamental rights violated during the hearing of his case; or had been subjected to inhuman or degrading treatment.

Domestic Law

Births and Deaths Registration Act Cap 149.

Constitution of Kenya.

Prisons Act Cap 90.

Prison Rules.

Comparative Law

Corbett v. Corbett (Otherwise Ashley), Probate, Divorce and Admiralty Division, United Kingdom, 1970 (holding that sex was biologically fixed at birth and could not be changed by medical or surgical means)

International Law

International Covenant on Civil and Political Rights, Article 26 (equal protection and non-discrimination).

Universal Declaration of Human Rights, Article 2 (non-discrimination) and Article 5 (torture or cruel, inhuman or degrading treatment or punishment).

Reasoning of the Court

The Court found that the petitioner's condition fitted its definition of intersex as "an abnormal condition of varying degrees with regard to the sex constitution of a person". In response to the petitioner's attempt to bring a representative suit, the Court held that, since there was no empirical data about intersex as a group or class within Kenyan society, the issue of the treatment of intersexuals generally was not a public interest matter. Furthermore, the "magnitude" of the issue was not such that it called for government intervention or regulation.

Lack of legal recognition and discrimination

The Court found that under the *Births and Deaths Registration Act*, sex meant either male or female. The term sex was not defined in the Constitution but the Court was persuaded by the English case of *Corbett v. Corbett* to assert that "biological sexual constitution" was determined, at birth at the latest, as either male or female. In the case of intersexuals, the Court held that they could be categorised within the broad categories of male and female based on their dominant physiological characteristics at birth. The Court found that at birth the petitioner's external genitalia and dominant physiological characteristics fit more with the male sex and that he therefore could have been registered as male under the *Births and Deaths Registration Act*. Consequently, the Court rejected the Petitioner's contention that he suffered from a lack of legal recognition based on an inability to have his birth registered.

The Court did not agree with the petitioner's assertion that, in order to provide intersexuals with equal protection of the law, the term "sex" in the Constitution should be interpreted widely to include a third category of gender. The Court held that it would be a "fallacy" to act as requested because the term "sex" under the Constitution included intersex within the categories of "male" and "female". Intersex individuals would fall into one category or another based on the dominant gender characteristics they exhibited at birth, and it was not within the mandate of the Court to expand the meaning of the term "sex" when the legislature had

not done so. The Court reasoned that this interpretation was compatible with the meaning of the term “sex”, in the context of recognition of equality, in the UDHR.

The Court also held that it was unnecessary to invoke the category of “other status” under Article 2 of the UDHR or Article 26 of the ICCPR, in order to accord intersexuals specific protection against discrimination. The Court stated that the *Constitution of Kenya* already adequately provided for intersexual status within the meaning of “sex”, and considered that any other conclusion would be contrary to the intent of the legislature and to the position of Kenyan society on the issue.

Discrimination and disadvantage in education, employment and housing

The Court held that the petitioner had not been discriminated against or disadvantaged in education, employment and housing. When the petitioner commenced schooling there was no requirement that a birth certificate be presented as a prerequisite to enrolment. The petitioner was found to have left school of his own volition and his problems with employment and housing resulted from this decision. The Court held that it was the petitioner’s failure to attend school, rather than his intersexual status, that had disadvantaged him.

In addition, the Court rejected the petitioner’s argument that he had been denied the right to vote through lack of recognition, holding that the petitioner was responsible for his failure to obtain the necessary identity documents. The petitioner was found to have made no effort to obtain a voter card and to have “disenfranchised himself by deliberately failing” to meet the conditions for voting.

Social Stigma

The Court held that the social stigma that the petitioner suffered was not a legal issue. Rather, it was a social problem highlighting the need to educate society to respect the dignity of human beings. The condition of intersexuality needed to be understood better and addressed in the community. The Court noted that Kenyan society was a “predominantly traditional African society in terms of its social, moral and religious values”. As a result, the legislature rather than the courts was required to gauge whether the circumstances required that legislative action be taken to alleviate the situation for intersexuals.

Violation of fundamental rights during the hearing of the criminal case

The Court dismissed the petitioner’s contention that he was unconstitutionally detained in the police station while his trial was pending. The detention was pursuant to a valid court order and the order was made because no other appropriate place of detention was available. The nature of the petitioner’s crime meant that he did not qualify for bail and his fundamental right to liberty was constitutionally limited because he faced a capital charge. On these grounds, the Court considered the detention to have been legal and justified.

The Prisons Act and Prisons Rules

The Court held that neither the *Prisons Act* nor the *Prisons Rules* contained provisions that discriminated against intersexuals. The petitioner argued that he should have been detained in a separate location where specially trained staff could have cared for him, rather than placed in a male prison. The Court acknowledged that the petitioner's situation was unique and had not been anticipated by the legislature but found that it would be impracticable to create a prison solely for him. The Court held that the petitioner's need for special treatment has already been recognised by the court order that he be separately confined. This order was made lawfully and for the petitioner's own good and was not a violation of his fundamental rights.

Freedom of movement and association and right to privacy

The Court held that the petitioner's rights to freedom of movement and association, and to privacy, had not been violated. Following his arrest, the petitioner's freedom of movement was lawfully restricted. Nor could the petitioner complain that his freedom of movement had been unconstitutionally limited prior to his arrest, because he had taken no steps to have his birth registered. The Court held that the petitioner's inability to obtain identity documents, including a passport, was caused by his own failure to register his birth.

The Court held that the evidence of interference in the petitioner's right to privacy was insufficient, because, as a convict, elements of his privacy had been legally removed.

Protection against inhuman and degrading treatment

The Court held that the petitioner had been subjected to inhuman and degrading treatment under the Constitution and Article 5 of the UDHR. The Petitioner had reported being exposed to other prisoners and having blood drawn without consent or explanation, in violation of his rights. Although all prisoners were searched as a matter of course, the exposure of the petitioner to other prisoners and the derision he subsequently endured constituted a violation of his rights. The petitioner had been subjected to humiliating and invasive body searches that were "motivated by an element of sadism and mischievous curiosity, to expose the petitioner's unusual condition". The exposure of the petitioner's ambiguous genitalia in the presence of others was found to have been "cruel and brought ridicule and contempt". This treatment revealed a lack of respect for the petitioner's human dignity and constituted a violation of his constitutional rights.

The Court awarded the petitioner damages of 500,000 Kenyan Shillings for the inhuman and degrading treatment he endured.

- 1 Some theorists view “intersex” as itself a gender beyond the masculine and feminine ones. In this view, intersex is not just a way of describing genetic and hormonal variety but represents a third sex. See, for example, Noa Ben-Ahser, ‘The Necessity of Sex Change: A Struggle for Intersex and Transsex Liberties’ (Winter 2006), 29 *Harvard Journal of Law & Gender* 51, 70 (criticizing ISNA for accepting the male-female binary); Julie A. Greenberg, ‘Defining Male and Female: Intersexuality and the Collision between Law and Biology’ (Summer 1999), 41 *Arizona Law Review* 265 (describing cultures that recognise more than two sexes or two genders).
- 2 Hazel Glenn Beh & Milton Diamond, ‘An Emerging Ethical and Medical Dilemma: Should Physicians Perform Sex Assignment Surgery on Infants with Ambiguous Genitalia’ (2000), 7 *Michigan Journal of Gender & Law* 1, 2-3.
- 3 *Ibid.*, at 19 (citing American Academy of Pediatrics, Timing of Elective Surgery on the Genitalia of Male Children with Particular Reference to the Risks, Benefits, and Psychological Effects of Surgery and Anesthesia), 97 *Pediatrics* 590 (1996)).
- 4 Noa Ben-Asher, ‘The Necessity of Sex Change: A Struggle for Intersex and Transsex Liberties’ (Winter 2006), 29 *Harvard Journal of Law & Gender* 51, 61.
- 5 ‘What’s Wrong with the Way Intersex Has Traditionally Been Treated?’ At: www.isna.org/faq/concealment; Jennifer Rellis, “‘Please Write ‘E’ in This Box”: Toward Self-Identification and Recognition of a Third Gender in the United States and India’ (2008), 14 *Michigan Journal of Gender & Law* 223, 237-38; Kishka Kamari-Ford, “‘First, Do No Harm” – The Fiction of Legal Parental Consent to Genital-Normalizing Surgeries on Intersexed Infants’ (2001), 19 *Yale Law & Policy Review* 469.
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- 8 Erin Lloyd, ‘From the Hospital to the Courtroom: A Statutory Proposal for Recognizing and Protecting the Legal Rights of Intersex Children’ (Fall 2005), 12 *Cardozo Journal of Law & Gender* 155, 156 (“While Reimer’s suicide cannot be blamed entirely on what some would call negligent medical care, it highlights the long-term psychological and emotional issues that the current surgical treatment can cause for intersex patients”).
- 9 ‘Gender Warrior Wins Case Against Surgeon’, *Deutsche Welle* (6 February 2008). At: www.dw-world.de/dw/article/0,2144,3111505,00.html.
- 10 Erin Lloyd, ‘From the Hospital to the Courtroom: A Statutory Proposal for Recognizing and Protecting the Legal Rights of Intersex Children’ (Fall 2005), 12 *Cardozo Journal of Law & Gender* at 162-163; Hazel Glenn Beh & Milton Diamond, ‘An Emerging Ethical and medical Dilemma: Should Physicians Perform Sex Assignment Surgery on Infants with Ambiguous Genitalia’ (2000), 7 *Michigan Journal of Gender & Law* at 2.
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GENDER EXPRESSION AND CROSS-DRESSING

Chapter seven

Gender Expression and Cross-Dressing

INTRODUCTION

One way in which law has played a role in enforcing gender norms is by prohibiting cross-dressing. Sumptuary laws were common in medieval Europe, Elizabethan England and colonial North America and served to regulate public attire according to occupation, class and gender.¹ Colonial systems exported dress regulations to many countries around the world. Contemporary sumptuary laws, known as cross-dressing laws, have been used to target individuals who transgress gender roles, whether they are gay, lesbian, transgender or straight. In Sudan, for example, laws prohibiting indecent or immoral dress have been used to punish men who wear women's clothes as well as women who wear trousers and male models who wear make-up.² In Nigeria, laws on indecent dress have been used to fine and imprison cross-dressing men.³ In Guyana, it is a crime under section 153 of the *Summary Jurisdiction (Offences) Act* when “a man, in any public way or public place, for any improper purpose, appears in female attire, or being a woman, in any public way or public place, for any improper purpose, appears in male attire”. After a series of arrests of transgender persons, activists there have filed a constitutional complaint.⁴

Cross-dressing laws can be challenged on various grounds. One's choice of attire may be described as an expression of individual liberty and autonomy, or an expressive statement protected under the right to freedom of expression. Cross-dressing may also be considered an element of trans identity protected under non-discrimination and equality guarantees. Early cases, however, dealt with the textual vagueness of laws that criminalised dressing in clothing of the opposite sex.

In the 1970s, US courts began to hear challenges to such laws on both freedom of expression and vagueness grounds. In *City of Columbus v. Rogers*, the Ohio Supreme Court heard the appeal of a man who had been convicted under a city ordinance that prohibited individuals from appearing in public in dress “not belonging to his or her sex”.⁵ Taking account of contemporary changes in the manner and style of dress, the Court found the ordinance unconstitutionally vague, because clothing for both sexes was “so similar in appearance” that a person “of common intelligence” might not be able to identify any particular item as male or female clothing. This logic was subsequently applied to strike down cross-dressing laws in a number of cities.⁶

In the case of *City of Chicago v. Wilson et al.*, the Supreme Court of Illinois found a very similar law unconstitutional on different grounds. Relying on privacy cases considered by the US Supreme Court, namely *Roe v. Wade* and *Griswold v. Connecticut*, the Illinois Court concluded that individuals had a “constitutional liberty interest” in their choice of appearance. It connected this liberty interest with the values of privacy, self-identity, autonomy, and personal integrity. The State attempted to justify the ordinance by asserting its interest in preventing crime. The Court rejected this argument. The two defendants were “transsexuals ... undergoing psychiatric therapy in preparation for a sex-reassignment operation”. There was no evidence of “deviate sexual conduct or any other criminal activity”. In the absence of evidence, the Court could not “assume that individuals who cross-dress for purposes of therapy are prone to commit crimes”. Following *Wilson*, eight transgender plaintiffs brought suit in Texas challenging a cross-dressing law under which they claimed they were threatened by prosecution. They argued that, as “transsexual plaintiffs who cross-dress in preparation for sex-reassignment surgery, they had a liberty interest in their personal appearance”.⁷ The Court agreed, finding the ordinance unconstitutional.

Later cases have used the right to freedom of expression to protect an individual’s choice of dress. In *Doe v. Yunits*, a teenager, who had been identified as male at birth and had been diagnosed with gender identity disorder, brought suit against her junior high school, which had repeatedly expelled her from class for wearing girls’ clothes. The school argued that the presence of a boy wearing girls’ clothes disrupted the learning environment. The Court held that the teenager’s style of dress was a form of expression. Through her choice of clothing, she expressed her female gender identity. The clothes themselves were not distracting and a female student would not have been disciplined for wearing them. Preventing the student from wearing certain clothes was therefore a suppression of protected speech.

McMillen v. Itawamba County School District concerned a lesbian teenager who wished to wear a tuxedo to her school prom. In this case too the Court relied on the right to freedom of expression. The student argued that wearing a tuxedo had the “intent of communicating to the school community her social and political views that women should not be constrained to wear clothing that has traditionally been deemed ‘female’ attire”. The Court agreed that wearing a tuxedo was a form of expressive conduct protected by the First Amendment to the Constitution.

In Thailand, the Chiang Mai Administrative Court examined the issue of gender non-conformity in terms of discrimination. In *Teerarojjanapongs I and Champathong II v. Governor of Chiang Mai Province*, a regulation prohibited individuals from appearing at the annual flower festival parade in clothing that expressed “sexual deviance”. The plaintiffs argued that the law would prevent transgender people from participating in the parade. The Court found that, under Article 30 of the Thai Constitution, all persons were equal before the law and enjoyed equal legal protection. This protection extended to individuals who dressed in a manner

contrary to their gender, or, in the Court's words, "persons who have sexual diversity". Their right to cross-dress was thus viewed as an integral aspect of their identity. The approach of the Thai court is similar to the one Sweden adopted: its non-discrimination law prohibits discrimination on grounds of both transgender identity and expression, and the latter is described as dressing in a way that indicates one's belief about "belong[ing] to another sex".⁸

CASE SUMMARIES

City of Chicago v. Wilson, Supreme Court of Illinois, United States (26 May 1978)

Procedural Posture

The defendants were convicted of violating a Chicago City law that prohibited people from wearing the clothing of the opposite sex and intentionally concealing their biological sex. Prior to trial, the defendants tried to have the charges dismissed on the grounds that the law was unconstitutional, but that motion was denied. Their conviction was upheld by the Appellate Court and was taken to the Supreme Court, where the defendants contested the law on the grounds that it was overly broad and vague and that it violated the 1st, 9th, and 14th Amendments of the United States Constitution.

Facts

After leaving a diner, the defendants were arrested for wearing female clothing, make-up and hairstyles, including a dress, nylon stockings, heels, a wig, and a fur coat. At the police station the defendants had been forced to pose in various stages of undress, and it was noted that they were wearing garter belts and brassières. At trial the defendants testified that they were "transsexuals", that they were both in psychiatric therapy in preparation for genital reconstruction surgery, and that they were required to dress and act as women in public settings as part of this therapy. Both defendants "thought of themselves as females".

Issue

Whether prohibiting individuals from wearing clothing of the opposite sex and from concealing their biological sex was a violation of the United States Constitution.

Domestic Law

Chicago Municipal Code, Section 192-8 ("Any person who shall appear in a public place ... in a dress not belonging to his or her sex, with intent to conceal his or her sex, ... shall be fined not less than twenty dollars nor more than five hundred dollars for each offence").

Constitution of the United States, 1st, 9th, and 14th Amendments.

Kelly v. Johnson, United States Supreme Court, 1976 (finding that citizens hold a liberty interest in personal appearance such that the State interest in regulating personal appearance is weighed against the degree of infringement).

MT v. JT, New Jersey Superior Court, United States, 1976.

Roe v. Wade, United States Supreme Court, 1973 (holding that there are “unspecified constitutionally protected freedoms”).

Reasoning of the Court

The Court relied on *Roe v. Wade* to establish that not all constitutional protections were textually explicit and on *Kelly v. Johnson* to establish the test for the restriction of a liberty interest in appearance: the State had to prove a need for the restriction that was greater than the individual’s right to liberty. The Court continued:

The notion that the State can regulate one’s personal appearance, unconfined by any constitutional strictures whatsoever, is fundamentally inconsistent with ‘values of privacy, self-identity, autonomy, and personal integrity that ... the Constitution was designed to protect.

Next, the Court discussed when a personal interest in appearance could be infringed and noted that there was no relevant case law to guide it. Although personal choice in appearance was not a fundamental right, the Court still found that there must be some degree of justification for the “intrusion”. The Court rejected the reasons proffered by the city: protection from fraud, for the detection of criminals, to prevent washroom crimes, and prevent anti-social behaviour, as being without evidentiary support.

The Court looked to law review articles discussing the transgender marriage case of *MT v. JT* to hold that the defendants were not committing a crime when they were pre-operative “transsexuals” cross-dressing “for the purposes of therapy.” The Court found that preventing them from making necessary preparations for gender surgery would be inconsistent with the legislative intent in granting permission for such surgeries. Finally, the Court held that the City had failed to provide any evidence that cross-dressing was harmful to society or that the ordinance itself protected morals.

The Court reversed the lower courts’ decisions and the case was remanded.

Doe v. Yunits et al., Superior Court of Massachusetts,
United States (11 October 2000)

Procedural Posture

The plaintiff sued for declaratory and injunctive relief from the dress code of the defendant junior high school and its officials. Because this was a request for a

preliminary injunction against the school, a public entity, the court was required to examine Doe's claim of injury and her chance for success on the merits, as well as any risk of injury that might flow to the public interest were the injunction to be granted.

Facts

The plaintiff, who was biologically male, first began to express her female identity in junior high school by wearing make-up and girls' shirts and accessories. The defendant's dress code prohibited "clothing which could be disruptive or distracting to the educational process or which could affect the safety of students". The school principal would send the plaintiff home to change clothes if she arrived at school wearing girls' clothes. In June 1999 the school referred the plaintiff to a therapist who diagnosed that she had gender identity disorder and found that preventing the plaintiff from wearing clothing consistent with her gender identity could harm the plaintiff's mental health.

When the school year resumed in September, the plaintiff was instructed to visit the principal every morning so he could "approve [her] appearance". Among other things, the plaintiff wore skirts, dresses, wigs, high heels, and padded bras with tight shirts, none of which were prohibited under the school dress code. She was often sent home to change and would be so upset that she would not return.

The plaintiff also had trouble with her classmates and teachers for, among other things, flirting, putting on make-up in class, dancing in the hall, using the girls' bathroom, grabbing a boy's buttocks, and telling the school that she and a boy had engaged in oral sex.

The plaintiff eventually stopped attending school altogether due to the "hostile environment", and she was held back a grade. Before enrolling the following year, school officials told the plaintiff and her family that she would not be allowed to enrol if she wore girls' clothes or accessories. At the time of the trial, the plaintiff was not attending school but was being tutored at home by a teacher provided by the school.

Issue

Whether preventing a transgendered teenager from wearing the clothing of the opposite sex denied her the right to freedom of expression, the right to be free from sex discrimination, and was a denial of her liberty interest in her appearance as guaranteed under the Declaration of Rights of the Massachusetts Constitution.

Domestic Law

Massachusetts Constitution, Declaration of Rights, Articles I, II, X, XIV, XVI and CXIV.

Harper v. Edgewood Board of Education, United States District Court for the Southern District of Ohio, 1987 (finding that where, to preserve community values

and maintain discipline, the school board prevented two students from attending the school prom dressed in clothes of the opposite gender, the students' freedom of expression rights were not violated).

Spence v. Washington, United States Supreme Court, 1974 (holding that a peace symbol attached to an upside-down flag sent a purposeful message that people could understand).

Texas v. Johnson, United States Supreme Court, 1989 (establishing a judicial test for whether an individual's actions constitute expressive speech protected under the law).

Reasoning of the Court

The Court found a likelihood that plaintiff would succeed on the merits. The Court first addressed whether the plaintiff's acts were expressive speech and therefore protected under Articles II, X and XIV of the *Massachusetts Constitution*. Drawing on the case of *Texas v. Johnson*, the Court followed a two-prong test: whether the plaintiff's style of dress was expression that could be understood by those perceiving it; and whether denying the plaintiff the right to dress as a girl at school was suppression of protected speech.

Through the case *Spence v. Washington*, the Court established that “[s]ymbolic acts constitute expression if the actor’s intent to convey a particularised message is likely to be understood by those perceiving the message”. The plaintiff was likely to be able to show that wearing clothing associated with the female gender was an expressive statement about her identification with that gender. The plaintiff’s therapist stated that dressing according to her gender was important for her well-being and health. Thus, her style of dress “was not merely a personal preference but a necessary symbol of her very identity”. The hostility expressed by fellow students and teachers established proof, in the Court’s view, that those perceiving the plaintiff’s “expression” understood it: namely that her choice to dress in girls’ clothes was because she identified as a girl.

Next the Court found that the plaintiff had a strong likelihood of being able to show that the defendant’s conduct was meant to suppress her expressive speech. By disciplining the plaintiff for wearing the same clothing that other girls at the school wore, the school was restricting speech that conveyed a specific message, that she alone was prevented from conveying her gender identity. The Court was not convinced by the defendant’s argument that the plaintiff was dressing in a distracting manner for which any student would be disciplined. The defendants were not distracted by the clothes themselves, but by the fact that the student wearing them was biologically male.

The defendants also suggested that the plaintiff’s “harassing behaviour towards classmates” was detrimental to the learning environment. The Court found that the issue of the plaintiff’s behaviour was distinct from the issue of how

the plaintiff dressed because “expression of gender identity through dress can be divorced from conduct in school that warrants punishment, regardless of the gender identity of the offender”. The school could discipline a student for threatening, harassing or obscene conduct, but could not discipline a student for wearing gender specific clothing.

The plaintiff also asserted a liberty interest under Articles I and X of the *Massachusetts Constitution*. The Court found that the plaintiff would be likely to prevail on this claim as well. It recognised that the plaintiff would be able to demonstrate that her attire was not distracting and that the defendant’s interests did not outweigh her liberty claim. In addition, it held that the defendant was guilty of sex discrimination for disciplining the plaintiff, who identified as female, when she wore clothes that other female students would not have been disciplined for wearing. The Court distinguished the plaintiff’s case from *Harper v. Edgewood Board of Education* on the grounds that the plaintiff “is not merely engaging in rebellious acts to demonstrate a willingness to violate community norms; plaintiff is expressing her personal identity, which cannot be suppressed by the school merely because it departs from community standards”. The Court further stated that it could not allow “the stifling of plaintiff’s selfhood merely because it causes some members of the community discomfort”.

The Court found that the plaintiff satisfied the burden of irreparable harm when she was denied the benefits of school, being in an interactive environment, and social development. The Court preliminarily enjoined the defendant from disciplining the plaintiff for wearing clothing that any other male or female student could wear without consequences.

Teerarojjanapongs I and Champathong II v. The Governor of Chiang Mai Province,

Chiang Mai Administrative Court of Thailand (5 February 2010)

Procedural Posture

The plaintiffs filed a complaint to the Administrative Court challenging a regulation that prohibited participants in a parade from wearing attire that expressed “sexual deviance.”

Facts

Each year the Province of Chiang Mai held a flower festival. As part of the festival there was a competition of festival floats. In 2009, the Governor of Chiang Mai issued regulations that required that women and men sitting on the floats had to dress properly and prohibited attire expressing sexual deviance. Plaintiffs filed a complaint against this provision of the regulations.

Issue

Whether a regulation prohibiting the wearing of attire that expressed “sexual deviance” was unconstitutional.

Domestic Law

Constitution of Thailand, Article 26 (human dignity) and Article 30 (equality and equal protection).

Flower Festival, Chiang Mai Province, 34th time, year 2553, Article 4.

Regulations for arranging Flower Festival floats joining the Flower Festival competition in the Chiang Mai.

Reasoning of the Court

The plaintiffs argued that the challenged provision would prevent persons “who are neither men nor women” (transgender individuals) from participating in the flower festival floats parade. The plaintiffs argued that the regulation was unconstitutional because it constituted unfair discrimination based on sexual difference and did not respect human dignity.

The defendant, on the other hand, argued that the ban on attire expressing sexual deviance had actually been in force each year since 2007 but, in practice, the defendant’s officers had never prevented “persons who have sexual diversity” from participating in the parade. This was because there had never been problems related to inappropriate or immoral attire. The defendant also argued that the ban was intended to be implemented solely within the framework of the flower festival beauty competition.

The Court first noted that three conditions had to be satisfied before it could issue a restraining order: success must be likely on the merits; failure to issue an order would cause severe injury to the plaintiff that would be difficult to amend afterwards; the restraining order would not pose problems to the administration of State bodies or the provision of public services.

The Court then applied these conditions. With regard to the first, the Court analysed the constitutional provisions concerning fundamental rights and freedoms and the legitimacy of grounds for their limitation.

In particular, Article 29 provided that the rights and freedoms guaranteed in the Constitution could be limited by law but only to the extent necessary and in a way that did not violate the essence of the right or freedom involved. Article 30 stated that all individuals were equal before the law and enjoyed equal legal protection. Unjust discrimination was therefore forbidden.

The Court noted that the challenged law directly limited the rights of persons wearing certain kinds of dress to participate in the parade. In the Court’s view,

this had a broad impact and denied the equal rights of “persons who have sexual diversity”. The challenged provision was therefore likely to be unlawful.

With regard to the second condition, the Court held that if the regulation remained in force, persons dressing contrary to their gender could be prevented from participating in the parade. This would constitute an injury that could not be amended after the event had finished.

As for the third condition, the Court noted that the defendant had admitted that in the flower festival parade some participants had always dressed in a way that did not correspond to their “natural gender”, but that there had been no instances of inappropriate attire. Therefore, preventing the authorities from implementing the challenged provision would not obstruct public administration or the provision of services.

The Court issued a temporary restraining order preventing the regulation from taking effect.

McMillen v. Itawamba County School District, United States District Court for the N.D. of Mississippi (23 March 2010)

Procedural Posture

The plaintiff filed a motion for preliminary injunction challenging the defendant school district’s decisions to prohibit her from bringing her girlfriend to the prom and wearing a tuxedo to the prom, and to cancel the event when she sought to complain.

Facts

The plaintiff, a lesbian student at Itawamba Agricultural High School (IAHS), asked her girlfriend to the school prom. Because the IAHS had an “opposite sex” dating policy, the plaintiff sought permission from the assistant principal and was told that “they could attend with two guys as their dates but could not attend together as a couple”. The plaintiff then sought permission from the principal and superintendent, and was told that they could attend separately but not together. Furthermore, the plaintiff and her girlfriend would not be permitted to slow dance together “because it could ‘push people’s buttons’”, and they would be “kicked out” if their presence or behaviour made other students uncomfortable. The plaintiff was also told that she could not wear a tuxedo or even trousers because girls were required to wear dresses.

On the plaintiff’s behalf, the ACLU sent the school district a letter asking it to change its decision. Instead the school board cancelled the prom and asked private citizens to organise an event instead.

The plaintiff testified that the prom was a memorable aspect of high school that she wished to share with her girlfriend. She further stated that telling her to attend the prom with a boy denied her, a gay student, access to the rights that straight students enjoyed: the latter were not only permitted to attend with the person they were dating but were allowed to dance together. Finally, she stated that she did not want to go to the prom if the school forced females to attend in traditional gender specific clothes and would not allow females to wear a tuxedo.

Issue

Whether the plaintiff could obtain a preliminary injunction against the school district preventing it from denying her permission to bring her girlfriend to the prom or wear a tuxedo, and preventing cancellation of the event; whether the plaintiff's constitutionally protected viewpoints under the 1st Amendment to the United States Constitution had been suppressed.

Domestic Law

Constitution of the United States, 1st Amendment (freedom of speech).

Canady v. Bossier Parish School Board, United States Court of Appeals for the 5th Circuit, 2001 (“[T]he ‘expression of one’s identity and affiliation to unique social groups’ may constitute speech as envisioned by the 1st Amendment.”).

Collins v. Scottsboro City Board of Education, Alabama Circuit Court 38th Judicial District, United States, 2008 (holding that school could not cancel a prom to prevent students from attending and requiring school to hold prom).

Fricke v. Lynch, United States District Court of Rhode Island, 1980 (holding that it was denial of freedom of expression to prevent a male student from attending prom with his boyfriend).

Gay Students Organization of University of New Hampshire v. Bonner, United States Court of Appeals, 1st Circuit, 1974 (holding that prohibiting a gay student group from holding social activities on campus denied members their right of freedom of association).

Romer v. Evans, United States Supreme Court, 1996 (finding unconstitutional a State constitutional amendment that withdrew a specific class of people - gays and lesbians - from the protection of the law without a legitimate State purpose, in violation of the equal protection clause of the federal Constitution).

Reasoning of the Court

The plaintiff had to satisfy four criteria in order for the Court to grant a preliminary injunction, each of which was addressed by the Court in detail.

The first, whether the plaintiff had “a substantial likelihood of success on the merits”, was found to have been satisfied. The Court came to this conclusion

by considering the plaintiff's free speech rights. The Court referred to **Romer v. Evans**, *Agriculture v. Moreno*, *Gay Students Organization of University of New Hampshire v. Bonner*, *Canady v. Bossier Parish School Board*, and *Collins v. Scottsboro City Board of Education* and found that the expression of sexual orientation was a protected form of speech. The Court also looked to the reasoning of *Fricke v. Lynch*, where the court had decided that the plaintiff's sense of personal identity and expression in attending prom with a person of the same-sex was a form of protected speech. The Court observed that clothing could be a form of speech. Where expression of sexual orientation and gender identity were protected "speech", the defendants violated the plaintiff's right to freedom of expression under the 1st Amendment by denying her request to bring her girlfriend to the prom and to wear a tuxedo.

The second and third factors, whether the plaintiff faced a "substantial threat of irreparable injury" and whether the potential harm to the plaintiff outweighed that to the defendant, were also found to be satisfied. The Supreme Court had established, through prior case law, that violating 1st Amendment rights constituted irreparable harm. Further, the Court was not convinced that the defendants would be harmed by the plaintiff's expression, because possible complaints would not disrupt the school prom and there was no reason to believe that the plaintiff's participation at the prom would be disruptive. As the plaintiff's freedom of speech had been curtailed by the defendants' policies, the Court found that both criteria were met.

With regard to the fourth criterion, "that granting the injunction will not disserve the public interest", the Court rejected the assertion that protecting the plaintiff's "rights and encourag[ing] the free exchange of ideas and viewpoints" was in the public interest. Parents had already agreed to sponsor a private prom for all students, including the plaintiff and her date, and the Court considered that requiring the school to host the prom "at this late date would only confuse and confound the community on this issue". In addition, the court found itself unsuited to the role of planning and overseeing a social event. Since an injunction would have been disruptive and contrary to the public interest, the motion was denied. The Court kept the case open should the plaintiff wish to amend her complaint and seek damages.

Postscript

The case was subsequently settled out of court for \$35,000 and the school agreed to implement an anti-discrimination policy that included sexual orientation.

- 1 Matthew Gayle, Note, 'Female by Operation of Law: Feminist Jurisprudence and the Legal Imposition of Sex' (Spring 2006), 12 *William and Mary Journal of Women and the Law* 737, 742.
- 2 'Cross-dressing men flogged in Sudan for being 'womanly'', BBC News (4 August 2010); 'Sudan male models fined for make-up 'indecent'', BBC News (8 December 2010); Amnesty International, *Sudan: Abolish the Flogging of Women* (London 2010).
- 3 'Nigeria transvestite handed fine', BBC News (15 February 2005); 'Cross-dresser jailed in Nigeria', BBC News (4 March 2008); 'Cross-dressers' in Nigeria court, BBC News (15 February 2008).
- 4 Case pending in the High Court of Guyana. SASOD, Marking World Social Justice Day, Transgender citizens, supported by SASOD, move to the courts to challenge Guyana's law against "cross-dressing", (Press Release 22 February 2010).
- 5 *City of Columbus v. Rogers*, Ohio Supreme Court, 5 March 1975.
- 6 William N. Eskridge, 'Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, Nomos, and Citizenship, 1961-1981' (Spring 1997), 25 *Hofstra Law Review* 817, 862 & n. 196.
- 7 *Doe v. McConn*, US District Court for the Southern District of Texas, 3 April 1980.
- 8 EU Fundamental Rights Agency, Homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity: comparative legal analysis (2010, Update), at 21.

RECOGNISING GENDER IDENTITY

Chapter eight

Recognising Gender Identity

INTRODUCTION

Transgender law covers a wide range of issues that arise when an individual's internal experience of gender does not correspond with the sex assigned at birth. Transgender individuals typically face discrimination in education, employment, immigration, and child custody decisions. They suffer high rates of hate crimes and are especially vulnerable to physical and sexual abuse in prison. Cases involving transgender individuals are included in a number of other chapters in this book. The cases here focus on one particular aspect of transgender law: legal recognition of the preferred gender of a transgender individual.

Legal recognition cases most commonly arise when individuals seek to change their sex on identity documents, such as birth certificates, passports, and national identity cards. They may concern other documents, such as diplomas, driver's licence, national health insurance card, or other certification or documentation related to identity or qualifications. Legal recognition cases also occur when individuals change their name to reflect a preferred gender. Since identification is required for most activities in daily life (enrolling in school, finding a job, opening a bank account, renting an apartment, or travelling across a border), the issue is one that is significant to the individuals concerned. An individual's right to change the sex on his or her identity documents protects privacy and prevents discrimination and stigma on the basis of gender identity or gender re-assignment.

In some countries it is legally difficult to change gender. Individuals may be required to undergo genital reconstruction surgery, be infertile, and be single or divorced. In other countries, no such requirements are imposed, or no legislative framework exists. The issue of changing gender on identity documents is closely related to the right to marry, which is discussed in Chapter 9.

The rights to equality and privacy are at the centre of jurisprudence on gender identity and gender recognition. In *P.V. v. Spain*, the European Court of Human Rights observed that Article 14 of the *European Convention* without doubt covers "transsexualité".¹ Much earlier, however, beginning with *Christine Goodwin v. United Kingdom*, the Court held that a State's failure to provide legal recognition

for Goodwin's gender re-assignment violated her right to privacy. The Court stated: "Under Article 8 of the Convention in particular, where the notion of personal autonomy is an important principle underlying the interpretation of its guarantees, protection is given to the personal sphere of each individual, including the right to establish details of their identity as individual human beings".² It confirmed this position in a line of succeeding cases. On similar grounds, under the ICCPR the UN Human Rights Committee has urged States to "recognize the right of transgender persons to a change of gender by permitting the issuance of new birth certificates".³

The European Court has also addressed the requirements that States have imposed on health insurance coverage for medical treatment associated with changing gender identity. In *Van Kück v. Germany*, the applicant had been denied reimbursement of the costs of medical treatment for expenses related to her gender reassignment operations and hormone treatment. The German courts had concluded that the applicant had not proved the treatments in question were medically necessary. The European Court found that requiring "medical necessity" breached the applicant's rights under Article 6 (fair hearing) and Article 8 (privacy) of the Convention.⁴ In a similar case, the European Court held that imposing a mandatory two-year waiting period before diagnosis of "true transsexualism" could be established was contrary to both Articles 6 and 8.⁵

The cases in this chapter can be divided into two categories. In the first, courts are dealing with a request for legal recognition of a change of gender in the absence of a specific statutory framework. The cases from Argentina, Malaysia, South Korea, Pakistan, and the Philippines fall into this category. The issue is whether an individual should be recognised under law as having a gender different from the one assigned at birth. In the second category, States have enacted legislation concerning legal recognition for a change of gender. Courts are therefore dealing with the question of whether the requirements imposed under such laws are constitutional. The cases from Australia, Germany, and New Zealand fall into this category.

In almost every case in the first category, the individual seeking gender recognition had undergone gender reassignment surgery. The exception is *Khaki v. Rwalpindi*. There the Supreme Court of Pakistan was operating in a cultural context that had long accepted *hijras* in some clearly defined social positions. The term *hijra* refers to individuals who are born male but who adopt female gender identities, typically through choice of dress and social roles. They may or may not have had male genitals removed surgically. The Court therefore did not focus its analysis on the surgical question when it ordered that *hijras* should be permitted to register as a "third sex."

In the other cases in this category, the courts reveal very different reasoning. In *Silverio v. Philippines*, the Philippines Supreme Court held that the plaintiff could

not change her name or sex because the law only allowed changes in official documents to be made following clerical or typographical errors. In the view of the Court, sex was immutably fixed at birth. For the South Korean Supreme Court, by contrast, true gender was determined not only by biology, but also by psychological and social factors. Because the principle behind the *Family Register Act* was to record the true personal status and relationships of a person, it was reasonable to allow the plaintiff to “correct” his gender in the Family Register. The Argentine court adopted a judicial compromise. Drawing on international and comparative law, the Family Tribunal had emphasised the right of privacy under Section 19 of the Constitution, which included the right to define one’s personal identity. On this ground, it concluded that the applicant should be issued new identity documents reflecting the changed gender. However, because the birth certificate was a record of a historical fact (the sex as recorded at birth) a new birth certificate could not be issued.

The second set of cases address statutory conditions for a change of gender. The Australian and New Zealand cases focus on the requirement of genital surgery. In ***Michael v. Registrar-General of Births***, the applicant was a transgender man who had undergone a bilateral mastectomy, was on testosterone hormone treatment, and had lived as a man for years. He had not, however, had genital reconstruction surgery. Under Section 28 of the *Births, Deaths, and Marriages Registration Act 1995*, a Family Court could declare that a birth certificate should contain the person’s “nominated sex” if it was satisfied, on the basis of expert medical evidence, that the applicant “has assumed (or has always had) the gender identity of a person of the nominated sex, and has undergone such medical treatment as is usually regarded by medical experts as desirable to enable persons of the genetic and physical conformation of the applicant at birth to acquire a physical conformation that accords with the gender identity of a person of the nominated sex; and will, as a result of the medical treatment undertaken, maintain a gender identity of a person of the nominated sex”. Noting the expense and dangers of genital reconstruction surgery for a transgender man, the Court held that Michael was not required to undergo surgery in order to obtain a new birth certificate.

The Court also stated, however, that Michael would not always be considered legally male. In reaching this conclusion, the Court studied the legislative history of the Act and in particular Part 5, titled “Declarations of Family Court as to sex”. Section 33 of Part 5, titled “New information not to affect general law”, provided that “the sex of every person shall continue to be determined by reference to the general law of New Zealand”. The Court interpreted this as a reference to general law, which limited marriage to opposite sex partners. Furthermore, Section 77 of the Act concerned authorisation to search birth certificate records. Such searches were generally limited to the Registrar-General, but the Registrar-General could permit another person to inspect the records if the purpose was to investigate “whether or not the parties to a proposed marriage are a man and a woman”. As

a result of these provisions, the Court concluded that Michael could be given a new birth certificate reflecting his male sex but that under certain circumstances information about the change of sex would be disclosed.

In *State of Western Australia v. AH*, the Supreme Court of Western Australia analysed the requirement of a “reassignment procedure” under the *State’s Gender Reassignment Act 2000*. Two individuals, AH and AB, had adopted male gender identities, undergone double mastectomies, and were undergoing hormone therapy. Neither AH nor AB had removed their internal female sexual organs or had surgery to remove external female genitalia or construct male genitalia. A lower court had found that both had completed the requirements for legal recognition of gender reassignment. The Supreme Court of Western Australia disagreed. It held that, under the Act, surgery was not specifically required, but that only individuals who had adopted the “gender characteristics of a person of the gender to which the person has been reassigned” could qualify for a recognition certificate. The Court found dispositive the fact that the applicants had retained both their internal reproductive organs and external genitalia. They did not therefore possess sufficient male gender characteristics.

Australian courts have been critical of the gender reassignment procedures imposed under State law. The Supreme Court of Western Australia suggested that legislators should have considered the fact that the Act made it more difficult for female to male transgender individuals to obtain a recognition certificate. In *Re. Alex*, the federal Family Court of Australia regretted “that a number of Australian jurisdictions require surgery as a pre-requisite to the alteration of a transsexual person’s birth certificate in order for the record to align a person’s sex with his/her chosen gender identity”.⁶ This case was relied upon by the Family Court of Auckland in *Michael v. Registrar-General of Births*; a later decision concerning Alex is included in this chapter.

The two German cases deal with the requirements of the *Transsexual Law*. In both cases, the Constitutional Court found portions of the law unconstitutionally limited rights. In the first case, *1 BvL 10/05*, the Constitutional Court struck down the requirement that an applicant must be unmarried or divorced before a new gender could be legally recognised. It found the forced divorce provision created a conflict between the right to marry and the right to protect one’s private sphere, including realisation of a self-determined sexual and gender identity. Both were protected under the *Basic Law*. Although the legislative purpose, to prevent the appearance of same-sex marriage, was legitimate, the law failed the proportionality test. Forcing the applicant to choose between recognition of her gender identity and her marriage was disproportionate to the legitimate legislative interest.

In the second case, *1 BvR 3295/07*, the Constitutional Court considered the requirement that an individual must undergo gender reassignment surgery in order to be legally recognised in a new gender. The applicant, who was

registered as male at birth but lived as a woman and was in a relationship with a woman, had been refused a civil partnership because civil partnerships were only available to same-sex couples. Because the applicant had not undergone reassignment surgery, marriage was the only means by which she and her partner could legally protect their relationship. However, since marriage in Germany was limited to opposite-sex couples, being in a marriage meant disclosing publicly that the applicant was born male. The Court held that the requirement of gender reassignment surgery was incompatible with the right to sexual self-determination and physical integrity, as protected by the *Basic Law*.

CASE SUMMARIES

In re KFB, Family Tribunal No 1 of Quilmes, Argentina (30 April 2001)

Procedural Posture

The plaintiff filed a petition before the Family Tribunal to have the sex and name on his birth certificate amended to match his acquired gender identity and to obtain new identity documents.

Facts

The plaintiff was born biologically female but identified as male. He underwent numerous surgeries, the first of which, a double mastectomy, was performed when he was fifteen years old. He subsequently underwent irreversible genital reconstruction surgery to create male genitalia. Because changes in identity documents were not automatically granted in Argentina, the plaintiff sought judicial permission.

Issue

Whether the plaintiff's request to change the sex on his birth certificate and receive a new identification card should be granted.

Domestic Law

Anti-Discrimination Law No. 23.592.

Constitution of Argentina, Section 19 ("The private actions of men which in no way offend public order or morality, nor injure a third party, are only reserved to God and are exempted from the authority of judges. No inhabitant of the Nation shall be obliged to perform what the law does not demand nor deprived of what it does not prohibit").

Comparative Law

American Convention on Human Rights, Article 5(1) (Every person has the right to have his physical, mental, and moral integrity respected).

American Declaration of the Rights and Duties of Man, Articles I (right to life, liberty and personal security), II (right to equality before the law), V (right to protection of private and family life), XVII (right to residence and movement), and XVIII (right to a fair trial).

French Declaration of the Rights of Man and of the Citizen (French Declaration of the Rights of Man), Articles 4 (“Liberty consists in being able to do all things that do not harm others”), and 5 (“Law can only prohibit such actions as are hurtful to society”).

International Law

B v. France, ECtHR, 1992 (finding a violation of Article 8 where the law refused to recognise the change of sex of a transgender woman in her civil status register and on her official identity documents).

Reasoning of the Court

The Court’s analysis concerned the right to privacy, which it linked to the principle of personal autonomy and the harm principle of J.S. Mill. The Court cited Section 19 of the Constitution, which protected the right to personal freedom and personal autonomy. It also referred to Articles 4 and 5 of the *French Declaration of the Rights of Man* and Articles I, II, V, XVII, and XVIII of the *American Declaration of the Rights and Duties of Man*, which upheld the legality of acts that do not harm others. According to the Court, individuals, including minorities, had the right to define their own identity as part of their personal freedom. In a democracy, the government did not have the power to prescribe how minorities lived their lives. Minorities had the right to define their own personal identity even when they did not conform to the majority’s sense of morality. As a transgender man, the plaintiff had expressed his desire to belong to his acquired sex as part of his constitutional right to define his own personal identity. As an expression of free choice, the decision to change sex must be respected.

Section 19 of the Constitution guaranteed intimacy. Referring to *B v. France*, the Court held that this right should be interpreted to include the right to sexual identity. Furthermore, Article 5 of *Law 23.054*, incorporating the *American Convention on Human Rights*, guaranteed the right of every person “to have his physical, mental, and moral integrity respected”. Psychological sex was part of that integrity and it was not necessarily defined by the person’s sex at birth. Relying on medical testimony, the Court noted that transgender people feel that they belong to a sex other than their genital, anatomical, and legal sex at birth. Their psychological sex was part of their personality and superseded their biological sex; it was an integral part of identity. By having irreversible genital reconstruction surgery, the plaintiff’s psychological and morphological sex now corresponded. Even if he was genetically female, in all other aspects he was his new sex. His right to personal integrity included his right to recognition of his new sexual identity.

The Court held that because the Constitution guaranteed the right to personal integrity and a transgender man or woman's personal identity included his or her acquired sex, a transgender man or woman had the right to be issued new identification documents reflecting the changed sex. The Court also pointed out that the laws of Sweden, Germany, Italy, Holland, Turkey, Spain, and several States in the USA allowed changes of sex in identification documents.

The Court found that Sections 37 and 75 of the Constitution implied the right to equality through legal action, but also through access to real equality of opportunity. The government was constitutionally responsible for removing obstacles to the effective realisation of this equality. Furthermore, the *Anti-Discrimination Law* made restriction or obstruction of the enjoyment of constitutional rights on the basis of sex illegal.

The Court accorded weight to the government's argument, that preservation of the "biological truth at birth" in the original document protected third parties and prevented fraud. Prior decisions were particularly adamant about this when personal identity and family relations were involved. Since the birth at sex was related to identity and to family, the birth sex ought to remain in the birth certificate. Additionally, preserving evidence of the individual's birth sex protected laws preserving marriage, as only between a man and a woman. For these reasons, a new birth certificate with changed sex could not be issued.

To protect the constitutional rights of transgender people as well as the constitutionally protected interest in maintaining historically accurate interpretations of the law, the Court ordered that a note should be placed in the margin of the original birth certificate noting the change of sex.

With regard to identity documents other than the birth certificate, the Court concluded that the change of sex should be granted. As requested, the plaintiff would be issued a new identification card with the masculine version of his original name at birth.

JG v. Pengarah Jabatan Pendaftaran Negara, High Court of Kuala Lumpur, Malaysia (25 May 2005)

Procedural Posture

The plaintiff filed a petition to be legally recognised as female and to have the last digit in her identity card changed to indicate the female gender.

Facts

The plaintiff was registered as male at birth. She identified with the female gender and in 1996 she had gender reassignment surgery in Thailand. Upon returning to Malaysia, she applied for a name change, which was granted, and she was given

a new identity card. However the plaintiff's identity number continued to have an odd number as the final digit, indicating the male gender. The plaintiff wanted to marry a man and was concerned that the number on her identity card would prevent her marriage.

Issue

Whether the plaintiff could be legally recognised as female by the Court and could have the last number on her identity card changed from an odd number to an even number to indicate the female gender.

Domestic Law

Wong Chiou Yong v. Pendaftar Besar/Ketua Pengarah Jabatan Pendaftaran Negara, High Court of Ipoh, 2005 (upholding a decision of the National Registration Department refusing to amend or change the birth certificate and national registration identity card of the plaintiff, a transgender man).

Comparative Law

Corbett v. Corbett (Otherwise Ashley), Probate, Divorce and Admiralty Division, United Kingdom, 1970 (holding that sex was biologically fixed at birth and could not be changed by medical or surgical means).

Bellinger v. Bellinger, England and Wales Court of Appeal, Civil Division, 2001 (determining that sex was based on biological factors; dissent of Lord Justice Thorpe).

Bellinger v. Bellinger, House of Lords, United Kingdom, 2003 (criticising *Corbett v. Corbett* but holding that the question of gender recognition should be left to the legislature).

Attorney General v. Kevin and Jennifer, Full Court of the Family Court of Australia at Sydney, 2003 (declining to follow *Corbett*; taking the view that psychological factors take precedence over biological ones, and stating "where a person's gender identification differs from his or her biological sex, the [psychological] should in all cases prevail. It would follow that all transsexuals would be treated in law according to the sex identification, regardless of whether they had undertaken any medical treatment to make their bodies conform with that identification").

Reasoning of the Court

The plaintiff presented the testimony of three doctors certifying that she was both mentally and physically a female. The Court began by acknowledging a recent decision, *Wong Chiou Yong*, on the same issue in a different domestic jurisdiction, which had closely followed the *Corbett* view of sex as immutably fixed at birth and had rejected that applicant's petition for a change of identity documents. The High Court of Kuala Lumpur, however, held that *Corbett* was not controlling and that it would follow *Kevin & Jennifer*, which held that the psychological status of the

individual was dispositive in determining gender. It also quoted the dissent in the Court of Appeal case of *Bellinger v. Bellinger*, where in dissent Lord Justice Thorpe had emphasised the importance of psychological factors in assessing gender.

The Court observed that ultimately the issue needed to be addressed by Parliament and should be informed by expert medical evidence. Until Parliament acted, however, the determination was for the courts. In the cases that followed *Corbett*, courts “had expressed sympathy with the victim trapped in such predicament and regretted they could not assist”. In this case, stated the Court, when medical evidence has established that the gender of the plaintiff was other than the biological sex, it was the duty of the Court to grant relief. The Court emphasised that “the medical men have spoken: the plaintiff is FEMALE”.

The Court held that, in the absence of legislative guidance, the courts should listen to medical experts to determine gender. Here, doctors had examined both the physical and psychological status of the plaintiff, and found that she was female. The plaintiff was granted relief.

In re Change of Name and Correction of Family Register, Supreme Court of South Korea (22 June 2006)

Procedural

The plaintiff originally brought an application to a lower court for correction of the family register. The application was rejected because the *Family Register Act* did not provide for change of gender.

Facts

The plaintiff was born biologically female but grew up identifying as a male. As a young adult, he began to live and work as a man doing construction work. At the age of 41 he was diagnosed with transsexualism and had his breasts and uterus removed, his genitals surgically reconstructed, and he started taking hormones. The plaintiff never married or had children, and was in a committed relationship with a woman who knew he was transgender man. The plaintiff’s doctors said he had a low possibility of changing back to his former gender and had a firm male gender identity.

Issue

Whether a transgender person’s gender can be changed in the Family Register when the law provides only for changing errors or omissions.

Domestic Law

Family Register Act, Article 120 (governing the application procedure for an individual to correct an error or omission).

Constitution of South Korea, Articles 10 (dignity and pursuit of happiness), 34(1) and 37(2) (limitations to rights).

Decision 96Do791, Supreme Court of South Korea, 1996 (holding that biological factors but also psychological and social factors, as well as the public's evaluation and attitude, all contributed toward the determination of a person's gender).

Reasoning of the Court

The Court distinguished the past, where gender was solely determined by biology, from the present, where gender included those psychological and social factors that comprised a person's sense of masculinity or femininity. *Decision 96Do791* stated that "the determination of a person's gender shall be made after a comprehensive consideration of the biological, psychological, and social factors". Although biological sex could be determined at birth, the social and psychological gender had to be determined as a person matured.

The Court next discussed the World Health Organization and the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM). DSM-IV, published in 1994, demonstrated widespread acceptance of "transsexualism" as a "gender identity disorder" which involved therapy, social presentation as the psychological gender, hormone therapy, and in some cases genital reconstruction.

Because it was impossible to tell at birth that a person would develop an internal gender identity that was not that of his or her biological gender, the Court held that a "transsexual" person should have the opportunity to be recognised in his or her new gender once the psychological factors became clear. The Court concluded that the legal gender should be the acquired gender (rather than the biological one), when: a person consistently felt discomfort with his or her biological sex; lived as and was accepted as the opposite sex both in appearance and social interaction; sought the physical characteristics of that sex, or had had full gender reassignment surgery; had been diagnosed with, and been counselled for, 'transsexualism' by a psychiatrist; and had received hormone treatments.

The Court noted that the *Family Register Act* did not have provisions for the correction of gender in the register, but that the principle behind the *Family Register Act* was to record the true personal status and relationship of a person. It was therefore reasonable to allow a transgender person to correct the register.

The Court further stipulated that, according to the Constitution, transgender persons should "be assured of worthiness and dignity as a human being, have the right to pursue and be entitled to a life worthy of human beings, [and] such rights should be protected as long as they are not against the maintenance of law and order or the public welfare." It was likely that, where the name and gender still reflected the person's previous sex, transgender men and women would face discrimination depriving them of their fundamental rights and resulting in a violation of constitutional protections.

The Court also found that the failure to make provision in the *Family Register Act* for transgendered persons was not a conscious choice by the legislature but due to a failure to consider that such provisions would be needed.

Finally, the Court held that the *Family Register Act* should adapt to changes in modern law, and under Article 120 it was reasonable to allow a transgender person to change the Family Register to reflect his or her changed gender.

The Court held that a transgendered person who had undergone complete genital reconstruction should be able to change his or her gender in the registry to reflect the new sex. The case was therefore reversed and remanded to the lower court.

Silverio v. Philippines, Supreme Court of the Philippines, First Division (22 October 2007)

Procedural Posture

The plaintiff filed a petition with the Regional Trial Court of Manila to change the first name and the sex on his birth certificate. No opposition was made to the petition. During the trial, the plaintiff presented the testimonies of his doctor, his fiancé, and himself. The trial court ruled in favour of the plaintiff. The Republic of the Philippines then appealed on the grounds that no law existed to allow sex to be altered on birth certificates in the Philippines. The Court of Appeals ruled in the government's favour. The plaintiff then petitioned the Supreme Court claiming that a change of name and sex on the birth certificate was allowed under the *Civil Code* and the *Rules of the Court*.

Facts

The plaintiff stated that although he was registered male at birth, he had felt himself to be female since childhood. He consulted several doctors in the United States, and after extensive psychological examination he underwent hormone treatment, breast augmentation, and gender re-assignment surgery. For the petition, he had a Filipino doctor examine him, who issued a certificate confirming these facts. The plaintiff lived as a woman, was engaged to be married, and sought legal recognition as female and a new name, Mely.

Issue

Whether existing Philippine law allowed the plaintiff to have his petition for official name and sex change granted.

Domestic Law

Civil Code of the Philippines, Articles 407, 408, and 412.

Civil Code Amendment RA 9048 (legislative amendment establishing guidelines for changing a first name, which originally required a judicial order unless a clerical

or typographical error occurred, and allowing administrative officers to govern the process. Changes limited to instances where (1) the name was ridiculous, had a bad connotation, or was hard to pronounce/spell, (2) the new name was commonly used, and has been for an extended time, or (3) a name change would avoid confusion).

Rules of Court, Article 108 (procedure governing substantial changes to the registry).

Wang v. Cebu City Civil Registrar, G.R. No. 159966, Second Division of the Philippines Supreme Court, 2005.

Comparative Law

K v. Health Division, Department of Human Resources, Supreme Court of Oregon, United States, 1977 (holding that it was reasonable to assume that the intent of the legislature was that a birth certificate was an historical record of the facts as they existed at the time of birth, subject to the specific exceptions of the statute; finding that the issue was one that should be decided by the legislature as a matter of public policy).

In re Ladrach, Probate Court of Stark County, Ohio, United States, 1987 (holding that a transgender woman could not obtain a marriage licence to marry a man).

In re Marriage License for Nash, Court of Appeals of Ohio, United States, 2003 (holding that the public policy in Ohio prohibited a transgender man from marrying a woman).

Standard Oil Co. v. United States, United States Supreme Court, 1911.

Reasoning of the Court

The Court began with a quotation from The Bible: Genesis; “He created them male and female”. The Court addressed the plaintiff’s petition to change his name based on his sex reassignment, as granted by the trial court. However, citing *Wang v. Cebu City Civil Registrar*, the Court held that changing one’s name was a privilege and not a right. Using *K v. Health Division*, a case from the United States, the Court also stated that name change was controlled by statute. It undertook a detailed analysis of the language of *Civil Code Amendment RA 9048* and concluded that where sex reassignment was not explicitly listed as a ground for name change, granting the petition would increase confusion rather than reduce it. Furthermore, stated the Court, the plaintiff “failed to show, or even allege, any prejudice that he might suffer as a result of using his true and official name”.

In addition, the Court held that the plaintiff’s appeal to change his official sex could not be granted because it was not the result of a clerical or typographical error in the official documents, which were correct regarding the plaintiff’s sex at birth. Referring to *In re Ladrach*, the Court stated that it must look to the statutes, specifically Article 412 of the *Civil Code*, which specified that “no entry in the civil

register shall be changed or corrected without a judicial order”. It found that sex reassignment was not among the legal acts or events mentioned in the governing law. The lack of statutory law regarding sex reassignment was fatal to the petition because “the determination of a person’s sex made at the time of his or her birth, if not attended by error, is immutable”.

The Court noted that the legal meaning of male and female should be traditionally defined, and stated that transgender persons did not fit within those definitions. It held that the well-known meaning of a word at the time a statute was created should be presumed. Sex was not an alterable category and therefore a transgender woman was not “included in the category female”.

The Court disagreed with the trial court decision that to allow a name and sex change would cause no harm. Such a change would have legal and public policy consequences and could allow the plaintiff to marry a man, which would “substantially reconfigure and greatly alter the laws on marriage and family relations”.

The Court concluded that “[t]he duty of the courts is to apply or interpret the law, not to make or amend it. In our system of government, it is for the legislature, should it choose to do so, to determine what guidelines should govern the recognition of the effects of sex reassignment.” Where the issues were largely governed by statutes, the Court held that legislation first had to confer the right to change name and sex and had to establish the statutory guidelines for that right.

The Court found that change of name was not a judicial issue but an administrative one, and that there was no merit to the claim. It upheld the Court of Appeals’ decision to dismiss the petition. It denied the plaintiff’s request to have his sex altered on his birth certificate, because no specific law allowed sex to be altered in the government registry.

1 BvL 10/05,

Federal Constitutional Court of Germany (27 May 2008)

Procedural Posture

After undergoing gender reassignment surgery, the petitioner requested recognition of her new gender at the local administrative office. Since the petitioner was still married to a woman, she did not meet the requirements under the *Transsexual Law*. The administrative office sought review of the case by the Federal Constitutional Court.

Facts

The *Transsexual Law* provided a mechanism for the legal recognition of gender change. Under Section 1, the “Minor Solution” permitted individuals to change

their names but did not permit legal recognition of a new gender. To qualify for the Minor Solution, an individual had to live in the new gender for at least three years and the court had to find that the individual would be unlikely to revert to the gender assigned at birth. Under Section 8, the “Major Solution” allowed an individual who had undergone gender reassignment surgery to have his or her new gender legally recognised. Three conditions were imposed: the individual could not be married; must be permanently incapable of reproducing; and was required to have acquired all the external physical characteristics of the new gender.

The petitioner, who was biologically male but had always identified with the female gender, was born in 1929 and had been married to a woman since 1952. In 2001, the petitioner adopted a female name under Section 1 of the *Transsexual Law*. The following year she underwent gender reassignment surgery. Although the petitioner and her wife wished to remain married, she sought to have her change of gender legally recognised under Section 8 because she had fulfilled all other legal criteria.

Section 8(1)(2) of the *Transsexual Law* left the petitioner with two options. She could file for divorce and then apply to be legally recognised as a woman; or she could remain married but legal recognition of her new gender would be denied.

Issue

Whether, in requiring transgender people to be unmarried or divorced as a requirement for legal recognition, Section 8(1)(2) of the *Transsexual Law* violated the constitutional rights of married transgender individuals under the *Basic Law*.

Domestic Law

Basic Law for the Federal Republic of Germany, Article 1(1) (human dignity), Article 2(1) (free development of personality), Article 2(2) (right to life and physical integrity), Article 3(3) (non-discrimination and equality before the law), and Article 6(1) (marriage and the family).

German Code of Civil Law.

Transsexual Law 1980, Section 8(1)(2).

Reasoning of the Court

Under the *German Code of Civil Law*, spouses were required to live apart for three years to establish that the marriage had failed. The petitioner argued that her marriage was strong and that the couple did not want to live separately for the mandatory three years. Furthermore, the petitioner experienced lasting psychological effects from the abuse she had suffered during the Nazi era. The petitioner feared that she could not live apart from her wife. A forced divorce under Section 8 of the *Transsexual Law* would be insulting and financially as well as emotionally injurious.

The Court held that Article 2(2) in relation to Article 1(1) of the *Basic Law* created a protection of the “private sphere” of a person’s life, which included realisation of self-determined sexual and gender identity. In the petitioner’s case, the attainment of her deeply felt female gender identity and the need to harmonise her physical and psychological sex were matters of human dignity and the protection of personhood which these Articles encompassed. The Court held that this personal sphere could be infringed only in cases of special public interest.

By providing a mechanism for the legal recognition of gender reassignment, Section 8 of the *Transsexual Law* was intended to accommodate and enhance the rights protected in Article 2(2) in relation to Article 1(1). However, the Court held that the requirement in Section 8(1)(2), requiring a transgender person to be unmarried before a gender change could be legally recognised, “substantially limited” the access to those rights of transgender people who were married. Section 8(1)(2) effectively forced the petitioner to choose between two constitutionally protected rights: the right to realisation of self-determined gender identity, and the right to marriage. This curtailment of constitutional rights could only be permitted if the provision in question was justified and proportionate to the pursuit of a legitimate goal.

The Federal Ministry of the Interior argued that the legislature’s legitimate goal, when it required unmarried (or divorced) status, was to prevent the occurrence of same-sex marriage. The Ministry submitted, and the Court agreed, that it was legitimate for the legislature to attempt to preserve the traditional character of marriage as a heterosexual institution and to prevent the “false impression” that same-sex couples would be able to marry.

The Court acknowledged that the legislation had already created a situation in which the appearance of same-sex marriage was legally possible, because the Minor Solution of the *Transsexual Law* did not require dissolution of marriages. In addition, married post-operative transsexuals who did not seek legal recognition of their gender change were effectively able to live in same-sex relationships and were not forced to end their marriages. Despite these inconsistencies, the Court nevertheless held that the legislature’s goal of preventing the occurrence of same-sex marriage was legitimate.

Having determined that the law had been enacted for a legitimate reason, the Court then considered whether the law operated in a manner that was justified and proportionate to its objective. In preserving marriage in its traditional form, Section 8(1)(2) created a tension between constitutional rights. In this case, the petitioner would have to fabricate reasons for a divorce in order to be recognised as female. The petitioner and her wife would then lose access to the rights and benefits which marriage conferred. On the other hand, if the petitioner and the petitioner’s wife did not end their marriage, Section 8(1)(2) then deprived the petitioner of the right to legal recognition of her self-determined gender identity.

For the petitioner, either choice entailed a deprivation of something existentially fundamental - her marriage or legal recognition of her gender identity. In the Court's opinion this was an unacceptable ultimatum that adversely affected the rights of the petitioner to "an extremely high degree". The impairment of the right of married transgender individuals was disproportionate to the legitimate interests of the legislature.

The Court held that the legislation could not force divorce on a person who, but for his or her marriage, fulfilled all the other criteria for recognition. The legislation should create a mechanism by which the union could continue in a different "but equally provided for" form. Under the current law, marriage encompassed two fundamental elements. Marriage was, first, an institution that could only be entered into by one man and one woman. It was, second, a legally created but private partnership of shared responsibility and companionship in which the State did not interfere. If, during the course of a marriage, one spouse discovered or disclosed an alternate gender identity, and took steps to realise that identity through gender reassignment, the couple could no longer have their relationship recognised as a marriage *per se*. However, the rights and duties that the couple had acquired when they entered into the marriage would still be protected under Article 6 of the *Basic Law* and the legislature was required to ensure that they were not diminished as a result of one spouse's change of gender.

The Court concluded that Section 8(1)(2) limited unacceptably the ability of a married transsexual person to fully enjoy the constitutional right to realise his or her self-determined sexual identity. The Court also suggested that, because only a small number of transsexuals were confronted by this situation, it was open to the legislature, in lieu of some other reform, to allow married transsexuals to obtain legal recognition of their identity while maintaining their marriage relationship (as an exception to the rule restricting same-sex marriage).

The Court declared Section 8(1)(2) of the *Transsexual Law* unconstitutional and inoperative until the legislature took action to remedy the situation.

"Michael" v. Registrar-General of Births,
Family Court of Auckland, New Zealand (9 June 2008)

Procedural Posture

The Registrar-General of Births applied to the Family Court for guidance with respect to all future sex and name change applications.

Facts

The plaintiff, Michael, was born with a female body but identified as male from an early age. In 2003 the plaintiff changed his female birth name to his current male name; and in 2004 he had a bilateral mastectomy and started taking testosterone

hormone treatment, which he expected to continue for the rest of his life. The plaintiff regularly consulted doctors, psychotherapists, and psychologists throughout the process, including Doctor R., a psychiatrist in gender identity issues, and Dr. F., a sexual health physician. The plaintiff's primary physicians testified that the plaintiff was a man, in terms of identity, appearance, manner, and outlook, and that, while surgery was part of gender reassignment therapy, it was not essential to the plaintiff's treatment. Furthermore, the plaintiff had lived as a man for a number of years, and had completed all the internationally-prescribed medical steps for gender transition. The plaintiff did not intend to undergo genital reconstruction, because he did not feel it affected his ability to be a man, and he felt that the risk and cost were greater than the possible benefit.

Issue

Whether the legislature intended to require individuals to undergo complete gender reassignment surgery before they could apply to change their name and sex on official documents; or, if not, to what degree applicants were required to have undergone physical changes consistent with their acquired sex.

Domestic Law

Births, Deaths, and Marriages Registration Act 1995, Sections 33 and 77(6)(c).

Attorney-General v. Otahuhu Family Court, High Court of New Zealand, 1995 (holding that, where a person has undergone surgical and medical procedures that have effectively given that person the physical conformation of a specified sex, no lawful impediment prevents that person marrying as a person of that sex).

Quilter v. Attorney-General, New Zealand Court of Appeal, 1998 (finding that the relevant Act defined marriage as a union between a man and a woman, without discussing the thresholds for legal recognition of male and female).

Comparative Law

Re Alex (Hormonal Treatment for Gender Identity Dysphoria), Family Court of Australia, 2004 (granting the request for a name change and hormone treatments for a minor; noting that "the requirement of surgery seems to be a cruel and unnecessary restriction upon a person's right to be legally recognised in a sex which reflects the chosen gender identity and would appear to have little justification on grounds of principle").

Attorney General v. Kevin and Jennifer, Full Court of the Family Court of Australia at Sydney, 2003 (declining to follow *Corbett* and stating that: "where a person's gender identification differs from his or her biological sex, the [psychological] should in all cases prevail. It would follow that all transsexuals would be treated in law according to the sex identification, regardless of whether they had undertaken any medical treatment to make their bodies conform with that identification").

Bellinger v. Bellinger, House of Lords, United Kingdom, 2003 (establishing a set of indicia for determining sex).

In re Kevin (Validity of marriage of a transsexual), Family Court of Australia, 2001 (holding that “it would be wrong to identify and define a person’s gender simply on the basis of the chromosomes, genitals, and gonads with which they are born. It is the mind as well as the body that determines the sex of an individual”).

International Law

Goodwin v. United Kingdom, ECtHR, 2002 (holding that classifying post-operative transgender persons according to their pre-operative sex violated Articles 8 and 12 of the *European Convention*; discussing the variety of ways transgender people expressed their sex, and the need for law or regulation to take into account the needs of people at different stages of gender transition).

Reasoning of the Court

The Court reviewed transsexualism and gender dysphoria. It examined the United Kingdom case of *Bellinger*, where seven key indices of gender were set forth: chromosomes, gonads, internal sex organs, external genitalia, hormones and secondary sex characteristics, style of life, and self-perception. Using these indicia, the Court explained the difference between intersex individuals and transgendered persons, defining transsexual people as “born with the anatomy of a person of one sex, but with an unshakeable belief or feeling that they are persons of the opposite sex.” The Court then addressed the four steps to “treatment”: psychiatric assessment, hormonal treatment, a period living as the opposite sex while under supervision, and (in suitable cases) gender reassignment surgery. In this context, the Court questioned whether surgery was a prerequisite of gender-reassignment.

The Court next considered the Australian cases of *In re Alex* and *In re Kevin*. *In re Alex* had observed in passing that making surgery a pre-requirement for changing identity documents seemed to run counter to respect for human rights. *In re Kevin* found that gender identity should not be based solely on the birth sex, and that the gender identity of transgender individuals was unlikely to conform with that of their physical body in the absence of changes that would allow them to feel that their bodies reflected their psychological sex.

Reviewing the legislative history of the *Births, Deaths, and Marriages Registration Act*, the Court concluded that it revealed that the legislature did not intend that applicants would necessarily be required to have undergone all available surgeries, but that they should have undergone “some degree of permanent physical change”. The *Births, Deaths, and Marriages Registration Act* itself did not require an applicant to have had surgery, so long as he or she had undergone medical treatment, including counselling and hormone therapy. The Court therefore determined: “[I]t is not necessary in all cases for an applicant to have

undergone full gender reassignment surgery in order to obtain a declaration under the section. Just how much surgery he/she needs to have had is determined on a case by case basis by reference to the evidence in the particular case, including that of the medical experts.” The Court also found that the requirement of permanency could be satisfied either by irreversible medical treatment or on the basis of expert medical evidence that the applicant would maintain the preferred gender identity.

The Court emphasised that under Section 33 of the *Births, Deaths, and Marriages Registration Act*, “the sex of every person shall continue to be determined by reference to the general law of New Zealand”. Where Section 77(6)(c) authorised marriage registrars to search and review the records documenting a change of sex, the Court found that it was possible that the legislature did not intend for a change of sex to have any legal effect with regard to a person’s capacity to marry.

The Court found that the medical evidence, with the plaintiff’s testimony that he intended to maintain his male gender identity, were sufficient to meet the legislative requirements. This evidence included the young age at which the plaintiff started living as a boy, the careful and medically-assisted process of transition he had adopted, his male lifestyle in public, and his adherence to the recommendations of his doctors. The Court also found that the permanent nature of the hormone treatments and the reasons given by the plaintiff for not wanting genital reconstructive surgery were convincing. The Court highlighted the fact that the construction of a penis was extremely difficult, dangerous, and expensive; total loss of sensation was frequent and there was a high risk that the reconstructed phallus would not function.

The plaintiff was therefore given a new birth certificate, on the understanding that under certain circumstances notification of the sex change would be required and that he would not necessarily always be legally considered male.

In re Alex, Family Court of Australia (6 May 2009)

Procedural Posture

The Government and Secretary of the Department of Human Services brought suit on behalf of Alex for a declaration from the Court that the Secretary could allow the seventeen-year old to undergo a bilateral mastectomy. A 2004 ruling had allowed the Secretary to consent to hormone therapy but had not considered the possibility that Alex might have surgery before the age of 18.

Facts

Alex was born anatomically female. His father died when he was 5 or 6, and his mother subsequently remarried and migrated to Australia in 2000. The following year, the Child Protection Services were alerted and they found that “Alex’s

mother had rejected Alex and did not want to see Alex again”. The Secretary of the Department was granted guardianship but, after living in foster care for a number of months, Alex began to live with a relative. He was diagnosed with gender dysphoria and in 2004 the Secretary applied for and received judicial permission for Alex to officially adopt a (male) name and start hormone treatment. Three medical reports, submitted to the Court, affirmed Alex’s commitment to the male gender and stated that, for Alex’s social and emotional development, it was important and urgent to allow him to have a bilateral mastectomy. Alex expressed no interest in genital reconstruction, but felt that the removal of breasts would allow him greater freedom to dress and act as a male.

Issue

Whether the court could grant a minor permission to have permanent physical surgery before the age of consent.

Domestic Law

Family Law Act 1975, Sections 60CC (best interest of the child) and 67ZC.

Human Rights and Equal Opportunity Act 1986 (allowing complaints about domestic breaches of internationally or nationally recognised human rights).

Re Alex (Hormonal Treatment for Gender Identity Dysphoria), Family Court of Australia, 2004 (granting request for name change and hormone treatment for a minor).

Minister for Immigration and Ethnic Affairs v. Teoh, High Court of Australia, 1995 (holding that, regardless of ratification, the Australian parliament “intends to give effect to Australia’s obligations under international law”).

Comparative Law

Gender Recognition Act 2004, United Kingdom (issuing a gender recognition certificate if a person over 18 has gender dysphoria and has lived in the ‘acquired’ gender for two years).

Gillick v. West Norfolk and Wisbech Area Health Authority, House of Lords, United Kingdom, 1986 (discussing the test for age of consent, finding that 18 or 21 could be too strict a standard, and suggesting that courts should instead look to a child’s own capacity to consent).

International Law

Convention on the Rights of the Child, Articles 6, 8 (right to preservation of identity), 12, 13 (freedom of expression), and 16 (right to privacy).

International Covenant on Civil and Political Rights, Articles 16 (right to recognition before the law), 17 (right to privacy), 19 (freedom of expression), and 26 (non-discrimination).

Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity.

Reasoning of the Court

The Court first reviewed the 2004 ruling and the testimony of Alex's doctors and government support staff. It noted their shared belief that Alex's male gender identity was permanent and not subject to change. Alex himself, the relative with whom he lived, and the government all agreed that surgery was in Alex's best interest. The Public Advocate did not contest the application.

The Court further noted that, if the issue had been raised, Alex could have been granted permission to consent to the procedure himself. The Court referred to the *Gillick v. West Norfolk and Wisbech Area Health Authority* test, which held that consent should be based on experience and psychology. While the 2004 ruling had found that, at thirteen, Alex was too young to form such a decision, the Court stated that the seventeen-year-old Alex had "the capacity for sophisticated reflection upon the implications of undertaking chest surgery".

Next the Court considered Sections 60CC (2) and (3) of the *Family Law Act*, focusing on additional considerations governing medical procedures. These included weighing the views expressed by the child, the nature of the child's relationships to relatives and other persons, and the likely effect on the child's life. The Court addressed each of these considerations in turn, and concluded that a variety of factors suggested that surgery was in Alex's best interest: Alex's maturity; the permanency of his decision; his good relationships with both the government support staff and his relative; his knowledge of the procedure; evidence that the procedure would be less invasive if it was undertaken earlier rather than at a later date; and the presence of a support system that could assist Alex through the whole process.

The Court relied on international human rights law to confirm its judgment. It reviewed a wide array of documents supporting equal treatment under the law. It referenced the domestic Human Rights and Equal Opportunity Commissions' *Sex and Gender Diversity Issues Paper*, as well as the ICCPR (Articles 16, 17, 19, 26), the CRC (Articles 6, 8, 12, 13, 16), *Minister for Immigration and Ethnic Affairs v. Teoh* (which discussed the significance of the CRC articles to Australian law), and the *Yogyakarta Principles* (which supported the finding that Alex should be recognised as a man). The Court expressed dismay that Australian law would not allow Alex to change his sex without full reconstructive surgery. After reviewing the responses from government officials that declared that current law required full gender reassignment surgery in order for the gender on the birth certificate to be changed, the Court suggested that the United Kingdom's approach in the *Gender Recognition Act* might be a better one.

The Court gave the Secretary permission to consent to Alex undergoing bilateral mastectomies, and held that Alex was to be the official name in all appropriate contexts, without need of parental consent.

Khaki v. Rawalpindi, Supreme Court of Pakistan (12 December 2009)

Procedural Posture

A constitutional petition was filed on behalf of *hijras* (also known as *unich* or *eunuchs*) before the Supreme Court. (Editorial Note: *Hijra* is a term used in South Asia to refer to individuals who adopt a feminine gender identity, including in clothing and roles. They are sometimes also referred to as a third gender.) The Court requested the provinces to submit detailed reports on the status of their *eunuch* populations. A working paper was drafted that discussed the need to protect the rights and welfare of *hijra* in light of the discrimination, stigma and exclusion they suffered. Specific problems were noted in the areas of inheritance, registration of identity, voting, employment, and schooling. The Court gave the provinces an opportunity to review the working paper and develop an implementation policy. In its judgment, the Court gave a status update on the working paper.

Domestic Law

Constitution of Pakistan, Article 22(4) (“Nothing in this article shall prevent any public authority from making provision for the advancement of any socially or educationally backward class of citizens”), and Article 25(1) (equal protection).

Reasoning of the Court

The Court began by addressing the right to inherit. Once a *eunuch* had been registered, the Social Welfare Department was required to ensure that the person’s family roots were tracked down and that they were afforded their share, if any, of the family inheritance.

Furthermore, whereas registration sheets previously had columns for only male or female, they were now to include a column for *eunuchs*, whose status was to be confirmed through unspecified medical tests. The Election Authority and the Social Welfare Department also agreed to work together to ensure that all registered *eunuchs* were entered into the voter lists.

The Court noted that no provisions were in place to ensure that *eunuchs* were admitted into schools; however, the provinces and the Social Welfare Department had assured the Court that steps were being taken for *hijra* admission and accommodation in educational institutions. This was especially important because the Constitution granted a basic and fundamental right to education under Article 22 read with Article 25.

Eunuchs had recently assisted with the administration of vaccinations, and the Court held that similar efforts to create respectable jobs should be extended to all provinces. It ordered a report from all provinces to this effect. The Court specifically referred to a system developed in the Indian State of Bihar, where: “[T]he Bihar government is trying out innovative ways to involve the eunuchs, also called *kinnars* or *hijras*, in socially useful work. It has successfully used the services of eunuchs to recover taxes from habitual defaulters in Patna. Now, the social welfare department plans to rehabilitate them - in a first such rehabilitation scheme for eunuchs. Bihar Social Welfare Minister Damodar [said] that the government would ... ‘provide literacy and vocational training to prepare them for respectable regular employment’.”

Finally, the Court noted that the provinces had done nothing to protect eunuchs from harassment or prevent non-eunuchs from using the status falsely to commit crimes. The Court ordered law enforcement institutions to create mechanisms to prevent these problems from occurring.

The Court gave the various social welfare mechanisms one month to issue reports confirming their compliance with the order.

In re Gesa Case No. 0162607,
Tribunal of Justice of Rio de Janeiro, Brazil (4 August 2010)

Procedural Posture

The applicant, a transgender man, filed a request with the court for correction of name and gender in the civil registry. Following a clinical and psychological assessment, the applicant had undergone a mastectomy.

Facts

Gesa was registered as female at birth but identified with the male gender. He underwent treatment for sex reassignment at a university hospital in Rio de Janeiro. The treatment included hormone therapy and a mastectomy.

Issue

Whether the applicant could change his name and gender in all civil records, having had a mastectomy, without further surgical intervention.

Domestic Law

Constitution of Brazil, Article 1 (dignity) and Article 3 (non-discrimination).

Federal Law No 6015 of 31 December 1973 (Public Registries Law), Article 55 (not registering first names that will expose people to embarrassment), Article 58 (procedures for changing first name following hearing before Public Ministry),

and Article 109 (procedures for making changes in the public registry through petition and judicial hearing and submission of opinion of public prosecutor).

Federal Council of Medicine Resolution No. 1652 (establishing medical guidelines for authorisation of sex reassignment surgery).

Reasoning of the Court

The Court emphasised the “inadequacy” of the applicant’s birth name and the discrepancy between the first name and gender registered at birth and the applicant’s present gender identity. It noted that the applicant had followed a gender reassignment programme that included non-surgical and surgical interventions, including a mastectomy. The applicant had also been evaluated for a possible neophalloplasty (surgical creation of a penis) which, according to the Brazilian Federal Council of Medicine, was still an experimental form of surgery. The applicant presented all the documentation required to prove that he had undergone the treatment claimed.

The Court found that the applicant’s original first name had the potential to negatively affect his dignity, resulting in pain, embarrassment, or general feelings of social inadequacy due to having a feminine name and a male appearance. Without breasts and with a beard, deep voice and other male characteristics, the applicant’s appearance was at odds with the female name and gender recorded in his civil identification documents. Such circumstances would expose him to discrimination on a daily basis. Not granting the changes requested would violate Article 3 of the Constitution.

As support, the Court cited a case from Rio Grande do Sul, which authorised rectification of the civil registry, whether or not sex reassignment surgery had been completed, on the basis of the right to personal identity and dignity.

The Court authorised the rectification of name and gender in the civil registry, without the surgical creation of male genitalia.

The State of Western Australia v. AH, Supreme Court of Western Australia (2 September 2010)

Procedural Posture

The Supreme Court of the State of Western Australia conducted a judicial review of a decision made under the State’s *Gender Reassignment Act 2000*.

Facts

The *Gender Reassignment Act 2000* provided a means by which individuals who had undergone a sexual reassignment procedure could obtain official recognition of the change of gender. The term “reassignment procedure” was defined as:

a medical or surgical procedure (or a combination of such procedures) to alter the genitals and other gender characteristics of a person ... so that the person will be identified as a person of the opposite sex ...

The term “gender characteristics” was defined as “the physical characteristics by virtue of which a person is identified as male or female”.

The State Administrative Tribunal had conducted a merits review of a decision by the Gender Reassignment Board of Western Australia. The Board had refused to issue Gender Reassignment Certificates to two applicants, AB and AH, on the grounds that they did not possess the required male gender characteristics. AB and AH were each born as females and self-identified as male. Each had undertaken testosterone hormone therapy and had undergone double mastectomies. Each lived his life in a male gender role and testified that they had no intention of ceasing therapy or ever again living as a female. However, neither AH nor AB had undergone a hysterectomy to remove internal female sexual organs, or a phalloplasty to construct a penis, and both had retained their external female genitalia. Both AB and AH submitted that such procedures were not necessary for their own sense of male gender identity; and that these operations were too complex and dangerous to undertake. The Board decided that the applicants’ retention of their internal female reproductive organs, and consequently their potential ability to bear a child, was inconsistent with being male.

The Tribunal overturned the Board’s decision on the grounds that both AB and AH had successfully completed a sexual reassignment. The Tribunal focused on the mastectomy procedure combined with the effects of hormone replacement therapy. The hormone therapy had resulted in diminished fertility, changes to internal organs, clitoral growth and masculinisation. The Tribunal did not require the removal of the internal reproductive organs as evidence of sexual reassignment.

The State of Western Australia appealed to the Supreme Court.

Issue

Whether AH and AB had reached the required threshold of male gender characteristics required by the *Gender Reassignment Act 2000*.

Domestic Law

Gender Reassignment Act 2000 (Western Australia), Sections 3 (definition of Gender Characteristics and Reassignment Procedure), 14 (applications for recognition certificates), and 15 (conditions required for the issue of a recognition certificate).

Attorney General v. Kevin and Jennifer, Full Court of the Family Court of Australia at Sydney, 2003.

R v. Harris and McGuinness, New South Wales Criminal Court of Appeal, Australia, 1988.

Secretary of Department of Social Security v. SRA, Federal Court of Australia, 1993.

Comparative Law

Gender Recognition Act 2004, United Kingdom.

Law on the Gender Confirmation of Transsexual Individuals, Finland.

Transsexual Law 1980, Germany.

Attorney-General v. Otahuhu Family Court, High Court of New Zealand, 1995 (holding that, where a person has undergone surgical and medical procedures that have effectively given that person the physical conformation of a person of a specified sex, no lawful impediment prevents that person marrying as a person of that sex).

Bellinger v. Bellinger, House of Lords, United Kingdom, 2003 (criticising *Corbett v. Corbett* but holding that the question of gender recognition should be left to the legislature).

Corbett v. Corbett (Otherwise Ashley), Probate, Divorce and Admiralty Division, United Kingdom, 1970 (holding that sex was biologically fixed at birth and could not be changed by medical or surgical means).

Reasoning of the Court

The State of Western Australia raised two grounds for appeal. The first was that the applicants retained the capacity to reproduce as females and this was inconsistent with the gender characteristics of a male. Secondly, the State argued that the applicants could not be considered to have the gender characteristics of a male because they had retained their female genitals. By 2-1 the Supreme Court found for the State.

Majority Opinion (per Chief Justice Martin)

Chief Justice Martin, based on a review of comparative law, noted the determinative factors for the recognition of a gender reassignment. Most laws, particularly those of other Australian jurisdictions, New Zealand and England, required that the applicant for reassignment undergo surgery to alter reproductive capacity or genitalia. By contrast, in Western Australia, either a “medical” or a “surgical” procedure could potentially suffice. Chief Justice Martin opined that the legislative rationale behind this difference might have been to give scope for a wider variety of situations in which gender reassignment may be required. For example, in the case of individuals born with ambiguous genitalia, the procedure required to acquire one gender or the other might be less demanding than the procedure required to effect a full transition from male to female. In addition,

Chief Justice Martin considered it possible that the legislation included non-surgical procedures in order to allow for future advances in medical technology.

Chief Justice Martin noted that, in the Australian line of cases, a successful change in gender usually required transformation of an individual's genitalia and reproductive organs. For example, in *Attorney-General v. Kevin and Jennifer*, one of the only cases cited that dealt with female to male transitions, the applicant was recognised as male having undergone a hysterectomy operation but without having had surgery for the construction of a penis. His Honour held that it was likely that the Western Australian Legislature had intended that a similar line of demarcation to this and other Australian case law be required under the *Gender Recognition Act*.

Chief Justice Martin accepted that the applicants had undergone reassignment procedures consisting of a combination of hormone treatment and surgical mastectomies. However, it was unclear whether these procedures had caused them to attain the necessary physical gender characteristics "by virtue of which a person is identified as male or female" as required under the legislation

Chief Justice Martin took the term "identified" to mean "established or accepted according to community standards and expectations". This interpretation did not imply a superficial view by a casual observer or a particular group, but was, rather, a general standard encompassing:

all aspects of an individual's physical make-up, whether external or internal, which would be considered as bearing upon their identification as either male or female according to accepted community standards and expectations.

In this context the future intent of the applicant, including continuation of hormone therapy, was irrelevant. The sole consideration for a decision-maker was the physical characteristics possessed by the applicant at the date of hearing.

Chief Justice Martin held that, to meet the necessary standard, individuals must possess "sufficient of the characteristics of the gender to which they wish to be assigned". This would depend on a balance of factors and on the facts and circumstances of each case. This was a question of degree that inevitably required value judgments to be made.

Chief Justice Martin held that, although retained fertility and ability to function sexually were not the sole physical determinants of gender, they were highly relevant factors. Although AB and AH would only be able to bear children "in very unlikely and remote circumstances", the fact that each had retained internal female reproductive organs was a particularly critical consideration. Chief Justice Martin held that AB and AH both had "the external genital appearance and internal reproductive organs which would, according to accepted community standards, be associated with membership of the female sex".

The fact that AB and AH possessed no male genital characteristics, coupled with the fact that each still possessed all of their internal reproductive organs and external genital characteristics, meant that they could not be regarded as possessing “sufficient” male gender characteristics. Chief Justice Martin placed the greatest weight on the plaintiff’s internal reproductive capacity and noted that gender recognition had occurred in other jurisdictions without the applicant having a phalloplasty procedure. These operations were not commonly undertaken, as they were expensive and prone to failure. Chief Justice Martin noted that the transition from female to male was medically more complex than that from male to female. He expressed sympathy for the difficult position in which this interpretation of the legislation placed the applicants and noted that the conclusion reached could leave them feeling “coerced” into having surgery that they would not otherwise choose.

I accept that this approach to the construction and application of the Act might, in the current state of medical science, make it more difficult for female to male gender reassignees to obtain a recognition certificate than male to female reassignees. However, if that is so, it is the consequence of the legislature’s use of norms expressed in general terms, and which may have different impacts in the extent of the procedures necessarily undertaken by each gender to meet the conditions required for the grant of a recognition certificate.

Dissent (per Justice Buss)

Justice Buss held that the purpose of the *Gender Reassignment Act* was to assist individuals suffering from gender dysphoria to address the incongruity between their psychological and biological genders. In this sense the *Gender Reassignment Act* was a “remedial or beneficial enactment” which was to be given a “liberal interpretation, so as to give the fullest relief which the fair meaning of its language will allow”. Justice Buss held that, when properly construed, the terms “reassignment procedure” and “gender characteristics” were to be interpreted pragmatically, taking into account the limitations of medical technology. On this basis, he considered that the legislature could not have intended to require a phalloplasty operation for female to male transsexuals. The clitoral growth experienced by AB and AH as a result of hormone replacement therapy should be considered a sufficient alteration of their external genitalia. In addition Justice Buss held that, if the legislature had intended to require permanent sterilisation as a precondition for recognition, this would have been stipulated in the *Gender Reassignment Act*. Justice Buss cited comparable legislation from other jurisdictions, including Germany and Finland, which explicitly required that an applicant for reassignment should be permanently sterile. The Western Australian legislature did not specify this condition and therefore the Act should not be interpreted to require sterilisation.

The Court overturned the tribunal decision and refused recognition of gender reassignment.

1 BvR 3295/07,
Federal Constitutional Court of Germany (11 January 2011)

Procedural Posture

Constitutional complaint before the Federal Constitutional Court. The complainant challenged a violation of her general right of personality and specifically the component of the right to sexual self-determination.

Facts

The complainant was born in 1948 with male external genitals. She perceived herself as belonging to the female gender. Her sexual orientation was that of a female homosexual, and she lived in a partnership with a woman. In accordance with the “Minor Solution” under Section 1 of the *Transsexual Law* she changed her male first name to a female one. She was not able to change her civil status to female in her identity documents because she had not undergone the surgery required by the “Major Solution” under Section 8 of the *Transsexual Law*. In December 2005, together with her partner, she applied to register a civil partnership, and was refused by the registrar on the grounds that a civil partnership was exclusively reserved for parties of the same gender. Transsexuals with a homosexual orientation either had to enter into a marriage or undergo gender reassignment surgery that resulted in infertility, before their perceived gender could be recognised legally, allowing them to enter into a registered civil partnership that corresponded to their same-sex relationship.

The local court confirmed the registrar’s decision, holding that marriage was the only option available to the parties. The complainant’s recognition as a woman under the law of civil status could not be enacted without the required gender reassignment surgery. Her appeals were unsuccessful. The plaintiff informed the Court in May 2010 that she and her partner had married because, in light of the complainant’s age, they did not wish to wait further to obtain mutual legal protection.

Issue

Whether it was constitutional to require a transsexual person to undergo gender reassignment surgery, including treatment leading to permanent infertility, as a precondition of changing civil status; whether a transsexual person who had changed his or her name but not undergone surgery could be denied entry into a registered partnership with a person of the same gender.

Domestic Law

Transsexual Law 1980, Sections 1 (requirements for a name change) and 8 (requirements for a sex change on identity documents, including gender reassignment surgery and infertility).

Basic Law for the Federal Republic of Germany.

Reasoning of the Court

The complainant wanted to enter into a civil partnership as a woman with her female partner. She argued that it was unreasonable to expect her to enter into a marriage because marriages were only for opposite-sex couples and, as a consequence, she would legally be regarded as a man. Furthermore, her female first name would disclose that one of the two women in the partnership was a transsexual, which would make it impossible to live an inconspicuous life free of discrimination in her new role. Due to her age, gender reassignment surgery involved significant health risks.

The Court held that it was unreasonable to require a transsexual person with a “homosexual” orientation, who had only complied with the requirements for a name change under Section 1 of the *Transsexual Law*, to enter into an opposite-sex marriage as a means of securing legal protection for her relationship. Since marriage in Germany was limited to opposite-sex couples, a marriage would align a “homosexual” transsexual with a gender that contradicted the individual’s self-perceived gender identity. This would infringe the constitutional principle that the gender identity perceived by the individual should be the one recognised. Entering into a marriage would make it apparent that one of the parties was transsexual, because the person’s name change and his or her external appearance would indicate a same-sex relationship. As a result, the person’s intimate sphere would not be protected against unwanted disclosure, as constitutionally guaranteed by the *Basic Law*.

Furthermore, a law that required transsexuals to have undergone gender reassignment surgery and become permanently infertile before they could be recognised under the law of civil status and by extension enter into a registered civil partnership was not compatible with the right to sexual self-determination and physical integrity.

Legal requirements for gender reassignment surgery and infertility surgery constituted massive impairments of physical integrity, which was protected by the *Basic Law*. They involved considerable health risks for the person concerned. Nor, according to the current state of scientific knowledge, was gender reassignment surgery always medically indicated in the case of a transsexuality diagnosis. The Court accepted that the State’s desire to preserve an understanding of gender that precluded men giving birth or women procreating children was a legitimate

State interest. However, it accorded greater weight to the individual's rights to sexual self-determination and physical integrity.

The Court considered the case was justiciable, despite the fact that the complainant had meanwhile entered into a marriage, because, in view of the complainant's age and the lengthy legal proceedings, the spouses could not delay acquiring legal protection for their relationship. The Court acknowledged as well that, having entered into marriage, the complainant's identity as a woman was constantly compromised because her gender identity was made visible to others through the marriage.

The Court found that the constitutional complaint was admissible. It found Section 8 of the *Transsexual Law* to be incompatible with the *Basic Law*. These points of the law were held to be inapplicable pending the enactment of a new law. The previous decisions by the Regional Court and Higher Regional Court violated the complainant's personality rights and were thus void. The Federal Republic of Germany was required to reimburse the complainant for costs incurred.

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- 1 European Court of Human Rights, Judgment of 30 November 2010, *P.V. v. Spain*, Application No. 35159/09, para. 30 (request for referral to the Grand Chamber pending).
 - 2 European Court of Human Rights, Judgment of 11 July 2002, *Goodwin v. United Kingdom*, Application No. 28957/95, para. 90; see also European Court of Human Rights, Judgment of 11 July 2002 (Grand Chamber), *I. v. United Kingdom*, Application No. 25680/94, para. 73; European Court of Human Rights, Judgment of 11 September 2007, *L v. Lithuania*, Application No. 27527/03, para. 60.
 - 3 Human Rights Committee, *Concluding Observations (Ireland)*, UN Doc. CCPR/C/IRL/CO/3, 30 July 2008, para. 8.
 - 4 European Court of Human Rights, Judgment of 12 June 2003, *Van Kück v. Germany*, Application No. 35968/97, paras. 65 and 86.
 - 5 European Court of Human Rights, Judgment of 8 January 2009, *Schlumpf v. Switzerland*, Application No. 29002/06, paras. 58 and 116.
 - 6 Judgment of 13 April 2004, *Re Alex: Hormonal Treatment of Gender Identity Dysphoria*, [2004] FamCA 297, para. 234.

TRANSGENDER MARRIAGE

Chapter nine

Transgender Marriage

INTRODUCTION

Transgender marriage occurs when a change of gender identity is judicially recognised in the context of marriage. Since marriage in the majority of jurisdictions is defined in terms of opposite-sex partners, courts ask whether an individual is a man or a woman for the purpose of the marriage statute. What does it mean to be male or female?¹ Is a person's sex a biological fact, a legal construction, or a bit of both? Is one's capacity to marry defined by the ability to engage in penile-vaginal sex? Or is the ability to procreate determinative? These are the questions that courts seek to answer.

There is a great lack of consistency. Some courts reject the notion that a person can be legally recognised in a new sex for the purpose of marriage, even if that person has been recognised in the new sex for other purposes. Other courts apply various tests of sexual functionality or physical appearance. Because of the medical risks involved in the surgical construction of male genitalia, physical appearance tests are significantly harder for transgender men to meet than transgender women.

Transgender marriage cases are dominated by the 1970 British decision on *Corbett v. Corbett*.² In some sense, all transgender marriage cases are either an extension of *Corbett* reasoning or a reaction to it.³ *Corbett* concerned a petition to legally annul the marriage between Arthur Corbett and April Ashley. April Ashley was born male and had undergone hormonal treatment and sex reassignment surgery, including vaginoplasty. According to Justice Omrod, the issue before him was the "true sex" of April Ashley and, secondarily, whether she had the capacity to consummate the marriage. He held that sex was determined by a congruence of chromosomal, gonadal and genital factors, and was a biological fact, determined at birth, forever immutable. In his view, April Ashley was physically incapable of consummating the marriage because intercourse using "the completely artificial cavity constructed" by a doctor could not possibly be described as natural intercourse. The outcome of *Corbett* was codified by the enactment of the *Nullity of Marriage Act 1971* and the *Matrimonial Causes Act 1973*. With his ruling, a single judge of the High Court set the terms of the debate for transgender marriage jurisprudence

MT v. JT, decided in 1976 by the Superior Court of New Jersey (USA), marked a significant departure from *Corbett*. Following their separation, MT petitioned for support and maintenance from her husband. MT had been born male and, prior to the marriage, had undergone “surgery for the removal of male sex organs and construction of a vagina”. JT argued in defence that MT was male and that the marriage was invalid. The court ruled that the marriage was valid, stating “we must disagree with the conclusion reached in *Corbett* that for purposes of marriage sex is somehow irrevocably cast at the moment of birth, and that for adjudging the capacity to enter marriage, sex in its biological sense should be the exclusive standard”. In reaching this conclusion, the court explained that it had a different understanding of sex and gender. It defined gender as “one’s self-image, the deep psychological or emotional sense of sexual identity and character”. In short, when an individual’s “anatomical or genital features” were adapted to conform with a person’s “gender, psyche or psychological sex”, then identity by sex must be governed by the congruence of these standards.

MT v. JT also emphasised MT’s capacity to function sexually as a female. The court stated that sexual capacity “requires the coalescence of both the physical ability and the psychological and emotional orientation to engage in sexual intercourse as either a male or a female”. Medical witnesses testified that MT could no longer be considered male because “she could not function as a male sexually for purposes of recreation or procreation”. Sexual capacity was thus determinative. Because MT had a vagina, she had the capacity to function sexually as a female and she should be legally recognised as a female for purposes of marriage. One commentator has described the relationship between *Corbett* and **MT v. JT** as the journey from “(bio)logic to functionality”.⁴

Since **MT v. JT**, US courts have arrived at various and contradictory conclusions on transgender marriage. Almost all the cases have quoted *Corbett* or cases that relied on *Corbett*. Even as US States have increasingly provided statutory instruments that make it possible to recognise a change of sex on birth certificates and other identity documents, courts have refused to recognise such marriages as valid, perhaps out of fear of condoning same-sex marriage.⁵ Thus in the case of *In re Simmons*, the marriage was ruled invalid even though Robert Simmons had changed his birth certificate to reflect his male sex.⁶ Markedly different reasoning is evidenced by US Board of Immigration Appeals in *In re Lovo-Lara*. The petitioner had changed her birth certificate to the female sex and married a male citizen of El Salvador. The Board found that her marriage was valid in the State in which she was married because she had met the legal requirements for changing her sex on her birth certificate. Since the marriage was legal under State law, the federal government was required to recognise it for immigration purposes.

MT v. JT has been influential in other jurisdictions. In *M v. M*, a New Zealand court heard an application to declare invalid a marriage between a male-to-female (MtF) transgender person and a biological male, following twelve years of marriage.⁷ In

this case Mrs. M brought the application for invalidity, arguing that she was and always had been male. She had undergone sex reassignment surgery, involving the amputation of the penis and both testes and the construction of a vagina. The marriage had been consummated. The court noted that Mrs M was similar to Ashley Corbett. Both had been born male, had had sex reassignment surgery, and their chromosomal structures had not changed. The court did not consider the length of the marriage or the fact that the parties had “ a continuing sexual relationship” to be factors that distinguished the case from *Corbett*. Nevertheless, *Corbett* was not binding on a New Zealand court. The court was sympathetic to the plight of an individual who would be trapped in “some kind of sexual twilight zone” if the change of sex were not recognised, but it also noted that sympathy alone could not resolve the question. In the end, the court declared the marriage valid, while acknowledging that there was “no simple medical test for the determining of which side of the sexual line a particular person falls”. The court stated:

[I]n the absence of any binding authority which requires me to accept biological structure as decisive, and indeed any medical evidence that it ought to be, I incline to the view that however elusive the definition of “woman” may be, the applicant came within it for the purposes of and at the time of the ceremony of marriage.⁸

In response to *M v. M*, the Attorney-General of New Zealand sought a declaratory judgment as to the validity of a marriage involving an individual who had undergone sex reassignment through surgery or hormone therapy or any other medical means. In *Attorney-General v. Family Court at Otahuhu*, the High Court of New Zealand moved beyond a functional assessment to assess the physical appearance of the individual, focusing on genitalia. The court observed that, before the discovery of chromosomes, the “obvious manifestations of breast and genitalia including a woman’s vagina would have been considered conclusive”. In rejecting the biological determinism of *Corbett*, the court noted that neither the ability to procreate nor the ability to have sexual intercourse were required in order to marry. The law of New Zealand no longer required that a marriage be consummated. It found the reasoning in *MT v. JT* and *M v. M* compelling.

The High Court stated that reconstructive surgery was necessary for recognition, but did not require the capacity to perform vaginal-penile intercourse. The Court noted that there were “many forms of sexual expression possible without penetrative sexual intercourse”. To be capable of marriage, however, a couple must present themselves as having what appeared to be the genitals of a man and a woman. Anatomy was dispositive, but sexual capacity was not. This opinion had practical implications. The court noted that there was “no social advantage in the law not recognizing the validity of the marriage of a transsexual in the sex of reassignment”. To hold otherwise would be to allow a MtF individual to contract a valid marriage with a woman, when to “all outward appearances, such would be same sex marriages”.

In *In re Kevin*, the Family Court of Australia affirmed the validity of a marriage between Kevin, a female-to-male (FtM) transgender individual, and his wife, a biological female. (The court of appeals later accepted the reasoning of the trial court in its entirety.) Kevin's situation differed from the earlier cases discussed because, although he had undergone hormone therapy and some surgery, he had not had phalloplasty (surgical construction of the penis). The court recognised the complexity of the situation, stating that there was no "formulaic solution" for determining the sex of an individual for the purpose of marriage. Instead it outlined a variety of factors without assigning preeminence to any of them; a person's individual sex should be determined by "all relevant matters". In the end, what appeared to be dispositive was the fact that Kevin functioned socially as a man, was accepted as male by his colleagues, family and friends, and was the father to a child born during the marriage through ART. Like *Attorney General v. Family Court at Otahuhu*, the court also emphasised the policy benefits of recognising transgender individuals in the acquired gender. Failing to do so would lead to situations where a FtM individual would only be permitted to marry a man.

In re Kevin, the court pointed out what it considered to be the major fallacy underlying *Corbett*. The court there had adopted an "essentialist view of sexual identity", by assuming that "individuals have some basic essential quality that makes them male or female". The Australian court disagreed with this assumption.

The task of the law is not to search for some mysterious entity, the person's "true sex", but to give an answer to a practical human problem ... to determine the sex in which it is best for the individual to live.

In *W v. Registrar of Marriages*, a recent Hong Kong case, the issue was whether a trans woman who had had sex reassignment surgery could marry. She had successfully changed her permanent identity card but not her birth certificate. The court first considered whether the words "man" and "woman" in the *Marriage Ordinance* and *Matrimonial Causes Ordinance* could be construed to include a "post-operative transsexual individual in his or her acquired sex". It found this to be a question of statutory construction. The meaning of "man" and "woman" did not include individuals who had changed their sex.

According to the court, "the ability to engage in natural heterosexual intercourse" was an essential feature of marriage, regardless of whether the law had always permitted older people or infertile people to marry. The purpose of marriage was procreative. It noted, too, that allowing a post-operative transsexual to marry in his or her acquired gender "would be tantamount to sanctioning same sex marriage of a particular form". This would have implications for other forms of same-sex marriage. In short, it was "almost self-evident that all this must be a matter for the legislature and not for the court in the name of statutory interpretation."

The Hong Kong court further noted that courts in New Zealand, Australia and New Jersey, while departing from *Corbett*, had adopted very different tests. *MT v. JT*

emphasised the capacity to function sexually. In New Zealand, the court held that genital appearance was dispositive. In Australia, Kevin had neither the capacity to engage in penile-vaginal intercourse nor male genitalia and yet was recognised as male, largely because of his self-perception and the perceptions of those around him. These varying circumstances, according to the court, also weighed in favor of a legislative solution. The court stated:

It seems to me that at the highest, the applicant's case here is that 40 years after Corbett, because of the many changes that have taken place, there has now been opened a legislative gap, so far as our law of marriage is concerned, relating to the position of post-operative transsexuals. It is a gap that needs to be addressed one way or another. Yet it does not follow that it is for a court, in the name of statutory interpretation, to fill the gap. Given the inherent difficulties and potential ramifications involved, the gap is one that is for the legislature to consider filling. The court has no mandate to do so.

As for the right to marry argument raised by the applicant, the court found that the definition of marriage was largely influenced by social consensus. It noted that non-consummation was still a ground for invalidating a marriage in Hong Kong and that, as a society, Hong Kong emphasised procreation. The applicant's argument, which prioritised mutual society, help and comfort over procreation, had potentially far-reaching implications and could open the door to same-sex marriage. "This shows that the problem one is dealing with cannot be answered by reference to logic or deduction alone, which is essentially what the present argument is all about; rather, it must be answered primarily by reference to societal understanding and acceptance". The court reframed the question: it was not about the restriction of a right "according to the wishes of the majority" but rather about whether the institution of marriage should be given a new contemporary meaning. Having held that the question was one of social consensus, the court found no violation of the right to marriage.

In 2002, the European Court of Human Rights, sitting as a Grand Chamber, effectively overruled *Corbett* and the *Matrimonial Causes Act* in the case of *Christine Goodwin v. United Kingdom*. In this instance, the applicant had been born male and had undergone hormone therapy, vocal chord surgery, and gender reassignment surgery. She alleged that, in refusing to change her social security card, national insurance card and birth certificate to reflect her female sex, the State had violated her right to respect for private life under Article 8 of the Convention. Furthermore, although she was in a relationship with a man, she could not marry her partner because the law treated her as a man, in violation of the right to marry under Article 12. The Court agreed.

The Court noted, first, that the applicant experienced stress and alienation that resulted from the "discordance" between her identity and her lack of legal

recognition. It described this as a conflict between social reality and the law. “Serious interference with private life can arise where the state of domestic law conflicts with an important aspect of personal identity”.⁹ The Court rejected *Corbett’s* assertion that sex was determined at birth on the basis of chromosomal, gonadal, and genital factors. It found that the chromosomal element should not “take on decisive significance for the purposes of legal attribution of gender identity”. Departing from its previous case law, the Court concluded that Article 8 imposed a positive obligation on the State to legally recognise gender reassignment.

As for the right to marry claim, the Court held that inability to conceive a child did not vitiate the right to marry.¹⁰ The applicant lived as a woman, was in a relationship with a man, and would only desire to marry a man. To deny her the possibility of doing so violated Article 12.¹¹

The cases included here from New Zealand and Australia are unusual in that they played a role in influencing the reasoning of the European Court of Human Rights. The European Court explicitly relied on these decisions, as well as legislative developments in other countries, when it found an international trend towards legal recognition of changed gender identity.¹² The Court also found support from *In re Kevin* in rejecting chromosomes as a deciding factor. The thinking of the European Court was influenced in a third way, too: Strasbourg acknowledged the lived social reality of transgender individuals, which was also highlighted in the New Zealand and Australian cases. The key issue was not finding the “true sex” of an individual, but recognising the sex in which that person lived. The interplay between these decisions and the landmark case of *Christine Goodwin* emphasises the extent to which judicial conversations take place not only across borders but also between national and supranational courts.

CASE SUMMARIES

MT v. JT, Superior Court of New Jersey,
Appellate Division, United States (22 March 1976)

Procedural Posture

Following a divorce, the plaintiff sued the defendant for marital maintenance and support. The trial court ordered the defendant to support the plaintiff. The defendant appealed, arguing that the marriage was a nullity on the grounds that the plaintiff, a transgender woman, had been born a man.

Facts

The plaintiff was born biologically male but identified as female. In 1971, with the financial support of the defendant, the plaintiff had sex reassignment surgery.

Following surgery, she successfully applied to change her birth certificate to reflect her female gender. In 1972 the plaintiff and defendant married. They separated in 1974 and eventually divorced. The plaintiff then sued for support.

Issue

Whether a marriage between a man and a transgender woman was legally valid.

Domestic Law

Anonymous v. Anonymous, New York Supreme Court, United States, 1971 (declaring that marriage ceremony between two males, one of whom later had sexual reassignment surgery, had no legal effect, such that parties were never bound by a marital contract; finding that whether one of the parties subsequently became a female was irrelevant).

Anonymous v. Weiner, New York Supreme Court, United States, 1966; *Hartin v. Director of the Bureau of Record and Statistics*, New York Supreme Court, United States, 1973 (denying recognition to transgender women).

Comparative Law

Corbett v. Corbett (Otherwise Ashley), Probate, Divorce and Admiralty Division, United Kingdom, 1970 (holding that sex was biologically fixed at birth and could not be changed by medical or surgical means).

Reasoning of the Court

Both parties relied on expert evidence from medical practitioners to support their arguments.

The defendant argued that because the plaintiff had been born anatomically male and did not, and naturally could not, for marital purposes, possess female sexual organs, she could not be considered female. The centrepiece of the defendant's argument was that gender was fixed at birth.

The plaintiff presented contrary expert evidence to suggest that, through the medical treatment she has received, her psychological and physical sex now corresponded to the extent that she should be legally recognised as female for marital purposes.

The Court opened its discussion by considering and rejecting the landmark English decision of *Corbett v. Corbett*. In *Corbett* the court had held that "biological sexual constitution" was fixed at birth and principally determinable by physical criteria. The Court rejected that view, stating that it stemmed from "a fundamentally different understanding of what is meant by 'sex' for marital purposes". In contrast to *Corbett*, the Court stated:

The evidence and authority which we have examined, however, show that a person's sex or sexuality embraces an individual's gender, that

is, one's self-image, the deep psychological or emotional sense of sexual identity and character.

The Court was willing to accept that the plaintiff's consistent and profound emotional connection to a female gender identity, coupled with her post-operative physical and sexual identity, was sufficient to consider her to be female for the purpose of marriage. The Court concluded that "for marital purposes if the anatomical or genital features of a genuine transsexual are made to conform to the person's gender, psyche or psychological sex, then identity by sex must be governed by the congruence of these standards".

In making this finding, the Court placed particular emphasis on the "success" of the sex reassignment surgery. Not only did the Court require the plaintiff to have a stable and unwavering female gender identity, it also required that the medical procedures that she had undertaken had successfully created a physical sexual ability that reflected that of the female sex. The Court stated:

If such sex reassignment surgery is successful and the postoperative transsexual is, by virtue of medical treatment, thereby possessed of the full capacity to function sexually as a male or female, as the case may be, we perceive no legal barrier, cognizable social taboo, or reason grounded in public policy to prevent that person's identification at least for purposes of marriage to the sex finally indicated.

The Court referred to the judgment of the trial judge in concluding that, rather than conducting an identity charade, the plaintiff was attempting to "remove any false facade". In summing up, the Court held that such recognition would "promote the individual's quest for inner peace and personal happiness, while in no way disserving any societal interest, principle of public order or precept of morality".

The Court affirmed the decision of the court below and found for the plaintiff, holding the plaintiff was female when she married the defendant and that as such the defendant was obliged to support her following their divorce.

New Zealand Attorney General v. Family Court at Otahuhu,
High Court of New Zealand (30 November 1994)

Procedural Posture

The Attorney General applied on behalf of the Registrar of Marriages to the High Court. Vivienne Ullrich argued as a friend of the court in opposition to the Attorney General. The Attorney General stated that the State's only interest was to have the matter settled, regardless of outcome.

Issue

The Attorney General requested that the Court decide if New Zealand marriage law allowed two people to marry if their birth genders were the same but if one of their genders was subsequently changed through surgery and hormone treatments.

Domestic Law

M v. M, Family Court at Otahuhu, New Zealand, 1991 (holding that post-operative transgender individuals are, for the purposes of marriage, recognised as their reassigned gender).

Comparative Law

Hyde v. Hyde and Woodmansee, Courts of Probate and Divorce, United Kingdom, 1866 (defining common law marriage as the voluntary union for life of one man and one woman, to the exclusion of all others).

MT v. JT, Superior Court of New Jersey, Appellate Division, United States, 1976 (rejecting *Corbett* and finding dispositive the sex of an individual on the day of marriage and not at birth).

Reasoning of the Court

The Court held that New Zealand law clearly limited marriage to opposite-sex couples. The main issue, therefore, was the definition of man and woman for the purposes of marriage. The Court recognised that scientific inquiry complicated the issue. Chromosomal patterns and the appearance of genitalia were unreliable indicators of gender. The Court reasoned that while the traditional function of marriage was procreation and sexual intercourse, New Zealand now recognised that the psychological and social aspects of marriage are the most important aspects of the institution. Therefore, the Court concluded that because society allows sex reassignment, society must allow transgender people to function as fully as possible in their reassigned genders. This included allowing transgendered individuals to marry persons of the opposite gender to their reassigned gender. In support of this proposition, the Court cited the New Zealand case *M v. M* and United States case *MT v. JT*.

Furthermore, following surgery, an individual could no longer function as the sex he or she had before the operation. A transgender woman could not have sex as a man or procreate. The Court stated that there was: “no social advantage in the law not recognising the validity of the marriage of a transsexual in the sex of reassignment. It would merely confirm the factual reality.” In fact, limiting transgender persons’ possible marriage partners to people who were the opposite of their birth sex would, in effect, legalise same-sex marriages. The Court rejected the notion that permitting transgender people to marry would harm children.

In holding that a transgender person could marry someone of the opposite sex to their reassigned sex, the Court emphasised: “Where two persons present themselves as having the apparent genitals of a man and a woman, they should not have to establish that each can function sexually”. Some conformity with the physical characteristics of the desired gender was sufficient. “I therefore make a declaration that for the purposes of s23 of the *Marriage Act 1955* where a person has undergone surgical and medical procedures that have effectively given that person the physical conformation of a person of a specified sex, there is no lawful impediment to that person marrying as a person of that sex”.

In re Kevin (Validity of marriage of transsexual), Family Court of Australia (12 October 2001)

Procedural Posture

The applicants, a woman and a transgender man named Kevin, applied for a declaration of validity of their marriage. The Attorney General intervened in their application, arguing against the couple. The case was heard by the Family Court.

Issue

Whether Kevin’s marriage to a woman was valid.

Facts

Kevin was born and raised as a female. In 1995 he began the female-to-male transition process by undergoing hormone therapy. In 1997 he underwent plastic surgery to remove his breasts. In 1998 a doctor performed a total hysterectomy on the applicant, who did not elect to have genital construction surgery due to the procedure’s complexity, expense, and risk of failure. (Nonetheless, the Attorney General did not argue that the applicant’s sex reassignment was incomplete or unsuccessful in any way.) In 1998 the applicant was issued a new birth certificate that reflected his sex reassignment. The applicants began the formal marriage process in 1999 and were soon thereafter awarded a Certificate of Marriage. The Attorney General disputed the validity of the Certificate.

Domestic Law

Anti Discrimination Act 1977 (State of New South Wales law amended in 1996 to protect against discrimination based on gender reassignment).

Sexual Reassignment Act 1988 (State of South Australia law allowing transgender individuals to register under their new sex).

Secretary of Department of Social Security v. SRA, Federal Court of Australia, 1993.

R v. Harris and McGuinness, New South Wales Court of Criminal Appeal, Australia, 1988.

Comparative Law

Bellinger v. Bellinger, England and Wales Court of Appeal, Civil Division, 2001 (determining sex based on biological factors).

Corbett v. Corbett (Otherwise Ashley), Probate, Divorce and Admiralty Division, United Kingdom, 1970 (holding that sex was biologically fixed at birth and could not be changed by medical or surgical means)

Hyde v. Hyde and Woodmansee, Courts of Probate and Divorce, United Kingdom, 1866 (defining common law marriage as the voluntary union for life of one man and one woman, to the exclusion of all others).

Reasoning of the Court

This Court accepted as valid the common law definition of marriage as the union for life of one man and one woman, to the exclusion of all others. The Court's decision, therefore, hinged upon its definition of "man" for the purposes of marriage.

The Court began its opinion by citing evidence that described Kevin medically and socially as a man. This included a lengthy description of Kevin's life before and after the transition process. The Court also reviewed the findings of social workers and doctors at a fertility clinic. This group concluded that Kevin was a man in a heterosexual relationship with his female partner. They noted that Kevin's transsexual history should not prevent him and his partner from receiving treatment at the clinic. The clinic identified the couple as a heterosexual couple seeking treatment for infertility consequent to absent sperm production. Kevin's partner conceived a child, and the applicants raised the child together as mother and father.

The Court also recited the findings of two psychiatrists, both of whom without hesitation identified the applicant as psychologically male. Testimony from thirty-nine of the applicants' friends and family corroborated the psychiatrists' and clinic's determination that the applicants were a heterosexual couple. The Court stated:

These witnesses' evidence is consistent, impressive, and unchallenged. They notice different things, and express themselves in different ways. A list of the things they noticed might suggest a stereotypical view of being a man. Perhaps it is, for example, a heterosexual model. Not all men might fit that stereotype. There are no doubt different ways of being a man. But these witnesses are not constructing models or trying to formulate criteria. They are describing what they see in Kevin. And what they see is a man.

Having established that the applicant was medically and socially accepted as a man, the Court next reviewed the legal definition of "man" and whether or not the

Kevin's transsexual history was incompatible with that definition. Transgender-related common law in Australia was guided by a line of cases stemming from the British decision in *Corbett v. Corbett*. However, the Court noted, "since at least 1982 the common law of Australia had developed to the stage where English decisions were no more than a guide to the common law in Australia, and thus the decision in *Corbett* is useful only to the degree of the persuasiveness of its reasoning". The Court rejected the reasoning in *Corbett*, but nonetheless explained the case in detail, because the respondents relied on it heavily.

Corbett developed a three-pronged test to determine a person's gender for the purposes of marriage: chromosomal sex, gonadal sex, and genital sex. These three factors alone were considered to determine a person's biological sex and, in turn, to determine a person's "true sex" for the purposes of marriage. The Court rejected this conflation of "biological sex" and "true sex", holding that it lacked any scientific or legal justification. The Court also rejected the term "true sex" as used in *Corbett*.

The use of this language creates the false impression that social and psychological matters have been shown to be irrelevant. In truth, they have simply been assumed to be irrelevant ... [Corbett] treats a person's (biological) sex as equivalent to the person's status as a man or woman, without any reasons having yet been advanced for disregarding psychological and social factors.

Corbett justified its three-prong inquiry by arguing that a person's sex, for the purposes of marriage, should be determined biologically because a spouse must be "naturally capable of performing the essential role of a [man or] woman in marriage." The *Kevin* Court disagreed with *Corbett's* justification and found persuasive critics of the opinion who argued that it limited women to the role of physical objects. The Court also found vague the terms "naturally" and "essential role".

Having dismissed *Corbett*, the Court also dismissed the respondents' argument that, for the purposes of marriage, "man" should be understood as it was understood when the *Marriage Act* was passed in 1961. The respondents argued that the 1961 definition included the common law definition of marriage established in *Hyde* in 1866, as well as the biological sex approach in *Corbett*. The Court concluded that this approach was anachronistic. It held that the biological principles that guided the *Corbett* decision were unknown in 1866. Furthermore, the Court expressed doubt that the creators of the *Marriage Act* had in mind the three factors enumerated in *Corbett* ten years later. The Court, therefore, defined a person's sex for the purposes of marriage from a more modern and less restrictive perspective.

In support of this functionalist approach, the Court provided examples from recent Australian legislation, Australian case law, various domestic courts, and international courts. The cited Australian legislation included the *Anti*

Discrimination Act 1977 (NSW) (State anti-discrimination law amended in 1996 to protect transgender individuals); the *Sexual Reassignment Act of 1988* (law allowing transgender individuals to register under their new sex); and passport reforms that allowed transgender individuals to travel under their reassigned gender.

Although Australian courts had not overturned *Corbett*, they had been critical of its analysis. In *R v. Harris and McGuinness*, the New South Wales Criminal Court of Appeal heard a case of two male-to-female transsexuals charged under a sodomy law prohibiting indecency between two males. The *Harris* court found that because one of the defendants was post-operative, she could not be considered a male and, therefore, neither defendant could be prosecuted. The *Kevin* Court also cited *Secretary of Department of Social Security v. SRA* to demonstrate that “under Australian law unless the context indicates reasons for a different approach, words like ‘man’ and ‘woman’ in legislation will be treated as ordinary words” and would normally be understood to include MtF and FtM individuals following sexual reassignment surgery. The Court adopted this approach, finding no evidence that the terms of the *Marriage Act* had been decided by *Corbett*.

In the United Kingdom case *Bellinger*, the court did not overturn *Corbett*, which had been good law in the United Kingdom, but did recognise that the point at which the State should recognise a person’s transition from one gender to another is arbitrary. The *Bellinger* court deferred to the legislature to clarify the issue. The *Kevin* Court found that *Bellinger*, despite its refusal to overturn *Corbett*, reflected changing attitudes towards transgender persons, and cited numerous jurisdictions that legally recognised a person’s reassigned sex, including Austria, Denmark, Belgium, Finland, France, Germany, Italy, the Netherlands, Portugal, and Sweden. The Court considered that these jurisdictions showed: “a general tendency to accept that for legal purposes, including marriage, post-operative transsexuals should be treated as members of the sex to which they have been assigned. When seen against this international context, the approach in *Corbett* is increasingly out of step with developments in other countries.”

In addition to these positive trends, the Court relied on expert testimony from various doctors and scientists unfamiliar with the applicants’ case. These experts supported the recognition of a transgender person’s reassigned sex for the purpose of marriage. The Court concluded that both global and domestic trends and scientific evidence compelled it to legally recognise a person’s capacity to change gender. Further, and more importantly, marriage was not to be excluded from transgender recognition. Not only did the Court fail to find a compelling reason to define “man” and “woman” differently for marriage, but the Court also found:

good reasons specific to marriage for recognizing the re-assignment. Doing so would be likely to promote the interests of others, in

particular the spouses and children involved. Failing to do so would lead to the odd result that a person who appears to be a man, who functions in society as a man, and whose body can never function as a woman's body and has most of the characteristics of a man, would be entitled to marry a man.

Finally, the Court held that recognising sex-reassignment for the purposes of marriage would bring Australian marriage law into conformity with other areas of law – for example, Australian passport laws and anti discrimination laws. The Court noted that, although it was possible for different areas of law to be incongruous, it was highly undesirable.

The Court held that for the purposes of marriage, a person's sex should be determined by considering a number of factors, which included, but were not limited to: “biological and physical characteristics at birth (including gonads, genitals, and chromosomes); the person's life experiences, including the sex in which he or she is brought up and the person's attitude to it; the person's self-perception as a man or woman; the extent to which the person has functioned in society as a man or a woman; any hormonal, surgical or other medical sex reassignment treatments the person has undergone, and the consequences of such treatment; and the person's biological, psychological and physical characteristics at the time of the marriage, including (if they can be identified) any biological features of the person's brain that are associated with a particular sex”. The Court noted that the inquiry into these factors should involve the person's state at the time the marriage was performed.

Postscript

The decision was affirmed on appeal by the Full Court of the Family Court *Attorney General (Cth) v. “Kevin and Jennifer”*, Family Court of Australia (Full Court), 2003.

In re Jose Mauricio Lovo-Lara and Gia Teresa Lovo-Ciccione,
Board of Immigration Appeals, United States (18 May 2005)

Procedural Posture

The petitioner, an American citizen, appealed against the immigration agency's denial of a visa petition for her husband on the basis of their marriage.

Facts

The petitioner, an American citizen, was a transgender woman who had legally changed her sex in 2001. In 2002 she married a male citizen from El Salvador and filed a visa petition on behalf of her husband. The immigration agency rejected the petition on grounds that the marriage of the petitioner and her husband was invalid under the Federal *Defense of Marriage Act* (DOMA).

Issue

Whether the marriage between a man and a transgender woman was valid for the purposes of the *Immigration and Nationality Act*.

Domestic Law

Defense of Marriage Act (DOMA) (the word marriage meant only a legal union between one man and one woman as husband and wife, and the word “spouse” referred only to a person of the opposite sex who was a husband or a wife).

Immigration and Nationality Act, Section 201(b)(2)(A)(i) (providing for classification as “immediate relatives” for the “children, spouses, and parents of a citizen of the United States”).

North Carolina General Statutes, Section 51-1 (valid and sufficient marriage would be created by the consent of a male and female person who may lawfully marry, presently to take each other as husband and wife, freely, seriously, and plainly expressed by each in the presence of the other), and Section 130A-118 (issuing of new birth certificates to be made by the State Registrar when: (4) A written request from an individual was received by the State Registrar to change the sex on that individual’s birth record because of sex reassignment surgery, if the request was accompanied by a notarised statement from the physician who performed the sex reassignment surgery or from a licensed physician who had examined the individual and could certify that the person had undergone sex reassignment surgery).

MT v. JT, Superior Court of New Jersey, United States, 1976 (rejecting *Corbett* and finding dispositive the sex of the individual on the day of marriage and not at birth).

Reasoning of the Court

The Board’s analysis was in two steps. First, it examined the validity of the petitioner’s marriage; second, it determined that the marriage qualified under the *Immigration and Nationality Act*. The Board found that the petitioner underwent gender reassignment surgery and amended her birth certificate according to the guidelines of Section 130A-118. As such, her marriage did not violate North Carolina’s statutory definition of marriage and her marriage was legal in North Carolina.

The dispositive issue was whether the petitioner’s birth sex precluded recognition of her marriage under the *Immigration and Nationality Act*. The State argued that DOMA’s limitation of marriage to the union of a man and woman prevented the federal government from recognising the petitioner’s marriage. Deciding in favour of the petitioner, the Board focused on the legislative history of DOMA and found that Congress did not address the issue of postoperative transsexuals and marriage. Indeed, Congress had failed to consider *MT v. JT*, an important transgender marriage case that recognised a post-operative transgender woman

in her reassigned sex for the purposes of marriage. Therefore, the Board reasoned, DOMA did not prevent federal recognition of a marriage between the petitioner and a man. The Board also rejected the State's argument that gender could be determined exclusively by chromosomal pattern without regard to other factors such as gender identity. Not only were there more than two possible chromosomal patterns, but medical experts had identified at least eight criteria that were used to determine gender.

Finally, the Board held that the sex designation on an original birth certificate was a poor indicator of gender. Normally, the sex of newborns was determined using only the appearance of their external genitalia. This method was faulty because an intersex person might have external genitalia that corresponded to one sex but a chromosomal pattern that corresponded to another. For these reasons, the Board ruled that it was appropriate to determine gender from the information on a current birth certificate issued by the State in which the marriage took place.

The Board held in favour of the petitioner. If a married couple presented documents proving that the State in which they married recognised them as an opposite-sex couple, then, for purposes of immigration visas, the federal government must also recognise their marriage.

W v. Registrar of Marriages, High Court of the Hong Kong Special Administrative Region (5 October 2010)

Procedural Posture

Petition for judicial review of a decision by the Hong Kong Registrar of Marriages to refuse to grant the applicant, a transgender woman, a licence to marry her male partner.

Facts

The applicant was registered at birth as male. From 2005 to 2008 the applicant received psychological and medical treatment including hormone therapy and eventually underwent sex reassignment surgery. The treatment was funded and provided by the State-run Hospital Authority. Following the surgery, the applicant was issued with an official medical letter which certified that she had undergone the procedure and stated that her gender should now be considered female. The applicant changed her name by deed poll and had her educational records and personal identity card altered to reflect her acquired female gender. She was not, however, legally permitted to amend her birth certificate.

When the applicant sought to marry her male partner, the Registrar of Marriages refused on the grounds that she was a man. The refusal was based on sections 21 and 40 of the *Marriage Ordinance*, which were construed to mean that marriage could only be a union between a man and a woman. In addition, although the

legislature provided no definition of the terms ‘male’ and ‘female’, section 20(1) (d) of the *Matrimonial Causes Ordinance* rendered void marriages in which the parties were not of the opposite sex.

Issue

Whether the *Marriage Ordinance* permitted a transgender woman to marry a man; whether, alternatively, the restriction on the right of a transgender individual to marry a member of his or her birth sex was inconsistent with the right to marry in the *Basic Law* or the ICCPR as enacted in Hong Kong through the *Bill of Rights*.

Domestic Law

Basic Law of Hong Kong, Articles 37 (protection of marriage) and 39(1) (incorporation of the ICCPR into the law of Hong Kong).

Hong Kong Bill of Rights, Articles 14 (protection of privacy, family, home, correspondence, honour and reputation) and 19(2) (recognition of the right of men and women of marriageable age to marry).

Hong Kong Marriage Ordinance, Sections 21 and 40.

Hong Kong Matrimonial Cause Ordinance, Section 20(1)(d).

Comparative Law

Attorney-General v. Otahuhu Family Court, New Zealand High Court, 1995 (holding that where a person has undergone surgical and medical procedures that have effectively given that person the physical conformation of a person of a specified sex, there is no lawful impediment to that person marrying as a person of that sex).

Bellinger v. Bellinger, England and Wales Court of Appeal, Civil Division, 2001 (determining sex based on biological factors).

Bellinger v. Bellinger, House of Lords, United Kingdom, 2003 (criticising *Corbett v. Corbett* but holding that the question of gender recognition should be left to the legislature).

Corbett v. Corbett (Otherwise Ashley), Probate, Divorce and Admiralty Division, United Kingdom, 1970 (holding that sex was biologically fixed at birth and could not be changed by medical or surgical means)

In re Kevin (Validity of marriage of transsexual), Family Court of Australia at Sydney, 2001; *Attorney General (Commonwealth) v. “Kevin and Jennifer”*, Full Court of the Family Court of Australia at Sydney, 2003 (declining to follow *Corbett v. Corbett*, the Court took the view that psychological factors take precedence over biological factors, and stated that “where a person’s gender identification differs from his or her biological sex, the [psychological] should in all cases prevail. It would follow that all transsexuals would be treated in law according

to the sex identification, regardless of whether they had undertaken any medical treatment to make their bodies conform with that identification”).

MT v. JT, Superior Court of New Jersey, United States, 1976 (recognising the marriage of a post operative male to female transsexual).

International Law

European Convention on Human Rights, Articles 8 (right to respect for private and family life) and 12 (right to marry).

International Covenant on Civil and Political Rights, Articles 17 (right to privacy) and 23 (right of men and women of marriageable age to marry).

Goodwin v. United Kingdom, ECtHR, 2002 (holding that classifying post-operative transgender persons under the sex they had before surgery violated Articles 8 and 12 of the *European Convention*).

Schalk and Kopf v. Austria, ECtHR, 2010 (holding that a same-sex couple without children constituted a family and were protected by the right to the family and private life guarantees of Article 8; finding no right of a same-sex couple to marry under Article 12).

Reasoning of the Court

The Court used the principles of statutory interpretation to frame its discussion of whether the *Marriage Ordinance* encompassed post-operative transsexuals. The decision was explicitly guided by the Court’s desire to adopt a construction that gave effect to the intent of the legislature. The Court observed that the *Marriage Ordinance*, by virtue of its foundations in Hong Kong’s colonial past (as part of the British Commonwealth), reflected a Church of England tradition. The *Marriage Ordinance* created an institution that could only be constituted by partners of the “biological opposite sex”. The Court also noted that within this tradition there was a particular emphasis on procreation.

Having determined that marriage in the *Marriage Ordinance* was restricted to opposite-sex partners, to the Court then determined whether the applicant could be defined as female for the purpose of marriage and thus enter into a marriage, or whether the marriage would be akin to a same-sex union and was thus prohibited. The Court considered the 1970 holding in *Corbett v. Corbett* that, for the purpose of marriage, sex was determined by biological criteria and was fixed at birth. This had the effect of excluding post-operative transsexuals from marrying under British law. Hong Kong’s *Marriage Ordinance* had its genesis in the same marriage law that was considered in *Corbett* and the Court regarded the subsequent enactment of the *Nullity of Marriage Ordinance 1971* (United Kingdom), as adopted in Hong Kong through section 20(1)(d) of the *Marital Causes Ordinance*, to be statutory recognition of the decision. Thus *Corbett* continued to represent the state of the law in Hong Kong.

The Court considered whether the definition of marriage should be extended to encompass post-operative transsexuals. The Court acknowledged that social change and decisions of the European Court had led to changes in the United Kingdom such that *Corbett* was no longer good law there. However, courts in the United Kingdom had left it to the legislature to decide how to provide recognition. The Court emphasised the boundaries of its role as interpreter of the law. It was concerned with the public policy ramifications that a finding for the applicant might have for the institution of marriage and its legal rights and obligations. The Court decided that, if a gap had opened between the legal status quo and social attitudes, it was the prerogative of the legislature and not the courts to address it.

The Court then turned to the applicant's alternative argument that, in so far as it did not permit a post-operative transsexual to marry in his or her acquired gender, the *Marriage Ordinance* was unconstitutional. An argument raised by the applicant, that the right to privacy under Article 14 of the *Bill of Rights* was relevant to the proceedings, was dismissed on the basis that it did not add anything to the case. The Court held that the applicant's case would "stand or fall" on the Court's interpretation of the scope of the right to marry. The Court reasoned that it would be a "very strange result" if the more general right to privacy was interpreted to provide rights held to be excluded by the more specific provisions for marriage. In concluding that the right of a transsexual to marry could not be based on the right to privacy, the Court distinguished the case of *Goodwin v. United Kingdom* and relied on the decision in *Schalk and Kopf v. Austria*. The Court reasoned that the claim in *Goodwin* had not been focused on the right to marriage but rather on the general recognition of "a post-operative transsexual's acquired gender", thus making the right to privacy relevant to that case.

The Court's decision focused primarily on the right to marry under Article 37 of the *Basic Law*, which provided that "the freedom of marriage of Hong Kong residents and their right to raise a family freely shall be protected by law", and Article 19(2) of the *Bill of Rights*, which provided that "the right of men and women of marriageable age to marry and found a family shall be recognised". The Court held that both Articles should be construed to refer to opposite sex marriage even where no gender was specified. The applicant did not contest the prohibition on same-sex marriage but, rather, sought recognition of her acquired gender for the purpose of marriage. In other words, she sought to enter into an opposite-sex union.

In the Court's opinion, the relevant question was whether the terms "man" or "woman" within the *Basic Law* or in the *Bill of Rights* included transgender men and women. The Court recognised that marriage was an evolving institution that was "necessarily informed by the societal consensus and understanding of marriage and the essence thereof in that society". It noted that scientific understanding of gender had evolved to include a transsexual's acquired gender but did not find this to be a decisive factor. Instead, the judgment focused on

whether the societal consensus in Hong Kong was at a point where it could accept a legal definition of marriage that encompassed post-operative transsexuals. Despite the movement of European jurisprudence in that direction, the Court held that no consensus on the issue existed under the ICCPR or in Hong Kong. The Court found that, although the government facilitated treatment for transsexuals and allowed gender change to be recognised on all documentation except birth certificates, this did not constitute acceptance of an extended understanding of gender within the right to marriage.

The Court found for the Registrar of Marriages.

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- 1 For a critique of the heteronormativity of transgender legal arguments and jurisprudence, see David B. Cruz, *Getting Sex "Right": The Heteronormativity and Biologism in Trans and Intersex Marriage Litigation and Scholarship*, 18 *Duke Journal Gender Law and Policy* 203 (Fall 2010).
 - 2 *Corbett v. Corbett* [1970], 2 All ER 33.
 - 3 For a discussion of the influence of *Corbett*, see Andrew N. Sharpe, *From Functionality to Aesthetics: the Architecture of Transgender Jurisprudence*, 8 *Murdoch University Electronic Journal of Law* (March 2011).
 - 4 Sharpe, 'From Functionality to Aesthetics: the Architecture of Transgender Jurisprudence', 8 *Murdoch University Electronic Journal of Law* (March 2001).
 - 5 *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App. 1999); *In re Estate of Gardiner*, 42 P.3d 120 (Kan. 2002); *In re Marriage License for Nash*, 2003, WL 23097095 (Ohio Ct. App. 2003); *Kantaras v. Kantaras*; 884 So.2d 155 (Fla. Dist. Ct. App. 2004) (reversing opinion of trial court that had recognized validity of marriage); *In re Marriage of Simmons*, 825 N.E. 2d 303 (Ill. App. Ct. 2005).
 - 6 *In re Marriage of Simmons*, 825 N.E.2d 303, 310 (holding that "the mere issuance of a new birth certificate cannot, legally speaking, make petitioner a male").
 - 7 *M v. M.*, [1991] NZFLR 337, Family Court Otahuhu (30 May 1991).
 - 8 *M v. M.*, [1991] NZFLR 337, Family Court Otahuhu (30 May 1991) at p. 35.
 - 9 European Court of Human Rights, Judgment of 11 July 2002, *Goodwin v. United Kingdom*, Application No. 28957/95, at para. 77. See also European Court of Human Rights, Judgment of 11 July 2002, *I v. United Kingdom*, Application No. 256080/94, (finding violations of Articles 8 and 12 for refusal to grant legal recognition to individual following gender reassignment surgery).
 - 10 *Ibid.*, at *Goodwin v. United Kingdom*, para. 98.
 - 11 *Ibid.*, at para. 101.
 - 12 *Ibid.*, at para. 56.

FREEDOM OF RELIGION AND NON- DISCRIMINATION

Chapter ten

Freedom of Religion and Non-Discrimination

INTRODUCTION

The work of activists who campaign for LGBT equality is frequently presented as a direct threat to religious values and institutions.¹ As this Casebook demonstrates, however, their right to demand freedom from discrimination based on sexual orientation or gender identity is protected by international human rights law and by many domestic legal systems. At the same time, international law protects the right to freedom of religion, conscience, and belief. Article 18(1) of the ICCPR affirms that the right to freedom of thought, conscience or religion includes a person's "freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching". Under Article 18(3), the freedom to "manifest one's religion" may only be subject to limitations that are prescribed by law and "necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others". A similar right is found in regional human rights treaties and many constitutions.²

Given that some religious teachings declare that same-sex sexual conduct is immoral, and some religions condemn not only same-sex sexual activity but also LGBT individuals, conflicts between the right to freedom from discrimination and the right to manifest one's religion are inevitable. Some religious individuals and organisations argue that compliance with non-discrimination norms limits their right to freedom of religion;³ Some commentators claim that removing religion from the public sphere "closets" religious identity.⁴ Courts are often expected to balance the tension between the two sets of rights. This chapter examines these tensions - in education, employment, medical care, partnership and marriage - and in so doing demonstrate the diversity of circumstances in which the principle of non-discrimination is relevant.

Religiously motivated disapproval of homosexuality may be manifested publicly or privately, by an individual, by religious institutions and private businesses, or by State employees. In two of the cases included here, the conflict was generated by the restrictions that religious institutions imposed on individuals who asserted a gay identity. *Hall v. Powers*, decided by the Ontario Supreme Court in 2002, concerned a student at a private Catholic high school who wished to bring his

boyfriend as his date to the school prom. His request was denied by the school authorities, on the grounds that authorisation would endorse a “homosexual lifestyle” of which they disapproved for religious reasons. The student sought an injunction to restrain the defendants from implementing this decision. In an earlier Supreme Court case, *Trinity Western University [TWU] v. British Columbia [BC] College of Teachers*, a teachers’ college had successfully argued that it would not be in violation of the non-discrimination provisions of the *Canadian Charter* if it required students to sign a code of conduct that condemned homosexuality.⁵ The Court considered the issue was one belief and not conduct, stating: “[t]he freedom to hold beliefs is broader than the freedom to act on them. Absent concrete evidence that training teachers at TWU fosters discrimination in the public schools of BC, the freedom of individuals to adhere to certain religious beliefs while at TWU should be respected. Acting on those beliefs, however, is a different matter.”⁶

In *Hall v. Powers*, however, the Court reasoned that the prom was a social event, not integral to the religious education provided by the school. Granting the injunction would have no impact on teaching in the school or on the beliefs of the Catholic Church, and therefore would not impair the defendants’ freedom of religion. Failure to grant the injunction, on the other hand, would harm the plaintiff by excluding him from an important school social event. The balance thus tipped in favour of the plaintiff and the Court granted the injunction.

The Equality Court of South Africa employed similar reasoning in *Strydom v. Nederduitse Gereformeerde Gemeente Moreleta Park* (2008). The church had terminated the employment contract of a music teacher when it learned that he was engaged to marry another man. It argued that, under Section 15 of the Constitution, its right to freedom of religion exempted it from compliance with laws covering discrimination in employment. The employment discrimination statute and Section 9 of the Constitution both listed sexual orientation as a protected class. The Court engaged in a balancing test. It began by distinguishing between the right to hold religious ideas “hostile to homosexual relationships”, which was protected under the Constitution, and the right to apply those beliefs in employment practices, which was not. It then asked whether compliance with the non-discrimination requirement was an excessive burden on the constitutional right to freedom of religion. The Court held that high-ranking church officials and ministers who were directly responsible for educational content could be required to conform to church standards concerning same-sex sexual relationships. The church was not required to hire ministers who violated its own precepts on homosexual conduct. By contrast, lower-level employees without “spiritual responsibility” had relatively little impact on the church community or its beliefs, and, like the plaintiff, they retained their right to be free of discrimination based on sexual orientation. Essentially, his distance from the content of religious education and his lack of influence over curriculum, meant that he was excused

from conforming with religious principles. The Court found that the church had discriminated against the plaintiff when it terminated his employment contract.

In ***Chamberlain v. Surrey School District***, decided by the Supreme Court of Canada in 2002, the issue was whether a public school board could rely on the religiously-motivated objections of parents when it banned books and other resource materials that made reference to same-sex families. The Court held that the school board had failed to conform to the secular requirements of the *School Act* and that its decision was therefore unreasonable. It stated: “A requirement of secularism implies that, although the Board is indeed free to address the religious concerns of parents, it must be sure to do so in a manner that gives equal recognition and respect to other members of the community.”

Both ***North Coast Women’s Care Medical Group*** and ***Hall v. Bull*** considered whether an individual’s religious beliefs could excuse the denial of goods or services to gay or lesbian members of the public. In ***North Coast***, decided by the Supreme Court of California in 2008, two medical doctors had refused to perform intrauterine insemination for a lesbian woman because they had religious objections to helping a same-sex couple conceive. The plaintiff had sued under a State non-discrimination statute that included sexual orientation, to which the medical clinic and its physicians had pleaded freedom of religion as a defence. In a 1990 case interpreting the Free Exercise Clause of the federal constitution, the US Supreme Court had held that the right to free exercise of religion did not excuse an individual from compliance with a neutral law of general applicability where that law imposed a minor burden on religious belief.⁷ Applying the reasoning of the US Supreme Court here, the California Court rejected the doctors’ argument.

In ***Hall v. Bull***, decided by Bristol County Court (UK) in 2011, a same-sex couple in a civil partnership was refused accommodation at a hotel owned and run by a devout Christian family. The defendants maintained that rooms were denied to all unmarried couples, whether heterosexual or homosexual, and that they differentiated on the basis of marital status, not sexual orientation. The Court held that the defendants’ right to manifest their religion, although protected under Article 9 of the *European Convention*, was qualified. In this instance, equality laws that prohibited discrimination on grounds of sexual orientation were a “necessary and proportionate intervention”, to protect the rights of others.

There is much debate about whether it is appropriate to grant religious exemptions from non-discrimination laws.⁸ When the Constitutional Court of South Africa decided ***Fourie*** (see Chapter 14), it was careful to note that the *Marriage Act* protected the right of marriage officers to refuse to solemnise certain marriages.

Nothing in this Act contained shall be construed so as to compel a marriage officer who is a minister of religion or a person holding a responsible position in a religious denomination or organization to solemnise a marriage which would not conform to the rites,

*formularies, tenets, doctrines or discipline of his religious denomination or organization.*⁹

When Canada enacted the *Civil Marriage Act* in 2005, which redefined marriage as the union of two persons to the exclusion of all others, it specifically provided that “officials of religious groups are free to refuse to perform marriages that are not in accordance with their religious beliefs”.¹⁰ Exemption for religious leaders, nevertheless, does not imply that individuals who do not exercise a religious function are exempt from compliance with general anti-discrimination laws.

The applicability of a personal religious exemption from a non-discrimination law was explored in the UK case of *Ladele v. Borough of Islington* and the Canadian case of *In the Matter of Marriage Commissioners*. In *Ladele*, a civil registrar employed by the London Borough of Islington refused to perform civil partnerships because her religious beliefs did not permit her to take an active role in enabling same-sex unions. When disciplinary proceedings were initiated against her, she brought a suit alleging workplace discrimination on religious grounds. The Employment Tribunal found for the plaintiff, but the Employment Appeal Tribunal reversed on appeal. It reasoned that as a civil registrar, the plaintiff was performing a “secular activity carried out in the public sphere under the auspices of a public, secular body”. The prohibition against discrimination on the basis of sexual orientation thus trumped her right to manifest her religious belief.

Following the enactment of federal marriage legislation in Canada, some provinces granted marriage commissioners the right to decline to officiate, primarily through policy statements.¹¹ In Saskatchewan Province, three marriage commissioners refused to perform same-sex marriages on the basis of their personal religious beliefs. They filed a human rights complaint alleging an infringement of their freedom of religion, which was dismissed. In a related case, the provincial human rights tribunal upheld a human rights complaint filed against one of these marriage commissioners by a same-sex couple.

As a result of these controversies, the provincial government requested the Court of Appeal for Saskatchewan to comment on the constitutional validity of two possible amendments to the provincial marriage statute. The first would allow a marriage commissioner appointed before the effective date of the marriage statute to refuse to solemnise a marriage if doing so would be contrary to her or his religious beliefs. The second contained no reference to the date of appointment but was otherwise identical. In *In the Matter of Marriage Commissioners*, the Court concluded that neither amendment would offend the equality provisions of the *Canadian Charter*.

The Court determined that the purpose of both amendments was to accommodate the religious beliefs of commissioners. Neither amendment had as its purpose the denial of rights under Section 15 of the Charter, but their effect would be to draw a distinction based on sexual orientation. To reach this judgment, it assessed the grounds on which it was justified to limit Charter rights. Under Section 1 of

the Charter, limitations were only permissible if they were prescribed by law and demonstrably justifiable in a free and democratic society. Specifically, Canadian case law required that the objective of the law must be sufficiently important to warrant overriding a Charter right; that the law should be rationally connected to its objective; that the law must impair the right or freedom in question as minimally as possible; and that the law must be proportional to the end achieved.

The Court found that the amendments were not proportional because their positive effects did not outweigh their negative impact. The most significant negative effect was that either amendment would

undermine a deeply entrenched and fundamentally important aspect of our system of government. In our tradition, the apparatus of state serves everyone equally without providing better, poorer or different services to one individual compared to another by making distinctions on the basis of factors like race, religion or gender. The proud tradition of individual public officeholders is very much imbued with this notion. Persons who voluntarily choose to assume an office, like that of marriage commissioner, cannot expect to directly shape the office's intersection with the public so as to make it conform with their personal religious or other beliefs.... Marriage commissioners do not act as private citizens when they discharge their official duties. Rather, they serve as agents of the Province and act on its behalf and its behalf only.

The violation of Section 15 rights was therefore not reasonable and justifiable within the meaning of Section 1 of the Charter and both amendments were unconstitutional.

CASE SUMMARIES

Hall v. Powers, Ontario Supreme Court, Canada (10 May 2002)

Procedural Posture

The plaintiff sought an interlocutory injunction restraining the defendants from preventing him from attending a prom at a Catholic high school with his boyfriend.

Facts

The plaintiff was a student in a Catholic high school. Several months before the prom (an annual dance for high school students), he expressed his wish to bring his boyfriend as his date. The director of the school refused permission, arguing that interaction at a prom between romantic partners was a form of sexual activity and that, by allowing the plaintiff to bring his boyfriend to a prom, the school would be seen to endorse a conduct contrary to Catholic teachings. The School Board confirmed the denial.

Issue

Whether the plaintiff's claim of discrimination on the basis of sexual orientation had sufficient merit to warrant an injunction.

Domestic Law

Constitution of Canada, Section 93.

Canadian Charter of Rights and Freedoms, Sections 1, 2 and 15 (non discrimination).

Ontario Human Rights Code, Chapter H.19.

Egan v. Canada, Supreme Court of Canada, 1995 (establishing that sexual orientation constituted a prohibited ground of discrimination under Section 15 of the *Canadian Charter of Rights and Freedoms*).

Reference re Act to Amend the Education Act, Ontario Court of Appeal, Canada, 1986.

Trinity Western University v. British Columbia College of Teachers, Supreme Court of Canada, 2001 (affirming that neither freedom of religion nor the guarantee against discrimination based on sexual orientation are absolute).

Reasoning of the Court

The Court first noted that a three-stage test had to be applied when considering whether to grant an interlocutory injunction: (1) whether the issue was a serious one; (2) whether the applicant would suffer irreparable harm in the absence of an injunction; and (3) whether the relative harm suffered by the parties favoured granting the relief.

The reasoning of the Court focused on the first question, whether the case had enough legal merit to justify the Court's extraordinary intervention. It concluded that a serious issue did exist.

The Court noted the fundamental role played by schools in the lives of young people and the fact that the establishment and implementation of policies by a publicly founded school board was subject to the *Canadian Charter of Rights and Freedoms*. In the present case, the policy was applicable to any student wishing to bring a same-sex date to the prom and implicated the non-discrimination provision of the Charter (Section 15).

The Court also cited *Egan v. Canada* and noted that gay men and lesbian women had historically suffered stigma and discrimination, contrary to Section 15. The plaintiff argued that his right to be protected against discrimination included the right to be different, to be accepted as different, and to be treated equally.

In the Court's view, the prom was not solely about physical intimacy leading to sex. In any case, the school was not supposed to inquire into the sex life of its students or their prom dates, these being private matters. Furthermore, the prom

could not be considered part of the religious education provided by the school, nor was it to be held on school property.

The defendants argued that Catholic schools were not the same as non-denominational public schools. The Bishop responsible for the region had intervened in the question and had stated that giving the plaintiff permission to take another boy as his date to the prom would imply a “clear and positive approval not just of the boy’s ‘orientation’ but of his adopting a homosexual lifestyle”. According to the Bishop, the school had adopted an “authentically Catholic position”. The Court disagreed, finding that religious beliefs could not justify discrimination against homosexuals without any judicial scrutiny. According to the Court, at trial on the merits a court could find that the school had unjustly discriminated against the plaintiff in violation to his Charter rights. Courts must “strike a balance, on a case-by-case basis, between conduct essential to the proper functioning of a Catholic school and conduct which contravenes such Charter rights as those of equality or s.15 or of conscience and religion in s. 2(a)”.

In the present case, the Court found that the defendants had not demonstrated that their decision to refuse the plaintiff permission to bring his boyfriend to the prom was justified under Section 93 of the *Constitution Act*, aimed at protecting denominational schools.

The Court then briefly analysed whether the restriction on the plaintiff’s rights caused by the school’s decision could be saved under Section 1 of the *Canadian Charter*, which established when it is justifiable to limit rights. The Court considered whether the restriction on the plaintiff’s rights had a rational connection to a pressing and substantial objective, whether it minimally impaired his rights, and whether it was proportionate. In the Court’s opinion, none of the three conditions had been met. The school’s decision was therefore not justified under section 1 of the Charter.

Returning to the injunction test, the Court found that the second and third stages of the inquiry had been satisfied as well. If the plaintiff were excluded from the prom, he would lose the opportunity it offered forever. According to the Court, the social significance of a high school prom was well-established and being excluded would constitute an irreparable injury to the plaintiff as well as a serious affront to his dignity. Furthermore, the Court found that granting or refusing the injunction engaged a public interest (with regard to the effects of stigma and discrimination against homosexuals).

Lastly, the Court considered the balance of convenience, by evaluating the relative hardship suffered by the parties if the Court decided to grant or deny the injunction. It found that “the effect of an injunction on the defendants and on other members of the Catholic faith community [would] be far less severe than the effect on [the plaintiff] and on lesbian and gay students generally if an injunction [was] not granted”. An injunction would have no impact on teaching within the

school or on the Catholic Church's beliefs and therefore would not impair the defendants' freedom of religion. On the other hand, were the injunction not granted, it would become acceptable to restrict gay and lesbian students from certain school activities on the basis of their sexual orientation until a trial on the merits took place. According to the Court, the effects of this exclusion would have been pervasive and serious.

The Court issued an interlocutory injunction restraining the defendants from preventing or impeding the plaintiff from attending the high school prom with his boyfriend.

Chamberlain v. Surrey School District No. 36, Supreme Court of Canada (20 December 2002)

Procedural Posture

The plaintiff teacher sought legal intervention when the Surrey School Board refused to approve three books that depicted same-sex partnerships because they thought the books would cause controversy and expose children to ideas that conflicted with the beliefs of their parents. The School Board resolution was quashed by the Supreme Court of British Columbia for violating Section 76 of the *School Act*, because religion had significantly influenced the Board's decision but was not within its mandate to consider. The Court of Appeals set aside that decision and ruled that the resolution had been within the Board's mandate because it was based on the views of the parents and the community in which the school was located. The Supreme Court of Canada then granted review.

Facts

The plaintiff asked the Surrey School Board to approve three books for his kindergarten class which depicted same-sex parents. These books could not be used to teach the family life education curriculum without the Board's approval. Shortly thereafter the Board adopted a resolution that materials from gay and lesbian organisations would not be approved. As a result, the three books were prohibited, and other resources such as library books, posters, and pamphlets were also removed from district schools.

Issue

Whether the Surrey School Board could lawfully deny a teacher permission to use children's books that depicted same-sex parents because such books might expose children to ideas that conflicted with their parents' religious beliefs, and caused controversy.

Domestic Law

Canadian Charter of Rights and Freedoms.

The School Act 1996, Section 76 (all “schools must be conducted on strictly secular and non-sectarian principles” and the “highest morality must be inculcated, but no religious dogma or creed is to be taught in a school...”).

Reasoning of the Court

The Court found that the appropriate standard of review was reasonableness. It noted, first, that no privative clause existed for the Board’s decisions. In addition, while the Board had considerable expertise in balancing the interests of diverse parental groups and disparate family situations, this was a human rights issue that concerned the relative value of some beliefs over others. The Board’s decision contradicted the *School Act’s* requirement of tolerance, respect for diversity, mutual understanding, and acceptance of all family models. Where this occurred, a high level of supervision and intervention was required and permitted. Lastly, the Court found that the Board had acted as though the issue was essentially about balancing community interests and should have sought to balance the religious interest of some against the interest of tolerance and respect for diversity. Having concluded that the standard of review was reasonableness, the Court determined whether, under that standard, the Board’s decision went beyond its legislative mandate.

Section 76 of the *School Act* promoted secularism and tolerance. The Board was entitled to take into consideration the views of parents, even their religious views, when deciding a case; but the secularism requirement of Section 76 ruled out “any attempt to use the religious view of one part of the community to exclude from consideration the values of the other members of the community”. In other words, religious values were not weightier than other values to which members of the district were attached, and “[r]eligious views that deny equal recognition and respect to the members of a minority group cannot be used to exclude the concerns of the minority group”.

Importantly, the Court found that the Board acted outside its *School Act* mandate by not giving the same recognition and respect to same-sex parented families as it gave to parents who considered same-sex relationships immoral. “Parental views, however important, cannot override the imperative place upon the British Columbia public schools to mirror the diversity of the community and teach tolerance and understanding of difference.”

Finally, the Court found that the Board had departed from its own guidelines, which required the curriculum to reflect the experience of its students. It had not considered the relevance of the materials in question to the curriculum or the needs of children from same-sex parented families. The Board failed to meet its mandate, and applied a criterion of necessity rather than the mandated criterion of enrichment, diversity, and tolerance.

Considering the educational system’s objectives of promoting tolerance and non-sectarianism, the Court found that the Board’s decision was unreasonable. The

Court ordered the Board to reconsider the issue in light of these principles and in accordance with the *School Act*.

North Coast Women's Care Medical Group v. San Diego County Superior Court, Guadalupe T. Benitez, Real Party in Interest, Supreme Court of California, United States (18 August 2008)

Procedural Posture

The plaintiff sued a medical clinic and two of its employee physicians (Brody and Fenton), alleging that their refusal to perform intrauterine insemination violated her right to be free from discrimination. The defendants argued that their right to the free exercise of religion was an affirmative defence. The Superior Court of San Diego County granted the plaintiff's motion for summary adjudication of the defendants' affirmative defence. The Court of Appeal then granted a petition for writ of mandate with regard to the two employee physicians. The plaintiff petitioned for review, which the Supreme Court granted.

Facts

In 1999 the plaintiff and her partner, a lesbian couple, consulted Dr Brody at the North Coast Women's Care Medical Group. They sought help with artificial insemination. Dr Brody contended that she had told the plaintiff that, because of her fertility problems, she might have to consider intrauterine insemination (a procedure in which a physician inserts sperm directly into the plaintiff's uterus), but that she herself would not perform the procedure on religious grounds, because the plaintiff was unmarried. Dr Brody also said she told the plaintiff that another doctor, Dr Fenton, shared her religious objections but two other doctors at the Medical Group could perform the procedure.

After several attempts to use alternative fertility treatments, the plaintiff opted for intrauterine insemination. Dr Brody was on vacation at the time and the plaintiff was assigned to the care of Dr Fenton, who also had a religious objection to preparing intrauterine insemination for the plaintiff. The other doctors available were not licensed to perform the procedure. The plaintiff was referred to a physician outside the Medical Group where, after a series of complications, she was able to conceive. She then sought damages and injunctive relief, alleging that the two physicians at the Medical Group had refused to perform the procedure because they objected on religious grounds to helping a same-sex couple conceive.

Issue

Whether the physicians' right to freedom of religion and free speech, protected by both the federal and Californian constitutions, exempted them from complying with statutory prohibitions against discrimination based on sexual orientation.

Domestic Law

California Constitution, Article I (4) (“Free exercise and enjoyment of religion without discrimination or preference are guaranteed”).

United States Constitution, 1st Amendment (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech ...”).

Unruh Civil Rights Act, Section 51(a) (interpreting non-discrimination provision, through a series of judicial decisions, to protect against discrimination based on sexual orientation).

Catholic Charities of Sacramento, Inc. v. Superior Court, Supreme Court of California, United States, 2004.

Church of Lukumi Babalu Aye, Inc. v. Hialeah, United States Supreme Court, 1993 (“a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice”).

Employment Div., Ore. Dept. of Human Res. v. Smith, United States Supreme Court, 1990 (overturning several prior freedom of religion cases, because the 1st Amendment’s right to free exercise of religion did not affect the obligation to comply with a “valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)”).

Reasoning of the Court

The Court reviewed United States Supreme Court case law and concluded that religious objectors had “no federal constitutional right to an exemption from a neutral and valid law of general applicability on the ground that compliance with that law is contrary to the objector’s religious belief.” Specifically, the California Supreme Court had adopted the test from *Employment Div., Ore. Dept. of Human Res. v. Smith*, that a law, which applied generally and neutrally to all persons and which concerned a matter that the State was allowed to regulate, was constitutional. The Court also referred to *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, which held that if the law was neutral and general it did not need to be justified on the grounds of a compelling government interest, even if the law imposed a minor burden on religious practices.

Next, the Court established that the *Unruh Civil Rights Act* was valid and neutral because it demanded equal treatment regardless of sexual orientation, and therefore the 1st Amendment’s right to the free exercise of religion did not exempt the defendant doctors “from conforming their conduct to the [Unruh] Act’s anti-discrimination requirements even if compliance poses as an incidental conflict with defendants’ religious beliefs.” The Court quoted *Catholic Charities of*

Sacramento, Inc. v. Superior Court, which found that: “[F]or purposes of the free speech clause, simple obedience to a law that does not require one to convey a verbal or symbolic message cannot reasonably be seen as a statement of support for the law or its purpose. Such a rule would, in effect, permit each individual to choose which laws he would obey merely by declaring his agreement or opposition.” The Court also stated that the defendants could have either refused to perform the intrauterine insemination for all patients; or could have ensured the availability of a physician who was qualified to perform the procedure.

The Supreme Court held that the trial court’s original ruling, that dismissed the defendants’ argument (that their constitutional rights to free speech and the free exercise of religion exempted them from compliance with the prohibition of discrimination against sexual orientation), was correct. The Court reversed the judgment of the Court of Appeal.

Strydom v. Nederduitse Gereformeerde Gemeente Moreleta Park,
Equality Court of South Africa (Transvaal Provincial Division)
(27 August 2008)

Procedural Posture

The complainant brought a case against Nederduitse Gereformeerde Gemeente Moreleta Park (Dutch Reform Church) in Equality Court. The complainant alleged that the Church’s termination of his contract on the basis of sexual orientation violated the *Promotion of Equality and Prevention of Unfair Discrimination Act of 2000*.

Facts

The Church hired the complainant as a music teacher in one of its religious schools. When the Church discovered that the complainant was engaged to another man, it terminated his contract on the grounds that a homosexual man could not be a positive spiritual role model for students.

Issue

Whether the right of the Church to freedom of religion and religious expression permitted a violation of the complainant’s right to non-discrimination in employment.

Domestic Law

Constitution of South Africa, Sections 9 (equality) and 15 (freedom of religion).

Promotion of Equality and Prevention of Unfair Discrimination Act 2000 (“discrimination” as a policy or situation that “imposes burdens” or “withholds opportunities” from members of certain protected classes; an entity or person

accused of discrimination must show the discrimination was justifiable or fair according to a list of factors enumerated in the Act).

Minister of Education & Another v. Syfrets Trust Ltd NO & Another, Constitutional Court of South Africa, 2006 (equality as fundamental right central to the Constitution).

Minister of Home Affairs and Another v. Fourie and Another, Constitutional Court of South Africa, 2005 (finding unconstitutional marriage laws that limited the right to marry to opposite-sex couples).

National Coalition for Gay and Lesbian Equality v. Minister of Justice, Constitutional Court of South Africa, 1998 (finding unconstitutional statutory and common law offences of sodomy).

Prins v. President, Cape Law Society and Others, Constitutional Court of South Africa, 2002 (importance of religious freedom).

Comparative Law

Caldwell v. The Catholic Schools of Vancouver Archdiocese and Attorney General of British Columbia, Supreme Court of Canada, 1984 (upholding church's refusal to rehire teacher after she married a divorced man).

Reasoning of the Court

The complainant argued that the termination of his contract at the Church's school was discriminatory because the Church only fired him after learning of his sexual orientation and his relationship with another man. He cited the *Promotion of Equality and Prevention of Unfair Discrimination Act of 2000* (PEPUD), which listed sexual orientation as a protected class.

The respondent was required to show that the termination was fair. According to section 13(2)(a) of the *PEPUD Act*, an entity could discriminate against an individual on the "prohibited" grounds of sexual orientation (or on other protected grounds, such as race) if the employer could show that it had a "fair" reason to do so. The Church defended its decision to fire the claimant on grounds of freedom of religious expression, arguing that allowing a man in a homosexual relationship to work at the school would have presented an unacceptable moral example to students which would have prevented the school from teaching its doctrine effectively.

The Court first determined whether discrimination had occurred within the meaning of the *PEPUD Act*. "Discrimination" was defined as any policy or action that would impose a burden on, or deny opportunities to, an individual because of his or her membership in a protected class. Since the complainant was fired because of his sexual orientation, there was a strong presumption of discrimination. The Act did not apply, however, if the respondent could show

that the discrimination was “fair” or otherwise appropriate in the context. The Church argued that discrimination was fair in this case because of the Church’s requirement that religious leaders in its community follow religious norms, including a celibate lifestyle for homosexuals. The Court rejected this argument.

The Court held that, by virtue of the *PEPUD Act* and Section 9 of the Constitution, South African constitutional law firmly protected equality and granted broad protection to certain minority classes. Previous case law also enshrined the right to freedom from discrimination for people in homosexual relationships. On the other hand, case law also established that religious freedom was a foundational principle of South African constitutional law. In cases concerning the rights of homosexual plaintiffs, the Constitutional Court of South Africa had avoided condemning anti-homosexual religious beliefs. The tension between secular and religious rights had therefore persistently been a point of difficulty when it came to determining claims of individual freedom from discrimination.

The Court preferred to step in to prevent discrimination, rather than reinforce discrimination through inaction. It would not prevent discrimination in the abstract (for example, teachings hostile to homosexual relationships) but would prevent the actualisation of teachings that result in discrimination, provided that judicial intervention would not unduly interfere with the constitutional requirement that spiritual leaders are entitled to live and express their religious doctrine.

The Court considered at what point judicial interference would constitute an excessive burden upon a church’s constitutionally enshrined freedom and refined its criteria for considering the relative weight of rights. High-ranking church officials, and ministers who were directly responsible for the religious education of followers, could be required to adhere to certain lifestyle standards, including refraining from same-sex sexual relationships. If the Church were required to hire influential pastors or ministers in accordance with the *PEPUD Act*, anti-discrimination laws might inhibit the Church from freely articulating its beliefs. However, in the day-to-day running of an organisation and the hiring of lower-level employees, the *PEPUD Act* still applied just as it would to an ordinary business. Low-level employees and contract workers of the church did not have spiritual responsibility. Their comparatively minor influence on the Church community or church beliefs meant that the Church’s religious rights could not outweigh the individual’s right to be free of discrimination. A balancing test was required. As an employee’s duty to show spiritual leadership increased, so his rights as an individual to live outside the bounds of the Church’s standards of behaviour diminished.

The complainant’s status as a contractual employee meant that he maintained a right to protection from discrimination based on sexual orientation. In addition, the complainant’s students were adults or older teenagers, and he taught music, rather than religion. It did not seem that the complainant would have any great

spiritual influence over his students. He was not even a member of the Church in question and did not participate in Church activities outside his employment. His contact with the Church community was also limited. He was so distanced from the spiritual activities of the Church that the Church's spiritual teachings could not be held to apply to his partnership outside work.

The Court held that the Church, without justification or reasonable excuse, had discriminated against the complainant by cancelling his contract. It ordered the Church to pay the complainant damages for cost of counsel, emotional suffering, and lost wages, and to issue an apology to him.

Ladele v. Borough of Islington, Court of Appeal, Civil Division, United Kingdom (15 December 2009)

Procedural Posture

The appellant brought a case to the Employment Tribunal alleging workplace discrimination based on religious views. The Employment Tribunal concluded that the government had harassed, and both directly and indirectly discriminated against the appellant under the *Employment Equality (Religion or Belief) Regulations*. The Employment Appeal Tribunal reversed that decision, holding that the *Religion Regulations* had not been breached, and agreeing with the respondent, the London Borough of Islington, that it could not have acted any differently under the *Equality Act (Sexual Orientation) Regulations*. The appellant appealed, seeking the restoration of the Employment Tribunal decision on indirect harassment and discrimination, and seeking to have remanded to the Tribunal some of the factual allegations on direct harassment.

Facts

The appellant was a registrar of Births, Marriages, and Deaths. When the *Civil Partnership Act of 2004* came into force all registrars were informed that they would assume civil partnership duties. The appellant, a Catholic who did not believe her faith allowed her to take “an active part in enabling same-sex unions to be formed”, informed her supervisors that she would not officiate at civil partnerships. The appellant then made informal arrangements to swap her civil partnership duties with other registrars.

In March 2006, the plaintiff was reported to the head of Islington's Democratic Services (IDS) by co-workers who felt victimised by her refusal to perform civil unions. Despite threats of formal disciplinary action for violation of Islington's “Dignity for All” non-discrimination policy, and the suggestion of a temporary compromise, the appellant continued to refuse to officiate at civil partnerships and to swap duties with co-workers. Another complaint by co-workers called her refusal an “act of homophobia”. The head of IDS responded to the complainants

with a letter containing personal information about the appellant in direct contradiction of Islington policy. The appellant accused the head of IDS of unfair treatment, and in response, the head of IDS explained that, under the *Equality Act (Sexual Orientation) Regulations*, the appellant's views would not be accommodated. The appellant's complaint of unfair treatment did not appear to have been investigated.

Disciplinary proceedings were instigated, wherein the appellant stated that her acts were non-discriminatory and asked for her religion to be taken into account. The investigator found that, while civil partnership duties were not originally part of the job description, the appellant's refusal to perform her duties, solely because of the sexual orientation of clients, was grounds for a formal disciplinary proceeding. At the proceeding, she was told that she would need to perform civil union duties or face termination and that her behaviour had prevented her from being considered for a supervisory position. The appellant filed a claim at the Employment Tribunal.

Issue

Whether the government could require an employee of the office that registers births, marriages and deaths to register same-sex civil partnerships despite her objections on the grounds of religious beliefs.

Domestic Law

Employment Equality (Religion or Belief) Regulations 2003.

Equality Act (Sexual Orientation) Regulations 2007 Regulation 3 (discrimination on the basis of sexual orientation) and Regulation 4 (discrimination in the provision of goods and services).

Civil Partnership Act 2004.

R (SB) v. Governors of Denbigh High School, House of Lords, United Kingdom, 2006 (affirming that "Article 9 does not require that one should be allowed to manifest one's religion at any time and place of one's own choosing").

International Law

European Convention on Human Rights, Article 8 (right to respect for private and family life), and Article 9 (freedom of thought, conscience and religion).

EU Council Directive 2000/78 EC of 27 November 2000, Article 2(2) (direct and indirect discrimination) and Article 2(5) (establishing that domestic legislation should be read in conformity with Article 9 of the *European Convention*).

Cosans v. United Kingdom, ECtHR, 1982 (holding that the *European Convention* protects only those beliefs that are "worthy of respect in a democratic society and are not incompatible with human dignity").

Pichon and Sajous v. France, ECtHR, 2001 (“the main sphere protected by Article 9 of the *European Convention* is that of personal convictions and religious beliefs”, although it “also protects acts that are closely linked to those matters such as acts of worship or devotion forming part of the practice of a religion or a belief”).

Salguero da Silva Mouta v. Portugal, ECtHR, 1999 (holding that sexual orientation was covered by Article 14 of the *European Convention*).

EB v. France, ECtHR, 2008 (holding that, “where sexual orientation is in issue, there is a need for particularly convincing and weighty reasons to justify a difference in treatment regarding rights falling within Article 8”).

Comparative Law

Christian Education South Africa v. Minister of Education, Constitutional Court of South Africa, 2000 (holding that where the State had banned corporal punishment in school, everyone had to comply, even Christian educators who believed there was an obligation to punish. There was no automatic right for believers to be exempt from the law. However, if possible, the State should “seek to avoid putting believers to extremely painful and intensely burdensome choices of either being true to their faith or else respectful of the law”).

Reasoning of the Court

First the Court examined the decisions of the Employment Tribunal and the Employment Appeals Tribunal. The Court stated that the Employment Tribunal’s finding of discrimination and harassment against the appellant was unsustainable because the complaint did not allege a difference in treatment. Rather, the Court stated, the appellant’s argument was that she should have been treated differently and was not. The complaint was “about a failure to accommodate her difference, rather than a complaint that she was being discriminated against because of that difference”. The Employment Appeals Tribunal had reversed the original judgment because the Employment Tribunal’s ruled that discrimination against the appellant had occurred but did not say whether that discrimination was permissible. Further, despite factual misconduct by the respondent, there was no evidence that the acts referenced in the complaint were based on the appellant’s religious beliefs.

The Court agreed with the Employment Appeals Tribunal and held that any alleged discrimination suffered by the appellant was due to her refusal to officiate over civil partnerships rather than her religion. Had the appellant agreed to fulfil the duties of the job or agreed to move to another department, there would have been no further conflict.

The respondent’s aim was to make sure that work was done practically and fairly as well as to ensure a discrimination-free environment. The Court held that requiring the appellant to officiate same-sex civil partnerships was not about

her personal beliefs, but about the internal and external functioning of the office in enforcing a policy of anti-discrimination. Since the appellant was in a public service job, it was not discriminatory to requiring her to perform a secular task not related to the core of her religion.

The Court next discussed Article 9 of the *European Convention on Human Rights*. The Convention stated that everyone had the right to freedom of religion, but that this freedom was subject to limits prescribed by law, which were necessary for a democratic society. The Court referred to several European Court cases, including *Pichon and Sajous v. France*, where it was held that a pharmacist who refused to sell contraceptives because of his religious beliefs was not protected by Article 9, since the pharmacy was the only place to obtain contraceptives and pharmacists could manifest their beliefs outside the professional sphere. The Court also discussed *Salguero da Silva Mouta v. Portugal* and *E.B. v. France*, which demonstrated the importance of equal treatment regardless of sexual orientation. Finally, the Court quoted *Christian Education South Africa v. Minister of Education*, which held that a ban on corporal punishment must be enforced, even in Christian schools that believed in a teacher's right and obligation to punish students physically.

The Court found that the 2007 *Equality Act (Sexual Orientation) Regulations* gave no room to the respondent to behave other than it had in relation to the appellant. The appellant had refused to perform same-sex civil unions but had agreed to perform marriages. According to the Court, this was discrimination in violation the *Equality Act (Sexual Orientation) Regulations*, because civil unions and marriages were substantially similar. Where public authorities exercised a public service function, they could not discriminate. As the employer, the respondent would be held responsible for the appellant's unlawful acts. Furthermore, the Court found that the prohibition against discrimination on the basis of sexual orientation overrode any right based on religious belief to practice such discrimination.

Sexual orientation discrimination was only allowed when it pertained "to the membership and operation of organisations relating to religion or belief, which plainly do not cover performing civil partnership unions, which is self-evidently a secular activity carried out in a public sphere under the auspices of a public, secular body". Therefore, the appellant had no religious or belief-based right to refuse to perform civil partnerships.

The Court held that where the legislature decided that discrimination regarding goods, facilities, and services on the grounds of sexual orientation was subject to very limited exceptions, refusal of a State official to perform the duties guaranteed and designated as part of the official job was not permissible. The decision of the Employment Appeals Tribunal was upheld.

Hall v. Bull, Bristol County Court, United Kingdom (4 January 2011)**Procedural Posture**

Discrimination claim brought before the Bristol County Court under the *Equality Act (Sexual Orientation) Regulations 2007*. The claimants sought damages and declaratory relief. The Equality and Human Rights Commission assisted the claimants in their claim.

Facts

The claimants were a same-sex couple in a civil partnership. They had made a reservation for a double room at the defendants' hotel. However, upon arrival they were refused service on the basis of a hotel policy that double rooms were only to be provided to married heterosexual couples. The defendants, whose hotel was adjacent to their family home, were devout Christians and the policy reflected their religious beliefs. Although their usual practice was to inform guests of the policy at the time of booking, the claimants were unaware of its existence.

Issue

Whether, contrary to Regulation 3 of the *Equality Act (Sexual Orientation) Regulations 2007*, the defendants' policy directly or indirectly discriminated against the claimants on the grounds of their sexual orientation.

Domestic Law

Equality Act (Sexual Orientation) Regulations 2007, Regulation 3 (discrimination on the basis of sexual orientation) and Regulation 4 (discrimination in the provision of goods and services).

Human Rights Act 1998, Section 3 (legislation to be interpreted, as far as possible in a way that is compatible with the *European Convention on Human Rights*).

An Application for Judicial Review by the Christian Institute and others, High Court of Justice in Northern Ireland, Queen's Bench Division, United Kingdom, 2007 (finding that service providers should not be required to act in a manner inconsistent with their religious beliefs in the provision of a service; risk of replacing one form of "legal oppression" with another).

Comparative Law

Ontario Human Rights Commission v. Brockie, Ontario Superior Court of Justice, Canada, 2002.

International Law

European Convention on Human Rights, Articles 8 (right to family and private life), 9 (freedom of religion and right to manifest religious beliefs), and 14 (prohibition of discrimination).

Reasoning of the Court

The defendants submitted that their policy was based on their belief that both homosexual and heterosexual sexual relationships outside of marriage were sinful. They argued that the policy was not discriminatory as it was focused on sex outside of marriage and applied equally to unmarried heterosexual or homosexual couples. The defendants also argued that, if they had indirectly discriminated, it was justified by their right to manifest their religious beliefs under the United Kingdom *Human Rights Act 1998* and the *European Convention on Human Rights*.

The Court found that the claim raised issues under Articles 8, 9 and 14 of the Convention and that a balance needed to be struck between the competing rights of the claimants and the defendants.

The Court concluded that the defendants had breached Regulation 3(1) of the *Equality Act (Sexual Orientation) Regulations*, which prohibited discrimination on the basis of sexual orientation. The defendants' policy discriminated on the basis of marital status and therefore implicated Regulation 3(4), which affirmed that no material difference existed between marriage and civil partnerships for the purpose of the Regulations. As the claimants were civil partners, the Court held that the policy directly discriminated against them on the basis of their sexual orientation. It followed that the defendants had also breached Regulation 4, which prohibited discrimination based on sexual orientation in the provision of goods, facilities and services.

The Court considered the interplay between the Regulations and the Convention and concluded that the two were compatible. Although the defendants' Article 8 right to family and private life and Article 9(2) right to manifest their religion were affected by the regulations, neither right had been breached. The defendants' Article 8 rights were "inevitably circumscribed by their decision to use their home in part as a hotel". Furthermore, although the hotel was connected to their family residence, the Regulations did not require them to let guests enter the private area of their home. Turning to Article 9(2), the Court held that the right was qualified and that, "in so far as the Regulations do affect this right they are ... a necessary and proportionate intervention of the state to protect the rights of others". The Regulations justifiably protected the claimants from sexual orientation discrimination and, moreover, gave effect to their Article 14 right to non-discrimination.

Having balanced the impact of the Regulations on the competing rights of the claimants and the defendants, the Court found no reasonable justification for the discriminatory practice. Each claimant was awarded £1800 in damages.

In the Matter of Marriage Commissioners Appointed Under the Marriage Act, Saskatchewan Court of Appeal, Canada (10 January 2011)

Procedural Posture

Constitutional Reference brought before the Saskatchewan Court of Appeal by the Lieutenant Governor in Council. The Court was asked to determine the validity of possible amendments to the *Saskatchewan Marriage Act 1995*.

Facts

The *Saskatchewan Marriage Act* empowered certain individuals, in particular qualified members of religious bodies, to conduct marriage ceremonies. In addition, the *Marriage Act* provided for the appointment of marriage commissioners, whose role was to officiate at all non-religious unions.

In 2004, following a decision by the Supreme Court of Canada upholding same-sex marriages, the Parliament enacted legislation that altered the statutory definition of marriage to include same-sex couples. A number of marriage commissioners in the province of Saskatchewan subsequently resigned or refused to officiate at same-sex marriages on the basis of religious objections. These refusals led to litigation in the province, including proceedings under the *Saskatchewan Human Rights Code*. As a response, two possible legislative amendments to the *Marriage Act* were drafted and the question of their validity was brought before the Court of Appeal.

The amendments would have allowed marriage commissioners in Saskatchewan to decline to officiate at same-sex civil marriages. The first would have allowed marriage commissioners who had been appointed prior to the 2004 recognition of same-sex marriage to refuse to solemnise marriages “if to do so would be contrary to the marriage commissioner’s religious beliefs” and if certain additional procedural requirements were met. The second, alternative amendment would have allowed commissioners to refuse on identical grounds but did not involve any procedural requirements and would have applied to all marriage commissioners in Saskatchewan regardless of the date of their appointment.

Issue

Whether either of the proposed amendments to the *Marriage Act 1995* was consistent with the *Canadian Charter of Fundamental Rights*.

Domestic Law

Canadian Charter of Fundamental Rights and Freedoms, Sections 1 (limitations to rights and freedoms), 2(a) (freedom of conscience and religion), and 15(1) (equality before the law).

Saskatchewan Marriage Act 1995.

Saskatchewan Human Rights Code.

R v. Oakes, Supreme Court of Canada, 1986 (setting out the analytical framework for determining whether restriction of a fundamental right could be justified under Section 1 of the *Canadian Charter*).

Reasoning of the Court

Majority Opinion

As a preliminary matter, the Court decided to deal with the two possible amendments together, on the grounds that they raised the same substantive issues. The Court then set out its basic methodology for dealing with the constitutionality of legislation in relation to the *Canadian Charter of Fundamental Rights and Freedoms*. Legislative amendments would be rendered void if they were found inconsistent with any constitutional right enshrined in the Charter. If the Court found that the purpose or effect of the proposed amendments would curtail one of those rights, it would have to determine whether that curtailment amounted to an inconsistency or, alternatively, could be considered a reasonable and justified limitation under Section 1, and therefore deemed lawful.

In addressing the first stage of this test, the Court considered the substance of the rights enshrined in the equal protection provision. Previous case law had established that the central elements of a violation were differential treatment, and discrimination associated with factors such as “the imposition of disadvantage, stereotyping, or political or social prejudice”. The Court noted that the proposed amendments were drafted to appear neutral. However, in practice the amendments could have the effect of preventing same-sex couples from enjoying the equal protection of the law by diminishing their ability to access the services of marriage commissioners. If a marriage commissioner could opt out of performing his or her function, same-sex couples, particularly those in isolated rural areas, would be unduly disadvantaged. Therefore, in the Court’s opinion, the amendments would open the door to negative and differential treatment on the basis of sexual orientation and would curtail same-sex couples’ rights under Section 15 (1) of the Charter. The Court stated:

Putting gays and lesbians in a situation where a marriage commissioner can refuse to provide his or her services solely because of their sexual orientation would clearly be a retrograde step – a step that would perpetuate disadvantage and involve stereotypes about the worthiness of same-sex unions.

Next, the Court conducted an analysis of whether this curtailment of rights would be justified and reasonable under Section 1 of the Constitution. In performing its Section 1 analysis the Court utilised the framework set out in the case of *R v.*

Oakes. The *Oakes* test required that, “the objective of the impugned law be of sufficient importance to warrant overriding a Charter right or freedom”.

The Court concluded that the objective of the amendment was to “accommodate the religious beliefs of the marriage commissioners”. Although the role of marriage commissioners, in contrast to religious officials, was to perform a strictly civil function, the Court found that, if the amendments were not enacted and marriage commissioners were compelled to perform same-sex marriages, their Section 2 right to freedom of religion could be curtailed. The Court held that the objective of the amendments was sufficiently important to warrant the curtailment of same-sex couples’ rights, subject to an analysis of proportionality.

Under the *Oakes* test, three factors relating to the proportionality of the law had to be considered: (a) the existence of a rational connection between the objective and means of achieving it, (b) the availability of less restrictive alternatives, and (c) the proportionality between the objective and deleterious effects of the amendments.

On the first point, the Court held that, by enabling marriage commissioners to opt out of officiating same-sex marriages, the proposed amendments were rationally connected to the objective of protecting religious freedom. However, on the second point, the Court held that the level of impairment of the Section 15(1) rights of same-sex couples, considered “within a range of reasonable alternatives”, was excessive and that less restrictive alternatives were available.

The failure of the minimal impairment element of the proportionality test was decisive and the Court held the amendments to be invalid. Since the matter was a constitutional reference, the Court continued its analysis and considered the third and final limb of the proportionality test. The Court held that the negative effects of the proposed law would be disproportionate to the objective of accommodating the religious beliefs of marriage commissioners. Requiring marriage commissioners to officiate same-sex marriages did not prevent them from holding their religious beliefs or from practicing their religion. Thus it did not infringe on the core of their right to religious freedom. In comparison, were the amendments to be enacted, they would have had serious negative consequences for same-sex couples.

The Court held that it would be “a significant step back if, having won the difficult fight for the right to same-sex civil marriages, gay and lesbian couples could be shunned by the very people charged by the Province with solemnizing such unions”. Allowing marriage commissioners to opt out of fulfilling the function for which they were appointed could perpetuate discrimination. The Court held that the differential treatment allowed by the amendments could have “genuinely harmful impacts”, including personal and psychological detriment, for same-sex couples, their families and friends. The Court focused on the fact that commissioners were government officials who were appointed to officiate

at non-religious marriages and had voluntarily assumed their posts. The Court held that to allow a marriage commissioner to reshape or opt out of his or her role would “sit uneasily with the principle of the rule of law” and “undercut the basic principle that governmental services must be provided on an impartial and non-discriminatory basis”. Therefore, the Court found that the objective of the proposed amendments did not outweigh their potential negative consequences.

Concurrence

The concurring opinion considered the impact of the amendments on the operation of the *Saskatchewan Human Rights Code* and in particular the fact that they were intentionally drafted to circumvent the prohibition on sexual orientation discrimination in the Code. The amendments would essentially grant marriage commissioners “an immunity to the anti-discrimination provisions of the Code” which was not available to any one else in the Province.

The concurrence emphasised that commissioners were essentially civil functionaries who were meant to fulfil their roles neutrally. To permit marriage commissioners to refuse to officiate at same-sex marriages would be akin to permitting discrimination on the basis of sexual orientation.

Both proposed amendments were held to be inconsistent with the Charter.

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- 1 See ‘Council of Churches against UNIBAM’s seeking of gay rights’, Channel 5 Belize (18 May 2011). At: edition.channel5belize.com/archives/54599; Kapyra Kaoma, ‘The US Christian Right and the Attack on Gays in Africa’ (Winter 09/Spring 10), *The Public Eye Magazine*; see generally Kapyra Kaoma, *Globalizing the Culture Wars: US Conservatives, African Churches, and Homophobia* (Political Research Associates 2009).
 - 2 *US Constitution*, Amendment 1 (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ...”); *Canadian Charter of Rights and Freedoms*, Section 2 (providing that everyone has the freedom of conscience and religion); *South African Constitution*, Section 15 (providing that everyone has the right to freedom of conscience, religion, thought, belief and opinion); see also *European Convention*, Article 9(1) (“Everyone has the right to freedom of thought, conscience and religion; this right includes the freedom to . . . manifest his religion or belief, in worship, teaching, practice and observance”), Article 9(2) (“Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others”); *American Convention on Human Rights*, Article 12 (similar); *African Charter on Human and Peoples’ Rights*, Article 8 (“Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms”).
 - 3 For example, the UK-based Christian Institute has written: “[C]reating legal rights based on sexual orientation has a unique capacity to clash with the rights of religious groups. There is an obvious disagreement between people who believe homosexual practice is acceptable and people who believe it is morally wrong... [O]nce a person engages in homosexual activity, or affirms the right to do so, he rejects part of the basic ethical teaching of the Bible.” Christian Institute, ‘Gay rights versus religious rights’ in *Sexual Orientation Regulations* (April 2006).

- 4 Carl F. Stychin, 'Faith in the Future: Sexuality, Religion and the Public Sphere' (Winter 2009), 29 *Oxford Journal of Legal Studies* 729, 732-33.
- 5 *Trinity Western University v. British Columbia College of Teachers*, Supreme Court of Canada, 17 May 2001.
- 6 *Ibid.*, para. 36.
- 7 *Employment Division, Oregon Department of Human Resources v. Smith*, US Supreme Court, 17 April 1990 (holding that the Free Exercise of Religion Clause does not excuse an individual from the obligation to comply with a law of general applicability that incidentally forbids or requires the performance of an act that his religious beliefs require or forbid).
- 8 Martha Minow, 'Should Religious Groups be Exempt from Civil Rights Laws?' (September 2007), 48 *Boston College Law Review* 781 (advocating a middle ground between full exemptions and no exemptions); Chai R. Feldblum, 'Moral Conflict and Liberty: Gay Rights and Religion' (Fall 2006), 72 *Brooklyn Law Review* 61, 119 ("If individual business owners, service providers and employers could easily exempt themselves from such laws by making credible claims that their belief liberty is burdened by the law, LGBT people would remain constantly vulnerable to surprise discrimination"); Andrew Koppelman, 'You Can't Hurry Love: Why Antidiscrimination Protections for Gay People Should Have Religious Exemptions' (Fall 2006), 72 *Brooklyn Law Review* 125, 135 ("The great attraction of regulation-plus-exemptions is that it lowers the stakes and makes possible a legislative compromise that does not threaten the deepest interests on either side.").
- 9 *Minister of Home Affairs and Another v. Fourie and Another; Lesbian and Gay Equality Project and Eighteen Others v. Minister of Home Affairs and Others*, Constitutional Court of South Africa, 2005, at 97.
- 10 Under Canadian law, the federal parliament has jurisdiction in determining the capacity to marry and the provinces have jurisdiction in defining marriage formalities.
- 11 Geoffrey Trotter, 'The Right to Decline Performance of Same-Sex Civil Marriages: The Duty to Accommodate Public Servants – a Response to Professor Bruce MacDougall' (2007), 70 *Saskatchewan Law Review* 365, 386; see also Bruce MacDougall, 'Refusing to Officiate at Same-Sex Civil Marriages' (2006), 69 *Saskatchewan Law Review* 351, 353 ("In Canada, some provinces have not allowed refusals, requiring such persons to resign").

PARENTING

Chapter eleven

Parenting

INTRODUCTION

Article 23 of the ICCPR protects the “right of men and women of marriageable age to marry and to found a family”. Similar rights to founding or raising a family are protected in regional human rights instruments.¹ Do lesbian, gay, and transgender individuals have the same right to be parents as everyone else? Does a person’s sexual orientation or gender identity affect his or her ability to raise a child? The cases in this chapter deal with these questions.² Because historically gays and lesbians have been portrayed as paedophiles or criminal or moral degenerates, gay parenting was often perceived to be a contradiction in terms. One US court ruled that a biological father’s homosexual relationship rendered him “an unfit and improper custodian as a matter of law”.³ Even courts that did not adopt *per se* rules of unfitness imposed extra evidentiary burdens on homosexual parents. Another court thus reasoned that “there are sufficient social, moral and legal distinctions between the traditional heterosexual family relationship and illicit homosexual relationship to raise the presumption of regularity in favor of the licit, when established, shifting to the illicit, the burden of disproving detriment to the children”.⁴

Similarly, in Portugal, the Lisbon Court of Appeal, reversing the joint custody decision of a lower court, stated:

*The child should live in a family environment, a traditional Portuguese family, which is certainly not the set-up her father has decided to enter into, since he is living with another man as if they were man and wife. It is not our task here to determine whether homosexuality is or is not an illness or whether it is a sexual orientation towards persons of the same sex. In both cases it is an abnormality and children should not grow up in the shadow of abnormal situations.*⁵

Especially in Europe, many of the States that have granted legal recognition to same-sex couples withhold from them rights to adopt or access to assisted reproductive technology (ART).⁶ The Netherlands was the first country in Western Europe to allow same-sex couples to adopt jointly, although it continued to bar them from adopting from foreign countries.⁷

Nevertheless, LGBT individuals have children, want to have children, and seek legal recognition as parents of the children they raise. The reality of gay and lesbian parenting first surfaced in courts as the result of custody disputes following divorce.⁸ In the 1999 case of *Salgueiro da Silva Mouta*, the European Court of Human Rights concluded that the Lisbon Court of Appeal had violated the applicant's rights, protected by Articles 8 (family life) and 14 (non-discrimination). In reaching this view, the European Court held that sexual orientation was a concept that was undoubtedly covered by the Convention.⁹ A similar case before the Inter-American Court of Human Rights, pending at the time of publication, examined the denial of custody to a lesbian mother in Chile. When Karen Atala and her husband divorced, the original custody arrangement gave Atala custody. The children's father filed suit on the grounds that Atala's "new sexual lifestyle choice" was harmful for the children. In 2004 the Supreme Court of Chile agreed, granting permanent custody to the father.¹⁰

The cases from Argentina and the Philippines concern custody disputes following divorce or separation of the biological parents. In the Argentine case, *LSF y ACP*, the mother argued that the fact that her former husband lived with a man placed the children in a situation of "moral danger". The court acknowledged the extent of social intolerance and hostility to same-sex sexual orientation, but concluded that the sole and essential issue was a parent's suitability as a parent. A parent's "lifestyle" was only relevant if it had a negative impact on the child's development. To hold that a parent's "non-conventional sexual behavior" necessarily meant that he or she could not exercise parental authority would amount to prohibited discrimination.

In *Pablo-Gualberto v. Gualberto*, the Supreme Court of the Philippines reached much the same conclusion, when it considered a statutory presumption in favour of maternal custody for children under seven years old. To remove a child from its mother before that age, the Court ruled, a court would have to find "compelling reasons". Simply showing that the mother was a lesbian was not a sufficient reason. To succeed, a father would have to demonstrate that the child's "proper moral and psychological development" had suffered, and no such showing had been made.

This issue has also arisen with respect to biological parents who transition from one gender to another. In *P.V. v. Spain*, the European Court did not find a violation of the Convention when a Spanish tribunal reduced visits with a biological parent undergoing gender reassignment; but it emphasised that gender identity was a prohibited ground of discrimination.¹¹ The Court noted that visitation rights were only reduced on a temporary basis and were then to be increased once the period of "emotional instability" had ended.¹²

In an early case included here, *Christian v. Randall*, a US court reviewed a custody order originally granted to the mother following divorce. The father petitioned for custody on the grounds that his former wife had undergone gender reassignment

and was now married to a woman. The court disagreed, on grounds that made no reference to morality, social prejudice, or equality. It relied instead on a State law providing that “the court shall not consider conduct of a proposed custodian that does not affect his relationship with the child”. Since nothing in the record indicated that the mother’s gender transition had impaired the “emotional development” of the children, or their relationship with their custodial parent, the court upheld the original custody order.

A second set of issues arises in the context of individual adoption, adoption by couples, and second parent adoption. In *E.B. v. France*, the European Court of Human Rights found that it was discriminatory for the State to reject an application to adopt based on the candidate’s sexual orientation. In taking this position, the European Court distinguished (and tacitly overruled) the earlier case of *Fretté v. France*.¹³ Though French law permitted adoption by individuals, the domestic record had revealed a disproportionate concern with E.B.’s relationship with another woman and the lack of a “paternal referent”.¹⁴

Some States ban adoption by gay individuals, although these bans are falling in court challenges. In 2006, in *Department of Human Services and Child Welfare Review Agency Review Board v. Howard*, the Supreme Court of Arkansas struck down an administrative regulation that prohibited an individual from acting as a foster parent if an adult member of the household was a homosexual. The Court reasoned that the exclusion was based on the child welfare agency’s “standard of morality and its biases” and that the State legislature had not granted the agency the power to promote morality.¹⁵ In *In re Matter of Adoption of X.X.G. and N.R.G.*, a Florida State court upheld a lower court’s finding that a law which prohibited all gay and lesbian adoption without exception was in violation of the equal protection guarantee of the Florida Constitution. The Department of Children and Families did not argue that gay people, as a group, were unfit to be parents, but that children would have better role models and face less discrimination if they were placed in “non-homosexual households” with married opposite-sex parents. The court found this argument unpersuasive in light of evidence that Florida law permitted adoption by individuals and also permitted foster parenting and guardianship by homosexuals. No rational basis existed for distinguishing between foster parents, or guardians and adoptive parents, on the basis of sexual orientation. A concurring opinion emphasised that, by the time of the court ruling, both children had already spent a significant portion of their lives with their adoptive father. The application of a categorical ban would be directly contrary to the best interests of the children.

Even today many countries forbid joint or second parent adoption by same-sex couples, either because they are unmarried or because of their sexual orientation.¹⁶ For example, in *Gas & Dubois* (pending before the European Court at the time of publication), the applicants challenged a decision of a French court that denied to a lesbian woman the right to legally adopt the daughter whom her partner had conceived via ART.¹⁷ Similarly, in May 2011, the Federal Tribunal

of Switzerland ruled that the registered partner of a woman could not adopt the daughter whom they had jointly planned and raised together.¹⁸

In joint and second parent adoption cases, the unrecognised partner of a parent may have no legal rights vis à vis the children. If the partners separate or the legal parent dies, the connection between the child and his or her *de facto* parent may be severed. In one of the first US cases to recognise a second parent adoption, decided in 1993, the Supreme Court of Vermont stated:

[O]ur paramount concern should be with the effect of our laws on the reality of children's lives. It is not the courts that have engendered the diverse composition of today's families. It is the advancement of reproductive technologies and society's recognition of alternative lifestyles that have produced families in which a biological, and therefore a legal, connection is no longer the sole organizing principle. ... We are not called upon to approve or disapprove of the relationship between the appellants. Whether we do or not, the fact remains that Deborah has acted as a parent of B.L.V.B. and E.L.V.B. from the moment they were born. To deny legal protection of their relationship, as a matter of law, is inconsistent with the children's best interests and therefore with the public policy of this state.¹⁹

The Constitutional Court of South Africa addressed these issues in a pair of cases decided in 2002 and 2003 and included here. In the first, ***Du Toit v. Minister for Welfare and Population Development***, the applicants challenged legislation that limited to married couples the right to adopt children jointly. At that time, same-sex couples in South Africa could not marry. The court emphasised the problems that arose when the law did not recognise and protect the *de facto* parent.

Although the first applicant is not the legally recognized adoptive parent, she is the primary care-giver. ... Yet, she has no legal say in matters such as granting doctors permission to give either of the children an injection or the signing of school indemnity forms for school tours or sporting activities. More importantly, in the event of the partnership between herself and the second applicant ending, her claim to custody and guardianship of the children would be at risk.

The Court concluded that legislative exclusion violated not only the equality and dignity guarantees of the Constitution, but also Section 28(2), which provided that the best interests of the child was of “paramount importance”. The second case, ***J v. Director General, Department of Home Affairs*** concerned exclusion of the female partner of a “birth mother” from being recognised as the parent of their twin children; the Court followed the same reasoning.

Courts in Brazil and Israel took a similar path in ruling that lesbian women could adopt their partners' children. In the Brazilian case, ***Public Ministry of the State***

of Rio Grande do Sul v. LMBG, LRM had adopted two children at birth and was their sole legal parent. Her partner, LMBG, sought recognition as their second legal parent. However, the law did not recognise second parent adoption other than by married spouses or partners in civil unions, which at the time were limited to heterosexual couples. The court emphasised that the principle of the best interests of the child was enshrined in the Constitution. Denying adoption rights to the second parent would leave the children without the right to inherit from LMBG's estate and, if LRM died, the children would lose the right to live with LMBG. Clearly, adoption was in their best interest. In the Israeli case, *Yaros-Hakak v. Attorney General*, two women had each given birth via ART and were raising the children together. The Supreme Court of Israel, citing the Vermont Supreme Court case among others, judged that the adoption law permitted second parent adoption (without curtailing the first parent's rights) according to the "supreme principle" that the best interests of the child should prevail.

The right of same-sex couples to adopt jointly was contested in Mexico when the Attorney General challenged a new law adopted by the Legislative Assembly of the Federal District.²⁰ (This case is included in Chapter Fourteen.) The Attorney General argued that situation of children adopted by same-sex couples would differ from that of children adopted by opposite-sex couples and that such adoptions were therefore not in their best interest. In the judgment of the Supreme Court, however, presuming that same-sex couples were unfit to adopt children because of their sexual orientation was akin to excluding a category of couples from adoption on the basis of race or ethnicity, and was in violation of the Constitution.

Gay and lesbian parenting cases also arise when parents seek recognition of foreign custody or adoption orders, as in the cases here from Italy, Slovenia and France. The Italian and Slovenian cases illustrate very different interpretations of the requirement of public order. In *Decree of 26 September 2006*, an Italian court refused to recognise a foreign same-sex adoption on the grounds that it was manifestly contrary to public order. In *In re Foreign Adoption*, by contrast, the Supreme Court of Slovenia reasoned that public order in Slovenia included the international understanding of public order articulated by the European Union and the Council of Europe. Since Europe's public order prohibited discrimination on grounds of sexual orientation, the court rejected the Prosecutor General's appeal against recognition of a foreign same-sex adoption.

Many of the cases in this book raise issues of equality, equal protection, non-discrimination, privacy and dignity. In this chapter, however, the cases introduce a new set of concerns. As a number of the decisions make explicit, the guiding principle is, or should be, the best interests of the child, as reflected in both the *Convention on the Rights of the Child* and domestic law. How that principle is applied in practice is a function of changing perceptions about sexual orientation, its relevance to child-rearing, and the recognition that same-sex families exist.

CASE SUMMARIES

Christian v. Randall, Colorado Court of Appeals, United States (13 November 1973)

Procedural Posture

Appeal against the decision of the District Court for Delta County, which granted custody to the appellant's former spouse, contrary to the couple's original divorce decree, because the appellant had undergone a female to male sex reassignment following the divorce.

Facts

The appellant and the petitioner were married in 1953 and had four daughters before they divorced in 1964. The divorce decree granted the mother, the appellant, custody of the children, who lived continuously with the appellant from the time of the divorce until the time of the case. After the divorce, the appellant commenced a process of gender transition. The girls' father petitioned the District Court for custody of the girls because of his former wife's sex reassignment.

Issue

Whether amending the couple's original custody arrangement, following the appellant's sex reassignment, was in the best interests of the children.

Domestic Law

Colorado Revised Statutes

Section 46-1-24(1) (listing factors to be considered regarding the best interests of the child: the wishes of the child's parent or parents as to his custody; the wishes of the child as to his custodian; the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interests; the child's adjustment to his home, school, and community; and the mental and physical health of all individuals involved).

Section 46-1-31(2)(a) (providing that "the court shall not modify a prior custody decree unless it finds ... that a change has occurred in the circumstances of the child or his custodian and that the modification is necessary to serve the best interests of the child").

Section 46-1-31(2)(a) (providing that "the court shall retain the custodian established by the prior decree unless (d) The child's present environment endangers his physical health or significantly impairs his emotional development and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child").

Searle v. Searle, Colorado Court of Appeals, 1946 (“In reviewing an order affecting the custody of a child, appellate courts will make every reasonable presumption in favour of the action of the trial court”).

Reasoning of the Court

The Court found that the evidence strongly supported the appellant. There was no evidence that the appellant’s home endangered or impaired the children’s physical or mental health and development. To the contrary, the evidence showed that “the children were happy, healthy, well-adjusted children who were doing well in school and who were active in community activities”. Testimony from the principal of the girls’ school supported this finding, as did a report prepared by Delta County Family and Children’s Services.

The judge also visited the family and concluded the children were well cared for and that there were close relationships among the children, and between the children and the adults. Based on this evidence, the Court held that none of the statutory provisions proscribing a change in custody were triggered. Furthermore, the Court found that, even if the children would experience some sort of benefit from a change in custody, this benefit would not outweigh the confusion and anxiety that could come from such a change.

The Court noted that the record clearly showed that the appellant’s gender reassignment did not affect his relationship with his children. It also found that Colorado’s laws on child custody, Section 46-1-24(2), expressly prevented the Court from considering gender reassignment as a factor. For these reasons, the Court ruled that, in light of the evidence presented, Colorado’s custody statutes prevented the State from interfering with the original divorce decree and that in changing the custody order the Colorado trial court had abused its powers.

The Court reinstated the original divorce decree and the children remained in the custody of the appellant.

Du Toit v. Ministers for Welfare and Population Development and Others, Constitutional Court of South Africa (10 September 2002)

Procedural Posture

The applicants challenged the constitutionality of Sections 17(a), 17(c), and 20(1) of the *Child Care Act* in the Pretoria High Court. The Minister for Welfare and Population Development, the Minister of Justice and Constitutional Development, and the Commissioner of Child Welfare were joined as respondents. They all withdrew their opposition and gave notice of their intention to abide by the High Court’s decision. The Pretoria High Court ruled that all of the impugned legislation violated the Constitution.

Section 172(2)(a) of the Constitution stated that rulings of constitutional invalidity had no force unless confirmed by the Constitutional Court. The applicants therefore appealed to the Constitutional Court to enforce the ruling of the High Court in Pretoria.

Facts

The applicants were in a longstanding lesbian relationship and had lived together since 1989. Their relationship was formally – though not legally – recognised in a commitment ceremony in September 1990. They pooled their financial resources, jointly owned property, and had a joint will bequeathing the surviving partner the other's share of property. They were also beneficiaries of each other's insurance policies.

In 1994 the applicants underwent the screening process required for all prospective adoptive parents. As prescribed by the *Child Care Act*, this process included psychological screening, home visits, and family recommendations. The authorities accepted the applicants as adoptive parents. In December 1994, two siblings were placed in the applicants' care. The children had remained in the applicants' care since then and considered both applicants their parents. In 1995 the applicants applied to legally adopt the children. However, legislation prevented them from doing so, because they were not married and at the time same-sex marriage had not been legalised in South Africa. As a result, only one of the applicants legally adopted the children. The other applicant had no legal rights or responsibilities regarding the children.

Issue

Whether Sections 17(a), 17(c), and 20(1) of the *Child Care Act* violated the Constitution by permitting only married persons to jointly adopt and be guardians of children, and, if so, whether the unconstitutionality was permissible because no statutory regulations protected children if their same-sex adoptive parents separated.

Domestic Law

Child Care Act 1983, Sections 17(a), 17(c) and 20(1).

Constitution of South Africa, Sections 9 (Equality), 10 (Human Dignity), and 28 (Children).

Reasoning of the Court

The Court stated that marriage and family provided security in society and played a pivotal role in rearing children. Family, according to the Court, could exist in different ways and “legal conceptions of the family and what constitutes family life should change as social practices and traditions change”. The Court observed that a longstanding and stable same-sex couple could form a family.

The Court found that the prohibition of joint guardianship for couples like the applicants violated Section 28(2) of the Constitution. Section 28(2) provided that “a child’s best interests are of paramount importance in every matter concerning the child”. By denying a same-sex couple joint guardianship, Section 17 of the *Child Care Act* violated the best interest principle. Preventing same-sex couples from adopting defeated the purpose of adoption, which is to provide “stability, commitment, affection and support important to a child’s development”.

The Court also considered Section 9(3) of the Constitution which prohibited discrimination based on sexual orientation. The Court found that sections 17(a) and (c) of the *Child Care Act* violated this provision by discriminating against couples based on their sexual orientation, because “their status as unmarried persons, which currently precludes them from joint adoption” was “inextricably linked to their sexual orientation”.

Furthermore, Section 10 of the Constitution provided that everyone had an “inherent dignity and the right to have their dignity respected and protected”. The Court found that the non-legal guardian, who acted in the role of a parent and who was viewed as a parent by the children, had a constitutional right to be legally recognised as their guardian. Denying her legal recognition was “demeaning” and violated her constitutionally protected right of dignity.

Although no explicit statutory regulations existed to protect adopted children in the event of a same-sex couple separating, the Court viewed the current system for children of divorced parents as applicable to unmarried couples as well. There was thus no reasonable justification for the challenged provisions of the *Child Care Act*.

J and Another v. Director General, Department of Home Affairs and Others, Constitutional Court of South Africa (28 March 2003)

Procedural Posture

The first applicant was denied recognition as a parent to the children whom her partner had conceived by artificial insemination. The couple then filed a complaint before the Durban High Court to obtain constitutional relief, which allowed it. The applicants applied to the Constitutional Court for confirmation of the order issued by the High Court. The Department of Home Affairs had not appealed the High Court’s order and did not oppose referral to the Constitutional Court.

Facts

The two applicants, who were partners in a long-term same-sex relationship, had decided to have a child. In 2001, the second applicant gave birth to twins conceived by assisted reproductive technology. The male sperm was obtained from an anonymous donor, while the female ova were donated by the first applicant.

Both applicants wished to be registered and recognised as the parents of the children. No legal impediment obstructed the second applicant from being registered as the mother of the children. However, the relevant regulations and forms made provision for the registration only of one male and one female parent. When the first applicant failed in her attempt to be registered as a parent of the children, she and her partner sought relief through the courts.

Issue

Whether preventing the same-sex partner of a woman who gave birth to a child conceived by assisted reproductive technology from registering as a parent of that child was unconstitutional.

Domestic Law

Birth and Deaths Registration Act 1992.

Children's Status Act 1987.

Constitution of South Africa, Sections 7 (affirmation of rights), 8 (application of constitutional rights), 9 (equality), 28 (children), and 36 (limitation of rights).

Du Toit v. Minister of Welfare and Population Development and Others, Constitutional Court of South Africa, 2002 (finding lack of provision for joint adoption by same-sex couple to be unconstitutional).

National Coalition for Gay and Lesbian Equality v. Minister of Home Affairs, Constitutional Court of South Africa, 1999 (extending spousal immigration benefits to same-sex partners of South Africans).

Satchwell v. President of the Republic of South Africa and Another, Constitutional Court of South Africa, 2003 (extending spousal pension benefits to same-sex partner of civil servant).

Comparative Law

The Court cited the laws of several European countries recognising same-sex unions and marriage, including Belgium, Denmark, Germany, Iceland, the Netherlands, Norway and Sweden.

Reasoning of the Court

The applicants sought an order requiring the Department of Home Affairs (the first respondent) to register the second applicant as the mother and the first applicant as the parent of the children. They requested an order requiring the Minister of Home Affairs to amend the relevant forms and regulations to allow a person in the position of the first applicant to register as parent of a child. In addition, the applicants argued that Section 5 of the *Children's Status Act*, relating to artificial insemination, should be declared constitutionally invalid because it was contrary to the rights set out in the Constitution.

In its decision, the High Court had held that Section 5 constituted discrimination on the ground of marital status “and probably sexual orientation”. With regard to the children involved, it had held that the provision amounted to discrimination on the ground of social origin and birth. The High Court had found that the presumption of unfair discrimination set forth in Section 9(5) applied and, since the Government had not tried to justify the discrimination, the provision had to be considered invalid. The High Court ordered the applicants’ joint recognition as parents of the children, amendment of the relevant forms and regulations, and modification of the text of Section 5. With regard to Section 5, the High Court had ordered that the word “married” (referring to the woman undergoing artificial insemination) be struck down, and that the words “or permanent same-sex life partner” be read in after the word “husband” wherever it appeared.

The Constitutional Court agreed that Section 5 of the *Children’s Status Act* unfairly discriminated between married persons and permanent same-sex life partners. The provision was therefore inconsistent with the prohibition in Section 9(3) of discrimination on grounds of sexual orientation.

The Court had already held an analogous difference in treatment to be unconstitutional in the case of *Du Toit*. That case dealt with a provision precluding adoption by unmarried persons, thereby automatically excluding partners in a same-sex union. The Court had found that the applicants’ status was inextricably linked to their sexual orientation and that the provision was therefore unfairly discriminatory. The same reasoning applied to the applicants’ case.

The Court also considered whether the limitation of the applicants’ rights caused by the challenged provision was justifiable and found that it was not. The Court cited *Du Toit*, where it had noted the need to end unfair discrimination suffered by same-sex couples in the past.

Lastly, the Court affirmed the need for comprehensive legislation regularising relationships between same-sex partners. It asserted that it was not satisfactory for the courts to grant piecemeal relief to gay and lesbian individuals, nor was it appropriate for them to determine the details of the relationship between partners in a same-sex union. The legislature therefore had a duty to “deal comprehensively” with same-sex couples.

The Court confirmed the order issued by the High Court.

LSF y ACP, Family Tribunal of the 4th Court District
of the City of Cordoba, Argentina (6 August 2003)

Procedural Posture

The plaintiff filed a complaint to the family tribunal to obtain custody of her children, which had previously been granted to her former husband.

Facts

Following the divorce of the plaintiff and her husband (the respondent), custody of the two children was originally granted to the plaintiff. The original custody decision was reversed because of the plaintiff's drug addiction. Three years later, the plaintiff requested custody on the grounds that she had recovered from her drug addiction and that her former husband was living with his male partner.

Issue

Whether a change of custody should be granted because of the respondent father's sexual orientation.

Domestic Law

Civil Code of Argentina, Article 206.

International Law

Convention on the Rights of the Child, Article 3 ("In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration").

Reasoning of the Court

The plaintiff advanced two main arguments to persuade the Court that she should be granted custody of her two children. The first was that she had completely recovered from her health problems, which had been the main reason for deciding to grant custody to the respondent. The second was that the children, by living with their father, were placed in a situation of "moral danger".

The respondent contested the claim that the plaintiff had recovered from her drug problems and that she was able to exercise parental authority. He maintained that the plaintiff had never taken advantage of her visitation rights. Furthermore, she had proved herself to be irresponsible by not taking care of her children's education and health when they lived with her.

The respondent also denied that the children were in a situation of "moral danger". The plaintiff had failed to provide any evidence to support this allegation. On the contrary, the children enjoyed everything that was necessary for their physical, psychological and emotional development, as the plaintiff herself had recognised on previous occasions.

In the respondent's view, the "right of the mother to stay with her children" had to be balanced against the principle of the best interests of the child, affirmed by the *Convention on the Rights of the Child*.

The Court observed that its decision concerning custody had to be based on the suitability standard provided by Article 206 of the *Civil Code* as well as the

principle of the best interest of the child affirmed by Article 3 of the *Convention on the Rights of the Child*.

The suitability standard involved an assessment to determine which parent was more fit and more able to satisfy the conditions required to guarantee a child's full and comprehensive development. However, the Court noted that, since these conditions could change over time, judicial decisions concerning custody were always open to revision. In the present case, the Court had to establish which parent was more suitable to exercise parental authority at that precise moment.

The Court then considered the arguments presented by the plaintiff: serious moral concerns about her former husband and his current relationship; the need to safeguard the morals and the well-being of her children; the situation of moral danger in which they had been placed while in the custody of their father; and the fact that she had completely recovered from her health problems.

The Court first reviewed evidence about the living conditions of the children while they were in their father's custody. According to an inspection of their residence, the children looked well cared for and had an affectionate relationship with their father. The plaintiff herself had agreed this was so on previous occasions and the evidence provided to the Court did not identify a change in this regard.

The Court rejected the claim that the children were in "moral danger" or that there were "concerns of a moral nature" because they lived with their father. On the contrary, it had been demonstrated that the respondent complied with all his parental responsibilities.

The Court noted that social intolerance of, and hostility towards, homosexuality were widespread, and that there was a tendency to speak about homosexuality as if it were a sickness. This discourse focused on the morality of homosexuality, but it was the Court's responsibility to decide whether a parent was suitable to exercise parental authority, regardless of his or her sexual orientation.

The Court held that "the lifestyle as well as the religious, political or ideological beliefs of a parent can only be judged if they have a negative impact on the development of the child". The Court therefore reasoned that its analysis should not focus on the respondent's "non-conventional sexual behaviour", since this did not *per se* constitute a factor implying that he was unsuitable as a parent. In the Court's view, the issue was whether a person, whatever his or her sexual orientation, could be a good parent. Any other analysis would have constituted prohibited discrimination. The plaintiff's arguments, based on alleged "serious concerns of a moral nature" or "moral danger" for her children, were therefore dismissed.

The Court found that no pervasive evidence that a change in custody would favour the plaintiff's children. The Court rejected the plaintiff's complaint and held that the respondent should retain custody.

In the Matter of M, High Court of Justice in Northern Ireland, United Kingdom (6 January 2004)

Procedural Posture

Application to adopt M, the child, by her long-term guardian, J; and an application by J and A, a same-sex couple, for a joint residence order regarding M.

Facts

M was placed in the care of J in 1992, when she was two-years old. At that time J was married to a man. She later divorced and began living with A, another woman. In 2002 J applied to adopt M. A guardian *ad litem* recommended that the adoption should take place.

Issue

Whether the *Adoption (Northern Ireland) Order 1987* should be read to permit a lesbian woman to adopt a child.

Domestic Law

Adoption and Children Act 2002, England and Wales, (defining a couple legally able to adopt as “two people (whether of different sexes or of the same sex) living as partners in an enduring family relationship”).

Adoption (Northern Ireland) Order 1987, Articles 9, 14, and 15(1).

Children Order 1995 of Northern Ireland, Article 3(3).

Re E (Adoption: Freeing Order) Court of Appeal of England and Wales, United Kingdom 1995 (holding that an unmarried lesbian’s sexuality should not affect her ability to adopt her foster child).

Re W (Adoption: Homosexual Adopter), High Court of Justice of England and Wales, Family Division, United Kingdom, 1997 (holding that homosexuals may adopt children).

T Petitioner, Inner House of the Court of Session, United Kingdom 1997 (holding there could be no fundamental objection to a gay man adopting a disabled child and raising that child with his same-sex partner).

International Law

Fretté v. France, ECtHR, 2002 (holding that the *European Convention* did not guarantee a right to adopt and that France had discretion over the issue of adoption by homosexuals because no consensus on the issue existed among member States).

Reasoning of the Court

The *Adoption (Northern Ireland) Order 1987* did not permit an unmarried couple to adopt but permitted an unmarried single person to adopt. Furthermore, the *Adoption Order* made no mention of the sexual orientation of a prospective parent. The Court interpreted the *Adoption Order* as permitting “one member of a lesbian cohabitating couple” to adopt a child. In doing so, the Court stated: “The law is not moribund. It must move to reflect changing social values and a shifting cultural climate.”

The Court quoted the English decision, *Re W (Adoption: Homosexual Adopter)*, which interpreted legislation comparable to the *Adoption Order* to permit adoption by a gay man. There the court said: “At the moment the 1970 Act is drawn in words so wide as to cover all these categories. If that concealed a gap in the intended construction of the Act then it was for Parliament and not the courts to close it.” The Court agreed with the approach taken in *Re W*.

The Court also considered the case of *Fretté v. France*, decided by the European Court of Human Rights in 2002. In *Fretté* the European Court held that no violation of Article 14 (non discrimination) occurred when the applicant was refused prior authorisation to adopt because he was a homosexual. The Court distinguished *Fretté* on three counts: (1) the *Fretté* case concerned a theoretical adoption whereas this case concerned a child who had been living with the applicant for 10 years; (2) here the best interests of the child were clearly served by the adoption; and (3) the social services agency responsible for the child had recommended adoption by J, while in *Fretté* the French authorities had rejected the applicant at a preliminary stage.

The Court concluded that the *Adoption Order* permitted: “adoption by a single applicant, whether he or she at that time lives alone or cohabits in a heterosexual, homosexual, lesbian or even asexual relationship with another person who it is proposed should fulfil a quasi parental role towards the child. Any other conclusion would be both illogical, arbitrary and inappropriately discriminatory in a context where the court’s duty is to regard the welfare of the child as the most important consideration.”

The Court also granted the application by J and A for a shared residence order with regard to the child. “It might only serve to cause confusion in her life if parental responsibility were to be vested on only one whereas equality in practice had prevailed as a matter of fact in the past between J and A. It is highly appropriate that both parties should be in a position to make decisions about this child especially if some unfortunate mishap were to befall J. ... I have no doubt therefore that a Shared Residence Order in this context is entirely apposite, reflects the reality of this child’s life and is clearly in her best interests.”

Yaros-Hakak v. Attorney General, Supreme Court of Israel (10 January 2005)

Procedural Posture

The appellants, a same-sex couple, applied to adopt each other's biological children. The Family Court denied the application and the District Court upheld the decision. The appellants appealed to the Supreme Court.

Facts

The appellants were in a lesbian relationship. Through anonymous sperm donations, one woman gave birth to two children while the other gave birth to one. The appellants raised the three children jointly and each applied to legally adopt the other's offspring.

Issue

Whether two unmarried women, who are mothers of children and who conduct a joint lifestyle can adopt the children of the other.

Domestic Law

Adoption of Children Law 5741-1981.

Section 3(2) ("Adoption may only be done by a man and his wife together; but the court may give an adoption order to a single adopter - (1) If his spouse is the parent of the adoptee or adopted him previously; (2) If the parents of the adoptee died and the adopter is one of the relations of the adoptee and is unmarried").

Section 25 ("If the court finds that it is in the best interests of the adoptee, it may, in special circumstances and for reasons that it shall state in its decision, depart from the following conditions ... (2) The death of the adoptee's parents and the relationship of the adopter under section 3(2)").

A v. Attorney-General, Supreme Court of Israel, 2003 (holding that, in special circumstances, a single person may adopt the child of his or her opposite-sex partner if such adoption was in the best interests of the child).

Steiner v. Attorney-General, Supreme Court of Israel, 1955 (holding that a child's best interests were "a principle that is second to none").

Comparative Law

Du Toit v. Minister of Welfare and Population Development, Constitutional Court of South Africa, 2002 (finding lack of provision for joint adoption by same-sex couple to be unconstitutional).

Constitution of South Africa, Section 28(2) (A child's best interests are of paramount importance in every matter concerning the child).

In re adoption of B.L.V.B., Supreme Court of Vermont, 1993 (holding that unmarried same-sex partner of biological mother could adopt children while leaving mother's parental rights intact).

Adoption of Tammy, Supreme Judicial Court of Massachusetts, 1993 (holding that adoption statute did not preclude same-sex cohabitants from jointly adopting child and finding that adoption was in the child's best interests).

Re K and B, Ontario Provincial Division Court, 1995 (finding that *Child and Family Services Act of Ontario* violated Section 15 of the Charter because it did not permit same-sex couples to bring a joint application for adoption).

Re W (Adoption: Homosexual Adopter), High Court of Justice of England and Wales, Family Division, United Kingdom, 1997 (holding that homosexuals may adopt children).

International Law

Convention on the Rights of the Child, Article 3 ("In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration").

Fretté v. France, ECtHR, 2002 (holding that the *European Convention* did not guarantee a right to adopt and that France had discretion over the issue of adoption by homosexuals because no consensus on the issue existed among member States).

Reasoning of the Court

The Court presented the issue as "whether it is possible, in principle, to recognise each of the appellants as a 'single adopter' within the framework of section 3(2) of the *Adoption Law*, assuming of course that each of the children is adoptable". Because it found that the appellants did not satisfy the conditions of Section 3(2), the Court considered whether or not their situation could be considered "special circumstances" under Section 25 and whether or not the adoptions would be in the best interests of the respective children.

The Court was guided by the decision in *A v. Attorney-General*. In that case the government had argued that Section 25 of the *Adoption Law* only applied in situations where the child had no parent, such as when the child was in the care of a government institution. The court here rejected such an interpretation. In this case the Court followed its earlier reasoning. It emphasised that Section 25 allowed "flexibility of the strict requirements provided in Section 3(2) of the law. This does not involve a departure from the whole framework of the law, since instead of the conditions provided in Section 3(2) of the law there are the requirements provided in Section 25 of the law."

The Court held that courts should take an individual approach to “special circumstances” in Section 25. In other words, adoption decisions based on Section 25 had to be made on a case-by-case basis that closely considered the best interests of the adoptee. The Court stated:

It cannot be said a priori that because of the homosexuality of the appellants, adoption by them will not be in the best interests of the adoptee. Each case should be considered on its merits; each case should be considered according to its circumstances. I accept that the attitudes of society with regard to the effect of a single-sex couple on the best interests of the adoptee ... [are] a part of the circumstances. But they are not the whole picture. They are certainly not the sole consideration within the framework of Section 25 of the Adoption Law.

The Court also made two observations. First the legislature clearly framed the *Adoption Law* to give courts broad discretion in their ability to establish the “special circumstances” that trigger Section 25 adoptions. Second, despite the courts’ authority over this matter, their discretion was not absolute. The best interests of the child – a “supreme principle” – limited the judicial discretion of members of the Court.

In support of this “supreme principle”, the Court relied on domestic, international, comparative and religious law. In *Steiner v. Attorney General*, the Court held that in Israel “the best interests of a child were ‘a principle that is second to none’”. The Court also cited the *Convention on the Rights of the Child*, which provided that, in all actions concerning children, “the best interests of the child shall be a primary consideration”. Similarly, under the *Constitution of South Africa*, “A child’s best interests are of paramount importance in every matter concerning the child”. Finally, the Court quoted a statement from Israeli religious court leaders that:

[A]ccording to civil law and Jewish religious law in the State of Israel, questions concerning the rights of parents and their children are decided solely, without exception, in accordance with the principle of the best interests of the child, which serves as a supreme principle under Jewish religious law and the laws of the State of Israel, and is equally binding in all the religious and civil courts.

Having established that the best interests of a child should guide the adoption process, the Court addressed the issue of the prospective adopter’s sexual orientation. The Court decided that its approach to sexual orientation in the adoption context should be case-by-case:

The fact that the biological parent and the person seeking to adopt are involved in a single-sex relationship or a heterosexual relationship is merely one of the circumstances in the complete picture. It is not an essential condition; it is not a sufficient condition;

it is not a general condition. Everything depends upon the sum total of all the circumstances, and the nature of the relationship – homosexual or heterosexual – is one of those circumstances that should be taken into account.

Despite the suggestion that sexual orientation could be identified as a negative factor in adoption cases, the Court did not accord significant weight to the suggestion that parental adequacy might be compromised by a person's (same-sex) sexual orientation. The Court cited fourteen studies, none of which found in adopted children negative effects that stemmed from the lesbian or gay sexual orientation of their adoptive parents. Nonetheless, the Court held that gay and lesbian individuals should not be allowed to adopt as a general principle. Such decisions should be left to the Family Court on a case-by-case basis. "On the basis of all of the material before it, the Family Court will reach a conclusion as to the best interests of the children ... and whether there are 'special circumstances'."

The Court also noted that, contrary to the government's argument, second-parent adoption by a biological parent's same-sex partner would not create a new legal status akin to same-sex marriage. The issue before it was simply the right of an unmarried individual to adopt her same-sex partner's children. "We are not determining a rule that a single-sex couple constitutes 'a man and wife together'; we are not being asked to make a joint adoption order. We are concerned with an adoption by someone who is not married... Our judgment does not contain any determination, implication or hint of [marital] status."

Consistent with its conclusion that the Family Court alone should ascertain the best interests of the adoptee, the Court, by majority, remanded the case to the Family Court. On remand, the Family Court granted the adoptions.

Pablo-Gualberto v. Gualberto,
Supreme Court of the Philippines (28 June 2005)

Procedural Posture

The father of a four-year-old child filed a petition to annul his marriage with the child's mother, who had left the marital home with the child and was allegedly in a relationship with another woman, and the father attached an ancillary request for custody of the child while the litigation was pending. The trial court granted custody *pendente lite* to the father. The mother then filed a motion to the same court to reverse its previous judgment and grant her custody, which she obtained.

The father filed a petition for *certiorari* before the Court of Appeals. The Court decided to grant him temporary custody until the issue was resolved but it also stressed that his wife's motion to lift the award of custody still had to be considered properly and ruled upon. Both parties then filed separate petitions

to the Supreme Court, challenging the decision of the Court of Appeals. The Supreme Court considered the petitions simultaneously.

Issue

Whether the mother's relationship with another woman was a compelling reason to deprive her of the custody of her child.

Domestic Law

Child and Youth Welfare Code, Article 17.

Civil Code of the Philippines, Article 363.

Family Code of the Philippines, Articles 211 and 213.

International Law

Convention on the Rights of the Child, Article 3.

Reasoning of the Court

After addressing procedural questions, the Court considered the substantive issues regarding the custody of a minor child. The so-called "tender-age presumption" under Article 213 of the *Family Code* provided that, in case of separation of the parents, custody of children under seven years of age was granted to the mother unless the court found "compelling reasons" to order otherwise.

The mother argued that under Article 213 of the *Family Code* her child could not be separated from her because of his young age. Conversely, the father argued that the mother was unfit to take care of their son and therefore there were "compelling reasons" to grant custody of the child to him.

The Court noted that, under Article 3 of the *Convention on the Rights of the Child*, the best interest of the child was to be the primary consideration. The principle of the best interest of the child informed national jurisprudence concerning minors and was the paramount consideration in decisions concerning parental custody.

When making a decision on parental custody, courts had to take into account all factors that were relevant to the child's well-being and development, including material resources, care and devotion, and "moral uprightness".

Under national jurisprudence, mothers had been declared unsuitable for parental custody for various "compelling reasons", including abandonment, unemployment, immorality, habitual drunkenness, drug addiction, maltreatment of the child, insanity, or affliction with a communicable disease.

In the present case, the father argued that the mother should not be granted custody on the basis of her immorality, due to an alleged same-sex relationship. However, the Court found that sexual orientation alone did not prove parental neglect or incompetence. To deprive the mother of custody, the father had to

establish that her “moral lapses” had an adverse impact on the welfare of the child.

The Court concluded that it was not enough for the father to show merely that his wife was a lesbian in order to obtain custody. He also had to demonstrate that she conducted her relationship with a person of the same sex under circumstances that were uncondusive to their child’s proper moral development. In the present case, there was no evidence that the child had been “exposed” to his mother’s sexual relationship or that his moral and psychological development had suffered as a result.

The Court found no compelling reason to deprive the mother of the custody of her child. It therefore reversed the Court of Appeals decision and reinstated the judgment of the Regional Trial Court.

**Decree of 26 September 2006,
Brescia Youth Court, Italy (26 September 2006)**

Procedural Posture

The plaintiff appealed to the Youth Court to have the adoption of his child recognised by the Italian authorities.

Facts

The plaintiff, an Italian citizen, married his partner in Massachusetts, which recognises same-sex marriages. The couple adopted a child in Massachusetts and then applied to have the adoption recognised in Italy.

Issue

Whether recognition of the foreign adoption was manifestly contrary to public order and should therefore be denied.

Domestic Law

Law 184/83, Article 36, Paragraph IV.

Reasoning of the Court

The Court examined the relevant Italian legislation concerning the recognition of foreign adoption and noted that recognition could only be refused in cases where it was manifestly contrary to public order, taking into account the best interest of the child.

Next the Court reviewed the facts and noted that in the present case the adoption had been granted to a same-sex couple. It was therefore necessary to consider whether this kind of adoption was contrary to public order. If that was the case, *Law 184/83* authorised the Court to refuse to recognise the adoption.

According to the Court, “public order” referred to those principles of the legal order whose violation would cause a serious breach of the peace and would clash with the ethical values of society.

The Court affirmed that the concept of public order evolved over time as ethical values and mores changed. It noted that *de facto* families were increasingly common in the country; and that the merits of permitting unmarried couples or single persons to adopt children had been the subject of debate. However, adoption by same-sex couples had not been considered in the same way as adoption by unmarried opposite-sex couples or individuals.

The Court concluded that recognising a parental relationship between a same-sex couple and a child was contrary to the fundamental ethical and social principles of the State. Recognition of the adoption was therefore denied.

In re Foreign Adoption, Supreme Court of the Republic of Slovenia (28 January 2010)

Procedural Posture

The Prosecutor General filed an appeal, called a request for protection of legality, against a decision of the Ljubljana District Court to recognise a foreign adoption by a same-sex couple.

Facts

The applicant parents, a same-sex couple with dual Slovenian and United States citizenship, had registered a same-sex civil partnership in New Jersey in the United States. Under New Jersey law, same-sex couples in registered partnerships had the same rights and benefits as opposite-sex couples under the civil marriage statutes, including the right to joint adoption.

The couple had jointly adopted a girl in the United States. Their request for recognition of the adoption in Slovenia was granted by the District Court of Ljubljana. The Prosecutor General then challenged the district court decision.

Issue

Whether recognition of a foreign adoption by a same-sex couple violated public order.

Domestic Law

Constitution of Slovenia, Articles 8, 53, 54, and 56.

Marriage and Family Relations Act 1976, Articles 12 and 135.

Private International Law and Procedure Act, Article 100.

Registration of a Same-Sex Civil Partnership Act.

International Law

Convention on the Rights of the Child, Article 3 (“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration”).

European Convention on Human Rights, Article 8 (right to respect for private and family life) and Article 14 (non-discrimination).

Comparative Law

The Court cited foreign legislation that permitted same-sex couples to jointly adopt children.

Reasoning of the Court

The Prosecutor General argued that recognising a foreign adoption order giving parental rights to same-sex partners would be contrary to public order in Slovenia.

The Prosecutor General noted first that, under Article 135 of the *Marriage and Family Relations Act*, no child could be adopted by more than one person, unless the adoptive parents were a married couple or were unmarried cohabiting opposite-sex partners. The *Registration of a Same-Sex Civil Partnership Act* did not regulate parenting issues and did not make same-sex unions equivalent to marriage.

According to the Prosecutor General, the objective of marriage and non-marital heterosexual unions was to create a biological family, which could not be accomplished in a same-sex union. A family could also be created by adoption, but in the case of same-sex partners this was not acceptable. Therefore, the recognition of foreign adoption by same-sex couples was contrary to public morals and impossible to enforce in domestic courts.

The Court first noted that the protection of legality procedure was an extraordinary judicial review of final judicial decisions, which was available to State Prosecutors. In the present case, the first instance court did not decide on the question of child adoption by same-sex partners but merely acknowledged a foreign adoption judgment. The question was therefore not whether adoption by same-sex partners was allowed under domestic law but whether the recognition of such adoptions would be contrary to the public order of the Republic of Slovenia.

“Public order” took account of legal norms, customary international law, fundamental moral principles and the vital economic and political interests of the country. Since values are continuously changing, public order was a relative concept.

Whether the request for the protection of legality was well-founded depended on whether the effect of recognising joint adoption by same-sex partners would

contradict public order. The Court had earlier held that, in considering such issues, it had to take into account international public order.

Since Slovenia had become a member of the European Union and the Council of Europe, the understanding of public order of their institutions had become part of the public order of the Slovenian State. As a consequence, the Court could not refuse to acknowledge a foreign judgment that was contrary to the public order of Slovenia if this refusal would be unjustified or disproportionate from the “European point of view”.

According to the Court, the role of public order differed according to whether the family relationship in question was first established within the country or abroad. In the latter case the Court only had to recognise already acquired rights, and the role of public order was less important. The reservation of public order was therefore to be used only when its non-application could lead to consequences that were unacceptable to the domestic legal system.

According to Article 135 of the *Marriage and Family Relations Act*, either of the partners in a same-sex union had the right to adopt the biological child of the other partner, but they could not jointly adopt a child who was not the biological child of one of them. However, the Court noted that the *Marriage and Family Relations Act* was not part of international public order and was therefore not relevant for the decision at hand.

The *European Convention*, on the contrary, was undoubtedly part of the public order of Slovenia. One of the prohibited grounds of discrimination under Article 14 of the *European Convention* was sexual orientation. Although not explicitly mentioned in the text, the prohibition of discrimination based on sexual orientation was based on European Court caselaw.

The European Parliament in several resolutions had called upon its members to abolish discrimination based on sexual orientation and remove obstacles to same-sex marriage and adoption. Slovenia had not yet implemented these recommendations, but the Court noted that legislation allowing for same-sex couples to jointly adopt children had been enacted in several European countries.

Next the Court considered the principle of the protection of the best interests of the child, set forth in Article 3 of the *Convention on the Rights of the Child* and allegedly violated by recognition of same-sex partners’ joint adoption. This principle was also part of the relevant international public order.

According to the Prosecutor General, recognition of the adoption would have been detrimental for the adopted girl. However, the first instance court had reached the opposite conclusion.

Furthermore, the fact that the current domestic legal framework did not allow same-sex partners to jointly adopt a child did not suffice to conclude that

recognition of the adoption would be contrary to morals. In the Court's view, individual behaviour could not be considered immoral when wider social consensus on the issue was absent. The Prosecutor General did not claim that consensus existed on the issue at stake.

The Court concluded that joint adoption by same-sex partners did not contradict international public order and that therefore public order could not be the basis for rejecting the recognition. The request for the protection of legality was thus unfounded.

Public Ministry of the State of Rio Grande do Sul v. LMBG, Superior Tribunal of Justice of Brazil (27 April 2010)

Procedural Posture

LMBG filed a petition with a lower level court to adopt LRM's children and the court granted the adoption. The Public Prosecutor's Office appealed but the intermediate court affirmed the adoption order. The Public Prosecutor's Office then appealed to the Superior Court of Justice.

Facts

LMBG and LRM were two women who had been in a relationship since 1998. In 2002 and 2003, LRM adopted two boys. LMBG and LRM raised the children together, although LMBG was not recognised as a legal parent.

Issue

Whether, in the absence of legal recognition of a same-sex relationship, the partner of an adoptive parent could be granted second parent adoption rights.

Domestic Law:

Constitution of Brazil, Articles 3 (providing that one of the objectives of the State was to promote everyone's well-being, without prejudice as to origin, race, sex, colour, age or other forms of discrimination); 226(3) ("For purposes of protection by the State, the stable union between a man and a woman is recognised as a family entity, and the law shall facilitate the conversion of such entity into marriage"); 227 ("It is the duty of the family, the society and the State to ensure children and adolescents, with absolute priority, the right to life, health, nourishment, education, leisure, professional training, culture, dignity, respect, freedom and family and community life, as well as to guard them from all forms of negligence, discrimination, exploitation, violence, cruelty and oppression").

Federal Law No. 10406 of 10 January 2002 (Civil Code), Articles 1622 ("Nobody can be adopted by two people, unless they are husband and wife, or if they live in stable union"), 1723 (recognising a family entity as the stable union of a man

and a woman), and 1724 (“Personal relations between the partners will follow the principles of loyalty, respect and care and custody, maintenance and education of children”).

Federal Law No. 8069 of 13 July 1990 (Children and Adolescents), Article 41 (providing that adoption gives the adopted child rights and duties, including succession rights, and releases the child from any link with parents and relatives); Article 42(2) (providing that in joint adoption, the adopters must be married civilly or maintain a stable union, proving the stability of the family); Article 43 (providing that adoption will be granted when there are real advantages to adopting and the advantages are based on legitimate grounds).

Federal Law No. 12.010 of 3 August 2009, Article 1 (“This Law provides for the improvement of the guaranteed right to family life for all children and adolescents, as stipulated by *Law 8069 of 13 July 1990*”), and Article 8 (revoking Article 1622 of *Law 10406*).

REsp 1.026.981, Superior Court of Justice, , 2010 (post mortem pension to same-sex partner).

REsp 238.715, Superior Court of Justice, 2006 (stable same-sex union and health benefits).

REsp 24.564, Superior Court of Justice, 2004 (stable same-sex union and family unity).

International Law

Universal Declaration of Human Rights, Article 2 (non-discrimination).

Comparative Law

Loving v. Virginia, United States Supreme Court, 1967 (holding that bans on interracial marriage are unconstitutional).

Reasoning of the Court

The Court began by rejecting a strict interpretation of Brazilian statutory law. It stressed that legal interpretation may and should evolve over time. As examples, the Court noted that Brazil had historically outlawed public nudity at the beach and that the United States had outlawed interracial marriage. The Court held that its legal interpretation should always be influenced by the concept of universal human rights as expressed in the UDHR and Article 3(IV) of the Constitution. By allowing the UDHR and the Constitution to guide legal interpretation, Brazilian courts would ensure that their decisions were not influenced by quickly changing social norms. In addition, the UDHR and the Constitution protected minority groups whose rights might be contravened were public opinion to be permitted to trump principles of human rights and non-discrimination.

The Court found that two facts were crucial to its decision. The first was the nature of LMBG's relationship with the children. She had lived with them since they were infants, and she and her partner had raised them together as parents. The four of them lived together in harmony. The second was the fact that Brazilian law provided no mechanism for recognising a parent's same-sex partner as the children's second legal parent. The Court found that the first fact was important enough to overcome the obstacles presented by the second.

Reading Article 1 of *Law 12.010* (guaranteeing the right to family life for all children) together with Article 227 of the Constitution, the Court held that the best interests of the child were paramount over any other consideration in a case involving children. Article 43 of *Law 8069* provided that an adoption would be granted when it had clear benefits for the child and when such benefits were based on legitimate grounds. The Court found that the strong emotional bonds between LMBG and the children were a clear advantage.

The Court also cited the decision of the lower court. "It is time to abandon hypocritical attitudes and preconceptions devoid of scientific basis and adopt a strong posture in defence of the absolute priority, constitutionally guaranteed, of children and adolescents' rights." According to the Court, because the children had lived with both women since birth, any decision that refused adoption would withdraw from the children their right to full protection. Refusing the adoption would, for example, prevent the children from claiming inheritance rights to LMBG's estate. Additionally, if LMR died, the children would lose their right to live with LMBG, effectively creating "orphans with a living mother". Similarly, if the couple separated, LMBG would have no legal right to continue being their mother. More concretely, the children would lose immediate benefits, included the possibility of being enrolled in LMBG's health insurance plan. Furthermore, as a university professor, LMBG could assure the children secondary and higher education.

Finally, the Court stated that the applicant's attitude represented an act of love. "The adoption, when claimed to provide the child's well-being, as in the present case, is a gesture of humanity." The adoption order was upheld.

**Judgment No. 791, Court of Cassation,
First Civil Chamber, France (8 July 2010)**

Procedural Posture

Petition to the French Court of Cassation.

Facts

A lesbian couple conceived a child through IVF in the United States. One of the women was a United States citizen and the other French. The Superior Court of

Dekalb County in Georgia recognised both women as legal parents of the child. The couple petitioned the French courts to recognise both women as parents.

Issue

Whether France should recognise joint adoptions by same sex couples that had been legally performed and recognised abroad.

Domestic Law

Civil Code of France, Articles 365 (establishing that the adoptive parent has exclusive parental authority over the adopted child, unless he or she is married to the mother or father of the child; in that case, they exercise parental authority jointly); and 370-5 (considering that an adoption lawfully recognised abroad is a “full adoption” in France if it severed the previous parent-child relationship completely and irrevocably; otherwise it only has the effects of “simple adoption”).

Code of Civil Procedure, Article 509 (judicial decisions adopted by foreign tribunals are enforceable in the territory of the French Republic as prescribed by law).

Code of Judicial Organisation.

Reasoning of the Court

In a short opinion, the Court held that French law required that both women be recognised as the child’s parents. The Court held that even though French law did not recognise second parent adoption for same-sex couples, Articles 365, 370-5 of the *Civil Code*, and Article 509 of the *Code of Civil Procedure* – when read together – required the Court to recognise second-parent adoptions performed abroad.

The Court ruled in favour of the couple without remand, noting that it was authorised to take this decision by the *Code of Judicial Organisation*.

In re Matter of Adoption of XXG and NRG, Third District Court of Appeal, Florida, United States (22 September 2010)

Procedural Posture

A gay foster father petitioned to adopt the two foster children who had been placed in his care. The trial court granted his petition and found that the State statute banning adoptions by homosexuals was unconstitutional under the Florida Constitution. The Department of Children and Families appealed.

Facts

In 2004, XXG and his brother NRG, then aged four and four months respectively, were removed from their home because of abandonment and neglect and placed in the home of FG, a licensed foster parent. In 2006 the biological parents’ parental

rights were terminated and FG applied to adopt the children. Florida State law provided that no homosexual person was eligible to adopt. The Department of Children and Families denied his application but acknowledged that it would have approved the application had it not been for this law.

Issue

Whether a law prohibiting adoption on the basis of sexual orientation was constitutional.

Domestic Law

Florida Constitution, Article I, Section 2 (“All natural persons, female and male alike, are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property... “).

Cox v. Florida Dept of Health & Rehab. Serv., Florida Supreme Court, United States, 1995 (holding that the law limiting adoption was constitutional).

Lofton v. Secretary of Department of Children and Family Services, United States Court of Appeals for the 11th Circuit, 2004 (holding that Florida law prohibiting homosexuals from adopting children did not violate equal protection under the *Constitution of the United States*).

Reasoning of the Court

All parties agreed that the law should be evaluated under the rational basis test, which provided that a court must uphold a statute if its classification had a rational relationship to a legitimate governmental objective. The question in this case, the Court stated, was whether the law had a rational basis.

The Department did not argue that the law reflected a legislative judgment that homosexual persons were, as a group, unfit to be parents. It argued that the law had a rational basis because children would have better role models and face less discrimination if they were placed in non-homosexual households, preferably with a husband and a wife as parents. The Court found this description of the law’s function to be inaccurate. It noted that the statute specifically allowed adoption by an unmarried adult, and did not restrict adoption to heterosexual married couples. Furthermore the statute contained no prohibition on placing children with homosexual persons as foster parents. Homosexual persons were also not prohibited from being legal guardians of children. The Court stated that it was “difficult to see any rational basis in utilising homosexual persons as foster parents or guardians on a temporary or permanent basis, while imposing a blanket prohibition on adoption by those same persons”.

The Court reviewed the expert evidence and found that even the Department’s own expert testimony did not support its reasoning, because those experts

acknowledged that in some instances homosexual persons could be fit parents. Experts did not support blanket exclusion. The Court observed that the legislature was permitted to make classifications but these must be based on real differences, which were reasonably related to the subject and purpose of the regulation. Under Florida law, homosexual persons were allowed to serve as foster parents or as guardians but were barred from being adoptive parents. All other persons were eligible to be considered on an individual case-by-case basis. The Court concluded that the statute lacked a rational basis.

Concurrence

The concurrences by Judge Salter emphasised that FG's partner, and his partner's child, were also members of the household and had formed bonds of attachment with the two foster children. The older foster child had lived there for half his life and the younger foster child had lived there for almost his entire life. The Department itself had conceded that the children were in a "wonderful household" and were well and appropriately cared for. A categorical ban on adoption by homosexuals was in conflict with the principle of the "best interests of the child". The statute was directly contrary to the State's interest in providing a stable and permanent home for the children.

The order of adoption was affirmed.

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- 1 *European Convention on Human Rights*, Article 12; *American Convention on Human Rights*, Article 17; *African Convention on Human and Peoples' Rights*, Article 18.
 - 2 The issue of forced sterilisation, which is sometimes as a condition requirement for of legal recognition of a change of gender identity, and which obviously precludes affects a person's ability to be a biological parent to a biological child, is discussed in Chapter 8. There are also cases in which transgender parents have been denied custody and deprived of parental rights because courts ruled that their marriages, being were same-sex marriages, and were therefore not valid. See *Kantaras v. Kantaras*, 884 So.2d 155, District Court of Appeal of Florida (2004) (holding that the law does not allow a postoperative transsexual to marry in the reassigned sex and reversing a lower court's order granting primary residential custody of the children to Michael Kantaras); *In re Marriage of Simmons*, 355 Ill. App. 3d 942, Appellate Court of Illinois First District (2005) (holding that a transsexual male's marriage was invalid as same-sex marriage, despite the issuance of new birth certificate in the male sex, and finding that the State *Parentage Act*, under which child born via artificial insemination to two married parents retain rights to parentage with both parents even if marriage is subsequently declared invalid, did not apply to marriages involving a of transsexual male). See also Katie D. Fletcher & Judge Lola Maddox, 'In re Marriage of Simmons: A Case for Transsexual Marriage Recognition' (2006), 37 *Loyola University Chicago Law Journal* 533. The issue of transgender marriage is discussed in Chapter 9.
 - 3 *Roe v. Roe*, Supreme Court of Virginia, United States, 1985, at 694.
 - 4 *Constant V v. Paul C.A.*, Superior Court of Pennsylvania, United States, 1985 (overruled by *M.A.T. v. G.S.T.*, Superior Court of Pennsylvania, 2010).

- 5 European Court of Human Rights, Judgment of 21 December 1999, *Salgueiro da Silva Mouta v. Portugal*, Application No. 33290/96, European Court of Human Rights, Judgment of 21 December 1999, at para. 14.
- 6 Erez Aloni, 'Incrementalism, Civil Unions, and the Possibility of Predicting Legal Recognition of Same-Sex Marriage' (2010), 18 *Duke Journal Gender Law & Policy* 105, 113; Kees Waaldijk, 'Others May Follow: The Introduction of Marriage, Quasi-Marriage, and Semi-Marriage for Same-Sex Couples in European Countries' (2004), 38 *New England Law Review* 569; Nancy Polikoff, 'Recognizing Partners But Not Parents/Recognizing Parents But Not Partners: Gay and Lesbian Family Law in Europe and the United States' (2000), 17 *New York Law School Journal of Human Rights* 711.
- 7 Paul Vlaardingerbroek, 'Trends on (Inter-Country) Adoption by Gay and Lesbian Couples in Western Europe' (2005), 18 *St. Thomas Law Review* 495, 502.
- 8 Nancy Polikoff, 'Lesbian and Gay Parenting: The Last Thirty Years' (2005), 66 *Montana Law Review* 51.
- 9 *Salgueiro da Silva Mouta v. Portugal*, at para. 28.
- 10 Application before the Inter-American Court of Human Rights in the case of *Karen Atala and daughters v. State of Chile*, 17 September 2010, para. 62.
- 11 *P.V. v. Spain*, Application No. 35159/09, European Court of Human Rights, Judgment of 30 November 2010, *P.V. v. Spain*, Application No. 35159/09, at para. 30.
- 12 *Ibid.*, at paras. 32-33.
- 13 European Court of Human Rights, *E.B. v. France*, Application No. 43546/02, Judgment of 22 January 2008; European Court of Human Rights, *Fretté v. France*, Application No. 36515/97, Judgment of 26 February 2002.
- 14 *E.B. v. France*, at para. 73.
- 15 *Department of Human Services and Child Welfare Agency Review Bd. v. Howard*, Supreme Court of Arkansas, 29 June 2006. In May 2011, the Supreme Court of Arkansas found unconstitutional a law that prohibited unmarried individuals who lived together as intimate partners with same-sex or opposite-sex partners from adopting children or serving as foster parents. *Arkansas Department of Human Services v. Cole*, Supreme Court of Arkansas, 7 April 2011.
- 16 As of February 2011, 10 out of 47 Member States of the Council of Europe permitted second parent adoption. Legislative changes were anticipated in Hungary, Slovenia, and Luxembourg to allow second parent adoption. See Supplementary Written Comments of FIDH, ICJ, ILGA-Europe, BAAF & NELFA, 21 February 2011, *Gas & Dubois v. France*, Application No. 25951/07, lodged 15 June 2007 (on file with the ICJ).
- 17 *Gas & Dubois v. France*, Application No. 25951/07, lodged 15 June 2007. A hearing was held on 12 April 2011.
- 18 'Une femme pacsée ne pourra pas adopter l'enfant de sa compagne', *Tribune de Genève* (5 May 2011). At: <http://www.tdg.ch/depeches/suisse/femme-pacsee-ne-pourra-adopter-enfant-compagne> (accessed 13 May 2011); 'Adoption toujours refusée aux couples homosexuels' 20 *Minutes* (Geneva 6 May 2011), 3.
- 19 *In re adoption of BLVB*, Supreme Court of Vermont, 18 June 1993, p. at p. 376.
- 20 *Acción de Inconstitucionalidad 2/2010*, Supreme Court of Mexico, 16 August 2010.

ASYLUM AND IMMIGRATION

Chapter twelve

Asylum and Immigration

INTRODUCTION

People cross borders for many reasons, to seek employment or educational opportunities, join family members, or flee persecution. In many respects migration does not implicate the sexual orientation or gender identity of those involved, but in two areas it does. The cases in this chapter focus on how LGBT individuals succeed or fail in obtaining protection as applicants for asylum, and residency rights as unmarried partners of nationals in their country of destination.

Asylum and Protection Issues

The main international instruments governing determinations of refugee status is the 1951 *Convention Relating to the Status of Refugees* and the 1967 *Protocol Relating to the Status of Refugees*. Article 1A(2) of the Convention defines a refugee as “any person who ... owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country”. With certain exceptions that are not relevant here, the Convention prohibits State Parties from returning refugees to their countries of origin. To qualify for refugee status, therefore, successful applicants must demonstrate (1) a well-founded fear of persecution (2) on one of the above-enumerated grounds and (3) lack State protection, because the State is either unable or unwilling to provide such protection. If a person does not fulfil the requirements for refugee status, he or she may nevertheless qualify for protection outside his or her country of origin under other international human rights treaties.¹

A significant volume of research documents both the harms suffered by LGBT individuals at the hands of State and non-State actors and how LGBT claims for asylum have fared in various national systems.² In addition, in 2008 the Office of the UN High Commissioner for Refugees (UNHCR) published a *Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity*. This sets out UNHCR’s analysis of the issues raised by LGBT asylum seekers, including those addressed in this chapter.³ Although the arguments overlap, both UNHCR’s guidance and national court jurisprudence have held that sexual orientation and

gender identity are included within “membership of a particular social group”.⁴ According to the UNHCR, the latter is:

*a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one’s human rights.*⁵

Courts first began to grant refugee status to individuals fearing persecution on the basis of their sexual orientation or gender identity in the 1980s.⁶ In one of the earliest decisions, the US Immigration & Nationality Service (INS) argued against recognising a gay man from Cuba as a member of a particular social group. At this time, a number of States in the USA still criminalised consensual same-sex conduct. The INS reasoned that “socially deviated behavior, i.e. homosexual activity is not a basis for finding a social group” and that recognizing the applicant as a member of a social group “would be tantamount to awarding discretionary relief to those involved in behavior that is not only socially deviant in nature, but in violation of the laws or regulations of the country as well”.⁷ The Board of Immigration Appeals disagreed. It distinguished first between criminal conduct and status, noting that the evidence demonstrated that it was not the applicant’s sexual activity that “resulted in the governmental actions against him in Cuba” but rather “his having the status of being a homosexual”. Second, the Court noted the extreme nature of the mistreatment. The applicant’s testimony showed that he was routinely detained, harassed, subjected to repeated physical and verbal abuse, and that the government eventually ordered him to leave the country or face imprisonment. This case did not simply involve “the enforcement of laws against particular homosexual acts” or “gay rights”. The Board confirmed the immigration judge’s order that the applicant should not be deported to Cuba. In 1994, the then-Attorney General Janet Reno ordered that this decision, *Matter of Toboso-Alfonso*, be considered precedent, making it binding on the decisions of all individual asylum officers, immigration judges, and the Board of Immigration Appeals.⁸ Within Europe, twenty-six states now provide in their domestic legislation that sexual orientation is included in the concept of “particular social group.”⁹

Courts have also recognised that transgender individuals are members of a social group. In a case from 2000, a US appellate court held that a gay man with a “female sexual identity”, who dressed in a feminine manner and wore his hair and nails long, was a member of a particular social group in Mexico. In reaching this decision, the court rejected the reasoning of the immigration judge, who had found that the applicant’s gender identity was not immutable because he could make the decision not to dress as a woman and in fact sometimes wore men’s clothing. For the court, the fact that the applicant could choose to wear male clothing or cut his hair short was irrelevant. It defined “particular social group”

as “one united by a voluntary association, including a former association, or by an innate characteristic that is so fundamental to the identities or consciences of its members that members either cannot or should not be required to change it.”¹⁰ Similar conclusions have been reached in Canada, France and several other European States.¹¹

Although their recognition as a social group is fairly established in most jurisdictions, LGBT asylum seekers must still prove that they have a “well-founded fear of persecution”. Here the issues are both subjective and objective. The applicant must demonstrate actual fear and that there is a reasonable basis for it. Only fear for which there is a reasonable basis will be considered “well-founded”. Since sexual orientation and gender identity are not visible in the way that race and nationality and even religion may be, asylum decision-makers have been preoccupied with obtaining “proof” that applicants are in fact gay or lesbian or bisexual or transgender. This information can be difficult to establish. Adjudicators may rely on their own stereotypes of how gay men or lesbian women look and act, threatening the impartiality of decisions. In *Razkane v. Holder*, for example, the US Court of Appeals for the 10th Circuit found that the immigration judge had wrongly concluded that a man from Morocco was not homosexual because he did not dress in an “effeminate manner” or have “effeminate mannerisms”. The court cited appellate opinions that had rejected similar prejudices as grounds of adjudication. In a rebuke to the original judge, the court ordered that the matter be assigned to a different immigration judge should further proceedings be warranted.

In hostile environments, the closet is often the safest option for LGBT individuals. They may not be open about their sexual identity even (or especially) to close friends and family members. Such individuals may not have experienced attacks, threats or violence and thus are unable to show evidence of past persecution. This may make it difficult for them to demonstrate that their fear of future persecution is well-founded. In addition, recognising the hidden nature of sexual orientation, some courts developed a doctrine of discretion. They reasoned that if individuals did not have a well-founded fear of persecution if they could return to their countries of origin and continue a deeply closeted lifestyle. Some of the cases in this chapter explain why courts rejected such reasoning.

In *Appellant S395/2002 v. Minister for Immigration*, the High Court of Australia examined a decision of the Refugee Review Tribunal that had denied asylum on the grounds that the appellants could avoid persecution by maintaining a “discreet” lifestyle. The Tribunal had reasoned that, since the appellants (two men from Bangladesh) had conducted themselves discreetly in the past and had not suffered serious harm because of their sexual orientation, they would not experience harm in the future.¹² The High Court found it was an error of law to reject a claim under the *Refugee Convention* because an applicant could avoid harm by acting discreetly. It stated that “persecution does not cease to be persecution

for the purpose of the Convention because those persecuted can eliminate harm by taking avoiding action within the country of nationality". It was a fallacy to assume that the applicants' conduct was not influenced by fear of persecution, because they were likely to have modified their behaviour out of fear. In this case, the Tribunal had failed to consider "whether the appellants acted discreetly only because it was not possible to live openly as a homosexual in Bangladesh".

This decision of the High Court of Australia had far-reaching influence in other jurisdictions. A similar and more recent decision comes from the United Kingdom. In the 2010 case of *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department*, the Supreme Court considered the unrelated appeals of two gay men. The lower court had concluded that each appellant could reasonably be expected to tolerate the requirement of discretion in his country of origin. Writing for the court, Lord Rodger found this reasoning "unacceptable as being inconsistent with the underlying purpose of the Convention since it involves the applicant denying or hiding precisely the innate characteristic which forms the basis of his claim of persecution". Lord Rodger emphasised that "sexual identity is inherent to one's very identity as a person". An applicant for asylum need not "show that his homosexuality plays a particularly prominent part in his life. All that matters is that he has a well-founded fear that he will be persecuted because of that particular characteristic which he either cannot change or cannot be required to change".

The UK Supreme Court thus largely adopted the reasoning of the UNHCR and the Equality and Human Rights Commission. Their joint intervention had submitted that there is "no place for the question posed by the Court of Appeal, namely whether '*discretion*' is something that such applicants can reasonably be expected to tolerate, as this is tantamount to asking whether individuals can be expected to avoid persecution by concealing their sexual orientation, the very status protected by the *1951 Convention*".¹³

LGBT-related persecution is often deeply personal. Violence may be meted out at the hands of family members, especially to lesbians in traditional societies where women have a smaller public role. Critics have noted that the paradigmatic asylum case assumes public harm, making it harder for women who experience harm in the private sphere to obtain asylum.¹⁴ Where the State is not directly involved in acts of persecution, courts have characterised the harm as "purely private" and have failed to ask whether the State concerned was unwilling or unable to offer protection.¹⁵ In the US case of *Nabulwala v. Gonzales*, decided by a federal appellate court, a lesbian woman from Uganda claimed that she had suffered repeated abuse at the hands of her family members, including a family-arranged rape, and had been beaten up by an angry mob. The immigration judge found her evidence credible but said that the incidents were isolated and amounted to

“private family mistreatment” rather than persecution. Because the abuse was not sponsored or authorised by government, the immigration judge denied her application for asylum. The US Court of Appeals for the 8th Circuit found the judge had erred in failing to consider whether the harm had been inflicted by persons whom the government was unable or unwilling to control.

Similarly, in *In re Appeal for the Cancellation of Denied Refugee Status Recognition*, the Seoul Administrative Court considered the claim of a gay man from Pakistan who had been threatened by his wife’s family and his own father, and blackmailed by private actors. The Court took into account that Pakistan criminalised consensual same-sex sexual activity, and found that persecution could occur at the hands of government or private actors where government protection was not available. Because the applicant had been victimised by family members and because Pakistan was known to criminalise homosexuality, the court concluded that the applicant had a well-founded fear of persecution and qualified as a refugee.

Residency Rights as Partners

The South African and Namibian cases concern the provision of immigration benefits to unmarried same-sex partners.¹⁶ In *National Coalition for Gay and Lesbian Equality v. Minister for Home Affairs*, South Africa’s Constitutional Court ruled that excluding spouses who were foreign nationals from preferential immigration treatment violated the equality and dignity sections of the Constitution. The court emphasised that opposite sex partners were able to choose whether or not to establish a legally recognised relationship. Because gays and lesbians were not entitled in law to marry, limiting immigration privileges to married spouses was unconstitutional. The court thereby focused on substantive rather than formal equality. The Supreme Court of Namibia reached the opposite conclusion in *Chairperson of the Immigration Selection Board v. Frank and Another*. It reversed a ruling of the High Court, which had found that Liz Frank’s long-term relationship with a Namibian woman should be taken into consideration because of the constitutional right to equality. According to the High Court the relationship was analogous to common law or de facto relationships of opposite-sex partners. The Supreme Court disagreed. A same-sex couple, even one raising a child together, could never be considered to be a family under Namibian law because, according to the Court, a family relationship focused on procreation. The Court declared that the South Africa decision was based on a constitution that specifically prohibited discrimination on grounds of sexual orientation. Nevertheless, the Court referred the matter back to the Immigration Board (because of procedural irregularities in the application process), and Frank eventually won the right to residency in Namibia on the basis of her professional qualifications.

CASE SUMMARIES

National Coalition for Gay and Lesbian Equality v. Minister for Home Affairs, Constitutional Court of South Africa (2 December 1999)

Procedural Posture

Constitutional challenge to the validity of Section 25(5) of the *Aliens Control Act No. 96 of 1991*, referred to the Constitutional Court of South Africa by the Cape of Good Hope High Court.

Facts

Under Section 25(5) of the *Aliens Control Act*, the foreign national “spouse” of a permanent and lawful resident of South Africa was provided with preferential treatment when applying for an immigration permit, whereas the same benefit was not granted to a foreign national who had a same-sex life partnership with another permanent and lawful resident of South Africa, though in all other respects the person was analogous to a “spouse”. A number of applicants challenged the law’s constitutionality.

Issue

Whether Section 25(5) of the *Aliens Control Act* unfairly and unconstitutionally discriminated against partners in permanent same-sex life partnerships by not giving them benefits equal to those conferred on “spouses”.

Domestic Law

Aliens Control Act 1991, Section 25(5).

Constitution of South Africa, Sections 9 (equality and equal protection) and 10 (human dignity).

National Coalition for Gay and Lesbian Equality v. Minister of Justice, Constitutional Court of South Africa, 1998 (finding unconstitutional statutory and common law offences of sodomy).

Comparative Law

Braschi v. Stahl Associates Company, New York Court of Appeals, United States, 1989; *El-Al Israel Airlines Ltd v. Danilowitz*, Supreme Court of Israel sitting as the High Court of Justice, 1994; *Fitzpatrick (A.P.) v. Sterling Housing Association Ltd*, United Kingdom House of Lords, 1999; *M v. H*, *Supreme Court of Canada*, 1999 (noting changes in societal and legal attitudes toward greater acceptance of same-sex partnerships).

Canada (Attorney-General) v. Mossop, Supreme Court of Canada, 1993; ***Egan v. Canada***, Supreme Court of Canada, 1995 (same-sex life partnerships as the only

“conjugal relationship” available to gay and lesbian couples in the absence of civil partnerships or marriage).

Reasoning of the Court

Justice Ackermann delivered the judgment of the Court. The Court unanimously held that Section 25(5) of the *Aliens Control Act* unfairly discriminated on the grounds of sexual orientation and marital status, by omitting to extend the benefits it conferred on spouses to permanent same-sex life partners. In doing so, Section 25(5) unjustifiably limited the rights of same-sex life partners to equality and dignity under Sections 9 and 10 respectively of the *Constitution of South Africa*. The Court’s decision was influenced by previous decisions in South Africa and comparative jurisprudence from Canada, Israel, the United Kingdom, the United States and elsewhere.

The Court held that same-sex partners were in a fundamentally different situation from unmarried heterosexual partners. This difference derived from the fact that, despite a growth in the express and implied recognition of same-sex partnerships, same-sex life partnerships were still not legally recognised. Heterosexual partners had the option of marriage. The Court did not address whether same-sex relationships should be legally recognised. Rather, it focused on determining whether Section 25(5) unjustifiably limited the constitutional rights of same-sex partners who were in a life partnership, which was “the only form of conjugal relationship open to gays and lesbians”.

The Court dealt with the equality and dignity sections of the Constitution in a related manner. Section 9(3) of the Constitution expressly prohibited the State from unfairly discriminating against individuals on the grounds of sexual orientation and marital status. Under Section 9(5) discrimination was “unfair” unless it was established to be fair. The Court held that discrimination on the basis of marital status existed because marriage was a prerequisite to obtaining the immigration benefit of Section 25(5). Gays and lesbians were excluded from the possibility of obtaining the benefit because they were unable to marry, and the fact that they were consequently excluded from Section 25(5) constituted unjustifiable sexual orientation discrimination.

The immigration law was found to reinforce harmful stereotypes of gay and lesbian relationships as having lower status than their heterosexual counterparts. The Court emphasised that “the family and family life which gays and lesbians are capable of establishing with their foreign national same-sex partners are in all significant respects indistinguishable from those of spouses and in human terms as important to gay and lesbian same-sex partners as they are to spouses”.

Section 25(5) also limited the rights of gay and lesbian people in relation to the constitutional guarantee under Article 10 that “everyone has inherent dignity and the right to have their dignity respected and protected”. The Court held

that, because it did not extend to foreign national same-sex partners, Section 25(5) sent a message that “gays and lesbians lack the inherent humanity to have their families and family lives respected or protected”. The Court rejected the contention that extending benefits to same-sex partners would adversely impact the institution of marriage or undermine the benefits which Section 25(5) extended to married spouses and their families. An extension of the scope of the section would provide new legal rights to same-sex partners but would not diminish existing spousal rights. The protection of marriage did not logically justify the continued exclusion of same-sex life partners from the benefit of Section 25(5).

The Court, therefore, held that the limitation that Section 25(5) placed on the constitutional rights of gays and lesbians to equality and dignity had no reasonable justification. These rights went to the core of South Africa’s “constitutional democratic values of human dignity, equality and freedom”. Furthermore, the Court noted, “the forming and sustaining of intimate personal relationships of the nature here in issue are for many individuals essential for their own self-understanding and for the full development and expression of their human personalities”. To prevent foreign national same-sex life partners from receiving the benefit of Section 25(5) unjustly and inequitably deprived gay and lesbian South Africans of rights to which they were constitutionally entitled.

The Court held that as a remedy to the omission it would read in, after the word “spouse” in the Section, the words “or partner, in a permanent same-sex life partnership”.

The remedial extension of Section 25(5) was declared to have immediate effect. The respondents were ordered to pay costs.

Chairperson of the Immigration Selection Board v. Frank and Another, Supreme Court of Namibia (5 March 2001)

Procedural Posture

The government appealed to the Supreme Court of Namibia against orders made by the High Court. The High Court had ordered the Immigration Selection Board’s refusal of a permanent residence permit to the respondent to be set aside.

Facts

In 1995, the respondent applied to the Namibian Immigration Selection Board for a permanent residence permit. She was a German citizen but had worked and resided in Namibia since 1990. Throughout that time she had been in a relationship with another woman, the second respondent, who was a Namibian citizen. The respondent acted as a parent to the second respondent’s son. Her initial application and a subsequent reapplication in 1997 were both denied.

Along with documentation of her work qualifications, skills and experience, the respondent had submitted evidence of the strength and extent of her same-sex relationship, including a statement that, were they able to do so under Namibian law, the respondents would have married. Under Article 4(3) of the Constitution and Section 26(3)(g) of the *Aliens Control Act*, foreign “spouses” of Namibian nationals were afforded preferential treatment in immigration applications. However, the Board had held that the respondent’s long-term relationship with the second respondent was a “neutral factor” because the relationship was “not one recognised in a Court of Law and was therefore not able to assist the respondents”.

The respondent successfully applied to the High Court of Namibia for review of the decision. The High Court ordered that the Board’s decision be set aside and directed that the respondent be issued with a permanent residency permit. The High Court held that the respondent’s relationship should have been taken into account in a decision based in part on the constitutional right to equality. The High Court reasoned that the respondent’s lesbian life partnership could receive legal recognition, because it was analogous to the legally recognised common law relationship of ‘universal partnership’, in which an unmarried heterosexual couple lived together as if they were husband and wife partners. The Chairperson of the Board appealed to the Supreme Court.

Issue

Whether the respondent’s lesbian life partnership could be considered in her application for permanent residency in Namibia.

Domestic Law

Constitution of Namibia, Articles 10 (right to equality and freedom from discrimination), 13(1) (right to privacy), and 14 (protection of family).

Immigration Control Act 1993, Section 26(3)(g).

Comparative Law

Banana v. State, Supreme Court of Zimbabwe, 2000 (upholding the constitutionality of State sodomy law).

International Law

African Charter on Human and Peoples’ Rights, Articles 17(3) (promotion and protection of morals and traditional values recognised by the community shall be the duty of the State), and 18(1) (family as a natural unit and the basis of society).

International Covenant on Civil and Political Rights, Articles 17 (right to privacy), 23 (protection of family), and 24 (protection of children).

Universal Declaration of Human Rights, Article 16(3) (family as the natural and fundamental group unit of society).

Reasoning of the Court

Much of the judgment dealt with procedural matters and consideration of the respondent's employment history. However, the respondent also raised a number of constitutional issues in relation to the treatment of her relationship with another woman.

The respondent contended, among other things, that her rights under the Constitution to equality, privacy, and the protection of family, as well as her right to freedom from discrimination, had been contravened.

As a preliminary matter, the Court found that under Namibian constitutional and immigration law the term "spouse" could only apply to a partner in a heterosexual marriage. Therefore it was impossible to infer that the respondent would be entitled to any preferential treatment as the foreign national "spouse" of a Namibian national under Article 4(3) of the Constitution or Section 26(3)(g) of the *Aliens Control Act*. The respondent did not contest this point, but nonetheless argued that her relationship should be afforded equal status as part of the right to the protection of family life under Article 14 of the Constitution. The Court rejected this argument.

According to the Court, Article 14's protection only extended to the "natural and fundamental group unit of society as known at the time as an institution of Namibian society". It did not create any new types of families. The Court held that in the Namibian context, homosexual relationships fell outside of the scope of Article 14. It refused to accept the respondent's argument that granting permanent residency would be in the best interests of the second respondent's child, stating that it was debatable and controversial whether being raised in a "homosexual 'family'" could protect a child's interests. The Court interpreted the "family institution" under the Constitution as a formal heterosexual relationship primarily focused on procreation. The Court found that this position was consistent with the *African Charter of Human Rights*, the UDHR, and the ICCPR.

The Court held that the respondent and her partner's right to privacy under the Constitution was not relevant because the respondent was an "alien with no existing right to residence". In addition, the Court held that the privacy provision under Article 17 of the ICCPR had "no rational connection" to the refusal of a residence permit.

The Court then turned to the argument that the right to equality and non-discrimination under Article 10 of the Constitution had been infringed because the Board had refused to recognise the respondent's relationship with a Namibian citizen. The Court held that the situation in Namibia was fundamentally different from the situation under South African constitutional and immigration law, where, under the right to equality, the preferential treatment given to foreign national "spouses" was extended to "partners in a permanent same-sex life partnership" in applications for permanent residency. The Court held that, because the

Constitution of South Africa explicitly prohibited discrimination on grounds of sexual orientation, the reasoning behind the extension of the South African law could not be applied in Namibia. The Court suggested that the implications of recognising sexual orientation as a prohibited ground of discrimination were such that it could extend to “any sexual attraction of anyone towards anyone or anything” (emphasis in original). According to the Court this could potentially extend to the decriminalisation of bestiality.

The Court found that unlike in South Africa, where a “legislative trend” evinced a greater commitment to equality with respect to sexual orientation, “Namibian trends, contemporary opinions, norms and values tend in the opposite direction”. The Court held that the position in Namibia was more closely aligned to that of Zimbabwe where, in cases such as *Banana v. State*, courts had shown little inclination to extend constitutional protections in relation to sexual orientation and “sexual freedoms”.

Furthermore, the Court held that some differentiation was permissible under Article 10 of the Constitution if it was based on a rational connection to a legitimate purpose and that “equality before the law for each person, does not mean equality before the law for each person’s sexual relationships”.

The Court decided that it was not in a position to make orders that would usurp parliament’s role as legislator and held that there was no requirement to do so under the Constitution. Unlike the South African Constitutional Court, it could not read in an extension of immigration laws to provide to permanent same-sex life partners of its citizens preferential treatment equalling that afforded to “spouses”. As a result, the Court held that the Board had no obligation to consider the respondent’s same-sex relationship as a factor that strengthened her application for permanent residence.

The Court also stated that “nothing in this judgment justifies discrimination against homosexuals as individuals, or deprives them of the protection of other provisions of the Namibian Constitution.”

The Court referred the case back to the Board for reconsideration. In doing so, it affirmed that, in the exercise of its “wide discretion”, the Board was permitted to consider the “special relationship” between the respondent and the second respondent as a factor in favour of granting permanent residence.

Appellant S395/2002 v. Minister for Immigration and Multicultural Affairs, High Court of Australia (9 December 2003)

Procedural Posture

Judicial review by the High Court of Australia of a decision of the Refugee Review Tribunal.

Facts

Under Section 36(2)(a) of the *Migration Act 1958* (Commonwealth) a non-citizen could be granted a protection visa if Australia owed them protection under the *1951 Convention Relating to the Status of Refugees*. Under Article 1A of the Convention a non-citizen would qualify as a refugee if, “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country”.

The appellants arrived in Australia from Bangladesh and applied for protection visas. They claimed they had a well-founded fear that, if they returned to Bangladesh, they would be persecuted because of their homosexuality. A delegate of the respondent Minister denied their claim. The Tribunal then rejected the appellants’ applications for a review of that decision. The Tribunal affirmed that the appellants, as homosexual men, were members of a social group for the purposes of the Convention, but were not refugees because they did not have a well-founded fear of persecution if returned to Bangladesh.

The Tribunal found that homosexuality was not accepted in Bangladeshi society and that homosexual sexual acts were criminalised under Section 377 of the *Penal Code of Bangladesh*. Prosecutions were rare but it was nevertheless impossible to live openly as a gay man in Bangladeshi society without risk of serious harm. However, the Tribunal concluded that homosexuality was generally ignored rather than openly confronted and that men were able to have homosexual relationships provided they were “discreet”. The Tribunal found that the applicants had not previously suffered serious harm on the basis of their sexual orientation and there was no “real chance” that they would be persecuted if they returned to Bangladesh. The Tribunal held that the appellants had “clearly conducted themselves in a discreet manner” and there was “no reason to suppose that they would not continue to do so if they returned home now”.

Issue

Whether the applicants, as homosexuals, were required to modify their behaviour by acting discreetly in order to avoid persecution; whether the Tribunal erred by dividing the social group of homosexual men into ‘discreet’ and ‘non-discreet’ sub-categories.

Domestic Law

Migration Act 1958, Sections 36(2)(a) and 476(1)(e).

International Law

1951 Convention Relating to the Status of Refugees, Article 1A.

Reasoning of the Court

The High Court found 4 to 2 for the appellants. The majority delivered two separate joint-judgments. Both majority opinions found the Tribunal's implicit finding, that homosexual men would not be subject to persecution if they acted discreetly, to be problematic. When the Tribunal stated that there was no reason to suppose that the appellants would not continue to act discreetly if they returned home, it had effectively broken the social group of "homosexual males in Bangladesh" into two sub-categories, those who were discreet and those who were not. The Tribunal implied that it would be more difficult for a "discreet" homosexual to obtain asylum because he would be less likely to suffer persecution. In creating this "false dichotomy", the Tribunal had fallen into jurisdictional error.

Justices McHugh and Kirby held that the Tribunal's decision was wrong in principle to the extent that it created a requirement or expectation that asylum seekers should take reasonable steps to avoid persecutory harm. They held that "persecution does not cease to be persecution for the purpose of the Convention because those persecuted can eliminate the harm by taking avoiding action within the country of nationality". An analogy to racial and religious persecution was illustrative. The object of the Convention itself would be undermined if individuals were required to modify their beliefs or opinions or to conceal their racial or national identities as a prerequisite to receiving protection. The same was true for the social group of homosexual Bangladeshi men.

The Tribunal had failed to consider how the appellants' conduct was influenced by the threat of serious harm; whether the appellants had acted discreetly in order to avoid harm; and, whether this in itself constituted persecution. In doing so, the Tribunal had misdirected itself on the issue of discretion and had not properly considered the appellants' claims that they had a real and well-founded fear of persecution if they returned to Bangladesh. The real question was whether the harm that would be suffered was such that, "by reason of its intensity or duration, the person cannot reasonably be expected to tolerate it".

Justices Gummow and Hayne also held that it would be wrong to expect an applicant for asylum to live discreetly so as to avoid persecutory harm. The Tribunal had no jurisdiction to compel applicants for asylum to behave in a certain way in their country of nationality. The Tribunal had asked the wrong question by placing an emphasis on the "discreet" conduct of the appellants, rather than contextualising and considering the adverse consequences that their sexual identities had within Bangladeshi society. The use of terms such as "discretion" and "being discreet" in connection with sexual expression could be misleading and, by using such terms, the Tribunal had distorted the real issue of whether the appellants had a well-founded fear of persecution within the meaning of the Convention.

The appeal was allowed and the original decision set aside. The matter was remanded to the Tribunal for re-determination.

Nabulwala v. Gonzales,
United States Court of Appeals for the 8th Circuit (21 March 2007)

Procedural Posture

The petitioner, a Ugandan citizen, challenged the final order of the Board of Immigration Appeals denying her claim for asylum, withholding of removal (a stay of the deportation order), and for relief under the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.

Facts

The petitioner arrived in the United States in 2001. She eventually applied for asylum based on her past persecution as a lesbian. She had come out as a lesbian to her family in 1994, while she was a high school student. Her family was angry and urged her to marry a man. While attending university, she joined an organisation called Wandegeya, which advocated for LGBT rights. During a Wandegeya meeting, a mob attacked the group, throwing stones and hitting them with sticks. In 2001, after the petitioner's family realised that she was still a lesbian, they forced her to have sex with a stranger. They also expelled her from the home and disowned her. The Immigration Judge found the petitioner credible but denied her application for asylum and the Board affirmed that decision. Although both the Immigration Judge and Board recognised that a lesbian might be a member of a "particular social group" under domestic refugee law (implementing the 1951 *Convention Relating to the Status of Refugees*), neither found her experiences rose to the level of persecution required.

Issue

Whether mistreatment at the hands of private actors could qualify as persecution under the *Immigration and Nationality Act*.

Domestic Law

Immigration and Nationality Act.

International Law

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

1951 Convention Relating to the Status of Refugees.

Reasoning of the Court

The Immigration Judge had denied the petitioner asylum after finding that the Wandegeya meeting was an isolated incident, that the family-arranged rape was "private family mistreatment", and that the petitioner had not suffered past persecution that was "government-sponsored or authorised".

The Court found that the Immigration Judge had erred in concluding that the petitioner must demonstrate persecution at the hands of government officials. It held that persecution could be a harm inflicted either by the government of a country or by persons or an organisation that the government was unable or unwilling to control. The Immigration Judge made no findings on whether the government was unable or unwilling to control the persons who had harmed the petitioner.

Since the Immigration Judge had made no findings about the government's willingness or ability to protect the petitioner, the case was remanded to the Board of Immigration Appeals for further proceedings consistent with the Court's opinion.

Razkane v. Holder,

United States Court of Appeals for the 10th Circuit (21 April 2009)

Procedural Posture

The petitioner applied for restriction on removal pursuant to the *Immigration and Nationality Act*. An Immigration Judge denied application. The Board of Immigration Appeals upheld the Immigration Judge's decision. The petitioner appealed to the Tenth Circuit Court of Appeals.

Facts

The petitioner was a Moroccan citizen who entered the United States in 2003. Because he had remained in the country after his visa expired, the Department of Homeland Security served upon him a Notice to Appear, charging him as removable under United States immigration laws. The petitioner applied for asylum, restriction on removal, and voluntary departure under the *Immigration and Nationality Act*. He also sought protection under the *Convention against Torture*.

Issue

Whether the Immigration Judge erred in his analysis of "whether it was more likely than not [the petitioner] would be persecuted on account of his membership in this social group [gay men] upon return to Morocco".

Domestic Law

Ali v. Mukasey, United States Court of Appeals for the 2nd Circuit, 2008, and *Shahinaj v. Gonzales*, United States Court of Appeals for the 8th Circuit, 2007 (assumptions about homosexuality prevented judges from performing their role fairly).

Chaib v. Ashcroft, United States Court of Appeals for the 10th Circuit, 2005 (what a petitioner must show to obtain a restriction on removal: a non-citizen "must establish a clear probability of persecution in that country on the basis of race, religion, nationality, membership in particular social group, or political opinion").

INS v. Stevic, United States Supreme Court, 1984 (defining the clear-probability standard: “whether it is more likely than not that the non-citizen would be subject to persecution”).

International Law

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Reasoning of the Court

Razkane had presented evidence before the Immigration Judge that in Morocco a neighbour had attacked him with a knife. The neighbour told him that death was better than being gay. Razkane presented expert testimony that homosexuality was seen as a violation of Islam and that gay men in Morocco had been harassed, beaten, raped and even killed. Police protection was non-existent.

The Immigration Judge concluded that Razkane had not been subjected to past persecution because the attack had not resulted in injury and the family of the assailant had apologised. The Immigration Judge distinguished Morocco from countries that persecuted homosexuals because of their status as homosexuals. He found Razkane could not show that his status as a homosexual would be likely to lead to persecution in Morocco.

The Immigration Judge found that Razkane’s appearance would not “designate him as being gay” because he did not dress in an effeminate manner. The Immigration Judge concluded that Razkane had not shown that he would engage in the type of “overt homosexuality” that would attract the attention of authorities in Morocco.

The Court rejected the findings of the Immigration Judge.

The [Immigration Judge]’s reliance on his own views of the appearance, dress, and affect of a homosexual led to his conclusion that Razkane would not be identified as a homosexual ... This analysis elevated stereotypical assumptions to evidence upon which factual inferences were drawn and legal conclusions made. To condone this style of judging, unhinged from the prerequisite of substantial evidence, would inevitably lead to unpredictable, inconsistent, and unreviewable results. The fair adjudication of a claim for restriction on removal is dependent on a system grounded in the requirement of substantial evidence and free from vagaries flowing from notions of the assigned [Immigration Judge]. Such stereotyping would not be tolerated in other contexts, such as race or religion.

The Court cited recent rulings by other courts on this stereotyped approach to sexual orientation. These courts had held that preconceived assumptions about homosexuality prevented immigration judges from performing their role fairly.

The Court reversed the decision of the Board and remanded the case for proceedings consistent with its opinion. The Court noted that if the Board determined that consideration by an Immigration Judge was necessary, a different Immigration Judge should be assigned to the case. The Court also extended the temporary stay of removal until the mandate had been issued.

**In re Appeal for the Cancellation of Denied Refugee Status
Recognition, Seoul Administrative Court,
South Korea (24 December 2009)**

Procedural Posture

The claimant appealed the decision of the Minister of Justice, who denied his application for refugee status.

Facts

The claimant was a homosexual man from Pakistan. The claimant legally entered the Republic of Korea, where he remained following the expiration of his visa. The claimant was arrested and detained on 16 February 2009. While detained, he applied for refugee status which was denied. He appealed to the Seoul Administrative Court.

Both the claimant and the Minister of Justice agreed on the following facts, set out in a report issued by the Immigration and Refugee Board of Canada. The *Pakistan Penal Code* criminalised same-sex sexual activity under Article 377. Relevant cases were introduced as evidence. The tribal council in Khyber province had warned two men that they would face death if they did not leave the province. The warning was based on the men's violation of tribal rules. In another incident two men were arrested and sentenced to being whipped after they were found having sex in a public bathroom in Khyber province. A couple in Lahore was detained when seeking a restraining order against the husband's abusive family. Prior to marriage, the husband underwent female-to-male sex reassignment surgery. The authorities detained the couple because they considered the marriage to be same-sex and anti-Islamic. The authorities also believed that the husband and wife lied about their genders and were guilty of perjury. In 2003 three men were arrested for having sex with each other in Lahore.

Both parties also accepted as fact the findings of the National Report on Pakistan published by the UK Border Agency. That report concluded that police in Pakistan routinely threatened and extorted money from homosexuals.

Issue

Whether the claimant's sexual orientation qualified him for refugee status in the Republic of Korea.

Domestic Law

Immigration Law, Articles 2.2 (definition of refugee) and 76.2 (recognition of a refugee).

International Law

1951 Convention Relating to the Status of Refugees, Article 1.

1967 Protocol Relating to the Status of Refugees, Article I.

Comparative Law

Pakistan Penal Code, Article 377 (punishing consensual “carnal intercourse against the order of nature” with imprisonment of between two and ten years).

Reasoning of the Court

The Court began its opinion by emphasising that Article 76.2.1 of the South Korean *Immigration Law* gave individuals the right only to apply for refugee status. Furthermore, the law did not guarantee refugee status even if an applicant satisfied the criteria outlined in the Convention and Protocol. This said, the Court affirmed that the law had the “clear intent of protection”.

Having interpreted the law, the Court outlined the procedure for granting refugee status in South Korea. Article 2.2 of the *Immigration Law* defined “refugee” according to the criteria outlined in the Convention. The Court was therefore deferential to the terms of the Convention, the Protocol and the *United Nations Handbook on Procedures and Criteria for Determining Refugee Status*. It focused on the requirement that the applicant must demonstrate a well-founded fear of persecution. Satisfying this requirement depended heavily on a court’s interpretation of the concepts of “persecution” and “fear”, the burden of proof being on the applicant.

Because no commonly accepted definition of “persecuted” existed, the Court referred to Paragraphs 51 and 65 of the Handbook. Paragraph 51 stated that persecution involved a threat to one’s life or physical freedom. “Unjust discrimination, suffering, and disadvantages” could also qualify. The Court understood Paragraph 65 to mean that the “main actor of the persecution should not be limited to a governmental organisation but can also be a non-governmental organisation when governmental protection is not viable”.

The Court interpreted “fear” in a similarly broad manner. It was clear under Paragraph 38 of the Handbook that the applicant must demonstrate subjective fear *and* objective evidence for having such fear. Additionally, as per Paragraph 195 of the Handbook, the Court held that it must also consider “the general human rights violation status of his/her country of origin ... [and] other specific conditions or events in his/her country [that could] ... be related to causing the applicant to feel the possibility of fear”.

Claimants have difficulty providing evidence in asylum cases. The Court recognised that their physical distance from their country of origin compromised their ability to provide compelling evidence. For this reason, the Court held that it would be “enough for the applicant’s claims to be overall reliable and credible ... the arguments should be coherent and plausible while at the same time not run counter to generally known facts”. Paragraph 204 of the Handbook supported this position.

Using this framework, the Court found that the facts presented satisfied the criteria for refugee status. It also accepted that the claimant’s testimony was credible. The claimant had testified that he was arrested while waiting in a taxi before he was to engage in a homosexual act; that his wife and her family knew of his sexuality and threatened him because of it; that his father threatened to deny him his inheritance because of his sexuality; and that he had been blackmailed by people who had videos of him engaging in same-sex sexual activity. Based on this testimony as well as the report from the Canadian Immigration and Refugee Board, the report from the United Kingdom Border Agency, and Article 377 of the *Pakistan Penal Code*, the Court held that “the claimant’s claims are in and of themselves coherent, plausible and overall credible and do not run counter to facts that are generally known ... [It] is very likely that the claimant, in the case that he gets sent back to Pakistan ... will be persecuted by Pakistani Muslims [and] the Pakistani government ... for being homosexual.”

The Court overturned the Minister of Justice’s ruling and recognised the claimant as a refugee according to Article 2(2) of South Korea’s *Immigration Law*.

**HJ (Iran) v. Secretary of State for the Home Department;
HT (Cameroon) v. Secretary of State for the Home Department,
Supreme Court of the United Kingdom (7 July 2010)**

Procedural Posture

Appeal to the Supreme Court against two unrelated decisions by the Court of Appeal to deny asylum to men who had claimed asylum under Article 1A of the *Geneva Convention Relating to the Status of Refugees*.

Facts

The appellants, HJ, an Iranian citizen, and HT, a Cameroonian citizen, were both gay men. In both Iran and Cameroon, homosexuality is subject to legal prohibition and social hostility. The appellants had presented evidence that individuals who were openly gay were at risk of serious harm. As a result, both men claimed that they had a well-founded fear that they would be persecuted on the basis of their sexual orientation if they were returned home.

HJ and HT each had their original asylum claims refused. They then appealed to the Asylum and Immigration Tribunal and subsequently to the Court of Appeal. In

dismissing the appellants' claims, the Court of Appeal applied a test of reasonable tolerability that was established in the 2007 case of *J v. Secretary of State for the Home Department*. Under this test a court "would have to ask itself whether discretion was something that the applicant could reasonably be expected to tolerate, not only in the context of random sexual activity but in relation to matters following from, and relevant to, sexual identity in the wider sense." In the case of HJ the Court of Appeal held that, on the available evidence, he could reasonably be expected to tolerate the conditions in Iran. For HT the Court did not consider reasonable tolerability. It held that the Tribunal was entitled to conclude that he would be discreet upon return to Cameroon, so there was no real risk of persecution in the future. On these grounds the Court of Appeal found that neither applicant had a well-founded fear of persecution. The appellants appealed to the Supreme Court.

Issue

Whether an applicant for asylum could be required to conceal his or her sexual orientation in order to avoid persecution and whether an applicant could reasonably be expected to tolerate such concealment; whether such a requirement would be contrary to the *1951 Convention Relating to the Status of Refugees*.

Domestic Law

J v. Secretary of State for the Home Department, Court of Appeal of England and Wales, United Kingdom, 2007.

Comparative Law

Applicant S395/2002 v. Minister for Immigration and Multicultural Affairs, High Court of Australia, 2003.

International Law

1951 Convention Relating to the Status of Refugees, Article 1A.

Reasoning of the Court

The Court, in separate judgments, unanimously held that the Court of Appeal had erred in its approach to the protection of gay people as a social group under the Convention.

Lord Hope described the logic behind the reasonable tolerability test as a "fundamental error". Such a requirement would essentially oblige an applicant to suppress or surrender his or her identity and would be contrary to the Convention. In addition, it detracted from the real issue of whether the applicant had an objectively well-founded fear of persecution on the basis of being gay.

Lord Rodger noted that the Convention was based on the notion that "people should be allowed to live their lives free from the fear of serious harm coming to

them because of their race, religion, nationality, membership of a particular social group or political opinion". The Convention was designed to protect individuals from harm, regardless of whether that harm occurred at the hands of State agents or because the State was unwilling or unable to provide protection. With respect to the social group of gay people, the rationale of the Convention was that they should be "able to live freely and openly, without fearing that they may suffer harm of the requisite intensity or duration because they are gay or lesbian". Living openly was found to encompass a wide spectrum of conduct. Homosexuals were entitled to live as freely as their "straight counterparts". Furthermore, Lord Rodger found that it was not intended to define an applicant solely by his or her sexuality; what mattered was that the characteristic of being gay could cause the applicant to be subject to serious harm and persecution. The central issue in an asylum claim was, therefore, whether the applicant possessed a particular characteristic which might make him subject to serious harm or persecution and which he or she could not change or should not be required to change.

The members of the Court each relied on the Australian High Court decision *Appellant S395/2002 v. Minister for Immigration and Multicultural Affairs*. Lord Rodger described the case as a powerful authority for the proposition that

If a person has a well-founded fear that he would suffer persecution on being returned to his country of nationality if he were to live openly as a gay man, then he is to be regarded as a refugee for purposes of the Convention, even though, because of the fear of persecution, he would in fact live discreetly and so avoid suffering any actual harm.

Lord Rodger, with whom Lords Walker, Collins and Dyson separately concurred, set out a multi-pronged procedure for determining whether a gay or lesbian applicant who applied for asylum under the Convention had a well-founded fear of persecution on the basis of sexuality. They found that if a Tribunal concluded that the applicant would, upon return, live discreetly, it had to ask why the applicant would live discreetly. If it concluded that he or she would do so because of "social pressures", then that did not amount to persecution and no protection was available under the Convention.

If, on the other hand, the Tribunal concluded that a "material reason for the applicant living discreetly on his return would be a fear of the persecution which would follow if he were to live openly as a gay man, then, other things being equal, his application should be accepted". The Court reasoned that such a person had a well-founded fear of persecution. "To reject his application on the ground that he could avoid the persecution by living discreetly would be to defeat the very right which the Convention exists to protect – his right to live freely and openly as a gay man without fear of persecution."

Both appeals were allowed and respectively remitted to the Tribunal for reconsideration in light of the approach outlined by the Court.

- 1 See, for example, the *non-refoulement* provision of Article 3 of the *Convention against Torture*: European Court of Human Rights, Judgment of 7 July 1989, *Soering v. United Kingdom*, Application No. 14038/88, paras. 87 and 90 (deriving the principle of *non-refoulement* from the obligation of States to secure human rights for all people subject to their jurisdiction); Human Rights Committee, *General Comment No. 31*, Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13, para. 12 (explaining that “the article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed”).
- 2 See, for example, Amnesty International, *Crimes of hate, conspiracy of silence, torture and ill-treatment based on sexual identity* (London 2001); Eric D. Ramanathan, ‘Queer Cases: A Comparative Analysis of Global Sexual Orientation-Based Asylum Jurisprudence’ (1996), 11 *Geo. Immigration Law Journal* 1; Arwen Swink, Note, ‘Queer Refuge: A Review of the Role of Country Condition Analysis in Asylum Adjudications for Members of Sexual Minorities’ (2006), 29 *Hastings Int’l & Comp. L. Rev.* 251, 253; Monica Saxena, ‘More than Mere Semantics: the Case for an Expansive Definition of Persecution in Sexual Minority Asylum Claims’ (2006), 12 *Michigan Journal of Gender & Law* 331; Paul O’Dwyer, ‘A Well-Founded Fear of Having My Sexual Orientation Asylum Claim Heard in the Wrong Court’ (2007-2008), 52 *N.Y.L. School Law Review* 185; Laurie Berg & Jenni Millbank, ‘Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants’ (June 2009), 22 *Journal of Refugee Studies* 195.
- 3 UNHCR, *Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity*, 21 November 2008.
- 4 UNHCR, *Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity*, November 2008; UNHCR, Advisory Opinion to the Tokyo Bar Association, 3 September 2004; UNHCR, *Guidelines on International Protection No. 2: “Membership of a Particular Social Group” Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, HCR/GIP/02/02, May 2002; European Council on Refugees and Exiles, ELENA Research paper on Sexual Orientation as a Ground for Recognition of Refugee Status, 1 June 1997.
- 5 UNHCR, *Guidelines on International Protection No. 2: “Membership of a Particular Social Group” Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, HCR/GIP/02/02, May 2002, para. 11.
- 6 In 1983, a German court recognised a gay man from Iran as a member of a particular social group for the purposes of the *Refugee Convention*. Brian Henes, ‘The Origin and Consequences of Recognizing Homosexuals as a Particular Social Group for Refugee Purposes’ (1994), 8 *Temple International & Comparative Law Journal* 377; European Council on Refugees and Exiles, *ELENA Research paper on Sexual Orientation as a Ground for Recognition of Refugee Status*, 1 June 1997.
- 7 *Matter of Toboso Alfonso*, US Board of Immigration Appeals (12 March 1990).
- 8 Attorney General Order No. 1895-94 (June 19, 1994).
- 9 Discrimination on grounds of sexual orientation and gender identity in Europe (Council of Europe 2011) at 65.

- 10 *Geovanni Hernandez-Montiel v. INS*, 225 F.3d 1084, US Court of Appeals for the 9th Circuit (24 August 2000). The Ninth Circuit has extended this reasoning to other cases of “gay men with female sexual identities”, thus appearing to conflate sexual orientation and gender identity. For additional case discussion, see Ellen Jenkins, ‘Taking the Square Peg Out of the Round Hole: Addressing the Misclassification of Transgender Asylum Seekers’ (Fall 2009), 40 Golden Gate University Law Review 67, 77-80; Fatima Mohyuddin, ‘United States Asylum Law in the Context of Sexual Orientation and Gender Identity: Justice for the Transgendered?’ (Summer 2001), 12 Hastings Women’s Law Journal 387 (collecting case studies regarding transgender and intersex individuals who were granted asylum).
- 11 *Decision M. Ourbih Mohandarezki*, Conseil d’Etat, France (23 June 1997) (reversing decision of the Conseil des Recours des Réfugiés and remanding for reconsideration an application for asylum of a transgender individual from Algeria and noting that a social group could be defined by the fact of persecution); *Decision T98-04159*, Immigration and Refugee Board of Canada (13 March 2000) (granting the application of a bisexual man who dressed as a woman). See also *Discrimination on grounds of sexual orientation and gender identity in Europe* (Council of Europe 2011) at 65.
- 12 The two men had in fact offered graphic and detailed descriptions of past harm, but the Tribunal had found these accounts not credible.
- 13 UNHCR, *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department* – Brief for the first intervenor (19 April 2010), at para. 8(1).
- 14 Victoria Neilson, ‘Homosexual or Female? Applying Gender-Based Asylum Jurisprudence to Lesbian Asylum Claims’ (2005), 16 Stanford Law & Policy Review 417; Jenni Millbank, ‘Gender, Visibility and Public Space in Refugee Claims on the Basis of Sexual Orientation’ (Spring/Summer 2003), 1 Seattle Journal for Social Justice 725.
- 15 Millbank, ‘Gender, Visibility and Public Space in Refugee Claims on the Basis of Sexual Orientation’, at 727.
- 16 The failure to recognise same-sex marriages for immigration purposes is also a current legal issue, although it is beyond the scope of this chapter. In some European States, overseas marriages have been judicially converted to domestic or registered partnerships. Within the European Union, the residency rights of third-country nationals whose partners are EU citizens are covered by the Free Movement Directive. Both married and unmarried same-sex partners can qualify for residency rights if they can establish a “durable relationship, duly attested”. Council Directive 2004/38/EC (free movement of citizens and their family members within EU), Article 3. For further information, see Mark Bell & Matteo Bonini Baraldi, *Lesbian, Gay, Bisexual and Transgender Families and the Free Movement Directive: Implementation Guidelines* (ILGA-Europe December 2008). In the USA, the issue of federal recognition of same-sex marriages has lately made headlines. See ‘Dancer in Same-Sex Marriage to Princeton Student Won’t be Deported for Now’, *The Trentonian* (7 May 2011). For general denial of immigration benefits to same-sex partners in the US, see Human Rights Watch & Immigration Equality, *Family, Unvalued: Discrimination, Denial and the Fate of Binational Same-Sex Couples under US Law* (1 May 2006).

PARTNERSHIP BENEFITS AND RECOGNITION

Chapter thirteen

Partnership Benefits and Recognition

INTRODUCTION

This chapter presents the struggle for legal recognition and protection of same-sex relationships. In general, the right of individuals to equality and non-discrimination was judicially recognised much earlier than their rights in relationships. This was driven in part by a fear of same-sex marriage. Thus in *Lawrence v. Texas*, Justice Kennedy framed the question of decriminalisation as one of individual liberty. Lawrence and Garner’s “personal relationship” was within their liberty to choose, regardless of whether it was “entitled to formal recognition in the law”.¹ As recently as 2001, after striking down laws that criminalised same-sex sexual conduct (*Dudgeon, Norris, Modinos*) and affirming sexual orientation to be a characteristic that was undoubtedly covered by the non-discrimination guarantee of Article 14 (*da Silva Mouta*), the European Court ruled in *Mata Estevez v. Spain* that “long-term homosexual relationships between two men do not fall within the scope of the right to respect for family life protected by Article 8 of the Convention”.² That case concerned the applicant’s request for a survivor’s pension after the death of his partner.

When same-sex relationships go unrecognised in law, however, couples suffer a range of consequences. Relationship recognition is not just about status. It is also about access to economic rights and benefits. (Rights and responsibilities related to children are covered in the Parenting Chapter.) Same-sex couples may be unable to own property jointly, to be included in health insurance plans, to benefit from tax relief, to visit each other in hospital, make decisions related to medical care, or receive survivor benefits in the event of death. Without recognition, many same-sex couples confront on a daily basis a series of “social indignities and economic difficulties ... due to the inferior legal standing of their relationships compared to that of married couples”.³ It is notable that many of the earliest cases concerning same-sex partnerships occurred when a surviving partner sought the right to continue to reside in a shared apartment or to receive a survivor benefit or pension, rights that would be conferred automatically on a widow or widower. In enacting a domestic partnership law, one legislature stated that such rights and benefits had an “essential relationship to any reasonable conception of basic human dignity and autonomy” and played an “integral role in enabling these persons to enjoy their familial relationships as domestic partners”.⁴

A strong case can be made that international law prohibits discrimination between the situation of married opposite-sex couples and unmarried same-sex couples, in terms of access to benefits and privileges. In *Young v. Australia* (2003), the UN Human Rights Committee held that denying a survivor's pension to Young, whose partner of thirty-eight years was a war veteran, because he was not a member of an opposite-sex couple, constituted prohibited discrimination under Article 26 of the Covenant.⁵ A similar outcome was reached by the European Court the same year, in the case of *Karner v. Austria*. The Court held that the Supreme Court's decision not to recognise Karner's right to succeed to the tenancy of an apartment after the death of his partner violated Article 14, and the respect for his home under Article 8 of the Convention.⁶ Although the European Court accepted that "the protection of the family in the traditional sense is, in principle, a weighty and legitimate reason which might justify a difference in treatment" between same-sex and opposite-sex couples, it concluded that the Government had not shown that exclusion of same-sex couples from the statute's protection was necessary in order to achieve that aim. The European Court of Justice has also held that differences in treatment between same-sex and opposite-sex couples with regard to employment and pension benefits amount to discrimination on grounds of sexual orientation.⁷

In the 2010 case of *Schalk & Kopf v. Austria*, the European Court held for the first time that the emotional and sexual relationship of a same-sex couple constituted "family life" within the meaning of Article 8 of the Convention.⁸ Consequently, same-sex couples, including ones without children, had the same need for "legal recognition and protection of their relationship" as opposite-sex couples.⁹ In taking this step, it acknowledged that: "[since] the decision in *Mata Estevez* was given, a rapid evolution of social attitudes towards same-sex couples has taken place in many member States ... In view of this evolution the Court considers it artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy "family life" for the purposes of Article 8."¹⁰

Same-sex relationships first received formal recognition in Denmark in 1989.¹¹ Norway and Sweden soon followed suit. In the United States, by contrast, formal recognition of relationships occurred later and slower. United States courts' employed a "functional approach", granting benefits and rights to same-sex partners but withholding official approval.¹² Until 2003, the US Supreme Court case of *Bowers v. Hardwick* was the law of the land and justified State-sanctioned discrimination. Thus in 1999 the Vermont Supreme Court relied on the State Constitution, rather than the federal Constitution, when it ruled that same-sex couples must be granted rights and privileges equal to those granted to married couples.¹³ That case led to the enactment of Vermont's civil union law.¹⁴

The cases in this chapter fall into two categories. In the first category are cases that deal with the exclusion of a same-sex partner from a right or benefit that State law or a private company or a benefit plan would award to an opposite-sex partner. The cases from Israel, Canada, South Africa and Slovenia, and the Brazilian case

of ***SGB v. PREVI***, fall into this category. The topics covered show the range of concerns that individuals excluded from relationship recognition raise. ***El-Al Israel Airlines*** (1994) concerns a free airline ticket, awarded to married spouses or opposite-sex companions, but not to same-sex partners of El-Al employees. In finding that El-Al was required to give the benefit to same-sex partners of its employees, the Supreme Court of Israel noted that the free ticket was given not only to the spouses of married employees but also to “recognized companions” of the opposite sex. This being the case, the purpose of the ticket was plainly not to “strengthen the institution of marriage”, since a ticket could be given to any opposite-sex companion with whom an employee lived, regardless of whether that employee was married. The court emphasised that a “life of sharing” was the common feature, and that this “life of sharing” was not different between same-sex and opposite-sex couples. A concurring opinion took note of the functional approach to defining same-sex families used by US courts. The dissent, by contrast, argued that the issue could be resolved linguistically. Justice Kedmi wrote: “To give the concept ‘couple,’ in the context discussed here, a different meaning from the linguistic meaning that it has always had is impossible”. He quoted the Bible as proof that a “couple” could only mean the joining of two individuals of opposite sexes for the purpose of biological reproduction.

The procreation argument did not win in the ***El-Al*** case but was dispositive in the 1995 case of ***Egan v. Canada***. Appellants had alleged that the exclusion of an opposite-sex partner from the benefits of the *Old Age Security Act*, which was limited by its terms to “spouses,” was discriminatory. The Supreme Court unanimously agreed that “sexual orientation” was analogous to the other grounds protected from discrimination by Section 15 of the Charter. However, a majority of the Court found that no Charter violation had occurred. Four justices held that the distinction between opposite-sex and same-sex couples was rational because only heterosexual couples were primarily responsible for raising children. The dissent argued that the presence or absence of children had no relevance to eligibility for an old age spousal supplement. Justice Cory, in dissent, emphasised that the discrimination was against individuals as couples, which involved conduct as much as status. The conduct in question was the choice of partner. As the Charter protected both religious belief and religious practice, so it should protect the conduct involved in choosing a life partner.

In the case of ***Blazic and Kern***, the Constitutional Court of Slovenia unanimously concurred that sexual orientation is an analogous ground. In that case, the couple challenged provisions of the registered partnership law that were unequal with regard to inheritance rights. Sexual orientation was not specifically mentioned in the equality guarantee of the *Constitution of Slovenia*. Nevertheless, the Court took note of the European Court’s reasoning in *da Silva Mouta v. Portugal*, where sexual orientation was found to be covered by the Convention. In the Brazilian case of ***SGB v. PREVI***, which concerned a survivor’s pension, the court

emphasised the evolution of attitudes to relationships that had occurred and held that the traditional preoccupation with procreation was no longer central to the definition of a stable union.

Courts and litigants have both expressed frustration with a piecemeal approach to relationship rights. Commentators have recognised that, although the functional approach represents an opportunity for courts to “afford stopgap legal recognition to same-sex couples within a statutory framework that would otherwise deny them such recognition”, it is “unsatisfactory as a long-term solution”.¹⁵ In *J & Another v. Director General, Department of Home Affairs* (see Parenting Chapter), the Constitutional Court of South Africa observed: “Comprehensive legislation regularizing relationships between gay and lesbian persons is necessary. It is unsatisfactory for the courts to grant piecemeal relief to members of the gay and lesbian community as and when aspects of their relationships are found to be prejudiced by unconstitutional legislation”.¹⁶

The second set of cases discussed in this chapter consider the recognition of relationships as relationships. Although the name varies – civil union, registered partnership, and domestic partnership are among the permutations – formal legal recognition for same-sex couples is increasingly common in North and South America and Western Europe. In Europe, it became possible to register partnerships largely as a result of legislative action, although in some instances a pending European Court case may have influenced legislators.¹⁷ In the United States, civil union laws were enacted as the result of judicial challenges in both Vermont and New Jersey. (In addition, court cases in Iowa, Connecticut, and Massachusetts resulted in statutory change to marriage law, whereas court cases in Hawaii and Alaska resulted in constitutional amendments prohibiting same-sex marriage.¹⁸) Recognition of same-sex relationships as relationships (rather than actions seeking individual benefits) has also come about through legal challenges in Colombia and, most recently, Brazil.

In *Lewis v. Harris*, same-sex couples challenged the constitutionality of their exclusion from State marriage laws. They did not ask for civil unions or domestic partnerships; indeed, they argued that a separate statutory scheme for same-sex couples would also be discriminatory. The Supreme Court of New Jersey held, first, that the right to marry a person of the same sex was not a fundamental right protected by the liberty guarantee of the State Constitution. It did, however, find a violation of the equal protection clause. In doing so, it separated the plaintiffs’ claim into a substantive component (whether they were entitled to the rights and benefits of marriage) and a symbolic one (whether they could claim the title of marriage). The Court found that the rights and benefits of marriage must be conferred on plaintiffs, but left the question of means to the legislature. (The dissent criticised what it viewed as judicial timidity, but the Court was no doubt aware of same-sex marriage decisions in Hawaii and Alaska that had led to constitutional amendments limiting marriage to the union of one man and one

woman.¹⁹) In this regard, the **Lewis** Court took a path that had explicitly been considered and rejected by the Constitutional Court of South Africa in **Fourie**. (See Marriage Chapter.) The Legislature of New Jersey responded by enacting the *Civil Union Act*, which not only created same-sex civil unions but established a commission to review the functioning of the law.²⁰ The plaintiffs have now challenged the *Civil Union Act* in court, alleging that they have still not been afforded the same rights and benefits as married couples.²¹

In Colombia, civil unions are regulated by *Law 54 of 1990*. This was first challenged in 1996 case when petitioners argued that the law discriminated on the basis of sexual orientation.²² The Constitutional Court found no discrimination. This decision was the subject of an application to the UN Human Rights Committee in *X v. Colombia*, which held that the lack of a pension benefit for the surviving partner constituted discrimination.²³ In **Sentencia C-075/07**, the Court held for the first time that civil unions should be extended to same-sex couples. The Court emphasised that, although the Constitution prohibited discrimination on the basis of sexual orientation, thus far that right had only protected individuals and not their relationships. Development as a member of a couple, however, was equally important. The Court concluded that the possibility of forming a relationship was an essential aspect of personal fulfilment, both sexually and in other dimensions as well. The ruling gave same-sex couples the same property and inheritance rights as heterosexual couples. In 2009, in **Sentencia C-029/09**, also included here, the Constitutional Court ruled that the benefits conferred on married couples in a wide range of areas (including housing subsidies, nationality and residence, testimonial privileges and domestic violence protection) must be extended to same-sex couples. The decisions of the Constitutional Court of Colombia are far-reaching and caused the benefits and protections of *Law 54* to be extended to same-sex couples.

The final case in this chapter concerns the Supreme Tribunal Federal of Brazil. In May 2011, the Tribunal held that laws regulating “stable unions” should be read to include same-sex couples. Same-sex couples in stable unions now have the same rights as opposite-sex couples to community property, alimony, health insurance, tax benefits, adoption and inheritance. Any other interpretation of the stable union law, the Tribunal ruled, would violate the Constitution.

CASE SUMMARIES

El-Al Israel Airlines Ltd v. Danielowitz, Supreme Court of Israel
sitting as the High Court of Justice (30 November 1994)

Procedural Posture

The respondent applied to the Regional Labour Court for a declaration that the employment benefits that he received for his male partner should be the same as

those received by his colleagues who had opposite-sex spouses or companions. The Regional Labour Court held that, in refusing to confer the same benefits on same-sex couples, the employment benefit scheme had been discriminatory under Section 2 of the *Equal Employment Opportunities Law, 1988*, which, under a 1992 amendment, prohibited discrimination on the basis of sexual orientation. The respondent's employer, El-Al Israel Airlines, had its appeal to the National Labour Court dismissed on the basis of the same law and the respondent was found to have a right to demand the benefit that he and his partner had been denied. El-Al then petitioned the Supreme Court sitting as the High Court of Justice.

Facts

The respondent was a flight attendant for the petitioner, El-Al Israel Airlines. Under a collective agreement, permanent employees and their "spouses" were entitled to receive a free or discounted ticket annually. Under an alternative arrangement, a ticket could also be given to "a companion recognized as the husband/wife of an employee of the company if the couple live together in a joint household as husband and wife in every respect, but they are unable to marry lawfully". The respondent applied to have his male partner recognised as his 'companion', in order to receive the benefit. The respondent and his partner were in a committed long-term same-sex relationship, in which they ran a joint household in a jointly owned apartment. El-Al declined the request.

Issue

Whether denial of a benefit to the same-sex partner of an employee was discriminatory when that benefit was given to opposite sex-partners and spouses.

Domestic Law

Basic Law: Human Dignity and Liberty, 5752-1992, Sections 7 and 8.

Equal Employment Opportunity Law (Amendment), 5752-1992.

Equal Employment Opportunity Law, 5748-1988, Sections 2, 2(a), and 2(c).

Comparative Law

Braschi v. Stahl Associates, New York Court of Appeals, 544 N.Y. Supp. 2d 784 (1989) (finding same-sex partner to have occupancy rights following death of tenant; adopting functional test).

Vriend v. Alberta, Alberta Court of Queen's Bench, 1994 (holding that sexual orientation was a ground analogous to those listed in section 15(1) of the *Canadian Charter of Rights and Freedoms*).

Egan v. Canada, Federal Court of Appeal of Canada, 1993 (holding sexual orientation to be analogous ground under the *Canadian Charter*).

International Law

Modinos v. Cyprus, ECtHR, 1993 (finding that sodomy laws of Cyprus violated the right to privacy under the *European Convention*).

Norris v. Ireland, ECtHR, 1988 (finding that sodomy laws of Ireland violated the right to privacy under the *European Convention*).

Reasoning of the Court

Majority Opinion (per Vice-President Barak)

The Court held that El-Al's refusal to provide an airline ticket to the respondent's same-sex partner was discriminatory, because the Airline was making an unjustifiable distinction on the basis of sexual orientation. The respondent and his partner had a right to the benefit of a ticket. This right was derived from the respondent's contractual entitlement to receive a ticket, as an employee benefit, for either a "spouse" or "recognized partner", in combination with the prohibition of discrimination on sexual orientation grounds under the 1992 *Employment Equal Opportunity Law (Amendment)*. The respondent's right to equal treatment had accrued from the date on which the amendment had been enacted into law.

The Court reached its decision after reviewing Israeli law with regard to the right to equality and, more specifically, discrimination on grounds of sexual orientation. The Court held that equality was a fundamental value of Israeli law. The principle of equality was entrenched through both case law and legislation. It was established in case law that recognition of the right to equality was a human right in Israel. In terms of legislation, equality was enshrined in numerous statutes and culminated in the *Basic Law: Human Dignity and Liberty*, which provided that equality was a constitutional right. The Court noted that the right to equality was not absolute; it had to be balanced against other rights and could be lawfully restricted if the justification for doing so was sufficient. In the respondent's case, however, the Court could find no justification for the discrimination and it noted that there was "nothing characterizing the nature of the job or the position that justifies unequal treatment".

The Court held that the mere fact that the respondent was in a same-sex rather than a heterosexual cohabiting relationship did not justify differential or discriminatory treatment. El-Al's employment benefit scheme was focused on a single goal. It was designed to provide an airline ticket as a benefit that would enable an employee to take a trip with his or her cohabiting partner. The benefit was designed to apply to partners whose relationship consisted of "a firm social unit based on a life of sharing", and by virtue of the collective arrangement the benefit was intended to apply regardless of whether the couple was able to marry. These were criteria that the respondent and his partner clearly satisfied and the Court found that sexual orientation was the only reason behind the denial of the benefit. This distinction on the basis of sexual orientation was an arbitrary and

unfair violation of their right to equality and amounted to discrimination in the conditions of employment, contrary to the *Equal Employment Opportunities Law*.

The Court denied El-Al's petition and declared that the benefit of the airline ticket contained in the collective agreement had to be made equally available to same sex partners of El-Al's employees.

Dissent (per Justice Kedmi)

Justice Kedmi wrote that the key question to be decided was whether the concept of "spouse" used in the employment agreements between El-Al and its employees included same-sex companions. He gave several reasons for holding that it did not and could not. The first was the linguistic meaning of the word "couple", which he defined as the joining of two individuals of opposite sexes. According to Justice Kedmi, "the Book of Books gives decisive proof of this". He then quoted Genesis. The El-Al agreement spoke of both "spouses" and "recognized companions". The latter term, however, did not depart from the framework of "couples". He wrote: "A married couple and an unmarried couple are fundamentally equal, in so far as the meaning of the concept 'couple' is concerned; distinguishing between them on the basis of 'marriage', which merely constitutes a formal, external mark of the framework of their joint lifestyle as a 'couple', amounts to improper 'discrimination' and not a permitted 'distinction'".

He criticised the majority opinion for finding that same-sex couples were equal to heterosexual couples. In his opinion, the Court was "dealing with two 'couples' that are completely *different* in nature; the one — the heterosexual (whether married or unmarried) — is a 'couple', whereas the other — the homosexual — is merely a 'pair'; therefore conferring a benefit on the one does not constitute discrimination when not conferring the benefit on the other". Justice Kedmi concluded that the distinguishing feature that made it possible to describe as a couple two individuals who enjoyed a life of sharing and harmony was their ability to fulfil the precept of "being fruitful and multiplying".

Concurrence (per Justice Dorner)

Justice Dorner wrote separately to discuss the changing social norms in Israel and the rest of the world regarding homosexuality. The principle of equality, he said, did not operate in a social vacuum. He considered the laws of Europe, the jurisprudence of the European Court, and a variety of cases including the cases of *Norris* and *Modinos*, the *Canadian Charter* and the cases of *Vriend v. Alberta* and *Egan v. Canada* (decision of the Federal Court of Appeal finding sexual orientation to be an analogous ground under the *Charter*). Although homosexuality was still criminalised in some States of the United States, the courts in several States had recognised the rights of a same-sex spouse, using the 'functional test'. He cited to the New York State Court of Appeals case of *Braschi v. Stahl Associations* (1989), which recognised the occupancy rights of the life companion of a deceased tenant.

Justice Dorner then adopted the functional test to determine whether the difference between homosexual and heterosexual couples was relevant for the benefit provided. “According to this test, no distinction should be made between homosexual couples and heterosexual couples, if the spousal relationship between the spouses of the same sex meets the criteria that realize the purpose for which the right or benefit is conferred.” If, for example, the purpose of the benefit was to encourage having children, then withholding the benefit from a same-sex spouse would not constitute discrimination. Here the airplane ticket was not to encourage “a lifestyle within a traditional family framework”. The sex of the spouse was not relevant for the purpose of the benefit.

Egan v. Canada, Supreme Court of Canada (25 May 1995)

Procedural Posture

Egan and Nesbit, the appellants, brought suit in trial court seeking a declaration that the definition of “spouse” in the *Old Age Security Act* contravened Section 15 of the *Canadian Charter of Rights and Freedoms*. The trial court dismissed the action and the court of appeal upheld the judgment. The appellant appealed.

Facts

Egan and Nesbit, a same-sex couple, had lived together since 1948. When Egan turned 65, he began to receive old age security payments under the *Old Age Security Act*. When Nesbitt turned 60, he applied for a spousal allowance, which he was denied on the grounds that his relationship with Egan did not fall under the definition of common law marriage contained in the *Act*.

Issue

Whether the exclusion of same-sex relationships from the definition of common law spouse violated the *Canadian Charter of Rights and Freedoms*.

Domestic Law

Canadian Charter of Rights and Freedoms, Sections 1 (limitations to rights and freedoms) and 15 (equality before the law).

Reasoning of the Court

The Court unanimously concluded that sexual orientation was an “analogous ground” to the other grounds covered by Section 15 of the Charter. However, the Court divided on whether the *Old Age Security Act* violated the Charter and a majority of the Court held that it did not.

Four Justices (La Forest, joined by Lamer, Gonthier, and Major) held that, although sexual orientation was an analogous ground, the distinction drawn by Parliament between heterosexual common law couples and homosexual common law

couples was relevant to the classification because heterosexual couples were primarily responsible for procreating and raising children. Thus “the distinction adopted by Parliament is relevant here to describe a fundamental unit to which some measure of support is given”. Therefore there was no violation of Section 15 of the Charter.

Justice La Forest wrote that Parliament’s original intent in enacting the statute was to provide for the needs of elderly married couples. Acknowledging changing social realities, it had amended the law to include opposite sex common law couples. According to Justice La Forest, the marital relationship, because of its connection with producing and raising children, had special needs that were the proper concern of Parliament. Legal marriage was “fundamental to the stability and well-being of the family”. The same underlying concerns justified extending support to common law couples because many of these couples bear and raise children. Justice La Forest observed: “Support of common law relationships with a view to promoting their stability seems well devised to advance many of the underlying values for which the institution of marriage exists”. It was not relevant that not all heterosexual couples (married or not) actually had children, because what mattered was their unique capacity to procreate. Same-sex couples, on the other hand, might “occasionally adopt or bring up children, but this is exceptional and in no way affects the general picture”. Other people who lived together in long-term relationships, such as siblings or friends, were also excluded. “Homosexual couples are not, therefore, discriminated against; they are simply included with these other couples.”

One Justice (Sopinka) held that the legislation did infringe Section 15 of the Charter but was saved under Section 1, which provided that a distinction had to be relevant to a proportionate extent to a pressing and substantial objective. He emphasised that recognition of discrimination on grounds of sexual orientation was relatively new and that Parliament should be given time to craft a legislative response.

Four Justices dissented, and argued that sexual orientation was covered by Section 15 of the Charter, and that the *Old Age Security Act* violated the Charter. Justice L’Heureux-Dubé’s dissent began by analysing the purpose of the equal protection guarantee. The types of discrimination that were at the heart of Section 15 were those that “offend inherent human dignity”. The focus was on effect.

She criticised the “grounds” approach as failing to take into account the impact of a distinction on the affected group. “By looking at the grounds for the distinction instead of at the impact of the distinction on particular groups, we risk undertaking an analysis that is distanced and desensitised from real people’s real experiences.”

A distinction is discriminatory within the meaning of [Section] 15 where it is capable of either promoting or perpetuating the view that the individual adversely affected by this distinction is less capable, or

less worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration.

Justice L'Heureux-Dubé found that the factors the Court had previously identified, in its analogous grounds approach, were also essential elements of any inquiry into the nature of the group affected by the distinction. Considerations included: whether the distinction was based on fundamental attributes that are generally considered to be essential to our popular conception of personhood or humanness; whether the adversely affected group was already a victim of historical disadvantage; whether group members were currently socially vulnerable to stereotyping, social prejudice and/or marginalisation; whether this distinction was likely to expose them in the future to stereotyping, social prejudice and/or marginalisation; and whether the group was a discrete and insular minority.

Justice L'Heureux-Dubé summarised: “[T]he more socially vulnerable the affected group and the more fundamental to our popular conception of ‘personhood’ the characteristic which forms the basis for the distinction, the more likely that this distinction will be discriminatory”.

Applying this analysis to the facts, Justice L'Heureux-Dubé agreed with the other members of the Court that Egan and Nesbit had been denied an equal benefit of the law because of a legislative distinction based on sexual orientation. She argued that this distinction was “capable of either promoting or perpetuating a view that the appellants Egan and Nesbit are, by virtue of their homosexuality, less capable or less worthy of recognition or value as human beings or as members of Canadian society, equally deserving of concern, respect and consideration”. She concluded that it did, and that the distinction was therefore discriminatory. Same-sex couples were a highly socially vulnerable group that had suffered considerable historical disadvantage, stereotyping, marginalisation and stigmatisation. Sexual orientation was an aspect of “personhood” that was possibly biological and at the very least a “fundamental choice”. The applicants had been excluded as a couple from any entitlement to a basic shared standard of living for elderly persons cohabitating in a relationship analogous to marriage. “This interest is an important facet of full and equal membership in Canadian society ... the metamessage that flows almost inevitably from excluding same-sex couples from such an important social institution is essentially that society considers such relationships to be less worthy of respect, concern and consideration than relationships involving members of the opposite sex. This fundamental interest is therefore severely and palpably affected by the impugned distinction”.

Finally, the Justice rejected arguments based on the “biological reality” that homosexual relationships were non-procreative. The presence or absence of children had nothing to do with eligibility for the old age spousal supplement.

Therefore the impugned distinction failed the rational connection branch of the proportionality test.

In his dissent, Justice Cory focused on the breach of Section 15. In particular he looked at discrimination against homosexuals as individuals and as couples. “Sexual orientation is more than simply a ‘status’ that an individual possesses. It is something that is demonstrated in an individual’s conduct by the choice of a partner. The Charter protects religious beliefs and religious practice as aspects of religious freedom. So, too, should it be recognised that sexual orientation encompasses aspects of ‘status’ and ‘conduct’ and that both should receive protection. Sexual orientation is demonstrated in a person’s choice of a life partner, whether heterosexual or homosexual. It follows that a lawful relationship which flows from sexual orientation should also be protected.”

Justice Iacobucci’s dissent analysed whether the discrimination could be justified under Section 1 of the Charter. He said the goal of the *Old Age Security Act* was to mitigate poverty among elderly households and found the exclusion of same-sex partners not rationally connected to this goal. He dismissed any arguments that the need to conserve financial resources (by reducing the number of qualified households) was a part of Section 1 analysis. The government had “not supplied evidence demonstrating why the patterns of economic interdependence among same-sex couples are sufficiently different from those in heterosexual relationships to indicate why excluding same-sex couples from the scheme would still enable the legislation to be rationally connected to its goal of mitigating poverty among elderly households”.

“On a broader note, it eludes me how according same-sex couples the benefits flowing to opposite-sex couples in any way inhibits, dissuades or impedes the formation of heterosexual unions.” Justice Iacobucci noted that the facts of this case did not require the Court to explore whether same-sex couples were constitutionally entitled to adopt or get married.

The Appeal was dismissed.

Satchwell v. President of the Republic of South Africa and Another, Constitutional Court of South Africa (25 July 2002)

Procedural Posture

The applicant, Satchwell, brought suit against the President of the Republic of South Africa to obtain the payment of spousal benefits to her same-sex partner under the *Judges Remuneration and Conditions of Employment Act 88 of 1989*. Counsel for the President argued that, because South Africa did not recognise same-sex marriage at the time, the applicant and her same-sex partner were not “married” and could not qualify for spousal benefits. The trial court declared

unconstitutional the limitation of spousal support benefits to heterosexual couples. The matter was referred to the Constitutional Court because all declarations of unconstitutionality had to be confirmed.

Facts

The applicant, a judge employed by the Government of South Africa, provided evidence of her financial interdependence and that of her same-sex partner, and testified that she and her partner were considered married by friends and family.

Issue

Whether the restriction of spousal benefits to heterosexual couples violated the *Constitution of South Africa*.

Domestic Law

Constitution of South Africa, Section 9 (equality and non-discrimination).

Judges Remuneration and Conditions of Employment Act 1989, Sections 8 and 9.

National Coalition for Gay and Lesbian Equality v. Minister of Home Affairs, Constitutional Court of South Africa, 1999 (finding unconstitutional statutory and common law offences of sodomy).

Comparative Law

Miron v. Trudel, Supreme Court of Canada, 1995 (finding marital status to be an analogous ground protected from discrimination under S. 15 of the Charter).

Reasoning of the Court

The Court recognised that, because same-sex couples were unable to marry legally in South Africa, conjugal approximations of legal marriage were the only life partnerships available to same-sex couples. In the manner of heterosexual weddings, same-sex life partnerships were often celebrated through public ceremonies.

According to the Court, the applicant was required to demonstrate a permanent, conjugal relationship with her spouse in order to obtain benefits for her. The applicant had produced evidence that she and her partner were recognised as effectively married by the community; that they shared finances, and that they were each other's beneficiaries in life insurance. The Court believed that this evidence was sufficient to establish that they were in a permanent conjugal relationship. The applicant's partner should therefore have been considered a spouse for the purpose of the *Judges Remuneration and Conditions of Employment Act*, which provided for pensions to be paid to judges' spouses under Sections 8 and 9. For practical purposes, the Court held that the Act should be read as if the following words appeared after the word spouse: "or partner in a permanent same-sex partnership in which the partners have undertaken reciprocal duties of support."

The Court held that Sections 8 and 9 of the *Judges Remuneration and Conditions of Employment Act* had to be extended in light of the equality clause in Section 9 of the Constitution, which prohibited unfair discrimination based on an individual's membership in a legally protected group. The equality clause specifically named sexual orientation as a protected individual characteristic, on a par with gender, race, or religion. The Court therefore held that the language of the *Judges Remuneration and Conditions of Employment Act* failed to adequately protect non-heterosexual couples.

The Court also considered the importance of same-sex marriage in a multicultural and tribal context. It noted tribal institutions of same-sex marriage between powerful women or women incapable of having children. In support of this conclusion, the Court cited *Miron v. Trudel*, where the Canadian Supreme Court had relied on a broad definition of marriage. Precedent also recognised a wide range of family structures and conjugal unions. The case of *National Coalition for Gay and Lesbian Equality v. Minister of Home Affairs*, decided two years earlier, acknowledged that social norms regarding marriage were subject to change and that the definition of marriage should not be narrowly construed for government purposes. As a matter of human rights and recognition of cultural self-determination, therefore, it was unconstitutional in South Africa to withhold benefits from a same-sex spouse, since withholding benefits constituted discrimination against a diverse group of individuals in same-sex couples.

The President conceded that withholding benefits was discriminatory but argued that extending benefits to same-sex couples was detrimental to public policy. He argued that the grant of benefits to same-sex couples would have to be extended to unmarried heterosexual couples if those couples could be shown to be in a permanent partnership. The Court rejected this line of reasoning because unmarried heterosexual couples, unlike homosexual couples, had the option to marry.

Lewis v. Harris, Supreme Court of New Jersey,
United States (26 October 2006)

Procedural Posture

Seven same-sex couples brought suit challenging New Jersey's laws restricting civil marriage to the union of a man and a woman. They argued that these laws violated the liberty and equal protection guarantees of the New Jersey Constitution. When the seven couples applied for marriage licences, the licensing officials told them that the law did not permit same-sex couples to marry. They then filed a complaint in the Superior Court. The Superior Court granted summary judgment to the defendants and the plaintiffs appealed to the Appellate Division. A divided three-judge panel affirmed the Superior Court's decision and the plaintiffs appealed to the Supreme Court.

Issue

Whether same-sex couples have a fundamental right to marry that is protected by the liberty guarantee of the State Constitution; whether denying same-sex couples the right to marry violates the equal protection guarantee of the State Constitution.

Domestic Law

Constitution of New Jersey, Article 1, Paragraph 1 (“All persons are by nature free and independent, and have certain natural and inalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness”).

Reasoning of the Court*Majority Opinion*

The State of New Jersey relied on tradition to defend the constitutionality of its marriage laws. It did not argue that limiting marriage to heterosexual couples was necessary for either procreative purposes or to provide an optimal environment for raising children, although these policy justifications were submitted by some amici curiae. The State contended instead that the long-held historical view that marriage was between a man and a woman was a sufficient basis to uphold the constitutionality of the marriage statutes. Any change to the definition of marriage should come from the democratic process.

To answer the liberty claim, the Court considered that it was required to determine whether “the right of a person to marry someone of the same sex is so deeply rooted in the traditions and collective conscience of our people that it must be deemed fundamental” under the State Constitution. The liberty analysis was thus the same as the one under the Fourteenth Amendment of the Federal Constitution, which requires that a fundamental right be deeply rooted in traditions and collective conscience. The Court rejected the dissent’s argument, that it had framed the question too narrowly, in terms of the right of people to marry individuals of the same sex, rather than in terms of the broader right to marry a person of one’s own choice. “That expansively stated formulation, however, would eviscerate any logic behind the State’s authority to forbid incestuous and polygamous marriages.” Framed as the right to marry a person of the same sex, the question was easily answered. Nothing in the traditions or history or conscience of the people of the State suggested that the right to marry a person of the same sex was a fundamental right.

With respect to the equal protection claim, the Court considered whether the marriage laws’ denial to same-sex couples of both “the right to and the rights of marriage afforded to heterosexual couples offend the equal protection principles of our State Constitution”. Equal protection jurisprudence required that, in distinguishing between two classes of people, legislation must bear “a

substantial relationship to a legitimate governmental purpose”. A court must weigh the nature of the right at stake, the extent to which the challenged statutory scheme restricts that right, and the public need for the statutory restriction. The Court considered that this involved the resolution of two questions: whether committed same-sex couples had a constitutional right to the benefits and privileges afforded to married heterosexual couples; and, if so, whether they had a constitutional right to have their permanent committed relationship recognised by the name of marriage.

The Court reviewed the rights afforded to married couples but denied to committed same-sex couples: a surname change without petitioning the court; ownership of property as tenants by the entirety, which allowed for automatic transfer of ownership on death; survivor benefits under the workers’ compensation law; back wages owed to a deceased spouse; compensation to spouses, children and other relatives of homicide victims; free tuition or tuition assistance at universities for surviving spouses and children of certain employers; tax deductions for spousal medical expenses; and testimonial privileges given to the spouse of an accused in a criminal action. It concluded that committed same-sex couples and their children were not afforded the benefits and protections available to similar heterosexual households.

The Court emphasised that this inquiry was not about whether same-sex couples should be allowed to marry “but only whether those couples are entitled to the same rights and benefits afforded to married heterosexual couples”. Rather than seeking to transform the traditional definition of marriage, the Court was concerned with “the unequal dispensation of benefits and privileges to one of two similarly situated classes of people”. Significantly, the State did not proffer any legitimate public need for depriving same-sex couples of these benefits and privileges. Its only argument concerned the traditional definition of marriage. The Court concluded that, under the equal protection guarantee of the New Jersey Constitution, “committed same-sex couples must be afforded on equal terms the same rights and benefits enjoyed by married opposite-sex couples”.

However, the Court did not specify whether the legislature should amend the marriage laws to include same-sex structures or create a separate scheme, such as civil unions. The plaintiffs argued that a parallel legal structure would be a “separate but equal” classification that would offend the equal protection guarantee. They sought “not just legal standing, but also social acceptance”. The Court disagreed.

We are mindful that in the cultural clash over same-sex marriage, the word marriage itself – independent of the rights and benefits of marriage – has an evocative and important meaning to both parties. Under our equal protection jurisprudence, however, plaintiffs’ claimed right to the name of marriage is surely not the same now that equal rights and benefits must be conferred on committed same-sex couples.

In opting for deference to the legislature, the Court stated: “[O]ur role here is limited to constitutional adjudication, and therefore we must steer clear of the swift and treacherous currents of social policy when we have no constitutional compass with which to navigate”.

Concurring and Dissenting Opinion (per Chief Justice Poritz)

Chief Justice Poritz, joined by Justices Long and Zazzali, wrote separately. He concurred in the majority’s determination that denying the rights and benefits of marriage violated the equal protection guarantee. He disagreed with the decision to distinguish those rights and benefits from the title of marriage. He also dissented from the majority’s conclusion that no fundamental right to same-sex marriage was encompassed within the concept of liberty guaranteed by Article I, Paragraph 1 of the State Constitution. He considered that the Court had framed the question too narrowly. “Of course there is no history or tradition including same-sex couples; if there were, there would have been no need to bring this case to the courts.” He noted that in the case of *Loving v. Virginia*, which struck down bans on interracial marriage, the question was not framed in terms of whether a right to interracial marriage existed.

On the question of legislative deference, C.J. Poritz pointed out that the plaintiffs had not sought the relief provided and that the Court had ignored the “deep and symbolic significance to them of the institution of marriage”. The plaintiffs sought not only the tangible benefits of civil marriage but also the intangible benefits of marriage.

Moreover, the possibility that the legislature might amend the marriage statutes to recognise the right of same-sex couples to marry did not relieve the Court of its responsibility to answer difficult constitutional questions. He stated: “[D]eference to the Legislature is a cardinal principle of our law except in those cases requiring the Court to claim for the people the values found in our Constitution. ... Our role is to stand as a bulwark of a constitution that limits the power of government to oppress minorities.” The question of access to civil marriage was not a matter of social policy but of constitutional interpretation.

Postscript

The Legislature of New Jersey adopted the *Civil Union Act* in December 2006. It provided in part: “‘Civil union’ means the legally recognised union of two eligible individuals of the same sex established pursuant to this act. Parties to a civil union shall receive the same benefits and protections and be subject to the same responsibilities as spouses in a marriage.” The *Civil Union Act* also established a Civil Union Review Commission to evaluate the new law. The final report of the Commission, released in December 2008, found that the separate categorisation created by the *Civil Union Act* invited and encouraged unequal treatment of same-sex couples and their children. In 2010, the twelve plaintiffs filed a motion in the

New Jersey Supreme Court claiming that they were still denied the full rights and benefits enjoyed by heterosexual married couples. The Court denied the motion but without prejudice to the plaintiffs should they choose to file a claim in the trial court for the development of an appropriate trial-like record.

Sentencia C-075/07,
Constitutional Court of Colombia (7 February 2007)

Procedural Posture

Direct challenge to the constitutionality of excluding same-sex couples from the economic protections afforded under *Law 54 of 1990*.

Issue

Whether denying same-sex partners the same inheritance protections and rights that were granted to heterosexual civil unions violated the Preamble, Article 1, and Article 38 of the *Constitution of Colombia*.

Domestic Law

Constitution of Colombia, Preamble and Articles 1 (human dignity), 38 (freedom of association), and 93 (granting international human rights treaties constitutional ranking).

Law 54 of 1990, modified by *Law 979 of 2005* (defining civil unions as the permanent union between an unmarried man and woman, who have lived together for more than two years in a monogamous relationship; partners meeting the qualifications of a de facto marriage could receive marital property rights once they had signed and had notarised the appropriate forms; included rights to alimony, equal distribution of assets acquired during the relationship, inheritance, and insurance in case of death).

Sentencia C-098/96, Constitutional Court of Colombia, 1996 (holding that Constitution did not require recognition of same-sex civil unions because same-sex relationships were differently situated to opposite-sex relationships and therefore it was legitimate for the legislature to treat them differently, relying on the definition of family under Article 42 of the Constitution).

International Law

International Covenant on Civil and Political Rights, Article 26 (equality before the law).

Dudgeon v. United Kingdom, ECtHR, 1981 (finding that the sodomy laws of Northern Ireland violated the right to privacy under the *European Convention*).

Toonen v. Australia, United Nations Human Rights Committee, 1994 (holding that Article 26 of the ICCPR prohibits discrimination based on sex, which includes sexual orientation).

Young v. Australia, United Nations Human Rights Committee, 2003 (holding that the denial of pension benefits to same-sex couples while granting them to opposite-sex couples is discrimination in violation of the ICCPR).

Reasoning of the Court

The Court began by establishing that the case before it concerned a constitutional issue that could be reviewed despite prior decisions that denied benefits to same-sex couples. Same-sex couples were unable to marry in Colombia and *Law 54 of 1990*, modified by *Law 979 of 2005*, recognised only civil unions that consisted of heterosexual couples.

The Court noted that where a specific group, such as same-sex couples, suffered harm due to a difference in treatment, this must be justified by a reasonable and sufficient purpose. The Court was required to determine whether providing marital property rights only to opposite-sex couples was discrimination based on sexual orientation and whether it interfered with the dignity and right to freedom of association of same-sex couples. If this were the case, there could be no reasonable or sufficient justification for the discriminatory treatment.

Previous cases had held that all discriminatory treatment of same-sex persons was presumed to be unconstitutional and deserved strict scrutiny. Specifically, the Court had found that sexual diversity was connected to personal autonomy and thus protected by the Constitution. It had also noted that the Constitution valued diversity. The right to personal autonomy protected sexual diversity, and homosexuals had rights not only as individuals but also in relationships. The Court emphasised that during the preceding decade “the recognition of sexual orientation as an inadmissible reason for discrimination has become a norm”.

Next the Court addressed *Law 54*. The original purpose of *Law 54* was to protect women from poverty and promote the family. *Act 979 of 2005* extended marital property rights to unmarried couples in order to protect women who were left destitute when relationships ended or the partner died. The Court found that, in a modern world where same-sex couples were essentially the same as opposite-sex couples, it was necessary to protect partner who would be destitute.

The Court referenced international law and jurisprudence, including decisions of the United Nations Human Rights Committee. It judged that this body of law supported the idea that prohibition of discrimination based on sex included prohibition of discrimination based on sexual orientation. Therefore, differences in treatment based on sexual orientation were suspect. In the absence of a reasonable and objective justification, and where same-sex couples were denied

access to specific rights granted to opposite-sex couples these differences in treatment would contravene Article 26 of the ICCPR.

The Court also considered the right to dignity under Article 1 of the Constitution. Economic considerations affected decisions to live in a partnership and the ability to live with dignity. According to the Court, dignity was promoted through protection of rights such as the rights to individual autonomy, physical integrity, and morals; and these required the support of public authorities. Autonomy, which allowed a person to choose to live in the manner best suited to him or her, was of special importance. The government and the law should protect people from suffering discrimination because of their choices, provided that they did no harm to others and were legal. The Court stated that limiting the protections afforded to people based on their sexual preference also affected their freedom to choose a life partner, and choose not only how they would live but with whom.

The Court concluded that excluding same-sex couples from civil unions violated their personal dignity. No legitimate reason existed to deny same-sex couples these rights and their exclusion was unjustified. Limiting the legal provision to heterosexual couples ran counter to “constitutional principles of respect for human dignity, the state’s duty to protect all persons equally and the fundamental right to freely develop one’s personality”. Those portions of *Law 54*, modified by *Act 979*, that excluded same-sex couples were discriminatory. The Court ordered language limiting the application of the law to opposite-sex couples should be struck out.

Four justices in the majority wrote separately to clarify that constitutional protection for same-sex civil unions did not mean that such unions were considered families under Article 42 of the Constitution.

Sentencia C-029/09, Constitutional Court of Colombia (28 January 2009)

Procedural Posture

Colombia Diversa, Dejusticia, and the Group for Public Interest Rights from the University of the Andes filed a public action challenging the constitutionality of various laws concerning partnership and marriage benefits. The Constitutional Court had previously found that discrimination based on sexual orientation was prohibited by the Constitution. In these laws, however, benefits were only granted to opposite-sex civil partners.

Issue

Whether, in the texts of the challenged provisions, the use of the gendered words for “partner” (*compañera y compañero*), the terms “a man and a woman”, or “spouse” (which under Colombian law was limited to opposite-sex partners), discriminated against same-sex couples.

Domestic Law

The complaint challenged many different laws concerning civil partnership benefits.

Sentencia C-075/07, Constitutional Court of Colombia, 2007 (extending marital property protections already provided to heterosexual civil unions to same-sex unions and finding that the lack of protection of same-sex couples with regard to joint property violated the right to free personal development and constituted prohibited discrimination).

Sentencia C-811/07, Constitutional Court of Colombia, 2007 (extending social security and health benefits to same-sex civil unions).

Sentencia T-856/07, Constitutional Court of Colombia, 2007 (concluding that the refusal to extend health benefits to a same-sex partner was discriminatory).

Sentencia C-336/08, Constitutional Court of Colombia, 2008 (extending pension benefits to same-sex civil unions).

Reasoning of the Court

The Court distinguished between a difference in treatment based solely on sexual orientation, which was prohibited under the Constitution, and disparate treatment that was based on actual and substantial differences between same-sex and opposite-sex couples. The Court noted that, where clear differences existed between heterosexual and homosexual couples, no constitutional duty required their equal treatment. A valid claim of discrimination could be made only where the relationship of a same-sex couple was substantially similar to the relationship of an opposite-sex couple. On this ground, the Court dismissed the plaintiffs' request that it should apply to all the challenged laws the assumption that any difference in treatment between same-sex and opposite-sex couples was discriminatory and therefore unconstitutional. Due to the number and breadth of the different laws at issue, a constitutional test of proportionality had to be applied to each one.

The Court distinguished between rights and benefits that protected and promoted families and those that protected and promoted civil partnerships. (The latter term referred to the legal protection of two people in a relationship and not to parent-child units.) Only rights and benefits provided to opposite-sex civil partnerships should be extended to same-sex couples. Denying same-sex couples the protections afforded to family units was not inherently discriminatory.

However, the Court held that people in civil unions, whether heterosexual or homosexual, were entitled to a minimum level of protection, without which their rights to human dignity and free personal development would be compromised. The Court therefore analysed when different treatment for same-sex civil unions might be justified, and determined that, to establish if differences of treatment

were discriminatory, it was necessary to analyse whether the disparate treatment in question had a constitutionally permissible purpose, was adequate to achieve that purpose, and finally was proportional to the purpose.

Using this analysis, the Court held that the following rights should be extended to same-sex civil unions: marital civil rights, immigration benefits, testimonial privilege, guardianship and conservatorship, civil protections for partners in cases of disappearances or kidnappings, health care, retirement and pension benefits for partners of law enforcement officers, all family subsidies that had previously been extended only to opposite-sex civil partners, and all housing allowances that had previously been extended only to opposite-sex civil partners.

The Court also concluded that gender-specific terms in the challenged laws should be replaced by gender-neutral terms.

Blažič and Kern v. Slovenia,

Constitutional Court of the Republic of Slovenia (2 July 2009)

Procedural Posture

A same-sex couple, who had registered their civil partnership under the *Registration of Same-Sex Civil Partnership Act (RSSCPA)*, filed a petition for review, alleging that the inheritance provisions of the law were unconstitutional. The National Assembly of the Republic of Slovenia did not respond.

Issue

Whether the inheritance provisions of the law providing for same-sex partnerships violated the petitioners' right to equality and non-discrimination under the *Constitution of Slovenia*.

Domestic Law

Constitution of Slovenia, Articles 14 (right to equality and non-discrimination) and 33 (the right to private property and inheritance).

Registration of Same-Sex Civil Partnership Act, Article 22 (providing that a surviving partner of a registered same-sex partnership had the right to inherit the decedent's share of community property).

International Law

European Convention on Human Rights, Article 14 (right to non-discrimination).

Salgueiro da Silva Mouta v. Portugal, ECtHR, 1999 (holding that sexual orientation was covered by Article 14 of the *European Convention*).

Reasoning of the Court

The petitioners claimed that the inheritance provisions for same-sex partners under the RSSCPA were different from the general inheritance rules for married couples under the *Inheritance Act*. For example, same-sex partners were excluded from having a share in “special property” (personal property owned by either party before entering the partnership) but married couples were not so excluded. Under the *Inheritance Act*, the surviving spouse in a marriage would inherit all the property of the deceased spouse or, if there were children, would divide such property equally with the children. The surviving spouse in a marriage also had the right to a forced portion of the estate even if the deceased spouse wrote a will excluding the spouse. Same-sex partners had no such protections. A surviving same-sex partner had no right to inherit special property and was not guaranteed a forced portion.

The petitioners further argued that Article 22 of the RSSCPA did not meet the goals of the legislature, because it introduced different inheritance rules for same-sex couples, solely on grounds of sexual orientation. They underlined that, in economic and social terms, a registered same-sex partnership was the same as marriage. It was a lasting life union of partners concluded for the purpose of mutual moral, emotional and economic support. The bases for both marriage and same-sex partnerships were mutual affection, love, understanding and trust. In both, the parties were obligated to respect, trust and help each other.

The petitioners invoked Articles 14, 15, 33, and 67 of the Constitution and the *Act Implementing the Principle of Equal Treatment*, which prohibited discrimination on the basis of sexual orientation in all fields of social life. The Court, however, dealt only with arguments regarding the right to non-discrimination under Article 14.

In determining whether treatment was discriminatory, the Court’s analysis considered: (1) whether the alleged difference in treatment was relevant to ensuring or exercising a human right or fundamental freedom; (2) whether the persons to whom the petitioners compared themselves were receiving different treatment; (3) whether the positions the petitioners were comparing were essentially the same; (4) whether differentiation was due to a circumstance that fell within Article 14 of the Constitution; and (5) whether the interference was constitutionally permissible. Whether interference was constitutionally admissible depended on a strict test of proportionality.

The Court found that, in accordance with Article 33 of the Constitution, the right to inheritance was a constitutional right. It found, further, that same-sex partners and married couples were treated differently with respect to this right. The essential question was whether the position of the petitioners position was comparable in its “essential and legal elements” to the position of married spouses. The Court held that these two situations were substantially similar and as such could be compared. It fully accepted the petitioners’ arguments on this

point and concluded that the difference in treatment with regard to inheritance was not based on objective and non-personal characteristics but on sexual orientation. Although sexual orientation was not explicitly listed in Article 14 of the Constitution, it was protected by the Constitution because it was analogous to other protected grounds. On this point the Court also cited the case *Salgueiro da Silva Mouta v. Portugal*.

Interferences with human rights were constitutionally permissible if they had a “constitutionally admissible” aim and were proportionate to that aim. The Court found that here no “constitutionally admissible reason” justified a difference in the regulation of inheritance between spouses and same-sex partners. The first prong of the test was therefore unsatisfied.

The Court held unanimously that Article 22 of the RSCCPA was contrary to the Constitution. It ordered the National Assembly to remove the inconsistencies within six months. Until new legislation was enacted, it ordered that the same rules for inheritance that applied to married partners should also be applied to same-sex registered partners.

SGB v. PREVI, Superior Tribunal of Justice of Rio de Janeiro, Brazil (4 August 2010)

Procedural Posture

Following the death of his partner, SGB filed suit against the decision of the pension fund of the State-owned Bank of Brazil (“PREVI”) to deny him survivor benefits. A first instance court granted SGB’s request for benefits, but PREVI appealed and that decision was reversed. SGB then filed an appeal to the Superior Tribunal of Justice.

Facts

SGB and LCFS had a fifteen-year relationship, which ended with LCFS’s death. A survivor’s benefit was granted by the National Social Security Institute, but LCFS also had a pension scheme with PREVI. PREVI denied benefits to SGB on the ground that it did not recognise a stable union between two men but only between opposite-sex couples.

Issue

Whether the long-term stable relationship of two men should qualify for a survivor pension in the same manner as the relationship of an opposite sex couple.

Domestic Law

Constitution of Brazil, Article 1 (dignity), Article 3 (non-discrimination), Article 5 (equality before the law), and Article 226(3) (“For purposes of protection by the

State, the stable union between a man and a woman is recognised as a family entity, and the law shall facilitate the conversion of such entity into marriage”).

Federal Law No. 10406 of 10 January 2002 (Civil Code), Article 1723 (recognising as a family entity the stable union of a man and a woman).

Decree-Law No. 4657 of 4 September 1942 (concerning the introduction of changes to Civil Code), Articles 4 (“When the law is silent, the court will decide the case according to the analogy, customs and general principles of law”), and 5 (in applying the law, the court will serve the social purposes to which it is addressed and the requirements of the common good”).

Reasoning of the Court

The first instance court had reasoned that the absence of specific legislation recognising same-sex civil unions or partnerships was not an impediment to judicial recognition. Using Article 4 of *Decree-Law No. 4657* and by analogy to the regulation of heterosexual civil unions provided by Article 1723 of the *Civil Code* and Article 226 of the Constitution, the first instance court concluded that all the requirements were fulfilled and that denial of the pension claim was unjustified.

PREVI appealed and the appellate court reversed. The appellate court relied on Article 226 of the Constitution (which defined the stable union of a man and a woman as a family unit) to conclude that same-sex relationships could not receive legal recognition.

On appeal to the Superior Tribunal of Justice, the appellant argued that the discrimination against same-sex relationships was based on prejudice and violated the rights of individuals whose sexual orientation differed from the heterosexual norm. This in turn infringed the constitutional guarantee of equal protection under the law. The appellant also argued that Article 5 of the Constitution provided that all persons were equal before the law without any distinction whatsoever. Given that sexual orientation was not defined in the Constitution as an essential feature justifying a difference in treatment, differences in treatment based on sexual orientation were discriminatory.

The appellant drew attention to the preamble of the Constitution, which described its purpose as ensuring “equality and justice as supreme values of a fraternal, pluralist and unprejudiced society”. Moreover, Article 1 enshrined human dignity as a foundation of Brazil, and Article 3 provided that the promotion of “the well-being of all, without prejudice as to origin, race, sex, colour, age and any other forms of discrimination” was a fundamental objective. The appellate court decision had used the sexual orientation of the pension holder to justify exclusion from the pension benefit scheme and this directly violated human dignity.

The Court agreed with the appellant’s arguments and overturned the lower court’s decision denying benefits. It recognised same-sex relationships as stable unions

with rights, and observed that valuing love and relationships meant setting aside traditional preoccupations with “patrimonial matters” or the “procreative purpose of the family entity”. It emphasised that the understanding of relationships had changed and that today’s view was more focused on the communion of life and interest between partners.

Postscript

On 5 May 2011, the Supreme Federal Court of Brazil unanimously recognised the legal rights of partners in same-sex civil unions. Although the Court maintained the distinction between civil unions and marriage, it ordered that same-sex couples be permitted to register their unions, thus granting them the rights of married couples. The Court relied on Article 3 of the Constitution.

ADI (Ação Direta de Inconstitucionalidade) 4277 and ADPF (Arguição de Descumprimento de Preceito Fundamental) 132, Supreme Tribunal Federal of Brazil (5 May 2011)

Procedural Posture

The Supreme Tribunal Federal heard two cases simultaneously: Direction Action (ADI) 4277, filed by the Federal Prosecutor (Ministério Público); and Action for Breach of Fundamental Rights (ADPF) 132, filed by the Governor of Rio de Janeiro. The first requested that Article 1723 of the *Civil Code* be declared unconstitutional because it defined a “stable union” as consisting of a man and a woman and thus violated guarantees of human dignity, non discrimination, equality, and liberty. The second challenged the *Rio de Janeiro Civil Servant Act* and decisions by State courts that refused to recognise same-sex stable unions.

Facts

Under Brazilian law, only opposite sex couples were recognised as having stable unions within the meaning of the *Civil Code* and *Law No. 9278*. Stable unions were accorded rights and benefits very similar to marriage. Although stable unions could be registered before a notary public, such registration was not necessary for recognition of a stable union. No laws in Brazil addressed same-sex unions.

Issue

Whether the legal definition of stable unions should be interpreted to include same-sex couples.

Domestic Law

Constitution of Brazil, Article 1 (dignity), Article 3 (affirming that the objective of the State was to promote the good of everyone “without prejudice as to origin, race, sex, color, age and other forms of discrimination”), Article 5 (equality

before the law), Article 226(1) (“Marriage is a civil act and its celebration is free of charge”), Article 226(4) (“Family shall be understood to mean the community formed by any of the parents and their children”), and Article 226(3) (“For purposes of protection by the State, the stable union between a man and a woman is recognised as a family entity, and the law shall facilitate the conversion of such entity into marriage”).

Civil Code, Article 1723 (recognising as a family union the stable union of a man and a woman).

Law No. 9278 of 10 May 1996 (Stable Union Law) (recognising as a family unit the permanent, public and continual partnership of a man and a woman that has been established for the purpose of constituting a family).

Reasoning of the Court

Per Justice Ayres Britto (Rapporteur)

The Court voted unanimously to recognise stable unions for same-sex couples under *Law No. 9278* and the *Civil Code*.

First, the Court relied on Article 3 of the Constitution, that prohibiting discrimination on the basis of sexual orientation. The Court noted that the Constitution did not endorse or prohibit a particular type of sexual orientation. Sexual orientation belonged to the sphere of private autonomy.

Second, the Court interpreted Article 226 of the Constitution and declared that its statement, that stable unions were formed by the union of a man and a woman, was not a limiting definition. It was intended to protect the equal role of women, and did not exclude the possibility of same-sex stable unions. Furthermore, the purpose of Article 226 was to recognise the family as the centre of society. The Court held that the word “family”, in the absence of constitutional definition, was defined by reality.

Interpreting Article 1723 and the *Stable Union Law* consistently with the Constitution required the Court to recognise same-sex stable unions and opposite-sex stable unions in the same manner in law.

Individual justices wrote separate concurring opinions. Justice Marco Aurelio emphasised that the traditional view of the family had changed. The guarantees of freedom of religion and secularism meant that religious and moral principles could not be used to limit fundamental rights.

- 1 *Lawrence v. Texas*, 539 US at 567.
- 2 European Court of Human Rights, Decision of 10 May 2001, *Mata Estevez v. Spain*, Application No. 56501/01 (finding application inadmissible).
- 3 *Lewis v. Harris*, 908 A2d at 202.
- 4 New Jersey Statutes Annotated 26:8A-2(d).
- 5 Human Rights Committee, Views of 18 September 2003, *Young v. Australia*, Communication No. 941/2000. The same conclusion was reached by the Human Rights Committee, Views of 30 March 2007, *X v. Colombia*, Communication No. 1361/2005.
- 6 European Court of Human Rights, Judgment of 24 July 2003, *Karner v. Austria*, Application No. 40016/98, para. 43.
- 7 European Court of Justice (Grand Chamber), Case C-14/08 of 10 May 2011, *Romer v. Freie und Hansestadt Hamburg* (finding that a city pension scheme under which married city pensioners than opposite-sex city pensioners constituted direct discrimination because same-sex life partners were in a comparable position to opposite-sex married couples); European Court of Justice, Case C-267/06 of 1 April 2008, *Maruko v. Versorgungsanstalt der deutschen Bühnen* (holding that denying the surviving partner of a life partnership a pension benefit that would have been granted to a surviving spouse was direct discrimination based on sexual discrimination, provided that national law placed life partners and married spouses in comparable positions with respect to survivor benefits).
- 8 European Court of Human Rights, Judgment of 24 June 2010, *Schalk & Kopf v. Austria*, Application No. 30141/04, paras. 92, 94.
- 9 *Ibid.*, at para. 99.
- 10 *Ibid.*, at paras. 93-94.
- 11 Danish Registered Partnership Act of 1989 (providing that the effects of registering a partnership shall be the same as contracting a marriage).
- 12 'Inching Down the Aisle: Differing Paths Toward the Legalization of Same-Sex Marriage in the United States and Europe' (2003), 116 Harvard Law Review 2004, 2021-2022.
- 13 *Baker v. State*, 744 A.2d 864, Supreme Court of Vermont, 1999.
- 14 *An Act Relating to Civil Unions* (Vt. 1999).
- 15 'Inching Down the Aisle: Differing Paths Toward the Legalization of Same-Sex Marriage in the United States and Europe' (2003), 116 Harvard Law Review 2004, 2024; Martha Minnow, 'Redefining Families: Who's In and Who's Out?' (1991), 62 University Colorado Law Review 269.
- 16 *J & Another v. Director General, Department of Home Affairs and Others*, Constitutional Court of South Africa, 2003 ZACC 3, 28 March 2003, at para. 23.
- 17 Austria's *Registered Partnership Act* was signed into law just months before the hearing in *Schalk & Kopf v. Austria*.
- 18 *Varnum v. Brien*, Supreme Court of Iowa, 2009; *Kerrigan v. Department of Public Health*, Supreme Court of Connecticut, 2008; *Goodridge v. Department of Public Health*, Supreme Judicial Court of Massachusetts, 2003; *Brause v. Bureau of Vital Statistics*, Superior Court of Alaska, 1998; *Baehr v. Lewin*, Supreme Court of Hawaii, 1993.
- 19 William N. Eskridge, Jr., 'Equality Practice: Liberal Reflections on the Jurisprudence of Civil Unions' (2001), 64 Albany Law Review 853, 874 (noting that the Vermont Supreme Court in *Baker v. State* was "aware of the fate of earlier same-sex marriage rulings in other states" and explaining that was why it "pulled its punches").

- 20 Tina Kelley, 'New Jersey Civil Union Law Has Fallen Short in its First Year, Commission is Told', *New York Times* (28 October 2007); New Jersey Civil Union Review Commission, 'Final Report: The Legal, Medical, Economic and Social Consequences of New Jersey's Civil Union Law' (10 December 2008).
- 21 *Lewis v. Harris*, 997 A.2d 227 (2010) (Supreme Court of New Jersey) (dismissing petition in aid of litigants' rights without prejudice to filing claim in Superior Court).
- 22 *Sentencia C-098/96*, Constitutional Court of Colombia, 1996; Esteban Restrepo-Saldarriaga, *Advancing Sexual Health through Human Rights in Latin America and the Caribbean*, 85 (International Council on Human Rights Policy, Working Paper, 2011) available at http://www.ichrp.org/files/papers/183/140_Restrepo_LAC_2011.pdf.
- 23 Human Rights Committee, Views of 30 March 2007, *X v. Colombia*, Communication No. 1361/2005.

MARRIAGE

Chapter fourteen

Marriage

INTRODUCTION

This book began with decriminalisation because the criminalisation of same-sex sexual relationships and the concomitant portrayal of all gays and lesbians as criminals is perhaps the most significant obstacle to their realisation of full human rights. The closing chapter focuses on the responses of courts to demands by same-sex couples for marriage equality. In many ways this is the opposite end of the spectrum. Because the legal landscape is changing so rapidly, any list of the countries where gays and lesbians enjoy full access to marriage would soon be rendered obsolete.¹ Marriage equality has been achieved by both legislative and judicial means and court cases have often served to drive legislative reform.

If the criminal laws are about sex and decriminalisation cases perpetuate a “hyper-sexualised” notion of gay men and women, marriage cases are about full citizenship and equal participation in one of the most basic elements of civic life.² They are also cases in which the role of international law is negligible. Unlike decriminalisation cases, most of which refer to *Toonen v. Australia* and *Dudgeon v. United Kingdom* as well as comparative law, marriage cases do not revolve around international or regional human rights jurisprudence. One significant exception is the decision of the Mexican Supreme Court of Justice, which concerned a challenge to a new law providing for same-sex marriage. The Supreme Court of Justice declared the law in question (Article 146 of the *Federal District Civil Code*) constitutional, relying partly on the prohibition in international law of discrimination on grounds of sexual orientation.

The reason for this is textual. In the current state of international law, marriage is defined as a union of opposite sex couples. Thus Article 16 of the *Universal Declaration of Human Rights* provides: “Men and women ... have the right to marry and to found a family”. Article 23 of the ICCPR states: “[T]he right of men and women of marriageable age to marry and to found a family shall be recognized.” The terms of Article 12 of the *European Convention* are almost identical. Interpreting Article 23, in *Joslin v. New Zealand* the UN Human Rights Committee found New Zealand had not violated rights under the ICCPR because it did not provide for same-sex marriage. The Human Rights Committee stated: “Use of the term ‘men and women,’ rather than the general terms used elsewhere

in Part III of the Covenant, has been consistently and uniformly understood as indicating that the treaty obligation of States parties stemming from article 23, paragraph 2, of the Covenant is to recognize as marriage only the union between a man and a woman wishing to marry each other”.³ In *Schalk and Kopf v. Austria*, the European Court reached much the same conclusion regarding Article 12. Noting the absence of a consensus regarding same-sex marriage in Europe and that the choice of wording in Article 12 was deliberate, the Court held that the Convention did not impose an obligation on Austria to grant same-sex couples access to marriage.⁴ It left the door slightly ajar, stating that it “would no longer consider that the right to marry enshrined in Article 12 must in all circumstances be limited to marriage between two persons of the opposite sex”, but it did not specify what those circumstances might be.⁵

As it stands, then, international law does not require States to ensure that access to marriage is equally available to all. Nor, however, does international law prohibit States from recognising same-sex marriage. In *Fourie*, the Constitutional Court of South Africa observed: “[w]hile it is true that international law expressly protects heterosexual marriage it is not true that it does so in a way that necessarily excludes equal recognition being given now or in the future to the right of same-sex couples to enjoy the status, entitlements, and responsibilities accorded by marriage to heterosexual couples”.⁶ International law thus functions as a floor, not a ceiling.

In all the cases presented here, the parties who challenge the exclusion of same-sex couples, under common law or statutory definitions of marriage, have argued that such exclusion was discriminatory under domestic constitutional provisions on equal protection and non-discrimination. (In *Perry v. Schwarzenegger*, the plaintiffs also argued that denying access to marriage violated their right to liberty under the US Constitution.) For the *Halpern* and *Fourie* Courts, sexual orientation was clearly a prohibited ground of discrimination. In the case of South Africa, sexual orientation is specified in Section 9 of the Constitution. In Canada, the courts had earlier determined that sexual orientation was a ground “analogous” to the other protected grounds listed in Section 15 of the *Canadian Charter*. Analysis then focused on whether limiting the right could be justified.

The criteria for such a justification were set out respectively in section 1 of the *Canadian Charter* and section 36 of the *Constitution of South Africa*. Essentially, they require courts to make a proportionality analysis that involves assessing the purpose of the law, the importance of the right infringed by the law, and the degree of infringement. Somewhat similar arguments were put forward in both cases regarding the importance of encouraging “procreation” (defined as unassisted sexual reproduction), and the courts advanced similar reasons for rejecting procreation as a justification. In *Halpern*, the Court found that, although encouraging procreation was a pressing and substantial governmental goal, it could not be said to be the objective of the marriage exclusion. Excluding same-

sex couples from marriage did not have any impact on whether heterosexual couples married or had children. Because same-sex couples could have children via adoption, surrogacy, or donor insemination, “natural” procreation was not a sufficiently pressing and substantial objective to justify infringing the equality rights of same-sex couples. The *Halpern* Court stated:

*The law is both overinclusive and underinclusive. The ability to ‘naturally procreate and the willingness to raise children are not prerequisites of marriage for opposite-sex couples. Indeed, many opposite-sex couples that marry are unable to have children or choose not to do so. Simultaneously, the law is underinclusive because it excludes same-sex couples that have and raise children.’*⁷

In *Acción Inconstitucionalidad 2/2010*, which concerned a constitutional challenge to a new law providing for same-sex marriages, the Supreme Court also analysed the procreation rationale. It noted that the institution of marriage had been separated from biological reproduction and that heterosexual reproduction could therefore no longer be the defining feature of marriage.⁸

The Constitutional Court of South Africa used similar reasoning in rejecting the “procreative potential” argument in *Fourie*. The other principal argument advanced in *Fourie* was that same-sex marriage would violate religious freedom. While acknowledging that under the Constitution religious leaders could not be compelled to officiate same-sex marriages, the Court was equally firm that religious doctrine could not be used as a source for constitutional interpretation. The constitutional ideal was a “mutually respectful co-existence between the secular and the sacred”.

US courts have adopted different approaches. In *Varnum v. Brien*, the Supreme Court of Iowa found that sexual orientation was a “quasi-suspect” group under its equal protection framework, meaning that laws distinguishing on this basis triggered the application of an intermediate level of scrutiny. (To pass intermediate scrutiny, a law must further an important governmental interest and be substantially related to that interest. Distinctions based on sex, for example, are subject to intermediate scrutiny in US equality jurisprudence.) To determine whether the group characteristic of sexual orientation deserved heightened scrutiny, the Court considered a variety of factors. It recognised that a history of “purposeful and invidious discrimination” against gays and lesbians made it more likely that any legislative burdens placed on the class were the reflection of “deep-seated prejudice”. It noted that sexual orientation was unrelated to a person’s ability to contribute to society. It concluded that same-sex sexual orientation, whether or not immutable, was such a significant part of a person’s identity that it was not appropriate to require a person to repudiate, change or conceal it in order to avoid discriminatory treatment. In this, the Court’s position was similar to that of the Supreme Court of Canada in *Egan*, which found that

sexual orientation was an analogous ground because it was a “deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs”.

In *Varnum*, the State of Iowa proffered three principal legislative objectives. These were to support the traditional institution of marriage; to promote procreation; and to promote optimal childrearing conditions. The Court found the first objective circular. Maintaining the traditional understanding of marriage was: “simply another way of saying the governmental objective is to limit civil marriage to opposite-sex couples. Opposite-sex marriage, however, is the classification made under the statute, and this classification must comply with our principles of equal protection.” Likewise, the Ontario Court of Appeal in *Halpern* dismissed tradition. “Stating that marriage is heterosexual because it always has been heterosexual is merely an explanation for the opposite-sex requirement of marriage; it is not an objective that is capable of justifying the infringement of a Charter guarantee.”

Nor was maintaining tradition a proper objective. The *Varnum* Court stated: “If a simple showing that discrimination is traditional satisfies equal protection, previous successful equal protection challenges of invidious racial and gender classifications would have failed”. It also noted that it was not legitimate to argue that a “more inclusive notion of marriage will transform civil marriage into something less than it presently is for heterosexuals”. A similar argument made by amicus curiae in *Fourie* was dismissed by the Constitutional Court as “profoundly demeaning to same-sex couples”.

As for the creation of optimal childrearing environments (i.e., heterosexual households), the Supreme Court of Iowa found this legislative objective to be both unsupported by the evidence and irrelevant. The data offered on optimal childrearing environments did not support the defendants’ arguments. Furthermore, same-sex couples in Iowa were already raising children and there was no evidence that the marriage ban affected their choices about whether or not to have children. Thus even if the defendants had somehow succeeded in showing that the optimal childrearing environment was heterosexual, there was no link between the marriage ban and preventing same-sex couples from having children. The procreation argument was similarly dismissed. The State of Iowa had failed to show how the exclusion of gay and lesbian individuals from marriage would result in more procreation. The Court stated:

Thus, the sole conceivable avenue by which exclusion of gay and lesbian people from civil marriage could promote more procreation is if the unavailability of civil marriage for same-sex partners caused homosexual individuals to ‘become’ heterosexual in order to procreate within the present traditional institution of civil marriage. The briefs, the record, our research, and common sense do not suggest such an outcome.

In *Perry v. Schwarzenegger*, the District Court for the Northern District of California used rational basis review, the most deferential approach, to evaluate a constitutional amendment (Proposition 8) that limited marriage to opposite-sex couples. Based on the evidence presented at trial, it found that gays and lesbians were the type of class which strict scrutiny (the highest in the tiered US system) was intended to protect, because they had experienced a history of purposeful discrimination and had been subjected to legislative burdens on the basis of stereotype. It used the most deferential standard of review because it found no legitimate governmental interest at all. Since the State of California had refused to defend Proposition 8, the arguments were advanced by the intervenors. Like the Supreme Court of Iowa in *Varnum*, the District Court found that preserving the traditional institution of marriage as the union of a man and a woman was not a rational basis for a law. “Rather, the state must have an interest apart from the fact of tradition itself”. Nor was the Court persuaded by arguments that implied opposite-sex partners were preferable as parents or that opposite-sex partnerships encouraged biological reproduction. Under California law, same-sex couples could have children, or adopt and raise them, and were treated identically to opposite-sex parents. “Even if California had an interest in preferring opposite-sex parents to same-sex parents – and the evidence plainly shows that California does not – Proposition 8 is not rationally related to that interest, because Proposition 8 does not affect who can or should become a parent under California law.” The District Court said the evidence presented at trial showed “conclusively that moral and religious views form the only basis for a belief that same-sex couples are different from opposite-sex couples”. Moral and religious views, however, were not a sufficient basis for a legislative classification.

The cases in which courts rejected challenges to the exclusion of same-sex couples from civil marriage adopt two principal positions. In the first case, courts hold that marriage is traditionally defined as the union of one man and one woman and that this definition alone is decisive. In the second, courts affirm that the legislature, not courts, must be responsible for any redefinition of marriage. In Portugal, where the Constitution prohibits discrimination based on sexual orientation, the Constitutional Tribunal adopted a narrow view of its role. Although Article 36(1) of the Constitution provided that everyone “has the right to form a family and to marry under conditions of full equality”, the Constitutional Tribunal held that its drafters would have used explicit language if they had intended to open marriage to same-sex couples. Article 36 did not prohibit same-sex marriage, but it was not for the judiciary to redefine marriage. Following this case, the Portuguese Parliament approved a bill legalising same-sex marriage and the President referred several of the bill’s articles to the Constitutional Tribunal for review. A majority of the Court found that the bill was constitutional and in June 2010 the law went into effect. (Married same-sex couples, nevertheless, still have no right to adopt children.⁹)

A similar tension between the roles of the judiciary and the legislature with respect to the definition of marriage and the protection of individual rights is evident elsewhere. In 1993, the Supreme Court of Hawaii was the first American court to find that the State's refusal to allow equal access to marriage was in violation of the State Constitution's guarantee of equal protection. In response, voters approved a constitutional amendment granting the State legislature the power to limit marriage to opposite-sex couples. A similar decision by the Supreme Court of California led to the passage of Proposition 8, an amendment to the State constitution limiting marriages to opposite-sex couples. Although in **Perry** the District Court found that Proposition 8 violated the federal Constitution, that decision is currently pending appeal to the Court of Appeals for the Ninth Circuit. In Argentina, following **Freyre** and similar cases, the legislature legalised same-sex marriage in July 2010.

The cases from Israel and Ireland show the impact that foreign judgments have on jurisdictions that limit marriage to opposite sex couples. The two courts adopted very different approaches to the question of whether a foreign marriage could be recognised domestically. For the Supreme Court of Israel, the answer was procedural. The duty of the registrar was to register duly authenticated marriage certificates and not to inquire into the capacity of the individuals to marry. This decision applied a rule, that the registration of marital status is merely an administrative procedure, which was established in an earlier case, *Funk-Schlesinger v. Minister of Interior*. Although the Court emphasised that registration of the marriage did not decide whether it was a valid marriage in Israel, in practice Israeli authorities rely on registration to grant spousal benefits.¹⁰ For the High Court of Ireland, a marriage of two Irish women performed in British Columbia (Canada) could only be given effect if those individuals had the capacity to marry under domestic law. It was, in other words, a substantive inquiry. Other jurisdictions have reached different conclusions. France recently recognised for tax purposes the foreign marriage of two Dutch men who were resident in France.¹¹

Marriage is at once practical and symbolic. Being married entails a bundle of rights and responsibilities. A spouse's rights to joint tenancy, inheritance, hospital visitation, and social security and pension benefits are usually unquestioned under default rules. In this sense, marriage cases are a logical extension of previous victories that have been won in the courtroom or the legislature. In **Fourie**, the Constitutional Court carefully delineated the achievements of prior cases: immigration benefits for same-sex partners; pension rights for surviving partners; joint adoption; and parental rights for same-sex partners where the other partner conceives through artificial insemination.¹² In **Perry v. Schwarzenegger**, the District Court noted that same-sex unmarried couples and opposite-sex married couples had the same parental rights under California law. All the incidents of marriage had been afforded to same-sex couples in the form of domestic partnerships.

However, marriage also has a symbolic weight. The status of being married means that the law recognises, protects, and values the relationship. Marriage both has and creates meaning far beyond the economic benefits apportioned by the State to married couples. Many of the marriage cases acknowledge the social and cultural significance of marriage. On these grounds, the Supreme Court of Mexico in *Acción Inconstitucionalidad 2/2010* dismissed the Attorney General's argument that civil unions would have been constitutionally adequate to recognise same-sex relationships. In *Perry*, the Court found that California had created domestic partnerships in order to offer same-sex couples the rights and benefits provided by marriage, while withholding the title of marriage, but this denial of title signalled that same-sex couples were inferior, in violation of the constitutional guarantee of equal protection. Similarly, in *Fourie*, the Constitutional Court considered and rejected the idea of civil partnerships because they perpetuated the "separate but equal" ideology that had pervaded both South Africa during apartheid and the United States during slavery. The Court stated: "In a context of patterns of deep past discrimination and continuing homophobia, appropriate sensitivity must be shown to providing a remedy that is truly and manifestly respectful of the dignity of same-sex couples".

The fact that constitutional challenges to sodomy laws and constitutional challenges to definitions of marriage are occurring simultaneously tells us that legal landscape is changing rapidly but evenly. The struggle for equality is advancing at very different rates in different countries. Unlike the decriminalisation cases, very few of the arguments that defend opposite-sex marriage rely on public morality. Instead, justifications are usually based on the traditional definition of marriage and the State's interest in promoting procreation and opposite-sex households for childrearing. Many of these cases demonstrate a vigorous enforcement by courts of the prohibition of discrimination on grounds of sexual orientation.

The number of successful marriage cases in various countries would have been unthinkable even a decade ago. Some commentators have suggested that a series of legal events in the 1990s hastened the promotion of the equality norm – the inclusion of sexual orientation in South Africa's post-apartheid constitution, the decision of the European Court of Human Rights that sexual orientation was included within Article 14 of the *European Convention*, and the similar decision of the Supreme Court of Canada concerning the *Canadian Charter*.¹³ What is clear is that courts are very aware of each other's reasoning and conclusions. Even where the outcome varies, courts are required to respond to the foreign and international law arguments raised by litigants. As Chapter 13 also demonstrates, even where courts do not recognise a right to marry and have reserved that institution for opposite-sex couples, courts have sought to prevent differences in treatment between couples based on sexual orientation.

The degree of cross-cultural convergence around the norm of non-discrimination based on sexual orientation indicates its universality.

CASE SUMMARIES

Halpern et al. v. Attorney General of Canada, Ontario Court of Appeal, Canada (10 June 2003)

Procedural Posture

Constitutional challenge. The respondents argued that Canada's common law definition of marriage violated the *Canadian Charter of Rights and Freedoms*. The case was transferred from a lower trial court to the Divisional Court. The government appealed the Divisional Court's opinion in the Court of Appeal for Ontario. On appeal the following groups intervened: the Association for Marriage and the Family in Ontario (in support of the government); the Interfaith Coalition on Marriage (in support of the government); the Canadian Human Rights Commission (in support of the respondents); Egale Canada (in support of the respondents); the Canadian Coalition of Liberal Rabbis for Same-Sex Marriage (in support of the respondents).

Facts

Two cases were joined and heard together by a panel of the Divisional Court. In the first, seven same-sex couples applied for civil marriage licences from the Clerk of the City of Toronto. Unsure of her ability to grant licences to same-sex couples, the Clerk held the licences in abeyance until a judicial ruling on the issue. The couples filed a complaint and their case was transferred to the Divisional Court. The Metropolitan Community Church of Toronto (MCCT) brought the second case. When the Office of the Registrar General refused to register same-sex marriages that MCCT had performed, it filed a complaint in the Divisional Court. In January 2001 these two cases were joined.

The Divisional Court unanimously held that the common law definition of marriage infringed the couples' equality rights in a manner that was not authorised by the Charter. The Attorney General of Canada appealed to the Court of Appeal on the equality issue, and the couples cross-appealed on the issue of remedy. The couples asked the court to declare the common law unconstitutional and to redefine marriage, effective immediately.

Issue

Whether denial of marriage licences to same-sex couples was discriminatory under the Charter.

Domestic Law

Canadian Charter of Rights and Freedoms, Section 1 (limitations to rights and freedoms), Section 2 (freedom of conscience and religion), and Section 15 (equality before the law).

Constitution of Canada, Section 91 (granting the federal government exclusive jurisdiction over marriage and divorce).

Hyde v. Hyde and Woodmansee, English Courts of Probate and Divorce, United Kingdom, 1866 (defining common law marriage as the voluntary union for life of one man and one woman, to the exclusion of all others).

Law v. Canada (Minister of Employment and Immigration), Supreme Court of Canada, 1999 (providing a three-part test for equal protection inquiries under the *Canadian Charter*).

Egan v. Canada, Supreme Court of Canada, 1995 (establishing that sexual orientation constituted a prohibited ground of discrimination under Section 15 of the *Canadian Charter of Rights and Freedoms*).

R v. Oakes, Supreme Court of Canada, 1986 (setting out the analytical framework for determining whether restriction of a fundamental right could be justified under Section 1 of the *Canadian Charter*).

Reasoning of the Court

The Association for Marriage and the Family in Ontario (“The Association”, an intervener that supported the government on appeal), argued that marriage was a constitutionally entrenched term that could therefore be amended only by means of the formal amendment procedures. The court rejected this argument, citing section 91(26) of the *Constitution Act of 1867*, which gave Parliament the exclusive authority to regulate marriage as it saw fit. No constitutional amendment was necessary. Second, the Court dismissed the notion that marriage is an inflexible institution. The Association’s understanding of marriage, the Court argued, went against Canada’s jurisprudence of progressive constitutional interpretation.

The Court also rejected MCCT’s position that the prohibition of same-sex marriage violated its constitutional right to religious freedom. According to the Court, this case was about marriage as a legal institution and was “not about the religious validity or invalidity of various forms of marriage”.

The bulk of the opinion subjected the common law definition of marriage to analysis under Section 15(1) of the Charter, which guaranteed equality before the law and the right to equal protection and benefit of the law without discrimination based on personal characteristics. Such an inquiry required the court to follow a three-part test, as outlined in *Law v. Canada (Minister of Employment and Immigration)*. The test considered: (1) whether the impugned law drew a formal distinction between the claimant and others based on personal characteristics; (2) whether the law subjected the claimant to differential treatment on the basis of one or more of the enumerated (or analogous) characteristics in the Charter; and (3) if so, whether the difference in treatment had the effect of confirming stereotypes or perpetuating the notion that the claimant, because of a personal

characteristic, was “less capable or worthy of recognition or value as a human being or as a member of Canadian society”.

The Court found that the facts satisfied all parts of the test. The first inquiry required a distinction to be drawn. The common law, by limiting marriage to opposite-sex couples, clearly made a distinction between same-sex and opposite-sex couples. Likewise, the second inquiry was clearly satisfied. While the Charter enumerated specific classifications (race, national or ethnic origin, colour, religious, sex, age, mental or physical disability), the case of *Egan v. Canada* had established that sexual orientation was analogous to classifications listed in the Charter. Classifications based on sexual orientation therefore required equal protection.

The third factor asked, in effect, whether the law violated the claimants’ human dignity. Canadian courts understood the concept of human dignity to be a subjective matter. The Court quoted from *Law v. Canada*:

Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment ... Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society. Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society per se, but rather concerns the manner in which a person legitimately feels when confronted with a particular law. Does the law treat him or her unfairly taking into account all of the circumstances regarding the individuals affected and excluded by the law?

Given the emphasis on the subjective effect of discrimination, it followed that the law did not have to be purposefully discriminatory. So long as claimants could show that their personal dignity had been compromised, then the law would not survive constitutional challenge. The Court outlined four contexts in which claimants could show that their dignity had been demeaned. These included, but were not limited to, situations characterised by: (1) any pre-existing disadvantage or stereotype, or the vulnerability of the claimants; (2) correspondence, or lack thereof, between the grounds of the claim and the needs, abilities or circumstances of the claimant or others situated similarly; (3) exclusion from the scope of inclusive ameliorative legislation of certain disadvantaged persons or groups in society; (4) the nature of the interest affected. The Court found each of these situations relevant here and concluded that the common law definition of marriage was in clear violation of human dignity.

Finally, having established that the prohibition on same-sex marriage clearly violated the right to equality before the law, the Court addressed Section 1 of the Charter. Under Section 1, a law in violation of Section 15(1) could be upheld

if it was within “reasonable limits prescribed by law as can be demonstrably justified”. Under *R v. Oakes* the objective of the law had to be pressing and substantial and the means chosen to achieve the objective had to be reasonable and demonstrably justifiable in a free and democratic society. This required that the violation of rights was rationally connected to the objective of the law; that the law minimally impaired the Charter guarantee; and that the effect of the law and its objective were proportional, so that attainment of the objective was not outweighed by abridgment of the right.

The government proffered three objectives of the common law definition of marriage: it united the opposite sexes, encouraged childbirth and childrearing, and encouraged companionship. The Court found that the first objective favoured opposite-sex couples over same-sex couples. This violated human dignity and therefore failed. The Court also rejected the second objective, because same-sex couples were equally able to raise children and to bring children into their unions. Most importantly, however, the procreation argument failed, because the prohibition of same-sex marriage was unrelated to the birth rate of women in opposite-sex marriages. Although the Court considered companionship, the third objective raised by the government, to be a laudable goal, it held that “encouraging companionship cannot be considered a pressing and substantial objective of the *omission* of the impugned law”. Because the Court found no valid objective, it ruled that the common law definition of marriage was not saved by a Section 1 analysis. The Court ruled that same-sex marriages must be recognised and performed in Ontario.

Postscript

In 2005 Canada enacted the *Civil Marriage Act*, which contained a gender-neutral definition of marriage. By that time, court decisions had already legalised same-sex marriage in the majority of provinces.

Minister of Home Affairs and Another v. Fourie and Another; Lesbian and Gay Equality Project and Eighteen Others v. Minister of Home Affairs and Others, Constitutional Court of South Africa (1 December 2005)

Procedural Posture

Two separate constitutional challenges to the common law and statutory definitions of marriage in South Africa were consolidated. In the first case (a complaint that South African common law unconstitutionally excluded same-sex marriage), the South African government appealed lower court decisions that had found in favour of Marié Adriaana Fourie and Cecelia Johanna Bonthuys, a lesbian couple. Fourie and Bonthuys had cross-appealed the remedy of the lower court.

In the second case, the Lesbian and Gay Equality Project challenged the statutory definition in the *Marriage Act* and were granted direct access to the Constitutional Court.

Issue

Whether the common law and statutory definitions of marriage were unconstitutional.

Domestic Law

Constitution of South Africa, Section 9 (equality and non-discrimination), Section 10 (human dignity), and Section 15(3)(a) (freedom of religion, belief and opinion).

Marriage Act 1961, Section 30(1).

Du Toit v. Minister of Welfare and Population Development and Others, Constitutional Court of South Africa, 2003 (finding the lack of provision for joint adoption by same-sex couple to be unconstitutional).

Satchwell v. President of the Republic of South Africa and Another, Constitutional Court of South Africa, 2002 (extending spousal pension benefits to same-sex partner of judge).

Mashia Ebrahim v. Mahomed Essop, Transvaal Supreme Court, Transvaal Colony, 1905 (defining common law marriage in South Africa as “a union of one man with one woman, to the exclusion, while it lasts, of all others”).

National Coalition for Gay and Lesbian Equality v. Minister of Home Affairs, Constitutional Court of South Africa, 1999 (holding that rapid changes in the makeup of South African families preclude a specific constitutional definition of marriage).

National Coalition for Gay and Lesbian Equality v. Minister of Justice, Constitutional Court of South Africa, 1998 (finding unconstitutional statutory and common law offences of sodomy).

International Law

Universal Declaration of Human Rights, Article 16 (right to marry).

Joslin v. New Zealand, United Nations Human Rights Committee, 2002 (holding that same-sex marriage bans were not a violation of Article 23 (protection of the family, the right to marriage) of the ICCPR).

Reasoning of the Court

The Court considered both cases together. Fourie and Bonthuys argued that the common law definition of marriage (“a union of one man with one woman”) violated the constitutional principles of equal protection and non-discrimination. The Lesbian and Gay Equality Project argued that altering the common law

definition was an insufficient remedy because the *Marriage Act* required a marriage officiator to ask the parties to take each other as “your lawful wife (or husband)”. The *Marriage Act*, therefore, would also need to be amended.

The petitioners pointed to the Constitution’s equal protection clause, which read: “[E]veryone is equal before the law and has the right to equal protection and benefit of the law”. They argued that their exclusion from marriage violated equal protection. Similarly, they argued that their exclusion from marriage violated the discrimination clause, which prohibited “... discrimination directly or indirectly against anyone on one or more grounds, including ... sexual orientation ...”.

The State argued that the Constitution did not protect the right to marry and had no effect on the validity of same-sex marriage prohibitions. The Government recognised that there was discrimination against same-sex couples, but argued that marriage, as a symbolic title, should be limited to opposite-sex couples. It suggested granting same-sex couples partnership recognition under a name other than “marriage”.

The Government gave four reasons for defining marriage as only between a man and woman. Procreation was advanced as the first reason. The Government contended that procreation was the defining characteristic of marriage and that, because same-sex unions were not able to reproduce sexually, they could not meet the procreation requirement and should not be considered marriage. Religion was the second reason. The Government argued that expanding the common law and *Marriage Act* to include same-sex couples would be disrespectful to religion, and would destabilise centuries of religious traditions in ways that also would violate the Constitution’s promise of religious freedom. The third argument drew on international law. The Government noted that international law recognised only opposite-sex marriage and argued that South Africa should follow that precedent. Citing *Joslin v. New Zealand*, and international law, particularly the *Universal Declaration of Human Rights*, that defined marriage as between a man and woman, it contended that South Africa’s marriage law ought to mirror international definitions because, according to the Constitution, Section 232, “[C]ustomary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament”.

Finally, the Government suggested that the Constitution’s promise of religious freedom also demanded that same-sex unions be recognised only by legislative action and only outside marriage law. Section 15 of the Constitution guaranteed freedom of religion, belief, and opinion. Section 15(3)(a) provided that the right to freedom of religion did not “prevent legislation recognizing – ... (ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion”. The Government interpreted this clause to mean that only the legislature could create a legal scheme to recognise same-sex couples; and that the clause also suggested that the Constitution envisioned that same-sex union law would exist outside marriage law.

Since all the parties agreed that same-sex couples were denied equal protection and were discriminated against, the Court focused on whether the creation of a union analogous to marriage but not called marriage would violate the Constitution.

First, the Court refuted the Government's position that the Constitution did not protect the right to marry. Although the Constitution made no express mention of marriage, in the Court's view this silence reflected the reticence of the makers of the Constitution to put the right to marry in strict constitutional terms. The rationale for this silence was that the constitutional values of human dignity, equality, and freedom encompassed the right of any two people to marry, regardless of their sex, gender, or sexual orientation. Furthermore, the case of *National Coalition for Gay and Lesbian Equality v. Minister of Home Affairs* had explained that rapid changes in the makeup of South African families precluded a specific constitutional definition of marriage.

The Court next reviewed the line of LGBT cases in South Africa. It found that, despite the Constitution's express protection against discrimination based on sexual orientation, discrimination persisted, especially in relation to marriage. The Court stated that "[T]he impact of the legal void in which same-sex couples are compelled to live is real, intense and extensive. To appreciate this it is necessary to look precisely at what it is that the law offers to heterosexual couples, and, conversely, at what it denies to same-sex couples."

The Court outlined both the importance of marriage as a symbolic and legal title and also the inadequacy of any alternative title. According to the Court, marriage conferred upon the involved parties certain legal rights and obligations including the reciprocal duty of support; joint tenancy and ownership of property; automatic guardianship of children born or adopted into the family; and divorce rights and protections. There were also legal consequences for married couples in the laws of insolvency, evidence, and delict. The State's marriage requirements (registration, paperwork, ceremony) reinforced the importance of marriage as a social and legal concept.

According to the Court, withholding marriage rights from same-sex couples represented

a harsh if oblique statement by the law that same-sex couples are outsiders, and that their need for affirmation and protection of their intimate relations as human beings is somehow less than that of heterosexual couples. It reinforces the wounding notion that they are to be treated as biological oddities, as failed or lapsed human beings who do not fit into normal society, and, as such, do not qualify for the full moral concern and respect that our Constitution seeks to secure for everyone. It signifies that their capacity for love, commitment and accepting responsibility is by definition less worthy of regard than that of heterosexual couples.

The possibility that many same-sex couple might reject marriage was not an issue. The Court stated: “[I]f heterosexual couples have the option of deciding whether to marry or not, so should same-sex couples have the choice as whether to seek to achieve a status and a set of entitlements on a par with those enjoyed by heterosexual couples”.

In addition to violating the equal protection and anti-discrimination provisions, the exclusion of same-sex couples from marriage also violated Section 10 of the Constitution, which stated: “[E]veryone has inherent dignity and the right to have their dignity respected and protected”.

The Court summarily dismissed each of the government’s reasons to limit marriage to opposite-sex couples. It rejected the procreation argument because legal and constitutional perspectives simply did not recognise that procreation was the essential feature of marriage. The procreation argument was also found to be demeaning to couples that had no sexual desire or capacity to procreate, to couples that had chosen to adopt, and to couples who elected to have no children. The argument regarding respect for religion also failed. The Constitution protected religious freedom, but the Court could not use “religious doctrine as a source for interpreting the Constitution”. The Court stressed that its ruling would not compel religious officials to perform same-sex marriages if that offended their religious beliefs.

The Court believed that the government had misinterpreted international law, and distinguished the Human Rights Committee decision in *Joslin* regarding same-sex marriage. *Joslin* stated that denying a marriage licence to a same-sex couple did not violate the ICCPR. This was not the same, however, as finding that international law forbid the recognition of same-sex marriage. Even if international law expressly protected heterosexual marriage, that protection did not preclude same-sex marriage. Finally, the Court criticised the government’s interpretation of Section 15(3) of the Constitution. In contrast to the Government’s position, the Court found that Section 15(3) did not require marriage laws to be enacted only through legislative channels; nor that same-sex relationships were required to be recognised through civil unions rather than marriages.

The Court concluded that the common law definition of marriage violated the Constitution by excluding same-sex partnerships. Similarly, the marriage script provided under the *Marriage Act* failed to acknowledge same-sex marriages and was unconstitutional. The Court gave Parliament twelve months to cure the defect. If Parliament failed to act within that time, the words “or spouse” would be automatically read into the *Marriage Act*.

Ben-Ari v. Director of Population Administration, Supreme Court of Israel sitting as the High Court of Justice (21 November 2006)

Procedural Posture

The petitioners brought a civil challenge to the Director of Population. Three justices heard the original oral arguments, but the panel was then expanded to seven.

Facts

Five same-sex couples who were legally married in Canada returned to Israel where they applied to have their marriages registered by the population registrar. The registrar refused to grant the application. Israel did not perform legally recognised same-sex marriages.

Issue

Whether the registrar of the Director of Population had to register as married *any* couple (regardless of sex, gender, or sexual orientation) that presented valid documentation.

Domestic Law

Population Registry Law, 5725-1965, Article 2.

Funk-Schlesinger v. Minister of Interior, Israeli Supreme Court, 1963 (holding that a registration official was only a statistician and had no authority to make decisions regarding who was eligible to marry).

Reasoning of the Court

The couples argued that, based on *Funk-Schlesinger v. Minister of Interior*, the registration official's only duty was to act as a statistician; he or she was not authorised to deny recognition of an authenticated marriage certificate unless its authenticity was doubtful. Furthermore, because the judiciary had never decided on the issue of same-sex marriages performed in Canada, the registrar had no legal basis for refusing the registration.

The Government argued that there was no basis for registering same-sex marriages performed in foreign jurisdictions. It argued on three grounds. First, Israel ought only to recognise those foreign marriages that broadly respected the same legal framework as Israeli marriages and, because Israel did not perform same-sex marriages, same-sex marriages performed abroad should not be recognised. Second, most countries did not perform or recognise same-sex marriage. Therefore, there was no comparative law justification for recognising the marriages in Israel. Third, because registration of same-sex marriages was an issue for the legislature, the Court should not decide the case.

Basing its opinion heavily on *Funk-Schlesinger*, the Court found that the registrar had only to perform the duty of statistician. The registrar had no authority to reject an authentic application, *unless* there was an obvious error in the facts presented. For example, a registrar had the authority to deny registration of an adult man who identified as a five-year-old boy. The Court noted that legal incorrectness is not to be treated as a form of factual incorrectness; accordingly, it rejected the respondents' argument that the applicants' sex represented a factual mistake stemming from Israel's non-recognition of same-sex marriage. This was rather a situation of legal incorrectness, the Court concluded, that the legislature must address.

In refusing to register same-sex marriages performed legally in Canada, the registrar had exceeded his authority. The marriages should have been registered in Israel.

The Court stressed repeatedly that its decision addressed only the extent of the registrar's powers. While its opinion affected the *registration* of same-sex marriages performed abroad, it had absolutely no bearing on the *recognition* of same-sex marriage in Israel. The Court stated: "[W]e are not deciding that marriage between persons of the same sex is recognised in Israel; we are not recognising a new status of such marriages; we are not adopting any position with regard to recognition in Israel of marriages between persons of the same sex that take place outside of Israel ... The answer to these questions, to which we are giving no answer today, is difficult and complex."

Zappone and Gilligan v. Revenue Commissioners and Others, High Court of Ireland (14 December 2006)

Procedural Posture

Following the decision of the Revenue Commissioners to refuse them tax allowances as a married couple, the plaintiffs sought leave to apply for judicial review and the High Court of Ireland granted the application.

Facts

The plaintiffs were an Irish lesbian couple who had lived together for 23 years. In 2003 they were married in British Columbia, Canada, because British Columbia procedures did not require citizenship or residency prior to marriage. After their marriage, the plaintiffs wrote to the first defendant, the Revenue Commissioners, requesting permission to claim their allowances as a married couple under the *Taxes Consolidation Act*. The Revenue Commissioners responded that they could not allow them the married couples' allowance because the text of the *Taxes Consolidation Act* explicitly referred to a married couple as husband and wife.

Issue

Whether the defendants' interpretation of tax law to exclude same-sex couples violated the plaintiffs' constitutional rights to equal protection, privacy, property and protection of the family.

Domestic Law

Civil Registration Act 2004, Section 2(2)(e) (providing that there is an impediment to marriage if both parties are of the same sex).

Constitution of Ireland, Articles 40 (equality before the law), 41 (protecting the family and the institution of marriage), and 43 (private property).

Taxes Consolidation Act 1997, Sections 1017 and 1019 (providing for a husband to be assessed on his and his wife's total income and vice versa).

Foy v. An t-Ard Chláraitheoir and Others, High Court of Ireland, 2002 (concerning the legal status of a post-operative transgender person and holding that marriage as understood by the *Irish Constitution* referred to the union of a biological man with a biological woman).

Murray v. Ireland, High Court of Ireland, 1985 (affirming that the impossibility to procreate did not exclude couples from the constitutional concepts of marriage and family and defining marriage as "a partnership based on an irrevocable personal consent given by both spouses which establishes a unique and very special life-long relationship").

International Law

European Convention on Human Rights, Article 8 (right to privacy), Article 12 (right to marry), and Article 14 (non-discrimination).

Goodwin v. United Kingdom, ECtHR, 2002 (holding that refusal to recognise post-operative transgender woman in her reassigned sex and the consequent lack of capacity to marry her male partner violated Articles 8 and 12 of the *European Convention*).

Johnston v. Ireland, ECtHR, 1986 (holding that Article 8 of the *European Convention* did not "impose a positive obligation to establish for unmarried couples a status analogous to that of married couples").

Karner v. Austria, ECtHR, 2003 (holding that different treatment based on sexual orientation required "particularly serious reasons" by way of justification).

Rees v. United Kingdom, ECtHR, 1986, *Cossey v. United Kingdom*, ECtHR, 1990 and *Sheffield and Horsham v. United Kingdom*, ECtHR, 1998 (holding that the right to marry under Article 12 of the *European Convention* referred to the traditional marriage between persons of opposite biological sexes).

Comparative Law

Baehr v. Lewin, Supreme Court of Hawaii, United States, 1993 (holding that the prohibition of same-sex marriage constituted gender-based discrimination).

Baker v. State, Vermont Supreme Court, United States, 1999 (holding that excluding same-sex couples from benefits and protections incident to marriage under State law violated the common benefits clause of the State Constitution).

Dean v. District of Columbia, United States Court of Appeals for the District of Columbia, 1995 (holding that a statute prohibiting the clerk of the Superior Court from issuing marriage licences to same-sex couples did not violate the equal protection clause of the Constitution).

Ghaidan v. Godin-Mendoza, House of Lords, United Kingdom, 2004 (holding that “where the alleged violation comprises differential treatment based on grounds such as race or sex or sexual orientation the court will scrutinise with intensity any reasons said to constitute justification”).

Goodridge v. Department of Public Health, Supreme Judicial Court of Massachusetts, United States, 2003 (holding that the ban on same-sex marriage failed the constitutional guarantees of equal protection and liberty).

Halpern and Others v. Attorney General of Canada, Ontario Court of Appeal, Canada, 2003 (holding that the definition of marriage under the *Canadian Charter* could not be frozen in its original meaning and must be interpreted to include same-sex couples).

Hyde v. Hyde and Woodmansee, Courts of Probate and Divorce, United Kingdom, 1866 (defining common law marriage as the voluntary union for life of one man and one woman, to the exclusion of all others).

Lawrence v. Texas, United States Supreme Court, 2003 (affirming that same-sex sexual conduct between consenting adults was part of the liberty protected by the substantive due process clause of the 14th Amendment to the federal Constitution and striking down the sodomy law of Texas).

Loving v. Virginia, United States Supreme Court, 1967 (declaring Virginia’s ban on interracial marriage unconstitutional and ending all race-based legal restrictions on marriage).

Reference re Same Sex Marriage, Supreme Court of Canada, 2004 (holding that the definition of marriage was not constitutionally fixed).

Wilkinson and Kitzinger v. Her Majesty’s Attorney General, High Court of Justice of England and Wales, United Kingdom, 2006 (holding that the ban on same-sex marriage constituted a distinction based on sexual orientation but, given that same-sex civil partnerships were recognised under English law, the distinction was within the margin of appreciation accorded to States under the *European Convention*).

Reasoning of the Court

The plaintiffs challenged the State's refusal to recognise their marriage performed in Canada. They argued that they were financially disadvantaged under Irish tax law because they did not receive the allowance for married couples. They also argued that, because the terms "married person", "spouse", "husband" and "wife" were not defined in the *Taxes Consolidation Act* or in the Constitution, the defendants had wrongfully interpreted tax law to exclude same-sex couples from the application of its provisions.

According to the plaintiffs, the same refusal subjected them to unjust discrimination, in breach of their constitutional rights under Articles 40, 41, and 43 of the Constitution. They therefore sought to have relevant provisions of the tax code declared invalid, whenever they limited tax benefits to heterosexual marriages. Alternatively, the plaintiffs argued, the same refusal amounted to discrimination based on sexual orientation, contrary to Articles 8, 12 and 14 of the *European Convention*.

The plaintiffs' main argument was that the relevant provisions of the tax law and the Constitution must be interpreted in the light of changes in the common understanding of the institution of marriage, and in particular the changing consensus on same-sex marriage.

The defendants responded that Article 41 of the Constitution, adopted in 1937, obviously considered marriage to be the union of a man and a woman, and it was impossible to reinterpret the Constitution to protect the right of same-sex couples to marry. Doing so would amount to rewriting rather than re-interpreting the provision. The same could be said of the European Court's jurisprudence. Far from recognising the right of same-sex couples to marry, its decisions concerning a post-operative transgender person's right to marry confirmed the heterosexual character of the institution of marriage.

Both parties relied extensively on comparative as well as international jurisprudence on the legal status of same-sex partnerships and same-sex marriage, and the definition of marriage itself.

The Court comprehensively reviewed the current position of medical and psychiatric theory, with regard both to homosexuality and the possible impact of same-sex parenting on children. The Court found that evidence on the positive or neutral impact of same-sex parenting on children was not consensual and stated that it would reserve judgment on this question. Studies of same-sex parenting were recent and were not comprehensive. Even if no evidence were found to demonstrate that same-sex parenting had an adverse impact on children, further studies were needed before a firm conclusion on the issue could be drawn.

The Court recognised that same-sex marriage had been extensively litigated around the world and that there was no consensus on what legal status, if any,

should be granted to same-sex couples. It noted great diversity among countries within the European Union with regard to same-sex marriage and partnerships. However, the Court recognised that the two plaintiffs had testified to “the sense of social exclusion they feel by virtue of being denied entry to the institution of marriage”. The Court commented on the strength and stability of their relationship and observed that the Constitution was a living instrument. It referred to the decision of the Massachusetts Supreme Judicial Court in *Goodridge*, but added that a number of other courts had come to a different conclusion. Furthermore, the Constitution’s definition of marriage as a union between a man and a woman had repeatedly been reaffirmed by Irish courts. It was therefore impossible to accept the plaintiffs’ argument that the definition of marriage as understood in 1937 must be reconsidered in the light of the contemporary understanding of marriage. The Court found no consensus on the question of same-sex marriage, either at domestic or international level.

Finally, the Court observed that, when it enacted the *Civil Registration Act* in 2004, Ireland had explicitly excluded same-sex couples from the institution of marriage. The Court considered this to be a clear indication of the prevailing attitude to marriage within Ireland.

If the exclusion of same-sex couples from marriage created a discriminatory distinction based on sexual orientation, the disparate treatment was justified under Article 41 of the Constitution, which pledged the State “to guard with special care the institution of Marriage”. A second justification could be found, moreover, in the lack of evidence about the impact of same-sex parenting on children.

Noting the hardship that people might suffer if they were denied the right to marry, the Court urged legislative action “to ameliorate these difficulties”. It was nevertheless for the legislature “to determine the extent to which such changes should be made”.

The Court dismissed the plaintiffs’ claim for recognition of their Canadian marriage as well as their challenge to the relevant provisions of the tax law.

Postscript

The plaintiffs appealed the High Court judgment to the Supreme Court. A decision is pending.

Varnum v. Brien, Supreme Court of Iowa, United States (3 April 2009)

Procedural Posture

The State of Iowa appealed a district court’s summary judgment ruling in favour of the plaintiffs.

Facts

Six same-sex couples requested that the Iowa Supreme Court strike down Section 595.2(1) of the *Iowa Code*, which limited marriage to opposite-sex couples.

Issue

Whether Section 595.2(1) of the *Iowa Code*, limiting marriage to heterosexual couples, violated the equal protection clause of the *Iowa Constitution*.

Domestic Law

Iowa Constitution, Article 1 (bill of rights), Section 1 (equal protection), and Section 6 (uniform operation of laws).

Iowa Code, Section 595.2(1) (“Only a marriage between a male and a female is valid”).

Clark v. Board of Directors, Iowa Supreme Court, United States, 1868 (striking down segregation).

In re Ralph, Iowa Supreme Court, United States, 1839 (prohibiting slavery and recognising that equal protection encompasses racial categories).

Reasoning of the Court

The State claimed that five important government interests supported a ban on same-sex marriage. The first three all involved the rearing of children: the marriage institution promoted procreation, childrearing by a father and mother, and the stability of opposite-sex relationships in the context of raising children. The Government further argued, fourth, that limiting marriage to opposite-sex couples conserved State resources. Finally, the Government had an interest in supporting the concept and integrity of “traditional” marriage.

In support of these claims, the Government provided testimony from college professors, pediatricians, and psychologists. The plaintiffs countered with expert testimony of their own. The plaintiffs’ experts – who included representatives from the American Academy of Pediatrics, the American Psychiatric Association, the American Psychological Association, the National Association of Social Workers, and the Child Welfare League of America – reached the opposite conclusion. The Court summarised the plaintiffs’ arguments as follows: “[A]most every professional group that has studied the issue indicates children are not harmed when raised by same-sex couples, but to the contrary, benefit from them.”

The plaintiffs also argued that Section 595.2(1) violated liberty and equality rights under the *Iowa Constitution*. The rights violated, according to the plaintiffs, included the fundamental right to marry, to privacy, and to familial association. They also claimed that the law unconstitutionally discriminated against them based on their sexual orientation.

The plaintiffs maintained that the inability to marry in Iowa disadvantaged them and placed them in an inferior position relative to opposite-sex couples. They could not, for example, make healthcare decisions for their partners or burial, autopsy, and disposition arrangements. They could not share State-provided health insurance, public-employee benefits, and many state-employer benefits. Tax benefits were denied to same-sex couples, and adoption proceedings were more cumbersome and expensive. The plaintiffs also noted that other non-governmental rights were denied, such as family gym memberships. The most significant disadvantage, however, was “the inability to obtain for themselves and for their children the personal and public affirmation that accompanies marriage”.

The Court began by framing the issue within the constitutional principle of equal protection:

The point in time when the standard of equal protection finally takes a new form is a product of the conviction of one, or many, individuals that a particular grouping results in inequality and the ability of the judicial system to perform its constitutional role free from the influences that tend to make society’s understanding of equal protection resistant to change.

The Court compared the plaintiffs’ case with other landmark equal protection cases in Iowa’s history, including *Clark v. Board of Directors* (striking down segregation) and *In re Ralph* (refusing to enforce a contract for slavery and holding that State laws must extend equal protection to all races). According to the Court, these decisions confirmed that “absolute equality for all” was “the very foundation principle” of Iowa’s Government.

The Court began its equal protection analysis by identifying whether or not the classification affected groups of similarly situated people; that is, it determined whether same-sex couples and opposite-sex couples were similarly situated, and whether the statutory gender requirements for marriage therefore violated the principle of equal protection. The Court found that the two groups were similarly situated in regard to the purpose of the law. Iowa caselaw indicated that the State’s marriage laws had various purposes. First, they provided a structural framework for one of organised society’s most fundamental institutions. They brought together the financial assets and responsibilities of two individuals, while giving the State (and general public) notice of the parties’ joint status. Same-sex and opposite-sex couples would benefit from such recognition in ways that were identical. Likewise, society benefited from providing couples of both forms with a stable framework for cohabitating and raising children. “Therefore, with respect to the subject and purposes of Iowa’s marriage laws, we find that the plaintiffs are similarly situated compared to heterosexual persons.”

Next, the Court considered whether Section 595.2 of the *Iowa Code* discriminated on the basis of sexual orientation. The law did not prevent gay and lesbian Iowans from marrying. It only required that they marry someone of the opposite sex. The Court found that this meant that “gay or lesbian individuals cannot simultaneously fulfill their deeply felt need for a committed personal relationship, as influenced by their sexual orientation, and gain the civil status and attendant benefits granted by the statute. Instead, a gay or lesbian person can only gain the same rights under the statute as a heterosexual person by negating the very trait that defines gay and lesbian people as a class—their sexual orientation.” The right to marry was thus no right at all.

Like all equal protection claims heard by the United States Supreme Court, the Iowa Supreme Court determined the appropriate level of scrutiny by considering four factors: (1) the history of discrimination against the class; (2) the ability of the class to contribute to society; (3) the mutability of the class’s distinguishing characteristic; (4) the political power of the class. The Court considered each of these issues, and found that the law had to pass more than a rational basis justification. Throughout United States history, the LGBT community had been regularly and systematically discriminated against. The group’s ability to contribute to society had no relationship to its distinguishing characteristic. The Court accepted that the group’s distinguishing characteristic – sexual orientation – was immutable; or, if it was not, that sexual orientation was “not the type of human trait that allows courts to relax their standard of review because the barrier is temporary or susceptible to self-help”. Finally, while the LGBT community had political power through the democratic process, and had significantly improved its access to civil rights, the Court was “convinced gay and lesbian people are not so politically powerful as to overcome the unfair and severe prejudice that history suggests produces discrimination based on sexual orientation”. While the Court accepted that, based on these factors, sexual orientation discrimination merited heightened scrutiny, the Iowa Court, like the United States Supreme Court, refused to rule on whether or not sexual orientation discrimination required strict, rather than intermediate, scrutiny. The Iowa Court stated that Iowa’s same-sex marriage prohibition did not even withstand intermediate scrutiny.

The intermediate standard required that a constitutionally valid statutory classification had to serve an important government interest. The Court rejected the Government’s interest in protecting the tradition of marriage. It reasoned that the Government’s logic was circular. The Government’s only real objective was to limit civil marriage to opposite-sex couples. Its interest in creating an optimal environment to raise children failed too. While the Government presented sincere opinions and testimonies, these were not supported by reliable science, which supported the plaintiffs’ arguments. Furthermore, the Government’s argument was both under-inclusive, because unmarried same-sex couples could raise children, and over-inclusive, because not all same-sex couples raised children.

The Government argued that it also had an interest in promoting procreation. This interest was valid if, and only if, excluding same-sex couples from marriage resulted directly in higher birth rates. It did not. Similarly, the Court found no reason to conclude that the exclusion of same-sex couples from marriage would promote stability in opposite-sex marriages. Finally, the Court addressed the issues of the conservation of State resources. The State rationally believed that restricting marriage to opposite-sex couples would increase the State's tax income and lower its expenses, by reducing the number of marriage benefits. However, this goal could be accomplished by prohibiting *any* identifiable group from marrying. The Court stated that "such classifications so obviously offend our society's collective sense of equality that courts have not hesitated to provide added protections against such inequalities". The Court rejected this government interest too. As a result, the "equal protection clause requires more than has been offered to justify the continued existence of the same-sex marriage ban under the statute."

The Government failed to justify the existence of any important interest in its exclusion of same-sex couples from marriage. Ruling that the statute violated the *Iowa Constitution*, the Court legalised same-sex marriages.

**Acórdão No. 359/2009, Processo No. 779/07, 1ª Secção,
Tribunal Constitucional, Portugal (9 July 2009)**

Procedural Posture

The petitioners appealed a ruling of the Lisbon Court of Appeal, which had confirmed a lower court's decision.

Facts

Denied the right to marry, a lesbian couple appealed to the Constitutional Court.

Issue

Whether denial of the right to marry violated constitutional rights.

Domestic Law

Constitution of Portugal, Articles 13 (non-discrimination) and 36 (right to marry).

Civil Code of Portugal, Article 1577 (marriage is a contract entered into by persons of different sex).

Reasoning of the Court

The petitioners argued that Article 1577 of the *Portuguese Civil Code* unconstitutionally prohibited same-sex marriage. They cited Articles 13(1) and 36(1) and (2) of the *Constitution of Portugal* to support their claim. They also argued that marriage was an expression of personal identity and the development of

personality. As such, same-sex marriage should be granted in a State bound by the rule of law and based on the primacy of human dignity and freedom.

The respondent, the Public Prosecutors' Office, argued that the Court could not legalise same-sex marriage. Such an action would effectively violate the separation of powers in Portugal's legal regime. Furthermore, the Public Prosecutors' Office argued, the legislature had no obligation to recognise a concept of family that included same-sex couples.

The Court accepted the Public Prosecutors' Office's assertion that a decision legalising same-sex marriage would overstep the Court's constitutionally defined authority. The Court, therefore limited its ruling to the question of Article 1577's constitutional validity.

It found that Article 1577 was valid for several reasons. First, the Court believed that Article 1577 of the *Civil Code* did not contravene the Constitution's prohibition of discrimination based on sexual orientation. It believed that, since the Constitution granted the legislature the power to "regulate the requirements for and the effects of marriage", it had power under the Constitution to limit marriage to persons who were of opposite sex. Second, it believed that the effect of Article 13(2) was limited to the legal order's neutrality with regard to a person's sexuality. Third, the Court stated that, had the legislature intended to include same-sex marriage when it added "sexual orientation" to Article 13 (2), it would have done so explicitly. Fourth, Article 36 of the Constitution was contextualised within the framers' intentions. The Court said that, because Article 36 expressly mentioned but did not define marriage, the Constitution's framers did not intend to stray from the traditional understanding of marriage between a man and a woman. Had the drafters intended to break with tradition and include same-sex marriage, the Court reasoned that the legislature would have done so expressly. "At every point in history, it is the legislative authorities that possess the democratic legitimacy to 'read' and translate the consequences, implications and requirements at that moment in time of the principles 'laid out' in the Constitution, and position them appropriately in the legal system."

Finally, the Court held that its understanding of Article 36 did not mean that Article 36 prohibited same-sex marriage. If the legislature recognised evolving social norms, it could recognise such marriages and amend Article 1577. Finally, the Court believed that court-ordered same-sex marriages would violate the sovereignty and power of the voting public to elect representatives to make political choices on their behalf.

The Court declined to recognise the plaintiff's right to marry, noting that only the legislature had to power to confer that right upon them.

Postscript

In 2010 the Portuguese legislature passed a law legalising same-sex marriage. In decision Number 192/2010, the Constitutional Court affirmed that the same-sex marriage law was constitutionally valid. Portugal's President subsequently signed it into law.

Freyre Alejandro v. GCBA, Administrative Tribunal of First Instance No. 15 of the Federal Capital, Buenos Aires, Argentina (10 November 2009)

Procedural Posture

After the plaintiffs' application for a marriage licence was denied, they filed an *amparo* action before the Administrative Tribunal, challenging the constitutionality of Articles 172 and 188 of the *City of Buenos Aires' Civil Code*.

Facts

The plaintiffs, two men, applied for a marriage licence but had their application rejected by the Registry on the grounds that they were both men. Articles 172 and 188 of the *Civil Code*, which regulated the issue of marriage licences, required that spouses be a man and a woman.

Issue

Whether the articles of the *Civil Code* that denied same-sex couples the right to marry were discriminatory and therefore unconstitutional.

Domestic Law

Civil Code of Argentina, Articles 172, 176, and 188.

Constitution of Argentina, Articles 2 (adoption of the Roman Catholic Apostolic religion as the religion of the government), 5, 14 (freedom of religion), 16 (equality before the law), 19 (right to privacy), 33, and 75(22) (incorporation of international treaties into the text of the constitution).

Constitution of the City of Buenos Aires, Articles 11 (equality before the law, right to be different, and prohibition of discriminatory treatment based on sexual orientation), and 16 (*amparo* action).

City of Buenos Aires, Law No. 1.004 (civil unions).

City of Buenos Aires, Law No. 23.515 (marriage).

National Law No. 23.592 (prohibition of discrimination).

Decision 314:1531, Supreme Court of Argentina, 1991 (votes of Petracchi and Fayt); *Decision 329:5266*, Supreme Court of Argentina, 2006 (presumption of unconstitutionality and suspect categories).

Decision 327:5118, Supreme Court of Argentina, 2004; *Decision 329:2986*, Supreme Court of Argentina, 2006; *Decision Salgado, Graciela B. c/GCBA*, Supreme Court of Argentina, 2001; *Decision Asociación por los Derechos Civiles (ADC) c/ GCBA*, Supreme Court of Argentina, 2005 (strict scrutiny test and discriminatory impact).

International Law

International Covenant on Civil and Political Rights, Articles 23 (right to marry) and 26 (right to equal protection of the law).

International Covenant on Economic, Social, and Cultural Rights, Articles 2.2 (non-discrimination) and 10 (protection of the family).

American Convention of Human Rights, Article 17 (protection of the family and right to marry).

Comparative Law

The Court noted that Holland, Belgium, Spain, Canada, South Africa, Sweden, and Norway had enacted laws that recognised marriage for same-sex couples, and that several other countries recognised same-sex civil unions.

Reasoning of the Court

The plaintiffs argued that the *Constitution of Argentina*, international treaties and relevant legislation did not restrict marriage to the union of a man and a woman. Only Article 188 of the *Civil Code* made an explicit reference to the opposite sex of partners in marriage.

The Government argued that the petition was ill-founded, that *amparo* was not the appropriate mechanism, that the local authorities had no jurisdiction to decide the case, and that any modification of the *Civil Code* should be done by the legislature and not the judiciary.

Equal protection and the right to be different

The Court first asked whether it was discriminatory to grant the right to marry to heterosexual couples only. Article 16 of the *Constitution of Argentina* guaranteed equality before the law. This protection was not limited to individuals equally situated under the law. It did not mean “equality among equals”, as the Government supposed, because, if this were the case, government would be permitted to decide what constituted equality and could circumvent the notion of discrimination. On the contrary, Argentina’s Constitution protected the right to be different and granted equal protection under the law to individuals in their diversity.

Moreover, the principle of equality needed to evolve with societal changes and to be interpreted broadly. This was demonstrated by the inclusion of sexual orientation as a prohibited ground of discrimination in the *Constitution of the City of Buenos Aires* (Article 11). As a result, the challenged provisions directly contradicted the Constitution.

Argentina's Constitution required the Government to eliminate barriers that impaired equal protection. Laws that deprived individuals of legal benefits because of their personal differences were examples of such barriers. A law that excluded individuals from the legal benefits of marriage because of their sexual orientation was a barrier to the equal protection of rights. The judicial system had the constitutional power, and the duty, to strike down such a law.

Suspect categories and discriminatory impact

The Court noted that, in cases of alleged discrimination, the burden of proof lay on the defendant and courts applied a strict scrutiny test. National jurisprudence indicated that strict scrutiny was even more important in “*categorías sospechosas*” (suspect classification) cases, where discrimination was considered particularly likely. Because this case concerned sexual orientation, a prohibited ground of discrimination under the *Constitution of the City of Buenos Aires*, it was evidently a suspect classification case.

Under the strict scrutiny test, the defendant had to demonstrate that the law advanced a substantial (not merely convenient) government goal; that the distinction was clearly related to the achievement of that goal; and that it promoted the goal effectively and that no less discriminatory alternative was available.

To prove discrimination, furthermore, it was not necessary to show discriminatory intent against a vulnerable group. On the contrary, a suspect category was subject to strict scrutiny if it had the effect of excluding protected groups from any legal benefits, regardless of the intent of legislators when they drafted the law in question.

The Court affirmed that laws should not classify people by sexual orientation except to provide benefits which these vulnerable groups had been deprived of in the past. Among other things, “sexually diverse” individuals had been deprived of the right to marry.

Marriage and religion

The Court noted that changes in the institution of marriage had occurred throughout history. It affirmed that the institution lacked innate characteristics, and that it reflected historical and cultural influences.

The Court observed that same-sex could not be opposed on the grounds that it offended the moral and religious convictions of a part of the population. Argentina was a secular State and therefore the civil sphere was distinct and independent

from the religious one. This distinction protected the constitutional rights of autonomy of conscience, individual freedom, and freedom of religion. These rights were fundamental principles of a constitutional democracy. Although permitting same-sex couples to marry went against very deeply ingrained religious beliefs in Argentinean society, it was not precluded by the Constitution.

The civil institution of marriage was also independent from religious institutions. Article 2 of Argentina's Constitution (adoption of the Catholic Apostolic Roman religion by the federal government) did not require that the government's view of marriage be identical with that of Catholics.

Discrimination based on sexual orientation

The Court then addressed directly the question of whether the prohibition of same-sex marriage amounted to discrimination based on sexual orientation. The Court noted that, if examined literally, Articles 172 and 188 of the *Civil Code* explicitly contradicted the constitutional rules that prohibited discrimination based on sexual orientation. The Court also referred to the provisions on non-discrimination and the right to marry of several international human rights treaties, noting that, under Article 75(22) of Argentina's Constitution, these provisions acquired constitutional standing in domestic law.

The Court observed that people who did not conform to socially accepted sexual conduct were victims of legal and social discrimination and could not fully enjoy their fundamental rights. Homophobia and discrimination on the basis of sexual orientation could be compared to racism: both built on the construction of an "other" who was rejected and accused of threatening the integrity of society. The Court observed that the constitutional regime of the city of Buenos Aires recognised no good or bad form of sexual orientation. "[S]exual orientation was simply out of the moral sphere."

State practice provided a further argument in favour of changing the law. During the previous 20 years, the Court noted, many countries had modified their laws to allow gay couples to marry or form civil unions. In some States (for instance in the United States), decisions of the judiciary had set in motion the reform process.

Civil Unions vs. Marriage

The defendant argued that, under *Law 1.004* of the City of Buenos Aires, all couples, including same-sex couples, had the option to form a civil union. In response, the Court noted that, although civil unions provided legal benefits similar to those of marriage, same-sex couples were still denied access to the right to marry. This regime only prolonged and reinforced a pattern of discrimination. Because this exclusion denied same-sex couples access to the symbolic value of marriage, the maintenance of separate legal forms reinforced the stigmatisation, disapproval, and non-recognition of diverse sexual orientations.

The *Constitution of Argentina* and the *Constitution of the City of Buenos Aires* guaranteed all people the right to equal protection under the law. Articles 172 and 188 of the *Civil Code of the City of Buenos Aires* denied the plaintiffs the right to marry based on their sexual orientation. Because the law afforded the privilege of marriage to heterosexual couples and denied it to homosexual couples, the law violated same-sex couples' right to equal protection of the law. It also violated their rights to individual freedom, full development of their personality, and their effective participation in the political, cultural, economic, and social life of the community.

Article 11 of the *Constitution of the City of Buenos Aires* empowered the government, including the judiciary, to remove any obstacles to equality. The Court therefore declared Articles 172 and 188 of the *Civil Code* unconstitutional and ordered the defendant (the Mayor of the City of Buenos Aires) to issue a decree authorising the plaintiffs' wedding.

Postscript

The Mayor of Buenos Aires followed the Court's decision, and authorised the plaintiffs' wedding. However, two different courts intervened, revoking the decision and ordering the authorities of Buenos Aires not to officiate the marriage. Shortly thereafter, the Governor of Tierra Del Fuego Province issued a decree ordering the civil registry office to perform and register their marriage. The couple eventually married on 28 December 2009, but the marriage was declared null and void by the Children and Family Court of Ushuaia, the provincial capital of Tierra Del Fuego. After the plaintiffs' marriage took place, several other same-sex couples were joined in legal matrimony in Argentina and almost all these marriages were also declared null and void by other courts. The Supreme Court heard argument on several cases concerning the right of same-sex couples to marry. As these cases were pending, the legislature adopted a new law legalising same-sex marriage on 14 July 2010.

In re Marriage Case No. 33-1252, Moscow City Court, Russian Federation (21 January 2010)

Procedural Posture

Cassation appeal.

Issue

Whether the registration of a same-sex marriage was possible under Russian legislation pertaining to marriages.

Facts

The Tver Civil Registry Department in Moscow refused to allow the plaintiffs to register a same-sex marriage. The Tver District Court of Moscow upheld the decision and the plaintiffs appealed to the Moscow City Court.

Domestic Law

Family Code of the Russian Federation.

International Law

Convention on Human Rights and Fundamental Freedoms of the Commonwealth of Independent States, Article 13.

European Convention on Human Rights, Article 12.

International Covenant on Civil and Political Rights, Article 23.

Reasoning of the Court

The plaintiffs argued that the relevant law had been incorrectly interpreted and applied and that the original decision had violated their right to marry under international law, in particular under Article 12 of the *European Convention*, which provided that men and women of marriageable age had the right to marry and found a family, according to national laws governing the exercise of that right. The Court concluded that the *Russian Family Code* was consistent with the right, but held that a normal legal marriage was correctly defined as a voluntary conjugal union between a man and a woman.

The plaintiffs' also argued that, because the *Family Code* did not explicitly indicate that the partners to a marriage had to be male and female, same-sex marriages were legal. The Court held that the ambiguity of the law did not provide grounds for concluding that same-sex couples were permitted to marry.

The plaintiffs failed in their appeal and the decision of Tver District Court of Moscow was upheld.

Sentenza 38/2010, Constitutional Court of Italy (14 April 2010)

Procedural Posture

The Venice Tribunal and the Trento Court of Appeal received two constitutional challenges to the *Civil Code* provisions relating to marriage. Having decided that the challenges were not manifestly ill-founded, the courts filed two separate motions to the Italian Constitutional Court, which the Court decided to examine together.

Facts

In one case, a same-sex couple tried to obtain the banns for their marriage from the registry office of the Venice municipality. The registrar refused their request because, under the *Italian Civil Code*, the right of marry was reserved to heterosexual couples. The same-sex couple then filed a complaint to the Venice Tribunal, challenging the constitutionality of the relevant provisions of the *Civil*

Code. Two other same-sex couples went through the same procedure with the Trento municipality and filed a complaint to the Trento Tribunal, which rejected the complaint. The plaintiffs then appealed to the Trento Court of Appeal.

Issue

Whether the provisions of the *Civil Code*, that limited marriage to heterosexual couples, were unconstitutional.

Domestic Law

Constitution of Italy, Articles 2 (human rights), 3 (equality), 10 (international law), 29 (family and marriage), and 117 (State and regional legislative power)

Civil Code of Italy, Articles 93, 96, 98, 107, 108, 143, 143-bis, and 156-bis.

International Law

Charter of Fundamental Rights of the European Union, Articles 7, 9, and 21.

European Convention on Human Rights, Articles 8, 12, and 14

Goodwin v. United Kingdom, ECtHR, 2002 (holding that classifying post-operative transgender persons according to their sex prior to surgery violated Articles 8 and 12 of the *European Convention*).

Reasoning of the Court

The Court began by reviewing the arguments which the parties had presented to the Venice Tribunal and the Trento Court of Appeal, and the reasoning of those two courts.

The plaintiffs had argued that Italian laws neither defined marriage in specific terms nor explicitly prohibited homosexual marriage. Furthermore, the challenged provisions (at least if interpreted literally) would be contrary to the *Constitution of Italy* as well as to the *Charter of Fundamental Rights of the European Union*.

The Tribunals had accepted the plaintiffs' arguments. The Court therefore focused its analysis on the motion presented by the Venice Tribunal.

First, the Tribunal had noted that, under Italian national law, same-sex marriage was neither contemplated nor explicitly prohibited. However, even if no specific definition was provided, the institution of marriage under Italian law undoubtedly referred to heterosexual marriage only. Therefore, according to the Tribunal, it was not possible to extend the institution of marriage to include same-sex couples. This would amount to re-interpretation of existing legislation, which could only be done by a constitutional court. Nevertheless, the Tribunal argued that recent changes in society and social mores could not be ignored. In the Tribunal's view, the traditional model of the family was no longer the only valid one, because new forms of cohabitation were becoming more common and were in need of protection.

The Tribunal then noted that the Constitution affirmed that the right to marry was a fundamental right. Article 3 of the Constitution (on equality) was also relevant in the present case and required that everyone without discrimination could enjoy the right to marriage. The Tribunal argued that since this provision prohibited unjustified disparate treatment, the implicit norm excluding homosexual couples from marriage had no rational justification. In order to support its argument, the Tribunal drew a comparison with the situation of transsexual persons who were permitted to marry a person of the same biological sex.

With regard to Article 29 of the Constitution, the Tribunal affirmed that family and marriage were institutions open to transformation and that their constitutional meaning had already evolved under the influence of social change.

Lastly, Article 117 of the Constitution required legislators to respect international treaty obligations. The Tribunal cited Articles 8, 12 and 14 of the *European Convention* as well as Articles 7, 9 and 21 of the *Charter of Fundamental Rights of the European Union*, and the judgment of the European Court of Human Rights in *Goodwin v. United Kingdom*. The Tribunal also noted that several European States had already enacted laws recognising same-sex marriage.

The State intervened in the proceedings to defend the challenged provisions and asked for the motions to be declared inadmissible and manifestly ill-founded. It argued that all the legislation relating to the institution of marriage undoubtedly referred to heterosexual couples and this had been confirmed by both doctrine and jurisprudence. Furthermore, according to the State, Article 3 of the Constitution ordered equal treatment for equal situations and allowed disparate treatment for situations that were in fact different. It also argued that the European Union had just adopted guiding principles relating to marriage but had left States with a wide margin of appreciation. The State affirmed that European countries had taken different approaches to same-sex unions, but the common element had been the central role of the legislature in deciding on the matter. The judicial inclusion of same-sex couples in the text of the legislation would violate the principle of separation of powers.

The Court first examined whether the challenged provisions were compatible with Article 2 of the Constitution. It noted that, under current legislation, the institution of marriage referred only to heterosexual couples, following a well-established and thousand-year-old concept of marriage. The question was therefore whether the legislation, by excluding same-sex couples from marriage, violated Article 2. According to the Court, homosexual unions, understood as a stable cohabitation of two persons of the same biological sex, were among the social groups protected by Article 2. Therefore, these persons had the right to freely live as a couple and to obtain legal recognition of their rights and duties as a couple. This said, recognition was not necessarily to be realised through marriage. In the Court's view, this was evident from the wide differences in the

way same-sex unions had been recognised in different European States. It was the responsibility of the legislative branch to identify the appropriate form of recognition and protection for same-sex unions.

With regard to the compatibility of the challenged provisions with Article 29 of the Constitution, the Court argued that the constitutional concepts of family and marriage could not be considered to be frozen at the time the Constitution entered into force. They had to be interpreted, taking into account the evolution of society and social mores. However, judicial interpretation could not modify the core of the law and include issues that had not been contemplated when the law was adopted.

Next, the Court examined the constitutionality issue under the Article 3 equality provision of the Constitution, concluding that the challenged law did not amount to prohibited discrimination because same-sex unions could not be compared to heterosexual marriages. The situation of transsexuals was not a valid comparator. On the contrary, the right of transgender persons to marry a person of the same biological (as opposed to acquired or preferred) sex was a confirmation of the heterosexual character of marriage.

Lastly, with regard to Article 117 of the Constitution and the international law obligations of the State, the Court noted that both the *European Convention* and the *Charter of Fundamental Rights of the European Union* affirmed the right to marry but then referred to national legislation for the concrete type of protection to be given to this institution. None of the international instruments required the recognition of same-sex marriage or the full equalisation between same-sex unions and heterosexual marriage.

The Court dismissed all the constitutionality questions as being inadmissible (Articles 2 and 117 of the Constitution) and ill-founded (Articles 3 and 29 of the Constitution).

Perry v. Schwarzenegger (“Proposition 8”), United States District Court for the Northern District of California (4 August 2010)

Procedural Posture

The plaintiffs, two same-sex couples, brought suit challenging *Proposition 8* as a violation of due process (“liberty”) and equal protection under the 14th Amendment of the *United States Constitution*. The plaintiffs named as defendants the Governor and Attorney-General of California, but these parties either refused to defend the suit or acknowledged that *Proposition 8* was unconstitutional. Defendant-intervenors, the official proponents of *Proposition 8*, were granted leave to intervene.

Facts

In November 2008 California voters enacted an amendment to the State constitution providing that only marriage between a man and a woman was valid or recognised in California. For five months previously, under a ruling of the California Supreme Court, same-sex couples had been able to marry. Eighteen thousand marriage licences were issued to same-sex couples during this period.

Issue

Whether *Proposition 8*, defining marriage as exclusively heterosexual, violated the Due Process and Equal Protection Clauses of the 14th Amendment of the *United States Constitution*.

Domestic Law

United States Constitution, 14th Amendment, Due Process Clause (“No state shall deprive any person of life, liberty, or property, without due process of law”), and Equal Protection Clause (“No state shall deny to any person within its jurisdiction the equal protection of the laws”).

Reasoning of the Court

The plaintiffs argued that marrying a person of one’s choice was a fundamental right, part of the “liberty” protected by the Due Process Clause. The plaintiffs also argued that *Proposition 8* violated the Equal Protection Clause by denying them the right to marry a person of their choice, whereas heterosexual men and women could do so freely.

Although, during the campaign for a referendum, *Proposition 8* proponents had argued for the moral superiority of heterosexual marriage and presented same-sex marriage as inferior and gays and lesbians as dangerous to children, at trial the defendant-intervenors advanced a different set of reasons. The Court, noting this change of tactic, stated: “A state’s interest in an enactment must of course be secular in nature. The state does not have an interest in enforcing private moral or religious beliefs without an accompanying secular purpose.” The proponents’ main argument was that *Proposition 8* promoted stability in relationships between men and women, which naturally produced children, and promoted statistically optimal households in which children were raised by a man and a woman who were married to each other.

The proponents argued that it was in the State’s interest to encourage child-bearing and child raising in stable household units, and that, since procreation only occurred naturally in heterosexual sexual relationships, it was in the State’s interest to promote heterosexual marriage. The Court asked proponents to explain how permitting same-sex marriage might adversely affect the State’s assumed interest in promoting procreation within heterosexual marriage, but the proponents had no response.

The Court defined marriage as “the state recognition and approval of a couple’s choice to live with each other, to remain committed to one another and to form a household based on their own feelings about one another and to join in an economic partnership and support one another and any dependents”. It recognised that, in licensing and fostering marriage, the State had an interest in facilitating governance and public order by organising individuals into cohesive family units and creating stable households and providing for legitimate (as opposed to out-of-wedlock) children. But it rejected the proponents’ assertion that the State’s interest in marriage was solely in the promotion of biological procreation. It also found that domestic partnerships did not provide gays and lesbians with a status equivalent to marriage because “the cultural meaning of marriage and its associated benefits are intentionally withheld from same-sex couples in domestic partnerships”.

Under the Due Process Clause, the freedom to marry was a fundamental right. The question was whether the plaintiffs, who sought to marry their same-sex partners, were actually seeking recognition of a new right. Although same-sex marriage was not part of the tradition of marriage, the Court emphasised that the nature and definition of marriage had changed over the years. Race restrictions and specific gender roles for partners no longer defined marriage. At the core of the institution of marriage was the right to choose a spouse and, with mutual consent, join together to form a household. The ability to procreate was not part of this core definition. The plaintiffs, the Court determined, were asking the State to recognise relationships that were “consistent with the core of the history, tradition and practice of marriage.” They were not seeking recognition of a new right. *Proposition 8* was unconstitutional because it denied to the plaintiffs their fundamental right, without legitimate reason.

Under the Equal Protection Clause, most laws creating classifications would be upheld if they were rationally related to some legitimate government interest. Rational basis was a deferential standard of review, but it had to be shown that the law did more than disadvantage a particular group. Although the Court applied a rational basis review, it found that the trial evidence showed that gays and lesbians were the type of minority that strict scrutiny (a higher standard of review) was intended to protect. Strict scrutiny was appropriate where a group had experienced a “history of purposeful unequal treatment” or had been subjected to “unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities”.

The Court held that *Proposition 8* failed even rational basis review because it lacked any legitimate government interest. Proponents had argued that the State had a legitimate interest in promoting traditional marriage by excluding same-sex marriage, but the Court found that tradition alone could not form a rational basis for a law. The State “must have an interest apart from the fact of the tradition itself”. The Court also rejected the assertion that *Proposition 8*

promoted opposite-sex parenting, because the exclusion of same-sex couples from marriage did not “make it more likely that opposite-sex couples will marry and raise offspring biologically related to both parents”. The Court stated: “[E]ven if California had an interest in preferring opposite-sex parents to same-sex parents – and the evidence plainly shows that California does not – Proposition 8 is not rationally related to that interest, because Proposition 8 does not affect who can or should become a parent under California law”. Finally, the Court found unconvincing the argument that *Proposition 8* protected the freedom of those who opposed same-sex marriage, reasoning that *Proposition 8* did not impinge on anyone’s right to freedom of expression.

Having rejected moral disapproval and tradition as justifications for the law, the Court concluded there was no rational basis. It found that *Proposition 8* “was premised on the belief that same-sex couples are not as good as opposite-sex couples. Whether that belief is based on moral disapproval of homosexuality, animus between gays and lesbians or simply a belief that a relationship between a man and a woman is inherently better than a relationship between two men or two women, this belief is not a proper basis on which to legislate ...The Constitution cannot control private biases but neither can it tolerate them”.

Proposition 8 was held to be unconstitutional under both the Equal Protection and Due Process Clauses.

Acción de Inconstitucionalidad 2/2010, Supreme Court of Justice of Mexico (10 August 2010)

Procedural Posture

The Federal Attorney General challenged the constitutionality of a series of *Civil Code* amendments that permitted same-sex couples to marry and adopt children.

Facts

In December 2009 the legislature of the Federal District amended a series of articles of the *Federal District’s Civil Code*. Article 146, as amended, defined marriage in gender-neutral terms. In addition, Article 391, as amended, permitted same-sex couples to adopt children under the same conditions as opposite-sex couples.

Issue

Whether the challenged provisions were compatible with constitutional provisions that protected marriage and the family.

Domestic Law

Constitution of Mexico, Articles 1, 4, 14, 16, and 133.

Federal Civil Code of Mexico, Articles 146 and 391.

International Law

Committee on Economic Social and Cultural Rights, General Comment No. 20, Article 2, Paragraph 1: Non-discrimination in economic, social and cultural rights, UN Doc. E/C.12/GC/20, 2 July 2009.

Convention on the Rights of the Child, Articles 3, 9, 12, 19, 20, 21, and 27.

Human Rights Committee, General Comment No. 16, Article 17, 8 April 1988 (right to respect of privacy, family, home and correspondence, and protection of honour and reputation).

Human Rights Committee, General Comment No. 19, Article 23, 27 July 1990 (protection of the family, the right to marriage and equality of spouses).

Report of the independent expert on minority issues, Gay McDougall, UN Doc. E/CN.4/2006/74, 6 January 2006.

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Advisory Opinion OC-4/84, Inter-American Court of Human Rights, 1984.

Cossey v. United Kingdom, ECtHR, 1990.

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Goodwin v. United Kingdom, ECtHR, 2002 (holding that classifying post-operative transgender persons according to their sex before surgery sex violated Articles 8 and 12 of the *European Convention*, overruling earlier cases on transgender recognition).

Kozak v. Poland, ECtHR, 2010 (finding that same-sex couples without children were protected by right to family life under Article 8).

Rees v. United Kingdom, ECtHR, 1986 (finding that State's refusal to recognise applicant's post-operative gender did not violate Articles 8 or 12).

Sheffield and Horsham v. United Kingdom, ECtHR, 1998 (finding that State refusal to recognise a person in his or her new post-operative gender was not a violation of Article 8).

X, Y and Z v. United Kingdom, ECtHR, 1997 (finding no violation of Article 8 where a transgender man was not granted legal recognition as the father of the three children born to his female partner during their relationship).

Comparative Law

Laws and judicial decisions concerning same-sex marriage and same-sex unions in the Netherlands, Belgium, Spain, Norway, Sweden, Portugal, United States, Canada, South Africa, and Argentina.

Reasoning of the Court

The Attorney General argued that, under Article 4 of the *Federal Constitution of Mexico*, a family was formed by a father, a mother, and their children. This was the social structure that the institution of marriage was intended to protect. Article 16 of the Constitution required that every law have a valid legal purpose. According to the Attorney General, the challenged law lacked a valid legal purpose, because the Legislative Assembly had failed to show how the previous law (providing only for opposite sex marriage) violated the rights of gays and lesbians. Same-sex couples could already protect their relationships through other institutions, such as civil unions. Marriage, by contrast, was created to protect a particular kind of family unit that was based on biological reproduction.

The Attorney General next argued that the right to marry, as defined in international law, confirmed the heterosexual character of the institution. With regard to the *Yogyakarta Principles*, the Attorney General noted that, even if the instrument was relevant for the issue at stake, the Principles were not binding on Mexico.

Lastly, the Attorney General criticised the Legislative Assembly for not having taken into account the impact that reform of the *Civil Code* would have on adoption. Specifically, he argued that the Assembly had not considered the psycho-emotional impact that reform would probably have on the adopted children, and therefore failed to pursue the best interests of the child, in violation of both domestic law and the *Convention of the Rights of the Child*.

Before assessing the merits of the case, the Court analysed same-sex marriage or unions under international and comparative law. It concluded that same-sex marriage, and the benefits and rights of same-sex unions, were increasingly recognised across the world.

Next, the Court addressed the motion of unconstitutionality concerning Article 146 of the *Civil Code*. It noted that the reform at stake aimed at expanding rather than limiting rights. The test to be applied was therefore one of reasonableness rather than proportionality.

Furthermore the objective of constitutional protection was family and not marriage. What had to be protected was the family as a social reality in all its different forms. Moreover, since Article 4 of the Constitution dealt with family and not with marriage, it did not define the institution of marriage. Marriage itself was not an immutable or petrified concept.

The Court noted that the institution of marriage had undergone many changes in recent decades. These had included the legalisation of divorce and, most important, the break of the bond between marriage and reproduction. According to the Court, the institution of marriage was no longer tied to procreation and was grounded solely in the mutual bonds of affection, sex, identity, solidarity and the commitment of two individuals willing to live a life together. Therefore, recalling the right to free development of the personality that included both the right to sexual identity and the right to marriage, the Court held that the heterosexuality of the couple was not a defining feature of the institution of marriage.

Because same-sex couples have exactly the same characteristics as heterosexual couples, that is, both constituted a life partnership based on emotional and sexual bonds, it was reasonable to extend the right of marriage to them.

Lastly, the Court dismissed the Attorney General's argument that same-sex marriage constituted a "threat" to the protection of family, affirming that same-sex marriage did not have a negative effect. Moreover, the sexual orientation of a couple could not be considered to affect the development of a child; for this reason, the denial of adoption rights to same-sex couples was also discriminatory.

The Court declared the motion ill-founded and affirmed the validity of Article 14.

- 1 According to ILGA, as of May 2011, 32 States and 30 entities (administrative or territorial units) recognise same-sex marriages and unions. See ILGA, *Lesbian and Gay Rights in the World Map* (May 2011).
- 2 See generally William N. Eskridge, 'Foreword: The Marriage Cases – Reversing the Burden of Inertia in a Pluralist Constitutional Democracy' (2009), 97 *California Law Review* 1785.
- 3 Human Rights Committee, *Views of 17 July 2002, Joslin v. New Zealand*, Communication No. 902/1999, para. 8.2.
- 4 European Court of Human Rights, Judgment of 24 June 2010, *Schalk & Kopf v. Austria*, Application No. 3014/04, paras. 55-63.
- 5 *Schalk & Kopf v. Austria* at para. 61.
- 6 *Minister of Home Affairs v. Fourie*, at para. 105.
- 7 *Halpern* at para. 130.
- 8 Commentary on Latin American case law has greatly benefited from Esteban Restrepo-Saldarriaga, 'Advancing Sexual Health through Human Rights in Latin America and the Caribbean', International Council on Human Rights Policy, Working Paper, 2011 available at: http://www.ichrp.org/files/papers/183/140_Restrepo_LAC_2011.pdf.
- 9 'Parliament legalises same-sex marriage, but not adoption', France 24 (8 January 2010); 'Same-sex marriage backed in Portugal's Parliament', BBC News (8 January 2010). In general, parenting and partnership decisions have advanced very differently in the United States and Europe. In the US, courts affirmed rights to custody and adoption long before they began to award couples legal recognition as couples. In Europe, partnership recognition has been achieved largely by legislation, while parenting (especially adoption rights) and same-sex marriage have been addressed separately.
- 10 Yuval Merin, 'Anglo-American Choice of Law and the Recognition of Foreign Same-Sex Marriages in Israel – On Religious Norms and Secular Reforms' (2011), 36 *Brooklyn Journal of International Law* 509, 518.
- 11 'La France reconnaît le mariage d'un couple d'hommes néerlandais', *Le Monde* (Paris 5 September 2008) available at http://www.lemonde.fr/europe/article/2008/09/05/la-france-reconnait-le-mariage-d-un-couple-d-hommes-neerlandais_1091846_3214.html.
- 12 These cases are *National Coalition for Gay and Lesbian Equality and Others v. Minister of Home Affairs and Others* (2000), *Satchwell v. President of the Republic of South Africa and Another* (2002); *Du Toit and Another v. Minister of Welfare and Population Development and Others* (2003); and *J and Another v. Director General, Department of Home Affairs, and Others* (2003). For the general discussion, see *Minister of Home Affairs v. Fourie* at paras. 50-58.
- 13 Kenneth McK. Norrie, 'Marriage and Civil Partnership for Same-Sex Couples: The International Imperative', (Winter 2004/Spring 2005) 1 *Journal of International Law & International Relations* 249, 251.

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